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MODERN TORT LAW

SEVENTH EDITION

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VIVIENNE HARPWOOD

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Seventh Edition

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PREFACE

Tort is a broad church and many hymns, ancient and modern, can be heard within it. It is an ideal subject for undergraduate study because it shows how the law develops and responds to changing social and economic conditions. The origins of tort can be traced to the early years of the last millennium and it has survived to enter this millennium while still undergoing a process of evolution. Jurisprudentially, it is intriguing because it demonstrates the shifting boundaries of judicial creativity. All the traditional subject matter of tort is analysed here in detail but particular emphasis is placed on exploration of complex and contentious areas and topics which students find perplexing.

This seventh edition updates the material in the previous edition in the light of recent developments in this fast moving area of law. There is discussion of numerous cases decided at appellate level, including those concerning duty of care, liability for psychiatric injury, breach of duty, quantum and occupiers' liability, as well as other mainstream areas of tort studied on undergraduate and professional courses. Developments concerning the effects of the Human Rights Act 1998 on the law of tort are also discussed. The substantive law is set in the context of the Civil Procedure Rules 1998, changes in the availability of public funding and other institutional and social changes. The book is carefully structured and has been updated with the student very much in mind.

This book is the product of many years of lecturing and tutoring tort and would not have been possible without the stimulus and encouragement of colleagues and students too numerous to mention.

Vivienne Harpwood 2008

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AN OVERVIEW OF THE LAW OF TORT

The aim of this chapter is to consider the definition, objectives and scope of the law of tort, and to take an overview of the subject. Tort law has developed over many centuries and has its origins in an agricultural society and largely rural economy of the middle ages in Britain. It is sometimes regarded as the area of common law which remains after all the other causes of action, such as contract or breach of fiduciary duty have been subtracted. As this area of law has developed it has proved to be infinitely adaptable, but it has not developed in isolation. Other areas of law have evolved alongside tort.

1.1 WHAT IS TORT?

The word 'tort' is derived from the Latin *tortus*, meaning 'twisted'. It came to mean 'wrong' and it is still so used in French: '*J'ai tort*'; 'I am wrong'. In English, the word 'tort' has a purely technical legal meaning – a legal wrong for which the law provides a remedy.

Academics have attempted to define the law of tort, but a glance at all the leading textbooks on the subject will quickly reveal that it is extremely difficult to arrive at a satisfactory, all-embracing definition. Each writer has a different formulation, and each states that the definition is unsatisfactory. In order to understand what tort law involves, it is necessary to distinguish tort from other branches of the law, and in so doing to discover how the aims of tort differ from the aims of other areas of law such as contract law or criminal law. The main emphasis in this chapter will be on the distinction between tort and contract, as these two subjects are closely related. Criminal law will be dealt with separately below.

1.2 TORT AND CONTRACT

The scope and objectives of tort as compared with contract are often discussed in the context of duties fixed by law and people to whom the duties are owed. The two subjects are frequently studied alongside each other.

1.2.1 Duties fixed by law

Many duties in tort arise by virtue of the law alone and are not fixed by the parties. The law imposes a duty in tort not to libel people, not to trespass on their land, and so on. By contrast, the law of contract is based notionally on agreements, the terms of which are fixed by the parties.

However, in modern law, it is unrealistic to suppose that contract and tort are so very different from each other in this respect. Terms of contracts are now imposed upon the parties by numerous statutes, quite independently of any 'agreement' and, indeed,

the notion of true agreement has long been discredited in many contractual situations, since few individual consumers have real bargaining power. Moreover, it is possible for the parties in contract to arrive at an agreement to vary the tortious duties which the law imposes.

1.2.2 The relationship between the parties

As duties in tort are fixed by law, the parties may well have had no contact before the tort is committed. The pedestrian who is injured by a negligent motorist will probably never have met the defendant until the accident which gives rise to the legal action. Of contract, it is often said that the parties will, through negotiation or by the very act of contracting, have had some contact and be fully aware of their legal duties before any breach of contract occurs.

This is too simplistic a view. Contracting parties often have little or no contact, and many of the terms of the contract may be implied by the operation of various statutes. In tort, the parties may well know one another before the tort is committed, as for example the doctor who negligently injures a patient who has been receiving a course of treatment, or the neighbour who allows fumes to pour over adjoining property, causing a nuisance. The distinction between the branches of law is again blurred.

Although the absence of a contract does not prevent a claim in tort, for a long time a claim for breach of a contract could only be brought by one of the contracting parties. However, the Contracts (Rights of Third Parties) Act 1999 now allows third parties to enforce contractual terms in certain circumstances.

The notion of relationship or proximity between the parties has recently been given much greater prominence in tort in recent cases than ever before. This draws the two branches of the law even closer.

The relationship between the parties is the basis for distinguishing between tort and contract when dealing with the notion of remoteness of damage. Here the courts consider the question: 'for how much of the damage suffered in a case should the defendant be held responsible?' The rules of contract require a closer relationship than the rules of tort in dealing with this issue.

1.2.3 Choosing tort or contract

There are practical reasons for distinguishing between tort and contract when deciding how a claim is to be made. The remedy for breach of duty in tort is usually a claim for damages, though equitable remedies are also available in appropriate cases. The *main aim of tort* is said to be compensation for harm suffered as a result of the breach of a duty fixed by law. Tort seems to place greater emphasis on wrongs of commission rather than wrongs of omission. Another important aim of tort is to deter behaviour which is likely to cause harm.

The *main aim of contract* on the other hand is to support and enforce contractual promises, and to deter breaches of contract. Contract, then, has no difficulty compensating for wrongs of omission. The doctrine of consideration, based on mutual promises, is all important in the law of contract, and failure by omission to keep the terms of a promise is a breach of contract which the law will seek to amend.

The distinction in practice is less clear, as many fact situations could give rise to an action in both contract (if there is a contract in existence) and tort. Numerous examples of this are to be found in cases of professional negligence, for example, where the parties may also have a contractual relationship (doctors, surveyors, architects, etc). In such cases, it again becomes necessary to decide whether to sue in contract or in tort. However, it often makes little difference to the outcome which branch of the law is chosen (see *Johnstone v Bloomsbury AHA* [1991] 2 All ER 293).

The considerations which may be relevant to the choice of contract or tort are that there may be more generous limitation periods (time limits) within which to bring an action in tort rather than in contract. In tort, the claimant's cause of action arises when the damage is suffered, but under the rules of contract, it arises when the contract is breached, irrespective of when the damage occurs. The need to prove fault is not always present in contract, whereas it is frequently necessary to do so in tort; and the range of remedies and amount of damages which are available in tort may be greater than in contract. The rules for determining remoteness of damage differ as between contract and tort. In tort, under the rule in the *Wagon Mound* case (*Overseas Tankship (UK) Ltd v Morts Docks Engineering Co Ltd* [1961] AC 388, there may be liability for highly unlikely results of a tortious act, but in contract, a substantial degree of probability is required. In tort, foreseeability of damage is required at the moment the tortious act is committed, whereas in contract the relevant time is when the contract is concluded. There are also differences in relation to the concept of contributory conduct on the part of the claimant. In tort the defence of contributory negligence is of general application, but in contract it will only be available if there is a breach of a contractual duty to take care – see *Forsikring-saktieselskapet Vesta v Butcher* [1988] 2 All ER 43.

The courts now take the view that where professionals owe duties to their clients in both tort and contract, the claimant has a free choice as to which remedy to pursue. The extent of this concurrent liability was confirmed by the House of Lords in *Henderson v Merrett Syndicates Ltd* [1994] 3 All ER 506. In that case, it was held that the duty of care which was owed in tort to Lloyd's 'names' by their managing agents was not precluded by the existence of a contract between the same parties. In a later case in which the choice between contract and tort was relevant, *Holt and Another v Payne Skillington (A Firm) and Another* [1996] PNLR 179, the Court of Appeal held that where a duty of care in tort arose between the parties to a contract, wider obligations could be imposed by the duty in tort than those which arise under the contract. In the earlier case of *Tai Hing Cotton Mill Ltd v Lui Chong Hing Bank Ltd* [1986] 2 All ER 947, the Privy Council had held that, in commercial situations, if a contract exists between the parties, the proper action lies in contract rather than in tort. In *Holt*, however, the arguments raised in the *Tai Hing Cotton* case were rejected by the Court of Appeal. The defendants contended that if, as here, there is a contract in existence, the duties of the parties in contract and tort are to be defined according to the express and implied terms of the contract, and would, if necessary, be limited by those terms. Accordingly, it was argued, there could be no expansion of liability by means of a duty of care in tort. However, the Court of Appeal accepted the claimant's arguments that a consideration of the facts of each individual case would determine whether a duty of care in tort existed which was wider than any duties imposed by contractual terms. Such a tortious duty, if it arose, was imposed by the general law and would not arise out of the common intention of the parties to any

contract. The matter was also discussed in *Spring v Guardian Assurance* [1992] IRLR 173 in connection with the existence of a possible implied term in contracts of employment requiring employers to exercise care in writing references. Further examples of cases which highlight the advantages of one action over another will be encountered throughout this book.

In recent years, the distinction between tort and contract has been blurred by new departures, and the differing aims of the two areas of law have become less clear. The development of the doctrine of promissory estoppel in contract suggests that contract may be moving closer to tort. When conditions allow that doctrine to apply, it may be possible to side-step the doctrine of consideration.

Developments in tort in the 1980s, in particular the case of *Junior Books Ltd v Veitchi Co Ltd* [1983] AC 520, now discredited and confined to its own particular facts, gave rise to the view that the tort of negligence was being used in what should have been contractual situations. This will be considered in detail later (see Chapter 5).

Since the rise of the tort of negligence during the 20th century, the law of tort places great emphasis on the need to prove fault. The aim here is to compensate for wrongs suffered through the fault of another person. Damages will usually only be awarded in tort if the claimant can establish fault. The system requires that someone be blamed for the injury sustained.

Contract, on the other hand, has been less concerned with fault as a basis of liability, and it is often unnecessary to prove fault in order to be compensated for a breach of contract. All that is necessary to prove is that the act which caused the loss was committed. This is known as strict liability and is a feature of much of the law relating to the sale of goods. However, there are established areas of strict liability in tort, such as libel and trespass.

One important distinction between contract and tort which has been emphasised in recent cases (for example, *Murphy v Brentwood DC* [1990] 2 All ER 908) is that, in the case of compensation for defective products, tort is concerned only with unsafe products, but contract will also provide compensation for shoddy products.

There are some tort actions, such as trespass, which do not require proof of damage, but negligence, the tort action most commonly in use today, does require the claimant to prove that he or she has suffered damage. *Johnson v Nei International Combustion Ltd* [2007] UKHL 39 is a case in which the claimants chose to bring claims in the tort of negligence, and were unsuccessful because they were unable to prove that they had suffered recognisable damage. The House of Lords ruled that the pleural plaques which were present in the lungs of the claimants had been caused by negligent exposure to asbestos, but did not in themselves amount to actionable damage. Nor did they amount to actionable damage when anxiety about the risk of developing future disease as a result of pleural plaques was taken into account. However, Lord Hope, Lord Scott and Lord Rodger pointed out that for future claimants, there was a possibility of exploring contractual remedies against employers, as it is not necessary to prove damage to succeed in a claim for breach of contract.

Ultimately, however, the choice between contract and tort may, for a claimant, depend upon practical matters relating to pleadings or choice of jurisdiction, as well as which area of law will provide the most appropriate remedy.

1.2.4 Unliquidated damages

The aim of tort damages is to restore the claimant, in so far as money can do so, to his or her pre-incident position, and this purpose underlies the assessment of damages. Tort compensates both for tangible losses and for factors which are enormously difficult to quantify, such as loss of amenity and pain and suffering, nervous shock, and other intangible losses. Tort damages are therefore said to be 'unliquidated'. The claimant is not claiming a fixed amount of compensation.

The aim of the award of damages in contract is to place the claimant in the position he or she would have been in if the contract had been performed. Thus tort is concerned with restoring the status quo, while contract is concerned with loss of expectation (see Burrows, *Understanding the Law of Obligations: Essays on Contract, Tort and Restitution*, 2000, Oxford: Hart). Contract is less willing to contemplate awarding damages for such nebulous factors as injury to feelings. The damages are described as 'liquidated'. The claimant has assessed exactly how much the breach of contract has cost and claims that fixed amount.

However, recent years have seen a willingness on the part of the courts to award damages for 'disappointment' in contract in some unusual cases, indicating that contract is willing to recognise and compensate certain intangible losses (*Jarvis v Swans Tours* [1972] 1 All ER 71).

Tort will not only provide a remedy in the form of money compensation but will, like contract, grant an equitable remedy in appropriate circumstances. For example, an injunction may be awarded to prevent repeated acts of trespass. Numerous equitable remedies are provided in the law of contract, but these are often difficult to obtain as it is necessary to prove that money would not be the real answer to the claimant's problem. In tort, the situation which calls for an injunction will usually be very clear cut and there will be fewer obstacles in the way of obtaining that remedy than in contract.

Specialist texts provide a detailed analysis of these matters, and it will be evident that the distinction between contract and tort is blurred. The two subjects were classified as separate topics by the early textbook writers when law began to be treated as a suitable subject for academic study. It is not surprising that some writers call for a different approach to these common law subjects by sweeping aside the dichotomy and dealing with the 'common law of obligations' as a whole. This approach would do away with some of the problems of definition. Despite the convergence between tort and contract, as is confirmed in *Spring v Guardian Assurance* (see 5.1.8, below) some important distinctions remain and for practical purposes should be understood.

1.3 TORT AND CRIMINAL LAW

The same fact situation, for example, a road accident, may give rise both to criminal prosecutions and to tort actions. Tort, which deals with civil liability, is concerned with claims by private individuals against other individuals or legal persons. Criminal law is concerned with prosecutions brought usually on behalf of the state for breaches of duties imposed upon individuals for the protection of society. Criminal prosecutions are dealt with by criminal courts and the standard of proof is more stringent than in civil cases.

The consequences of a finding of criminal guilt may be regarded as more serious for the individual concerned than the consequences of civil liability.

Both areas of law are concerned with the breach of duties imposed by law, but the criminal law has different priorities. It is concerned with the protection of society by deterring wrongful behaviour. It is also concerned with the punishment of criminals. These concerns may also be found in tort, but are secondary to the main objective of compensation. A motorist who is speeding is far more likely to be worried about being caught by the police than being sued by a person whom he may happen to injure if he is negligent. Nevertheless, tort does have some deterrent value. For example, motorists who have been negligent have to pay higher insurance premiums.

To complicate matters, criminal law does make provision for compensating victims in some cases by compensation orders or through the Criminal Injuries Compensation Scheme, but this is not the main objective of the criminal law.

Similarities and differences may be found between tort and criminal law and, at the very least, the definition at 1.1 above should have made clear that tort is a branch of civil law to be distinguished from criminal law.

There are some instances in which people have brought civil claims in an effort to encourage prosecutions in criminal law. For example, the family of a woman who was killed by her former boyfriend succeeded in having him branded as a killer in a successful civil claim for assault and battery heard in the High Court in 1998 (*Francisco v Diedrich* (1998) *The Times*, 13 April). The Crown Prosecution Service had decided not to prosecute.

Some aspects of the meaning of tort have been considered here. Deeper analysis should reveal more similarities and differences between tort and contract law, tort and criminal law, and tort and other areas of law. The simple fact is that the boundaries of the subject are not easily defined.

1.4 INSURANCE AND THE LAW OF TORT

Underpinning the modern tort system is the system of insurance which provides payment of compensation in most tort cases. Indeed, it is usually not worth the trouble and expense of claiming in tort unless the defendant is insured (or is very wealthy). It is possible to insure against liability in tort in relation to many different activities. Motorists are compelled by statute to insure against liability for injuries to third parties and passengers (see the Road Traffic Act 1988), and manufacturers insure against harm caused by their products. Employers (see Employers' Liability (Compulsory Insurance) Act 1969) and occupiers take out insurance policies to cover the cost of accidents. Insurance is also important in relation to sporting and educational activities, and clubs and schools are covered by insurance policies. Many large public bodies carry insurance, but some act as their own insurers, taking upon themselves the risk of paying damages if they are found liable. First party insurance should not be overlooked. This type of insurance allows individuals to buy policies that will compensate them if they are injured, regardless of the fault of others.

To some extent, insurance can influence the way in which people behave. Thus, motorists are aware that their insurance premiums will be higher if they are found

negligent and may be encouraged to take fewer risks. Some motorists have to pay higher premiums because they fall into a high risk category. Figures published in 1999 by the Office for National Statistics indicate that young men under the age of 25 years are three times more likely to die in a road accident than women of the same age group, and are much more likely to be involved in accidents than older motorists. To allow for this, young men pay higher premiums than other motorists.

There is, of course, a counter-argument concerning insurance – that people who are aware that they are insured are likely to be less careful because they can be confident that their insurance company will compensate any victims of their wrongful activity. Insurance can also create problems of waste, because it is impossible to predict when liability will arise and people may over-insure. It has also been claimed that in some cases insurance may motivate decisions in the law of tort, so that in road accident cases, judges may be more willing to find in favour of claimants because they know that there will be a source of compensation available to support them through insurance. A judge may find the defendant legally to blame though morally he should not be responsible (see *Nettleship v Weston* [1971] 2 QB 691). Despite this, there are several cases in which judges have stated that the insurance positions of the parties should be ignored when determining liability (*Morgans v Launchbury* [1973] AC 127). Nevertheless, insurance is a useful way of spreading the cost of compensating people who suffer injury as a result of negligence. Insurance allows people to recover damages for negligent driving from close relatives, so easing the burden of caring within families.

1.5 AN OVERVIEW OF THE LAW OF TORT

In order to understand tort, it may be helpful to withdraw for a moment from the problems of definition and take an overview of the subject to consider the nature of the duties which are imposed and the interests which are protected by this branch of the civil law.

Tort has been used for many centuries to protect personal interests in property. Some of the earliest actions known to English law are those concerned with protecting interests in land. These include the torts of nuisance and trespass to land.

Tort has also been concerned with protecting people from intentional interference, through actions for assault and battery and false imprisonment, and the reputation, through the torts of libel, slander, malicious prosecution and injurious falsehood. Purely financial interests (economic and trading interests) have more recently been brought within the province of tort and their scope is still unclear, but personal property has been protected by tort for hundreds of years.

The evolution of the law of tort has been somewhat haphazard, and it is an area of law which is still developing. The process of evolution is in part a response to changes in social and economic conditions and social values. This is acknowledged by the judges as they develop the law. For example, in *Chester v Afshar* [2004] UKHL 41, Lord Steyn said:

> I am glad to have arrived at the conclusion that the claimant is entitled in law to succeed. The result is in accord with one of the most basic aspirations of the law, namely to right wrongs. Moreover, the decision . . . reflects the reasonable expectations of the public in contemporary society.

Only since 1932, when the tort of negligence was first officially recognised by the House of Lords as a separate tort, has negligence been of central importance. However, the vast majority of tort claims today are for negligence, and negligence has proved the most appropriate claim in modern living conditions, especially since the development of the motor car. In negligence, the main issue is not what interests the law intends to protect, since negligence is of general application, but whether or not a duty of care was owed to the claimant by the defendant.

The continued development of tort can be seen in the action for breach of confidence which some authorities claim is not a tort at all, contending that it belongs to equity. The Court of Appeal has recently referred to the equitable origins of this action in *R v Department of Health ex p Source Informatics* [2001] QB 424. The issue under consideration concerned the passing of anonymised patient information by pharmacists, for a fee, to the appellants, Source Informatics.

Source Informatics sought a declaration to the effect that there was no breach of confidence involved in passing on anonymous information about patients. The Court of Appeal considered the classic statement of the prerequisites of a successful claim for breach of confidence by Lord Greene in *Saltman Engineering Co Ltd v Campbell Engineering Co Ltd* [1963] 3 All ER 413 (Note) and the legal basis of the doctrine of confidentiality. Whilst recognising that the action for breach of confidence lies in the law of tort, the Court of Appeal also reviewed the cases which had been decided on equitable principles. The conclusion of the court was that in a case involving personal confidences, confidence was not breached where the identity of the confider was protected. The reasoning of the Court of Appeal in this case appears to merge the tort of breach of confidence with principles of equity, which lie at the heart of the development of the law in this area.

The implementation of the Human Rights Act 1998 has facilitated and accelerated evolutionary changes in Tort (see 1.10) as can be seen in the development of something akin to privacy law – *Campbell v Mirror Group Newspaper Ltd* [2004] UKHL 22 (see Chapter 19).

There is still greater potential for further development of the law, in particular, the law of negligence, in the light of the European Convention on Human Rights. In *Smith v Chief Constable of Sussex* [2008] EWCA Civ 39, Pill LJ was impressed by the human rights arguments presented to the Court and commented that there was a strong case for developing the common law action for negligence in the light of Convention rights. Time will tell as to whether this is in fact what happens.

Occasionally, it is possible to observe the dynamic nature of tort in the development of little used, rather obscure torts in modern conditions. For example, in *Three Rivers DC and Others v Bank of England* (*No 3*) [2000] 3 All ER 1, HL, the unusual tort of 'misfeasance in public office' was revived in an attempt to provide remedies for those who suffered losses in the BCCI incident. The Court of Appeal held that, in order to succeed in a claim for this tort, it had to be proved that there had been a deliberate and dishonest abuse of power. The tort only applies to the acts of public officers, and the claimant must prove to the satisfaction of the court that damage was suffered by him as a result of abuse of power by a public officer. The official concerned must have known that the claimant would suffer loss as a result, or must have been reckless or indifferent as to that result. The House of Lords dismissed the appeal in this case, ruling that a public officer would be liable for the tort of misfeasance in public office only if he or she acted knowingly or

with reckless disregard to the likelihood of causing injury to either the claimant or a person who was a member of the class to which the claimant belonged. However, the basic elements of the tort were confirmed as two 'limbs'. First, there must be targeted malice with the intention to injure, and second, there must be knowledge on the part of the defendant that his conduct is unlawful.

In *Docker v Chief Constable of West Midlands Police* [2001] 1 AC 435, the House of Lords held that the police are not immune from action by former defendants alleging conspiracy to injure and misfeasance in public office.

The tort was further clarified in *Watkins v Secretary of State for the Home Department* [2006] UKHL 17, in which the House of Lords concluded that there must be proof of material damage in the form of financial loss, physical injury or psychiatric damage.

If a claim for misfeasance in public office is successful exemplary damages may be payable (*Kuddus v Chief Constable of Leicestershire Constabulary* [2001] UKHL 29). For further consideration of the scope of this tort, see *Iqbal v Legal Commission Services*, QBD, 6 August 2004.

Not every wrongful act is actionable as a tort. There are some activities which cause harm but are not treated as torts. The case of *Bradford Corp v Pickles* [1895] AC 587 is an example of this. Here, the defendant had prevented underground streams flowing through his land from reaching the claimant's land, to force them to buy his property at a much inflated price. The House of Lords held that the defendant could not be liable because every landowner has a right to take water from his own land even if it means that neighbouring properties are deprived of water altogether. This is an illustration of a principle known as *damnum sine injuria* (a wrong without a legal remedy).

This has recently been confirmed in *Arscott v The Coal Authority* [2004] EWCA Civ 892, in which the Court of Appeal held that the so-called 'common enemy rule' did not contravene Art 8 of the European Convention of Human Rights (see 11.10.3 for the details of this case).

The opposite side of the same principle, *injuria sine damno*, is present in cases where no damage is suffered but a tort action is available because the interest to be protected is regarded as being of vital importance. A recent, and somewhat controversial example of this can be found in the case of *Chester v Afshar* [2004] UKHL 41, in which the House of Lords recognised that a patient's right to be given appropriate information which she requested about the risks involved in a surgical procedure was so important that there was no need for her to prove that she had suffered damage as a result of not receiving the information she had sought. The tort of trespass to land is another, much older, example of the way in which the common law operates to protect a crucially important interest without requiring the claimant to prove damage. To obtain an injunction to prevent further acts of trespass, it is enough to prove that the defendant has walked onto the claimant's land, and there is no need for any damage to have been caused.

1.6 CASE LAW

Although there are some recent statutory developments, tort is essentially a common law subject developed by the judges, often in response to changes in social and economic conditions. It is important to appreciate that many of the decisions have been influenced by judicial policy founded on pragmatic considerations and notions of social justice, such as loss distribution based on the extended use of insurance. The Human Rights Act 1998 has added a new dimension to judicial decision making in tort cases.

Some tort decisions appear to conflict, and judges may seem to be doing one thing when saying another. It may appear that the judge decided at the outset on the outcome of a case, and found reasons later to support that decision. However, as will be seen, in the great landmark cases like *Donoghue v Stevenson* [1932] AC 562, the policy behind the decisions is usually discussed openly and in depth by the judges.

All these factors may cause confusion to students first embarking on the study of tort. It is only towards the end of the study of the law of tort that it will be possible to form a complete picture of the subject. It is worth returning to this first chapter at the end of the entire book to put the subject into perspective.

1.7 OTHER SYSTEMS OF COMPENSATION

Tort is not the only means whereby a person who suffers as a result of a wrongful act may receive compensation. Indeed, tort is the least efficient system of compensation. Other sources include the social security system, the industrial injuries scheme, the criminal injuries compensation scheme, charitable gifts, and first party insurance.

1.8 TORTS OF STRICT LIABILITY

Although the vast majority of tort actions are for negligence, which requires proof of fault, there are some torts in which it is not necessary to prove fault. All that needs to be proved is that the defendant committed the act complained of, and that the damage was the result of that act. These are termed torts of 'strict liability'.

However, the term 'strict liability' covers a wide variety of circumstances and does not itself withstand strict scrutiny as it is so indeterminate. It is, therefore, an easy label to attach but remains conceptually awkward. To some extent, strict liability appears to occupy a continuum with complete absence of concern for any mental element on the part of the defendant at the one end, to the other end where the rules are sufficiently relaxed to allow some consideration of voluntariness, as in the tort of trespass.

Some strict liability is of very ancient origin, whereas other examples, such as the instances of strict liability introduced by the Consumer Protection Act 1987, are fairly recent. All have in common the fact that the society in which they originated demanded particular protection for potential claimants, and the emphasis tends to be on the type of activity rather than the defendant's conduct in carrying it out. There may be no obvious reason for such emphasis, and some authorities suggest that strict liability is merely a

form of loss distribution. Another argument is that, because many of the torts of strict liability are concerned with particularly hazardous activities, the defendant bears some initial blame for being prepared to impose hazards on others, and it would offend justice and morality to impose the requirement of proving fault in such circumstances. However, instances of strict liability are often haphazard and it may appear strange that driving, arguably one of the most hazardous activities in modern life, does not attract strict liability. Many instances in which strict liability has been imposed are the responses by judges to the particular circumstances of the cases before them, as in *Rylands v Fletcher* (1868) 100 SJ 659, (1868) LR 3 HL 330, (1866) LR 1 Ex 265, or by Parliament to the demands of the EU or pressure groups, as in the Consumer Protection Act 1987 and the Vaccine Damage Payments Act 1979.

The conclusion must be that there is no general underlying rationale, but a series of ad hoc adjustments prompted more by pragmatism than principle.

Strict liability is imposed to varying degrees in the following circumstances:

- liability for dangerous wild animals;
- liability for livestock straying onto neighbouring land;
- liability for defective products under the Consumer Protection Act 1987;
- liability under the rule in *Rylands v Fletcher*;
- liability for breach of statutory duty, if the statute in question imposes strict liability;
- liability for defamation;
- liability for man-made objects causing damage on the highway.

In almost all of these instances strict liability is subject to exceptions and defences. Indeed, in some cases, there are so many avenues of escape from strict liability that the term hardly seems appropriate to describe the particular tort (see sections on the Consumer Protection Act 1987, Chapter 15 and *Rylands v Fletcher*, Chapter 11). Moreover, absolute liability, which does not admit of any defence at all, is almost never to be found outside the criminal law.

On the other hand, in the law of negligence, there are certain circumstances where in effect there is strict liability, as in the case of learner drivers (*Nettleship v Weston*), the egg-shell skull cases in remoteness of damage, and in many of the cases in which the defendant was insured, in which judges have mysteriously found in favour of the claimant.

This further supports the view that tort suffers from internal contradictions and inconsistencies derived in part from haphazard decisions and judicial policy making, and that, therefore, the search for some grand design giving coherence to different areas of tort is misguided and naïve.

Details of the torts of strict liability will be covered in course of this book.

1.9 HUMAN RIGHTS ACT 1998

Although various aspects of Human Rights law will be referred to throughout this book, the impact of the Human Rights Act 1998, which came into force on October 2, 2000, does

deserve consideration at this point. For several years before the year 2000, UK judges had been hearing arguments about the European Convention on Human Rights, and taking it into account when considering issues in tort, with a view to promoting consistency between the common law and the Convention. This position was formalised by the coming into force of the Human Rights Act 1998. The Act provides that, wherever possible, UK legislation must be interpreted in such a way as to be compatible with the European Convention on Human Rights. Although the Human Rights Act 1998 has no effect on the continued validity of a statute or statutory instrument, the higher courts have the power to issue declarations of incompatibility, if satisfied that any legislation is incompatible with the Convention. This is intended to alert Parliament to the need to change the law, but it does not have any effect on the position of the parties to the litigation that led to the declaration. It is up to Parliament to decide how to respond, and there are fast track procedures to amend incompatible legislation if it is decided that this is necessary.

Certain statutes have been subjected to scrutiny – for example, the Police and Criminal Evidence Act 1984, as amended, breaches of which can in certain circumstances give rise to civil claims for damages for assault, battery and false imprisonment, and the Mental Health Act 1983. The Human Rights Act 1998 makes it unlawful for public authorities (including courts and tribunals) to act in a way which is incompatible with a Convention right. If the alleged tortfeasor is a private individual rather than a public authority, Art 6 of the Convention might assist a claimant who qualifies as a 'victim' as defined by the Act. It provides that everyone is entitled to a fair trial in the determination of his or her civil rights and obligations, within a reasonable time, by an impartial tribunal. If there is no existing tort remedy equivalent to a Convention right, the judges are required, by Art 6, to develop one.

The effect of the 1998 Act is that when hearing tort cases the judges are required to ensure that the common law is not incompatible with Convention rights. There is already a well established place within the law of tort for considering many of the matters that are contained within Convention rights. For example, the tort of trespass to the person has for many years protected individuals from inhuman and degrading treatment and torture. The Convention, in Art 3, protects the same rights. In claims for assault and battery, the courts are now required to take into account Art 3 and the jurisprudence of the European Court of Human Rights (ECtHR) on the subject. It will, therefore, be unusual for a person to base a claim solely on an infringement of a Convention right, as there are already tort actions which can be used. Arguments based on the infringement of Convention rights will usually simply be added to the contentions of claimants. However, in the case of claims involving less highly developed torts, such as those concerning alleged infringements of privacy, claims may be based purely on the Convention.

As far as the duty of care in negligence is concerned, Sedley LJ stated in a recent case:

> There is . . . an unanswered question as to how, if at all, the common law of negligence is to develop in response to the Human Rights Act and the Convention values it imports [*Smith v Chief Constable of Sussex* [2008] EWCA Civ 39].

It could be argued that a new cause of action is created by the Human Rights Act 1998, taking the form of a new action for Breach of Statutory Duty (see Chapter 9), in which the award of damages is discretionary (at common law, tort damages are available as of

right) (Law Commission, *Damages Under the Human Rights Act 1998*, Law Com 266, London: HMSO, para 4.20).

The Convention rights which have so far been prominent as far as tort is concerned are: the prohibition of inhuman or degrading treatment or punishment (Art 3); the right to liberty and security (Art 5); the right to a fair trial (Art 6); the right to respect for privacy, family life, home and correspondence (Art 8); the right to freedom of expression (Art 10); and the right to freedom of assembly and association (Art 11). Some of these have already been scrutinised by the courts and such cases are discussed in the relevant sections of this book. Students of tort law need to be familiar with the large body of case law that has already been developed by the ECtHR.

1.10 A SUMMARY OF THE OBJECTIVES OF TORT

The objectives of the law of tort can be summarised as follows:

- **Compensation**
  The most obvious objective of tort is to provide a channel for compensating victims of injury and loss. Tort is the means whereby issues of liability can be decided and compensation assessed and awarded.
- **Protection of interests**
  The law of tort protects a person's interests in land and other property, in his or her reputation, and in his or her bodily integrity. Various torts have been developed for these purposes. For example, the tort of nuisance protects a person's use or enjoyment of land, the tort of defamation protects his or her reputation, and the tort of negligence protects the breaches of more general duties owed to that person.
- **Deterrence**
  It has been suggested that the rules of tort have a deterrent effect, encouraging people to take fewer risks and to conduct their activities more carefully, mindful of their possible effects on other people and their property. This effect is reflected in the greater awareness of the need for risk management by manufacturers, employers, health providers and others. This is encouraged by insurance companies.

  The deterrent effect of tort is less obvious in relation to motoring, though the incentives to be more careful are present in the insurance premium rating system.
- **Retribution**
  An element of retribution may be present in the tort system. People who have been harmed are sometimes anxious to have a day in court in order to see the perpetrator of their suffering squirming under cross-examination. This is probably a more important factor in libel actions and intentional torts than in personal injury claims which are paid for by insurance companies. In any event, most cases are settled out of court and the only satisfaction to the claimant lies in the knowledge that the defendant will have been caused considerable inconvenience and possible expense.
- **Vindication**
  Tort provides the means whereby a person who regards him or herself as innocent in a dispute can be vindicated by being declared publicly to be 'in the right' by a court.

However, again it must be noted that many cases never actually come before a court and the opportunity for satisfaction does not arise.

- **Loss distribution**
  Tort is frequently recognised, rather simplistically, as a vehicle for distributing losses suffered as a result of wrongful activities. In this context loss means the cost of compensating for harm suffered. This means re-distribution of the cost from the claimant who has been injured to the defendant, or in most cases the defendant's insurance company. Ultimately, everyone paying insurance or buying goods at a higher price to cover insurance payments will bear the cost. The process is not easily undertaken and it involves considerable administrative expense which is reflected in the cost of the tort system itself. There are also hidden problems attached to the system, such as psychological difficulties for claimants in using lawyers and courts, and practical difficulties such as the funding of claims which may mean that many who deserve compensation never receive it. It has been suggested that there are other less expensive and more efficient means than tort for dealing with such loss distribution.
- **Punishment of wrongful conduct**
  Although this is one of the main functions of criminal law, it may also play a small part in the law of tort, as there is a certain symbolic moral value in requiring the wrongdoer to pay the victim. However, this aspect has become less valuable with the introduction of insurance.

1.10.1 An illustration of the operation of the tort system

The issues raised by the road traffic accident described below illustrate some facets of the objectives of tort and its relationship with other systems of compensation.

1.10.2 The scenario

A, a man aged 27, had consumed five pints of beer in a public house one Sunday lunch-time. He left for home on foot in the early afternoon when road and weather conditions were good. His route took him across a busy main road close to the centre of a city, but as this was a quiet Sunday he decided to take a chance and cross the road some distance from the traffic lights and adjoining pedestrian crossing. He looked to the right and noticed that the lights were red and that there were two cars just approaching the traffic lights. Then he looked to the left and began to cross the road. As he reached the centre of the first carriageway, he realised that the cars were now approaching at speed and that he might not be able to reach the central reservation. He dithered for a moment and the next thing he knew he was hit by the car driven by B. A was taken to hospital and detained there for 10 weeks suffering from multiple injuries. After leaving hospital, A slowly recovered, but still suffers from mild post-traumatic stress disorder and has pain in his legs which were operated on immediately after the accident. A will always walk with a slight limp and he may develop arthritis at some distant future date as a result of the accident. He also has numerous scars on his face and arms, and will require cosmetic dental treatment to replace damaged teeth. He is paying for private dental treatment and hopes to recover the cost of this from B. The estimated speed of the car which hit A

was 45 mph in a 30 mph limit and he is lucky to have survived at all. A has at last managed to find another job as a lorry driver earning a comparable salary to that which he had before the accident. B was convicted by magistrates of driving without due care and attention, and was fined £150 and given nine penalty points.

A is now seeking compensation from B by means of a tort action. He is still angry about having been injured by B and would like to see B suffer by being brought before a civil court because he believes that B 'got off much too lightly' in the magistrates' court. A is also hoping to receive a large sum by way of compensation for the pain he has suffered.

A will need to consider how he can pay for legal advice and representation. He has received a large sum in state benefits during the recovery period and before he could find a new job. He is surprised to learn that this will be deducted from any award of damages which he will receive. He is also surprised to discover that because he has made such a good recovery he will not receive a particularly high award, especially as he has found a job. In addition, A is amazed that he is likely to be found at least 25% contributorily negligent because he told the doctor who admitted him to hospital that he had drunk about five pints of beer just before the accident. This is recorded on his medical notes, though A has no recollection of having told the doctor this. Witnesses have stated that they thought he took a chance in trying to cross the road when he did.

In the event, the case never reaches court. A is told that a sum of £10,000 has been paid into court by lawyers acting for B's insurance company. He is advised to accept this, because if the judge makes a lower award he will have to pay the costs of the other side from the date of paying in. His barrister is concerned that there may be a finding of a high percentage of contributory negligence (up to 40%). The case is finally settled three years after the accident for £12,000. The legal costs involved, solicitors' fees, the advice of a barrister, including a case conference and expert medical examinations and reports, total £8,000.

B is now having to pay very much higher motor insurance premiums and is worried about losing his licence if he is prosecuted for another driving offence in the near future. A does not know about this.

1.10.3 Are the objectives of tort met in this case?

If one considers whether all the objectives of tort have been met in this situation, it is apparent almost immediately that they have not. To take the picture from A's perspective: the tort system has protected A's interests through the negligence claim. However, A does not feel that he has had his revenge. He has not had the opportunity of seeing B cross-examined in court, and he does not even know about B's fears for his driving licence, a criminal law matter in any event. He has had the support of the NHS and state benefits during the most crucial period of his hospitalisation and recovery, but feels that he has had to wait much too long to obtain his tort damages.

He is disappointed that he will only receive part of the compensation which he thought he deserved because the case is to be settled out of court, and he had never even heard about contributory negligence before this happened to him. He feels that he will go

on suffering for a long time because of the injuries which he received. However, he is more fortunate than many pedestrians who are injured. At least he could afford to pursue his claim through his conditional fee agreement. Those without such financial support frequently give up as soon as they discover the cost of litigation.

As far as B is concerned, tort has had some deterrent effect because he will now probably drive more carefully, at least for a while, to avoid having to go on paying higher insurance premiums, as these will gradually be reduced if he has no more accidents. He has probably had some sleepless nights worrying about what will happen, but he is reassured that the insurance company will pay any compensation. He has been more concerned about the criminal prosecution, as he wanted to avoid publicity because he was a married man and was in the car with a girlfriend on the day of the accident. He is also worried about committing another driving offence and losing his licence, and he will consciously drive more carefully. To that extent, he has been more concerned about criminal law matters than about tort.

From the point of view of society as a whole, tort has ensured that A is compensated. The insurance system has to some extent been driven by tort, and B's original insurance cover which provided the compensation was compulsory under the Road Traffic Act 1988 (usually regarded as a criminal law statute). Compulsory insurance for motorists means that all motorists help to pay compensation to people who are injured like A. This has achieved a form of loss distribution. The general deterrent effect of contributory negligence is minimal. A had never even heard of the rule and there are many road users who have not. The law has allowed recovery of the costs of A's financial support from B's insurance company, but the NHS and the state benefit system have proved quicker and more efficient than the tort system in providing medical care and money to A at the very time he needed it.

This commonplace accident raises doubts about some of the claims which are made for tort and lead us to question seriously how far the present system really fulfils its objectives. It is clear that the state has provided better and more efficient support for A at the most crucial time and at a lower cost than tort. This has been a simple case in which there was sufficient evidence that B was at fault because there are witness statements and a police report as well as a criminal conviction. Also, A's injuries, although unpleasant, will have no serious lasting effect on him. However, there are many cases which are far more complex and where the issuing of proceedings is a real gamble. For example, suppose no one had witnessed the accident and A had no recollection of what happened. It might be difficult to prove that B was actually at fault, especially if he states that A had run out unexpectedly into his path. There could be complex issues concerning causation of the injuries, and the issue of quantum is often much more complicated than in this case. Suppose A could find no solicitor willing to act for him on a conditional fee (no win, no fee) basis. It would be very likely that A would bring no legal action at all in such circumstances and the legal system would have failed him.

It is worth returning to this scenario when considering the criticisms of tort in Chapter 22 at the end of the book.

FURTHER READING

Cane, *The Anatomy of Tort Law*, Hart Publishing, 1999
Cane (ed), *Atiyah's Accidents, Compensation and the Law*, 7th edn, Cambridge University Press, 2006, Chapter 1
Ibbetson, *Historical Introduction to the Law of Obligations*, Oxford University Press, 1999
Nolan, 'New Forms of Damage in Negligence' (2007) 70(1) *MLR* 59
Wright, *Tort Law and Human Rights*, Hart Publishing, 2001

For regular monthly up-dates on this area of law, see *Personal Injury Compensation*, published monthly by Informa UK Ltd.

CHAPTER 2

INTRODUCTION TO THE TORT OF NEGLIGENCE

In legal practice today, negligence has pride of place in tort. The majority of tort claims are for negligence and, even if other torts such as breach of statutory duty or nuisance are involved in a particular case, negligence is frequently claimed as well. This has not always been the case. Negligence is a relatively recent tort to emerge in its own right in the long history of tort. This chapter will introduce the tort of negligence by tracing the rise of fault as a basis of liability and commenting on the case of *Donoghue v Stevenson* [1932] AC 562. The chapter concludes with an account of the criteria which need to be satisfied in order to establish a successful claim in negligence.

2.1 FAULT

Although much emphasis is placed on the notion of fault in the modern law of tort, this is a comparatively recent development.

Legal historians have different theories about the significance of fault in early law. However, it is clear that the need to prove fault in order to establish liability in tort became increasingly important towards the end of the 19th century. As social attitudes changed following the reforms pioneered by Chadwick and others, the volume of social legislation designed to improve the lives of employees, tenants and citizens naturally increased. Ascribing responsibility became easier with the advancement of science and greater competence in determining causation. There was a trend away from selfish individualism towards stronger social and civic responsibility. This trend eventually manifested itself in legal decisions culminating in the case of *Donoghue v Stevenson* in 1932, although there had been a large number of specific actions based on fault before this case. Allowing for a degree of cultural lag, the common law will inevitably follow some years behind enlightened social attitudes. Indeed, the majority decision in that case came as a surprise to some experts in 1932 because of the dearth of favourable precedents, and it involved a degree of ingenuity on the part of the judges, especially Lord Atkin. This case could be regarded as a bringing together of the previous causes of action and the creation of a new one relating to product liability.

2.2 *DONOGHUE v STEVENSON* AND THE MODERN TORT OF NEGLIGENCE

In *Donoghue v Stevenson*, the appellant brought an action against the manufacturer of ginger beer bought for her by a friend at Minchella's cafe in Paisley. She drank some of the ginger beer and when the rest was poured into her glass she noticed the remains of what appeared to be a decomposed snail floating out of the opaque bottle into her tumbler. The appellant claimed damages for personal injury, including gastro-enteritis and nervous shock as a result of having drunk some of the ginger beer, and the nauseating sight of the foreign body in her drink.

The case proceeded to the House of Lords on the preliminary point as to whether an action for negligence was available irrespective of the fact there was no contract between the appellant and the manufacturer of the ginger beer. The basis of the case was that the manufacturer owed a duty to the consumer to take care that there was no harmful substance in his product, that he had breached this duty and that she had been injured as a result.

The House of Lords reviewed the few relevant existing authorities and by a majority of three to two decided in favour of the appellant, so establishing authoritatively the existence of negligence as a separate tort in its own right. The two most significant speeches are those of Lord Atkin, expressing the majority view in favour of the appellant, and of Lord Buckmaster, who was in the minority.

2.2.1 The policy arguments

Lord Buckmaster expressed fears that if the case were to be decided in favour of the appellant it was difficult to see how trade could be carried on. This economic consideration undoubtedly weighed heavily on the minds of the minority judges. However, social justice considerations involving the need to compensate consumers injured through the negligent acts of manufacturers won the day. The majority, described later by Lord Devlin as 'bold spirits' as against the 'timorous souls' in the minority, were prepared to take a creative leap and to generalise from slight pre-existing authority.

Lord Atkin, to calm the fears of the minority that a flood of actions might follow this case, emphasised the need for 'proximity' between the parties:

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

He went on to attempt to limit the scope of future claims by formulating his famous 'neighbour principle'. It was only when this principle applied, he argued, that a duty of care can be established and the basis of a negligence action will be in place:

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

Ironically, this very limitation was used later, as will be seen, as a device to extend the scope of the tort of negligence beyond the manufacturer/consumer situation into a wide range of fact situations affecting many spheres of life.

In principle, the appellant could continue with her claim. It did not matter that there was no contract between the appellant and the manufacturer. However, the manufacturer died before she was able to proceed with her claim and the case was settled out of court for £100. The facts relied upon by the appellant were never proved, and to this day no one knows with certainty that the foreign body in the drink was a snail, nor

that it was this which caused the illness. It could, for example, have been contaminated ice-cream or something the appellant ate for supper the previous day which made her ill.

Trade was still carried on despite the fears of the minority, and the cost of consumer products increased because manufacturers, fearing legal claims, systematically insured their products, so spreading the cost of compensating injured consumers. Manufacturers improved their mechanisms for quality control to the benefit of the whole of society. The cost of this and of insurance premiums was passed on to consumers by increases in the price of goods. With the passage of time, common law, through the operation of the doctrine of *res ipsa loquitur* (see 7.3, below) made it difficult for manufacturers to escape liability for foreign bodies in foodstuffs, and this has been confirmed by statute in the Consumer Protection Act 1987.

2.2.2 The significance of the decision

At least five important points emerge from *Donoghue v Stevenson*:

- negligence was confirmed as a separate tort in its own right;
- a claim for negligence can exist whether or not there is a contract between the manufacturer and injured party;
- a claim for negligence will succeed if the claimant can prove: a duty of care is owed by the defendant to the claimant; a breach of that duty by the defendant; resulting damage which is not too remote;
- in order to establish the existence of a duty of care the 'neighbour principle', based on reasonable foresight, must be applied. This is a minimum requirement and would not justify liability in all cases;
- a manufacturer of drinks owes a duty of care to the consumer not to cause injury by negligently allowing foreign bodies to contaminate those products.

Donoghue v Stevenson only provides a remedy to consumers in the case of products which are likely to cause injury to health. It does not offer a remedy for shoddy or unmerchantable goods. That is the province of contract.

Since 1932, the law concerning duty of care has moved on. The modern approach was established in 1990 in *Caparo Industries plc v Dickman* [1990] 2 WLR 358 (see 3.2, below).

2.3 ESTABLISHING LIABILITY FOR NEGLIGENCE

It is difficult to define negligence in simple terms. As Lord Atkin explained in *Donoghue v Stevenson*:

> To seek a complete logical definition of the general principle is probably to go beyond the function of the judge, for the more general the definition the more likely it is to omit essentials or to introduce non-essentials.

Many years later, Lord Roskill explained the position in the following terms in *Caparo* when he said:

> There is no simple formula or touchstone to which recourse can be had in order to provide in every case a ready answer to the question whether, given certain facts, the law will or will not impose liability for negligence or, in cases where such liability can be shown to exist, determine the extent of that liability.

2.3.1 What must be proved: duty; breach; damage

Despite the difficulties, lawyers need to have a conceptual framework within which to decide whether there is the basis of a claim or the possibility of a good defence, and it is now well established that, in order to succeed in a claim for negligence, the claimant must prove each of three elements: first, that a legal duty of care is owed to him or her by the defendant; secondly, a breach of that duty; thirdly, a causative link between the breach of duty and the injury or loss. Linked to the element of causation, the claimant must establish that the damage which was suffered is not regarded in law as too remote. If the claimant is successful in proving each of these elements, the value of the claim (quantum) must be assessed. It is this framework which is set out here under three general headings: (1) duty of care; (2) breach of duty; and (3) damage (quantum is discussed in Chapter 19).

Each of these elements requires detailed consideration, and there are numerous authorities to be examined under each of the three headings, as the tort of negligence has been developed for the most part through the cases. The rest of this chapter and the six chapters which follow will be devoted to explaining the three elements of the negligence claim.

Although the law has moved on since *Donoghue v Stevenson* and is still evolving, the legal framework within which negligence has developed owes much to that case,

2.3.2 Duty of care

The first matter to be established is that the defendant owed a duty of care to the claimant. Unless it is possible to establish this in the particular circumstances of the case, there will be no point in considering whether an act or omission which has resulted in harm was negligent. The tests for deciding whether or not a legal duty of care is owed will be discussed at length later in this chapter and in the following two chapters. As will be seen, the existence of a duty of care depends upon one of two possible tests:

EITHER: (test one), demonstrating that the situation under consideration falls within a category of duty that has already been established by precedent; OR (test two) if the situation is one which has not yet been categorised under test one, establishing that one or more of three factors is present – foresight, proximity and justice.

It should be noted that in the vast majority of negligence cases there is no dispute about the existence of a duty of care because they fall within test one, and duties are well-established. Most negligence cases in practice are fought on the issues of breach of duty and causation. Nevertheless, the impression given in many textbooks is that disputes frequently arise under test two about whether or not a duty of care exists. One reason for this is that the reported cases tend to involve important issues of legal principle in areas of human activity in which the law is developing or is unclear. These cases often reach the House of Lords and Court of Appeal and are, therefore, given much prominence in

the *Law Reports* and the media. On the other hand, the large number of cases concerning breach of duty turn on their own special facts. Most are now decided at county court level and never appear in the *Law Reports*, the more so now that the financial limits for county court claims have been increased. Still more claims are settled out of court or at the door of the court. The same is true of many cases involving causation. This has been encouraged by the Civil Procedure Rules, which aim to enable the parties to cooperate and reach settlements through negotiation and mediation without using the courts. Thus, it appears to students new to the study of tort that there are as many claims involving disputes about the existence of a duty of care as about the other elements of negligence. This false picture places undue emphasis on the duty of care element of negligence. For this reason, some tort courses in universities begin the study of negligence by examining breach of duty and causation and only cover duty of care at a later stage.

2.3.3 Breach of duty

The second matter to be considered is whether the defendant was in breach of the duty of care. This element lies at the very heart of the negligence action. It involves consideration of whether the act or omission of which the claimant complains gives rise to liability. As will emerge from the detailed chapter on this subject (see Chapter 7), what is in issue is whether the defendant met the standard of care required by law when undertaking the particular activity. This element of the negligence claim therefore involves proof of fault in legal terms on the part of the defendant, and in law fault means acting unreasonably in the particular circumstances. This often happens when the risk of harm arising from an activity outweighs the cost or inconvenience of taking precautions to avoid it. Like duty of care, this involves considerations of foreseeability.

Different standards of care apply in different situations. For example, experts are expected to exercise a higher standard of care than lay people and all depends on the circumstances of each case.

Courts and lawyers are concerned with the very basic factual details of precisely what happened in each case. When particulars of the claim are drafted by lawyers acting for the claimant, they refer in detail to acts or omissions that are the subject of the claim. In a road traffic claim arising out of an accident in which a pedestrian was knocked down by a car at traffic lights, the particulars might contain the following allegations of negligence on the part of the driver of the car:

(1) failing to observe that the lights had changed to red;
(2) failing to stop at a red traffic signal;
(3) travelling at excessive speed;
(4) failing to keep a proper lookout;
(5) failing to observe that the claimant was on the pedestrian crossing with the traffic lights in his favour;
(6) failing to observe that the claimant was in the process of crossing the road;
(7) failing to take sufficient notice of ice on the road,

and so on, depending on the circumstances. The defence filed on behalf of the motorist would seek to answer these allegations and would probably allege contributory

negligence on the part of the claimant. Some of the factual matters involved in such a claim would be agreed on the basis of admissions by the defendant, and possibly an admission of a small amount of contributory negligence on the part of the claimant. The dispute can then be narrowed down to one or two points and the Civil Procedure Rules 1998 have speeded up this process. For example, it may be that there is a dispute about whether the lights were red when the motorist proceeded. Much will depend upon witness statements and whether or not the police successfully prosecuted the motorist for related criminal offences.

Thus, in legal practice there is much emphasis on factual matters in relation to breach of duty.

2.3.4 Causation and remoteness of damage

Under normal circumstances it is essential to prove damage for a negligence claim to succeed. Thus in *Johnston v Nei International Combustion Ltd* [2007] UKHL 39, the claim failed because the claimants were unable to establish that they had suffered any damage in the legal sense, even though there were pleural plaques present in their lungs. Very recently a possible exception to this rule was laid down by the House of Lords in *Chester v Afshar* [2004] UKHL 41, but that rule applies only in extremely specialised circumstances in relation to negligent failure to inform a patients of the risks involved in medical treatment.

The third question is whether the breach of duty complained of was the cause of the damage suffered. The burden of proof is on the claimant to establish that the negligent act caused, or substantially contributed to, the damage or injury which he or she suffered. Once again facts are important. It is not always a simple matter to prove causation, and expert evidence can be crucial. This aspect of causation depends on proof of factual matters. Even if the factual aspects of causation can be proved, there arises the question of 'remoteness of damage'.

The law will not provide compensation for damage which it regards as too remote from the accident itself. This is a question of law rather than fact. It is the law which places a limit on recovery, and the legal principles involved will be discussed in a later chapter (Chapter 8). The rules state that the defendant will not be liable for damage which is too far removed from the negligent act or omission because the defendant could not have foreseen the particular kind of damage which occurred. The concept of foresight which is considered in relation to duty of care and breach of duty also arises at this stage. Once it is established that there is foreseeability of the type of harm, the extent of the loss suffered by the claimant does not need to be considered. The defendant must take his claimant as he finds him. For example, if a pedestrian is knocked down by a motorist, it is foreseeable that he will suffer personal injuries. The defendant will, therefore, be liable if the claimant had a minor bruise or if he had a pre-existing heart defect which meant that he suffered a heart attack because of the shock of the accident and died as a result.

Assessment of the damages is often closely related to issues of causation. For example, if the claimant states that he has suffered a back injury through being required to lift heavy objects at work without proper supervision, medical experts will be asked to give evidence about the injury which was sustained. There may be a dispute about how much of the injury was caused by the work accident and how much arose naturally

through the natural process of aging. The answer will affect the award of damages. Many such disputes arise in personal injuries cases, and the parties often reach a compromise and settle the case out of court. Such factual matters may significantly affect quantum of damage (how much compensation the claimant will receive).

FURTHER READING

Cane (ed), *Atiyah's Accidents, Compensation and the Law*, 7th edn, Cambridge University Press, 2006, Chapter 3

For regular monthly up-dates on this area of law, see *Personal Injury Compensation*, published monthly by Informa UK Ltd.

CHAPTER 3

DUTY OF CARE – GENERAL PRINCIPLES

3.1 DUTY OF CARE

The first consideration in any negligence claim is whether the claimant was owed a duty of care by the defendant. The duty concept has been used from time to time as a means of extending or restricting the development of the law of negligence. The defendant may admit that there has been a breach of duty that caused the damage complained of, but may deny that there is legal liability on the grounds that he did not owe a duty of care to the claimant. The question as to whether a duty of care exists is frequently argued as a preliminary issue before the court, as a point of law before the evidence is produced and the facts of the case are determined. When this happens the arguments are based on assumptions of fact, and this can be confusing for those who are new to the law of tort. It is, however, a useful means of filtering out hopeless cases, as there would be little point in wasting time and money dealing with breach of duty and causation if the case could be struck out at an early stage as disclosing no reasonable cause of action. There has also been conceptual confusion between the concepts of duty of care and remoteness of damage, both of which use the test of foresight.

Despite the fact that it may appear from the discussion in this chapter that there are circumstances when a duty of care has been limited or excluded by the courts, there are very many situations in modern life when a duty of care is owed because of the existence of established precedents. The legal basis for the existence of such duties is discussed in the next chapter, but some examples of 'duty situations' are described below.

These instances are based on established lines of precedent, (but that does not mean that it may not be possible for a court to distinguish the cases and find that no duty is owed in certain circumstances, as described in Chapter 5). So, for example, motorists and other road users owe a duty of care to one another in relation to physical injuries. Doctors and other healthcare professionals owe a duty of care to patients. Parents owe a duty of care to their children, as do teachers who are temporarily *in loco parentis* (acting in the place of parents). Manufacturers owe a duty of care to consumers of their products. Employers owe various duties of care at common law to their employees.

3.2 THE TEST FOR DETERMINING THE EXISTENCE OF A DUTY OF CARE

If it has not been established in a previous case that a duty of care exists in a particular situation, the modern approach to deciding whether a duty of care exists in a novel situation involves applying one or more of three tests based on:

(a) foresight;
(b) proximity;

(c) considerations of justice and reasonableness in imposing the duty (*Caparo Industries plc v Dickman* [1990] 2 WLR 358).

3.2.1 Foresight

In *Donoghue v Stevenson* [1932] AC 562, the notion of foresight of the claimant as a member of a group who is likely to suffer harm as a result of the defendant's acts or omissions was notionally of importance as a deciding factor for liability. However, although it is possible to find cases in which it is argued purely on the question of foresight that a duty of care exists, it is too simplistic to suggest that foresight or 'reasonable contemplation of harm' alone is the test for the existence of a duty of care. It should be regarded as simply one aspect to be weighed in the balance. Many of the cases cannot be explained by reference only to foresight. What began to happen after 1932 was that judges interpreted the *ratio decidendi* of *Donoghue v Stevenson* by stating it in abstract terms focusing on 'the neighbour principle'. Whenever a novel fact situation presented itself, the judge would ask whether a duty of care was owed in *that* situation. If the judge thought it appropriate to compensate the claimant in a particular case, it was a fairly straightforward matter of deciding that a duty of care was owed by the defendant to that claimant, and the rest followed, provided of course that breach and consequent damage could also be established.

This 'backward reasoning', often thinly disguised and based on notions of judicial policy, is an important feature of tort, and much turned upon the decisions which followed quickly upon *Donoghue v Stevenson*. Manufacturers of many different kinds of products began to seek advice from their lawyers and insurers as to whether the newly developing law would apply to their goods.

Within a matter of a few years, it was decided that a duty of care was owed by manufacturers of clothing to their consumers. In the case of *Grant v Australian Knitting Mills* [1936] AC 85, the claimant suffered dermatitis caused by a chemical used in the manufacture of woolly underpants made by the defendant. It was held that a duty of care was owed to him and the defendants were liable even though the illness he suffered was extremely rare (one complaint in 5 million).

It is still possible to find decisions which are arrived at using the simple test of reasonable foresight. For example, in *Topp v London Country Bus (South West) Ltd* [1993] 1 WLR 976, the claimant was unsuccessful because he was unable to establish that the defendant ought reasonably to have foreseen that a joy-rider would have stolen the bus which his employee left unattended in a lay-by. His wife was killed through the negligence of the unidentified joy-rider when he collided with her and knocked her off her bicycle.

In *Margereson v JW Roberts Ltd, Hancock v Same* [1996] PIQR 358 (a case which was also concerned with causation), it was held that the owner of an asbestos factory should reasonably have foreseen that children who played near the factory might in later life, develop pulmonary injury through dust contamination. A duty of care was owed to them.

There were, and still are, a number of 'grey areas' in which the extent of liability and the scope of the duty of care are less clear (see Chapters 4, 5 and 6). In such areas foresight alone is an inadequate test for liability.

3.2.2 Proximity

Closely related to foresight is the notion of 'proximity'. This concept was considered in *Donoghue v Stevenson* itself and was emphasised in the early cases on negligence. In some instances, proximity has become a more important consideration than foresight as a device for controlling the existence and scope of duty of care in personal injury cases. In *Yuen Kun Yeu v Attorney General of Hong Kong* [1988] AC 175, Lord Keith referred to proximity as a synonym for foreseeability on the one hand, and on the other as referring to the whole concept of the relationship between the claimant and the defendant as described in *Donoghue v Stevenson* by Lord Atkin. Proximity plays an important part in the reasoning in many of the cases concerning the extent of liability for economic loss caused by negligent misstatement, as will be seen later in Chapter 5. It has also been regarded as important in relation to the scope of duty of care in omissions rather than positive acts. In many instances the concept of proximity is but one of the factors which may apply in the process of judicial reasoning, whereby judges are enabled to arrive at the decisions they believe to be just in individual cases. *Sutradhar v Natural Environmental Research Council* [2006] UKHL 33 is an example of a case in which the House of Lords decided that there was insufficient proximity between the parties to establish the existence of a duty. One of the defendant's departments, BGS had conducted a survey of water supplies in Bangladesh. In keeping with the usual practice, it did not test the water for arsenic. The results of the survey were sent to various organisations. The claimant alleged that he had sustained serious injuries as a result of drinking water contaminated by arsenic. The House of Lords held that there was insufficient proximity between the parties, in the sense of control over and responsibility for the danger, to give rise to a duty of care. In any event, there was no duty to test for arsenic. The claim also failed on the preliminary point that there was no implied representation by BGS that the water was free from arsenic.

Proximity has proved very important in determining whether a duty of care exists in relation to psychiatric injury, and there is extensive case law on this matter (see Chapter 4). For example, see *AB v Leeds Teaching Hospital & Another* [2004] EWHC 644 (QB).

3.2.3 What is fair, just and reasonable

The duty concept has continued to evolve. From a series of decisions in the late-20th century, it appears that the test for the existence of a duty of care is now approached in three stages, the third of which allows the courts to develop judicial policy.

After a long process of evolution, in which the notions of foresight and proximity were relatively quickly established, the concept of fairness and justice was incorporated into the test for duty of a care. The approach recommended in the leading case, *Caparo Industries v Dickman* [1990] 2 AC 605 is to deal with the question of duty of care by applying three criteria. As explained above, the first is to consider whether the consequences of the defendant's act were reasonably foreseeable; the second is to ask whether there is a relationship of proximity between the parties; and the third is to consider whether in all the circumstances it would be fair, just and reasonable that the law should impose a duty of a given scope upon one party for the benefit of the other. This is not necessarily a scientific approach, as Lord Roskill pointed out in his speech (at

para 628) as the words 'foreseeability', 'proximity', 'neighbourhood', 'just and reasonable' are not intended to be precise definitions but:

> at best labels or phrases descriptive of the very different factual situations which can exist in particular cases, and which must be carefully examined in each case before it can be pragmatically determined.

There are many examples of cases in which the courts draw upon this so called 'incremental' approach, rejecting the earlier two-stage test in *Anns v Merton BC* [1978] AC 728. The three-stage approach was used in the following cases, among many others: *Ancell v McDermott and Another* [1993] 2 QB 161; *Punjab National Bank v de Bonville* [1992] NLJ 856; *Marc Rich & Co v Bishop Rock Marine* [1994] 1 WLR 1071; *Aiken v Stewart Wrightson Members Agency Ltd* [1995] 1 WLR 1281; *Jones v Wright* [1991] 3 WLR 1957; *Spring v Guardian Assurance* [1992] IRLR 173; *Kent v Griffiths and London Ambulance Service (No 2)* [2000] 2 All ER 474; *Barrett v Enfield BC* [2001] 2 AC 550; *A& B v Essex County Council* [2003] EWCA Civ 1848; and *JD and Others v East Berkshire Community Health* [2003] EWCA Civ 1151. A more recent example of the application of considerations of what is fair, just and reasonable can be found in *Vowles v Evans and Another* [2003] EWCA Civ 318. The Court of Appeal held that a rugby referee owed a duty of care to players to take reasonable steps to enforce the rules of the game because players depended on the enforcement of the rules. Rugby is a fast moving game and it is fair, just and reasonable to expect players to rely on the referee.

Considerations of 'what is fair, just and reasonable' are in reality co-extensive with policy arguments but such considerations should now only become relevant after the questions of foresight and proximity have been settled. Indeed, it has been suggested by Lord Bingham (in *Her Majesty's Commissioners of Customs and Excise v Barclay's Bank plc* [2006] UKHL 28, para 7) that the incremental test is of little real value since it simply has the effect of indicating whether there has been be an assumption of duty, or whether a duty should be imposed by the court.

Attempts to reformulate the criteria by developing the three-stage test mask the inevitable problem of patrolling the boundaries of liability and attempting to adapt the law to changing circumstances.

For the judges, a restrictive approach has the advantage of acknowledging their traditional constitutional role as learned interpreters of the law rather than law makers. Yet, as Lord Reid has said in acknowledging that judges can and do make law:

> Those with a taste for fairy tales seem to have thought that, in some Aladdin's cave, there is hidden the common law in all its splendour and that on a judge's appointment there descends on him knowledge of the magic words Open Sesame . . . But we do not believe in fairy tales any more.

Students should be wary of any ambition to impose or discover doctrinal coherence in this area – it is reminiscent of the attempts of legal philosophers like Dworkin to argue that there is nearly always a right answer to a question of law.

The next two chapters will examine in detail the development of the scope of duty of care in negligence in relation to psychiatric injury and economic loss. Chapter 4 will outline instances in which the courts have held that no duty of care exists. In many

of the cases which will be considered in these chapters, judicial policy has played an important part.

3.3 THE OPERATION OF JUDICIAL POLICY IN NEGLIGENCE

Judges have used the concept of 'duty of care' as a device for implementing policy considerations of various kinds. It will become apparent in later chapters that judicial policy is important in connection with breach of duty, causation and remoteness of damage, and that it operates in other areas of tort. However, for present purposes, policy can be dealt with in relation to duty of care.

3.4 DEFINITION OF 'POLICY'

A useful definition of policy is as follows:

> The use of the word 'policy' indicates no more than that the court must decide not simply whether there is or is not a duty, but whether there should or should not be one, taking into account both the established framework of the law and also the implications that a decision one way or the other may have for operation of the law in our society [Rogers, *Winfield & Jolowicz on Tort*, 15th edn, 1998, London: Sweet & Maxwell, para 1].

What this meant was that judges can and do adapt the law from time to time in response to changing social conditions. Although this is an over-simplification of the definition, one only has to examine a number of lines of cases in tort which deal with the scope of the duty principle, to observe that many of the decisions have less to do with the logical application of pre-existing legal rules than with matters of social or economic pragmatism.

It is possible to find a straightforward discussion of the policy issues which arise in novel situations, despite the many twists and turns which have taken place during the 1980s and 1990s in the attitudes of the judges to whether policy is a matter for open deliberation.

3.5 FACTORS INFLUENCING JUDICIAL POLICY

The factors that influence judges may include the following considerations (the list is not exhaustive):

- Loss allocation. Which party can best afford to bear the loss? Which party is insured (the deepest pocket principle)?
- The 'floodgates' argument. This involves the fear that a flood of claims may follow a particular decision and is found in a number of 'grey areas' of negligence, such as that concerning psychiatric injury.
- Whether the imposition of a duty would create inconsistencies with other areas of the law.
- Moral considerations.

- Practical considerations such as forward planning for manufacturers.
- The notion that professional people like doctors and barristers need to be protected from the threat of negligence claims which could inhibit their professional skills and judgment (*Saif Ali v Sydney Mitchell & Co* [1980] AC 198, now overruled by *Hall v Simons and Others* [2000] 3 WLR 543, [2000] 3 All ER 673). (In *Hatcher v Black* (1954) *The Times*, 2 July, Denning MR expressed the view that medical negligence litigation was like a 'dagger at the doctor's back'.)
- The respective constitutional roles of Parliament and the judiciary. Judges are not always happy about making new law. 'The policy issue where to draw the line is not justiciable': *per* Lord Scarman in *McLoughlin v O'Brian* [1983] AC 410.
- Judicial reluctance to create new common law duties where none previously existed.
- The idea that there should be no duty owed to members of an 'indeterminate class' of potential claimants. In *Goodwill v British Pregnancy Advisory Service* [1996] 1 WLR 1397, [1996] 2 All ER 161, the claimant was claiming in respect of an unwanted pregnancy. She claimed that her partner had not been properly advised as to the possibility of his vasectomy operation not being successful. This operation had been performed some four years previously, before the couple had met and formed a relationship. The claimant's partner had been advised that he was sterile and need use no other form of contraception. It was held by the Court of Appeal that the claim should be struck out because the claimant was a member of a class of persons which was indeterminately large and she was not therefore foreseeable to the defendants. The claimant and defendant were not in a special relationship such as gave rise to a duty of care and there were no policy reasons why they should treat such a tenuous relationship as giving rise to a duty, though a duty would have been owed at the time of the operation and subsequent advice given to the man's then sexual partner.
- Whether imposing a duty would encourage people to take more care. For example, in *Smoldon v Whitworth and Nolan* [1997] PIQR 133, it was held that the referee of a colts rugby match owed a duty of care to the claimant, a player injured when a scrummage collapsed. The Court of Appeal stressed that the case was confined to its own special facts involving colts rugby as it was played in 1991 before the rules changed, and was of the view that it was just and reasonable to impose a duty because it was proven beyond doubt that it was a well known risk of the game that collapse of a scrum could cause very serious neck injuries. It was not necessary to establish a high level of probability of the *type* of injury involved. The claimant was found not to have consented to the risks. There had been no previous case in any jurisdiction in which a referee had been held liable to a player but comments on the decision by members of the rugby fraternity have indicated that in future, despite the judge's cautious confining of the decision to its facts, referees will need to be extra careful. A spokesman for Rugby League is quoted in *The Times* as saying: 'This decision has ramifications for all sport in the UK, however humble.' The effect of this case has been considerable in terms of safety at all rugby matches.

3.5.1 Legal reasoning

The reasons which judges give for their decisions can be analysed into a number of different categories. Legal philosophers have identified the following:

- **Goal and rightness reasons**
  Summers has identified, among other reasons, 'goal reasons' and 'rightness reasons'. *'Goal reasons'* are forward looking to achieve some social or economic aim, such as compensating consumers. *'Rightness reasons'* appeal to justice or fairness regardless of the consequences (Summers, 'Two types of substantive reasons' (1978) 63 *Cornell L Rev* 707, pp 716–25).
- **Principle and policy**
  Dworkin (Dworkin, *Taking Rights Seriously*, 1978, London: Duckworth) has produced a celebrated dichotomy, 'principle' and 'policy', which is discussed in some of the cases (for example, *McLoughlin v O'Brian* [1983] AC 410).

What analysts like Summers and Dworkin are doing is exploring the deep structure of legal reasoning and attributing certain sorts of justification to judges who may in fact say very little by way of explanation for their decisions. This is in part because judges are under considerable pressure not to be seen to be making law, which is the function of the legislature.

If, in the early development of the law of negligence the judges had wished to restrict progress of the law, they could have treated *Donoghue v Stevenson* as a departure which should be confined to its own particular facts or, at the very most, as applying only to consumer cases involving foreign bodies in foodstuffs. However, what materialised is a massive expansion of the law of negligence. In effect, what the notion of 'duty of care' does is define the interests protected by the tort of negligence. These interests are by now many and varied, which is why some experts take the view that negligence is 'taking over' the law of tort and usurping the territory of some of the other torts.

3.6 LATENT POLICY DECISIONS

It is possible to identify a number of negligence decisions over the course of many years which were clearly policy driven, but where the judges do not admit to this. Instead, they confine their reasoning to precedent or use the concept of reasonable foresight and the neighbour principle to their own ends as policy devices, so remaining within the confines of the traditional role of the judge, which is to interpret and apply the existing rules of law. In this category belong a number of cases in which the decision expressed by the judge or judges was that, on application of the neighbour principle, no duty of care was owed because the claimant was not reasonably foreseeable by the defendant.

One example of this is the case of *King v Phillips* [1952] 1 All ER 617. A mother who suffered nervous shock when she saw her child in a situation of great danger and presumed him to have been injured, was unable to succeed in her claim for nervous shock caused by the negligence of a taxi driver who reversed into her son's bicycle. The reason given by the Court of Appeal for denying the mother a remedy was that she was too far away from the scene of the accident and, therefore, outside the scope of reasonable

foresight. No one would seriously believe that a motorist could not reasonably foresee the possibility of psychiatric harm to the mother of the child in such circumstances, even if she was some distance from the scene of the accident. Probably, the real reason for the decision was fear of 'floodgates' opening to permit a large number of similar claims.

3.7 EXPLICIT POLICY DECISIONS

Judges do, now more frequently, discuss at length the policy issues involved in particular cases. This is both interesting and helpful to lawyers who have to advise their clients in other similar situations. It enables them to predict with greater certainty the trends in judicial thinking and represents a major departure from the hypocrisy which surrounds many of the earlier decisions.

The important explicit policy decisions made by the House of Lords and Court of Appeal are often described as 'landmark' cases; the first of these is *Donoghue v Stevenson* itself. The House of Lords discussed at length in that case the social and economic consequences of the possible outcomes. In the earlier cases the majority of judges were satisfied with the control on future development of the law which Lord Atkin imposed in the concept of 'duty of care' and the 'neighbour principle'. The neighbour principle was confirmed by the House of Lords in *Hedley Byrne & Co v Heller & Partners* [1964] AC 465 as a flexible test which could be applied in a variety of fact situations. In *Dorset Yacht Co Ltd v Home Office* [1970] AC 1004, the neighbour principle as a basis for the duty of care was treated as a statement of principle to be applied in all cases unless some reason for its exclusion could be justified. Many of the cases which establish that no duty of care is owed in particular circumstances involved explicit exposition of the policy reasons for denying the claimant a remedy. A more recent example of detailed discussion of a wide range of policy issues is to be found in *McFarlane v Tayside Health Board* [1999] 3 WLR 1301 (see Chapter 19).

Later, the 1970s was an important decade for those who favoured open recognition of the 'legislative function' of the courts (see Symonds (1971) 24 MLR 395).

(Policy can also be discussed openly in relation to causation, as well as in relation to duty of care. A recent example is *Chester v Afshar* [2004].)

3.8 THE INCREMENTAL APPROACH – THE THREE-STAGE TEST

As was explained at the start of this chapter, the courts now favour what has been described as 'an incremental approach' where reasoning by analogy with reference only to existing cases should prevent sudden 'massive extensions' of the duty of care.

3.9 HUMAN RIGHTS CONSIDERATIONS

The picture is further complicated by human rights issues which are now frequently introduced in legal argument. One result since the implementation of the Human Rights Act 1998 (see 4.8, below) has been a marked reluctance of courts to strike out claims without a hearing on grounds of public policy.

Human rights issues are now considered as a matter of course where relevant, and have had the effect of colouring or even changing the approach taken by the judiciary to policy matters. One positive result of this has been the insistence of judges that it should no longer be possible for cases to be dismissed without a hearing on the facts, simply because in the past (see *Hill v Chief Constable of South Yorkshire* [1989] AC 53) a blanket rule had developed that on policy grounds, no duty of care existed in certain situations. See *Van Colle v Chief Constable of Hertfordshire* [2006] EWHC 360, Lord Justice Sedley, who examined the common law cases in detail in *Smith v Chief Constable of Sussex* [2008] EWCA Civ 39, made the important point that: 'There is nevertheless an unanswered question as to how, if at all, the common law of negligence is to develop in response to the Human Rights Act and the Convention values it imports' (these cases are discussed in detail in Chapter 6).

FURTHER READING

Doldin and Mulander, 'Tort Law, Incrementalism and the House of Lords' (1996) 47 *NILQ* 12
Lord Hoffmann, 'Human Rights and the House of Lords' (1999) 62 *MLR* 159

For regular monthly up-dates on this area of law, see *Personal Injury Compensation*, published monthly by Informa UK Ltd.

CHAPTER 4

DUTY OF CARE – PSYCHIATRIC INJURY

The object of this chapter is to examine the cases concerning psychiatric injury, or nervous shock as it was called in the earlier cases, and to trace the development of the scope of duty of care within that context. This will help towards an understanding of the extent of judicial law-making in this narrow area of tort law.

'Nervous shock' cases form an area of law which illustrates well the operation of judicial policy. By close examination of the cases, it is possible to trace the changing attitudes of lawyers, doctors and of society in general over a period of about 100 years, to psychiatric injury. It is also possible to observe changing judicial attitudes to the scope of duty of care and to the whole issue of policy decisions.

Psychiatric injury, like pure economic loss, is sometimes described as a 'grey area' of negligence because judicial attitudes are constantly developing and new formulations of the scope of the duty of care are regularly produced. This means that the law is rather unclear at times and the cases are frequently difficult to reconcile. However, the courts have little difficulty in compensating psychiatric injury which is claimed alongside physical injuries suffered by the same claimant, as for example frequently happens following car accidents. The contentious issues concern what might best be described as 'pure' psychiatric injury unaccompanied by physical trauma.

Indeed, this area of the law, which has developed on an ad hoc basis as part of personal injury law, has been subject to many criticisms. Lord Oliver in *Alcock v Chief Constable of South Yorkshire Police* [1992] 1 AC 310 at 418 said, 'I cannot, for my part, regard the present state of the law as either satisfactory or logically defensible'. Lord Steyn, in *Frost v Chief Constable of South Yorkshire Police* [1999] 2 AC 455 at 500 said:

> The law on the recovery of compensation for pure psychiatric harm is a patchwork quilt of distinctions which are difficult to justify.

This chapter may also appear to resemble a 'patchwork quilt' as it describes an area of law that has developed haphazardly.

4.1 WHAT IS 'NERVOUS SHOCK'?

Before proceeding with the cases, it is necessary to define 'nervous shock' which is the rather quaint term still sometimes used by lawyers for various kinds of psychiatric injury. Physical symptoms may accompany the mental distress which the claimant suffers. For example, a pregnant woman who suffers nervous shock may miscarry (though some doctors now doubt that this can happen) and a person with a certain heart condition may suffer a heart attack. Although these kinds of physical symptoms may have facilitated claims in the early days when judges were more sceptical about claims for psychiatric harm, it is not now necessary for the claimant to prove that physical symptoms were suffered in order to succeed in a claim.

However, there must be evidence that the claimant has suffered a serious psychiatric

condition which is more than mere temporary grief or fright (see *Alcock v Chief Constable of South Yorkshire* [1992] 1 AC 310). Medical evidence is very important in claims for nervous shock, and psychiatrists now know much more about the condition than they did when the first claims were brought. As scientific knowledge has increased, judges have become increasingly willing to recognise that the condition described by lawyers as 'nervous shock' exists.

With the development of the railway network in the 19th century, an increasing number of claims arose out of railway accidents and one writer, John Erichsen (*Railway Injuries and Other Obscure Injuries of the Nervous System*, 1886, London: Walton & Maberly), identified nervous shock injuries as part of a clinical pattern following railway accidents. He concluded that many accidents resulted in 'severe and prolonged' nervous shock, 'weariness', 'cramps', 'twitching' and other symptoms. Charles Dickens described his own symptoms of weakness and faintness following a railway accident in which he was involved as a passenger.

People who suffered no physical injuries but who sustained psychological harm might not have considered legal action until medical science identified and documented the condition, and it was not until 1888 that the first case reached the courts.

One of the reasons why judges were initially reluctant to recognise that a duty of care could be owed in relation to psychiatric injury was that its very existence as a medical condition was doubted by them. They feared that the illness could be faked more easily than physical conditions, and at times seemed to mistrust psychiatrists, because so much conflicting psychiatric evidence was presented in the nervous shock cases. They also feared that once claims for nervous shock began to succeed, the 'floodgates' would be opened to allow a rush of claims. In a famous article in 1953 ('The shock cases and area of risk' (1953) 16 MLR 14), Professor Goodhart explained this reluctance in the following terms:

> The principle of the wedge is that you should not act justly now for fear of raising expectations that you may act still more justly in the future – expectations which you are afraid that you will not have the courage to satisfy.

However, once it became clear that psychiatrists were prepared to give consistent support to the existence of psychiatric illness arising from mental trauma, the number of successful claims increased.

It should be noted that in one important and clear respect the law does not provide compensation for psychiatric injury. Article 17 of the Warsaw Convention allows compensation for bodily injury sustained on board an aircraft but does not cover compensation for mental illness that was not caused by and does not amount to bodily injury (*King v Bristow Helicopters Ltd* [2002] UKHL 7).

4.1.1 Recognised symptoms of psychiatric injury

As well as producing the physical symptoms discussed above, nervous shock manifests itself in a number of ways.

In recent years, a form of psychiatric injury known as 'post-traumatic stress disorder' (PTSD) has been identified, and this forms the basis of many claims which are brought as a result of accidents and disasters. PTSD is a serious long term medical condition which

can be distinguished from temporary feelings of shock which most people experience immediately after witnessing an accident.

There are two main systems of classification of psychiatric illnesses currently in use in the UK. These are the Diagnostic and Statistical Manual of Mental Disorders of the American Psychiatric Association which first recognised PTSD in 1980, and the Glossary of Mental Disorders in the International Classification of Diseases, which recognised the condition in 1987 for the first time.

The definition of PTSD provided by the first of these is that the condition must be traceable to a traumatic event which is outside the normal range of human experience. Examples would include serious threats to the individual's own safety, or to that of his or her close relatives, or even seeing a complete stranger who has been severely injured or killed. A variety of symptoms may be experienced by the sufferer. These include nightmares about the traumatic event, or 're-living' the experience. Other common symptoms include irritability, lack of interest in everyday life, aggression, poor concentration, lack of emotional response, avoidance of anything which might prompt a reminder of the traumatic event, and unreasonable or 'pathological' grief. In some cases, a person suffering from psychiatric injury suffers a personality change (*McLoughlin v O'Brian* [1983] 1 AC 410), and there are instances in which a personality change has meant that an individual becomes more susceptible to physical harm through alcohol abuse, for example, or even through excessive smoking that resulted in throat cancer (*Commonwealth v McLean* (1977) 41 NSWLR 389).

Some individuals may be particularly prone to the condition, and this led judges in some of the earlier cases to produce the somewhat contradictory ruling that only people of 'normal fortitude' could succeed in a claim for nervous shock. It later emerged that what was intended here was that a claimant who was abnormally sensitive should only succeed in a claim for nervous shock if a so called 'normal' person would also have suffered nervous shock in the same circumstances. Neurotic individuals and people with alcohol or drug abuse problems seem to be particularly vulnerable.

In the Herald of Free Enterprise (Report 1989, Vol 5, No 5) Arbitration, there was concern expressed about the variety of terms used to describe the claimants' psychiatric conditions: 'Many of the victims suffered from PTSD, of course some victims suffered from other psychiatric illnesses, for example, depression'. In addition to PTSD, courts have awarded damages for nervous shock when the symptoms were described rather vaguely to include 'depression' (*Chadwick v British Rlys Board* [1967] 1 WLR 912) and 'personality change' (*McLoughlin v O'Brian* [1983] AC 410).

By the time *McLoughlin v O'Brian* was decided in 1982 by the House of Lords, the legal profession had accepted the condition described as 'nervous shock' and had arrived at an understanding of it, expressed by Lord Wilberforce in that case in the following terms:

> Although we continue to use the hallowed expression 'nervous shock', English law and common understanding have moved some distance, since recognition was given to this symptom as a basis for liability. Whatever is known about the mind-body relationship (and the area of ignorance seems to expand with that of knowledge), it is now accepted by medical science that recognisable and severe physical damage to the human body and system may be caused by the impact, through the senses, of external events on the mind. There may thus be produced what is as identifiable an illness as any that may be caused by direct physical impact.

It should also be noted that there is now little difficulty in making an award if the claimant was the subject of sexual abuse and suffered PTSD as a consequence.

An example of some of the complex issues in these cases is *Pierce v Doncaster MBC* [2007] EWHC 2968 (QB) *The Times*, December 27, 2007. The claimant, born in 1976, succeeded in his claim against the defendant local authority on the basis that it had been in breach of its duty of care because of its failure to take adequate measures to protect him, as a child at risk, during his childhood. The defendants had been aware of his difficult family circumstances, and had removed him from his home and placed him in foster care soon after his birth until November 1977. However, he was then returned to live under the care of his mother and father where he suffered emotional and physical neglect and abuse. He left home when he was 15, and lived rough, making money as a prostitute. He was able to prove that he had suffered serious psychological damage as a result of many failures on the part of the local authority's social workers.

The judge held that there was no reason why the imposition of a duty could be anything but fair, just and reasonable, *X (Minors) v Bedfordshire CC* [1995] 2 AC 633 and *Z & others v UK* (2001) FLR 612, (*Caparo Industries Plc v Dickman* [1990] 2 AC 605). Mr Justice Eady reviewed the concept of duty of care in relation to local authorities. He explained that there have been significant developments in recent years in this area of the law of negligence concerning investigations of allegations of child abuse, pointing out that the reasoning in *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633 has been considerably undermined by subsequent authorities and, in particular, by the effects of the Human Rights Act 1998. He cited the statement made by the Court of Appeal in *JD & Others v East Berkshire NHS Trust & Others* [2003] EWCA Civ 1151:

> In so far as the position of a child is concerned, we have reached the firm conclusion that the decision in *Bedfordshire* cannot survive the Human Rights Act. Where child abuse is suspected the interests of the child are paramount – see section 1 of the Children Act 1989. Given the obligation of the local authority to respect a child's Convention rights, the recognition of a duty of care to the child on the part of those involved should not have a significantly adverse effect on the manner in which they perform their duties.

His Lordship explained that in the present case, the events relied upon as giving rise to a breach of duty occurred well before October 2000, and commented that the reference to 'fair, just and reasonable' reflected the test stated by the House of Lords in *Caparo Industries Plc v Dickman* [1990] 2 AC 605, and took the view that the exercise is essentially one that involves public policy as judicially interpreted at a particular time. He reflected on the impact of the Human Rights Act on this area of law:

> In the context of suspected child abuse, breach of a duty of care in negligence will frequently also amount to a violation of article 3 or article 8. The difference, of course, is that those asserting that wrongful acts or omissions occurred before October 2000 will have no claim under the Human Rights Act. This cannot, however, constitute a valid reason of policy for preserving a limitation of the common law duty of care which is not otherwise justified. On the contrary, the absence of an alternative remedy for children who were victims of abuse before October 2000 militates in favour of the recognition of a common law duty of care once the public policy reasons against this have lost their force.

The House of Lords has ruled that a claim for psychiatric injury will not be successful unless it is dependent in some way on physical injury which is more than simply trivial.

In *Johnston v Nei International Combustion Ltd* [2007] UKHL 39, involving conjoined appeals, the appellants had been exposed to asbestos dust sometime in the past through the negligence of their employers, and had developed pleural plaques. The plaques, which do not usually cause symptoms or asbestos-related diseases, are an indication of the presence of asbestos fibres in and around the lungs, which might independently cause life-threatening diseases and even death. One of the appellants, G, had developed clinical depression as a result of discovering that his pleural plaques showed exposure to a significant amount of asbestos, and others suffered anxiety about their future health status.

The appellants argued that, although they had no free-standing claim as regards the risk of developing disease in the future, and even though they had no free-standing claim for the anxiety they suffered, yet when taken together, those factors amounted to an injury which was more than *de minimis* (negligible), and therefore they had a cause of action.

The House of Lords held that pleural plaques which gave rise to no symptoms were not 'damage' that could be the basis of a legal claim. In fact they had no effect upon physical health at all. The risk of developing diseases in the future was not actionable, nor was anxiety about the possibility of that happening – *Gregg v Scott* (2005) UKHL 2, [2005] 2 AC 176 and *Hicks v Chief Constable of South Yorkshire Police* [1992] 2 All ER 65.

Furthermore, the House of Lords held that pleural plaques do not amount to what the law understands as damage, even when aggregated with the risk of future disease or anxiety that such risk might materialise. By adding together two or more components of a possible claim, none of which was actionable on its own, it would not be possible to arrive at a cause of action. The Supreme Court Act 1981, s 32A (which does permit a claimant to obtain provisional damages where there is a possibility that a serious disease could develop in the future) does not support the aggregation theory, and that Act applies only when the claimant has an initial cause of action.

In the case of G, who could prove that he had suffered a recognisable psychiatric illness, the House of Lords took the view that his psychiatric illness was not a reasonably foreseeable consequence, in a person of normal fortitude, of his employers' breach of the duty – *Page v Smith* [1996] AC 155 was distinguished, as it has been in *Rothwell v Chemical and Insulating Co Ltd* [2006] EWCA Civ 27 (another case involving pleural plaques). Accordingly all the appeals were dismissed. The case is a clear indication that the courts are not prepared to expand the concept of liability for psychiatric injury.

4.2 DEVELOPMENT OF THE LAW

The topic is best approached chronologically so that the development of the law can be traced as logically as possible. It must be emphasised again that there is little difficulty in awarding damages for nervous shock if the claimant also suffers physical injuries in the same accident. Legal difficulties usually only arise if there is psychiatric injury without any form of bodily injury. As will be seen, the scope of liability expanded during the twentieth century but then contracted following the House of Lords ruling in *Alcock v Chief Constable of South Yorkshire Police* (1991).

The first attempt to claim damages for nervous shock was in *Victorian Rly Comrs v Coultas* (1888) 13 App Cas 222. Little medical evidence was available in those days to

assist the court in arriving at its decision and the Privy Council refused the claim, expressing the fear that a flood of claims would follow if this succeeded. It was thought that 'a wide field of imaginary claims' would be opened.

The first successful nervous shock claim was in *Dulieu v White* [1901] 2 KB 669. The court was prepared to recognise and compensate the claim of a publican's wife who suffered a severe fright when a horse-drawn van crashed through the window of the bar where she was working, cleaning glasses. She was pregnant at the time and the child was born prematurely soon after the accident. The recovery of damages was limited by the judge, Kennedy J, to the particular facts, which involved real and immediate fear of injury to the claimant herself. He formulated a limitation on the scope of liability for nervous shock which became known as the 'Kennedy limitation':

> There is, I am inclined to think, one limitation. Shock, when it operates through the mind, must be a shock which arises from a reasonable fear of immediate personal injury to oneself.

This limitation was used in later cases to restrict the scope of liability for nervous shock. However, the principle was not applied consistently in all cases which followed, and eventually it fell into disuse after higher courts had extended the scope of liability.

4.2.1 Fear for relatives and friends

Courts later began to award damages to people who had feared for the safety of close relatives. In *Hambrook v Stokes* [1925] 1 KB 141, the court was prepared to award damages for nervous shock when a mother, who had been made to fear greatly for the safety of her children at the sight of a lorry careering out of control towards them, suffered nervous shock. She suffered a miscarriage and died. The court took the view that it would be unfair and indeed 'absurd' to deny a remedy when a mother feared for the safety of her children. The court concluded that as she feared for her own safety the claim would have succeeded. She had witnessed the experience through her own unaided senses – a theme which was later developed by Lord Wilberforce in *McLoughlin v O'Brian* and refined in *Alcock v Chief Constable of South Yorkshire* [1991] 4 All ER 907 (as will be seen at 4.4.1, below).

As the notion of nervous shock became more acceptable to lawyers, articles began to appear in legal literature which explained the medical aspects of the condition and more claims were brought before the courts. New limitations were suggested by judges, ostensibly based on the notions of foresight and proximity formulated by Lord Atkin in *Donoghue v Stevenson* [1932] AC 562, though in reality, the true reasons for the decisions involved issues of policy.

4.2.2 The impact theory

Whereas shock had initially been treated as a form of physical injury, probably because some of the early cases had involved miscarriages as the physical manifestation of shock, a new view began to emerge. This was known as the 'impact theory' and it meant that damages would only be awarded if the claimant was within the foreseeable area of impact or geographically close enough to the scene of the accident.

4.2.3 The 'area of shock' theory

Subsequently another theory emerged, that even if a claimant was outside the foreseeable area of impact, damages may still be recoverable as long as the claimant was within the foreseeable area of shock. The remnants of this approach are still in existence today but in some of the older cases it is difficult to discern which approach is favoured.

In *Bourhill v Young* [1943] AC 92, the claimant, an Edinburgh fishwife, had just alighted from a tram when she heard the impact from a serious accident 50 yards away on the other side of the road and outside her line of vision. She later walked over to the scene and suffered nervous shock as a result of what she saw. She gave birth to a stillborn child very soon afterwards, but her claim for nervous shock failed. Three judges in the House of Lords held that she was outside the area of impact, and that as she was a total stranger to the motorcyclist involved in the accident, she was outside the area of foresight of shock. Their Lordships accepted that the test was that of foresight of shock. It was also decided that as a pregnant woman she was not 'normal' in terms of what she could endure by way of shock, and she was not entitled to succeed in her claim.

In *Brice v Brown* [1984] 1 All ER 997, the difficult subject of people of 'normal fortitude' was again considered, though in the context of remoteness of damage. A woman and her daughter were involved in a minor car accident, and the girl aged nine suffered slight physical injuries. The mother who was very neurotic, suffered serious nervous shock. The court decided that the mother's claim should succeed. The test which was applied was that if a person of ordinary phlegm or fortitude would have suffered nervous shock in these circumstances, the claimant should succeed, and could then recover compensation for the full extent of her illness. If not, she could recover nothing at all.

In *Page v Smith* [1994] 4 All ER 522, further light was thrown on the notion of 'normal fortitude' (see 4.6.1, below) and it is now established that the claimant can succeed in obtaining damages for psychiatric injury as long as the court decides that it was reasonably foreseeable to the defendant that his actions could result in physical injury of some kind to the primary victim of his negligence.

In the strange case of *Owens v Liverpool Corpn* [1933] 4 All ER 727, relatives in a funeral procession succeeded in their claims for nervous shock when they saw the hearse collide with a corporation vehicle and the coffin fall out on impact. The only emotions which the relatives could have experienced were those of enhanced grief and horror. The relative in the coffin was already dead, so there could have been no claim based on fear for the safety of any living person.

The courts continued to extend the scope of liability for nervous shock. In *Dooley v Cammel Laird & Co Ltd* [1951] 1 Lloyd's Rep 271, a crane driver recovered damages when he witnessed an accident involving a workmate.

In *Kralj v McGrath* [1986] 1 All ER 907, a woman who suffered nervous shock when she saw the dreadful condition of her child who was the victim of a negligent delivery by a doctor, succeeded in her action for nervous shock.

4.2.4 Rescuers

The law concerning liability to rescuers was expanded during the mid-20th century in their favour, but in more recent years liability to rescuers has become more limited. In *Chadwick v British Transport Commissioners* [1967] 1 WLR 19, a passer-by, who assisted the official rescue teams at the scene of a serious rail disaster, suffered nervous shock and eventually committed suicide. He did not know any of the victims personally but he witnessed horrific sights. His claim was successful. The case represents an extension of liability for nervous shock, which applied for several years, to rescuers who come upon an accident and assist in rescuing in the immediate aftermath.

A professional rescuer, or indeed any rescuer who is present while an accident is still in the process of happening, may, in appropriate circumstances, qualify in his or her own right as a primary victim of an accident and may recover damages for nervous shock even though he or she suffers no physical injury during the rescue. In November 1992, a fireman who had been involved in the rescue of the victims of a serious fire at King's Cross Underground Station was awarded £147,683 damages for nervous shock. While the defendants admitted liability, and a number of other claims by firemen for nervous shock were settled out of court, the dispute in this case was about the amount of the award (the highest previous award to a fireman for PTSD had been £13,000). The claimant, Mr Hale, suffered nightmares about dead people and skeletons, severe depression, which had almost led to the breakdown of his marriage, and had only been able to manage a desk job since returning to work. He was unlikely to be able to continue working. The judge concluded: 'He will continue to suffer from a deep-rooted depression which is unlikely to abate, and affects his whole outlook on life' (*Hale v London Underground* (1992) 11 BMLR 81).

In *Wigg v British Rlys Board* [1986] NLJ 446, the defendants were liable when a guard had been negligent in starting a train before a passenger had boarded properly. The driver, who had stopped the train as soon as possible, went to the passenger's assistance but he was already dead. The driver, with 20 years' experience, suffered nervous shock even though this sort of accident was described as 'an occupational hazard' and the claimant had experienced two previous incidents in which people had died on the railway line in 1979 and 1980.

Despite the special consideration which the law has afforded to rescuers in these earlier cases, there is now a more restrictive approach (see 4.6.1, below). The restrictions on liability to rescuers are the inevitable result of the more restrictive approach to all victims of negligence who suffer psychiatric injury established in the *Alcock* case (see *Frost v Chief Constable of South Yorkshire* [1999] 2 AC 455).

4.3 EXPANSION OF LIABILITY IN THE 20TH CENTURY

In all the early successful claims, the claimants who experienced fears for the safety of loved ones or colleagues had witnessed the scene of the accident through their own senses. In *McLoughlin v O'Brian* [1983] 1 AC 410, however, the House of Lords was prepared to extend liability to a situation in which the claimant only saw her family after they had been removed from the scene of the event to a hospital casualty department.

The claimant was the mother of four children. She was not present when her family was involved in a tragic road accident, liability for which was admitted by the defendant. She was at home at the time, about two miles away from the scene of the crash. By the time she had been informed of the accident and had arrived at the casualty department of the hospital, about an hour had elapsed. The members of her family were still in various states of shock and had not been cleaned up after the accident. One of her children had died, her husband was severely shocked and had suffered bruising, and the other two children were badly injured. The claimant suffered a serious psychiatric illness as a result of what she saw. The House of Lords held that the mother was owed a duty of care by the defendant. Extending the previous ambit of the duty of care, their Lordships unanimously agreed that although she had not been present at the scene, she had come upon the accident in its 'immediate aftermath'.

Lord Wilberforce and Lord Edmund-Davies considered that it was open to the court to decide the issue upon grounds of policy. The relevant policy issues which might have operated to negative the claim were discussed at length and were all rejected. Lord Wilberforce stated that close family ties would mean that there was a sufficiently close relationship between the parties to satisfy a claim, but unrelated bystanders would be too remote. Any relationships falling between these two ends of the spectrum would need to be dealt with case by case on their own facts. Claimants would need to be present in the immediate aftermath of a tragedy in order to succeed in a claim, but information received from a third party would not be sufficient to constitute the 'immediate aftermath'.

Lord Bridge and Lord Scarman considered that this particular claimant could succeed on the foresight test alone, and that a test of 'reasonable foresight' was sufficient to decide liability in cases of nervous shock.

If fear of opening of floodgates is an important consideration, it is unlikely to be a problem in cases such as this, which are extremely unusual.

4.3.1 Cases involving the 'immediate aftermath'

Following *McLoughlin v O'Brian*, the concept of 'immediate aftermath' was further developed.

In *Jaensch v Coffey* (1984) 54 ALR 417, a woman who saw her husband in hospital in a serious condition after he had been injured succeeded in her claim for nervous shock.

Attia v British Gas [1987] 3 All ER 455, was decided, however, on application of the reasonable foresight test alone, and here it was decided that a claimant who had returned home to witness the sight of her house burning down could obtain damages for nervous shock caused by the defendants' negligence in installing central heating. She was not present at the scene when the accident happened, but the court was sympathetic to her claim, and this case represents the high water mark of expanding liability for psychiatric injury, since the claimant was not in fear of her own life, nor that of a close relative or friend. She was in shock at the sight of damage to her property.

In two High Court cases (*Hevican v Ruane* [1991] 3 All ER 65, which did not go to appeal, and *Ravenscroft v Rederiaktieblaget* [1991] 2 All ER 470, which was reversed on appeal ([1991] 3 All ER 73)), after the *Alcock* case (*Alcock v Chief Constable of South Yorkshire* [1991] 4 All ER 907, see 4.4.1, below), both claimants succeeded in their claims for nervous shock.

In the first of these cases, a father who was at home when he was told of his son's accident, and in a police station when he learned that he had died, but later saw his body at a hospital, suffered severe long-term depression. Although he did not arrive at the hospital in the 'immediate aftermath' of the death, his claim was successful.

The second case concerned a mother was called to a hospital after her son had been killed in a crushing accident at work. She never saw the body, but later she suffered a prolonged grief reaction. She, like the father in the *Hevican* case, was found to be a person of normal fortitude and, once again, although she was not present in the 'immediate aftermath' of the accident, her claim was initially allowed but could not stand on appeal after the decision in *Alcock*.

In both cases, the judges accepted that as a medical fact the presence of a person at the scene or in the immediate aftermath makes no difference to the likelihood of a psychiatric illness developing.

Both judges based their decisions on the 'reasonable foresight' test. It must surely be reasonably foreseeable that a parent who merely hears about the death or serious injury suffered by a child may suffer nervous shock even without actually witnessing the event at first hand.

It is likely that *Attia* and these two cases at High Court Level represent the furthest limit of the expanded duty of care in relation to nervous shock as will be seen below, in the discussion concerning 'the immediate aftermath' in more recent cases.

4.4 CONTRACTION OF LIABILITY FOR NERVOUS SHOCK

The policy reasons surrounding the fear of a flood of claims are familiar arguments against extending the scope of duty of care in relation to nervous shock.

However, the fears are often overstated. Psychiatric illnesses are not easy to simulate now that there have been considerable advances in the knowledge of the symptoms of these conditions. It is unlikely that there will be large numbers of claims by people who were not present at the scene of accidents. Awards of damages for nervous shock have remained relatively low, with the exception of the award to a fireman in the King's Cross fire, a rescue case, discussed above (*Hale v London Underground*), where the claimant was forced to give up work because of a psychiatric illness.

Indeed, in the *Ravenscroft* case, expert evidence was adduced to the effect that only a very small percentage of the population will suffer from an extreme grief reaction. The Law Commission has criticised the contraction of liability for psychiatric injury. It recommends extending the categories of people able to claim (see 4.7, below).

4.4.1 Restrictions on the scope of the duty

The House of Lords gave further detailed consideration to the scope of liability for nervous shock in *Alcock* and certain restrictions were introduced. Some of the unanswered questions in *McLoughlin v O'Brian* were clarified.

In *Alcock v Chief Constable of South Yorkshire* [1991] 4 All ER 907, the House of Lords considered 10 claims for nervous shock by relatives of the victims of the Hillsborough football stadium disaster. The police had admitted negligence in allowing too many

people into the stadium, as a result of which 95 people had died and 400 needed to be treated in hospital. The tragedy had been broadcast on television as it was happening.

The claims involved clarification of a number of points which included the following:

- could people other than parents, children and spouses claim for nervous shock?
- how far did the 'immediate aftermath' extend?
- could people who witnessed on television events as they happened to their loved ones succeed in claims for nervous shock?

In rejecting all 10 claims, the House of Lords held that the three relevant factors in considering whether a duty of care exists in a particular claim for psychiatric injury are:

- the proximity of the claimant in time and space to the scene of the accident;
- the relationship between the accident victim and the sufferer;
- the means by which the shock has been caused.

4.4.2 Proximity

The concept of proximity is of particular importance in claims for psychiatric injury. It has led to the concepts of 'primary' and 'secondary' victims (see 4.6.1, below).

In *Alcock*, not one of the claimants had actually witnessed the events happening to a loved one at very close quarters. Those who were present at the ground were too far from the scene to observe the faces of the victims. One claimant who had identified his brother eight hours later in the mortuary fell outside the 'immediate aftermath', and those who had seen the events on television would not have seen details of the faces of individuals because broadcasting rules had been observed.

There is continued emphasis on the need for a secondary victim to be present at the scene of the accident or to arrive in the immediate aftermath. In *Tranmore v TE Scudder Ltd* (1998) unreported, a father arrived at the place where his son had been killed two hours earlier when the building in which he had been working collapsed. He did not succeed in his claim for damages for psychiatric injury. He was beyond the 'immediate aftermath' of the accident. In its deliberations, the Court of Appeal referred to the Law Commission report, *Liability for Psychiatric Illness* (Law Com 249, 1998, London: HMSO) (see 4.6, below), in which the creation of a new statutory duty of care had been recommended in cases where the claimant had a close tie of love and affection with an accident victim. Although such a change in the law, if accepted by Parliament, would abolish the 'immediate aftermath' restriction, under the existing law the claimant in this case could not bring himself within the 'immediate aftermath' and the claim failed for lack of proximity. Despite this, the meaning of 'immediate aftermath' has been blurred in more recent cases (see 4.3.1, above and 4.8, below).

4.4.3 The close tie of love and affection

None of the claimants in *Alcock* who might otherwise have qualified under the criteria, including brothers and brothers-in-law, had proved a close tie of love and affection with the victim, but that did not mean that in future cases it would not be possible to admit to

the class of possible claimants for nervous shock people who are not spouses, parents or children of the victims. This allows the opportunity to expand the class of people who can claim for psychiatric injury. Rescuers and other people directly involved in the events might be included if the tie could be proved. It is wise to plead a close tie of love and affection when a claim is initiated. Those claimants in the *Alcock* case who had lost a son and a fiancé would probably have succeeded on the basis of the close relationships with the victims, but were too far away from the scene of the accident.

4.4.4 The means by which the shock was sustained

As to the means by which the shock was caused, those people who actually witness events at close quarters are within the scope of the duty of care. The events must be witnessed through the claimant's own sight or hearing either as they happen or in the immediate aftermath, which must be very soon after the events. Eight hours was too long in *Alcock*. Their Lordships did not absolutely rule out the possibility of claims based on observation of the events on simultaneous television. If, for example, the broadcasting rules were broken and details of faces of individuals were shown, there might be a claim available against the broadcasting company.

4.4.5 Breaking 'bad' news

There have been conflicting views as to the scope of any duty to break bad news sensitively. The law does now lean in favour of such a duty, especially if the news that is communicated is inaccurate. In *Allin v City and Hackney HA* [1996] 7 Med LR 167, a mother who was told, incorrectly but sensitively, that her baby was dead, succeeded in her claim when the defendants conceded that a duty of care was owed. See also *Farrell v Avon HA* [2001] Lloyd's Rep Med 458.

In *AB and Others v Leeds Teaching Hospital* [2004] EWHC 644 (QB) it was held that doctors could owe a duty of care to parents after the death of their baby. That duty extended to an obligation to give parents an explanation about what the post mortem involved, and how organs might be retained and used. Much depended on the existence of a doctor/patient relationship between the parents and pathologists. If such a relationship existed, the tests of proximity and justice/reasonableness could be satisfied. However, a claim might still fail if psychiatric injury was not *foreseeable* in the circumstance of the particular case.

In *BA v Tameside & Glossop HA* (1997) 35 BMLR 79, several patients claimed against the Health Authority on the grounds that it had acted insensitively by informing them in a letter, instead of in a face to face meeting, that they had been treated by a nurse who was HIV positive. It was held that the defendants had acted reasonably in the circumstances, and the claims failed.

4.5 THE IMMEDIATE EFFECTS OF *ALCOCK*

After *Alcock*, it seems that a duty of care in relation to psychiatric injury would be owed in the following cases:

- The claimant was present at the scene and also suffered physical injury – that is, he or she was a primary victim (see *Page v Smith*, 4.6.1, below).
- The claimant was present at the scene and his or her own safety was threatened – again, he or she was a primary victim (*Chief Constable of West Yorkshire v Schofield* (1998) 43 BMLR 28).
- The claimant can prove a close tie with the victim, and witnessed the events at close quarters – though the claimant was a secondary victim.
- The claimant can prove a close tie with the victim and saw the victim very soon after the accident happened – though the claimant was a secondary victim. In *Taylor v Somerset HA* (1993) 4 Med LR 34, a widow whose husband died as a result of a heart attack and who within an hour viewed his body in an attempt to settle her disbelief, failed in her claim for nervous shock. It was held that she did not fall within the 'immediate aftermath' principle because her visit to the mortuary was not for identification purposes, and her husband's body bore no signs of violent injury. This decision is a clear attempt to follow the restrictive trend in nervous shock cases.

  In *Palmer v Tees HA and Hartlepool and East Durham NHS Trust* [1999] Lloyd's Rep Med 351, a mother whose daughter had been murdered was found not to have seen her daughter's body in the immediate aftermath of her death, and her claim failed.
- If the claimant was a rescuer or a member of the professional rescue services, he or she may be a primary or secondary victim depending on circumstances. In *Piggott v London Underground* (1995) unreported, four firemen at the King's Cross fire were awarded damages for PTSD. It is clear from recent decisions that there is no automatic finding that a rescuer is a primary victim, and that to be a rescuer a person must actually participate in the rescue activity. A rescuer must be present at the scene or in its immediate aftermath and should not automatically be regarded as primary victim (see *White v Chief Constable of South Yorkshire* [1999] 1 All ER 1, 4.6.2, below in which police officers who rescued victims at Hillsborough were denied a remedy).

  In *Duncan v British Coal Corpn* [1997] 1 All ER 540, CA, the claimant worked at a colliery in Yorkshire. He was 275 metres away from the scene of an accident in which one of his fellow workers was crushed to death. He arrived at the scene and gave him mouth-to-mouth resuscitation, but it was too late to save the victim. There was no sign of blood or injury on the body, but the claimant developed a serious psychiatric illness as a result of what he had experienced. His claim was based on the fact that he was a rescuer, that he was himself within the area of risk and was a primary victim, and that he had witnessed the immediate aftermath of the accident. He failed on each of these points and was unable to prove that he was in a special relationship with the victim as required by *Alcock*.

  In *McFarlane v EE Caledonia* [1994] 2 All ER 1, a bystander who was helping to receive casualties from the Piper Alpha oil rig disaster also failed in his claim. A mere off-duty bystander who is owed no duty under the master-servant relationship and who does not participate in the rescue cannot succeed. However, he may do so if he is linked by ties of love and affection to a primary victim of the disaster which he witnesses. Following this restriction, in the later case of *Robertson and Rough v Forth Road Bridge* 1994 SLT 566, the claimants failed to obtain damages. They had

witnessed a friend and workmate being killed. Three workmates had been working together in a gale, repairing the Forth Bridge. They found a large metal sheet and put it on a pick-up truck. One of them sat on the piece of metal. The first claimant drove the truck and the second claimant drove behind in another vehicle. A sudden violent gust of wind blew the man sitting on the sheet of metal over the side of the bridge and he was killed. Both claimants were unsuccessful. They were not rescuers; they did not have sufficient ties of affection with the deceased; and they were not primary victims because they were not active participants in what had occurred. They fell into the category of bystanders.

4.5.1 Pre-accident terror

The case of *Hicks v Chief Constable of South Yorkshire Police* [1992] 2 All ER 65 prevents claims for 'pre-accident' terror, which have been successful in the US. The claims were brought in respect of the terror suffered by two sisters immediately before their deaths in the Hillsborough disaster, and for pain and suffering experienced as they died. The claims were rejected by the House of Lords, partly on the grounds that the time involved, minutes instead of hours or days, was too short. There have been numerous successful claims in which pain and suffering between the accident and the death was compensated, but the timescale involved in these was much longer than in *Hicks*. If there is to be a successful claim, evidence of psychiatric injury must be presented to the court, and this of course, is not possible when the person concerned dies almost immediately.

4.6 MORE RECENT DEVELOPMENTS

Since *Alcock*, the courts have taken a cautious approach to finding a duty of care in relation to psychiatric injury, despite a report by the Law Commission which recommended removing many of the restrictions on liability (Law Commission Report (1998)).

4.6.1 Primary and secondary victims

A distinction is made between primary and secondary victims of negligence. This distinction was identified in the *Alcock* case by the House of Lords. A primary victim is a person who is a 'participant' in an accident, described by Lord Oliver as someone involved in an accident either 'mediately or immediately' who suffers following what he sees or hears. Such a person is usually well within the range of foreseeability. A secondary victim is someone who is not a direct participant, but merely witnesses an accident or arrives in the aftermath of an accident, 'a passive and unwilling witness of injury caused to others'. In his Lordship's view, such a person is almost always outside the range of foreseeable physical injury and it follows that there are more limited circumstances in which a secondary victim can succeed in an action for psychiatric injury. It is only secondary victims who are required to satisfy the additional criterion set out in *Alcock* which requires proof of a special emotional tie with a person injured in the accident. In *Page v Smith* (see 4.6.7. below) this distraction was elaborated further.

Claimants are advised wherever possible to consider first whether they can establish that they are primary victims, and then to argue in the alternative that they are secondary victims with a tie of love and affection to the victim who was injured. In *Burdett v Dahill* (2002) unreported, the claimant was walking with a close friend along a country lane at 3 am. His friend was killed when he was hit by a car. The claimant was able to bring himself within the category of primary victims and was awarded damages for PTSD. The judge also ruled that had the claimant been a secondary victim he would still have succeeded. He had a strong tie of affection with his dead friend and would have qualified for compensation as a secondary victim. In *McLoughlin v Jones* [2001] EWCA Civ 1743 (not an accident case), the Court of Appeal ruled that a man who had been wrongly convicted and imprisoned as a result of his solicitors' negligence was a primary victim and awarded him damages for psychiatric injury.

Unfortunately the distinction between primary and secondary victims has now become blurred. The courts have identified some victims as falling into the 'primary' category even though they did not come within the range of foreseeable *physical* injury. Among these are employees who suffer stress at work, as in *Barber v Somerset County Council* [2004] UKHL 13. In some cases the courts have accepted that claimants are primary victims in situations that are not conventional 'accidents'. Thus in *W v Essex County Council*, foster parents were found to be primary victims when an adolescent they had fostered abused their own children. In *A v Essex County Council* adoptive parents who suffered psychiatric injury as a result of disruptive conduct by an adoptive child were treated as primary victims of the defendant's negligent failure to warn them of his behavioural problems.

In *Chief Constable of West Yorkshire v Schofield*, the Court of Appeal had little difficulty in finding that the trial judge had been correct in deciding in favour of a claimant who was a primary victim. A woman police sergeant had suffered PTSD after a fellow officer had unexpectedly fired three rounds of ammunition in a room which the officers were searching for firearms. Indeed, as Hutchison LJ pointed out, this was not a case in which the question of possible injury to others in a traumatic event was relevant. The woman police officer was herself present and was a primary victim. As the trial judge had found that the other officer had been negligent and should have foreseen that the claimant might suffer physical or psychiatric injury, there was sufficient proximity to give rise to liability.

In *Cullin and Others v London Fire and Civil Defence Authority* [1999] PIQR P314, the Court of Appeal held that the issue as to whether the claimants were primary or secondary victims was a mixed question of fact and law.

In *Hunter v British Coal Corpn and Another* (1998) 42 BMLR 1, the Court of Appeal held by a majority of 2:1 that a workman who was not present at the scene of an accident in which a colleague had died was not entitled to recover damages for depressive illness suffered as a result. The claimant was about 30 metres away from the scene of the accident in which a fire hydrant had burst in a mine, and he blamed himself for the accident and suffered a psychiatric illness. The Court of Appeal identified this situation as being outside the conventional cases of PTSD. As Lord Justice Brook explained:

> It was not a case in which the claimant was involved as a rescuer. Nor did he ever see the deceased's body or the scene of the accident until after it was cleared up. There was

> nothing particularly out of the ordinary about the shock to his nervous system which he suffered when he was told, 15 minutes later, that his workmate had died.

This case was regarded as a case of 'survivor's guilt', for which the law is reluctant to provide compensation. A comparable situation arose in the earlier Australian case of *Rowe v McCartney* [1976] 2 NSWLR 72, and there too the court refused to make an award on the basis that the guilt suffered by the survivor was not a foreseeable consequence of the accident. The claimant was distinguishable from those who succeeded in their claims in *Young v Charles Church (Southern) Ltd* (1997) 33 BMLR 101; *Dooley v Cammel Laird & Co Ltd* [1951] 1 Lloyd's Rep 271; *Galt v British Rlys Board* (1983) 133 NLJ 870; and *Salter v UB Frozen Foods Ltd* 2003 SLT 2001, which also involved employment accidents, in which the injuries suffered were a direct consequence of the breaches of duty which had occurred.

It appears that rescuers who are employees of the defendant may be able to succeed in claims for psychiatric injury on the basis that their employers have failed to provide adequate counselling or support to enable them to make a recovery after they have witnessed a traumatic event. This argument was pursued by two policewomen who suffered psychiatric injury after attending the Dunblane massacre.

4.6.2 Rescuers – a new approach

Rescuers are in a less favoured position since the distinction between primary and secondary victims has been identified. In *Page v Smith*, where the claimant was actually involved in a car accident and, as such, could be classified as a primary victim, he suffered no physical injuries as a result of the impact but was held by a majority of 3:2 in the House of Lords to be able to claim damages for psychiatric injury. The House of Lords emphasised the fact that certain control mechanisms are necessary to limit the number of claims for psychiatric injury where the claimant is a secondary victim but that these mechanisms have no part to play in cases where the claimant is a primary victim. Thus, for example, the need to establish that it must have been foreseeable to the defendant that the psychiatric injury would have been suffered by a person of normal fortitude is not relevant in the case of primary victims.

In *White sub nom Frost v Chief Constable of South Yorkshire* [1997] 3 WLR 1194 the House of Lords took the opportunity to explore again the boundaries of liability for psychiatric injury. The respondents had been present at the Hillsborough football stadium disaster in 1989, and were serving officers in the South Yorkshire Police Force. The tragedy had been caused by the negligence of a senior officer in the force. All of the appellants were claiming damages for psychiatric injury, contending that their role as both rescuers and employees of the police force put them in the position of primary victims, according to the classification in *Alcock*. The legal positions of both rescuers and employees in relation to claims for psychiatric injury were examined in depth.

The majority in the House of Lords took the view that, although all of the appellants were more than mere bystanders, as they were on duty and assisted in the aftermath of the tragedy, to recognise their claims for psychiatric injury would expand substantially the boundaries of liability. By a majority of 4:1, it was decided that to allow employees, by virtue of their employment positions, to claim damages for psychiatric injury as

'primary' victims of injuries caused by their employer to third parties would not be 'fair, just or reasonable'. It was pointed out that the law denied redress to other groups who had suffered psychiatric harm as a result of the Hillsborough tragedy and who were even more deserving of compensation, and it would not be fair to single out police officers for special treatment.

The House of Lords decided that it would be undesirable to allow rescuers a position of special privilege if they had not been exposed to personal danger of physical harm in the course of the accident occurring. There were two reasons why rescuers should not be given special treatment by the law – first, there was a problem in distinguishing between a rescuer and a bystander; and, second, it would offend notions of distributive justice to allow rescuers particular privileges that were denied to close relatives of accident victims.

The law which had developed since *Alcock* was reviewed and the control mechanisms established in that case were carefully considered by the House of Lords. Relevant policy considerations were outlined, which were broadly similar to those discussed in *McLoughlin v O'Brian*. These included:

- the difficulty of distinguishing between acute grief and psychiatric injury;
- the unconscious effects of bringing claims which could interfere with the process of recovery and rehabilitation;
- the likely increase in claims, which would be the result of allowing the law in this area to expand;
- the fact that the burden of liability on defendants could be disproportionate to the tortious act.

The House of Lords acknowledged that since the *Alcock* case the search for coherent principle in this area of law had been abandoned, and that what was necessary now was to approach each case in a practical way, in order to achieve fairness for each individual. *Chadwick v British Transport Commission* [1967] 1 WLR 912, which had been cited as authority for the proposition that rescuers fall into a special category of accident victims which justifies extending the usual rules, was not directly overruled, as the claimant in that case was regarded as being in immediate danger during his rescue attempts, from falling wreckage, and should be viewed in modern law as a primary victim. Rescuers are in future to be treated in the same way as all other accident victims. The police officers in the *White* case were denied remedies.

Earlier in the same year that the *White* case was decided, the claimant rescuer succeeded in obtaining compensation by a different route, in *Young v Charles Church (Southern)* (1997) 39 BMLR 146, in which the claim for psychiatric injury failed at first instance in negligence and breach of statutory duty. The claimant was found to have been only a secondary victim. He was employed on a building site and was erecting scaffolding with two workmates. He handed a long scaffolding pole to one of the other men and turned away to pick up another pole. As he was doing this, he heard a loud bang and a hissing sound when his workmate touched an overhead electric cable with the pole. The claimant realised immediately that his workmate had been killed and saw the ground onto which he had fallen bursting into flames. He ran for help to an office 600 yards away. When he returned to the scene of the accident, an ambulance had already

arrived. As a result of what he had seen and heard, the claimant suffered a psychiatric illness. However, the Court of Appeal found a way around the restrictions in this case and held that he could recover for breach of statutory duty under reg 44(2) of the Construction (General Provisions) Regulations 1961 (SI 1961/1580), which were designed to give protection to employees from the kinds of injuries which can be foreseen as likely to be caused by dangerous electrical equipment. These injuries included psychiatric injury.

In *Greatorex v Greatorex* [2000] 1 WLR 1970 the rescuer was a fire officer who attended the scene of a car accident to release the trapped victims. One of those injured was the claimant's own son, who had been driving the car which was owned by a friend. The claimant developed a psychiatric illness as a result of this incident. He brought a claim against his son. The judge held that this claim should fail. He feared that 'to open up the possibility of a particular undesirable type of litigation' would divide families and friends. This line of reasoning is difficult to justify since the Motor Insurer's Bureau would have borne the cost of compensating the claimant in this case, and in similar situations insurers have paid the damage.

The courts acknowledge that the law concerning rescuers is still in the process of evolving. For example, in *Harrhy v Thames Trains Ltd*, QBD, 30 July 2003 the Court of Appeal ruled that a rescuer had at least an arguable claim for psychiatric injury and that the case should proceed to trial. The claimant had been employed by the defendant as a manager of senior train drivers. On 5 October 1999, there was a horrific train disaster in Paddington in which several people died, and the claimant had been requested by the defendant to attend at the scene of the accident on the following day as its representative. He had to enter the wreckage and view badly damaged corpses. The claimant alleged that as a result of these events he had developed major depression and post-traumatic stress disorder. He argued that the defendants owed him a duty as one of their employees, not to expose him to injury that was reasonably foreseeable and that it was immaterial whether that injury was physical or mental. In presenting his argument the claimant relied on the reasoning in *Walker v Northumberland County Council* [1995] 1 All ER 737, a case concerning employers' liability for work stress (see Chapter 14) and argued that the defendant was similarly liable for the psychiatric injury that he had suffered. The defendant responded with the argument that the psychiatric injuries suffered by the claimant were not foreseeable; that the claimant could not prove that the injuries he suffered were caused by the defendant's negligence; and that the claimant had not satisfied the criteria laid down in *Alcock v Chief Constable of South Yorkshire Police* [1992] 1 AC 310. They contended that the rules of law concerning liability for psychiatric injury as laid down in *Frost v Chief Constable of South Yorkshire Police* [1999] 2 AC 455 and in *Keen v Tayside Contracts* 2003 Scot CS 55 (26 February 2003) meant that the claim was doomed to failure.

The Court of Appeal held that the High Court Master had been correct to allow the claim to proceed, as the law concerning psychiatric injury was still developing. The case should proceed to trial for a judge to decide whether he preferred the approach taken in the *Walker* case or that in the *Keen* case, as there was nothing to indicate that *Walker* was bad law. The claimant had an arguable case and the appeal was dismissed. It should be noted that a distinction was drawn in *Sutherland v Hatton* between cases in which psychiatric injury arises as a result of breach of an implied contractual term and those in

which there is a pure tort claim or one in which the claimant is a secondary victim and also an employee (see Chapter 14 dealing with employers' liability).

4.6.3 The role of foresight

It is still possible, despite the complexities of the developing law, to decide some cases on the basis of foresight alone. Thus in *Duddin v Home Office* [2004] EWCA Civ 181 the Court of Appeal held that a prison inmate's claim must fail. He had been unable to prove that the psychiatric injury he suffered was the reasonable foreseeable result of a sexually inappropriate conversation between his wife and prison staff.

Foresight formed the basis of the decision in *Giblett v P and NE Murray Ltd* (1999) 96(22) LSG 34. There, it was decided by the Court of Appeal that the claimant would have been able to recover damages for a psychiatric condition which made her incapable of having sexual relations and children of her own if physical injury in the road accident was foreseeable. In this case, the reasoning in *Page v Smith* was followed by the court. The claimant was a front seat passenger in a car which was stationary at a roundabout when the defendant's vehicle drove into the rear. The impact was relatively minor and liability was not in dispute. She suffered a mild to moderate whiplash injury, and any organic disability suffered was minimal. Over the next few years, however, the claimant had complained of seriously disabling symptoms which had no organic or clinical basis and which could only be explained on a psychiatric level. She claimed damages for psychiatric injury, including the exacerbation of pre-existing neurosis and somatisation disorder, or 'total body pain', as she put it. The trial judge awarded £12,500 general damages for pain, suffering and loss of amenity.

On appeal, the claimant argued that the trial judge did not find a causal link between the accident and the psychiatric disorder and did not recognise the injuries sufficiently in the award of damages. She also submitted that the trial judge erred in rejecting her claim for damages for her temporary inability to continue sexual relations or to have a family. The Court of Appeal took the view that it was clear from the size of the award that the judge had recognised some psychiatric overlay which was attributable to the accident and which resulted in more pain than normal but held he had been wrong to find the full claim for psychiatric injury too remote. Personal injury was reasonably foreseeable and the form that it took was immaterial (*Page v Smith*). The test of causation in that case was:

> Did the accident, on the balance of probabilities, cause or materially contribute to, or materially increase the risk of the development or prolongation of the symptoms of, the psychiatric illness?

Reliance on foresight was also significant in *Howarth v Green* [2001] EWHC 2687, where a High Court judge ruled that a stage hypnotist should have foreseen that he could cause psychiatric injury to the claimant when he hypnotised her in front of an audience.

4.6.4 Employees

There is a developing line of cases developing in which employees claim damages for psychiatric injury on the basis that employers have a duty to provide counselling to those of their employees who have been affected by accidents or other traumatic situations,

experienced in the course of employment. The law on this matter is still not clear. It appears that the person concerned need not even be an employee for a duty to provide counselling to arise. In *Leach v Chief Constable of Gloucestershire Constabulary* (1999) 46 BMLR 77, the Court of Appeal found that a voluntary worker who had acted as an 'appropriate adult' during police interviews with Fred West was not owed a duty of care by the police. It was held that there was nothing in Code C of the Police and Criminal Evidence Act 1984 which imposed a duty of care on the police in relation to voluntary workers, even though the claimant in this case had been locked in a cell on numerous occasions, alone with Fred West, who admitted in her presence to having committed many horrifying acts of depravity and murder. Her claim for damages, based on her contention that the police owed her a duty of care to protect her from physical or psychological harm in her capacity as an 'appropriate adult' was struck out. However, the case was allowed to proceed to trial on the issue of failure to provide counselling services. In *Swinney v Chief Constable of Northumbria* [1997] QB 464, the Court of Appeal allowed a claim to proceed when claimants alleged that they had suffered psychiatric injury as a result of being threatened with violence soon after confidential information they had provided to the police was stolen from a police vehicle as a result of alleged negligence on the part of the police. The Court paid no particular attention to the fact that the claims were for psychiatric injury as opposed to other forms of harm.

4.6.5 Sudden shock or slow appreciation

At one point it appeared that in the case of secondary victims there would only be liability if there was a sudden shock, as apposed to the gradual appreciation of a horrifying event. In *Sion v Hampstead HA* (1994) 5 Med LR 170, in which the claimant's psychiatric illness was the result of a continuous process of attending intensive care and realising that medical negligence could have caused the victim's injuries, Gibson LJ said:

> A psychiatric illness caused not by a sudden shock but by an accumulation of more gradual assaults on the nervous system over a period of time is not enough.

The policy issues which emerged from the *Alcock* case were restated in *Sion v Hampstead HA* by Staughton LJ:

> It is . . . recognised almost universally that the common law ought to impose some limit on the circumstances in which a person can recover damages for the negligence of another. The common law has to choose a frontier between those whose claims succeed and those who fail. Even the resources of insurance companies are finite, although some jurists are slow to accept that. For the present, the frontier for one type of claim is authoritatively and conclusively fixed by the House of Lords (in the *Alcock* case).

However, the law is still developing and the rule is not fixed.

In *North Glamorgan NHS Trust v Walters* [2002] EWCA Civ 1792, a mother who suffered psychiatric injury on witnessing the last distressing 36 hours of her baby's life was held to be entitled to recover damages for nervous shock from the hospital that negligently misdiagnosed and treated his condition. The decision is to be welcomed, as it provides a just solution for the woman concerned and it clarifies the extent of the restrictions imposed on liability for psychiatric injury, offering insight into the way in which the courts are prepared to interpret the law laid down by the House of Lords in the

Alcock case. The claimant was the mother of a baby boy who, when he was 10 months old, was admitted to hospital. The hospital failed to diagnose acute hepatitis, and he suffered a major epileptic fit in the presence of his mother. She was sleeping in the same room as the little boy, and awoke to see him coughing blood and choking. She was told by staff that no brain damage had occurred but that the baby would have to be transferred to King's College Hospital London for a liver transplant. The mother followed the ambulance to London, where she was told that her son had suffered severe brain damage and was on a life support machine. The next day she agreed to the termination of his life support. Her son died in her arms soon afterwards. The medical experts in the case agreed that the claimant suffered pathological grief reaction, now a recognised psychiatric illness, caused by the events leading up to her son's death. The defendants admitted that the baby died as a result of their negligent treatment. Thomas J, at first instance, held that the mother was a secondary victim. He took the view that her injury had been caused by shock or trauma within the definition of the leading authorities, and that she was entitled to recover damages from the defendants. The defendants appealed arguing that the judge had erred in law in holding that the 36 hour period, starting with claimant's witnessing of her child's fit and ending with the termination of his life support, could amount to one single horrifying event, and that the judge had been wrong to hold that the claimant's appreciation of the 36 hour period was sudden within that time frame. They contended that it was a more gradual assault on the mind over a period of time and, on the basis of earlier decisions, that there was no duty of care owed to her. They also argued that he had expanded the established control mechanisms with insufficient regard to the recognised policy constraints.

The Court of Appeal held that the law allowed courts to take a realistic view of what constituted the necessary 'event', depending on the facts of each individual case. Here, there had been a progression from the moment when the epileptic fit had occurred to the point when the child died in the claimant's arms – 'a seamless tale with an obvious beginning and obvious end'. The entire process was horrifying and the circumstances were capable of producing an effect going well beyond grief and sorrow. The Court of Appeal concluded that the judge had been correct. The test of proximity in time and space was satisfied in this case. In fact, the judge had not taken an incremental step advancing the frontiers of liability. Accordingly, the appeal was dismissed.

In *Froggatt v Chesterfield and North Derbyshire Royal Hospital NHS Trust* [2002] All ER (D) 218 (Dec), the husband and son of a woman who had undergone an unnecessary mastectomy after a misdiagnosis of breast cancer were both awarded damages for psychiatric injury. The woman herself received substantial damages for physical and mental trauma, but the defendants argued that the claims for damages for nervous shock brought by her husband and son should not succeed because as secondary victims neither had experienced a direct, horrifying event that was sufficient to bring the case within the *Alcock* principles. However, the judge did not accept these arguments, ruling instead that each had a close relationship with the victim, and that there was proximity in time and the discovery by sight or sound of what had happened. Both had suffered real psychiatric illnesses as a result. The husband had experienced sudden appreciation of the trauma that had been suffered by his wife when he saw her undressed for the first time after the mastectomy. For the son, the sudden appreciation came as a result of overhearing his mother's telephone conversation in which she discussed the fact that

she had cancer and was likely to die. The husband was awarded £5,000 and the son £1,000.

In the case of primary victims, the slow appreciation over a long period of time of the possibility of having been infected by a frightening illness is sufficient. In the CJD litigation, *Andrews and Others v Secretary of State for Health* (2000) 54 BMLR 111, Morland J decided that a claimant could recover compensation whether he or she was a person of normal phlegm and ordinary fortitude or one with a vulnerable personality, as long as he or she could prove that the psychiatric illness was caused by becoming aware of the risk that he or she might already be infected with CJD and that he or she suffered a genuine psychiatric illness. In a further CJD case, *Schedule 2 Claimants v Medical Research Council and Secretary of State for Health* (2000) 54 BMLR 1, Morland J held that, in the CJD cases, there was no reason why foreseeability of shock and psychiatric injury should be limited to a period of time contemporaneous with, or almost contemporaneous with, the negligent event. If the psychiatric injury was foreseeable, it should be untrammelled by spatial, physical or temporal limits. These cases should be read in the light of the *Johnston v Nei International Combustion Ltd* [2007] UKHL 39 case discussed above (at 4.1.1)

4.6.6 The immediate aftermath again

The courts appear to be adopting a more flexible approach to what is meant by the immediate aftermath of an accident. In *Farrell v Merton, Sutton and Wandsworth HA* (2000) 57 BMLR 158, it was held that a mother who did not see her severely damaged infant for 24 hours after the birth could nonetheless succeed in her claim for psychiatric injury. The sight of her baby had been denied to her by the defendants until the day after the delivery and this brought her within the immediate aftermath of the event, causing her a terrible shock. The House of Lords, in *W v Essex CC and Another* [2000] 2 WLR 601, acknowledged that parents of children who had suffered sexual abuse by a foster child at least had an arguable case that although they had discovered the abuse some time after it had happened, they might still be in a position to succeed in their claim for psychiatric injury. The matter was eventually settled out of court.

In *Atkins v Seghal* [2003] EWCA Civ 697, a mother had been told by a police officer at the scene of an accident that her daughter was dead, but did not see the accident and did not see her daughter's body until 9.15 pm, some two hours after the death. She succeeded in her claim for psychiatric injury. The Court of Appeal held (referring to *North Glamorgan NHS Trust v Walters*) that the 'immediate aftermath' extended from the time of the accident to the time of the claimant's visit to the mortuary.

4.6.7 A summary of developments since *Alcock*

As has been seen, the principles established in *Alcock* are open to interpretation, and developments in the law are still underway.

Since the *Alcock* case, much of the litigation involving psychiatric injury has turned on two matters: (1) the nature of the illness suffered, that is, whether the symptoms amount to a serious psychiatric illness; and (2) causation. These developments are discussed in detail in the light of the new law. However, it is important to return to first

principles by keeping in mind the need to consider foresight, proximity and whether it is just and reasonable for a duty to be imposed (see *Sutherland v Hatton and Others* [2002] EWCA Civ 76; *Bradford-Smart v West Sussex CC* [2002] EWCA Civ 7):

- **The nature of the psychiatric illness**
  It has always been the case that no one will succeed in a claim for psychiatric injury unless the trauma which is suffered leads to a serious illness (see 4.1, above). Mere shock or temporary grief will not be enough. As Lord Bridge said in *Alcock*: The first hurdle which a claimant must surmount is to establish that he is suffering not merely grief, distress or any other normal emotion but a positive psychiatric illness.

  Thus, in *Reilly v Merseyside RHA* (1994) 23 BMLR 26, there was no liability on the part of the defendants when a husband and wife were trapped in a lift on a visit to a hospital to see their new grandson. Both suffered claustrophobia, and the husband, who had angina, thought he would choke, later had difficulty walking up to the ward and suffered chest pains and insomnia for a while afterwards. The wife, who already suffered from claustrophobia, was very distressed by the event and had difficulty breathing until they were released from the lift. She also had problems with insomnia afterwards. Although the defendants admitted that they had not maintained the lift properly, the Court of Appeal held that the unpleasant feelings which were suffered by the claimants amounted to no more than ordinary human emotions, and they had not established an identifiable psychiatric illness.

  In *Fraser v State Hospital Board for Scotland* 2001 SLT 1051, it was held that no duty of care was owed to protect a person from unpleasant emotions that do not amount to psychiatric injury. The injury was not foreseeable. By contrast, in *Tredget v Bexley HA* [1995] 5 Med LR 178 a couple who had experienced great distress as a result of the frightening circumstances surrounding the death of their newly delivered baby were able to prove serious psychiatric illness and were awarded damages.

  Similarly, in *McLelland v Greater Glasgow Health Board* 2001 SLT 446 a father was awarded damages for psychiatric injury suffered as a result of the failure of the defendants to diagnose that his baby suffered from Down's Syndrome.

  There are some primary victims who develop symptoms of psychiatric injury over a long period of time. A claim may well fail for limitations reasons (see Chapter 20), if the claimant does not begin proceedings until after a long period of time has elapsed (*Crocker v British Coal Corpn* (1996) 29 BMLR 159, which involved a claim brought by a victim of the 1966 Aberfan disaster). Similar problems can also arise in the cases of individuals who have suffered physical or sexual abuse as children.

  A distinction used to be drawn between PTSD which is regarded as an actionable psychiatric condition, and pathological grief disorder, which is not always linked causally to a traumatic event. In *Calscione v Dixon* (1993) 19 BMLR 97, the claimant was the mother of a 20 year old who had died of injuries which he had sustained in an accident on his motorbike. The defendant admitted negligent driving, but denied liability for *all* the alleged psychiatric illness suffered by the claimant. The nature of

the claimant's psychiatric conditions was explored in an effort to decide what was recoverable, and the case turned ultimately on causation. Part of the claim failed because she could not prove a direct causal connection between her symptoms and the accident. The Court of Appeal held that she had suffered some PTSD, but her more serious symptoms were attributable to events which had occurred after her son's death, including an inquest and a private prosecution which she had brought against the defendant. It was held that the trial judge had been correct to separate PTSD and pathological grief disorder.

More recently, however, courts have recognised the significance of pathological grief disorder as a psychiatric illness (see *North Glamorgan NHS Trust v Walters*, 4.6.5, above).

In *Vernon v Bosely (No 1)* [1997] 1 All ER 577, the Court of Appeal took the view that damages are recoverable for nervous shock which is partly attributable to pathological consequences of grief and bereavement. In this case, the claimant had witnessed his children drowning in a car negligently driven into a river by their nanny. The defendants accepted that he fell within the categories of people entitled to claim according to the *Alcock* case. However, they contended that he did not suffer from PTSD as opposed to pathological grief disorder which he would have suffered even if he had not been present at the scene and witnessed the events in person. The claimant had a somewhat 'egg-shell' personality and had not made a success of his life. He had bought a failing business which was doomed to flounder for economic reasons, but after the accident his failure to cope with everyday matters meant that the business failed more quickly and his marriage broke up. The Court of Appeal found that damages were recoverable for nervous shock notwithstanding that the illness might also have been considered to be a pathological consequence of the grief and bereavement. It was not necessary therefore to research the various minute permutations of psychiatric medicine to discover which part of the damage was attributable to the traumatic event and which to bereavement.

- **Causation and remoteness of damage**
  If a duty of care is found to exist in relation to psychiatric injury, it is still necessary for the claimant to prove breach of duty and damage flowing from the breach. In the case of primary victims this is not usually difficult, but it is a question of fact to be established by the claimant and some claims involving primary victims do fail on the causation issue. Thus in *V v A School Trust* [2004] EWHC 114 a claim failed because the claimant was unable to establish that two episodes of psychiatric illness she had suffered had been caused by the negligence of the defendants.

  It may be difficult to prove causation if many years have elapsed since the event which caused the psychiatric trauma. Even if the limitation rules (see 20.10, below) are satisfied, the claimant has the task of proving on a balance of probabilities that the event caused the psychiatric illness which developed later. A study by the Institute of Psychiatry (Research Report 1999) concludes that children who witness disasters are more likely to suffer from depression and to harbour suicidal thoughts as adults than their peers. Of course, anyone who is present and part of a disaster as it happens (a 'primary victim') would not have as much difficulty establishing causation as a person who was not actually part of the

event. It was reported in March 1996 that a seaman who had been assisting in the recovery of bodies after the Zeebrugge ferry disaster and who was suffering from PTSD some nine years after the tragic event, was seeking leave of the court to sue his employers because the claim was outside the limitation period. He had not brought the claim before because he had not realised that he was suffering from a recognised medical condition and had not sought medical advice. In the intervening years, he had suffered many flashbacks of the traumatic events and had taken to drink. His marriage had broken up and he was no longer able to work because of his illness.

In *H v N and Another* [2004] EWCA Civ 526 the Court of Appeal held that the judge had failed to apply the correct test to decide the date of knowledge for the purposes of the Limitation Act 1980 s 11 and s 14. H had been a resident at a children's home operated by the local authority from 1981 to 1983, where T had been the unit manager. H alleged that T had sexually abused him during his time there. H reached the age of 18 years in 1984 but the writ in the present case was issued in July 1997. The question arose as to whether proceedings had been issued outside the limitation period under the Limitation Act 1980 s 11, s 14 and s 28, and this was tried as a preliminary issue (see Chapter 21 for the law on limitations).

A consultant psychiatrist instructed on behalf of H, confirmed the diagnosis of post traumatic stress disorder arising as a result of his experiences at the children's home and confirmed that the condition often presented after a delay of some time. The judge approached the preliminary issue on limitations on the basis that 'the injury in question' for the purpose of s 14 was the initial abuse. He found that H knew at the time he reached the age of 18 that he had suffered significant injury as a result of T's acts, and he ruled that proceedings had been commenced outside the limitation period.

On appeal H argued that the date of knowledge of significant injury, here long-term psychiatric injury, was in fact July 1997 when he had received an expert psychiatric report.

The Court of Appeal took a different view to that of the trial judge and held that regardless of how serious T's alleged acts may have been, and whatever their immediate physical effects, this claim was based on an allegation of post traumatic stress disorder that may not have emerged immediately, and was argued by the claimant in this case to have appeared several years later. It was that injury with which the court was concerned – *Various claimants v Bryn Alyn Community Homes Ltd and Another* [2003] EWCA Civ 85, (2003) 1 FLR 1203; see now *A v Hoare* [2008] UKHL 6.

The Court decided that the judge had not adequately considered the post traumatic stress disorder, whether and when it had emerged or when H knew that it was significant and attributable to T's actions. It would therefore be appropriate to allow further evidence to be adduced for the purposes of clarification, and for the parties to have another opportunity to argue the limitation issue before the judge assigned to the case. Accordingly the appeal was allowed.

If the claimant is a primary victim, and already has a predisposition towards psychiatric problems, this is no reason for a court to deny a remedy on the grounds of

remoteness of damage. In these 'egg-shell personality' cases, the claimant will succeed if it can be proved that some kind of psychiatric injury was foreseeable, but the exact form of illness suffered by the claimant need not be foreseen. In *Page v Smith*, the claimant had a history of ME and had been unable to sustain satisfactory long-term employment for many years, though he had been recovering quite well from a bout of the illness immediately before the accident. After a frightening, though relatively minor, car accident, his medical condition deteriorated and the ME was exacerbated. The condition became chronic and he would never be able to work again. The House of Lords applied the thin skull rule. It was held that if a driver was negligent and caused an accident, he would be liable for nervous shock to a primary victim of the accident (that is, someone actually involved in the accident) if personal injury, whether physical or psychiatric, of some kind was foreseeable. It was irrelevant that the defendant could not reasonably have foreseen that the claimant had an egg-shell personality (a pre-existing tendency towards psychiatric problems). Lord Browne-Wilkinson said:

> Any driver of a car should reasonably foresee that if he drives carelessly he will be liable to cause injury. In the present case, the defendant could not foresee the exact type of psychiatric damage . . . The claimant had an egg-shell personality, but that is of no significance . . . Once a duty is established, the defendant must take the claimant as he finds him.

Lord Lloyd, while agreeing with this view, thought on the basis of reasoning in the earlier cases such as *Bourhill v Young* (see 4.2.3, above) that there would only be liability to secondary victims if psychiatric injury would have been foreseeable in a person of normal fortitude in the circumstances.

The principles of remoteness of damage and the 'egg-shell' concept are explained in Chapter 8. These matters are usually considered after it has been established that a duty of care exists and that there has been a breach of that duty. For the sake of completeness, they are being dealt with here.

The House of Lords, in *Simmons v British Steel plc* [2004] UKHL 20 dealing with causation and remoteness of damage has re-affirmed the principle that it is necessary for both primary and secondary victims to establish a casual connection between the accident and the damage sustained. It was held that an employer was liable for the pursuer's (claimant's) psychiatric illness when one of the causes of his illness had been the claimant's own anger after an accident he had suffered at work for which the employer was liable. This case is discussed more fully in connection with Employers' Liability in Chapter 14, but it is a useful indicator of the fact that the question of causation must be explored fully in cases involving psychiatric injury, when reactions of victims to their accidents may be unpredictable or unusual. Lord Scott gave an excellent and concise summary of the basic principles of causation and remoteness of damage in tort, and applied them to cases involving psychiatric injury.

4.7 THE FUTURE OF PSYCHIATRIC INJURY CLAIMS – A DEVELOPING AREA OF LAW

The case of *W v Essex CC and Another* [2000] 2 WLR 601 gives some indication that the House of Lords is now prepared to contemplate extending the scope of the duty of care in special circumstances and that the law in this area is still developing. It is useful to consider this case in detail. The claimants were appointed specialist adolescent foster carers by the defendant council and they had explained, when they were approved by the council, that they were unwilling to accept any child who was known to be, or was suspected of being, a sexual abuser. However, despite that stipulation, the council placed with them a 15 year old boy, G, who had admitted to and had been cautioned by the police for an indecent assault on his own sister and who was being investigated for an alleged rape. The claimants were not told that this was the case, even though these facts were recorded on the council's files and were known to the social worker concerned. Serious acts of sexual abuse against the claimants' children (who were also claiming against the council) were alleged to have been committed by the boy over the course of a month after he arrived at the foster home. It was alleged that, because of the abuse, both parents and children suffered injury and the defendants agreed to compensate the children for their injuries, but argued before the House of Lords on the preliminary issue that they owed no duty of care to the parents whose claim was for psychiatric injury alone. The parents argued that the claim for their own injury should not be struck out. They contended that the defendants were negligent in placing a known sexual abuser in their home when they knew of the parents' anxiety. The parents argued that they were able to prove that when they discovered the serious acts of sexual abuse on their children, including anal and vaginal penetration and oral sex, the claimants suffered psychiatric illness and damage, including severe depression and PTSD. The defendants argued that the parents were secondary victims and that they had no direct or indirect perception of the events as they happened, so that they were too remote in time and space to fall within the scope of the *Alcock* criteria.

The House of Lords took a cautious approach to the question of striking out the parents' claims and concluded that they did have an arguable case.

The defendants also rejected any suggestion that the parents could claim to be entitled to damages on the ground that they felt that they had participated in, contributed to, or laid the foundation for the commission of the acts of abuse on their children by arranging for G to be brought into their home.

The House of Lords considered that it was impossible to conclude that the psychiatric injury claimed by the parents was outside the range of psychiatric injury which the law recognises as deserving of compensation. It certainly amounted, on the face of it, to more than 'acute grief'. The parents' previously happy marriage had broken up, and both had suffered reactive depression and could no longer act as foster parents. Their sex lives had been ruined. The effect on the family had, allegedly, been devastating.

However, this was only the beginning of the claim. The question of whether the parents were primary or secondary victims was not absolutely clear, and the issue of the categorisation of those claiming to be included as primary or secondary victims is not

finally closed. It is, in Lord Slynn's view, a concept still to be developed in different factual situations. If the psychiatric injury suffered by the parents flows from a feeling that they brought the abuser and the abused together, or that they have a feeling of responsibility that they did not detect earlier what was happening, that does not necessarily prevent them from being primary victims. Indeed, in *Alcock* (1991), Lord Oliver said:

> The fact that the defendant's negligent conduct has foreseeably put the claimant in the position of being an unwilling participant in the event establishes of itself a sufficiently proximate relationship between them and the principal question is whether, in the circumstances, injury of that type to that claimant was or was not reasonably foreseeable.

W v Essex CC and Another was far from being a clear cut case, and it did not justify being struck out. The House of Lords unanimously dismissed the appeal. The case was eventually settled out of Court.

It is important to recognise, as Lord Slynn observed, that the law concerning psychiatric injury is still evolving, and courts must proceed incrementally (*Caparo Industries plc v Dickman* [1990] 2 WLR 358).

In a related case, *A and B v Essex CC* [2003] EWCA (Civ) 1848, it was held that a local authority was vicariously liable for psychiatric injury and other losses arising from the failure of its social workers to ensure that prospective adopters were given full information concerning a child before placement. The claimants, A and B, were approved by the local authority's adoption panel as prospective adopters. In February 1996, two children were placed with A and B and on 1 May 1997 the court duly made adoption orders. One of the children was diagnosed later as having Attention Deficit Hyperactivity Disorder. A and B said they had expected some behavioural problems, but that they were not prepared to accept such a high level of disturbed behaviour on the part of the boy whom they found impossible to control. The defendant submitted that the case was non-justiciable on the grounds that no duty of care existed, that adoption had the extra security of court proceedings, and that the imposition of a duty of care might deter agencies from making placements. However, the judge found that under reg 12 of the Adoption Agencies Regulations 1983 (SI 1983/1964) it was mandatory for an agency to provide written information about children to prospective adopters before placement. Applying the principle in *Phelps v Hillingdon LBC* [2002] 3 WLR 776, a common law duty was not contrary to the presumed statutory purpose of promoting adoption. Moreover, a local authority could be vicariously liable when a professional person was acting in furtherance of the authority's performance of a statutory duty, breach of which did not of itself sound in damages. There was physical injury to B and in addition foreseeable psychiatric injury had been suffered by the claimants. The judge concluded that A and B were entitled to damages for such injury, loss and damage that they may prove they sustained during the placement but not thereafter. The Court of Appeal upheld the judge's decision.

The House of Lords' decision on *JD v East Berkshire Healthcare NHS Trust; Dewsbury Healthcare NHS Trust and Kirklees Metropolitan Council; Oldham NHS Trust and Blumenthal* [2005] UKHL 23 is instructive, as it indicates that in this area of law the policy of the Courts does not favour expanding the boundaries of liability. The case is discussed fully in Chapter 6.

There are several matters in relation to psychiatric injury which require clarification, and these cases highlight some of them. They include: the exact scope of the category of 'primary victims'; the extent of the limitations as to time and space placed on claims of secondary victims; whether it is possible to include in the category of those entitled to succeed individuals who believe that they have failed in their responsibility to primary victims; and the justification for distinguishing between foresight of physical and psychiatric injury.

From time to time these issues do arise for consideration by the courts and the relationship between the parties is clearly an important factor in the assessment of foreseeability of psychiatric harm. For example in *Organ Retention Group Litigation* [2004] EWHC 644 (QB) the duty to relatives concerning retention of organs after post-mortem was in issue. A High Court judge ruled that doctors could owe a duty of care to parents not to cause them psychiatric injury, following the death of a baby, that extended to giving the parents an explanation of the purpose of a post-mortem and what it involved, including alerting them to the fact that organs from their child might be retained. The three lead claimants were the parents of deceased children from whom organs had been removed at post-mortem. The parents each claimed damages for psychiatric injury caused by the removal, retention and disposal of the organs from their children without their knowledge and consent.

The issue as to whether the defendants, through their doctors, owed a duty of care to the claimants depended on whether or not there was in existence a doctor-patient relationship between the clinicians and the claimants at the point when their consent to the post-mortem was obtained. If such a relationship did exist there could be no difficulty in satisfying the tests of proximity and what was fair just and reasonable in the circumstances. Evidence from the doctors and experts indicated that doctors could owe such a duty of care to a parent after the death of a baby on a doctor-patient basis. The test of proximity was thus established, and the facts in these claims could be distinguished from *Powell v Boldaz* (1998) Lloyd's Rep Med 116. The duty of care extended to giving the claimants an explanation about the purpose of a post-mortem and what it involved, and telling them that organs might be retained. That duty had been breached. However, on the facts, the claims of two of the lead claimants were dismissed, as the risk of their suffering psychiatric injury was not sufficiently foreseeable, so their claims in negligence failed. One claimant was awarded £2,750 general damages and such sums as would be agreed for special damages and interest.

4.7.1 Psychiatric injury suffered in the workplace

Recent developments suggest that employees who suffer psychiatric injury as a result of being bullied at work may be awarded damages in civil claims against their employers. In order to succeed it would be necessary to prove that the employer knew of the employee's tendency to psychiatric illness and took no steps to help (*Walker v Northumberland CC* [1995] 1 All ER 737. These are cases in which the claimant suffers psychiatric illness as a result of some cause other than a sudden traumatic event, but there may be liability at common law, providing damage of that type was foreseeable and the claimant is a primary victim.

In *Sutherland v Hatton*, the Court of Appeal established guidelines for judges

dealing with claims for negligence against employers in circumstances where claimants were forced to stop working because of stress-induced psychiatric illness. Even when there is no evidence of bullying an employer can be negligent by ignoring or failing to take adequate steps to prevent stress at work (see 14.2.5, below where the cases are covered in depth). *Barber v Somerset Council* [2004] UKHL 13, [2004] 2 All ER 385; *Hartman v South Essex Mental Health & Community Care NHS Trust* [2005] EWCA Civ 6. These cases have been followed by a number of successful claims against employers for foreseeable work related stress resulting in psychiatric injury. See for example *Intel Corporation UK Ltd v Daw* [2007] EWCA Civ 70, where the employee was given an increased workload after she had been suffering from post natal depression; *Hiles v South Gloucestershire NHS Primary Care Trust* (unreported 20/12/2006), in which a health visitor was given an excessive work load and the employer knew she was feeling under stress because she had broken down in tears during an appraisal interview; *Green v DP Group Services (UK) Ltd* [2006] EWHC 1898 QB, in which a woman who was known to have been suffering from clinical depression was bullied by fellow employees.

4.7.2 Liability for psychiatric injury at work under the Protection from Harassment Act 1977

In all of the cases covered in the above paragraph, employers were liable for psychiatric injury because they knew of the claimant's vulnerability in that respect. However it has more recently been established that in certain circumstances employers can be liable for psychiatric injury suffered at work by their employees even if the employer was unaware of the employee's circumstances. The House of Lords has held that an employer can be vicariously liable under the Protection from Harassment Act 1997 s 3 if an employee behaves in a way that amounts to harassment in breach of s 1 of that Act. The advantage of using vicarious, rather than primary liability, is that there is no need to prove that the employer knew that bullying was happening and failed to take steps to prevent it – *Majrowski v Guy's and St Thomas's NHS Trust* [2006] UKHL 34. This case is discussed in more detail in Chapter 14, along with the similar case of *Green v DB Group Services (UK) Ltd* [2006] EWHC 1898 QB.

In the field of education, it appears that schools do owe a duty to ensure that bullying does not occur on their premises but that beyond the school boundaries such a duty does not exist unless it is clear to teachers that the victim's educational performance is suffering as a result of bullying by pupils being carried out outside school. In *Bradford-Smart v West Sussex CC*, the Court of Appeal held that a causal connection between bullying and psychiatric injury must be established if a claim is to succeed in these circumstances.

4.8 PSYCHIATRIC INJURY AND OTHER TORTS

The courts recognise that a claim for psychiatric injury may arise as a result of torts other than negligence. For example, there are cases in which psychiatric injury has been compensated when breach of statutory duty has been proved, as in *Young v Charles*

Church (Southern) Ltd (1997) 39 BMLR 146; or when statutory harassment has been proved, as in *Martins v Choudray* [1997] EWCA (Civ) 1379 and *Majrowski v Guy's and St Thomas's NHS Trust* [2006] UKHL 34. Indeed, it is theoretically possible for damages to be awarded for psychiatric injury for a range of torts, and in some instances, as the Court of Appeal explained in *Martins v Choudray*, compensation for psychiatric injury may merge with more general distress or injury to feelings.

4.9 HUMAN RIGHTS ACT CLAIMS

Note that damages for psychiatric injury may be available under the Human Rights Act 1998. In *R v Secretary of State for Home Dept ex p PN* [2003] EWHC 207 (Admin), an asylum seeker alleged that he had suffered psychiatric harm as a result of administrative errors in the processing of his application. The judge found that there had indeed been such errors on the part of those responsible for processing his asylum application. He also found a causal link between these errors and the applicant's psychiatric illness. It was held that an award of declaratory relief alone would not provide adequate compensation for infringement of the Art 8 rights involved here. Since the Human Rights Act 1998 had created a new regime for damages English common law principles played no definitive part in this. An award of damages was therefore made in the exceptional circumstances of the case, under the guiding principles in cases decided by the European Court of Human Rights.

The Court made it clear that damages will only be awarded under the Convention if the State concerned has not taken measures already in respect of the claimant. Moreover, there must be a clear causal link between the breach of the Convention right and the loses suffered by the claimant.

4.10 THE LAW COMMISSION REPORT

The Law Commission report, *Liability for Psychiatric Illness* (1998), which was based on wide ranging consultation, recommended legislation to remove what the Commission concluded were unwarranted restrictions on liability for negligently inflicted psychiatric illness. The main recommendation was that restrictions based on the physical and temporal proximity of the claimant to the accident and on the means by which the claimant came to learn of the accident should be removed. The report recommended that two other restrictions should also be removed – the requirement that the illness must be caused by a shock, and the requirement that the illness must not be the result of death, injury or danger to the defendant him or herself. However, the Law Commission recommended that the restriction based on a tie of love and affection with the accident victim should remain.

The Law Commission produced a draft Bill to deal with the recommended changes in the law. In *Hunter v British Coal Corpn*, Brook LJ, in the Court of Appeal, referred to the

Law Commission's recommendations and concluded that, as the matter was so 'policy charged', it would not be the proper function of the courts to 'don a legislative mantle in this controversial field again', though, if that were to be done, it would be a matter for the House of Lords and not the Court of Appeal.

Although the House of Lords subsequently considered the question of psychiatric injury in *White v Chief Constable of South Yorkshire* (see 4.6.2, above), the opportunity was not taken to remove the restrictions placed on the liability in *Alcock v Chief Constable of South Yorkshire*. It seems that it is now for Parliament to find time in its busy legislative programme to deal with the issues in the Law Commission report if it is considered necessary to change the law on liability for negligently inflicted psychiatric illness. As the discussion in this chapter demonstrates, the law on psychiatric injury is confused, in part because of the arbitrary nature of the boundaries drawn by the courts as a means of preventing too wide and rapid and expansion of the scope of liability. It is now a decade since the Law Commission made its proposals for reforming this area of law, and Parliament has not found time to implement them, despite the expression of concerns about the escalating number of claims and the alleged existence of a compensation culture in the UK. The Courts have demonstrated similar reluctance, but the future of the law in this field remains in the hands of the judges for the foreseeable future.

SUMMARY OF SOME OF THE PSYCHIATRIC INJURY CASES

Name	**Relationship with victim**	**Present at scene**	**Immediate aftermath**	**Present at other times**	**Damages awarded**
Victorian Rly Comrs v Coultas (1888)	Self	Yes			No
Dulieu v White (1901)	Self	Yes			Yes
Hambrook v Stokes (1925)	Mother of children in danger	No		Just before accident	Yes
Owens v Liverpool Corpn (1933)	Corpse	Yes			Yes
Bourhill v Young (1943)	None		Yes		No
Chadwick v BRB (1968)	Rescuer		Yes	Out of sight but within earshot	Yes
Hale v London Underground (1992)	Rescuer	Yes	Yes		Yes
Wigg v BR (1986)	Rescuer	Yes			Yes
Dooley v Cammel Laird (1951)	Workmate	Yes			Yes
McLoughlin v O'Brian (1982)	Husband and children	No	Yes		Yes
Jaensch v Coffey (1984)	Wife		Yes		Yes

Name	Relationship with victim	Present at scene	Immediate aftermath	Present at other times	Damages awarded
Kralj v McGrath (1986)	Mother of damaged baby	Yes			Yes
Alcock v Chief Constable of South Yorkshire Police (1991)	Fiancé Brothers in law, etc Brother	No	No	Several hours later 8 hours later	No
Taylor v Somerset AHA (1993)	Wife	No	No	Within one hour	No
Palmer v Tees HA (1998)	Mother	No	No	After three days	No
Chief Constable of West Yorkshire v Schofield (1993)	None	Yes	N/A	N/A	Yes
Reilly v Merseyside RHA (1994)	Self	Yes	N/A	N/A	No
Tredget v Bexley HA (1995)	Self	Yes	N/A	N/A	Yes
Vernon v Bosely (1996)	Father	Yes	N/A	N/A	Yes
Page v Smith (1996)	Self (primary victim)	Yes	N/A	N/A	Yes
Sion v Hampstead HA (1994)	Parents	Yes	Yes	N/A	No
Piggott v London Underground (1995)	Rescuers	Yes	Yes	N/A	Yes
Robertson v Forth Road Bridge (1994)	Workmate (secondary victim)	Yes	N/A	N/A	No
McFarlane v EE Caledonia (1994)	Bystander helping rescue (secondary victim)	Yes	N/A	N/A	No
Frost v Chief Constable of South Yorkshire (1996)	One rescuer who was a primary victim	Yes	Yes	No	Yes
White v Chief Constable of South Yorkshire (1999)	Rescuers who were secondary victims	No	Yes	No	No
Duncan v British Coal (1996)	Workmate (secondary victim)	No	Yes	No	No
Young v Charles Church (1996)	Workmate (secondary victim)	Yes, as bystander	Yes	No	Yes. Breach of statutory duty

Name	Relationship with victim	Present at scene	Immediate aftermath	Present at other times	Damages awarded
Hunter v British Coal (1998)	Workmate	Close by, not present	Yes	Just before accident	No
W v Essex County Council (2000)	Parents	Close, not present	No	Yes	Yes
North Glamorgan NHS Trust v Walters (2002)	Mother	Yes	N/A	Yes, gradual realisation	Yes
Leach v CC Gloucestershire (1999)	Appropriate adult	Present during police interview	N/A	No	Settled
Giblett PC v Murray (1999)	Self	Yes	Yes	N/A	Yes, but not for nervous shock
Group B Plaintiffs v MRC (1998)	Self	Yes	N/A	N/A	Yes
Farrell v Merton Sutton and Wandsworth (2000)	Mother primary victim	Yes, during birth	Yes		Yes
Farrell v Avon Health Authority (2001)	Father primary victim	Yes	N/A	N/A	Yes
Atkinson v Seghal (2003)	Mother	No	Yes	N/A	Yes
Allin v City and Hackney HA (1996)	Self	Yes	Yes	N/A	Yes
Simmons v British Steel (2004)	Self	No	N/A	N/A	Yes
Harrhy v Thames Trains (2003)	Rescuer	N/A	N/A	Yes	Yes
R v Sec of State for Home Dept ex p N (2003)	Self	Yes	N/A	N/A	Yes – under Human Rights Act 1998
Majrowski v Guy's and St Thomas's (2006)	Self	Yes	N/A	N/A	Yes – under Protection from Harass-ment Act 1977
JD v Berkshire (2005)	Self	Yes	N/A	Yes	No

FURTHER READING

Stapleton, 'In Restraint of Tort' in *Frontiers of Liability*, Birks (ed), 1994 Law Commission Report No 429

Barrett, 'Employers' Liability for Stress at the Workplace: Neither Tort nor Breach of Contract?' (2004) *Industrial Law Journal* 33(4):343–49

For regular monthly up-dates on this area of law, see *Personal Injury Compensation*, published monthly by Informa UK Ltd.

CHAPTER 5

DUTY OF CARE – ECONOMIC LOSS

The object of this chapter is to explore the limits of liability for economic loss in tort, which is another area of law in which the courts have found it necessary to restrict the number of claims for pragmatic reasons, especially when the damage is regarded as 'pure' economic loss. Distinctions have been drawn between economic loss caused by careless words or statements, and economic loss caused by careless conduct. Different rules have also been developed in relation to economic loss resulting from damage to property belonging to a third party or from injury to a third party. As regards claims under other areas of law, such as deceit, the courts are less restrictive in their approach to economic losses.

The law of contract usually has little difficulty in compensating economic losses. Tort, although it has been prepared to compensate the victims of fraudulently occasioned losses through the tort of deceit, has had considerable problems about compensating financial losses caused by negligence. The judges have been concerned about the opening of the floodgates to a proliferation of claims. There is a fear that the consequences of financial loss might spread too rapidly and be experienced too widely. There are other policy reasons why there has been reluctance to create too wide an ambit of liability for economic loss. These include the notion that economic losses are less likely to be foreseeable than physical losses and the notion that economic loss is less deserving of compensation than personal injuries. This has meant that the development of the law has been dependent upon various trends in social policy and judicial attitudes and some of the cases are difficult to reconcile in consequence. The law is often illogical and decisions appear to have been made on an arbitrary basis. Despite this, judges have been prepared to award compensation for financial losses that are the consequence of personal injury or property damage that is recoverable (see Chapter 19). The real difficulties arise in relation to 'pure' economic loss in tort.

5.1 ECONOMIC LOSS CAUSED BY CARELESS STATEMENTS

The clearest picture of liability for economic loss in tort lies in the field of negligent misstatement.

Most of this section concerns negligent statements rather than omissions. In negligence generally, an omission is capable of giving rise to liability in the same way as a negligent act, providing of course causation can be proved (*Donoghue v Stevenson* [1932] AC 562). However, in relation to economic loss, where there are situations akin to contract it may be more difficult to prove an assumption of responsibility where there is mere silence as opposed to a positive statement on the part of an advisor. It can, therefore, sometimes be more difficult to establish liability for omissions in this area of the law of negligence. In the case of products, outside the consumer sphere where there is strict liability for defective products (see Chapter 15), it appears that there is no duty on the part of manufacturers to warn potential users that a product may fail to function (*Hamble Fisheries Ltd v Gardner & Sons Ltd* [1999] 2 Lloyd's Rep 1).

5.1.1 Statements made by the defendant

In *Candler v Crane, Christmas & Co* [1951] 2 KB 164, the Court of Appeal held that no duty of care arose in tort in relation to careless advice given by accountants in preparing a company's accounts which they knew would be relied upon by third parties (the claimants). Denning LJ, in a famous dissenting judgment, argued that the defendants did owe a duty of care to their employer or client 'and any third person to whom they themselves show the accounts so as to induce them to invest money or take some other action upon them'.

This view was later proved correct when the House of Lords was prepared to extend the ambit of the duty of care in this area in the landmark case of *Hedley Byrne & Co v Heller & Partners* [1964] AC 465. The appellants in that case were advertising agents who were worried about the financial status of one of their clients, E Ltd. The appellants' bankers asked E's bankers, who became the respondents in this case, about the financial position of E Ltd. The letter sent in reply by the respondents said that E was 'a respectably constituted company, considered good for its ordinary business engagements. Your figures are larger than we are accustomed to see'. Acting in reliance on this statement the appellants lost a substantial sum of money when E Ltd went into liquidation. The respondents were protected by a disclaimer with which they had prefaced their statement, but the House of Lords held that if it had not been for the disclaimer, a duty of care would have been owed to the appellants in the circumstances. The House of Lords gave some indication of the circumstances when such a duty of care will arise. These are discussed in the paragraphs that follow.

5.1.2 The special relationship

There must be reasonable reliance within a 'special relationship between the parties'. The exact meaning of the special relationship was not fully explained in *Hedley Byrne*, and this left scope for the judges in later cases to use the notion of 'special relationship' as a device for the development of judicial policy. From the later decisions it emerged that at first the special relationship was treated in rather narrow terms, as a relationship in which the person giving the advice was in the business, or represented that he was in the business, of giving advice of the particular kind that was sought.

Later, in a dissenting judgment in *Mutual Life Assurance Co v Evatt* [1971] AC 793, it was suggested that the special relationship could include any business or professional relationship. This view was approved at first instance in *Esso Petroleum Co Ltd v Mardon* [1976] 1 QB 801 but on appeal the case was decided in contract rather than tort, so the position remained unclear. However, it was clarified in *Howard Marine and Dredging Co Ltd v Ogden & Sons Ltd* [1978] QB 574, and it can now be stated with confidence, that in any business or professional relationship there is potential for the special relationship to exist.

This of course means that professional advisors insure against claims based on negligent mis-statement. Although private individuals are vulnerable to being misled by professionally qualified advisors, people and organisations acting professionally are not necessarily precluded from claiming. In *Francis v Barclays Bank* [2004] EWHC (Ch) it was held that a surveyor, who had failed to make proper enquiries about the status

of planning permission relating to property held by a bank, could be found liable in negligence to the bank. The bank was still responsible for carrying out its duty as mortgagee.

Social relationships are still excluded, however, unless the circumstances make it clear that carefully considered advice was being sought. In *Chaudhry v Prabhakar* [1988] 3 All ER 718, the claimant asked a friend to help her to find a second hand car. She specifically explained that she did not want to buy a car which had been involved in an accident. The defendant found her a car which he recommended that she should buy but, in the event, it was discovered that the car had been involved in a serious accident and was unroadworthy. The defendant was liable even though he was not a qualified mechanic but the Court of Appeal made it clear that this was an unusual case which turned upon its own special facts and did not establish a general rule of liability in all such cases.

5.1.3 Reliance

The concept of reliance is a vital consideration in economic loss claims, and is one which allows scope for judicial discretion. There must be reliance by one party upon the advice of the other. Although professional people do rely on other experts for advice from time to time, there is less likely to be reliance if both parties are experts than in cases where one is a private individual and the other is professionally qualified. In *Valse Holdings SA v Merrill Lync*h [2004] EWHC 2471 it was held that the defendants were not liable for negligent advice when the client was a designated expert. In *Lambert v West Devon BC* (1997) 96 LGR 45, a local authority was liable when the claimant had relied on its advice that he could begin building even though planning permission had not yet been approved. However, if the statement which was made did not influence the claimant's judgment, then it cannot be the basis of a negligence claim. Therefore, in *Jones v Wright* [1991] 3 All ER 88 the claim was struck out as disclosing no cause of action when the claimants failed to establish that they had relied on an audit carried out by the defendants. The claimants were investors whose money was held on trust by a company which had been audited by the defendants. They alleged that the auditors should have discovered that there had been misuse of trust monies. It was decided that the mere fact that there was a relationship of trust between the investors and the company did not place a duty of care on the auditors of the company, and not only had there never been an assumption of a duty to the investors, neither had there been any reliance on them. If the 'just and reasonable' test was applied, there could be no finding that a duty of care was owed.

Similarly in *White v Taylor* [2004] EWCA Civ 1151 it was held that the claim must fail. The Court of Appeal took the view that since the claimant had not demonstrated that he would have acted any differently without the advice given to him by solicitors, their negligence had not caused his financial loss. This is as much a matter of causation as it is of reliance.

In *Goodwill v British Pregnancy Advisory Service* [1996] 2 All ER 161 (see 3.5, above, for the facts of this case), the Court of Appeal took the view that, in order to succeed in a claim for financial loss occasioned by negligence, the claimant has to prove that the defendant knew or ought to have known that the advice was likely to be acted upon without independent inquiry by the claimant.

If there is a situation that is akin to a contract, it is likely that there will be reliance by one party on the other and a duty of care is more likely to arise – for example where advice is given in a pre-contractual relationship.

The Court of Appeal confirmed this in *Commissioner of Police for the Metropolis v Lennon* [2004] EWCA Civ 130. The claimant and the Commissioner were in a non-contractual relationship similar to employment. Relying on advice given by the defendant the claimant took time off work before moving to a new force. As a result he suffered economic loss in that he lost his entitlement to a housing allowance. It was held that the facts fell within *Hedley Byrne*. The police advisor had voluntarily assumed responsibility for advising the claimant, who had acted on that negligent advice, relying on the information.

A recent case illustrating the more restrictive view of the courts to claims for pure economic loss, and further consideration of the concept of 'reliance', is *Customs and Excise Commrs v Barclays Bank plc* [2006] UKHL 28 in which the House of Lords reinstated the ruling of the trial judge that a bank which has been served with a freezing order (Mareva Injunction) which prohibited the disposal of the funds of a certain client, did not owe a duty of care to the organisation which had obtained the order. It was impossible, in the view of the House of Lords, to find that there had been an assumption of responsibility on the part of the bank, since the bank had no choice but to comply with the freezing order. This case is somewhat difficult to categorise, as it involved what was essentially a negligent act rather than a statement, but it was treated in much the same way as the cases involving negligent statements. The case is interesting in that it appears to generate confusion relating to what had been regarded as settled law that with one or two exceptions, no duty of care is owed in relation to economic loss of any kind unless there is an assumption of responsibility by the party who is alleged to owe the duty (see *Spring v Guardian Assurance* [1994] 3 All ER 129, and *Henderson v Merrett Syndicates* [1994] 3 All ER 606).

5.1.4 Reliance must be reasonable

The claimant's reliance on the defendant's statements must be reasonable in all the circumstances. Like the notion of 'special relationship', that of 'reasonable reliance' has been seized upon and used by the judges as a device for implementing policy. The person relied upon must have known, or have been in such a position as to be reasonably expected to have known, that the other party was relying on the statement, and the reliance must have been reasonable. In *Caparo Industries plc v Dickman* [1990] 2 WLR 358, Lord Oliver stated that the person giving the advice must have known by inference that the statement would be received by the claimant or class of persons to which the claimant belonged, and acted upon without further independent advice being sought. This approach was also taken in some earlier cases.

In *Yianni v Edwin Evans* [1982] QB 438, a prospective purchaser relied upon advice given by a surveyor to the building society from which he was seeking a mortgage. The building society had required payment of a fee by the prospective purchaser in the usual way, so that it could instruct the surveyor to value the property to ensure that it was worth the amount which they were prepared to lend. The building society even informed the purchaser in writing that he should instruct his own independent surveyor, but he

did not do this. Evidence was produced to the effect that only 15% of private house purchasers have a separate independent survey before purchase and the court concluded that it was reasonable for the purchaser to rely on the building society survey if the building society was happy to do so. It transpired that the surveyor was negligent and that considerable expenditure was required to remedy a major defect in the property. The defendant surveyor was liable. A duty of care existed, as the test of reasonably foreseeable reliance was satisfied.

In *Harris v Wyre Forest DC* [1989] 2 All ER 514, a survey had been carried out by a local authority surveyor before the purchase of a property, for which the local authority was providing a mortgage. The purchaser was not permitted to see the survey, but presumed that it must have been favourable because the mortgage went ahead. It was decided that it was foreseeable that the purchaser would rely on the survey, even though there was a clause excluding liability for negligence in the surveying process. The insertion of an exclusion clause was declared unreasonable under the Unfair Contract Terms Act 1977 and the defendant local authority was liable to the claimant in negligence.

In *Smith v Eric S Bush* [1990] 1 AC 829, which the House of Lords heard at the same time as *Harris v Wyre*, it was held that because the surveyor knew that the purchaser was relying on his survey, a duty of care was owed. Lord Griffiths explained that this situation was rather exceptional:

> It should only be in cases where the advisor knows that there is a high degree of probability that some other identifiable person (than the immediate recipient of the advice) will act upon the advice that a duty of care should be imposed.

This was the case here and, moreover, the size of the purchase price was relatively small when compared with the cost to the purchaser of commissioning an independent survey. This approach favours private purchasers rather than large commercial concerns, and this same approach has been adopted in later cases, particularly where a commercial firm is involved in the same kind of business as that about which advice is sought.

In a related situation, it was held in *Commrs of Customs & Excise v Barclays Bank plc* [2004] EWHC 122 that the bank owed no duty of care to the claimant in relation to payments from the accounts of two companies which were subject to freezing orders in the claimant's favour.

5.1.5 Discharging the duty

A case in which a surveyor did succeed in escaping liability was *Eley v Chasemore* [1989] NLJ Rep, 9 June. The surveyor in this case had undertaken a full structural survey but had not advised the claimant about necessary underpinning. However, he had advised the claimant to insure against 'ground-heave, settlement and landslip'. It was held that he did owe a duty of care and that he had discharged it by advising on insurance.

5.1.6 A 'case by case' approach

There have been many cases involving accountants in recent years, perhaps as a result of the so called 'boom years' of the property and financial markets in the 1980s. The most significant of these is *Caparo*. This case provided the House of Lords with an opportunity

to restate the principles involved in the notions of 'special relationship' and 'reasonable reliance'. It concerned a public company whose accounts the defendants had audited as required by the Companies Act 1985. The claimants, who already owned shares in the company, purchased more shares and made a successful takeover bid for the company. When the claimants suffered a considerable loss as a result of the takeover, they complained that the accounts had been negligently prepared by the defendants. The case turned upon the question as to whether the defendants owed a duty of care to the claimants. The House of Lords decided that a limited duty of care is owed to shareholders by a company's auditors. No duty was owed to individual members of the company in relation to decisions as to whether to purchase further shares. The duty only existed in relation to the control that shareholders are required to have over the affairs of the company, for which they need details of its accounts. Therefore, there was no liability for the loss incurred by the claimants in this case. No duty of care was owed to them in that respect. The principle applies to existing shareholders, prospective shareholders and institutional lenders who suffer financial losses as a result of inaccurate statements in negligently prepared accounts. The House of Lords treated as crucial the purpose for which the statement was made. Unlike the statement in *Smith v Bush*, the statement in *Caparo* was unconnected with the purpose for which it was relied upon.

5.1.7 Summary of *Caparo*

The House of Lords favoured a 'case by case' approach to the question of duty of care, based on directly relevant existing authorities, and rejected a general test of liability based on reasonable foresight in these kinds of cases.

A summary of Lord Oliver's explanation of the current state of the law is that a relationship is required before the duty of care can exist and:

- the advice must be required for a purpose, either specified in detail or described in general terms;
- the purpose must be made known, either actually or inferentially, to the advisor at the time the advice is given;
- the advisor must know, either actually or inferentially, that the advice will be communicated to the advisee, either as a specific individual or as a member of an ascertainable class in order that it should be used by the advisee for the known purpose;
- it must be known, either actually or inferentially, that the advice will probably be acted upon for that purpose without independent advice or inquiry;
- the advice must be so acted upon to the detriment of the advisee.

His Lordship concludes:

> That is not to suggest that these conditions are either conclusive or exclusive, but merely that the actual decision in the case does not warrant any broader propositions.

The law is unlikely to expand now that this much narrower approach is clearly favoured by the House of Lords. The new approach is the result of a change in policy, and is the reaction to the earlier expansion in the law. The underlying fear is of the opening of the floodgates to a rush of claims, or liability 'in an indeterminate amount for an

indeterminate time to an indeterminate class' as it was expressed in *Ultramares Corpn v Touche* (1931) 174 NE 441, by Cardozo LJ.

Companies need to make their own independent inquiries and will not be able to rely on annual accounts to help them to arrive at their decisions on the financial viability of other concerns which they intend to take over. Private individuals may still be in a more favoured position than commercial organisations.

5.1.8 Further developments

It was inevitable that further cases on this subject would be heard by the courts because the *Caparo* decision allows the courts to decide what is fair and reasonable in the circumstances of each case. Many advisors might therefore consider it worth contesting claims, particularly as large sums of money are often involved. Consistency will be difficult to achieve in the future.

In 1991, the Court of Appeal heard the case of *James McNaughton Papers Group Ltd v Hicks Anderson & Co* [1991] 1 All ER 134. Neill LJ, who gave the leading judgment, drew upon *Caparo* and indicated that there are six important considerations in determining whether a duty of care exists in these cases:

- the purpose for which the statement was made; was it made specifically to inform the advisee, or for the direct benefit of someone else?
- the purpose for which the statement was communicated; was it for information only, or was it intended to be acted upon?
- the relationship between the advisor, the recipient of the advice and any third parties; was the advisee independent and able to make his own decisions?
- the size of the class to which the recipient of the advice belongs; it is sometimes easier for a member of a large class to establish liability than it is for an individual;
- the knowledge and experience of the advisee; did the advisor know that the advisee would rely on the information without taking independent advice?
- whether the advisee was reasonable to rely on the advice. Did the advisee actually rely on the statement?

It was held that a duty of care was not owed in this case by auditors who had prepared draft accounts for use in negotiations for the takeover of another paper company, MK Papers. The accounts were prepared at the request of MK Papers who initiated the takeover talks. At a subsequent meeting, the defendants admitted that MK Papers were just about breaking even, but later it transpired that they were faring very much worse than that, and that the accounts had been misleading. It was not reasonable for the claimants, who were experienced business people, to rely solely on the draft accounts which had been prepared for MK Papers. They should have taken independent financial advice.

In *Morgan Crucible plc v Hill Samuel Bank Ltd* [1991] 1 All ER 148, the directors and financial advisors of a company (the takeover of which was being considered) made certain statements about the accuracy of financial records and forecasts as required by the City Code. They intended a specific bidder to rely upon these statements. The bidder did so rely, and later alleged that financial loss had been incurred as a result. As the original

particulars of claim had been drafted before the *Caparo* case, it was based on reasonable foreseeability. Following *Caparo*, it was necessary to amend the particulars to the narrower basis of one previously identified bidder. The Court of Appeal held that it was at least arguable that this case was distinguishable from *Caparo*, presumably because the identifiable bidder had emerged before specific statements were made about the financial status of the company. Leave to amend was therefore given.

It should be noted courts are likely to be influenced by the Fifth European Directive on Harmonisation of Company Law, which states that a duty of care is owed by a company's auditors to third parties in relation to negligent acts which cause financial loss.

In cases that do not concern the possible liability of auditors, the courts regularly return to the basic text in *Caparo*. For example, in *Raja v Gray* (2002) 33 EG 98 (CS), the Court of Appeal held that although receivers owed a duty of care to those who held an interest in the equity of redemption in a mortgaged property, no duty was imposed on valuers instructed by the receivers, as there was insufficient proximity between them. The court took the view that it would not be fair, just or reasonable to impose a duty in these circumstances.

Paradoxically, despite the apparent trend *away* from expansion of the ambit of the duty of care relating to pure economic loss, cases decided by the House of Lords since *Caparo* appear to have marked an extension of liability in this area. The case of *Henderson v Merrett Syndicates Ltd* [1994] 3 All ER 506, is very significant and provides important reading on this subject, as it indicates the view which the House of Lords is taking on the development of the law in this area. In *White and Another v Jones and Another* [1995] 2 AC 207, and *Spring v Guardian Assurance* [1992] IRLR 173, the scope of liability for economic loss was extended. In the *Henderson* case, which arose out of the losses suffered by Lloyds' names, the House of Lords held that Lloyds' underwriting agents owed a duty of care to their names (both to direct and indirect names). The underwriters argued that the position should be governed by the terms of the contracts between the parties and not by the law of tort which favoured the claimants because of the more advantageous limitation periods in tort. In the course of arriving at the decision, the nature of the contract/tort relationship was explored, and the advantages of using one branch of the law rather than the other were considered to be more than merely academic, as very real practical advantages for claimants were offered by tort in this case. Lord Goff brought the case within the *Hedley Byrne* principle and pointed out that this was a classic example of the relationship within which *Hedley Byrne* should apply. One of the main factors of importance in imposing liability in this case was the 'assumption of responsibility' by the defendants. The agents claim to have special skills to give advice as to the risks which are to be underwritten, and assume responsibility for that advice. The names in their turn place reliance on the advice which they receive. In reviewing the *Hedley Byrne* principle, Lord Goff restated the law and recognised that the scope of *Hedley Byrne* extends beyond negligent misstatement, though probably only in non-professional relationships. The decision is underpinned by important policy implications. The problems at Lloyds have generated a large amount of litigation and not everyone believes that the names deserve the protection of the law, given that they were richer than average and were hoping to become wealthier through what was essentially a gamble with their money. Against that background is the cavalier way in which the names were

treated by the underwriters, many of whom were able to make considerable financial gains through their inside knowledge. The principles established in this case were applied by the High Court in *Aiken v Stewart Wrightson Members Agency Ltd* [1995] 1 WLR 1281, another case arising out of the Lloyds crisis, and in *NM Rothschild and Sons Ltd v Berensons and Others* [1995] NPC 107.

The important issue of assumption of responsibility which was raised in *Jones v Wright* and the *Henderson* case prevented the claimants succeeding in *McCullagh v Lane Fox and Partners Ltd* [1994] EGCS 2. The claim was brought by the purchasers of a house against an estate agent acting for the seller of the property. Although the purchasers had relied on a negligent statement and had suffered financial loss as a result, they were not entitled to accept that the agent had assumed responsibility for the statement, especially as there was a disclaimer in the sale particulars on which the agent was entitled to rely as, in the circumstances, the Unfair Contract Terms Act 1977 would not prevent him from so doing.

The Court of Appeal, finding in favour of the claimant in *Commissioner of Police for the Metropolis v Lennon* [2004] EWCA Civ 130 outlined in para 5.1.3, placed special emphasis on the fact that a police employee had negligently advised the claimant in the course of carrying out a task pursuant to an express voluntary assumption of liability. It did not matter that she was not a professional financial advisor. She had allowed the claimant to believe that he could rely on her.

The Courts must review all the relevant circumstances and decide whether they fall within situations in which an assumption of legal responsibility exists. In *Precis plc v William Mercer Ltd* [2005] EWCA Civ 114 the Court of Appeal held that the respondent actuaries could not be taken to have agreed to the appellants' reliance on the information for any particular purpose, since they were unaware what type of transaction was envisaged. The precise scope of the concept of assumption of responsibility was still evolving and there were no comprehensive guiding principles to assist the courts.

In 1994, the House of Lords again considered some of these issues in *Marc Rich & Co v Bishop Rock Marine* [1994] 1 WLR 1071. The case involved the nature of the duty of care which may arise in the surveying of a ship. The House of Lords applied the three-stage test from *Caparo*, and commented that it is now settled law that there must be foreseeability and proximity and the elements of justice and fairness must be satisfied in all negligence cases. More significantly, it was stated that with regard to these elements there is no distinction between direct physical damage and indirect physical damage or economic loss. However, in this case, it was held not to be fair, just and reasonable to impose a duty, and this is a good example of the use of the test in *Caparo* as a means of restricting the scope of liability for practical or policy reasons.

The House of Lords extended the scope of liability for economic loss in *Spring v Guardian Assurance* in which it was held by a majority of four to one that an employer owes a duty of care to employees and ex-employees not to cause economic loss by writing careless references. The relationship is one of sufficient proximity, and it is fair, just and reasonable to impose a duty because of the reliance which the employee places on the employer. Here, the claimant's employer had supplied a reference for him which incorrectly stated that he was a man of little integrity and had been involved in selling unsuitable insurance policies to clients. As a result, the employee failed to obtain another

job after he had been dismissed by the defendants. As he was unable to prove malice, there would have been a successful defence to libel on the basis of qualified privilege (see Chapter 18). The case was sent back to the Court of Appeal on the causation issues involved but the House of Lords' decision raises a number of important points. For the purposes of this discussion, there are two main issues which deserve particular attention:

Lord Goff again followed the line that this case fell within the limits of the *Hedley Byrne* case and considered that the rule was not limited to situations in which advice or information is provided, but that it also extends to other services. This could herald a more sensible approach than the artificial distinction which had previously been drawn between negligent words and negligent acts causing pure economic loss. On this point, Lord Lowry agreed.

Policy matters were discussed. The majority view was that the case should be decided in the light of the 'fair, just and reasonable' test. There was much discussion of the present state of the employment market and the need for extra vigilance on the part of employers when writing references, though it was considered to be unlikely that an employer would owe a duty of care to the prospective employer receiving the reference.

5.1.9 Wrongful birth cases

In the Scottish case of *McFarlane v Tayside Health Board* [1999] 3 WLR 1301, the House of Lords took the view that the cost of bringing up a child born after an unsuccessful sterilisation operation was an economic loss. Lord Slynn treated the claim as one which fell into the broad category of economic loss. As such, he thought that it should be handled with caution in the light of the reluctance of the courts to create liability for pure economic loss in the absence of closer links between the act and the damage than were foreseeably provided. His Lordship concluded that it would not be fair, just and reasonable to impose a duty on the doctor or his employer in the circumstances of this case (*Caparo*).

This approach was confirmed in *Rand v East Dorset HA* (2001) 56 BMLR 39, where it was admitted that the defendant's negligence had resulted in the wrongful birth of a disabled child. In January 1988, doctors wrongfully failed to inform the claimants of the results of a scan which disclosed the likelihood that Mrs Rand would give birth to a Down's syndrome baby. It was accepted by the defence that this negligent omission had deprived the claimants of the opportunity to terminate the pregnancy and that, if they had been given the results, Mrs Rand would have had an abortion. The parents brought a claim for damages to cover the financial consequences flowing from that negligence. The judge accepted that the claim was based upon the extended principle of *Hedley Byrne* for the financial consequences flowing from the admitted negligence of the defendant, limited to the consequences of the child's disability. The claim for the cost of maintenance and the cost of care for the child was a claim for pure economic loss, as was the claim for loss of profits of the residential care home that the claimants ran (see Chapter 19). In *Roberts v Bro Taff HA* (2001) and *Parkinson v St James and Seacroft University Hospital NHS Trust* [2002] QB 266, the courts again treated the additional losses associated with caring for a disabled child as economic losses. The status of this case is in doubt since the decision, in *Rees v Darlington Memorial Hospital* [2004] 1 AC 309, in which the mother of an unplanned child, born after a failed sterilisation operation, was disabled, and claimed

compensation for the extra costs involved in bringing up a child while suffering a disability. The House of Lords held that the law should not discriminate between parents who were well and those who were disabled, and her claim for economic loss failed, even though she had originally sought the sterilisation because she did not want the additional stress and financial burden of bringing up a child.

5.1.10 Statements made by a third party

There are some cases which do not fit neatly into the requirement of reliance within a special relationship.

In *Ministry of Housing and Local Government v Sharp* [1971] 1 All ER 1009, a clerk in the land registry had negligently omitted to notice a planning charge and issued a clear certificate. This meant that the Ministry lost compensation to which it would have been entitled when the land was developed. The Court of Appeal held that the employers of the clerk were vicariously liable. Loss to the claimant was reasonably foreseeable. This was an extension of *Hedley Byrne* outside the traditional special relationship as the reliance was made by the purchaser in this case, yet a third party, the Ministry, was able to claim because that purchaser's reliance on the statement had resulted in a loss to them.

The more recent case of *White v Jones* [1995] 2 AC 207 rests on principles which are difficult to reconcile with *Hedley Byrne*. It concerns a will which was made by the father of a family who deliberately cut his daughters out of his will after a quarrel but later became reconciled with them. He instructed his solicitors to change the will in order to give them £9,000 each as previously intended. However, the solicitors did nothing for a month and the father again told them to amend the will but they still did nothing and one month later the father died. The daughters succeeded in their claim for economic loss against the solicitors in an appeal to the House of Lords, despite the fact that the daughters could not demonstrate that they had relied directly on the solicitors. The decision is rather surprising in the light of the previously restricted interpretation of *Hedley Byrne* in the recent past, though the case of *Ross v Caunters* [1980] Ch 297, in which the facts were similar had also been decided in favour of disappointed beneficiaries. In *White v Jones*, there was sufficient proximity to form the basis of a duty of care.

In *Gibbons v Nelsons* [2000] PNLR 734 it was held that a solicitor's duty of care to an intended beneficiary of whom he was unaware was limited. The duty was only owed if the solicitor knew about both the benefit that the testator wanted to confer and the person or class of persons upon whom the benefit was intended to be conferred. Similarly, in *Worby v Rosser* (1999) *The Times*, 9 June, it was held by the Court of Appeal that a solicitor who is preparing a will is not under any duty of care to inquire whether the testator has the capacity to make a will, nor must he or she ascertain whether or not the testator was being unduly influenced.

In *Gorham v British Telecommunications plc* [2000] 1 WLR 2129, the Court of Appeal held that, if an insurer owed a duty of care to a customer when advising about pensions and life assurance, it also owed a duty to the customer's dependants, as intended beneficiaries. Mr Gorham opted out of the BT pension scheme run for the benefit of employees. Instead, acting on advice from a representative of Standard Life Insurance he stopped contributing to the BT scheme and took out an inferior personal pension with

Standard Life. He had completed a questionnaire for Standard Life indicating that his top priority was providing for his family. After his death his widow succeeded in her claim against Standard Life, Pill LJ commenting 'practical justice requires that disappointed beneficiaries should have a remedy against an Insurance Company'. The deceased had relied on the advice given for the benefit of his family.

It can be concluded that, as far as these rather specialised cases are concerned, there is not necessarily any need to establish 'reliance' within the special relationship, though the claimant's case is clearly stronger if there is reliance.

In *White v Jones*, Lord Goff argued that the usual reason for not allowing recovery for pure economic loss – that of fear of unlimited liability – did not apply because the loss to the daughters was limited both in amount and in the number of potential claimants.

The question of whether a duty to third parties existed was further considered in *Possfund Custodian Trustee Ltd v Diamond and Others* (1996) *The Times*, 18 April. In this case, the issue was whether those responsible for a company's prospectus owed a duty of care to subsequent purchasers of shares. The claim was not struck out as there were arguments which could be made relating to proximity and reliance, and the issue as to whom the prospectus was aimed.

It is difficult to reconcile these cases with the *Hedley Byrne* requirements. They can perhaps be explained by the fact that the relationship between the claimants and the defendants is very close, and that only one person could possibly have suffered a loss. The possibility of indeterminate liability to a large number of different potential claimants does not therefore arise. See also *Ross v Caunters* [1980] Ch 297 where a lawyer failed to make a valid will for a client who wanted to benefit the claimant.

Another case in which these issues were considered by the House of Lords is *Williams v Natural Life Health Foods Ltd* [1998] 2 All ER 577. The second defendant in this case had established a company to franchise various health foods and to run a shop of his own. The claimants, who wanted to obtain a franchise, contacted the company for information. They received a brochure and prospectus, which indicated that the second defendant was experienced and highly successful; relying on this, they proceeded to obtain a franchise. The claimants sought damages from both the company and the second defendant for pure economic loss suffered after their shop failed to make a profit. As the company had gone into liquidation, the proceedings were eventually brought only against the second defendant.

The House of Lords held that the claim must fail, on the basis that there was no special relationship between the claimant and the second defendants. At no stage in the negotiations at the pre-contract stage had the claimants had any contact with the second defendant and there were no personal dealings of a direct or indirect nature between them which could have indicated that the second defendant has assumed any responsibility for the claimants' affairs. They had relied on statements made by the company, but there was no evidence that they had ever relied on the second defendants to take steps to safeguard their position as franchisers. Lord Steyn did, however, state that there is a 'gap-filling' function of the law of tort, and that this arises especially in cases in which the law of contract proves wanting because the rules of privity of contract prevent justice from being done.

The question of reliance was considered further in *Law Society v KPMG Peat Marwick* [2000] 4 All ER 540.

The claimants, solicitors employed the defendants, who were accountants, to prepare their annual reports which had to be submitted to the Law Society under the Solicitors' Act 1974. One objective of the rules is to enable the Law Society to identify whether solicitors are acting dishonestly in the handling of clients' funds. The Law Society could then intervene and use its compensation fund to compensate clients who had suffered as a result of dishonesty on the part of solicitors' firms. In this case the Law Society claimed in negligence against the defendant accountants, alleging that the reports they had prepared had failed to identify irregularities, as a result of which some clients had been defrauded and had been compensated by the Law Society. Although the Law Society was a third party to the relationship between the solicitors and the accountants, the Court of Appeal held that the defendants owed the Law Society a duty of care, as they were aware of the precise purpose for which the annual reports were being prepared, and knew that they would be acted upon. There was little difficulty in bringing this situation within the criteria established in the *Caparo* case.

5.1.11 Advice as opposed to information

The cases indicate that there is a distinction between providing advice and giving information, but the *Hedley Byrne* principles apply to both forms of statement when the person making an inquiry as to facts has no means of checking them or verifying their accuracy. The real significance of the distinction, however, lies in the way in which losses are assessed in relation to advice and information. In the case of advice, it appears that the advisor should have regard to all the foreseeable losses that are the result of any negligence, whereas in the case of information provision, the defendant only has a duty to ensure that the information is correct and will only be liable for the foreseeable results of giving information that is inaccurate (see the House of Lords' ruling in *South Australia Asset Management Corpn v York Montague Ltd* [1997] AC 191, [1996] 3 All ER 365). The House of Lords has held more recently that this view has given rise to a related rule in relation to valuers, concluding that valuers will usually be liable only for the consequences of a valuation being incorrect and not for all other foreseeable consequences of negligent valuations (*Aneco Reinsurance Underwriting Ltd v Johnson and Higgins Ltd* [2001] UKHL 51).

5.1.12 Judicial discretion

Despite the fact that there is considerable scope for judicial discretion in the decision-making process, judges can be quick to claim that the scope of *Hedley Byrne* liability is still limited to very specific circumstances. In *Newell v Ministry of Defence* [2002] EWHC 1006, Elias J concluded that no duty of care was owed by the Ministry of Defence to an army officer whose application for early release was alleged by the claimant to have been handled negligently, with the result that he suffered economic loss by turning down an offer of a civilian job when waiting for what he considered to be an unreasonably long time to hear the outcome of his application. The judge took the view that the category of persons who could claim for negligently inflicted economic loss was very limited and that here the army had not undertaken to assume responsibility for the affairs of an

officer who would be seeking employment outside the armed services. He did not think that considerations of fairness, justice and reasonableness justified an extension of liability to cover this situation. By contrast, in *Cassidy v Railtrack plc* (2002) unreported, 17 October, the Court of Appeal was prepared to find that there was a case to answer when a railway maintenance worker brought a claim for economic loss against Railtrack, his former employer. The claimant argued that his employers had been negligent in failing to inform him that his certificate of competence had been withdrawn, rendering him ineligible for certain kinds of maintenance work. The Court of Appeal considered that the claimant should have been so informed and not only was there a close or proximate relationship between the parties, but also it would be fair, just or reasonable to impose a duty of care in relation to economic loss in the circumstances of the case.

In *R (On the application of A and Another) v Secretary of State for the Home Department* [2004] EWHC 1585 (Admin) the question arose as to whether an asylum seeker could succeed in a claim for economic loss suffered as a result of a mistake on the part of government officials. An error had been made in respect to the claimant's entry clearance as a result of which she had lost benefits for a year before the error was corrected. It was held on application of *Caparo* that a duty of care existed in negligence. There was a sufficient relationship of proximity between the parties to give rise to a duty of care.

5.1.13 Misrepresentation Act 1967

There is some overlap between contract and tort in the Misrepresentation Act 1967 (s 2(1)) if a party to a contract can prove that a misrepresentation was made by the other contracting party, and the claimant has suffered damage as a result. If the person who made the misrepresentation would be liable for damages had the misrepresentation been made fraudulently, he will be liable even if the misrepresentation was not made fraudulently, unless he can prove that he had reasonable grounds to believe, and did believe, at the time of entering into the contract, that the statement was true. A claimant relying on the Misrepresentation Act has no need to prove that a duty of care exists and is, therefore, in a better position than a claimant relying solely on negligence. Damages under the Act are assessed on the basis of damages in tort rather than contract but are based on the measure of damages for the tort of deceit and not negligence. This places the claimant under the Act at an advantage over the claimant relying solely on tort, since there will be liability for unforeseeable losses.

Claims for deceit are less common than those for negligence because of difficulties involved in proving a state of mind on the part of the defendant. A recent example of a successful claim for deceit is *Black v Davies* [2004] EWHC 885 QB.

The claimant who cannot establish the existence of a contract will be forced to rely solely on tort.

5.2 ECONOMIC LOSS CAUSED BY NEGLIGENT ACTS

Economic loss caused by negligent acts is often difficult to understand because in many of the cases there is an artificial distinction drawn between acts and statements which result in economic loss.

In an article which examines the development and current state of the law in this area in detail, Basil Markesinis and Simon Deakin identify as one of the doctrinal weaknesses of the common law the fact that the courts have attempted to create artificial distinctions between the various kinds of damage in these cases ('The random element of their Lordships' infallible judgment: an economic and comparative analysis of the tort of negligence from *Anns* to *Murphy*' (1992) 55 MLR 619).

Furthermore, the judicial gyrating had led to the almost ridiculous situation that architects and engineers who give negligent advice leading to the construction of shoddy buildings may be liable to the buildings' owners, 'but the builders, whose negligence produces the same result, will not'.

The reason why a distinction developed is perhaps best explained by returning to the decision in *Hedley Byrne*, and examining the way in which the House of Lords in that case attempted to justify their extension of liability. It appeared that, while the judges in that case were prepared to expand the scope of liability for negligent statements causing economic loss, they were reluctant to widen it further to cover negligent words causing economic loss. The reason given was that 'words are more volatile than deeds'.

In later cases involving losses caused by acts, the courts were able to use this view to perpetuate the policy of restricting a rapid expansion of the law.

5.2.1 'Pure' economic loss distinguished from other types of economic loss

A further distinction in the law of negligence was made between 'pure economic loss' and economic loss which is consequent upon physical damage to property. This distinction is illustrated in *Spartan Steel and Alloys v Martin & Co (Contractors) Ltd* [1973] QB 27. The claimant operated a stainless steel factory on a small industrial estate, and the defendant's employees negligently cut off the electricity supply to the factory by damaging a cable when they were digging up the road. The claimants claimed damages for the 'melt' which was currently in the machinery, for physical damage to the machinery itself and for the loss of profit on four further melts which could not be carried out until the machinery was operational again. The Court of Appeal allowed the claim for the damage to the melt in the machines, and for loss of profit on that. However, they did not allow the claim for loss of profit on the four further melts. The further loss was undoubtedly foreseeable but, as Lord Denning conceded, 'the question, at bottom, was one of policy'. The line of liability had to been drawn somewhere, and it was a matter of pragmatism that the line was drawn where it was. Lord Denning explained that such losses were better borne by the entire community than by the defendants. Considerations such as the fear of a proliferation of claims also played a part in the decision.

In *Weller v Foot and Mouth Disease Research Institute* [1966] 3 All ER 560, the claimants were auctioneers who were unable to carry on their business because of a serious outbreak of foot and mouth disease in cattle in the area. This had been caused by the escape of a virus from the defendant's research establishment. Farmers were obliged to slaughter cattle with the disease and auctions were forced to close to control its spread. The claimants were denied a remedy. Their loss was too remote from the original act of negligence which had caused financial losses directly to the farmers but only indirectly to the auctioneers.

5.2.2 Expansion of liability

It is very clear that in the above cases the cause of the loss was an act and that the damage was economic loss. However, in other cases, the distinction is less obvious.

In *Dutton v Bognor Regis UDC* [1972] 1 All ER 462, the Court of Appeal held that the local authority was liable when the owner of a building suffered financial loss as a result of defective foundations having to be repaired. The foundations were defective because of a negligent inspection carried out by the defendant's building inspector. It is difficult to distinguish between a negligent act of inspection and a negligent statement that the foundations of a building are adequate and comply with regulations. It is also difficult to distinguish between damage to property (that is, the building) and financial loss which is consequent upon having to repair the damage to the building. The claim was successful because there was a threat of injury to health from the damaged property. If the defect had only meant that the property was defective, or of poor quality, but not dangerous to health or safety, the claim would have failed. *Donoghue v Stevenson* only established liability for injury to health or safety, not for damage to the quality of a manufactured or fabricated product alone. If the ginger beer in that case had merely been a poor colour, or unpleasant to taste, there would have been no duty of care owed.

What made the difference and gave rise to liability in tort rather than in contract was the fact there was injury to the claimant's health.

One possible explanation for the over-complicated approach in *Dutton* is that the facts do not fall squarely within the *Hedley Byrne* line of cases, nor within the *Donoghue v Stevenson* principle, unless there is an act causing potential injury to health. If injury to health is merely threatened, the loss, it can be argued, is a purely financial one. Fearing a further expansion of the *Hedley Byrne* cases, the court produced a cautious formulation of the facts of *Dutton* to achieve that desired result without apparently opening the floodgates.

However, this formulation was in itself confusing because it focused too closely on injury to health.

A confusing line of cases followed, beginning with *Anns v Merton BC*, in which the House of Lords approved *Dutton*. In this case, the council negligently failed to inspect the foundations of a block of flats. It transpired that the foundations were too shallow and some years later when many of the flats had changed hands it became apparent that there was a serious defect in their construction. The claimant claimed that the damage to the properties threatened health and safety. The claim succeeded. This was an explicit policy decision in which the whole issue of the desirability of arriving at decisions on grounds of policy was openly discussed, and in which Lord Wilberforce formulated a test which paved the way for an expansion of liability.

It is interesting to observe the way in which the trend towards expansion continued for some years, and was later discredited when it appeared to the judges that they had moved too far in the direction of an indeterminate liability for pure economic loss caused by negligent acts. This is arguably the nature of the loss in *Anns*, where there was a threat to health and safety rather than actual injury. In *Donoghue v Stevenson*, by contrast, there was alleged injury to health.

The expansion continued in *Batty v Metropolitan Property Realisations* [1978] QB 554. In this case, a claim was brought by the owner of a house which had been built near an

embankment on land which was unstable and subject to landslips. The house was one of several built in a small close, and part of the garden slipped away. The house itself was unsaleable. The builders were liable for negligence in that they had not anticipated these problems even though the house itself was still standing. The evidence suggested that the house would become dangerous at some time in the future. This case introduces a wider liability than *Anns v Merton* because the court was prepared to award damages for possible future threats to health and safety, and at the time of the hearing the only loss was an economic loss, coupled with anxiety.

In *Dennis v Charnwood BC* [1982] 3 All ER 482, it is possible to see the timescale involved in some of these cases, a factor which compounds the difficulties in making an award for economic loss. The facts were as follows:

1955 A house was built on an old sand pit. The local authority advised that a concrete raft was necessary to support the foundations.
1966 Small cracks began to appear in the walls. The builder inspected these, reassured the owners, and filled in the cracks.
1976 Very large cracks appeared in the walls.
1977 It was clear that the concrete raft was inadequate.
1982 The Court of Appeal held that the local authority was liable in negligence for the defects to the property which were likely to cause danger during the normal lifespan of the building.

Once again, it is difficult to see how the liability of the local authority was based on acts rather than advice.

5.2.3 The 'high-water' mark

In *Junior Books Ltd v Veitchi Co Ltd* [1983] AC 520, the House of Lords stretched the scope of the duty of care in negligence to its limit and, with some reservations, found that a duty of care existed in relation to a defect in quality of a product even though there was no threatened danger to health or safety. The defendants were flooring specialists and were nominated as subcontractors by the claimants who had employed the main contractors. The defendant subcontractors had allegedly been negligent in the laying of a factory floor, with the result that the floor was defective but not dangerous. The defect was, therefore, only one of quality. Under normal circumstances, tort would not compensate such defects, the usual remedy being an action for breach of contract. In this case, there was no claim available against the main contractors and the only hope of a remedy was in tort. It was held, on a preliminary point that there was a duty of care owed in the particular circumstances of this case. On its facts, it was difficult to envisage a situation closer to contract than this. The claimants had themselves specified which particular subcontractor should carry out the work. The defendants should, therefore, have known that the claimants would be relying upon their skill and experience. There was close proximity between the parties and there could be no fears of opening the floodgates to numerous claims arising out of this claim as the claimants were foreseeable as an individual enterprise.

The judges acknowledged that there were a number of policy decisions in this area, including *Spartan Steel v Martin*, and Lord Wilberforce's test established in *Anns* was discussed.

Lord Brandon dissented, fearing that tort was about to usurp the province of contract, and provide compensation for defects in the quality of manufactured and fabricated products.

The case was much criticised by academics in that it appeared to be an attempt to lay the foundations for a general duty of care relating to pure economic loss caused by negligent acts, where there was no danger to health or safety involved, and the courts began to draw back from the position in *Junior Books* as soon as opportunities presented themselves.

5.2.4 Contraction of liability

Following the decisions in which the scope of liability was extended, there were a number of cases in which it became apparent that the judges were having reservations about the rapid expansion of liability. As in *Junior Books*, the facts are somewhat complicated in these cases by a structure of contracts and of subcontracts.

However, this is often perceived as the reason for restricting further expansion of the scope of the duty principle.

In *Muirhead v Industrial Tank Specialities Ltd* [1985] 3 All ER 705, the Court of Appeal distinguished *Junior Books*. The claimants in this case were wholesale fish merchants who hit upon the idea of buying lobsters when they were cheap, storing them in tanks, and selling them some months later when lobsters were scarce and the prices were higher. They bought a tank for the purpose of storage from the first defendants along with seven pumps which the first defendants had obtained from the second defendants. The motors on the pumps had been manufactured in France and, because they were defective, they regularly cut out, with the result that the lobsters could not be stored and the claimants lost money. The claimants obtained judgment against the first defendants in contract, but they went into liquidation, so they sued the second defendants in tort. Their claim failed on the grounds that they could not rely on *Junior Books*. That case must, it was held, be restricted to its own very particular facts. There must be both real reliance by the claimant (such as nomination of a particular product, supplier or subcontractor) and close proximity between the parties before a duty of care will be held to exist in cases where there is a negligent act causing a defect in the quality of a product.

5.2.5 The courts recognise the artificial distinctions made in previous cases

In *D and F Estates v Church Comrs* [1988] 2 All ER 992, a firm of builders employed subcontractors to carry out plastering work in a block of flats. The subcontractors were negligent and the plaster began to fall off the walls some time after the flats had been let to various tenants. One of the occupants of the flats sued the builders (the main contractors) for negligence, alleging that they should have known that the plastering work was sub-standard. The sum claimed was the cost of replacing the defective plaster. In rejecting the claimant's claim, the House of Lords cast doubt on the decisions in the *Dutton* and *Anns* cases, on the grounds that economic loss was not recoverable in tort by a remote claimant if a defect is discovered before any actual damage involving danger to health or safety is done. In the words of Lord Bridge:

> If the defect is discovered before any damage is done, the loss sustained by the owner of the structure who has to repair or demolish it to avoid a potential source of danger to third parties would seem to be purely economic.

At last, the artificial distinction between damage to property and economic loss was openly recognised and rejected. The distinction has been further discredited in later cases (see *Marc Rich & Co v Bishop Rock Marine*).

In *Simaan General Contracting Co v Pilkington Glass (No 2)* [1988] QB 758, the defendant had supplied goods to a subcontractor engaged by the main contractor, and the main contractor, the claimant in this case, suffered a loss as a result. There was no liability in negligence here, as Bingham J said:

> There is no general rule that claims in negligence may succeed on proof of foreseeable economic loss caused by the defendant even where no damage to property and no proprietary or possessory interests are shown.

A number of other decisions limited the ambit of *Anns* by restricting the liability of local authorities.

In the *Governors of the Peabody Donation Fund v Sir Lindsay Parkinson & Co Ltd* [1985] AC 210, it was held that a local authority, which is exercising its supervisory powers under a statute, does not owe a duty of care to the owner of a building who employs architects or engineers for professional advice.

A greater burden is now placed on professional advisors than on local authorities, as was confirmed in *Investors in Industry Commercial Properties Ltd v South Bedfordshire DC* [1986] 1 All ER 787 and, indeed, in *Murphy v Brentwood DC* [1990] 2 All ER 908, which is discussed below. This can only operate to the detriment of the building owner, because local authorities have perpetual succession and do not disappear or go into liquidation in the same way as commercial enterprises.

5.2.6 The new limits on liability

The death-knell of *Junior Books* was finally sounded in *Murphy v Brentwood DC*. In 1970, the claimant bought a house which had just been built by a construction company, using a concrete raft to secure the foundations. The local authority had received plans and calculations for the foundations and had referred them to a firm of consulting engineers to be checked prior to approval being granted. On the recommendation of the consulting engineers, the local authority approved the plans under the building regulations. By 1981, it became apparent that the foundations were inadequate and, in 1986, the claimant sold the house for £35,000 less than it would have been worth without defective foundations. The claimant relied upon the fact that there was imminent danger to the health and safety of his family because gas and oil pipes had broken during settlement of the building. The House of Lords held that there was no liability on the part of the defendants. A dangerous defect which had manifested itself before it had actually caused physical injury, was pure economic loss. The true loss consisted of expenditure of money required to repair the building. This so called 'dangerous' defect was a defect in quality, and it was not the province of tort to provide a remedy for such defects. As the Lord Chancellor explained:

> In these circumstances, I have reached the clear conclusion that the proper exercise of the judicial function requires this House now to depart from *Anns* in so far as it affirmed a private law duty of care to avoid damage to property which causes present or imminent danger to the health and safety of owners, or occupiers, resting on local authorities in relation to their functions of supervising compliance with building bylaws or regulations, that *Dutton* should be overruled, and that all decisions subsequent to *Anns* which purported to follow it should be overruled.

The House of Lords made it clear that damage to another part of the same building or structure, caused, for example, by inadequate foundations, does not constitute 'damage to other property', and will not be actionable.

The House of Lords took the opportunity to state that the test established by Lord Wilberforce in *Anns* was not to be regarded as universally applicable.

Murphy was followed in *Department of the Environment v Thomas Bates & Son Ltd* [1990] 2 All ER 943, in which the claimants failed to obtain damages for the cost of repairing a building which had been constructed of low-strength concrete but was not dangerous.

This area of law was revisited in *Tesco Stores Ltd v Costain Construction Ltd and Others* [2003] EWHC 1487 (TCC). Tesco alleged that the spread of a fire in one of its stores was the result of the absence of fire-stopping measures. Preliminary issues in the claim arose concerning the liability of the builder and the architect. The Technology and Construction Court held that Costain owed Tesco a duty of care in negligence to carry out building or design work with the care and skill that could be expected of a reasonably competent contractor so that no damage resulted to the person or property and no economic loss occurred. However, the architect did not owe a continuing duty of care to review the building design.

Ironically, despite the fact that builders may now escape liability in negligence when there is no injury to health as a result of negligent construction work, there is still the possibility of a claim in nuisance if adjoining land is threatened and of highway nuisance for which liability may be strict if there is a threat to people using the highway (Markesinis and Deakin (1992)).

5.3 OTHER NEGLIGENT ACTS

The principles of law outlined above in relation to pure economic loss caused by careless acts have in some cases been extended to fact situations which do not involve builders and developers. For example: the limits of the duty of care owed by doctors in terms of economic loss were explored in *West Bromwich Albion Football Club Ltd v El-Safty* [2006] EWCA Civ 1299, where there was no contract, and it was not necessary to imply one, under which a private orthopaedic surgeon owed a duty to a football club to advise the club in respect of his treatment of one its players, and about its financial affairs. The surgeon owed no duty of care in tort in respect of foreseeable economic loss to the club resulting from the negligent treatment. The defendant had not assumed responsibility to the club in respect of financial losses which the club might incur as a result of the diminution in the value of one of its players caused by negligent medical treatment. There was nothing in their dealings with one another that indicated that the defendant would agree to be responsible to the club for economic losses which it might sustain. He

was paid under the insurance scheme to treat the players, not to treat the club, nor to advise it about the players or its financial affairs. It would not be fair, just or reasonable to impose such a duty.

5.4 SUMMARY

Looking back over the 1990s, it is possible to observe a period of expansion in the law relating to nervous shock and economic loss. However, the serious reservations which many academic lawyers and some senior judges expressed, particularly about economic loss, eventually gave way to a more restrictive approach and, as the decade passed, the scope of the duty of care relating to economic loss has in almost all its various aspects become narrower. Recent cases concerning nervous shock also indicate a more restrictive attitude. The trend towards a policy of expansion is unlikely to return in the foreseeable future.

The implications of this retreat have clear ramifications for business practice, for insurance, for individuals, and for lawyers, and it is interesting to note that a rather more relaxed and expansive attitude may be creeping back into the decisions since 1993, following cases such as *Spring v Guardian Assurance* [1995] 2 AC 296 and *Henderson v Merrett Syndicates* [1995] 2 AC 145. While these cases may turn on particular policy issues, the fact that the House of Lords has been prepared to expand the boundaries of liability for economic loss in these instances is certainly worthy of note, as many other cases are likely to turn on these decisions. The scope of the duty of care in relation to economic loss has caused much difficulty and for many of the same reasons as that relating to nervous shock. Policy considerations such as fear of too rapid an expansion of liability have been behind many of the decisions. Indeed, the reason given most commonly for restricting the scope of duty of care in economic loss cases is the fear of indeterminate liability despite the fact that in many of the cases there is no real possibility of indeterminate liability. There is a general arbitrariness in the decisions in this field of law and what appears to be judicial reluctance to deal with the policy issues openly. This has not always been the case in the courts of other common law countries where there is a tendency to lean in favour of house purchasers and subsequent property owners in claims involving economic loss.

FURTHER READING

Atiyah, 'Negligence and Economic Loss' (1967) 83 *LQR* 248
Cane, *Tort Law and Economic Interests*, Oxford University Press, 1996
Mullis and Nolan, 'All England Annual Review', (2007) 455–57
Stapleton, 'Economic Loss: A Wider Agenda' (1991) 197 *LQR* 249

For regular monthly up-dates on this area of law, see *Personal Injury Compensation*, published monthly by Informa UK Ltd.

CHAPTER 6

DUTY OF CARE – SOME PROBLEM AREAS

6.1 APPLICATION OF THE LAST LIMB OF THE *CAPARO v DICKMAN* TEST

Some complex areas of case law have developed around the 'fair, just and reasonable' limb of the criteria stated in *Caparo v Dickman*, and it follows that in many of these cases the courts are restricting the development of the law on the basis that it would not, for policy reasons, be desirable to extend the ambit of the duty of care in negligence. It is possible to categorise the cases by grouping them into recognisable areas which have been identified by judges and academic writers. Many of the cases involve the liability of public bodies such as the police and local authorities. There are some situations in which it has been established that no duty of care is owed – though instances are few and the law is seldom clear-cut. Most of these decisions rest on policy considerations, and some grey areas remain. This is an area of law in which competing policy considerations lead to shifts in liability that can be unpredictable. Some changes have been introduced since the implementation of the Human Rights Act 1998 and more can be expected.

6.2 LAWYERS

Until July 2000, a barrister (and any advocate, since the intervention of the courts with the Legal Services Act 1990) did not owe a duty of care to a client in connection with any representation in court or anything preparatory thereto.

This was decided by a unanimous House of Lords in *Rondel v Worsley* [1969] 1 AC 161. Although the exact scope of the immunity from action was unclear after it was extended in *Saif Ali v Sydney Mitchell & Co* [1980] AC 198, the rationale behind it was stated by the House of Lords to be based on public policy which, it was thought, demanded that barristers should not continually be looking over their shoulders in fear of negligence actions.

The question of advocates' immunity came before the Court of Appeal again in 1998 in *Arthur Hall & Co v Simons; Barrett v Woolf Seddon Cockbone v Atkinson, Dacre and Slack; Harris v Scholfield, Roberts and Hill* [1999] 3 WLR 873, where it was held that the immunity of advocates from negligence suits was justified by reference to public policy considerations. The Court of Appeal was clearly aware that the European Court of Human Rights (ECtHR) might be called upon to rule as to the compatibility of *Rondel v Worsely* with the European Convention on Human Rights, but treated that case as binding for these appeals. However, pending reconsideration of *Rondel* and *Saif Ali* by the House of Lords, it was held that the *ratios* of those cases were binding on the lower courts. The court took the view that any extension of the basic forensic immunity beyond the limit recognised in those cases must be scrutinised carefully.

However, the House of Lords in the appeal ([2000] 3 All ER 673) ruled that the immunity of advocates from claims arising out of the negligent conduct of cases has ended. The decision was unanimous in relation to civil cases, but three of the seven Law Lords dissented in relation to criminal cases. Thus, advocates may now be sued for negligence in relation to their performance in court or matters closely related to it. Their Lordships were of the opinion that there are unlikely to be problems of conflicting duties for advocates, who should always abide by their duties to the court. In *Wright v Paton, Farrell and Others* (2002) 27 August, Court of Session Outer House, it was held that advocates in Scotland retained their immunity, at least in criminal cases, despite Art 6(1) of the European Convention on Human Rights, and that *Arthur Hall v Simons* did not apply in Scotland.

The question of allegedly negligent advice by a barrister was considered again by the House of Lords in *Moy v Pettman Smith and Perry* [2005] UKHL 7. In that case the House of Lords recognised that the public interest no longer required barristers to be immune from liability, but emphasised that the application of that principle should not stifle an advocate's independence of mind and action in advising clients and conducting litigation. It was held that the barrister in question was not in breach of duty when the client had suffered economic loss in reliance on her advice, even though that advice was not as detailed as it might have been.

6.3 LEGAL PROCEEDINGS

Judges, witnesses and parties to legal proceedings do not owe a duty of care in relation to those proceedings on grounds of public policy (*Sirros v Moore* [1975] QB 118). The question of witness immunity arose in *Meadow v General Medical Council* [2006] EWCA Civ 1390, a case concerning Professor Sir Roy Meadow, who had given evidence for the prosecution at the trial of Sally Clark for the murder of her two sons. She was originally convicted, but later acquitted after a second appeal. During the criminal trial, Sir Roy Meadow had told the jury that there was a 'one in 73 million' chance of two children in a family like that of the Clarks, dying from cot death. Following a complaint by Sally Clark's father, the Fitness to Practise Panel of the GMC had found Sir Roy Meadow guilty of serious professional misconduct in respect of his behaviour as an expert witness, and he was struck off the medical register. The case eventually reached the Court of Appeal on the question of witness immunity after the High Court had ruled that Sir Roy Meadow should not be struck off the medical register. The trial judge had held that an expert witness would only lose immunity if his conduct had fallen far below what was expected of him. The Court of Appeal held that there was no basis, in principle, for an extension of witness immunity to fitness to practise proceedings. That was because fitness to practise proceedings had a purpose which was entirely different to that of civil proceedings, which was to ensure that professionally qualified people who were found to be unfit to practise did not do so. The Court decided that there should be no partial extension of immunity such as that proposed by the trial judge. It was for Parliament to introduce any such changes.

6.4 OTHER SOURCES OF COMPENSATION

It has been held in certain instances that no duty of care is owed where a remedy might be available under another compensation system, as in *Jones v Department of Employment* [1989] QB 1, when the social security system might have provided a remedy. However, more recently the view tends to be that the mere fact that an alternative compensation system exists does not preclude the existence of a duty of care in tort.

Matthews v Ministry of Defence [2003] UKHL 4 concerned a system of no-fault compensation for claims for damages by members of the armed forces injured in the course of employment. The issue of a certificate by the Secretary of State under s 10(1)(b) of the Crown Proceedings Act 1947 had the effect of barring claims by ex-servicemen against the Ministry of Defence, and they were compensated instead under the scheme, through the Naval, Military and Air Forces etc (Disablement and Death) Service Pensions Order 1983 (SI 1983/883). The claimant had contracted a very serious illness as a result of exposure to asbestos when carrying out his work on board ship in the Royal Navy between 1955 and 1968. The effect of the s 10 certificate was that the Crown was not liable to him in tort. At first instance the judge had held that the bar to the claim in tort was procedural only and was incompatible with the claimant's rights of access to the courts under Art 6(1) of the European Convention on Human Rights. The Court of Appeal allowed the Crown's appeal on the basis that s 10 was substantive and not procedural, and in those circumstances Art 6 did not apply. The claimant appealed, and conceded that in order to succeed in his appeal he needed to demonstrate that s 10 was a procedural bar used to defeat a substantive claim which was valid when proceedings were commenced. The House of Lords ruled that the argument that s 10 was a procedural bar ignored the reality of the circumstances, as s 10 of the Crown Proceedings Act 1947 substituted a no-fault system of compensation in many cases arising before 1987 and in cases of latent injury sustained before 1987. That was a matter of substantive law. The substitution by a state of a no-fault compensation in place of tort claims was not incompatible with Art 6(1) of the European Convention on Human Rights (*Dyer v UK* (1984) 39 D & R 246). The condition concerning the Secretary of State's certificate formed part of the substantive law and was not a procedural limitation. Accordingly, the appeal was dismissed. *Brooks v Commissioner of the Metropolitan Police* [2005] UKHL provides another example of this principle (see page 103).

6.5 CLAIMANT IS A MEMBER OF AN INDETERMINATELY LARGE CLASS OF PERSONS

No duty of care will arise if the claimant belongs to a class of people that is too large to allow any relationship to exist with the defendant. In *Goodwill v British Pregnancy Advisory Service* [1996] 2 All ER 161, no duty was owed by the defendants to the claimant when they gave negligent advice to a man having a vasectomy, who became the claimant's sexual partner some time later. The justification for this approach is that there is insufficient proximity between the parties and the potential claimant and it was not foreseeable at the time of the negligence.

In medical cases, the courts have been unwilling to extend liability beyond the immediate doctor/patient relationship. This is probably based on a fear that the floodgates will open to a large volume of litigation if a duty of care were to be found in relation to relatives and others who are not immediately proximate to the doctor and patient concerned. Cases include an unsuccessful claim by relatives of a child who died because of a negligent diagnosis and who claimed that there was a duty on the part of the doctors not to conceal the truth of what had happened (*Powell v Boldaz* (1997) unreported).

6.6 WRONGFUL LIFE

There is no duty of care in relation to wrongful life. In *McKay v Essex AHA* [1982] QB 1166, a child had been born with severe disabilities because her mother had suffered from rubella in the early stages of pregnancy. The defendants had been careless in their testing and treatment of the mother. The child, through her mother, claimed damages for negligence on the grounds that she should never have been born at all. She claimed that her mother should have been advised to have the pregnancy terminated. The claimant was denied a remedy because the court decided that no duty of care existed in such circumstances. To hold otherwise, it was decided, would be against public policy. This type of claim should be distinguished from claims for wrongful birth, in which the parents claim for damage which they suffer as a result of the birth of an unplanned pregnancy and birth (see *McFarlane v Tayside Health Board* [1999] 4 All ER 987).

In France a recent decision of the Supreme Court for civil and criminal matters (the *Cour de Cassation*) in effect recognised a right of action in similar circumstances to those in the *McKay* case (the case of Nicholas Perrouche).

6.7 THE POLICE

Although the police owe a duty of care to prisoners in their care (see *Clarke v Chief Constable of Northamptonshire Police* (1999) *The Times*, 14 June) it has been held in the past that they owe no duty of care to the public in general to prevent them becoming the victims of crime. However the developing law, in the light of the human rights framework, suggests that this rule is being eroded.

Hill v Chief Constable of West Yorkshire [1988] 2 WLR 1049 established that the mother of the last victim of Peter Sutcliffe, known as the 'Yorkshire Ripper', could not succeed in a claim against the police for negligence because no duty of care was owed to individual members of the public by the police. It could well have been that the police had not been sufficiently diligent in their investigation of the crime and that the mass killer should have been apprehended sooner, so avoiding the death of Jacqueline Hill. However, it was against public policy, and also very impractical, to hold that the police owed a duty of care. There could be no general duty of care in respect of the possible crimes which could be committed by a person whose identity was unknown to the police at the time, and there was no proximity in relation to this particular victim over and above any other potential victim. The only circumstances where a duty is owed by the police to the public would seem to be when they have a suspect in custody and negligently allow that person to harm someone, either by that person escaping or while in custody.

Osman v Ferguson [1993] 4 All ER 344 demonstrates the reluctance of the UK courts to find the police liable. In that case, the Court of Appeal refused to allow a negligence claim to proceed in circumstances where the police had chosen not to act on warnings that a teacher, who was infatuated with a pupil, was suffering from a psychiatric disorder and was likely to commit serious offences. In the event, the teacher killed the boy's father and seriously injured the son. The Court of Appeal recognised that there was 'an arguable case' based on the very close proximity between the police, the family and the teacher, whom they had interviewed about the acts of vandalism which he had previously committed at the boy's home. However, there was immunity from for negligence claims in cases involving the investigation and detection of crime. Lord Justice McCowan said:

> The House of Lords' decision on public policy immunity in the *Hill* case dooms this action to failure. It is a plain and obvious case falling squarely within the House of Lords' decision.

The relevant policy issues seemed to be the 'time, trouble and expense' which would be involved in defending such cases and the possibility of a flood of claims, coupled with the re-opening of cases without reasonable cause.

There can be no doubt on the facts that there was proximity between the parties and, for that reason, a *prima facie* duty of care arose. This would mean that the case does not fall squarely within the decision in *Hill v Chief Constable of West Yorkshire*, in which there was insufficient proximity to give rise to the initial duty of care.

The decision in the *Osman* case was later challenged in the ECtHR ((1999) 29 EHRR 245, [1999] 1 FLR 193). The Court reached the conclusion that the ruling made by the Court of Appeal in *Osman v Ferguson* breached Art 6 of the Convention (the right to a fair trial) because it had the effect of giving the police blanket immunity to negligence actions by denying that a duty was owed to all third parties. However, the Court emphasised the positive nature of the duty to safeguard life as one that should be interpreted so as not to impose an impossible or 'disproportionate' burden on public authorities. It should be noted that the ECtHR has since (*Z v UK* [2001] 2 FLR 612) admitted that its ruling in *Osman v UK* was founded on a misunderstanding of UK tort law and the rules of procedure that allow the courts to strike out claims that disclose no reasonable cause of action.

The basic principle in *Hill* – that immunity should cover situations relating to the detection of crime – was extended in later cases (see, for example, *Clough v Bassan* [1990] 1 All ER 431) and the special position of the police was restated in *Ancell v McDermott and Another* [1993] 2 QB 161, in which it was held that the police are under no duty of care to road users in general to protect and warn them of particular road hazards which are within their knowledge but which the police have not created. In this case, the police had become aware of an incident in which diesel fuel was spilled onto the road, but although they reported the matter to the local highways department, they did not attempt to warn approaching vehicles. A car skidded on the spilled fuel, one person was killed and several were injured. The Court of Appeal invoked the 'incremental approach' to negligence and considered what was just and reasonable in the circumstances, rejecting the notion that there could be a single general test for the duty of care which can be applied to every situation. In the circumstances of this particular case, it would be unfair to impose a duty of care on the police. Lord Beldam said:

> A duty of care would impose upon a police force potential liability of almost unlimited scope. Not only would the class of persons to whom the duty was owed be extensive, but the activities of police officers which might give rise to the existence of such a duty would be widespread.

It is interesting to note that, in using these criteria, Lord Beldam used the very words of Lord Wilberforce in *Anns v Merton BC* [1978] AC 728 when he established a two-stage test which the Court of Appeal in this case rejected (see Chapter 3, above).

In *Alexandrou v Oxford* [1993] 4 All ER 328, it was held at first instance that the police did owe a duty of care to the claimant because they had been alerted by a burglar alarm which was sited on the claimant's shop premises and, when activated, signalled the police station. The police had been in breach of their duty when they had failed to check the premises properly after they had been alerted to the possible presence of an intruder. On the specific facts of this case, it is possible to distinguish it from cases which fall within the *Hill* principle because there was an assumption of responsibility by the police for the safety of the premises when they had agreed to the direct line between the burglar alarm and the police station. Yet, on appeal, it was held that this case fell within the *Hill* principle and, indeed, that it was indistinguishable from *Hill*. Explaining the relationship which arose as a result of the direct line to the police station, Glidewell LJ said:

> If as a result . . . the police came under a duty of care to the claimant, it must follow that they would be under a similar duty to any person who informs them, whether by a 999 call or in some other way, that a burglary . . . is being or is about to be committed. It follows, then, that . . . there was no special relationship between the claimant and the police.

The reasoning in this case is difficult to understand in terms of proximity because common sense suggests that there is a very obvious distinction between the general relationship which the police have with the public at large (as in *Hill*) and the very much closer proximity which exists between police officers at a particular station and an individual who has chosen, and indeed paid, to have a direct line from his or her burglar alarm to that police station. It is much easier to rationalise the outcome which the judges required in this case in more general terms of public policy, on the grounds that it would not be fair, just and reasonable to impose a duty of care in the circumstances of the case. However, the only fair and just reason for denying the existence of a duty in this situation must be some preconception that there is a need to protect the police from litigation. Several justifications have been advanced for such a view. It was suggested in *Hill v Chief Constable of West Yorkshire* that fear of litigation might lead to 'defensive policing', which would add to the cost and time spent by the police in dealing with investigations, with no obvious public benefit.

A second justification lies in the proposition that no individual should be burdened with the duty to protect others from the acts of third parties, though there are recognised exceptions to this, as in *Dorset Yacht Co Ltd v Home Office* [1970] AC 1004.

The third justification can be found in the wider public policy context of policing generally, where there is a well established principle of public law that the courts will not interfere with police discretion except in the most extreme circumstances. This is especially important at higher levels of policing when the cases indicate that enormous discretion is vested in a chief constable in relation to how he or she decides upon policing

priorities for his or her area, although, of course, police officers of even the lowest ranks are sometimes required to exercise discretion at street level. Chief constables regularly make important decisions as to what particular crimes they intend to target within their budgets. In one area, motoring offences may be a priority; in another, catching burglars or drug dealers or controlling prostitution may be the focus of attention; in yet another, inner city policing or controlling demonstrators may be the main target of funds, and so on, but, providing the chief constable is acting within the law and does not abdicate responsibility for law enforcement, the courts will not question his or her priorities. This attitude was reflected in Lord Scarman's report on the Brixton riots, which concludes:

> The exercise of discretion lies at the heart of policing . . . Successful policing depends on the exercise of discretion in how the law is enforced. The good reputation of the police as a force depends upon the skill and judgment which policemen display in the particular circumstances of the cases and incidents which they are required to handle.

Despite the general public policy rule that there is no duty of care owed by the police to the public as a whole, each case should be decided on its own particular facts, and it is possible to find cases in which the police *have* been held to owe a duty of care.

In *Swinney v Chief Constable of Northumbria Police* [1997] QB 464, a claim was allowed to proceed, the Court of Appeal taking the view that it was at least arguable that the police owed a duty of care to informants to ensure that confidential information that they had provided to the police was not lost or stolen from a police vehicle. The public policy considerations were more evenly balanced in this case than in *Hill v Chief Constable of West Yorkshire, Alexandrou v Oxford* and *Ancell v McDermott*. The policy arguments involved were discussed fully, as was the ruling of the ECtHR in *Osman v UK*), in the course of the judgment.

In *Waters v Commissioner of Police for the Metropolis* [2000] 4 All ER 934, the House of Lords distinguished *Hill*, because the case involved an allegation of rape by one officer against a colleague, which had allegedly been negligently investigated by the police. The distinction was explained on the grounds that this was an employment situation, and as such it required a duty of care to be exercised by the employer in relation to his employees.

A related problem was raised in *Elguzouli-Daf v Comr of Police of the Metropolis and Another* [1995] 1 All ER 833 and *McBreaty v Ministry of Defence and Others* (1994) *The Times*, 23 November. The claimant in the first case had been detained and charged by the police with handling explosives after a bomb had been planted at a Royal Marine barracks, but he continued to maintain that he was innocent and that traces of explosive substances on his hands were the result of innocent contamination. After 85 days in custody, the Crown Prosecution Service (CPS) offered no evidence against him at committal proceedings because they could not exclude the possibility of innocent contamination. He brought a claim for negligence against the CPS on the grounds that the prosecution should have been discontinued earlier and he should have been discharged from custody sooner, as the flaw in the evidence had been apparent from the start. The claimant in the second case had been charged with rape and, after he had been in custody for 22 days, the CPS abandoned the prosecution because forensic examination had revealed that semen on a swab taken from the victim could not have been his. He claimed that the CPS had been

negligent in not obtaining, processing and communicating the negative results of the forensic tests sooner. The Court of Appeal upheld the decision at first instance that both claims should be struck out. The policy issues were considered by the court, and on balance it was decided that the welfare of the community as a whole outweighed the interests of individualised justice, so precluding the existence of a duty of care by the CPS to individuals aggrieved by CPS activities. The fear that a defensive approach by the CPS might inhibit the discharge of its central function of prosecuting crime was an important factor in the decision. Accordingly, it would not be fair, just and reasonable to impose a duty of care on the CPS in relation to people who might be prosecuted by them. In arriving at this view, the Court of Appeal considered the earlier case of *Welsh v Chief Constable of Merseyside Police* [1993] 1 All ER 692, in which the CPS had been found negligent in not informing the magistrates' court that the Crown Court had already taken the accused's previous offences into account, as a result of which he was re-arrested and detained further. It was decided that the *Welsh* case was distinguishable from the two cases before the Court of Appeal because, in that case, there had been a clear assumption of responsibility by the CPS to keep the magistrates' court informed of the fact that the claimant's previous offences had already been taken into consideration by the Crown Court. The judge had repeatedly emphasised that this was of particular importance. It follows that there may still be some cases in which the CPS may owe a duty of care to those people whom it prosecutes, providing a sufficient relationship of proximity can be established through the special assumption of particular responsibility for the accused.

There are some apparently contradictory decisions in this area of law and it should be emphasised that each case turns on its own facts. For example, in *Cowan v Chief Constable for Avon and Somerset Constabulary* [2001] EWCA Civ 1699, the Court of Appeal took the view that no duty of care was owed by the police to an assured tenant to prevent his eviction without a court order in breach of the Protection from Eviction Act 1977. The claimant was an assured tenant under the Housing Act 1988 and his tenancy could only be lawfully ended if the landlord obtained a court order. In December 1997, he received notice to quit from his landlord and on 23 February 1998, two men called at the property and told him to be out of the premises by 6 pm that day, threatening him with violence. The claimant called the police and two officers called at the property and told him to call again if the men returned. At about 6 pm, the claimant spotted four men taking property from a house opposite, so he called the police and the same two officers returned. They spoke to the landlord over the telephone, who confirmed that the property had been sold and that the claimant had been given notice to leave. A police sergeant and another officer arrived. The sergeant was uncertain who had the legal right to the property and decided not to reinstate the claimant, fearing that it might lead to violence. The officers knew nothing about the Protection from Eviction Act 1977 and thought their role was to prevent a breach of the peace. On 7 March 2000, one of the men who had evicted the claimant pleaded guilty to an offence under s 1 of the 1977 Act, and the claimant issued proceedings in negligence against the Chief Constable, on the basis that the officers who attended the property owed him a duty of care to take steps to prevent the commission of the crime under the 1977 Act. The Court of Appeal decided that any duty owed by a chief constable to arrange training for his officers had to be a duty owed to the public as a whole, and concluded that there was no special relationship between a chief constable and an individual member of the public in that respect on the basis of *Hill v Chief*

Constable of West Yorkshire. A duty of care would only be owed by the police to an individual if a particular responsibility towards that individual arose, establishing a sufficiently close relationship.

The court concluded that in this case the mere presence of the officers at the scene was not enough to establish the necessary special relationship. Something more than attendance at the scene was necessary. Here the claimant had been threatened and although it may have been arguable that the police assumed a responsibility for his personal safety they did not assume responsibility to prevent the eviction. Even if there had been a sufficiently proximate relationship to give rise to a duty of care to prevent an attack, it did not follow that that relationship gave rise to a duty of care to prevent eviction. The court accepted the argument that public policy did not demand that a duty of care be imposed upon the police towards individual citizens to prevent crime, as there was no sufficiently weighty countervailing public interest to make such a duty of care appropriate, just or reasonable.

It seems that the assumption of responsibility is an important factor in determining the existence of a duty of care in cases involving the police and the CPS. In *Kirkham v Chief Constable of Greater Manchester* [1990] 3 All ER 246, it was decided that the police had been negligent in not informing the prison service that a prisoner whom they were placing in their care was a suicide risk. The decision was based on the fact that the police, in taking the man into custody, had assumed responsibility for him. The same principle applies, as will be seen in relation to the assumption or imposition of responsibilities, in the rescue cases.

Hill v Chief Constable of South Yorkshire [1988] 2 WLR 1049, which is the basis of many of the decisions discussed in this section has not been followed in certain other jurisdictions, and there are those who would argue that produces unfair decisions in individual cases. For example, it was not followed in Canada in *Doe v Board of Commissioners of Police for Metropolitan Toronto* (1989) 58 DLR (4th) 396; *Jane Doe v Board of Commissioners of Police for Municipality of Metropolitan Toronto* (1990) 72 DLR (4th) 580, 585; *Jane Doe v Board of Commissioners of Police for Municipality of Metropolitan Toronto* (1998) 160 DLR (4th) 697; *Odhavji Estate v Woodhouse and others* [2003] 3 SCR 263. Nor in South Africa – *Carmichele v Minister of Safety and Security* (2001) 12 BHRC 60; see also *Hamilton v Minister of Safety and Security* 2003 (7) BCLR 723. In the UK the House of Lords revisited the principles established in the Hill case in *Brooks v Commissioner of Police for the Metropolis* [2005] UKHL 24. The claimant in that case was present during the notorious incident when his friend Stephen Lawrence was abused and murdered by a racist gang. He was himself also abused and attacked, and was deeply traumatised by his experiences that night and in the following weeks. A public inquiry into the killing (The Stephen Lawrence Inquiry: Report of an Inquiry (1999) Cm 4262–I) revealed that the police investigation into the incident was conducted very badly, and that the claimant himself was treated shabbily. The position was summarised in the report that was cited by the House of Lords:

> Mr Brooks saw his friend murdered, dying on the pavement, and dead as he was carried into the hospital. And he has had to endure that night, and the whole course of the failed investigation. He was a primary victim of the racist attack. He is also the victim of all that has followed, including the conduct of the case and the treatment of himself as a witness and not as a victim.

Criticisms of the conduct of police officers towards Mr Brooks included the following:

- 'We have to conclude that no officer dealt properly at the scene with Mr Brooks.'
- 'There is no evidence that any officer tried properly to understand that this was so, and that Mr Brooks needed close, careful and sensitive treatment.'
- 'We are driven to the conclusion that Mr Brooks was stereotyped as a young black man exhibiting unpleasant hostility and agitation, who could not be expected to help, and whose condition and status simply did not need further examination or understanding.'

The claimant, who had developed post traumatic stress disorder from which he still suffers, issued proceedings for negligence, false imprisonment, misfeasance in public office and breaches of s 20 of the Race Relations Act against the Commissioner of Metropolitan Police and a number of other individuals, all but one of whom were police officers. The Commissioner applied to strike the claim out on the grounds that it disclosed no reasonable grounds for bringing a claim. The Court of Appeal allowed the claimant's appeal against the trial judge's decision on false imprisonment and the Commissioner accepted that ruling. The Court of Appeal dismissed the claimant's appeal on the question of misfeasance in public office and the claimant did not appeal on that point.

The focus of the appeal by the Commissioner to the House of Lords was the question of the duties of care owed by the police to Mr Brooks. He did not challenge the ruling in Hill but argued that it did not prevent his submission that the police owed him a common law duty to take reasonable steps to assess whether he was a victim of crime and then to afford him reasonable protection, support, assistance and treatment if he was so assessed; to take reasonable steps to provide him with the protection, assistance and support usually given to key eye-witnesses to serious crimes of violence; and to give reasonable weight to the account of the events that he gave and to act upon it accordingly.

The House of Lords examined the authorities on the duties of police officers towards the victims of crime, and reversing several of the findings of the Court of Appeal, unanimously held that the claimant could not proceed with a claim for damages in negligence against the police for the manner in which he was treated by the police. No duty of care was owed by the police to ensure that either a victim or a witness did not suffer psychiatric harm as a result of police actions or omissions, in accordance with the principles in *Hill v Chief Constable of West Yorkshire* [1988] 2 WLR 1049. The House of Lords concluded that there was no basis for imposing on the police any of the three legal duties asserted by the claimant, since to do so would interfere with the freedom of action which the police needed when investigating serious crime. The principle established in Hill should be judged in the light of legal policy and the European Convention of Human Rights, and although with hindsight not every aspect of the decision in Hill could now be supported, the core principle had remained unchallenged in UK domestic jurisprudence and European jurisdiction for many years and it must still stand. The three duties of care relied upon by the claimant were inextricably bound up with the police function of investigating crime, which was covered by the principle in Hill. Lord Bingham explained:

> These are not duties which could be imposed on police officers without potentially undermining the officers' performance of their functions, effective performance of which serves an important public interest.

Lord Steyn was in broad agreement, but left open the possibility of a challenge to Hill, saying:

> I am not to be taken as endorsing the full width of all the observations in *Hill v Chief Constable of West Yorkshire* [1989] AC. There may be exceptional cases where the circumstances compel the conclusion that the absence of a remedy sounding in damages would be an affront to the principles which underlie the common law. Then the decision in Hill's case should not stand in the way of granting an appropriate remedy.

Lord Steyn's speech is instructive, as he reviews all the authorities on the duties of the police, including *Hill*. Reiterating what was said by Lord Keith in the *Hill* case he points out that police officers like everyone else may be liable in tort to a person who is injured as a direct result of their acts or omissions, and may be liable for assault, unlawful arrest, wrongful imprisonment and malicious prosecution, and in appropriate cases, for negligence. The cases in which negligence has been established are *Knightley v Johns* [1982] 1 WLR 349 and *Rigby v Chief Constable of Northamptonshire* [1985] 1 WLR 1242. Police officers also owe the general public a duty to enforce the criminal law – *R v Commissioner of Police of the Metropolis, Ex parte Blackburn* [1968] 2 QB 118. However, chief officers of police have a wide discretion as to the manner in which the duty is discharged depending on how available resources should be deployed, whether particular lines of inquiry should or should not be followed and whether certain crimes should be prosecuted. Common law lays down no specific requirements as to the manner in which a chief officer's duty must be discharged, and therefore there is no intention in the common law to create a duty towards individual members of the public.

Lord Steyn referred to several cases in which Hill was relied upon as authoritative, including *Calveley and Others v Chief Constable of Merseyside Police* [1989] AC 1228, *Alexandrou v Oxford* [1993] 4 All ER 328, 340J; *Ancell v McDermott* [1993] 4 All ER 355, O*sman v Ferguson* [1993] 4 All ER 344 and *Cowan v Chief Constable for Avon and Somerset Constabulary* (2002) HLR 830.

Turning to the status of *Hill* in modern law, Lord Steyn pointed out that there have been developments which affect the reasoning of that decision in part, not least among these being the decision of the European Court of Human Rights in *Z and others v United Kingdom* 34 EHRR 97, in the light of which he suggests that the principle in *Hill* should be reformulated in terms of the absence of a duty of care rather than a blanket immunity. He took the view that a more sceptical approach to the carrying out of all public functions is necessary nowadays. He also welcomed the concession by counsel for the Commissioner that cases of assumption of responsibility under the extended *Hedley Byrne* doctrine fall outside Hill and that in such cases there is no need to consider whether it is 'fair, just and reasonable' to impose liability for economic loss – *Williams v Natural Life Health Foods Limited* [1998] 1 WLR 830.

Despite these modifications, he emphasised that the core principle established in *Hill* remained unchallenged in UK domestic jurisprudence and in European jurisprudence for many years, and concluded that if a similar case arose for decision today it would be decided in the same way. Accepting that it is desirable that police officers should treat victims and witnesses with respect, he did not consider that it would be appropriate 'to convert that ethical value into general legal duties of care on the police towards victims and witnesses.' He continued:

> A retreat from the principle in Hill would have detrimental effects for law enforcement. Whilst focusing on investigating crime, and the arrest of suspects, police officers would in practice be required to ensure that in every contact with a potential witness or a potential

> victim time and resources were deployed to avoid the risk of causing harm or offence. Such legal duties would tend to inhibit a robust approach in assessing a person as a possible suspect, witness or victim.

Finally, he pointed out that when claims in tort and the Race Relations Act 1976 (as amended) are inapplicable, an aggrieved citizen may have to be content with pursuing a complaint under the constantly improved police complaints procedure.

As to the questions concerning the duty of care in relation to Mr Brooks, Lord Steyn agreed with Lord Bingham's view that the three alleged duties were inextricably bound up with the police function of investigating crime which is covered by the principle in *Hill*, and was satisfied that the three duties of care put forward in this case were conclusively ruled out by the principle in *Hill*, as restated, and should be struck out.

Once the police have custody of a prisoner, they have responsibility for the care of that individual and owe him or her a duty of care. In *Reeves v Comr of Police for the Metropolis* [1999] 3 WLR 363, the House of Lords held that, where the police owed a duty to a prisoner to ensure that he did not commit suicide, they were not entitled to rely on defences of *volenti* or *novus actus interveniens* (see Chapter 20) if a breach of their duty did in fact result in the suicide of the prisoner. However, the amount of damages awarded would be reduced where the prisoner was of sound mind, in order to take account of contributory negligence.

In *L (A Minor) v Reading BC and Chief Constable of Thames Valley Police* [2001] 1 WLR 1575, the Court of Appeal ruled that it was at least arguable that there was sufficient proximity between a police officer and a suspected child victim for a duty of care to have arisen during an interview. The court was also of the view that it was arguable that a duty of care was owed to a father suspected of child abuse.

Despite a cautious approach to the imposition of a duty of care on public authorities, the Court of Appeal held, in *Van Colle v Chief Constable of Hertfordshire* [2007] EWCA Civ 325, that the police did have a duty to take preventive measures in order to protect a witness who was being threatened, and who was later murdered, and that the police were in breach of their duty, and had acted in a manner that was incompatible with the European Convention on Human Rights 1950 Art 2. However, the Court reduced the award of damages made by the trial judge to the estate of the deceased and to his parents under the Human Rights Act 1998 s 8, on the grounds that it had been too high.

The Court took the view that the question in cases of this kind was whether there was any real and immediate risk to the life of the witness, and this should be considered in the context that the person concerned was not simply any member of the community in general, but was a prosecution witness at a criminal trial (see also *R (on the application of DF) v Chief Constable of Norfolk* (2002) EWHC 1738 and *R (on the application of Bloggs 61) v Secretary of State for the Home Department* (2003) EWCA Civ 686, [2003] 1 WLR 2724).

The Court of Appeal again considered the nature of the duty owed by the police in *Smith v Chief Constable of Sussex* [2008] EWCA Civ 39, and held that a claim in negligence against the police should not be struck out in the specific circumstances of that case. They had allegedly been told of death threats, but had not taken the necessary steps to protect the victim. The claimant alleged that he had told police officers on several occasions that his former partner was threatening to kill him, and that they had ample evidence to arrest him and should have done so. The death threats were both abusive and aggressive.

While investigations were on-going, the claimant was attacked and seriously injured by his former partner. At first instance, the chief constable had applied to strike out the claim, and the trial judge held that there was insufficient proximity between the claimant and the police to give rise to a duty of care in negligence. In his view, the claimant was an ordinary member of the public, and special protective measures were unnecessary. He based his decision on the view that public policy was against the imposition of a duty of care on the police. The Court of Appeal disagreed and unanimously found that there was a justiciable cause of action.

The earlier authorities were carefully reviewed, and the Court pointed out that anyone considering a claim in negligence should have regard to the European Convention on Human Rights 1950 Art 2 (the right to life) – *Officer L, Re* (2007) UKHL 36, [2007] 1 WLR 2135. The police could not be expected to be answerable in negligence to everyone whose life or health might have been spared by better policing, but if the life of a particular individual had been placed in the hands of the police in so clear a way that they should be expected to take at least basic steps to protect it, failure to do so could result in a claim for negligence if harm resulted. The Court was of the view, citing *Osman v United Kingdom* (23452/94) (1999) 1 FLR 193 ECHR, that if an informer was entitled to police protection, a witness should be also, either under ECHR Art 2, or at common law.

The claimant was in a very different position from ordinary members of the public, and the police, once they had been alerted, could not escape responsibility. They were not in the same position as ordinary passers-by, as their public office required them to take some action to assist. Lord Justice Sedley emphasised the potential impact of the Human Rights Act and the ECHR on the common law, recognising that:

> If there is a Convention value in play here, it is the right to life enshrined in Article 2, with the derivative obligation upon states, developed in the Court's jurisprudence, to take reasonable steps to protect human life.

The other members of the Court of Appeal agreed, and Lord Justice Pill was impressed by the human rights arguments saying:

> In *Osman v The United Kingdom* [1998] 29 EHRR 245, paragraph 116, the ECtHR considered the effect of *Hill v Chief Constable of Yorkshire* [1989] 1 AC 53. The court held that there was no breach of Article 2 on the facts of that case but that what it saw as a blanket immunity granted in Hill was a breach of Article 6 of the Convention.

He concluded that in his view there was a strong case for developing the common law action for negligence in the light of Convention rights. Time will tell as to whether this is in fact what happens.

It was at least arguable that the police owed the victim a duty of care. Lord Justice Sedley, who examined the common law cases in detail, commented that:

> There is nevertheless an unanswered question as to how, if at all, the common law of negligence is to develop in response to the Human Rights Act and the Convention values it imports.

6.7.1 The human rights arguments

The European Convention on Human Rights considered the policy adopted by the UK courts in the police cases in *Osman v UK* (1999) 29 EHRR 245. The ECtHR ruled, by

17 votes to three, that, although there had been no violation in the *Osman* case of Arts 2 and 8 of the Convention (the right to life and the right to private life respectively), the exclusionary rule established by the House of Lords in *Hill v Chief Constable of West Yorkshire*, based on public policy, which operates as a watertight defence for the police in civil claims, amounts to a disproportionate restriction on the rights of individuals.

The ECtHR stated in the later case of *Z v UK* [2001] 2 FLR 612 that the views expressed by that Court in *Osman v UK* were based on a misunderstanding of the distinction between procedural rules and rules of substantive law (see 6.7, above).

As all UK courts are obliged to take the European Convention into account in their deliberations where appropriate since the Human Rights Act 1998 came into force in October 2000, this decision is of great importance in cases concerning the duty of care owed by public services.

The European Court of Human Rights reiterated its criticisms of UK law in *Bubbins v United Kingdom* (Application number 50196/99). A man had been shot dead by police officers during a house siege. It emerged later that the gun he had been holding was only a replica. A police investigation and later the Police Complaints Authority, confirmed that there had been no wrongdoing by the police. A coroner's jury had returned a verdict of lawful killing. The man's sister who was the applicant in this case was refused legal aid to commence judicial review proceedings, and continued to the ECHR. There it was decided that the UK was in breach of Art 13 of the European Convention. It is likely that these cases influenced the Court of Appeal in *Van Colle v Chief Constable of Hertfordshire* [2007] EWCA Civ 325, and *Smith v Chief Constable of Sussex* [2008] EWCA Civ 39, which is discussed earlier in this chapter.

6.8 CLAIMANT CAUSED HIS OR HER OWN MISFORTUNE

No duty of care is owed when it can be shown that the claimant caused his or her own misfortune. In *Governors of the Peabody Donation Fund v Sir Lindsay Parkinson & Co Ltd* [1985] AC 210, it was decided that the claimants were not owed a duty of care because they should have taken independent advice from a qualified expert to ensure that building regulations were followed. The same principle underlies the defence of *volenti non fit injuria* or consent (see Chapter 20).

6.9 RESCUE CASES

It appears that there is no general duty in UK law at present to rescue a person in danger. This is based on the principle that there is no liability for a 'pure' omission that applies in cases of failure to rescue or failure to warn. In theory, it is possible to watch a child drowning in a puddle without attracting legal liability. In *Yuen Kun Yeu v Attorney General of Hong Kong* [1988] AC 175, Lord Keith said there is no liability on the part of a person 'who sees another about to walk over a cliff . . . and forbears to shout a warning'. However, if a person undertakes responsibility to carry out a specific duty towards an individual, a duty of care is owed to that person and, in some instances, the law imposes such a duty even if the person upon whom the duty is placed does not wish to take it on. Thus,

parents are expected by law to care for their young children, and parents would have a duty of care in relation to their children who are in danger and require rescuing.

Similarly, people employed to undertake rescues, such as ambulance drivers and firemen (*Salmon v Seafarer Restaurants Ltd* [1983] 3 All ER 729), or other caring duties, have a duty of care to potential victims if they have details of the precise situation in which the victim is to be found (see 6.4.2, below). This duty may be described in the employment contracts of members of the rescue services.

However, in *Digital Equipment and Others v Hampshire CC* (1997) *The Independent*, 10 April, the Court of Appeal held that merely by attending and fighting a fire, a fire brigade was not under a duty of care to owners of the premises on which the fire was burning. The fire brigade would only be liable if it had negligently created a further danger causing extra damage (unless it could be shown that the particular damage would have occurred in any event). Stuart Smith LJ explained that a fire brigade did not enter into a relationship of sufficient proximity with the occupier or owner of the premises to give rise to a duty of care merely by attending to fight a fire.

A classic example is that of a doctor who owes a duty of care to his or her own patients, as indeed any sensible person might assume, and as has been well-established in case law (*Bolam v Friern Hospital Management Committee* [1957] 2 All ER 118). If a hospital doctor fails to treat a patient, that omission could amount to negligence (*Barnett v Chelsea and Kensington HMC* [1969] 1 QB 4282). Yet, if the same doctor drove past an accident whilst off duty and did not intervene to help the injured, there would probably be no negligence. A doctor's legal duty does not currently extend to the whole world. 'Good Samaritan' acts may be avoided by doctors, as, once embarked upon, they could attract liability if the doctor is careless in the treatment given. A rescuer owes a duty to those rescued to carry out the rescue using reasonable care. There are some exceptions to these rules. For example, midwives owe a duty of care by statute to attend any woman in labour and rules of maritime law require the operators of fishing vessels in the North Sea to go to the aid of other vessels in distress. Even if a person has been responsible for the safety of another, that duty may cease. In *Griffiths v Brown* (1998) *The Times*, 23 October, it was held that a taxi driver owed no duty of care to a passenger who was clearly drunk once he had set him down close to his destination.

It remains to be seen whether the Human Rights Act 1998 will lead to the development of a duty to rescue in UK law. Such a duty does exist in Australia (*Lowns v Woods* [1996] Aust LR 81–376) and in French law.

6.10 LOCAL AUTHORITIES AND NHS ORGANISATIONS

The question of whether a duty of care is owed by various public authorities is frequently brought before the courts. Claims for negligence against public bodies appear to fall into a category of their own, and special rules are applied in some cases. The situation has become more complicated since the introduction of the Human Rights Act 1998 which creates a new cause of action against public authorities. Claims in negligence will fail if the decision or act of a public authority is not justiciable – that is, not suitable to be decided by a court. There have been several cases concerning the duties owed by local authorities, health authorities and others to children and adults with special needs and to

those in their care. Courts are reluctant to impose a common law duty in negligence if the effect might be to discourage a proper performance of a statutory duty.

6.10.1 Health authorities and local authorities

In general NHS organisations, such as NHS Hospital Trusts, Primary Care Trusts (called Local Health Boards in Wales), owe a duty of care in negligence to patients for whom they have responsibility. However, there are some borderline cases in which the law is not clear. For example, some of the earlier authorities reveal a harsh attitude towards victims of crime committed by psychiatric patients. In *Palmer v Tees HA and Hartlepool and East Durham NHS Trust* [1999] Lloyd's Rep Med 351, the Court of Appeal ruled unanimously that a health authority owed no duty in respect of the death of a child, Rosie Palmer, who was murdered by a psychiatric outpatient. This decision was not unexpected, in view of the restrictive approach taken in the past in cases of this kind, the most celebrated being that of *Hill v Chief Constable of West Yorkshire*.

The Court of Appeal decided the *Palmer* case on the basis that there was insufficient proximity to impose a duty of care in negligence on a health authority in relation to a child who was sexually abused and murdered by an outpatient. Nor was a duty owed to the child's mother in respect of psychiatric injury suffered on learning of her daughter's injuries and death. The defendants and their predecessors had been responsible for administering and managing the NHS Trust where a patient, Shaun Armstrong, had received treatment, and for providing psychiatric care and care in the community.

Shaun Armstrong had, on 30 June 1994, abducted, sexually abused and murdered four year old Rosie Palmer. He was diagnosed as suffering from personality disorder and psychopathic disorder, and had attempted suicide five times. In June 1993, while in hospital, he had told his carers that a child would be murdered when he was discharged from hospital. It was argued on the claimant's behalf that the defendants had failed to recognise a real, substantial and foreseeable risk that Shaun Armstrong would commit serious offences against children, causing injury or death, and that they had failed to take steps to treat him and/or detain him in order to reduce that risk.

The Court of Appeal agreed that the three-stage test for a duty of care established by the House of Lords in *Caparo* should be applied here. On that basis, it was not sufficient to say that the mother's mental anguish and psychiatric injury were foreseeable. A link based on proximity was necessary. The situation here was distinguishable from that in *Dorset Yacht Co v Home Office*, where borstal boys readily and repeatedly escaped and interfered with yachts in the immediate course of their escape. That was foreseeable, as was the risk of damage to yachts, and, most importantly, the potential victims in the *Dorset Yacht* case were identifiable.

The crucial authority on the matter was considered to be *Hill v Chief Constable of West Yorkshire*. The facts in that case differed from those in *Palmer*, but *Hill* had established that the vital principle was that there must be some relationship between the defendant and the victim, and the victim must have been identifiable as an individual. An important question was what measures the defendants could have put in place to avoid the specific danger to the child. In this case, the victim and her mother were not identifiable as particular individuals who might suffer damage. This meant that there was insufficient proximity between the victims and the defendants, who could not have known and

warned them about the danger, even if it had been realised. Accordingly, the Court of Appeal ruled that the judge had correctly held that there was no proximity as between the respondents and the murdered child. It was inevitable that the claim would fail. The appeal was dismissed. The claims in respect of the child's death and her mother's psychiatric injury on learning of it both failed.

For policy reasons, the courts have been reluctant to establish that a duty of care exists in claims of this kind. The dominant reason given in the cases is the fear of a flood of claims, but the families of victims of crimes committed by psychiatric patients have been pressing for an extension of liability. Pressure groups such as the Zito Trust are anxious for members of the public to be provided with better protection, even at the expense of the liberty of psychiatric patients.

In *Clunis v Camden and Islington HA* [1998] 3 All ER 180, the Court of Appeal held that there is no common law duty which exists alongside the statutory duty on a health authority to provide aftercare services under s 117 of the Mental Health Act 1983. The claimant, who suffered from schizophrenia, had been convicted of manslaughter after he had killed a complete stranger in an unprovoked attack. His claim against the defendant health authority was based on the contention that there had been a breach of a common law duty owed to him to treat him with reasonable care and skill while he was at large in the community.

A review of the cases concerning the position of local authorities in cases involving children indicates that the Courts are ambivalent as to the scope of the duty of care. Cases concerning wrongful accusations of child abuse give rise to particular difficulties and apparent injustices, especially in the light of rulings by the European Court of Human Rights.

In *X v Bedfordshire County Council* [1995] 2 AC 633 five children complained that they had been maltreated and neglected, and that although the defendant council had been informed about this, it had failed to act on the information for some considerable time. The facts, which were assumed when the strike-out application was heard in this country but which were later established or accepted when the claimants took their complaint to the European Court of Human Rights, were distressing. The children's experiences were described as 'horrific', and a senior paediatrician stated in evidence that this was the worst case of neglect and emotional abuse that she had seen in her professional career: *Z v United Kingdom* (2001) 34 EHRR 97, para 40. It was accepted in the European Court of Human Rights that the neglect and abuse suffered by the applicants reached the threshold of inhuman and degrading treatment, and amounted to a violation of Article 3 of the European Convention, arising from the failure of the UK system to protect the children from serious, long-term neglect and abuse. The European Court of Human Rights awarded compensation to the children amounting to £320,000. However, the failure of the local council to intervene, as a result of which the abuse and neglect had continued, had been held by the Court of Appeal and the House of Lords to afford the children no tortious remedy in negligence against the local authority in English law, on the basis that no duty of care was owed to them by the defendants.

M v Newham London Borough Council [1994] 2 WLR 554 also gave rise to serious concerns about the scope of the duty of local authorities in the UK. In that case there was reason to believe that M, aged four years old, had been sexually abused. During an

interview by healthcare professionals, it was thought that the child had identified her mother's partner as the abuser. However, it seems that the child had in fact referred to a cousin who used to live in the house, and who had the same first name. The child was taken from the mother's care for a period of almost a year, and during that time the mother was not permitted to see the video and transcript of her child's interview. Only when the video and transcript were seen by the mother's solicitors did it become clear that the healthcare professional had mistaken the identity of the abuser. Mother and child both brought a claim for damages against the employers of the healthcare professionals involved, but in domestic proceedings the mother's claim was dismissed by the Court of Appeal and the House of Lords. Both were successful before the European Court of Human Rights in Strasbourg, in establishing that there had been a violation of Art 8 (the right to privacy and family life), and this ruling was based not on the fact that the child had removed from the mother's care but on a failure to disclose to the mother immediately the matters as evidence that the child could not be returned safely to her care. Psychiatric disorders were suffered by both mother and child – *TP and KM v United Kingdom* (2001) 34 EHRR 42. As in *X v Bedfordshire* a human rights violation had afforded no remedy in tort on the basis that no duty of care was owed to those concerned. In ruling that it was not fair, just and reasonable to impose a duty of care on the healthcare professionals towards the claimants in those cases, the House of Lords was strongly influenced by policy considerations identified in the opinion of Lord Browne-Wilkinson expressed as follows:

> Is it, then, just and reasonable to superimpose a common law duty of care on the local authority in relation to the performance of its statutory duties to protect children? In my judgment it is not. Sir Thomas Bingham M.R. took the view, with which I agree, that the public policy consideration which has first claim on the loyalty of the law is that wrongs should be remedied and that very potent counter considerations are required to override that policy. However, in my judgment there are such considerations in this case.

S v Gloucestershire County Council [2001] Fam 313 concerned a claim for damages in negligence against a local authority for abuse suffered by an individual during a placement with foster parents. The Court of Appeal allowed his appeal against the striking out of his action, while at the same time upholding the decision to strike out another action which was also the subject of appeal.

In *W v Essex County Council* [2001] 2 AC 592, the facts of which are described in chapter four, the claim was made not only by children but also by parents, and here the House of Lords held that the parents' appeal should be allowed because it was at least arguable on the facts that a duty of care was owed to them. It could not be said that the argument that a duty of care was owed to the parents and that there had been a breach of that duty by the local authority was unarguable. It was inappropriate to strike out without investigation of the full facts and the factors that had influenced the decision of the local authority.

Foster carers have huge responsibilities when local authorities place difficult children with them. However, a High Court judge held in *Lambert v Cardiff City Council* [2007] EWHC 869 QB, that a local authority was not liable for psychiatric injuries caused by a teenager's harassment of her former foster carers. The court ruled that the authority did not owe them a duty of care, since the imposition of a duty would have resulted in the need to insure carers against such injury. The fostering agreement, which

provided that the authority would insure the carers, was not legally enforceable as a contract.

Proceedings in *L (A Child) and Another v Reading Borough Council and another* [2001] 1 WLR 1575, brought by a daughter and her father, arose out of a fabricated complaint by the mother to a local authority and police authority that the father had sexually abused the child. The authorities had accepted the complaint as true, though it later transpired that it was completely fabricated, and the claimants sought damages for negligence against both authorities. The local authority did not apply to strike out either claim, but the police authority did. The trial judge struck out the father's claim against the police but allowed the child's negligence claim to proceed. The Court of Appeal allowed the father's appeal on the basis that it would be inappropriate to strike out on the basis of assumed facts.

In *Bluett v Suffolk County Council* [2004] EWCA Civ 1707 the Court of Appeal held that despite some obvious difficulties, a claim against a local authority for breach of a common law duty of care by a social worker would be allowed to proceed because the claimant had an arguable case that had some real prospect of success. The claimant had sustained serious injuries after jumping from a third-floor window to escape an attack by three non-residents of the hostel accommodation found for her by a social worker from the local authority. Although her parents had parental responsibility, the local authority had undertaken to advise and befriend her.

In the light of all the authorities, and the decisions of the European Court of Human Rights, it cannot now be argued that no common law duty of care is owed by healthcare professionals to children. The position of parents is rather different though, as the courts have responded differently to different sorts of claims. In *A and B v Essex County Council* [2002] EWHC 2707 (QB), [2003] 1 FLR 615 a claim by adoptive parents for damages against a local authority was successful at first instance, and an appeal was dismissed, albeit on somewhat different grounds: *A and another v Essex County Council* [2003] EWCA Civ 1848, [2004] 1 WLR 1881.

JD v East Berkshire Community Health NHS Trust; MAK v Dewsbury Healthcare NHS Trust; RK v Oldham NHS Trust [2005] UKHL 23 provides a strong indication of a very cautious attitude on the part of the judiciary to suggestions that the scope of the duty of care should be extended in cases of this kind. In that case the House of Lords dismissed appeals by parents falsely accused of child abuse, and confirmed that they were not entitled to claim damages against local authorities and health authorities for psychiatric harm arising from false allegations by child welfare professionals. The parents appealed against the ruling of the Court of Appeal (2003) EWCA Civ 1151, on the preliminary issue of law, that their claims for damages for psychiatric injury against doctors or social workers who had mistakenly decided that the parents had abused or harmed their children, should be struck out on grounds of public policy. The parents had suffered recognised psychiatric illnesses following allegations that they had caused illness and/or injuries to their children. They alleged that there had been a negligent misdiagnosis of non-accidental injuries. In some instances the parents had also suffered financial loss.

All the events had taken place before the coming into force of the Human Rights Act 1998. In the first appeal, a mother claimed that she had suffered acute anxiety and distress allegedly as a result of a false accusation that she was suffering from Munchausen's syndrome by proxy. In the second and third appeals a father and his child

and another set of parents claimed damages for psychological injury allegedly caused by false allegations of sexual and physical abuse made about them, as a result of which they were separated from them temporarily. In each case, the claims had been dismissed at first instance on the basis of preliminary decisions that the defendants owed no duty of care to the claimants, since in accordance with the ruling in *X v Bedfordshire County Council; M v Newham London Borough Council* [1995] 2 AC 633, it would not be 'fair, just and reasonable' to impose such a duty, though this ruling had since been modified in relation to the duty owed to children in such cases, as opposed to parents.

The Court of Appeal had held that the question as to whether the imposition of a duty was fair, just and reasonable should be decided on the facts of each individual case, but acknowledged that there were strong public policy reasons for concluding that no duty of care was owed in negligence to parents in relation to decisions concerning child abuse or childcare. In situations when the question was whether proceedings should be brought for the removal of a child from his or her parents, a common law duty of care could be owed to a child but not to the parents. Interestingly, the Court ruled that the decision in *X v Bedfordshire* did not comply with the Human Rights Act 1998 as regards the children, and that it was no longer good law to rule that as a matter of law no common law duty was owed to a child in the investigation of suspected child abuse and the commencement of care proceedings.

On appeal to the House of Lords the parents argued that the health care professionals' duty to children to exercise proper skill and care in the investigation of suspected abuse extended to the parents of those children as their primary carers.

The House of Lords, dismissing the appeals, held (Lord Bingham dissenting) that health professionals did not owe a duty of care to people suspected of having carried out abuse where those suspects suffered psychiatric injury, as long as the investigation was undertaken in good faith, even if it was undertaken carelessly. The question as to whether doctors or social workers owed a duty of care to parents depended on whether, applying the test laid down in *Caparo Industries plc v Dickman* [1990] 2 AC 605, 618, 'the court considers it fair, just and reasonable that the law should impose a duty of a given scope upon the one party for the benefit of the other'.

The majority reasoned that at common law alleged interference with family life did not justify a higher level of protection for suspects of child abuse than for other suspected criminals. The reason for this was that there was a conflict between the interests of the parents and the children in such cases. It followed that health professionals who acted in good faith in what they believed were the best interests of the child, should not be subject to conflicting duties when investigating allegations of abuse. A lower level of protection was necessary for parents in these circumstances, the appropriate level of protection being that clinical and other investigations must be conducted in good faith. This would afford suspected parents a similar level of protection to that afforded generally to persons suspected of committing crimes.

The House of Lords based this opinion on the view that the respondents did not owe substantially the same duty of care to the parents as to the children, because there was insufficient sufficient proximity between the parents and the healthcare professionals to give rise to existence of a duty of care. As the Court of Appeal held, there were reasons of public policy for ruling that no common law duty of care should be owed

to the parents, and it was accordingly not fair, just and reasonable to impose such a duty, *Caparo Industries plc v Dickman* [1990] 2 AC 605.

Lord Bingham, who dissented, reasoned that he would not strike out the claims as he was in favour of the courts being allowed to carry out a full exploration of the facts. He argued that it would involve a small incremental development to recognise that the present claims were at least arguable, and that whereas in earlier cases (*X v Bedfordshire*) it had been held that no duty of care was owed to children there were instances of that having been extended by the courts. The same principle should be applied to parents. Such an extension of the duty of care did not in his view undermine the need (identified by Lord Laming in the Inquiry into the death of Victoria Climbie CMD 5730, 2003, at the hands of an abusive relative) for effective communication between healthcare professionals; and if there was an occasional need for healthcare professionals to take emergency action without informing parents, that would not displace a rule that healthcare professionals should assume that parents were the people who normally had the closet concern for the interests of their children. As he pointed out:

> What appeared to be hard-edged rules precluding the possibility of any claim by parent or child have been eroded or restricted. And a series of decisions of the European Court of Human Rights has shown that application of an exclusionary rule in this sensitive area may lead to serious breaches of Convention rights for which domestic law affords no remedy and for which, at any rate arguably, the law of tort should afford a remedy if facts of sufficient gravity are shown.

In other jurisdictions, such as France and Germany, claims by parents were not summarily dismissed, and in Lord Bingham's opinion, matters should be dealt with under the concept of breach of duty rather than duty of care, which had proved a blunt instrument for those identifying claims which should lead to recovery, as opposed to those which should not. He favoured evolutionary and incremental development of the law of tort, 'so as to fashion appropriate remedies to contemporary problems.'

Lord Nicholls expressing the majority opinion, acknowledged at the outset that 'it must be every parent's nightmare to be suspected of deliberately injuring his or her own child.'

He pointed out that normally the interests of parent and child coincide, but that this is not the case when a parent deliberately harms his child, so that consideration of the liability of doctors and social workers in such cases calls for two countervailing interests to be taken into account – the need to safeguard children from abuse by their parents – and the need to protect parents from unfair and undesirable interference with their family life. Clearly, child abuse is one of the worst forms of criminal conduct, but is peculiarly difficult to combat, and this means that investigations require intrusion into highly sensitive areas of family life, with the added complication that a parent responsible for abuse may well give a false account of the child's history. The opposing interest is the interest of the parent in his family life, an interest that is regarded as highly important by Article 8 of the European Convention on Human Rights, derogations from which required strong justification. The question raised by these appeals, as the House of Lords accepted, was how the opposing interests can best be balanced when a parent is wrongly suspected of having abused his child. The majority view was that health professionals must act in good faith, and not recklessly, that is, without caring whether an

allegation of abuse is well-founded or not. As Lord Nicholls pointed out, misfeasance in public office calls for an element of bad faith or recklessness.

The crucial question in this case was whether the potential disruption in family life justified the imposition of a duty of care on those investigating suspected abuse by parents and carers who are under investigation. In the majority view, it did not. In the words of Lord Nicholls:

> The seriousness of child abuse as a social problem demands that health professionals, acting in good faith in what they believe are the best interests of the child, should not be subject to potentially conflicting duties when deciding whether a child may have been abused, or when deciding whether their doubts should be communicated to others, or when deciding what further investigatory or protective steps should be taken. The duty they owe to the child in making these decisions should not be clouded by imposing a conflicting duty in favour of parents or others suspected of having abused the child.

The best interests of children in cases of suspected abuse were that healthcare professionals should report and investigate all the circumstances in consultation with other similar professionals. This process should not be impeded by the existence of a duty of care in negligence to the parents, though healthcare professionals should act in good faith. Lord Nicholls did not favour an approach that dealt with the issue on the basis of breach of duty rather than duty of care, as suggested by Lord Bingham, because he thought that this would lead to a period of uncertainty in this important area of law. He admitted that the suggestion that the common law should 'jettison the concept of duty of care as a universal prerequisite to liability in negligence', and make use of breach of duty to accommodate the complexities arising in certain areas of human activity, had its attractions. He also explained that he realised full well that it was difficult to identify the parameters of expanding areas of the law of negligence, especially in relation to the discharge of statutory functions by public authorities. However, he expressed some reservation about attempting to 'transplant this approach wholesale into the domestic law of negligence in cases where, as here, no claim is made for breach of a Convention right.'

Lord Rodger, concurring, added two further points. First, that if the duty of care were to be extended to parents, that would open the floodgates to further claims by other relatives, friends, teachers, child minders and so on. Second, as the events in the cases before the House of Lords took place before the Human Rights Act 1998 came into force, he reserved his opinion as to whether it would be appropriate in such cases to modify the common law of negligence, rather than to found an action on the convention.

The result of this decision is that where medical diagnoses of abuse are flawed, parents cannot bring claims against the investigators unless it is possible for them to prove bad faith. Thus except in extreme cases where bad faith is obvious, the courts cannot inquire into whether investigations of suspected abuse were conducted negligently.

The law in this area remains confused. It is possible to find cases in which the courts continue to apply that established line of authorities to the effect that there is no recognised cause of action relating to a duty of care owed by a local authority to parents in the process of investigating cases of suspected child abuse. The High Court took the

view that it is not fair, just or reasonable to impose a duty of care to parents in the conduct of the investigation in *L and B v Reading Borough Council; Wokingham District Council; Chief Constable of Thames Valley* [2006] EWHC 2449. Here the defendants applied to strike out B's claim for damages arising from the actions and decisions of social workers employed by them. The social workers had suspected B, one of the claimants, of sexually abusing his daughter when she was young, and had prevented him from seeing her for several years. That allegation was later proved to have been unfounded and B sought damages from the local authority. The application before the court concerned B's cause of action for vicarious liability on the part of the local authorities for the alleged negligence of their social workers, whom he argued owed him a duty of care. The local authorities argued that the legal landscape had changed, and that it was not fair, just or reasonable for a local authority to owe a duty of care to parents who were being investigated for suspected child abuse. It was held that there was little to be gained by postponing the determination of the preliminary application until the date of trial itself, and that the correct procedures for B's advisors to have followed would have been to seek a short hearing before the judge so that he could decide whether the hearing should proceed. The judge decided to deal with the application of the local authorities to strike out the claim there and then. He decided that when professional social workers and others were investigating whether a child had been abused, it would not be fair to impose upon them a duty on them to take account of the risk that the parents might suffer harm in the process. If the professionals were to owe a duty to the parents as well as to the children, it would be very difficult for them to consider the interests of both – *JD v East Berkshire Community NHS Trust* (2005) UKHL 23 was applied.

It is clear that it will be very difficult for parents falsely accused of child abuse to succeed in claims for damages against local authorities and health authorities for psychiatric harm arising from false allegations made against them. The scope of the duty of care in such cases is limited at present and for the foreseeable future. Another recent case involved similar, though not identical facts. In *AD v Bury Metropolitan Borough Council* [2006] EWCA Civ 1, a case which did not involve sexual abuse but non-accidental injury. The mother M, and C, her child, appealed against the dismissal of their claims for negligence against the local authority. C had sustained four fractured ribs at the age of five months when he was being cared for by his parents. Local authority social workers suspected that the injuries were non-accidental and obtained an interim care order. M consented at that time to a residential family risk assessment, and the interim care order was renewed. C was placed with foster parents for four months. It emerged that C was suffering from brittle bone disease and that the rib fractures were not caused by abusive parents. C was returned to his parents and the care proceedings were discharged. M and C had commenced proceedings for negligence against the local authority, alleging that they had both suffered psychological harm, but the trial judge had dismissed both claims, finding that the local authority did not owe a duty of care to M. The local authority did concede that it owed a duty of care to C, but the judge ruled that any damage he had suffered by being removed from his parents was only temporary and minimal, so it was non-justiciable. The Court of Appeal held that a local authority did not owe a duty of care to parents in the conduct of care proceedings in respect of their child. The mere fact that part of the investigation, after the making of an interim care order, was conducted by agreement with the parents, did not mean that a duty of care had arisen.

These decisions were further reinforced by the Court of Appeal in *L v Pembrokeshire County Council* [2007] EWCA Civ 446. L appealed against the decision of a trial judge striking out her claim against the local authority, for negligence. Social workers employed by the authority, P, had put L's children on the child protection register for some 14 months. The ombudsman had upheld several complaints by L of maladministration on the part of the authority, and had recommended that that they compensate L. Spurred on by this development, L issued proceedings against P for breach of the duty of care owed to her in negligence. The trial judge had held that the reasoning of the majority of the Law Lords in *JD v East Berkshire Community Health NHS Trust* (2005) UKHL 23, that no duty of care was owed by professionals investigation allegations of child abuse to parents who were suspected of abusing their children, had not been affected by the incorporation of Art 8 European Convention on Human Rights 1950 into domestic law. L argued before the Court of Appeal that Art 8 demanded an evolutionary change in the law of negligence in circumstances when it overlapped with the right of a parent to respect for family life. L contended that the court could and should take a 'small incremental step' further than the approach of the House of Lords in *JD v East Berkshire*, so that full effect could be given to the use of Art 8 to support the interests of parents in family life, as much as that of the child.

However, the Court of Appeal, dismissing the appeal, refused to endorse the 'small incremental step' on the grounds that it would take the development of the law too far. There was a public interest in effective and fair investigation of criminal matters such as child abuse, which had shaped the common law to protect those suspected of child abuse from malice or bad faith, but not from well-intentioned, albeit negligent, mistakes. There was a need to protect those who had a duty to investigate and enforce the law in good faith from the imposition of a duty in negligence which might inhibit them in the effective fulfilment of their duty.

In *B v Reading Borough Council and Others* [2007] EWCA Civ 1313; *The Times*, December 27, 2007 the Court of Appeal rejected yet another claim alleging negligence by social workers, and holding that there was no primary or vicarious liability on the part of the local authority. A social worker and a police officer had interviewed B's daughter (L) and a police officer who formed the opinion L had been sexually abused by B. The local authority brought care proceedings and, after a long hearing, the judge found that B had not sexually abused L in any way. Eventually L went to live with B, who instituted proceedings against the local authority. He contended that the social workers had owed him a duty of care, and that the local authority was vicariously liable for breach of duty.

The Court of Appeal held the trial judge had been correct in holding that the social workers owed no duty to B, applying the principles in *JD v East Berkshire*. It followed that B could not succeed on the basis of a direct duty, unless it was 'fair, just and reasonable' to hold that the social worker owed B a duty of care. The *JD v East Berkshire* principles led to the conclusion that the social workers owed no duty of care to B as a parent suspected of child abuse, and that the contrary was not arguable. It was not arguable that the social workers ever assumed any legal responsibility to B.

However, despite these harsh decisions, it is important not to lose sight of the fact that there may well be a duty to a person who was the victim of abuse in childhood (*Pierce v Doncaster MBC* [2007] EWHC 2968 (QB) *The Times*, December 27, 2007). Such a person may be able to succeed in a claim for damages even after the normal limitation period has

expired – *A v Hoare; C v Middlesbrough Council; X v Wandsworth LBC; H v Suffolk County Council; Young v Catholic Care* [2008] UKHL 6.

In the field of education and other local authority activities, a rather different approach applies. This is illustrated by *Phelps v Hillingdon London Borough Council* [2001] 2 AC 619, which was one of four appeals heard together by an enlarged committee of the House of Lords. In each of the cases the claimant alleged negligent decisions concerning his or her education made by the defendant local authorities. In three of the cases the Court of Appeal had struck out the claim and in only one had it been allowed to proceed. The House of Lords unanimously dismissed the local authority's appeal in that last case but allowed the appeals of the claimants in the other three, ruling that it was clear in principle that a teacher or educational psychologist could owe a duty of care to a child as well as an employing authority.

However, in *E v Dorset CC* [1994] 3 WLR 853 the Court of Appeal took the view that, at least at common law, it is arguable that a duty of care is owed by the employees of local authorities, including teachers and educational psychologists, to ensure that children with special needs do not suffer when they are not provided with special facilities. In *Dowling v Surrey CC and Another* (1994) unreported, it was held that a local authority owed a duty of care to children who are left by their parents in the care of childminders whom they approve and register. The county council officers were aware that there was a significant risk to any young child left in the care of a particular registered childminder and they were in breach of their duty when they did not warn the parents of the risk and a child was injured.

In *Gower v Bromley LBC* (1999) *The Times*, 28 October, the Court of Appeal held that the staff at a special school for disabled pupils owed them a duty of care to educate them in accordance with their needs. The local authority could be vicariously liable if teaching staff failed in this duty. The claimant was 16 years old and was suffering from the degenerative disease known as Duchenne muscular dystrophy. This illness affects speech and movement, but not intellectual capacity. However, he had been educated between the ages of nine and 12 at a school where he alleged that the staff were professionally incompetent and where he had not been provided with the necessary electronic equipment which would have enabled him to learn and to communicate and socialise effectively. Although his parents had removed him from this school at the age of 12, he had failed educationally and had suffered psychological and emotional damage. He alleged that he had suffered damage as a result of the failure of staff to make appropriate educational provision for him at the correct standard to meet his specific requirements.

In *Carty v Croydon London Borough Council* [2005] EWCA Civ 19, the claimant, who had special educational needs, alleged that the defendant authority had been in breach of its duty of care in failing to provide him with appropriate education. The Court of Appeal agreed with the trial judge that the allegations of negligence had not been made out, but before so doing, the question of whether a duty of care arose in the circumstances of the case was examined. Dyson LJ warned that it would not be easy to establish the existence of a duty in cases such as this. It would only be considered fair, just and reasonable to impose a duty in order to avoid decisions of local authority officers that were plainly wrong, and a common law duty of care could not be founded on failure of a public authority to perform a statutory duty or power (*Gorringe v Calderdale Metropolitan Borough Council* [2004] UKHL 15 – see Chapter 11). However, although there

was no duty owed in this case, there could be instances in which a duty of care could be owed by education officers to children with special needs.

The history of this area of law is interesting, as general proposition would appear to have been established early on in the history of public liability in tort that if the basis of a claim is the defendant's failure, as a public body, to exercise a statutory power or duty, the defendant will only be liable if a private person would also be liable in the same circumstances – *East Suffolk Catchment Board v Kent County Council* [1941] AC 74. By the time *Stovin v Wise (Norfolk County Council third party)* was decided [1996] AC 932, the approach taken by the courts was much more restrictive and it was very difficult indeed to establish the existence of a duty of care in tort. In that case, the House of Lords held that no duty was owed to the claimant when the local authority had failed to exercise their power under s 79 of the Highways Act 1980 to remove a dangerous bank obscuring the view on a road, which could give rise to a common law duty in negligence.

Gorringe v Calderdale Metropolitan Borough Council [2004] UKHL 15 took the same line of reasoning still further. The House of Lords held in that case that the rule extends to both powers and duties of public authorities. The duty to promote road safety in s 39 of the Road Traffic Act 1988 did not of itself give rise to liability at common law. The duty was owed to the public in general rather than to any particular individual, and failure to exercise it would not give rise to the existence of a duty of care.

These cases may be difficult to reconcile with developments in cases concerning other areas of public life and the entire picture would benefit greatly from clarification.

In *Barrett v Enfield BC* [2001] 2 AC 550, it was held that a claim by a person who alleged that he had not been properly cared for while in local authority care under the Children Act 1989 should not be struck out, and that the claimant should have the right to fight the case in court. This was a landmark case, and it has been followed by other claims brought by people who believe that they were mistreated in local authority care. The appellant had been taken into care but had never been placed for adoption. He alleged that this failure on the part of the local authority had caused him to suffer psychiatric illness and difficulties with alcohol. He had been moved six times to different homes and he claimed that the local authority had failed to safeguard his welfare.

Again, in *Bluett v Suffolk County Council* [2004] EWCA Civ 1707, the Court of Appeal did not rule out the possibility of claim against a local authority arising out of the alleged negligence of a social worker. The local authority had assumed responsibility for the claimant and a social worker had helped her to find accommodation in a hostel. The claimant had jumped from a window to avoid physical attack, and had suffered injuries.

The appeal concerned the preliminary point as to whether the issue was justiciable in the light of earlier rulings in which it had been held that local authorities do not owe a duty of care to children in certain circumstances. The House of Lords distinguished this case from *X (Minors) v Bedfordshire CC*, which concerned the decision whether or not to take the initial step of taking a child into care, whereas *Barrett* concerned events which had occurred when the child had already been taken into care. Explaining that it would be proper to proceed with the decision on an 'incremental' basis, as required by *Caparo*, Lord Slynn explained that each case should be considered in the context of its own facts and of the particular statutory framework which was applicable, in order to decide

whether the matter was justiciable. In this particular case, the allegations were directed at the way in which the local authority had exercised its powers, and it was arguable that, as far as some of the allegations were concerned, a duty of care had been owed by the local authority, and that had been broken. However, the case also involved the question of the exercise of discretion as to whether to place the child for adoption, which the trial court might find not to be justiciable at all.

The interests of the child could not be properly protected if there was no jurisdiction to consider whether a duty of care existed and it by no means followed that, if the court were to decide that a child could not sue his or her parents for negligent decisions made by them in relation to upbringing, there could necessarily be no duty imposed on a local authority. The House of Lords considered that the question of whether it would be just and reasonable to impose a duty of care on the local authority should not be decided in the abstract for all acts or omissions of local authorities, but each case should be considered on its own facts.

Although the issues in the *Barrett* case were not clear cut, and the court was of the view that the claimant might experience difficulties in his claim, he was entitled to have the allegations investigated. He was not a member of an indeterminate class but was identifiable as an individual already in the care of the local authority, and one who had been placed there by the operation of statute. Thus, it would not constitute a new category of negligence to hold that the defendants owed him a duty of care. As this was a difficult and developing area of law, it would be wrong to decide issues on the basis of hypothetical facts without considering the details of individual cases. *Osman v UK* was mentioned as an example of a case which involved Art 6 of the European Convention on Human Rights and the question of whether a public body (in that case, the police) could owe a duty of care in negligence. English law had been criticised by the ECtHR, which considered that, in the light of that decision, it would be difficult to foretell what would be the result if the case were struck out by the House of Lords. *Barrett* is a landmark decision because it marks a move away from the old approach which dealt with the issues in terms of public law towards a direct application of the principles of negligence.

This area of law is exceptionally difficult because of the complexity of the issues involved, and because the law gives a discretion to public bodies such as local authorities. Many of the cases concern omissions on the part of those bodies, rather than positive acts of negligence. Several earlier decisions (see *Anns v Merton BC* and *Dorset Yacht Co v Home Office*) had established that, if a discretion is imposed on a local authority, there could only be liability if it were exercised so carelessly and unreasonably that there had been no exercise of the discretion imposed by Parliament; then the body concerned could not be said to have exercised the discretion at all and would have acted outside the statutory power. If the exercise of the discretion involved policy making about matters such as allocation of resources, it would be extremely difficult to establish that a local authority had acted beyond the power given to it by Parliament.

The questions to be determined are: first, whether the alleged negligence in the exercise of the discretion granted by statute involved policy considerations – if so, the matter would be non-justiciable; and, second, whether the acts which formed the basis of the cause of action fell within the scope of the statutory discretion – if they did not, the question as to whether it would be fair, just and reasonable to impose a duty of care should be considered by the court. What the House of Lords concluded in *Barrett*, which

concerned the *way* in which a discretion was exercised, is that it is a matter for the judge at the trial to decide whether the case gives rise to policy issues such as the balancing of competing interests and, if so, at that stage the case can be struck out as non-justiciable but it should at least go ahead for the matter to be decided at full trial, and not simply struck out on the basis of generalisations drawn from other cases and hypothetical facts.

There are still situations in which it is necessary to prove *Wednesbury* unreasonableness: first, where a claim is brought against a public authority for failure to exercise a power conferred by statute, *Stovin v Wise* [1996] 3 All ER 801 and secondly, where a decision by a public authority is found to be non-justiciable, it might be the case that a claim in negligence could still succeed if the decision by a public authority failed the test for *Wednesbury* reasonableness (*Dorset Yacht Co v Home Office*, *per* Lord Diplock).

6.11 DUTIES OWED BY EMERGENCY SERVICES

Basic principles of tort were relied upon in the arguments presented in the case of *Kent v Griffiths, Roberts and London Ambulance Service* (2000) Lloyds Law Rep 109 concerning the duty of care owed by an ambulance service. Despite the cases in which it has been held that there is no general duty of care owed by public services, such as the police and fire brigade, the claimant in this case relied on the contention that, once she had been named and her condition and address were known to the ambulance service, and had relied on the service to take her to hospital and to provide any treatment required en route, a duty of care to her as an individual would arise.

The full trial of this case on liability was held later in the High Court and resulted in an appeal to the Court of Appeal. In *Kent v Griffiths, Roberts and London Ambulance Service (No 2)* [2000] 2 WLR 1158, the appeal concerned the question of whether the ambulance service owed a duty of care to a particular patient in the circumstances of the present case and whether there had been a breach of that duty. (It had previously been decided in an earlier appeal by a differently constituted Court of Appeal, on the preliminary matter as to whether the claim should be struck out as disclosing no justiciable cause of action, that there was indeed an arguable case.)

The facts of *Kent* are as follows. The 26 year old claimant, who was married with one child, was pregnant for the second time. She suffered from asthma and on 16 February 1991 she was very wheezy, so she telephoned her doctor, who arrived at the house at around 4 pm. At 4.25 pm, she telephoned the third defendant, using the 999 service. She gave her name, age and address, and an indication of her medical condition, and requested that an ambulance be sent to the claimant's home at once as a matter of urgency, to take her to Queen Mary's Hospital. The person who received that telephone call agreed to direct an ambulance to the house, the distance from the ambulance station to the claimant's home being about seven miles. The nationally recommended maximum standard time from the receipt of a call to arrival of an ambulance at the scene was 14 minutes.

At 4.38 pm, the claimant's husband telephoned the ambulance service, and he was told that they were well on their way. At 4.54 pm, the doctor telephoned the ambulance service again and was told that 'the ambulance is on its way to you, it should be a couple of minutes'. In fact, the ambulance did not arrive until some 38 minutes after the first call,

and the first defendant then travelled with the claimant in the ambulance on the journey to the hospital, which took about six minutes. They arrived at around 5.15 pm. During the journey to the hospital, the claimant was given oxygen intermittently but, before the journey was over, she suffered a respiratory arrest, resulting in serious memory impairment, a personality change and a miscarriage.

Turner J had ruled that the ambulance service was in breach of its duty of care to the claimant. He stated:

> I should have found it offensive to and inconsistent with concepts of common humanity if, in circumstances such as the present, where there had been an unreasonable and unexplained delay in providing the services which the ambulance service was in a position to meet, and had accepted that it would supply an ambulance, the law could not in its turn provide a remedy.

It was accepted by the defence that two of the requirements for the existence of a duty of care, as stated in *Caparo*, were present here. These were foresight and the requirement that it should be fair, just and reasonable for a duty to exist. However, the defendants contended that the necessary relationship of proximity between the parties, also laid down as a requirement in that case, was not present. The Court of Appeal rejected this argument, holding that the ambulance service is more aptly compared with a hospital or health service than with other emergency or voluntary services. The ambulance service was held to be at least under a public law duty as part of its statutory function. It was wholly inappropriate to regard its officers as volunteers, as the defence had suggested. The judge at first instance had been correct in holding that the ambulance service owed a duty of care to the claimant and had, in all the circumstances of the case, been in breach of that duty.

The Court of Appeal held that, in certain circumstances, an ambulance service could be liable to a patient if an emergency 999 call has been accepted and the ambulance fails, for no good reason, to arrive within a reasonable time. However, it was held that there is no general duty owed to the public by the ambulance service to respond to a telephone call for help. It is crucial that a 999 call must have been accepted and that the patient was relying on the timely arrival of an ambulance. Lord Woolf remarked that the case might well have been differently decided if the question of resources had been raised, as the courts are reluctant to be drawn into arguments about resources.

It is common practice for the person, usually a doctor, who calls for the ambulance to state not only the name and address of the patient, but also to give some details about the condition of the patient, indicating the urgency of the situation. It does seem fair, just and reasonable in those circumstances that a duty of care should be found to exist once the call has been accepted and is relied upon. The patient is not a member of an indeterminate class and is likely to suffer physical harm rather than pure economic loss or mere property loss. The need for an ambulance to attend is dependent upon the supply of sufficient information for the ambulance service to enable it to recognise the urgency of the situation and the address or location of the patient. It will still be possible, in future cases, to defend a claim based on non-attendance or late attendance, if it can be proved that weather or traffic conditions prevented the ambulance reaching the patient either in time or at all. This matter would be considered under the general heading of breach of duty. However, the court rejected the argument that there might not be a duty of care if there were a conflict of priorities at the scene of an accident. Lord Woolf considered that

the issue of breach of duty might be sufficient to provide a defence in an appropriate situation.

In *R v Comr of Customs and Excise ex p F and I Services Ltd* (2000) *The Times*, 26 April, the judge remarked that the scope of duties owed by public authorities in the exercise of their statutory functions is a developing area of law and it could not be stated with any certainty that the Commissioner did not owe a duty of care in this case.

In *Capital and Counties Bank plc v Hampshire CC* [1997] 2 All ER 865, the Court of Appeal held that under normal circumstances the fire service is under no duty to respond to an emergency call and if they fail to attend at a fire they will not be liable. However, if they do attend and carry out a positive act (here turning off sprinklers) that causes additional damage they will be liable.

In *John Munroe (Acrylics) Ltd v London Fire and Civil Defence Authority and Others* [1997] 2 All ER 865, CA, it was held that no duty of care was owed by a fire brigade to respond to a call for assistance. Nor, simply by responding to an emergency call, did the fire brigade put itself into a position of assuming responsibility to people likely to be hurt in a fire.

In *OLL Ltd v Secretary of State for Transport* [1997] 3 All ER 897, it was held that no duty of care was owed by coastguards in respect of a rescue that was carried out negligently. May J struck out a claim by survivors and relatives of the deceased as disclosing no reasonable cause of action, ruling that the coastguards are not liable if they fail to respond in an emergency and if they did damages would only be payable if they carried out some positive act that caused more injury than if they had failed to respond.

It remains to be seen how the law will develop in relation to emergency services following the decision in *Kent v Griffiths, Roberts and London Ambulance Service*.

6.11.1 Human rights considerations

Clearly the Human Rights Act 1998 can affect the attitude of the courts towards those responsible for the performance of public law duties. In *Secretary of State For Justice v Walker; Secretary of State For Justice v James* [2008] EWCA Civ 30, it was held that the Secretary of State had acted unlawfully by failing to provide measures to allow the respondent prisoners, who were serving long sentences to protect the public, to demonstrate to the Parole Board when their minimum terms had expired, that their detention was no longer essential for the protection of the public. Both respondents were placed in an unacceptable situation since they had been denied reviews of the lawfulness of their detention, which, if continued, could amount to a breach of Art 5(4). Their detention would not be justified under Art 5(1)(a) when it was not longer necessary for the protection of the public, or if it had been so long since there had been a proper review that their detention was disproportionate or arbitrary.

6.12 ADDITIONAL SITUATIONS

There are several situations established on a case by case basis in which it has been held that no duty of care exists. Arguments surrounding the imposition of a duty of care are

usually raised as a preliminary matter where novel situations are considered. Examples abound and are discussed at various points in this book – for example, *W v Essex CC* [2000] 2 WLR 601; *Barrett v Enfield BC; A and B v Essex CC* [2002] EWHC 2707 unreported. In the earlier cases the courts tended to rationalise these decisions by stating that some matters were simply not justiciable – because there is no cause of action disclosed, so they are no concern of the law – or by explaining that there are limits to the scope of the duty of care in negligence regardless of foreseeability or proximity. Thus, for example, it was held in *Thorne v University of London* [1966] 2 QB 237 that the marking of examinations and awarding of grades were internal matters for universities and outside the jurisdiction of the courts. In *Bradford Corpn v Pickles* [1895] AC 587, it was held that there was no duty of care to prevent water being diverted away from neighbouring land (see also *Stephens v Anglian Water Authority* [1987] 3 All ER 379). There is no duty of care in negligence to avoid interfering with parental rights (*F v Wirral MBC* [1991] 2 All ER 648) and members of the armed services owe no duty of care to colleagues in battle situations (*Mulcahy v Minister of Defence* [1996] 2 All ER 758) – the decision was made by the Court of Appeal on the grounds that it would not be fair, just and reasonable to impose a duty of care on a soldier in relation to his colleagues when engaging with the enemy. However, in *Multiple Claimants v Ministry of Defence* [2003] EWHC 1134, it was held that although the Ministry of Defence does have wide ranging immunity from claims, it was in breach of duty because it had delayed unduly after March 1995 to implement a recommendation for the screening of stress related disorders, though in fact no claimant would have been adversely affected by that delay. Although there was a negligent failure to detect post traumatic stress disorder, there was no evidence of systemic failure with regard to the threshold for referral to a medical officer. Following that ruling, in *O v Minister of Defence* [2005] EWHC 1645, it was held that a former soldier should succeed in his claim for damages for pain, suffering and loss of amenity as a result of the breach of duty by an army consultant psychiatrist who had failed to diagnose and treat him for post traumatic stress disorder, though he was not entitled to compensation for the exacerbation of his symptoms as a direct consequences of a criminal offence that he committed when he should have been receiving treatment.

It has also been held that there is no duty of care owed to competitors in the course of legitimate trade competition even if it resulted in financial loss to one party; it was not a matter for the courts.

In the more recent cases the rationalisation offered is likely to be based on the principles of fairness, justice and reasonableness stated in *Caparo*. In *McFarlane v Tayside Health Board* [1999] 3 WLR 1301, the House of Lords held that there is no duty of care owed to parents by doctors in the course of providing advice and/or treatment for sterilisation, in relation to the upbringing of a healthy child born later as a result of a failed sterilisation operation (see 5.1.9, above). This case is of particular interest because the policy reasons for not imposing a duty of care were carefully considered and frankly expressed, each judge taking a different perspective.

As far as other public bodies are concerned, it appears that it will be at least arguable that a duty of care exists if the evidence from all the circumstances suggests that a public body has assumed a duty. Thus, in *Thames Trains Ltd v Health and Safety Executive* [2002] EWHC 1415 it was held that, even though the defendants owed no general or statutory duties to rail users, it was arguable that in its position as the safety regulatory authority

for railways it owed a common duty of care to the victims of the Ladbroke Grove Road train crash.

Note that in many of the cases the courts examine the scope and nature of the alleged duty and consider precisely how far the defendant can reasonably be expected to owe that duty to the claimant. This leads to a certain amount of conceptual overlap with breach of duty that is the subject of the next chapter. It is also becoming clear that since the advent of a more formal human rights regime, the UK courts are less willing to strike out claims as disclosing no reasonable cause of action on the basis that no duty of care is owed, following the decision of the ECtHR in *Osman v UK*, as this has the appearance of granting blanket immunity to the defendant, even though striking out is a procedural matter rather than one of substantive law (see *Barrett v Enfield LBC*). This tendency has been gathering legitimacy despite the apparent acceptance by the ECtHR that it had decided the *Osman* case on the basis of a possible misunderstanding of the procedural rules in UK law that allow a case to be struck out if no reasonable cause of action is disclosed (*Z v UK*). It is, however, now accepted that in cases where the law is developing it is usually not appropriate to decide matters at a preliminary hearing on the basis of hypothetical issues when the facts have not yet been determined.

To take the field of education as an example, it has been held that schools are *in loco parentis* and owe a duty of care to pupils while they are in their care, and during the time they are leaving the premises (*Wilson v Governors of the Sacred Heart Roman Catholic School* [1998] 1 FLR 663), but that it would be unjust to expect that duty to extend to situations outside school, such as bullying on the way home (*Bradford-Smart v West Sussex CC* [2002] EWCA Civ 7). Again, where students on a skiing holiday arranged by their school repeatedly skied off-piste despite having been told by their teachers that this was forbidden it was held that a duty of care extended to them, though here the Court of Appeal found that there had been no breach of duty (*Chittock v Woodbridge School* [2002] EWCA Civ 915).

More generally, it has also been decided by the House of Lords that local education authorities owe a duty of care to people with special educational needs to diagnose their conditions and provide them with suitable education (*Phelps v Hillingdon LBC* [2001] 3 WLR 776). Lord Clyde made it clear that the problem was a general one that could relate to anyone undergoing a course of education, and emphasised that in principle where a professional person gave advice knowing, or being taken to know, that another would rely on that advice in deciding how to manage his affairs, the advisor might owe a duty of care to that other person. In the *Phelps* case the House of Lords ruled that there were no sufficient grounds to exclude these claims on grounds of public policy alone. In *Carty v Croydon London Borough Council* [2005] EWCA Civ 19, the Court of Appeal held that an education officer, in the course of performing statutory functions, might be found to owe a duty of care to a child, having assumed responsibilities towards him. The existence of such a duty would depend on satisfying the *Caparo* test, as education officers do not enjoy blanket immunity – *Phelps v Hillingdon*. Here a child with dyslexia had not been placed in the most appropriate learning environment, but the Court of Appeal ruled that there had been no breach of the duty of care it had found to exist. In *Kearn-Price v Kent CC* [2002] EWCA Civ 1539, the Court of Appeal held that the duty of care owed by a school to its pupils included a duty to take reasonable steps to enforce a playground ban on full sized leather footballs, and to carry out necessary spot-checks during the

pre-school period, and that there was no authority whatever for the proposition that schools were under no duty to supervise pupils who were on school premises before or after school hours. The crucial issue in this case was the scope of the duty owed to children on school premises before and after school hours and the defendant had a duty to do what was reasonable in the circumstances.

As far as universities are concerned, despite the long standing decision *Thorne v University of London*, it must be noted that courts are now less willing to strike out claims as disclosing no reasonable cause of action. Students can bypass tort in any event as they may challenge the decisions of examination boards by means of judicial review rather than negligence. This means that even if no duty of care is owed in negligence, students who can prove that they have suffered damage as a result of inappropriate treatment may have some other legal remedy against a university. In *R v Cambridge University ex p Persaud* [2001] EWCA Civ 534, the Court of Appeal took the view that as a general rule there was no principle of fairness that entitled a person to challenge or make representations with a view to changing a purely academic judgment on his or her work or potential. It was necessary to examine each case on its facts but, where the facts revealed that the process of reaching that judgment was not fair, the court would intervene. The court ruled that there were three factors which led to the conclusion that the Board of Graduate Studies at the University had not acted fairly towards the applicant and found in her favour, quashing the Board's decisions. Although this case was dealt with by means of judicial review, it does mean that students might find it possible to challenge their results in other ways. It could be argued that universities owe a duty of care to mark examination scripts fairly and accurately because they are in a position of trust towards their students. The relationship between universities and their students has changed since the 1960s and students can now be regarded as consumers of educational facilities in a way which was unthinkable in days gone by. Universities and students are probably best regarded as contracting parties. Brochures advertising courses make statements that influence students to select one institution rather than another and the rights and duties of students and their lecturers are frequently set out in documentation relating to degree courses. Students pay fees and can demand to see their records, and they have internal procedures for appealing against their results which can be challenged by means of judicial review. Equal opportunity policies apply in education and students have a right not to be discriminated against. They may have remedies available under the Disability Discrimination Act 1995 in certain circumstances, and for these reasons it is unrealistic to assume that a future court will hold that no duty of care can ever be owed to students in the tort of negligence.

In claims involving sport and other forms of recreation it is now generally accepted that a duty of care is owed, even at amateur level, though this was not always the case. In *Vowles v Evans and Another* [2003] EWCA Civ 318, it was held by the Court of Appeal that the referee of an adult amateur rugby match owed a duty of care to the players to take reasonable care for their safety when carrying out duties. In the final scrummage of an amateur game the front rows of the scrum failed to engage properly and the claimant sustained a dislocation of the neck. As a result of the injury he suffered permanent tetraplegia. The defendants tried to argue that no duty of care was owed by the referee in these circumstances. However, the court ruled that a duty of care existed, and that as a matter of policy it was just and reasonable that the law should impose upon an amateur

referee of an amateur rugby match a duty of care towards the safety of the players. The standard of care depended on the circumstances of each match.

Finally, it should be noted that by statute, mothers are immune from claims brought by their children for pre-natal injury, unless the mother was driving and did not take reasonable care (s 1(1) of the Congenital Disability (Civil Liability) Act 1976).

6.13 CONCLUSION

In many of the cases discussed in this section, the single common factor has been that the courts have referred to *Caparo* and the three-stage test. From this, we may conclude that many of the decisions turn on issues of policy and considerations of whether it would be 'fair, just and reasonable' to impose a duty. For that reason, it is difficult to predict the outcome of decisions and this is an interesting area of law in which there are sure to be important developments. In particular, the courts have indicated in the more recent cases concerning liability of public authorities that human rights considerations could well mean that the extent of liability will increase (see 1.10, above).

FURTHER READING

Kime, 'The Duty to Control the Conduct of Another Fowler v. Harper', *The Yale Law Journal*, Vol 43, No 6 (Apr, 1934), 886–905
Morgan, 'Tort, Insurance and Incoherence' (2004) *MLR* 67(3) 384–401
Witting, 'Duty of Care: An Analytical Approach' (2005) *OJLS* 25(1):33–63

For regular monthly up-dates on this area of law, see *Personal Injury Compensation*, published monthly by Informa UK Ltd.

CHAPTER 7

BREACH OF DUTY – THE STANDARD OF CARE

The second consideration for the claimant in a negligence case is to establish that there has been a breach of duty on the part of the defendant. This lies at the heart of negligence litigation and represents what negligence in essence really means – fault on the part of the defendant. Fault in law is unreasonable behaviour in a particular situation.

Two matters are involved in deciding whether there has been a breach of duty. The first centres on the question, 'how ought a person in the position of the defendant have acted in the circumstances?'. This is a question of law, which sets the standard of care that the defendant was required to meet. The second question 'did the defendant meet the required standard?' turns on factual matters. The courts frequently deal with both matters simultaneously. As in the case of duty of care there is scope for judges to exercise a certain amount of discretion when deciding whether there has been a breach of duty. This has been further enhanced by s 1 of the Compensation Act 2006, which gives statutory recognition to the ability of judges to take into account the social context within which certain activities take place.

7.1 THE 'REASONABLE MAN' TEST

The traditional formula which the courts employ is to ask whether the defendant has observed the requisite standard of care in all the circumstances. Failure by the defendant to act as a reasonable person would have acted is an indication of negligence.

In practice, the position is that the 'reasonable man' formula is, like the concept of duty of care, a control device which the judges use to arrive at decisions which they consider to be fair or appropriate in the circumstances. A number of policy questions may be involved. For example:

- who can best bear the loss in the particular case?
- was the defendant insured?
- what implications will the particular case have for future cases?
- what standard of safety can potential claimants expect?
- what is fair and just on the particular facts?
- what are the implications of a particular decision for society as a whole?

Thus, the 'reasonable man' formula may simply be a device which allows the judges to arrive at decisions on grounds of policy or expediency. There are now no juries in negligence cases. Before the use of juries in these cases was discontinued, it was arguable that the jury could decide whether, as average, reasonable people, they thought the defendant had met the required standard but such argument is no longer possible, as it is the judge alone who must decide.

Nevertheless, as far as possible, the standard is objective and the judge formulates the

position in terms not of what the particular person ought to have done in the circumstances, but what a reasonable person should have done in those circumstances.

Bearing this in mind, it is still necessary to consider the various interpretations of the expression 'reasonable man'.

Here are some of the better known formulations:

- *Per* Alderson B in *Blythe v Birmingham Waterworks* (1865) 11 Ex 781: Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate human affairs, would do, or doing something which a prudent and reasonable man would not do.
- *Per* Greer LJ in *Hall v Brooklands Auto-Racing Club* [1933] 1 KB 205: The person concerned is sometimes described as the 'man on the street', or the 'man on the Clapham Omnibus', or as I recently read in an American author the 'man who takes the magazines at home and in the evening pushes the lawnmower in his shirt sleeves'.
- *Per* Lord Macmillan in *Glasgow Corpn v Muir* [1943] AC 448: The standard of foresight of the reasonable man eliminates the personal equation and is independent of the idiosyncrasies of the particular person whose conduct is in question.
- *Per* Lord Steyn in *McFarlane v Tayside Health Board* [1999] 3 WLR 1301: 'Travellers on the London Underground' describing reasonableness in the context of foresight of damage.
- CK Allen in *Law in the Making*, 7th edn, 1964, Oxford: Clarendon: Nobody is deceived by the fiction that the judge is stating not what he himself thinks, but what an average reasonable man might think.

On occasion the parties may attempt to establish a standard of care in advance. This is common in relation to entry onto premises (see Chapter 10) when occupiers may try to limit their liability to visitors. However, in business situations any attempt to do so is forbidden or curtailed by the Unfair Contract Terms Act 1977.

7.2 THE CASES

The cases reveal the judicial approach to the problem of deciding whether in a particular case, the standard of care has been met by the defendant. A number of general propositions can be elicited from the cases.

The legal standard of care applicable in a variety of different fact situations is now settled law. What is regarded as 'reasonable' behaviour varies according to the circumstances of each case and the standard of care usually relates to the activity being carried out by the defendant rather than to his or her personal characteristics. It should be noted that negligence may occur in the omission to take some action or other, as well as in carrying out some positive negligent act. However, the House of Lords has warned against relying too heavily on previous cases to decide what behaviour can be regarded as meeting, or failing to meet, the appropriate standard of care, as it can be dangerous to treat as a precedent a decision that turns on the *factual* matter as to whether a breach has

occurred, rather than the legal question of what the appropriate standard of care is in given circumstances.

7.2.1 Reasonable assessment of risk

It is reasonable to assess the risks involved in a particular situation, and to consider whether precautions are necessary, bearing in mind the magnitude and likelihood of harm.

If the defendant had an opportunity to reflect, he or she is expected to carry out a basic assessment of risks. The reasonable person is expected to consider the likely consequences of particular actions and weigh them against the precautions which are necessary to avoid injury. A defendant who can show that sensible consideration has been given to the implications of particular activities is less likely to be found negligent than one who has not. Risk management of this kind is commonplace in industry and healthcare. However, in many everyday activities, such as driving, incidents can arise that demand 'spur of the moment' decision making; in such circumstances, risk assessment and management are clearly less relevant.

It would be unreasonable not to weigh up the risks involved and to balance them against the difficulties, inconvenience or expense of taking steps to avoid them. There is, however, no duty to guard against risks that are obvious to a reasonable person – *Evans v Kosmar Villa Holidays plc* [2007] EWCA Civ 1003

Risk assessment is now an important feature in many professions and industries. For example in *Davis v Stena Line* [2005] EWHC 420 (QB) the widow of a man who had fallen overboard during a ferry crossing succeeded in her claim against the ferry company. After a passenger had sighted a man in the sea, the crew carried out the company's procedures for use when a person had fallen overboard, but no preparations were made to retrieve the passenger from the sea if and when he was found. Weather conditions were too bad for the ferry's rescue boat to be launched but a passing vessel had sighted a man in good condition in the water and had a fast rescue boat that was ready and able to launch. The ferry captain decided to try to recover the man by manoeuvring the ferry close to him, throwing him a line and pulling him close to a door in the side of the ferry. During that procedure it was noticed that the passenger was dead in the water.

It was held that the captain had known that it would have been almost impossible to rescue a man overboard by lifting him to a high sided vessel such as the ferry in question, but the company had failed to carry out an appropriate risk assessment or to give training to the captain and crew. As there was clear awareness in the industry of this problem and the likelihood of such an emergency occurring on the particular route, these were serious and negligent failures on the part of the company. Failure of the captain to prepare a detailed rescue plan or to have a rescue plan available was negligent. The captain's plan was so hopeless and so risky both to the passenger in the sea and the safety of the ferry and its crew that it had been negligent to attempt it. There was a good chance that the man would have been recovered alive if the other vessel had been asked to launch its fast rescue boat, and there had been negligence on the part of the captain in his failure to seek such assistance. Appropriate advice and training would have provided the captain with the clear guidance that he should have considered other available options for recovering someone in these circumstances when the ferry's own rescue boat could

not be launched. The captain's manoeuvres had fallen short of what was expected of a reasonably competent and prudent master mariner and the passenger had drowned as a direct consequence of the change in sea conditions caused by the movement of the ferry around him in the water.

A case that is frequently cited on this point was decided long before formal risk assessment was introduced. In *Bolton v Stone* [1951] AC 850, a cricket ball was hit right out of a cricket ground and onto a road where the claimant was standing 100 yards away from the batsman. The ball cleared a 17 feet high fence which was 78 yards from the batsman. During the trial, evidence was produced that the ball had only been hit out of the ground about six times in the previous 30 years. It was held by the House of Lords that the defendants had not acted unreasonably in failing to guard against the remote risk involved.

Lord Reid said:

> Reasonable men do in fact take into account the degree of risk, and do not act upon a bare possibility as they would if the risk were more substantial.

In *Hilder v Associated Portland Cement Manufacturers Ltd* [1961] 1 WLR 1434, a case involving similar facts to those in *Bolton v Stone*, it was held that there had been negligence when a football was kicked from an open piece of land with a low boundary wall onto a highway and the claimant, who was riding on the adjacent road on his motorcycle, was killed when he was hit by the ball. Social concerns, such as keeping troublesome boys occupied, did not justify the risks created by football to innocent passers-by.

In *Haley v London Electricity Board* [1965] AC 778, it was held that the likelihood of a blind person walking along a busy pavement, and falling into a hole dug there by the defendants, should have been anticipated and guarded against by them. A large number of blind people live in London, and it is statistically likely that eventually a blind person will walk on a city street and perhaps fall into an unguarded hole.

In many instances it is not a single individual but a system that is at fault and is responsible for an accident. Thus in *Slater v Buckinghamshire County Council* [2004] EWCA Civ 1478 it was held that the system for ensuring the safe transport of disabled passengers to a day centre was not reasonably safe, given the level of road safety competence of the passengers.

Obviously, the greater the potential harm the more important it is to take sensible precautions against it, and the less reasonable it is to ignore the need to take such precautions.

In *Paris v Stepney BC* [1951] AC 367, the defendants were held to have been unreasonable in failing to supply safety goggles to a one-eyed workman. The consequence of their lack of care was the total blindness brought upon the workman when a chip of metal flew into his one good eye.

The care taken by the defendant should be commensurate with the risk, and there may be some situations in which the reasonable person need take no precautions at all, because no one is expected to guard against remote events or outrageously improbable events.

The Compensation Act 2006 has created a statutory approach to the problem of excessive caution being exercised by some organisations for fear of legal claims in the

event of accidents. The standard of care varies according to the circumstances of individual cases, and the Act presupposes that in some instances a too high a standard of care is expected.

Section 1 of the Act provides that a court, when 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 Government believed that activities such as school expeditions were being restricted or cancelled for fear of negligence claims being brought against them in the event of injuries. Section 1 of the Act aims to encourage judges to reject claims which they consider to be socially undesirable in the light of the activities being undertaken in the context of which the claim was made, so that people wishing to enjoy or promote worthwhile activities will be able to obtain insurance cover more easily. The promoters of the legislation hope that judges will give careful consideration to the social benefits of activities such as charity walks and other socially beneficial events when considering claims. Courts will be expected to take into account the wider social value of the activity that is being scrutinised.

In 1999, one commentator, Frank Ferudi, estimated that growth of the 'compensation culture' could cost the UK almost £7 billion a year in damages and lawyers' fees. In a booklet published by the Centre for Policy Studies, he recommended that an upper limit be put on damages for personal injuries, and cited several instances of what he considered to be successful but undeserving claims. For example, the case of Vincent Kemp, awarded £500,000 after tripping over a kerb stone when drunk, and falling into the path of an oncoming vehicle, and a doctor who received a £465,000 settlement after a needle-stick injury that resulted in 'needle-stick phobia'.

Shortly before the Compensation Bill, which became the Act of 2006, was introduced, Tony Blair said:

> There needs to be a proper and proportionate way of assessing risk and the response to it. Government cannot eliminate all risk. A risk-averse scientific community is no scientific community at all. A risk-averse business culture is no business culture at all. A risk-averse public sector will stifle creativity and deny to many the opportunities to be creative while supplying a few with compensation payments.

He cited as examples of events that have given rise to risk averse behaviour, a claim by a girl who sued the Girl Guides Association because she burnt her leg on a sausage, and the man who was injured when he did not apply the brake on a toboggan run in an amusement park. He objected strongly to unnecessary and over cautious steps that are taken by public bodies because they fear litigation. For example, a local authority had removed hanging baskets for fear that they might fall and injure someone, even though no such accident had ever occurred. A Cotswold village was required to take away

a seesaw because it was considered a danger under an EU Directive on Playground Equipment for Outside Use, even though no accidents had occurred on it.

It remains to be seen, of course, how the provisions of the new Act will operate in practice, and whether it actually changes the approach that judges took previously (see *Trustees of Portsmouth Youth Activities v Poppleton* [2008] EWCA Civ 646). There is ample evidence of awareness on the part of the judiciary of the need to strike a sensible balance between an over cautious approach to risk management and permitting people to take reasonable responsibility for their own safety. Lord Hobhouse, in the House of Lords, in *Tomlinson v Congleton BC* [2003] AC 46, a case concerning the liability of occupiers for injury to trespassers, commented:

> The pursuit of an unrestrained culture of blame and compensation has many evil consequences.

In *Gorringe v Calderdale Metropolitan Borough Council* [2004] UKHL 2, Lord Steyn commented:

> The courts must not contribute to the creation of a society which is premised on the illusion that for every misfortune there is a remedy.

There have been many statements in the media in recent years suggesting that compensation is too readily available. For example: BBC News headlines on 2 May 2002, 'NHS Negligence Claims Soar', or the inflammatory 2006 *The Times* newspaper headline '£2.8 million award for prisoner who tried to kill himself', followed by a front page article opening: 'Compensation payments to prisoners have doubled in the last year to more than £4 million, while the total legal bill to the prison service has reached £20 million a year'.

Section 2 of the Compensation Act deals with apologies by potential defendants to complainants. This sometimes happens spontaneously, perhaps immediately following a car accident. It also happens when public bodies and commercial organisations are dealing with complaints from clients and customers.

Section 2 states:

> An apology, an offer of treatment or other redress, shall not of itself amount to an admission of negligence or breach of statutory duty.

Again, in practice judges almost always accept that apologies do not necessarily amount *per se* to acceptances of blame, and focus much more on the circumstances and other evidence than on the fact that one party may have apologised to another at some stage.

7.2.2 Unforeseeable risks cannot be anticipated

The defendant may have a defence based on current knowledge at the time of the incident. The standard of knowledge required of a defendant is that which was available at the time that the alleged negligence occurred. The defendant is judged only in the light of knowledge available at the time of the alleged negligent act.

A reasonable person is not expected to anticipate unknown risks. Unforeseeable risks cannot be anticipated and failing to guard against them will not be negligence.

This is sometimes known as the 'state of the art defence'. It is best illustrated by the case of *Roe v Minister of Health* [1954] 2 QB 66. The claimant was one of two patients who

suffered pain and permanent paralysis from the waist down after being injected with a spinal anaesthetic called nupercaine. The nupercaine had been stored in glass ampoules which had in turn been placed in phenol solution, a disinfectant. Evidence was produced at the trial to the effect that minute invisible cracks had formed in the glass ampoules, which had allowed some of the nupercaine to be contaminated by phenol solution which had seeped through the cracks. Although this evidence has since been doubted, it was accepted at the trial, and on the grounds that such a phenomenon had not previously been discovered and could not, therefore, be guarded against, the defendants escaped liability for negligence.

The evidence in this case has since been discredited, but the principle is still valid and is reflected in the Consumer Protection Act defence outlined in Chapter 15.

Once it is suspected that there may be a risk of harm, it is necessary to reappraise the situation. In *N v UK Medical Research Council; sub nom Creutzfeldt-Jakob Disease Litigation* (1996) 54 BMLR 85, it was held that there had been a negligent failure to carry out a full reappraisal of the use of Human Growth Hormone (HGH) after it was suspected that it could cause Creutzfeldt-Jakob Disease (CJD). HGH had been used as part of a clinical trial programme to treat children from 1959. By 1977, it was suspected that children who had received the treatment had contracted CJD.

In the context of prison suicides, a recognised problem for prison authorities, it was held in *Smiley v Home Office* [2004] EWHC 240 that the duty to take steps to identify whether a prisoner presented a suicide risk should relate to the risk profile of the individual prisoner. A duty to take reasonable care to prevent suicide only arises when the prison authorities knew or ought to have known that a particular prisoner presented a risk.

7.2.3 The utility of the conduct

The reasonable person assesses the utility of the conduct which is being carried out. For example, risky measures might be necessary in order to save lives.

In *Watt v Hertfordshire CC* [1954] 1 WLR 835, a woman had been trapped under a car, and the claimant was a fireman and a member of the rescue team. He was injured by a heavy piece of equipment, which in the emergency circumstances had not been safely secured on the lorry on which it was being transported. His claim for negligence failed on the grounds that the risk of the equipment causing injury in transit was not so great as to prevent the efforts to save the woman's life.

Driving at excessive speed, while not normally acceptable, is perhaps justified in exceptional circumstances, as in the case of emergency services racing to assist an injured person. However, the case law suggests there is no special case for exempting employees of the emergency services if they cause injury to other road users when responding to emergency calls. In *Ward v London CC* (1938) unreported, a fire engine driver was held to have been negligent when he drove across a light-controlled crossing when he should have stopped. In *Griffin v Mersey Regional Ambulance* (1998) unreported, a motorist collided with an ambulance which was proceeding across a junction against a red traffic light, and the ambulance driver was held to have been negligent, but there was a 60% reduction in the damages to take account of contributory negligence.

As has been seen above, under the Compensation Act 2006, the court may consider the social utility of the activity under consideration.

7.2.4 The expense of taking precautions can be considered

It would not be negligent to fail to take a precaution which is prohibitively expensive in the light of a risk which is not very great.

In *Latimer v AEC* [1953] AC 643, the owners of a factory which had been flooded did all that was possible to cover slippery areas with sawdust. The alternative would have been to close the factory. When the claimant slipped on the floor and was injured, he sued for negligence, basing his claim on the fact that his employers should have closed the factory. This extreme measure was held to have been unnecessary and the claim failed.

In *Smith v Littlewoods Organisation Ltd* [1987] AC 241, [1987] 1 All ER 170, HL, vandals set fire to a cinema that had been left empty and derelict. The fire spread to adjoining buildings causing property damage, but no one was injured. The defendants had tried to take precautions to prevent vandals entering the property, but they were unaware of their presence there and had no reason to believe that adjoining landowners considered that there was any threat from them. The monetary loss in this case was substantial, but the likelihood of the events occurring which caused the damage was low. The House of Lords held that there was no breach of duty here.

Particular difficulties are raised in cases concerning design defects; there are no cases reported in which a claimant has succeeded in obtaining damages for injury allegedly caused by negligent vehicle design.

In *Withers v Perry Chain and Co Ltd* [1961] 1 WLR 1314, [1961] 3 All ER 418, employers of a man who was very prone to dermatitis were not liable when they found no alternative work for him that did not involve contact with chemicals. They had no such work available and there was nothing they could have done to avoid his injury, short of dismissing the claimant. In *Overseas Tankship (UK) Ltd v Miller Steamship Co Pty Ltd, The Wagon Mound (No 2)* [1967] 1 AC 167, the Privy Council took the view that a reasonable man may ignore a very small risk if there is a valid reason for doing so, but he should not ignore a small risk if the elimination of that risk is a simple and cheap matter.

It has occasionally been successfully argued that limited resources made it impossible for defendants to take precautions necessary to prevent harm. Similar arguments are also successful in claims against occupiers for breach of their duties under legislation (see Chapter 10). These arguments did not succeed in *Selfe v Ilford and District HMC* (1970) 114 SJ 935. The claimant was admitted to a hospital ward after a suicide attempt and was put on the ground floor along with three other patients, all of whom were known suicide risks. The claimant climbed through an unlocked window and jumped out in another suicide attempt and sustained serious injuries. The judge chose not to accept arguments on behalf of the defence that scarce resources prevented proper staffing. Despite this decision, there have been others in which mentally ill patients who have attempted suicide have brought unsuccessful claims. For example, in *Thorne v Northern Group HMC* (1994) unreported, a depressed patient was sent home from a general hospital, and soon afterwards committed suicide at home. It was held that there had been no negligence on

the part of the staff at the hospital, as this was not a patient who should have been kept under constant supervision.

In *Knight v The Home Office* [1990] 3 All ER 237, it was held that the higher standard of care to be expected in hospitals did not apply to remand prisons. Pill J said:

> To take an extreme example, if the evidence was that no funds were available to provide any medical facilities in a large prison, there would be a failure to achieve the standard of care appropriate for prisoners. In a different context, lack of funds would not excuse a public body which operated its vehicles on the public roads without any system of maintenance for the vehicles, if an accident occurred because of lack of maintenance.

Despite cases of this kind, the courts are reluctant to enter into a formal cost-benefit analysis and the decisions are often based on a 'gut reaction' by judges, taking into account factors such as the social utility of particular conduct as well as the cost of safety measures.

7.2.5 Lack of special skills

Ordinary people who do not possess special skills are not expected to exercise the same standard of care as skilled people.

For example, in *Phillips v Whiteley Ltd* [1938] 1 All ER 566 a jeweller who pierced the claimant's ears, was not expected to take the same hygiene measures as a surgeon performing an operation. The claimant contracted a serious blood disorder after having her ears pierced by the defendant jeweller. He had performed the procedure in a white-washed room, and dipped the instruments in disinfectant, passed them through a flame, and placed them under running water. It was held that he had taken reasonable steps in the circumstances.

In *Wells v Cooper* [1958] 2 All ER 527, an amateur handyman had fixed a door handle. It came off in the claimant's hand and he fell backwards and was injured. His negligence claim failed because the defendant had shown the same degree of skill as a reasonably competent carpenter in undertaking the work.

A rather different conclusion was reached by the Court of Appeal in *James v Butler* [2005] EWCA Civ 1014. The claimant had asked the defendant, a neighbour, to help him to build a conservatory on the back of his house. The defendant was a general labourer, and the claimant had agreed to pay him for his assistance. While assembling the frame of the conservatory the defendant had rested a rafter on the main structure and thought he had secured the rafter with a finger-tightening screw as a temporary measure while he fetched another tool. When he returned, as he was climbing a ladder, the rafter was dislodged. It fell and hit the claimant in the face, causing serious injury to an eye. The Court of Appeal held that the trial judge was wrong in concluding that it was reasonable for the defendant to think that he had tightened the screw adequately by hand. The task was so simple that it easily fell within the capability of a reasonable handyman. The standard of care should be related to the type of activity rather than the category of the person who was carrying out that activity. The Court of Appeal also ruled that it was not reasonable to have expected the claimant to have checked for permission before entering the conservatory area, since it would have appeared to him that the area was safe.

7.2.6 Contributory negligence and the standard of care

Contributory negligence operates as a partial defence to a negligence claim. If the court decides that a claimant has contributed to his injuries by failing to take appropriate care, the damages awarded may be reduced (see Chapter 20).

If a case concerns the question of contributory negligence, the approach taken by the courts may be more subjective and the judges tend to consider what behaviour would have been reasonable for the *particular* claimant in the circumstances. For example, children can be treated more leniently than adults when the courts are deciding whether they have taken sufficient care for their own safety.

7.2.7 Children and young people

Children are not expected to be as careful as adults. Although there are few English cases on this point, there is authority from other common law countries which suggests that children are not expected to exercise as high a standard of care as adults. In *McHale v Watson* (1966) ALR 513, it was held that the standard is that of the reasonable child of the defendant's age.

In *Mullin v Richards* [1988] 1 All ER 920, the Court of Appeal held that a 15 year old schoolgirl was not negligent when, while she and a school friend of the same age were 'fencing' with plastic rulers, the friend was injured in the eye. Games of that kind were not prohibited by the school and were played quite frequently. Hutchinson LJ followed the approach taken in *McHale v Watson*, saying:

> The question is . . . whether an ordinarily prudent and reasonable 15 year old schoolgirl in the defendant's situation would have realised as much.

There are parallels which may be drawn from other areas of English law. For example, in occupiers' liability, where the standard of care is very similar to that in the ordinary law of negligence, the Occupiers' Liability Act 1957 states that 'an occupier must expect children to be less careful than adults' (s 2(3)(a)).

In contributory negligence, where again similar standards apply, it has been held that the appropriate standard of care is that of a child of the age of the claimant (*Gough v Thorne* [1966] 1 WLR 1387). The Pearson Commission endorsed this in 1978, taking the view that no child under the age of 13 years should be found contributorily negligent. Unusually, in *Armstrong v Cottrell* [1993] PIQR P109, CA, it was held that a 12 year old was one-third to blame for her injuries, the judge being of the opinion that 12 year olds should know the Highway Code. It appears that the courts deal with each case on its facts. Thus, in *Morales v Eccleston* [1991] RTR 151 an 11 year old boy who ran out into the road after his football was found to be 75% contributory negligent.

While occupiers' liability and contributory negligence provide useful guidance, it should be borne in mind that the approach tends to be more subjective in both these instances than in ordinary negligence, with the courts looking at the situation from the standpoint of the child.

The law does expect young children to be supervised and, if they are not adequately supervised, the adults responsible for them may be sued for negligence. In *Fowles v Bedfordshire CC* [1995] PIQR P380, a local authority was held to be negligent in allowing

young people to do gymnastics at a youth centre without supervision. Local authorities and teachers take the place of parents as regards children in their charge, and must exercise the standard of care of the reasonably prudent parent. In *Jenney v North Lincolnshire CC* [2000] LGR 269, the Court of Appeal held that a local authority had been negligent, because they had failed to demonstrate that there was a non-negligent explanation for the presence of a schoolchild on a major road during school hours (see 7.2.9, below).

People with the power or duty to control others must take reasonable steps to prevent them from causing harm by their acts or omissions. Accordingly, parents and others who take charge of children may be primarily liable if their children are out of control and other people suffer foreseeable damage as a result.

Despite this there are many examples of successful claims by children who have been injured in the absence of their parents, especially in the area of law concerned with child trespassers – see Chapter 10.

In *Blake v Galloway* [2004] EWCA Civ 814 the Court of Appeal drew a close analogy between horse play indulged in by 15 year olds and organised sports.

The Court of Appeal held in *Mountford v Newlands School* [2007] EWCA Civ 21, that a school was vicariously liable for the negligence of a member of staff who had chosen a boy who was well above the age of the rest of the group for a match, to play for a junior rugby team. The boy's size, heavy weight and maturity had contributed to a player being injured. There was an 'age rule' applicable to school rugby which the teacher in question had failed to observe.

In *Blake v Galloway* [2004] EWCA Civ 814, a group of friends, aged about 15 years old, were messing about, and the claimant threw a piece of bark at the defendant, who threw it back and injured to the claimant's eye. The Court of Appeal drew an analogy between this type of horseplay and sporting activities, commenting horseplay in this case had been carried on without formal rules, but with some kind of unspoken understandings of what behaviour was acceptable. The defendant in this case had done no more than display a lapse of skill which could not be regarded as a breach of duty. The claimant had consented to the risk of being hit by the missile, as long as it was used within the rules of the game. The Court of Appeal was at pains to point out that each case turns on its own facts, and the defendant's conduct should be considered in the light of all the circumstances.

7.2.8 The sick and disabled

If the defendant is ill or in some way incapacitated, the courts have traditionally regarded that as irrelevant, so elderly people, and those who are disabled tend to be treated less leniently than children. As an early writer in Tort, Holmes, said:

> 'The law does not attempt to see men as God sees them'.

If a sick or disabled person undertakes a high risk activity such as giving medical treatment (*Barnet v Chelsea and Kensington Hospital Management Committee* [1969] 1 QB 428), or driving (*Roberts v Ramsbottom* [1980] 1 All ER 7), he is expected to be as careful as any other person carrying out the same activity.

7.2.9 Carers and organisers

People who care for others and are responsible for them must take steps to see that they are reasonably safe. The standard of care is higher for carers of very vulnerable people, such as young children and the sick and disabled, than it is for others who are able to take some responsibility for themselves. However, under the Compensation Act 2006 (above) courts may in future be rather more lenient towards teachers and others who organise or facilitate beneficial activities for children.

In *Morrell v Owen and Others* (1993) *The Times*, 14 December, it was held that the duty of care owed to disabled athletes by coaches and organisers is greater, and the standard of care required is higher, than that owed to able-bodied athletes. The claimant in this case was a paraplegic amateur archer who was injured by a stray discus suffering brain damage as a result. The judge took the view that a blow from a misthrow was entirely foreseeable and that coaches and organisers should have taken more comprehensive safety precautions.

People who organise sports activities and take responsibility for participants are expected to exercise care when offering guidance and instruction. A qualified guide and experienced mountaineer was liable for the death of a client in *Woodroffe-Hedley v Cuthbertson* (1997) QBD Unreported. The standard of care in such cases is close to that expected of professional people.

In some instances, carers have been held to be guilty of the crime of manslaughter when they failed to discharge their duty to people in their care. Such a finding would almost automatically result in the settlement of any civil claim against them. In the prosecution of the managing director of an activity centre responsible for a canoeing disaster at Lyme Bay in which several young people were killed, both he and his company OLL Ltd were found guilty of manslaughter. It was held that there was gross negligence on the part of the managing director, and this factor led to the finding of corporate manslaughter.

In *Barrett v Ministry of Defence* [1995] 3 All ER 87, the defendants were liable for failing to take proper care of an airman who died when he inhaled his own vomit after a long drinking session. Although there was no duty to prevent him becoming drunk, the defendants, were held to have assumed responsibility for him after he had become unconscious.

In *Jebson v Ministry of Defence* (2000) *The Times*, 28 June, the Court of Appeal held that an adult should normally be aware of dangers created by his actions and could not rely on others to exercise care on his behalf when he is drunk. However, if a duty of care was implied in respect of a person likely to be drunk, that duty could not later be avoided.

In *Metropolitan Police Comr v Reeves (Joint Administratrix of The Estate of Martin Lynch (Decd))*, [1999] 3 WLR 363 duty police officers had been informed by a doctor that a prisoner, Mr Lynch, was a suicide risk. They could have taken relatively simple precautions which would have prevented the prisoner committing suicide, and were held to have been negligent in failing to do so.

In *Various Claimants v Flintshire CC* (2000) unreported, a High Court judge ruled that the defendants were in breach of their duty to 11 people who had been abused in local authority care.

In *Watson v British Boxing Board of Control* [2001] QB 1134, [2001] 2 WLR 1256, the organisers of a boxing match were negligent when they failed to provide proper ringside medical facilities. The claimant suffered serious brain damage during a boxing match as a result of a blow to the head. As the Board had failed to provide both proper equipment and trained medical specialists, it was in breach of its duty to the claimant. The claimant was not *volenti* (that is, he had not consented to the injury).

In *Thompson v Home Office* [2001] EWCA Civ 331, it was held that there had been no breach of duty when a young offender was attacked by a fellow inmate at an institution, and injured with a razor blade.

In *Bacon v White and Others* (1998) unreported, a diving instructor was in breach of his duty of care to a novice diver who died while scuba diving. Although there had been a breach of the rules of the governing body of the sport, this did not necessarily define the standard of care in this case, but nevertheless, the proper standard of care had not been met because the claimant was a novice and was owed a higher standard of care than in the case of skilled participants in this particularly hazardous sport. Similarly, referees owe a duty of care to players, especially if they are young and new to the game (*Smoldon v Whitworth and Nolan* [1997] PIQR 133).

7.2.10 Drivers and other road users

Statistics show that most negligence claims involve road traffic accidents. The basic principles of negligence apply equally to virtually all road users, including cyclists, pedestrians and drivers, and the standard of care is that of the reasonable road user. In very exceptional cases, however, there are some variations in this standard in the case of particular classes of individual. Reasonable drivers are not entitled to assume that other road users will exercise care, and they will be liable for foreseeable injury caused by their negligence. The Highway Code gives guidance on sensible driving and the reasonable person is expected to be familiar with its contents. However, it is not safe to assume that there is negligence every time a person fails to observe the Highway Code. Failure to observe the Highway Code does not in itself give rise to liability on the part of the defendant, but this may be relied upon successfully in some cases to establish liability in a civil claim. If the defendant has committed a traffic offence, there may also be a finding of negligence, and, if the defendant has been convicted of a driving offence arising out the facts of the case where there is a negligence claim, that claim will usually be settled out of court in the claimant's favour. Section 11 of the Civil Evidence Act 1968 allows evidence of a person's criminal convictions to be used in civil proceedings, and the burden of proof will be reversed.

It would appear that all drivers are expected to exercise the same high standard of care. In *Roberts v Ramsbottom* [1980] 1 All ER 7, the defendant driver, an elderly man, suffered a stroke and became mentally and physically incapable of driving safely. He was held to have been negligent when he caused accidents. By contrast, in *Mansfield v Weetabix* [1997] PIQR 526, the Court of Appeal ruled that if the loss of control occurs when the driver is unaware that he or she is suffering from a medical condition, whether the onset is gradual or sudden, the driver should not be found to be negligent. The courts do tend to take a pragmatic approach to the question of breach of duty, and do not expect perfection from drivers. For example, in *Ahanonu v South East London & Kent Bus Co Ltd*

(23/01/2008), the Court of Appeal held that a trial judge had expected too much of a bus driver who had collided with a pedestrian, and overturned the decision on the grounds that the judge had imposed a counsel of perfection upon the driver, which ignored the reality of the situation.

Car owners are expected to take reasonable steps to maintain their vehicles in good order. They should obtain MOT certificates when necessary but a valid MOT certificate will not of itself absolve a defendant from liability for an accident caused by a defective vehicle.

However in *Exel Logistics v Curran* [2004] EWCA Civ 1249 the Court of Appeal held that a driver was not negligent merely because he had failed to check the tyre pressures before setting off on a journey.

The position of drivers has probably been influenced by the requirement of compulsory liability insurance. As Professor Atiyah points out (Atiyah, *Atiyah's Accidents, Compensation and the Law*, Cane (ed), 1993, London: Butterworths):

> The tendency to objectivise the standard of care, and to ignore the personal characteristics of the defendant, which has gathered force during the past 50 years or so, may have been influenced by insurance considerations. Since the defendant is not going to pay the damages personally, judges may be (consciously or unconsciously) more concerned with the hardship to the claimant . . . and may therefore be more willing to find a defendant negligent even though he has done nothing morally culpable.

In *Nettleship v Weston* [1971] 2 QB 691, a very inexperienced learner driver crashed and injured her instructor. Her instructor had knowingly put himself in a relationship with an underskilled person. She was, however, held by the Court of Appeal to have been negligent. Although she was only learning to drive, she should have exercised the same standard of care as a reasonably competent experienced driver, although she was told by Lord Denning that she should not regard herself as morally blameworthy.

In many other jurisdictions the Courts accept that difficulties of proof are inherent in traffic accidents. Accordingly, in France for example, the owner/insurer of a vehicle involved in an accident is liable in full for death or personal injury, even if he is not at fault in any way, even if the claimant was contributorily negligent, unless the claimant was driving at the time. It has been pointed out that even in the UK it is usually drivers who bear the most blame even when pedestrians are contributorily negligent.

A study of the extensive body of case law concerning civil claims in road accidents cases will confirm the very obvious observation that the circumstances of no two accidents are identical and that each case turns on its own facts. The circumstances in accidents involving vehicles are almost always complex, and those involved tend to blame one another, so the evidence of witnesses is crucial in determining whether there has been a breach of duty. Here are some recent examples.

Fagan v Jeffers and Another [2005] EWCA Civ 380: Opposing traffic stopped in order for a motorist to turn right, the Court of Appeal ruled that a motorist should have proceeded with the utmost care and should not have crossed the carriageway until he had put himself in a position where he was satisfied that no traffic was likely be approaching on the inside of the opposing traffic. The car driver had failed to take such care and the judge had been entitled to find him 50% liable for a collision with a motor scooter.

Bland v Morris [2005] EWHC 71 (QB): A coach driver had negligently obstructed a dual carriageway and a lorry driver collided with the coach, causing injury and death to passengers. It was held that it was relevant in terms of apportioning blame that the coach driver had had an opportunity to avoid injury to the passengers who were in her charge by evacuating them from the coach.

Eyres v Atkinsons Kitchens & Bedrooms Ltd [2007] EWCA Civ 365: A driver who had been required to work excessively long hours, fell asleep at the wheel and was injured when his car veered off the road. He succeeded in his claim against his employers, but the damages payable to him were reduced for contributory negligence, as there must have been a short period of time when he was aware that he was in danger of falling asleep.

Finally, it should be noted that the authorities responsible for maintaining the road in good condition may in certain circumstances be liable for accidents – see Chapter 11.

7.2.11 Experts, professionals and people with special skills

Experts and people who have received special training are expected to demonstrate the same high standard of care as others at a similar level within the same field. It was quickly established for example that there are different levels of expertise even within the same profession. Thus not all doctors are expected to exercise the highest expert skill, and a GP would only be required to meet the same standards as other competent GPs, rather than those of consultants. Even within this framework, different standards have been held to apply in certain circumstances. For example, in *Knight v Home Office* [1990] 3 All ER 237 it was held that a prison doctor could not be expected to exercise the same standard of care as a doctor working in an NHS hospital. In that case, a prisoner had committed suicide and the judge recognised that the resources available for care and supervision of prisoners who might commit suicide was a resource allocation matter for Parliament. However, each case will turn on its own facts, and in *Brooks v Home Office* [1999] 2 FLR 33 it was held, distinguishing *Knight v Home Office*, that a woman prisoner who is being held on remand can expect the same standard of obstetric care as would be available to her outside prison, subject to the constraints of having to be transported and having her freedom restricted. However, the claimant's case failed because she could not prove that the breach of duty caused the damage complained of.

An expert is required to exercise the same standard of care as a reasonably competent person trained in that particular trade or profession. This applies to people of all professions, but the cases demonstrate that over the years members of the professions have been able to escape liability by relying on what has become known as the *Bolam* test, or defence, established in a medical negligence case in 1957. As will be seen, the *Bolam* test was modified by the House of Lords in 1997. In *Bolam v Friern HMC* [1957] 2 All ER 118, the test was stated thus, *per* McNair J:

> A doctor is not guilty of negligence if he has acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art. Putting it another way round, a doctor is not negligent if he is acting in accordance with such a practice, merely because there is a body of opinion that takes a contrary view.

The facts of the case are that there were two schools of thought about the treatment of patients who receive electro-convulsive therapy (ECT). One recommended that relaxant

drugs should be used, and the other that they should not because of the risk of fractures. The claimant, who had not been warned of the risks involved, had been not given the relaxant drugs, and had not been restrained to prevent injury. He suffered fractures as a result of not being properly restrained when receiving the treatment. On the basis of the above test formulated by the judge, the claim failed.

Although the statement was only a direction to the jury in a High Court case, it was adopted by the House of Lords with approval in later cases (eg, *Whitehouse v Jordan* [1981] 1 All ER 267) and has regularly been restated in clinical negligence cases.

In effect, it meant that provided the doctor concerned was able to produce expert witnesses prepared to testify that they would consider the course of action taken by the defendant to be in keeping with a responsible body of medical practice, he or she could escape liability. Professional people are well organised and may have an incentive to protect one another from negligence claims except in cases of blatant negligence, in which case the claim is likely to be settled out of court. The result is that claimants have been at a disadvantage. Indeed, the Pearson Commission in 1978 commented that only 30–40% of medical negligence claims are successful, as opposed to 60–80% of negligence claims generally.

The justification for the *Bolam* rule was stated by Lord Scarman in *Maynard v West Midlands RHA* [1985] 1 All ER 635:

> Differences of opinion exist, and continue to exist, in the medical as in other professions. There is seldom any one answer exclusive of all others to problems of professional judgment. A court may prefer one body of opinion to the other; but that is no basis for a conclusion of negligence.

The rule was later extended to cover all claims for professional negligence.

7.2.12 Some criticisms of *Bolam*

A number of criticisms of the *Bolam* principle were expressed over the years. They can be summarised as follows:

- the rule was unfair to claimants and too protective of the professions;
- the rule allowed the professions to set their own standards, when professional standards should be reviewable by the courts;
- the *Bolam* test was a state of the art descriptive test, based on what is actually done, whereas in negligence generally the test is a normative test, based on what should be done (see Montrose, 'Is negligence an ethical or sociological concept?' (1958) 21 MLR 259);
- the *Bolam* test in medical cases allowed treatments which are only marginally acceptable to meet an acceptable standard of care. In the *Bolam* case itself, the treatment which injured the claimant was even in those days almost obsolete, and was known to carry a high risk of fractures. Articles had appeared to that effect in the medical press for many years;
- while requiring the defendant to conform to a 'responsible' body of opinion the cases never actually defined what is 'responsible'. How many doctors would be required to form a 'responsible body'?;

- the rule is yet another example of the professions protecting one another: see *Hatcher v Black* (1954) *The Times*, 2 July, in which Lord Denning described the negligence claim as a 'dagger at the doctor's back'.

7.2.13 Challenges to *Bolam*: the modified test in *Bolitho*

Some of the arguments which were raised against *Bolam* in the older cases were resurrected in a later series of cases which challenged the *Bolam* test.

The matter was eventually clarified by the House of Lords in *Bolitho v City and Hackney HA* [1992] PIQR P334, (1997) 39 BMLR 1, HL. Although the test is simply a modification of the *Bolam* test, it provides the opportunity for a new approach to expert evidence in relation to the standard of care.

The facts of the case are as follows. In 1984, a two year old boy, Patrick Bolitho, was admitted to hospital, suffering from croup. His treatment was under the care of Dr Horn, the senior paediatric registrar, and Dr Rodger the senior house officer in paediatrics, and arrangements were made for him to be nursed on a one to one basis. The next morning, Patrick seemed much better but in the afternoon the nurse was very concerned because he was wheezing badly and had turned white. She bleeped Dr Horn, who promised to come and check him, but when the nurse returned to him, Patrick was much better so it was decided that Dr Horn did not need to come. A second episode occurred and the nurse again became very worried and telephoned Dr Horn, who was in clinic. Dr Horn said she had asked Dr Rodger to see Patrick, but the batteries in her bleep were flat and she did not receive the message from Dr Horn. Meanwhile, Patrick's condition again improved and he was chatty and active. About half an hour later, the nurse became concerned yet again and telephoned the doctor. The emergency buzzer sounded, which meant that Patrick had severe breathing difficulties, and a cardiac arrest team was called, but Patrick's respiratory system had become completely blocked and it was about 10 minutes before his heart and breathing functions were restored. As a result of this episode, Patrick suffered severe brain damage. He did not die that day, however, and eventually returned to his home. Patrick did later die, and his mother continued proceedings as administratrix of his estate.

The defendants admitted that Dr Horn was in breach of her duty of care, as she should have attended Patrick or should have ensured that a deputy did so. The case turned on causation, and the court had to consider two issues. The first was what Dr Horn would have done if she had attended Patrick when called to do so and whether this would have made any difference to the outcome. It was agreed that, if Dr Horn had intubated the little boy before the serious episode (to provide an airway), he would not have suffered the cardiac arrest. The trial judge ruled that, if Dr Horn would have intubated the patient had she seen him, the claim should succeed, but if she would not have intubated him, the claim could only succeed if it could be established that such failure was contrary to accepted medical practice. This involved the application of the *Bolam* test to *causation* in the event of a negligent omission. On the facts, the trial judge found that Dr Horn would not have intubated had she gone to check on Patrick.

The trial judge applied the Bolam test to determine what Dr Horn *should* have done had she attended. The House of Lords found that the trial judge had been correct to do so

because he had been bound by the *Bolam* case as it was re-stated in the later decision of the House of Lords in *Maynard v West Midlands RHA*.

Lord Browne-Wilkinson, delivering the judgment of the House in the *Bolitho* case, explained the law:

> The two questions which he had to decide on causation were: (1) what would Dr Horn have done, or authorised to be done, if she had attended Patrick? And (2) if she would not have intubated, would that have been negligent? The *Bolam* test has no relevance to the first of those questions but is central to the second.

Their Lordships concluded that the court is not always bound to find that a doctor can escape liability for negligence by providing evidence from experts that his opinion and actions were in accordance with accepted medical practice. Lord Browne-Wilkinson continued:

> 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 medical 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 view, the experts have directed their minds to the question of comparative risks and benefits and have reached a defensible conclusion on the matter.

Two highly persuasive cases supported this view. In *Hucks v Cole* [1993] 4 Med LR 393, the Court of Appeal found that a doctor had been negligent in not treating with penicillin a patient who was suffering from a condition which could lead to puerperal fever – a potentially fatal illness. Despite expert evidence that there were some doctors who would not have given the patient penicillin, the court believed that it was correct to select which expert view was 'correct' and chose that of the experts for the appellant. In the second case, *Edward Wong Finance Co Ltd v Johnson Stokes and Master* [1984] AC 1296, [1984] 2 WLR 36, the Privy Council held that, even though the defendants had acted in accordance with an almost universal practice, they had still been negligent because that practice was not reasonable or responsible. Lord Browne-Wilkinson went on to explain that:

> in the vast majority of cases, the fact that distinguished experts are of a particular opinion will normally mean that the opinion is reasonable, and that only in rare cases will it be possible to demonstrate that the professional opinion does not withstand logical analysis.

In the end, in the *Bolitho* case, the House of Lords unanimously decided that the case was not one in which the court could choose between the two expert views. Evidence given by the defence expert could not have been dismissed as unreasonable or illogical, since intubation is far from being risk free, especially in a young child. The appeal therefore failed and the child's parents obtained no remedy.

7.2.14 The wider implications of *Bolitho*

The decision in the *Bolitho* case is significant not only for clinical negligence but also because it has implications for all other types of professional negligence claims – see *Twenty Two A Property Investments Ltd v Simpson Curtis* [2000] EGCS 140.

The new approach does allow the court to choose between two bodies of opinion in appropriate circumstances, but this will only be possible if the judge is unable, as a matter of 'logic', to accept one of the professional opinions and reject the other. These cases are likely to be rare. However, it seems that risk management by professional people will be regarded as important in future cases. Risk management involves the development of systems to identify and manage risks, often by means of specially drafted policies, protocols and guidelines. In many fields of industry and professional practice, including education, assessment and management of risks may be required by Health and Safety Regulations, or by insurers (see Chapter 14).

There is a steady stream of claims on a wide range of professional negligence issues. These are reported regularly in the Law Reports and in professional journals such as 'Professional Negligence' and 'Personal Injury Compensation'.

It should be noted that the *Bolam/Bolitho* approach applies only to matters of professional opinion, and is not relevant when the judge is taking expert advice on matters of fact. In *Penney and Others v East Kent HA* (2000) 55 BMLR 63, the Court of Appeal ruled that, where the judge was required to make findings of fact which were the subject of conflicting expert evidence, *Bolam,* as modified by *Bolitho*, had no application at this early stage in the enquiry, which is concerned with establishing the truth of factual evidence.

Smith v Southampton University Hospital NHS Trust [2007] EWCA Civ 387 provides an example of the application of the *Bolitho* approach. This was an appeal against a decision in favour of the defendant NHS Trust for clinical negligence. The claimant had suffered injuries in the course of a radical hysterectomy and the removal of potentially cancerous pelvic lymph nodes. The Court of Appeal concluded that the trial judge had been entitled to reach the conclusion that the surgeon was not negligent in overstitching a hole in a vein after his first attempt had failed. There had been a conflict of evidence between the medical expert witnesses, and the judge was entitled to prefer the evidence of an expert supporting the approach taken by the surgeon, on application of *Bolam/Bolitho*.

The *Bolam/Bolitho* approach has been considered by the Court of Appeal in several cases in relation to causation (see Chapter 5), and has been extended to cases involving the question of consent to medical treatment (*Pearce v United Bristol Healthcare Trust*).

The test has also been considered in the context of breach of duty. One case that is frequently cited in this context is *Marriott v West Midlands AHA and Others* [1999] 1 Lloyd's Rep Med 23. The claimant had fallen down the stairs at his home and had collapsed in an unconscious state. He was assessed and admitted to hospital for observation but was allowed home the next day, although he complained of feeling ill. When his condition did not improve after some days the claimant's wife contacted the GP, who advised that he should stay at home, despite knowing the details of his medical condition. It turned out that the claimant was seriously ill and suffered further serious illness. The trial judge heard expert evidence for both sides, and choosing between the opposing expert witnesses, concluded that the GP had been negligent. The Court of Appeal, by a majority, held that the judge had been correct. The court had to be satisfied that the exponents of the body of opinion relied upon had a logical basis. However, in the view of Pill LJ, who dissented, it was not necessary to apply *Bolitho* in these circumstances, as the judge could simply have found, on the facts, that the defendant's expert report could have been discounted.

Some would argue that judges are now more willing to make a finding of negligence on the part of a doctor. *Harding v Scott-Moncrieff* [2004] EWHC 1733 QB is an example. Here a GP who was called to a house to attend a man suffering from a heart attack was held to have been negligent in not summoning an emergency ambulance and not giving the patient aspirin and a diuretic. In *Ryan v East London and City HA* (2001) unreported, liability was established where the misdiagnosis of a spinal tumour led to the wrong operation being performed as a result of which a child suffered permanent serious physical incapacity. If the correct diagnosis had been made and appropriate treatment had been given the child would probably have had a stable spine without any serious deformity. The judge held that the management of the early stages of the claimant's condition, at the diagnostic stage before the first operation, fell below acceptable standards of medical practice and led to the wrong operation.

In *Hunt v NHS Litigation Authority* (2002), it was held that a hospital had been in breach of its duty of care to a mother in labour because a doctor in its employment had failed to realise the true implications of cardiotocograph results, and the baby suffered cerebral palsy. A doctor examined the mother in labour, noted that the cervix was fully dilated and gave instructions for drugs to be administered to speed up contractions, if the foetal heart was strong enough. The mother was then left in the care of midwives, who administered the drug but the doctor attended twice more and on the second occasion she noted that the baby's heart was beating irregularly. The baby was then delivered using forceps, but the cord was wrapped very tightly around her neck. She suffered brain damage immediately before her birth. The judge found that the doctor should have realised from the monitoring that the administration of the drugs at the material time risked causing serious hypoxia and injury to the foetus, and that a forceps delivery should have been carried out earlier. On the basis of *Bolam/Bolitho*, the doctor's actions were not acceptable to a responsible body of medical opinion and thus were negligent.

Again, in *Swift v South Manchester HA* (2001) unreported, a judge found a hospital liable in negligence where a mother had been left unattended between the delivery of twins and the second twin was consequently born with cerebral palsy. The court preferred the expert evidence offered for the claimant, applying both limbs of the *Bolam/Bolitho* test.

Under reforms introduced into the NHS by the Health Act 1999, healthcare organisations will be required to implement guidance designed to improve standards of quality of care on a uniform basis. Clinical guidelines written by a range of experts in different fields of medicine under the auspices of the National Institute for Health and Clinical Excellence (NICE), are distributed throughout the NHS. This has become known as NICE Guidance, and it is not unusual for courts to use this and other guidance to determine the appropriate standard of care in clinical negligence cases. It will be difficult for doctors who deviate from these official guidelines to defend claims for negligence, unless there are specific reasons which justify such a departure from recognised good practice.

The decision in *Thomson v James and Others* (1996) 31 BMLR 1, a case decided long before the National Institute for Health and Clinical Excellence was established, is an indication of the importance of guidelines in professional practice. In that case, a GP had failed to observe the government advice when advising the parents of a child about the vaccine for measles, mumps and rubella. In the event, the child who was not given the vaccination on the advice of the GP, later contracted measles and, following

complications, meningitis. She suffered permanent brain damaged as a result. The doctor was found at first instance to have been negligent because he had not observed the guidelines.

Sir Michael Rawlins, who chairs the National Institute for Health and Clinical Excellence is on record as saying that he always:

> urges doctors to record their reasons for departing from clinical guidelines, because there is a widely held legal view that guidelines are being used increasingly to define the standard of care in clinical negligence claims. [*Medeconomics*, November 2004].

If doctors act fully in accordance with the policy laid down by hospitals that employ them, it is likely that they will escape liability for negligence, and the hospital will not be liable for system failure as long as the policy was reasonable. In *Cowley v Cheshire & Merseyside Strategic Health Authority* [2007] EWHC 48 (QB) the claimant's mother had a history of giving birth prematurely, and she was admitted to hospital late in the afternoon, experiencing abdominal tightening and pain. The doctor who examined her decided correctly that she was not in premature labour at that time and applying the hospital's policy relating to her condition, did not administer cortico-steroids. The drugs were only administered later, when premature labour began, but despite the treatment, the claimant was born later that night, suffering from significant brain damage. The claim failed, as the weight of evidence demonstrated that the hospital's policy was within the reasonable range of policies at the relevant time for the management of premature labour, and the doctor concerned had complied with it.

On the other hand, in *Richards v Swansea NHS Trust* [2007] EWHC 487 (QB) it was held that since the doctors who were dealing with the claimant's mother had not delivered him by caesarean section within the national standard time of 30 minutes, once it was discovered that he was suffering foetal distress, there had been negligence. The onus was on the defendants to prove that there were good reasons why it took so long to deliver the baby, and as they could not do so, the claim succeeded.

It was thought for some time that experts were not expected to keep abreast of every new development in their field of specialist interest. In *Crawford v Charing Cross Hospital* (1983) *The Times*, 8 December, the claimant suffered brachial palsy because of the position of his arm during a blood transfusion while he was having surgery. He claimed that the anaesthetist should have been aware of the risk because an article on the subject had been published in the *Lancet* six months previously. It was held that there had been no negligence. No reasonable doctor could be expected to keep up to date with the entire literature all the time.

This view has now been modified. The latest General Medical Council advice on this matter is that a doctor must keep up to date with new developments, not only in medicine, but also in those aspects of law which are relevant to their practice. Attendance at professional development courses is now compulsory for doctors and most other professional people.

In these days of much improved communications and emphasis on fast dissemination of professional information on electronic databases, it would be much more difficult to argue that keeping up to date is not to be expected. Changes brought about by the Health Act 1999 will ensure that the latest authoritative guidance be given to all doctors.

The emphasis in this section has been on clinical negligence claims, which fall into a special category given priority treatment by the Lord Chancellor's Department and the Department of Health because of growing concern about the increase in claims in recent years. It is dealt with separately from other civil claims under the Civil Procedure Rules (see Pre-action Protocol for the Resolution of Clinical Disputes).

The Audit Commission Reports suggest that cash injections into the NHS are being seriously eroded by defending clinical negligence claims and the cost of paying damages. The reports estimate that thousands of patients die or are seriously injured every year as a result of medical errors and that one in every 14 patients suffers an adverse event such as a diagnostic error or hospital infection. The increase in claims is possibly the result of people being better informed and more litigious than in previous years. It is not only the number of claims that has increased. Since the decision in *Wells v Wells* (1996) 93(40) LSG 25, the amount paid in damages is now higher, especially in cases involving accident victims who require a substantial amount of future care. The decision in *Heil v Rankin* [2000] 2 WLR 1173 (see Chapter 20) inevitably means that awards of general damages will increase and there have been many claims awaiting settlement on the basis of the outcome of that litigation.

The government conducted a detailed consultation on the clinical negligence litigation system, entitled 'Making Amends', and proposed a range of reforms that it is hoped will prevent a further escalation in the number of claims. The result of the consultation is the NHS Redress Act 2006 which aims to establish a more efficient way of dealing with claims against the NHS.

7.2.15 Clinical negligence and consent to treatment: failure to warn

Failure to warn a patient of the risks involved in a particular medical procedure may amount to negligence. Treatment given against the express wishes of the patient would be actionable as battery (see Chapter 13). For many years the UK courts adopted a paternalistic approach and it was for the doctor to assess how much information to provide to the patient. This was not the case in other jurisdictions, such as Australia, where a highly developed doctrine of 'informed consent' has applied for many years, and patients have been entitled to full information about risks and side effects of treatment. There is recent evidence that the UK courts are finally prepared to concede that attitudes towards doctors have changed and patients should be told about significant risks and side effects of their treatment. Trends in judicial policy reflect a contemporary swing by the government towards recognising the importance of patient autonomy and 'putting patients at the centre,' as Department of Health rhetoric repeatedly states. Indeed, in *Chester v Afshar* [2004] UKLH 41, Lord Steyn went so far as to say 'In modern law medical paternalism no longer rules'.

It is instructive to trace the development of the law in this area.

In *Sidaway v Governors of Bethlem Royal and Maudsley Hospitals* [1985] 2 WLR 480, a patient suffered pain and partial paralysis in her arm after an operation to remove pressure on a nerve root. The operation was performed with all care and skill possible, but it carried a small risk (less than 1%) that the patient would suffer paralysis, and the patient alleged that she had not been informed of this risk. The House of Lords held that in cases involving risks, exactly how much information must be given depends upon the

Bolam principle. A doctor's duty of care will be discharged if he or she conforms with the practice of a responsible body of medical opinion in deciding how much to tell a patient. Lord Bridge thought that if the risk was as high as 10% a patient should be informed of it. In the case of Mrs Sidaway, where the risk was only about 1%, expert witnesses from the branch of the medical profession concerned gave evidence that they would not normally inform a patient of so small a risk.

Although they are difficult to find, and few in number, there followed some successful claims based on negligence in failing to inform of the risks of treatment. In *McAllister v Lewisham and North Southwark Health Authority* [1994] 5 Med LR 343, the claimant was not told by a senior consultant surgeon that there were risks surrounding an operation he was about to undergo on his leg. One such risk materialised and the claimant sought damages. It was held that there had been negligence on the part of the surgeon.

In *Smith v Tunbridge Wells Health Authority* [1994] 5 Med LR 334 a 28 year old man was not told by the surgeon treating him that impotence and bladder dysfunction were risks inherent in surgery to treat a rectal prolapse. He suffered both, and brought a successful claim against the surgeon. It was considered that the only reasonable course for the surgeon would have been to disclose these risks.

In *Carver v Hammersmith and Queen Charlotte's Special HA* (2000) unreported, the court stated that, before consent is provided by a competent adult, the patient is entitled to receive some explanation of the treatment to be provided. How much detail should be given by the doctor depends on the circumstances of the particular case, but the courts appear to be moving towards insisting that doctors give fuller consideration to the autonomy of the patient as stated in *Pearce v United Bristol Healthcare Trust* (see below). In *Carver*, the defendant health authority was found liable in negligence for the failure of its doctor to explain that the 'Bart's test' for Down's Syndrome was not a diagnostic test, unlike amniocentesis, but was only a screening test which could not detect one in three Down's Syndrome foetuses.

The case of *Bennett v NHS Litigation Authority* (2001) was settled out of court. In this case a 25 year old man was told by a neurosurgeon that his epilepsy might improve if he underwent a procedure known as depth-electrode brain exploration. A consultation with the patient was interrupted by a telephone call, and the surgeon did not explain fully what the procedure involved, nor the risk of possible brain damage that it carried. The claimant signed a consent form on admission to hospital but suffered brain damage during the treatment. Although liability was disputed, the claim was settled for £225,000.

The question of how much information a patient is entitled to receive in order to provide valid consent to treatment was again considered again by the Court of Appeal in *Pearce v United Bristol Healthcare NHS Trust* [1999] 1 PIQR 53. Mrs Pearce was pregnant with her sixth child. The expected date of delivery of the baby was 13 November 1991 and on 27 November she saw her consultant, an employee of the defendants, and asked if labour could be induced or the baby delivered by elective Caesarean section, as she was anxious because the baby was so overdue. The consultant examined Mrs Pearce, explained the risks of an induced labour and advised her to have a normal delivery. Mrs Pearce accepted the consultant's advice. She was admitted to hospital on 4 December and the baby was delivered stillborn.

Mrs Pearce and her husband brought a claim, arguing that they should have been told that there was an increased risk of still birth if the delivery was delayed beyond 27 November and that, if she had been made aware of the risk, she would have opted for an elective Caesarean section as soon as possible.

The Court of Appeal dismissed the appeal. It was held that, when deciding how much information to provide to a patient, a doctor must take into account all the relevant circumstances, including the patient's ability to understand the information and his or her physical and emotional state.

This view was based upon an analysis of *Sidaway* and *Bolitho*. The Court of Appeal took the view that it is the legal duty of the doctor to advise the patient about any 'significant risks' which may affect the judgment of a reasonable patient in making a decision about treatment. In the case of Mrs Pearce, there was a very small increased risk of still birth if the delivery was delayed after 27 November. This risk was in the order of one or two in 1,000, and the medical experts indicated that, in their view, this was not a significant risk. As Mrs Pearce had been in a distressed state at the time that she received the advice, this was not a case in which it would be proper for the court to interfere with the opinion of the doctor who treated the patient. The Court of Appeal took the view that, even if she had been advised of the risk, Mrs Pearce, on the evidence, would have opted to have a normal delivery.

Although the outcome of this case is not surprising, given the very low risk of still birth, there are certain aspects of the Court of Appeal's ruling which are worth noting, as there is an indication of a new approach to the question of information provision prior to obtaining consent to treatment. First, it seems that the *Bolitho* test is likely to be of relevance in consent cases, despite the fact that Lord Browne-Wilkinson expressly excluded information and consent from the discussion in *Bolitho*. Secondly, Lord Woolf indicated that it is for the court, and not for doctors, to decide on the appropriate standard as to what should be disclosed to a patient about a particular treatment. He stated:

> If there is a significant risk which would affect the judgment of a reasonable patient, then, in the normal course, it is the responsibility of a doctor to inform the patient of that risk if the information is needed so that the patient can determine for him or herself as to what course he or she should adopt.

This suggests an approach similar to that taken in the Australian case of *Rogers v Whittaker* (1992) Aust Torts Rep 81, in which the Australian High Court ruled in favour of doctors disclosing all material risks which the reasonable patient might regard as significant, taking into account the particular patient. The patient in that case had asked several times for details of the risks and complications of her treatment, and had not been told that she had a one in 14,000 chance of becoming blind.

The law in this area is continuing to evolve in line with changes in attitudes to the responsibilities of healthcare professionals and the rights of patients in modern society in the context of human rights and a developing framework of guidance issued by the Department of Health. Its *Reference Guide to Consent* (2002) is now in need of further revision in the light of the decision of the House of Lords in *Chester v Afshar* [2004] 4 All ER 587, [2004] UKHL 41. The case is concerned not only with consent to medical treatment but also with the question of causation, and it will be considered again in chapter eight.

The claimant was referred to the defendant, a consultant neurosurgeon, because she had been suffering from back pain since 1988. After a further recurrence of the problem she accepted that she might need disc surgery to correct the problem. Her doctor explained in the letter of referral to the consultant that the claimant was anxious to avoid surgery if possible, and when she saw the defendant for the first time the claimant explained that she was anxious about having an operation because of what she described as 'horror stories' about back surgery. She specifically asked him about risks associated with the operation that was proposed. The trial judge found that paralysis had not been mentioned by the defendant as a possible side-effect of the surgery, and that the defendant had merely said that he had not crippled anyone as yet. The claimant argued that if she had been told of the small risk of paralysis (around 1%–2%), she would not have agreed to have the operation when she did, and she would have made further enquiries and sought other opinions as to whether surgery was necessary. She did agree that she would probably have had the same operation eventually.

In the event, the operation, which involved removal of two discs, was carried out by the defendant and afterwards the claimant suffered motor and sensory impairment and further pain. No other patient on whom the defendant had carried out the procedure had ever experienced this outcome. However, there was no negligence in the way in which the operation was carried out, the only question of negligence arising in relation to failure to inform the claimant about the risks of the surgery.

The House of Lords ruled, by a majority of three to two, that in a claim for negligence on the basis that insufficient information was provided to the claimant about the risks involved in medical treatment, the claim may succeed even when the conventional principles of causation have not been satisfied. Issues of consent and causation are bound together inextricably in this particular case, and interesting new developments in both areas may follow.

The House of Lords considered carefully the case of *Chappell v Hart* (1998) 195 CLR 232, an Australian High Court decision, which was only a persuasive precedent, but which mirrored in many respects the issues and arguments in this case. Lord Hope examined *Sidaway v Board of Governors of Bethlem Royal Hospital* [1985] 1 All ER 643, *Chappell v Hart* and several academic opinions. He made it plain that the function of the law is to protect the patient's right to free choice, saying (603:54f):

> If it is to fulfil that function it must ensure that the duty to inform is respected by the doctor. It will fail to do this if an appropriate remedy is not given if the duty is breached and the very risk that the patient should have been informed about occurs and she suffers injury.

Lord Walker argued that advice given by a doctor is the very foundation of a patient's consent to treatment, saying:

> In a decision which may have a profound effect on her health and well-being a patient is entitled to information and advice about possible alternatives or variant treatments.

He considered the dangers inherent in finding against the claimant, pointing out that such an outcome would leave an honest claimant who was not prepared to assert that she would never have undergone the treatment, without a remedy, even though she had suffered injury that fell directly within the scope of the defendant's duty to warn. He

concluded that a claimant ought not to be without a remedy, even if that remedy involves some extension of existing principles of causation, otherwise the duty of the surgeon would be meaningless.

Even Lord Bingham, one of the dissenting judges accepted that medical paternalism 'no longer rules', but took the view that the law should not seek to reinforce the right of a patient to receive information by providing the opportunity 'for the payment of very large damages by a defendant whose violation of that right is shown not to have worsened the physical condition of the claimant.'

He added:

> The patient's right to be appropriately warned is an important right, which few doctors in the current legal and social climate would consciously or deliberately violate.

Lord Steyn said:

> A patient's right to an appropriate warning from a surgeon when faced with surgery ought normatively to be regarded as an important right which must be given effective protection whenever possible.

The decision of the House of Lords in this case is a strong indication of the importance attached by the judiciary to informed choice in healthcare, reflecting the stance taken in the European Charter of Patients' Rights which expresses a trend across Europe that favours patient autonomy. Among the fourteen rights listed in the European Charter of Patients Rights are the right to information, the right to consent, the right to free choice and the right to respect for patients' time. Government policy and that of the courts in the UK is now slanted towards the empowerment of patients, and despite the different views expressed about the correct approach to causation, there was unanimity in the House of Lords about the importance of the need to inform patients about risks inherent in their treatment.

In effect the ruling of the House of Lords gives greater priority to the doctrine of informed consent than to the basic principles of causation in tort, as will be seen in chapter eight. It represents a departure from logic in favour of the principle that patients should be able to make informed choices about their treatment. As Lord Hope acknowledged, each patient is an individual (612:86):

> For some the choice may be easy – simply to agree to or to decline the operation. But for many the choice will be a difficult one, requiring time to think, to take advice and to weigh up the alternatives. The duty is owed as much to the patient who, if warned, would find the decision difficult as to the patient who would find it simple and could give a clear answer to the doctor one way or the other immediately.

The question of information provision is further discussed in the context of consent to treatment, and in the context of causation in Chapter 8. However it is still possible to find some surprising decisions, such as *Hamwi v Johnston* [2005] EWHC 206 (QB) where a judge held that there was no duty on a doctor to ensure that a patient understood his advice.

7.2.16 Trainees

Those who are learning skills are required to exercise the same standard of care as people who have already acquired such skills.

The case of *Nettleship v Weston* (see 7.2.10, above) demonstrates that people who are learning a skill must exercise the same high standard of care as those who are already proficient in that skill.

Trainee solicitors, accountants, nurses, cooks, doctors and others should all take heed of this principle. The case of *Wilsher v Essex AHA* [1988] 2 WLR 557 confirmed this some 15 years later. Junior doctors are required to adhere to the same standard of care as those who are more senior. If there is a problem with which a junior person cannot deal, then the standard of care will be met if that person seeks advice from someone more senior. In *Wilsher*, a doctor working in a special care baby unit negligently misread the oxygen levels in a baby's blood with the result that the baby became blind. The concept of 'team negligence' was introduced, and it was held that everyone working in the unit was expected to exercise the same professional standard, and to look to a more senior person for advice if necessary. In fact, the case was sent back to the High Court for the issues of causation to be decided, but potentially there had been negligence here.

The idea of 'team negligence' has been further developed in later cases. In *Morris v Solihull Healthcare NHS Trust* (1999) unreported, the claimant succeeded in obtaining damages because the judge found that there had been failures of communication between members of her team of carers.

7.2.17 Professional negligence claims generally

There is some evidence from the case law that in professional negligence cases generally, which do not involve clinical negligence, the courts have been more willing to condemn as negligence a practice which is commonly adopted and followed by professional people carrying out their customary activities. For example, in *Re Herald of Free Enterprise* (1989) *The Independent*, 5 May, the Divisional Court declared that the universal practice of the masters of roll-on roll-off ferries, allowing vessels to set sail without carrying out checks to ascertain whether their bow doors were open, amounted to negligence, even though the practice was carried out on all such vessels all of the time. In *Edward Wong Finance Co Ltd v Johnson Stokes and Master* [1984] AC 1296, [1984] 2 WLR 36, the Privy Council ruled that a solicitor following standard practice when dealing with conveyancing in Hong Kong had been negligent, despite a body of expert opinion supporting the practice.

In *Adams v Rhymney Valley DC* (2000) 150 NLJ 1231, the Court of Appeal held that the *Bolam/Bolitho* test applies to all those who exercise a particular skill, regardless of whether the particular defendant possesses the relevant qualification. Claims for negligence against the professions in general have risen rapidly in recent years, and solicitors have seen a sharp increase in the contributions which they pay to the Solicitors Indemnity Fund, which provides compulsory insurance cover for the profession. There has been speculation about the reasons for the rising number of claims against solicitors and other professional people, such as valuers and architects, and it is thought that the rapid rise and fall in the property market at the end of the 1980s may have been responsible (see, for

example, *Bristol and West Building Society v Fancy and Jackson* [1997] 4 All ER 582; *Platform Home Loans v Oyston Shipways Ltd* [1999] 2 WLR 518). In *Merivale Moore plc v Strutt and Parker* (1999) *The Times*, 5 May, it was held that advice given in unqualified terms by surveyors and valuers to their clients who relied upon that advice, justified a finding of negligence. The advice should have carried a warning of the risks involved in the purchase of the property in question.

Another reason that has been suggested is the extension of the *Hedley Byrne* principle (see *Hedley Byrne & Co v Heller & Partners* [1964] AC 465), which allows claims by people other than clients – see *White v Jones* [1995] 2 AC 207.

The use of conditional fee agreements has made it possible for more claimants to bring claims in respect of negligent work by professional people such as accountants, solicitors, surveyors and valuers. Although professional people carry indemnity insurance, the steady rise in claims is a growing cause for concern and this might have been reflected in *Hyde v JD Williams & Co* [2001] BLR 99 where the Court of Appeal ruled that, if a profession has different schools of thought, a professional person must be judged against the lowest acceptable standard.

In the case of teachers, the professional standard of care has been equated with that of the reasonable parent (*Beaumont v Surrey CC* (1968) 66 LGR 580) in relation to safety and caring matters. However, the Courts do not accept that some injuries suffered by school children are the result of unfortunate accidents rather than negligence. In *Babbings v Kirklees Metropolitan Borough Council* [2004] EWCA Civ 1431 the Court of Appeal ruled that the Courts would be doing a disservice to gym teachers if they were to find them liable for every accident that occurred in a gym. However, in more specific educational matters, such as the delivery of efficient lessons and preparation for examinations, the standard is that of the reasonable teacher. Future claims against teachers stand to be decided in the light of the Compensation Act 2006 and it remains to be seen whether the standard of care will be affected.

To take an example from another profession, the law expects high standards of pharmacists who are dispensing prescriptions. In *Horton v Evans; Lloyds Pharmacy Ltd* [2006] EWHC 2008 (QB), it was held that a pharmacist had a duty to consider whether the medication prescribed for a particular patient was suitable for that patient, and if there had been a change to the strength of the patient's medication, the pharmacist should ask whether the prescription represented what the doctor had really intended to prescribe, or whether there had been some mistake on the part of the doctor. Failure to question the correctness of the prescription with the doctor or the patient could amount to a breach of duty.

7.3 PROOF OF BREACH AND *RES IPSA LOQUITUR*

In most cases, the claimant has the task of amassing the evidence and proving the case alleged against the defendant, on a balance of probabilities. This is often very difficult and, in some cases impossible.

There are a few exceptions to the general rule. Thus, under s 11 of the Civil Evidence Act 1968, a conviction in a criminal prosecution will be regarded as evidence that a

defendant committed the crime. This can be helpful to claimants in claims arising from road traffic accidents.

In rare circumstances, the courts are prepared to draw an inference that there has been negligence and it will then be for the defendant to demonstrate that there has been no negligence in the circumstances. This situation is described as *res ipsa loquitur* (translated as 'the situation speaks for itself'). Clearly, this situation will make matters of proof much easier for the claimant. Note that the use of Latin phrases such as *res ipsa loquitur* are frowned upon by the courts since the Civil Procedure Rules 1998 (see *Fryer v Pearson* (2000) *The Times*, 4 April).

Although it was at one time described as a 'legal doctrine', *res ipsa loquitur* has been recognised by Lord Megaw as:

> . . . no more than a common sense approach, not limited by technical rules, to the assessment of the effect of evidence in certain circumstances.

If the facts of a particular case are suitable, in that the criteria set out in *Scott v London and St Katherine's Docks* (1865) 2 H & C 596 apply, the case will be appropriate for the operation of *res ipsa loquitur*.

The criteria are as follows:

- the accident must be one which cannot easily be explained. Its cause must be unknown;
- the incident would not have happened had it not been for lack of proper care;
- the defendant must have been in control of the situation.

In the *Scott* case itself, some bags of flour fell out of the upper window of a warehouse injuring the claimant. The Court of Appeal, directing a new trial, set out the criteria for *res ipsa loquitur* to apply. The trial judge had found in favour of the defendant because there was no evidence that he had been negligent, even though the circumstances suggested that there must have been negligence of some kind.

7.3.1 Unknown cause

If the circumstances of an accident are known, it is for the claimant to prove negligence. However, the claimant is at a great disadvantage if the cause is unknown, and *res ipsa loquitur* places responsibility for providing an explanation upon the defendant. If no one really knows what happened, the defendant is best placed to provide an explanation, particularly if he or she was in control and had some knowledge denied to the claimant.

In *Widdowson v Newgate Meat Corpn* [1998] PIQR P138 the claimant, who had a serious mental disorder, had been walking along a dual carriageway when he was struck by a van which was being driven by an employee of the defendants. In a statement to the police, the driver of the van had said that he had been driving at about 60 mph at the time with his headlights on full beam and that he had been aware that the van had hit something, though he had not known what it was. The trial judge had ruled that, as the claimant did not give evidence, he could not decide who was at fault, and he was not prepared to allow *res ipsa loquitur* to apply. However, the Court of Appeal held that, although it was not common for judges to allow the use of *res ipsa loquitur* in road traffic accidents, in this case it could be justified.

Contributory negligence was assessed at 50%. There was also a finding of 50% contributory negligence in *Hatton v Copper* [2001] EWCA Civ 623 in which a car driven by the claimant collided in the middle of the road with one driven by the defendant, and neither could remember the accident.

7.3.2 Lack of proper care

Cases which illustrate the lack of proper care speak for themselves. For example, it was held in *Chapronière v Mason* (1905) 21 TLR 633 that a stone in a bath bun could only have been there through some carelessness in its manufacture. In *Cassidy v Minister of Health* [1951] 1 All ER 575, it was held that when a patient entered hospital for a minor operation on two stiff fingers, but left hospital with four stiff fingers, there must have been negligence at some point on the part of the doctors.

7.3.3 Control by the defendant

If the defendant has control of the situation and the claimant had little or no knowledge of events, it is logical that the defendant should be made to provide an explanation, and that *res ipsa loquitur* will apply.

However, it should be noted that the burden of proof is on the claimant to show that any cause of the accident outside the control of the defendant was unlikely (*Lloyd v West Midlands Gas Board* [1971] 1 WLR 749).

7.4 *RES IPSA LOQUITUR* AND MEDICAL CASES

It might appear that *res ipsa loquitur* would should almost always apply to cases where there is an allegation of clinical negligence since the three criteria above can be applied very readily in the medical context. However, the courts have been reluctant to allow its application in medical cases (with one or two exceptions, for example, a dentist breaking a patient's jaw). Lord Denning, in *Hucks v Cole*, said that it should only apply against a doctor in extreme cases, and the Pearson Report in 1978 rejected its general application in medical cases for fear of an escalation of claims and a rise in doctors' insurance premiums, as has occurred in the US, where *res ipsa loquitur* frequently operates to the disadvantage of doctors.

The effect of *res ipsa loquitur* was identified by Hobhouse LJ in *Ratcliffe v Plymouth and Torbay HA* [1998] Lloyd's Rep Med 162 as follows: '*Res ipsa loquitur* is not a principle of law; it does not relate to or raise any presumption. It is merely a guide to help to identify when a *prima facie* case is being made out.' This case is instructive because in it the Court of Appeal gives guidance on the preferred approach to *res ipsa loquitur* in clinical negligence claims.

Res ipsa loquitur was frequently applied in cases involving foreign bodies in food-stuffs. Since the Consumer Protection Act 1987, its use in these cases has become unnecessary.

7.5 EFFECTS OF *RES IPSA LOQUITUR*

It has been argued that *res ipsa loquitur* has the effect of reversing the burden of proof and effectively creating strict liability in cases when it applies because it is almost always impossible for the defendant to provide an explanation as to what exactly happened. In *Ward v Tesco Stores* [1976] 1 WLR 810, for example, the claimant slipped on some spilled yoghurt on the floor in Tesco's. Although the store claimed to have operated an efficient scheme of patrolling the store to look for spillages, they could not explain how long the yoghurt had been on the floor and could produce no other evidence. They had little chance of successfully defending the claim. (But compare this with *Fryer v Pearson* (see 7.3, above), in which it was held that the mere fact a bottle had fallen at a supermarket checkout was insufficient to raise the inference of negligence.)

This view has now been discredited to some extent, and the better approach would appear to be that *res ipsa loquitur* does not go as far as was originally believed, as it simply raises an inference that there may have been negligence on the part of the defendant, and gives the defence the task of explaining what happened.

The application of *res ipsa loquitur* was explained in *Ratcliffe v Plymouth and Torbay HA* by Hobhouse LJ, when he said:

> *Res ipsa loquitur* is not a principle of law . . . When expert or factual evidence has been called on both sides at a trial, its usefulness will normally have long since been exhausted.

In practice, the application of the maxim usually eases the claimant's difficulties in proving negligence and places the defendant in the position of having to rebut the inference that he or she has been negligent. One advantage of this is that there may be an early settlement of the case.

7.6 CONSUMER PROTECTION ACT 1987

In some circumstances, the need to prove fault (breach of duty) has been abolished by the Consumer Protection Act 1987. This is discussed in Chapter 15.

FURTHER READING

Cane (ed), *Atiyah's Accidents Compensation and the Law*, 6th edn, Cambridge University Press, 2006, Chapter 2

Harpwood, *Medicine, Malpractice and Misapprehensions*, Routledge-Cavendish, 2008, New South Wales Civil Liability Act 2002

For regular monthly up-dates on this area of law, see *Personal Injury Compensation*, published monthly by Informa UK Ltd.

CHAPTER 8

CAUSATION AND REMOTENESS OF DAMAGE

8.1 THE RELATIONSHIP BETWEEN CAUSATION AND REMOTENESS OF DAMAGE

In strict theory, causation (called 'cause in fact') and remoteness (called 'cause in law') must be dealt with as two separate requirements in each case. Causation is a matter of fact and requires the claimant to prove that the negligent act caused the damage complained of. The rules concerning remoteness of damage are a matter of law and broadly require the claimant to establish that the damage was of a kind which was reasonably foreseeable. It is concerned with setting a limit on the extent of the harm for which the defendant should be held liable. However, it is not always a clear cut issue to establish where causation ends and remoteness begins, nor is it always a simple matter to separate some aspects of remoteness from issues which arise in relation to duty of care. Both causation and remoteness of damage frequently turn on issues of policy. Both are relevant throughout the law of tort and are dealt with in connection with negligence for the sake of completeness.

8.2 CAUSATION

The claimant will not succeed unless it can be demonstrated that the negligent act of the defendant caused or materially contributed to the damage complained of. This matter is a question of fact, and there are many cases which go to trial on the question of causation when there is no dispute about duty and breach.

The task of establishing a causal connection between the act of the defendant and the damage suffered by the claimant is not always simple. Often, there may be a complex set of conditions present, or even two concurrent sets of circumstances, and it can be difficult to untangle the web of circumstances to pin-point liability.

8.2.1 A typical examination problem

To take a road accident for example: A's car has faulty brakes because of a poor repair done by B, a junior mechanic who should have been supervised. A is driving late at night along a slippery wet road, which has been poorly maintained by the local highway authority. He has chest pains and feels dizzy. C, a child, runs into the road, whilst a teacher, on duty as the children leave school, attends to a sick child. A sees C, but just as he is about to apply the brakes, he has a heart attack, and loses consciousness. The brakes would have failed in any case but a deep rut in the road causes the car to swerve into the child, killing him. A is also killed. He had visited his doctor the day before complaining of chest pains but the doctor had negligently failed to diagnose a serious heart condition. Who is responsible for the two deaths?

It need not be necessary to establish a single cause of the damage, and indeed there

are often concurrent causes, in which case responsibility may be apportioned. In such cases, the various defendants, their lawyers and insurers often argue as to the proportion of liability each should bear, and frequently a case which might have been settled out of court at an early stage if there had only been one defendant will be taken to trial or settled at the door of the court because the defendants are fighting one another.

Potential defendants in the above case would be A's estate, the local highway authority, the local education authority, the garage, the child's estate and the doctor. Not all of these would be worth suing, but insured defendants, and local authorities who are their own insurers, certainly would.

Traditionally, the courts have applied various metaphors to assist in establishing cause. Judges speak of 'chains of causation', 'conduit pipes', and so on. Various tests are applied by the courts. For example, the following questions may be asked:

- has the chain of causation been broken?
- would the harm to the claimant have occurred 'but for' the defendant's negligence, or would the harm have been suffered anyway?
- was there a *novus actus interveniens* (a new intervening act)?

A close study of some of the cases in this area might assist you. Bear in mind that causation is important throughout the law of tort, even when there is strict liability. It is merely for the sake of convenience that it is dealt with here, and in most of the textbooks, in the context of negligence.

8.2.2 The 'but for' test

When the damage would have happened anyway, even without the defendant's negligence, there will be no liability on the part of the defendant. This 'but for' test is often applied first, and is rather a simplistic approach. It is not very helpful in multi-factorial situations, such as our road accident problem. There are some relatively simple situations when it can work well.

In *Robinson v Post Office* [1974] 1 WLR 1176, a patient who was to be given an anti-tetanus vaccination was not tested properly for an allergic reaction before the vaccination was administered and he did develop an allergy. However, as the result of the test would not have been discovered in time, and as the vaccination was necessary almost at once, it was decided that the failure of the doctor to test for the allergy did not in fact cause the damage.

More recently in *Devon County Council v Clarke* [2005] EWCA Civ 266, the Court of Appeal found that there was a causative link between a psychologist's negligence, the lack of remedial teaching provided to the claimant and the long-term effects of his dyslexia.

In *Barnett v Chelsea and Kensington HMC* [1969] 1 QB 4282, a night watchman was taken to hospital vomiting and suffering from severe stomach pains, but the casualty doctor on duty sent him away to see his own GP. He died soon afterwards of arsenic poisoning, and it was discovered that an unknown person had put arsenic in the tea of the watchmen on duty on a particular site. There was no dispute about the fact that the doctor had been negligent. What was in issue here was whether that negligent act had

caused the man's death. It was held that it had not. The man would have died anyway. Much of the evidence turned upon the question of whether he would have survived if he had been given an antidote as soon as possible after arriving at the hospital, and it was proved that he would not. The defendants were not liable.

In some cases it has been held that even if a breach of duty by a defendant does not satisfy the 'but for' test, it nevertheless amounted to a 'material contribution' to the risk, so the defendant should be responsible when the risk materialises (see 8.3, below).

Carter v Basildon & Thurrock University Hospitals NHS Foundation Trust [2007] EWHC 1882 (QB) is a case similar to *Barnett v Chelsea and Kensington HMC*, in which the arguments about causation were relatively straightforward and the decision turned on factual evidence. The claimant contended that his wife, who was aged only 20 at the time, had died as a result of clinical negligence on the part of hospital staff. His wife had attended the hospital for a post-natal check up, complaining of severe headaches in the mornings. The staff involved allowed her to leave the hospital, and she died the next day of a stroke. The defendants admitted breach of duty, as they agreed that his wife should have been admitted to hospital for assessment and observation when she explained about her headaches at the post-natal check, but argued that nothing could have prevented the death and that the negligence made no difference. It was held that if she had been admitted to hospital when she had her check up, and been given the correct treatment, on the balance of probabilities, she would not have died.

Fact situations are frequently complex, and in many situations the 'but for' test is unhelpful. The House of Lords ruling on *Chester v Afshar* [2004] UKHL 41 indicates that the traditional 'but for' test may not always be appropriate and that the courts may, in appropriate cases, introduce a new and radical approach to causation. The facts of the case are outlined on pages 152–3. The claimant could not argue that 'but for' the defendant's negligent failure to inform her of the risks of her treatment she would have decided not to undergo the proposed surgery. That was because she admitted that she would probably have had the operation at some future time in any event, but she would not have had the operation at the precise time that she did. The difficulty was that claimant was honest about this. Had she been less honest it would have been a simple matter for her to establish causation. However, as the risk would have been the same whenever the operation was carried out, it was impossible for her to suggest that the defendant's negligent failure to warn had been the cause of her injury. For a full statement of the facts of the case see Chapter 7.

Established tort law until then had required that for a claimant to succeed in negligence it is necessary to prove that there was a breach by the defendant of a duty of care, and that the breach of duty that resulted in damage. That principle had been modified to some extent by the decision in *Fairchild v Glenhaven Funeral Services* [2002] UKHL 22 (see 8.3.1). In this case therefore, the requirements of the negligence claim had not been satisfied, and this clearly presented a difficulty for the claimant. In Lord Hope's words:

> The question of law . . . is whether it was sufficient for Miss Chester to prove that, if properly warned, she would not have consented to the operation which was in fact performed and which resulted in the injury, or whether it was necessary to prove that she would never have had the operation.

The House of Lords held that the defendant had been negligent in failing to inform the claimant of the risk of paralysis, and that the claimant was entitled to damages *even though that failure to inform had not resulted in the injuries suffered by the claimant*.

Lord Steyn drew on the analogy of *Fairchild v Glenhaven Funeral Services* [2003] 1 AC 32, in which on policy grounds the House of Lords had modified the approach that is required to prove causation, and had decided that as each defendant had materially contributed to the damage, all should be liable. He concluded that the claimant's right to dignity and autonomy should be vindicated 'by a narrow and modest departure from traditional causation principles'.

Lord Hope examined the cases of *Sidaway v Board of Governors of Bethlem Royal Hospital* [1985] AC 871, *Chappel v Hart (supra)* and rejected the use of the conventional 'but for' test in this case, deciding in favour of the claimant. However, his view was that the injury in this case was so intimately connected with the failure of the duty to warn that it could be regarded as having been caused by it.

Lord Walker took a similar stance, arguing that advice by the doctor is the very foundation of a patient's consent to treatment:

> In a decision which may have a profound effect on her health and well-being a patient is entitled to information and advice about possible alternatives or variant treatments.

He concluded that a claimant ought not to be without a remedy, even if that remedy involves some extension of the existing principle, as in Fairchild, otherwise the duty of the surgeon would be meaningless.

The two dissenting speeches are interesting. Lord Bingham concluded that whenever the surgery was carried out the risk would have been the same, and took the view that the law should not seek to reinforce the right of a patient to receive information by providing the opportunity 'for the payment of very large damages by a defendant whose violation of that right is shown not to have worsened the physical condition of the claimant'.

Lord Bingham's view was that the timing of the operation was irrelevant to the injury suffered by the claimant. The injury would have been as liable to occur whenever the surgery was performed and whoever carried it out.

Lord Hoffman thought that conventional rules of tort should apply in this case, and that the claimant should have proved that she would not have had the operation at all in order to succeed in her claim. He used the game of roulette to illustrate the situation here, pointing out that the odds of a particular number coming up are exactly the same whether roulette is played today or a week later or at a different casino. In this case the risk of injury to which the claimant was exposed would have been the same on any occasion she had the surgery, and the injury was not caused by the failure to warn of the risk.

The decision of House of Lords gives greater priority to doctrine of informed consent than to the basic principles of causation in tort. It represents a departure from logic in favour of the principle that patients should be enabled to make informed choices about their treatment. The policy issues were clearly stated and the causation issue was dealt with under the framework that covers the scope of the defendant's duty. This was the second case within the space of two years (the other being Fairchild) in which the House

of Lords held that where there was a breach of duty, the usual requirement of proving causation could be circumvented in the interests of 'justice' and that when compensation appears to be appropriate the 'but for' test can be dispensed with to the detriment of the defendant. The House of Lords offered little guidance as to when it might be appropriate to take this approach, and there is uncertainty as to when policy might dictate yet another incremental departure from the established rules relating to proof of causation.

It might be going too far to suggest that the majority in the House of Lords intended to create an entirely new tort, closer to battery (in which damage need not be proved for a claim to succeed) than negligence, and actionable without proof of damage. This would be the tort of failing to inform a patient of the risks of medical treatment. Bearing in mind the conceptual confusion that this approach would create that seems unlikely, as even Lord Hoffman argued that it could be said that damage of some kind, in terms of affronts to dignity and autonomy might be suffered by a claimant who was not informed of risks.

This decision should not be regarded as a general departure from the principles that govern causation. It concerns only cases of consent to medical treatment. It does however, indicate yet again that establishing causation in tort is a very inexact science and that causation is a concept that is prone to policy decisions.

8.2.3 *Novus actus interveniens*

It may sometimes be possible to establish that a *novus actus interveniens*, or intervening act, has caused the damage and that the original defendant is not liable. Such an event is said to 'break the chain of causation'. This is most likely to be the case when the two possible causes are separate in time. However, as has been observed elsewhere in the law of tort, judges often use the concepts which they have created as a means of arriving at the decisions which they consider to be the most desirable in the circumstances.

An example of *novus actus* can be found in the case of *Wright v Lodge* [1993] 4 All ER 299. The first defendant's car had broken down late at night in very thick fog and she was held to have been negligent in leaving it on the carriageway. The second defendant was a lorry driver who was travelling too fast, collided with the abandoned car and slewed across the road crashing into several cars. It was held that she could not be held liable for the injuries caused to the drivers of the cars which were damaged by the lorry because the second driver was not merely negligent but also reckless and this factor broke the chain of causation.

As John G Fleming says (Fleming, *An Introduction to the Law of Torts*, 1977, Oxford: Clarendon), the various metaphors used in establishing causation are:

> . . . only a screen behind which the judges have all too often in the past retreated to avoid the irksome task of articulating their real motivation.

Crown River Cruises v Kimbolton Fireworks [1996] 2 Lloyd's Rep 533 provides an example of an unbroken chain of causation. Debris from fireworks on a barge where the first defendant held a firework display caused a fire on a second barge moored nearby. The fire-brigade failed to extinguish the second fire properly, as a result of which the claimant's barge was set alight. It was held that there was no *novus actus* on the part of the fire-brigade and found them 75% responsible for the second fire.

8.2.4 The 'dilemma' principle

An intervening act will not break the chain of causation if it can be established that the intervening actor was not fully responsible for his or her actions, perhaps because he or she had been put into a dilemma by the original actor.

In *Sayers v Harlow BC* [1958] 1 WLR 623, the defendant claimed that the claimant's own act was the entire cause of her misfortune. She had been locked in a public lavatory belonging to the defendants because of a faulty door lock and, faced with the prospect of remaining in the lavatory all night, she decided to try to climb out. She did this by attempting to stand on a toilet roll holder, which spun around and threw her onto the floor. As a result of the fall, she suffered injuries, and sued the council for compensation. It was held that since she had been put into a dilemma by the council, her actions were not unreasonable, and she was not fully responsible for the damage suffered, but she was contributorily negligent, and the damages were reduced accordingly. The chain of causation set up by the defendants had not been broken.

In *Wieland v Cyril Lord Carpets* [1969] 3 All ER 1006, the claimant had been injured and was forced to wear a surgical collar. This restricted her neck movements, and she could not look down through her bifocal glasses. She fell down a flight of stairs as a result, and sued the defendants for negligence. The original defendants were liable for all the injuries because they should have foreseen that the claimant's life would be restricted by the original injury. She was not unreasonable in attempting to carry on her life as normal.

By contrast, the case of *McKew v Holland & Hannen & Cubitts (Scotland) Ltd* [1969] 3 All ER 1621 was decided in favour of the defendants, who had negligently injured the claimant's leg. As a result, the leg was likely to give way at any time. Without asking for help he attempted to climb a flight of stairs and the injured leg gave way, causing him further injuries. It was held by the House of Lords that the act of climbing the stairs constituted a *novus actus interveniens* which broke the chain of causation. The risk taken by the claimant was unreasonable. The defendants could not be liable for every foreseeable consequence of their actions.

This decision is difficult to accept, given that under basic principles of remoteness of damage (to be discussed later in this chapter), the defendant must take the victim as he finds him. It follows that where the defendant actually creates a foreseeable risk it should be all the more likely that he would be liable for the consequences of the risk which he himself created.

8.2.5 The claimant was not responsible for his own acts

In *Kirkham v Chief Constable of Greater Manchester* [1990] 3 All ER 246, the police were held liable for the suicide of a person whom they had transferred to Risley Remand Centre without informing the authorities there that he was a high suicide risk. His act of committing suicide was not a *novus actus interveniens*, even though to many people suicide is an unreasonable act. The balance of his mind was disturbed, and he was incapable of making a rational decision. The police knew this, so the chain of causation remained intact.

In *Pigney v Pointers Transport Services* [1957] 1 WLR 1121, the defendants were liable

for the death of a man who had committed suicide after sustaining head injuries as a result of their negligence. His suicide was not a *novus actus interveniens*.

8.2.6 The foreseeability of the intervening act

In *Lamb v Camden LBC* [1981] QB 625, the claimant owned a house in London which had been damaged when the defendants negligently caused serious subsidence to the property by fracturing a water main. Later, squatters moved into the house and caused considerable damage. Rather surprisingly, since the evidence indicated that the house was in an area in which squatters regularly operated, the Court of Appeal held that the acts of the squatters were not foreseeable by the council and therefore amounted to a *novus actus interveniens*.

If the intervening act is foreseeable, it is unlikely that the chain of causation will be broken. The degree of likelihood of harm occurring is also an important consideration. This is illustrated by the very early case of *Scott v Shepherd* (1773) 2 Wim Bl 892, in which the defendant threw a lighted squib into a market house. It was picked up by the person on whose stall it had landed and thrown onto another stall. Again, the owner of that stall threw it onto another where it exploded and caused the claimant to lose an eye. The person who had thrown the squib originally was liable. There is a clear example of an unbroken chain of causation here.

In the case of *Smith v Littlewoods Organisation Ltd* [1987] AC 241, [1987] 1 All ER 170, HL, the problem of the likelihood of harm was dealt with by reference to the question of duty of care rather than causation or remoteness of damage. In that case, Littlewoods had failed to protect a derelict cinema which they owned from vandals who caused a fire which spread to adjoining properties. It was held that the occupiers had insufficient knowledge of the presence of trespassers and did not owe a duty of care to spend large amounts of money attempting to keep them out.

8.2.7 Omissions

Special difficulties can arise when the negligent conduct takes the form of an omission rather than a positive act. The court must then consider what would have happened if the defendant had opted to act instead of omitting to do so. This problem was considered in the case of *Bolitho v City and Hackney HA* [1992] PIQR P334, (1997) 39 BMLR 1, HL, the facts of which are set out in Chapter 7, where the issue of causation is explained in detail. That case has been followed in *Brock v Frenchay Healthcare Trust* (1999) unreported, where it was alleged that the defendants were negligent in their care of the claimant. When he was 16 years old, he had fallen off his bicycle. He had not been wearing a crash helmet at the time. He was taken to hospital. No fracture was detected in an X-ray of his skull, and the claimant was discharged.

At about 3 am the following morning, it was apparent that he was very seriously ill, and he was taken to hospital by ambulance. His Glasgow coma scale was recorded as three (the lowest level on the scale) and the neurosurgical team was called to carry out an emergency operation. He was ready for the drug Mannitol to be given at 4.15 am. This could have helped to relieve the pressure on his brain, but the anaesthetist did not administer the drug until the surgeon arrived 15 minutes later. The claimant was

irreversibly brain damaged. The trial judge accepted that there was no negligence on the part of the doctor for failing to identify a skull fracture on the X-ray when the claimant had first been admitted to casualty, and that there was no negligence in respect of his discharge from casualty.

The crucial issue was whether the omission to give Mannitol earlier had made any difference to the claimant's condition. Both parties accepted that the decision of the House of Lords in *Bolitho v City and Hackney HA* was directly relevant in determining causation in this case.

The Court of Appeal found that the judgment of the trial judge had contained a remarkably clear analysis of both the facts and the evidence in this case, and at no time was it decided that the claimant would have gained any benefit from an earlier administration of Mannitol. Accordingly, the appeal was dismissed and leave to appeal to the House of Lords was refused.

Although it is generally assumed that the Bolitho test applies in all negligence cases where there is an omission, the Court of Appeal did not extend the principle to negligent omissions in connection with financial advice in *Beary v Pall Mall Investments* [2005] EWCA Civ 415.

The courts continue to pay due attention to arguments raised on the basis of *Bolitho v City and Hackney Health Authority* [1997] 4 All ER 771, see for example, *Gouldsmith v Mid-Staffordshire General Hospitals NHS Trust* [2007] EWCA Civ 397, in which there were direct references to statements made by Lord Browne-Wilkinson in the *Bolitho* case concerning the correct approach to causation in the case of omissions, as opposed to positive acts. It is vital for the correct sequence of questions to be applied in cases of this kind. There are two separate questions which must be dealt with. First – 'what would have happened?' – to which the Bolam test is irrelevant. Secondly – 'what should have happened' to which the Bolam test as modified by Bolitho, is relevant. If the first is answered in the affirmative as it should have been in this case, there is no need for the court to turn its attention to the second.

8.2.8 Cases in which there are several possible causes

Where there are several possible causes, the 'but for' test does not provide a simple solution. The causes may occur in succession or they may be concurrent. If the causes occur successively, the second act may create the same damage as the first or it may create more damage. For example, in *Performance Cars v Abrahams* [1962] 1 QB 33, a Rolls Royce car had been damaged in a collision caused by the first defendant's negligence but, at a later date, the second defendant crashed the Rolls Royce. It was held that the second defendant was not liable for the respray, as that was already necessary as a result of the damage caused by the first defendant.

In *Baker v Willoughby* [1970] AC 467, the claimant suffered an injury to his ankle in an accident, as a result of which he could only undertake light work. He was employed as a watchman and was shot in the same leg during a robbery while he was at work. The leg had to be amputated. The House of Lords, refusing to apply the 'but for' test, held that the first defendant was only liable to compensate the claimant for the first injury, and not for the amputation. If it had been possible to sue the robbers they would have been liable for the amputation of an imperfect leg, and would not have had to pay as much

compensation as would have been payable for a perfect leg. This seems to be a fair and realistic approach, since, as Lord Reid pointed out, compensation is payable for the losses which arise from an injury, such as loss of amenity and earning power, and not for the injury itself. The second injury had not taken these losses away, and it was unfair for the defendants to argue that he should receive no compensation because he was worse off than they had made him in the first accident.

In *Jobling v Associated Dairies* [1982] AC 794, the claimant had suffered an injury to his back at work which reduced his earning capacity by 50%. It was discovered, between the date of the accident and the date of the trial, that the defendant had developed a serious back condition which was entirely unrelated to the injury. This is a situation which is common in cases of back injury and the arguments centred on the fact that the vicissitudes of life must be taken into consideration. He became completely unable to work. The House of Lords held that the compensation for loss of earnings should be available only to a cut off point of the date when he was finally unable to work. The decision was probably based on policy, the relevant issue being fear of over-compensating certain claimants who might have other sources of compensation available to them. This case is distinguishable from *Baker v Willoughby* because the second event was a natural one, rather than one which had been caused by a deliberate act, but it is not easy to see how the two cases are compatible.

The position now seems to be that if the second event was caused by negligence or a deliberate act, *Baker v Willoughby* will apply but, if the second event is attributable to a natural cause, *Jobling* will apply.

Consider the following situation: A injures B's arm through negligent driving. B needs an immediate blood transfusion and surgery to save the arm but B is a Jehovah's witness, and refuses the blood transfusion. B dies. Is A liable for B's death?

8.3 PROBLEMS IN PROVING CAUSATION

Causation is a question of fact which it is necessary for the claimant to prove. In civil cases, a proposition must be proved 'on a balance of probabilities'. This is sometimes extremely difficult, especially where it is possible for the defendant to argue that there are a number of other causative factors besides the one relied upon by the claimant. For example, if a child is born with cerebral palsy and the parents sue the doctor who delivered the baby for negligence, the defence might argue that there are a number of possible causes of cerebral palsy. It could be the result of natural causes such as inherited disease, or of some event which occurred in the womb through no one's fault, perhaps through placental deficiency which was undetectable by ultrasound scan at the crucial stage in pregnancy.

Some of the cases in this area appear to be contradictory and there are many difficulties involved in them which make the outcomes seem unfair to the claimants in some instances.

8.3.1 Case studies

In *Bonnington Castings v Wardlaw* [1956] 1 All ER 615, the claimant suffered pneumoconiosis after years of working in a dusty industry. The claimant claimed that his employers did not provide proper washing facilities or extraction fans for the safety of their employees. There were two main dust sources in his workplace. One was the pneumatic hammers for which the employers were not liable for any breach of duty. The other was the swing grinders for which the employers had failed to provide extraction fans. The claimant could not establish which type of dust he had inhaled most. However, the House of Lords held that because the dust from the swing grinders was at least a contributory cause of the illness, the claimant should succeed for the full amount of his claim. All that was necessary was that he should establish on a balance of probabilities that the dust from the swing grinders was a definite contributory factor in the illness. The House of Lords agreed to this even though it was impossible on the facts to make a realistic assessment of the proportion of dust inhaled from either source. This case clearly operated in the claimant's favour. The defendant's negligence had materially contributed to the risk of injury, and that was sufficient to prove causation. In *McGhee v National Coal Board* [1973] 1 WLR 1, a workman contracted dermatitis as a result of handling brick dust. The evidence indicated that the risk would have been reduced if the employers had installed showers for use when workers ended their shifts but, as this had not been done, the claimant could not wash until after he returned home. He could not prove, on a balance of probabilities, that the illness could have been avoided by the use of showers at work but he succeeded in his claim. The reasoning of the court was that because the employee had demonstrated neglect by the defendant of an obvious safety precaution, it followed that when the risk that the precaution could have avoided materialised, the burden shifted to the defendant to disprove a causal link. This was clearly of great advantage to the claimant and placed him in a far more advantageous position than he would have been in under the application of the 'but for' test.

A different approach was taken in *Hotson v East Berkshire HA* [1987] 2 All ER 909. The claimant was a 13 year old school boy who had injured his knee when he fell from a rope. An X-ray had been taken of the knee by the hospital and no injury was apparent, so no further exploratory examination was made. The boy continued to suffer pain and five days later he returned to the hospital and a hip injury was diagnosed and treated. However, the boy developed a condition known as avascular necrosis, which is caused when the blood supply to an injury site is restricted. This results in pain and deformity and eventually in most cases in osteoarthritis. Although the boy may have suffered the condition in any case as a result of the injury, there was a 25% chance that if it had been properly treated immediately, he would have made a full recovery. It was held at first instance that the claimant should receive 25% of the full award available for the injury, so that he would be compensated for a 25% lost opportunity of recovering.

The House of Lords held that he should receive nothing. He had not been able to establish that, on a balance of probabilities, the defendant's negligence had caused his injury, as there was a 75% chance that he would have developed the avascular necrosis even if they had not been negligent in their original treatment. If he had so succeeded, he would have had an award of the full amount of the compensation available. To win on causation, the claimant must therefore establish that there is at least a 51% chance that the negligent act caused the damage in question. This 'all or nothing' approach is logically

consistent with the rule that in a civil action it is necessary to prove the case on a balance of probabilities. Although damages for 'loss of a chance' are well established in cases involving economic loss and in contract, the court was not prepared to make an award in this personal injuries claim. A similar approach was rejected in *Gregg v Scott* [2005] UKHL 2.

The *Hotson* principle that proof of causation should be based on a balance of probabilities (the 51% rule) seems to be eminently logical, but it can mean that some claimants are denied any remedy at all even though it is reasonably likely that the negligent act of the defendant caused the loss. The rules of causation based on *Hotson* are effectively a means of limiting the number of successful claims and operate ultimately to the benefit of defendants' insurers. However, there is some evidence that courts do not slavishly follow the *Hotson* line. In *Stovold v Barlows* [1996] 1 PNLR 91, for example, the claimant claimed that he had lost the sale of his house through the defendant's negligence. The court decided that if it had not been for the defendant's negligence there was a 50% chance that the sale would have gone ahead.

The Court of Appeal, following the line taken by itself rather than the House of Lords in *Hotson*, halved the claimant's award on that basis. In *Allied Maples Group Ltd v Simmons and Simmons* [1995] 1 WLR 1602, the Court of Appeal held that the claimant has to prove that he had a real or substantial chance as opposed to a speculative chance. If he can do this, the evaluation of that chance is to be treated as part of the quantum of damages. See also *Platform Home Loans v Oyston Shipways Ltd* [1999] 2 WLR 518 (see 20.1.7, below).

In *Wilsher v Essex AHA* (1988) (see Chapter 7), the House of Lords decided that, on the medical evidence, there were six possible causes of retrolental fibroplasia, and that excess oxygen was just one of these. The burden of proving causation is on the claimant, and that burden had not been discharged in this case. The case was sent back for retrial on the issue of causation. The trial judge had taken the view, which the House of Lords rejected, that the burden of proof had shifted onto the defendants once the claimant had established that the illness could have been caused by the negligent act of the defendants in administering an excess of oxygen to the baby. The House of Lords would not accept that there could be liability on the basis of the 'material contribution' principle. The *McGhee* principle could not be applied because there were five possible causes of the injury.

There is considerable concern about the effects of exposure to asbestos, which is now known to be extremely dangerous, and litigation concerning lung diseases and deaths caused by asbestos continues on a regular basis, attracting liability even when people outside the immediate workforce are affected. For example Deborah Bowen, who had developed cancer that was asbestos related after hugging her father when she was a child in the 1960s, as he returned from work, recently succeeded in her claim for compensation from the Ministry of Defence. The latency period for asbestosis and mesothelioma can range from 20–40 years, and this inevitably causes legal problems.

In *Fairchild v Glenhaven Funeral Services Ltd* [2002] UKHL 22, the House of Lords added to the picture, confirming in effect that causation is not concerned only with factual matters, but also with policy issues. The case demonstrates that even when medical science is incapable of establishing certain factual matters on a balance of probabilities, the claimant may still succeed in proving causation. Central to this is the issue as to whether a claimant suffering from injury caused by exposure in the distant

past to asbestos has to demonstrate a causal link between the injury and particular exposure by a particular defendant, or simply an increased risk of such an injury.

The case involved three appeals by people who had developed mesothelioma, a deadly and usually fatal form of cancer, after inhaling asbestos fibres at their places of work. As the disease may not develop until many years after inhalation of asbestos fibres, it can be difficult for a claimant to establish precisely where and when the fibres were inhaled. The inhalation of one single particle of asbestos dust has the potential to cause this particular disease and a claimant wishing to establish a causal link between exposure to asbestos by a negligent employer and the damage eventually sustained would, on the application of traditional principles of causation, need to demonstrate that a particular defendant had caused the damage. It would not be enough, under these traditional rules, to establish simply that there was increased risk of exposure.

In this case the claimants had all worked for several different employers in jobs where they had been exposed to the asbestos dust and fibres and there was no way in which they could prove the precise employment in which they had inhaled the fibre or fibres that had caused their illness. Other forms of disease caused by exposure to asbestos, such as asbestosis, are cumulative diseases in which each separate employer can be held liable for the proportion of the disease for which he can be proved responsible. By contrast, proof of causation is much more difficult in the case of mesothelioma. *McGhee v National Coal Board* provided support for any possible modification of the general rule on the application of the 'but for' test as a prerequisite for establishing liability.

The House of Lords, influenced by policy considerations, and unexpectedly reversing the decision of the Court of Appeal, held that in the exceptional circumstances of these claimants, the normal application of the 'but for' test should be relaxed, and each employer could be taken to have made a material contribution to the risks. Damages were apportioned according to the length of time that the claimants had worked for each employer. The House of Lords reviewed and commented upon the other cases dealing with the issues raised by the 'but for' test and multiple causes, and explained the novel approach used in reaching this decision. As Lord Nicholls explained, in this case:

> Any other outcome would be deeply offensive to instinctive notions of what justice requires and fairness demands.

However, their Lordships made it clear that this decision was exceptional. It should be applied in future with great caution as it is unsafe to extract general principles from it that are applicable in all situations involving multiple causes of damage to claimants. The approach taken by each of the judges was slightly different, but it was emphasised that the effect of the decision should be limited. Lord Hoffman formulated preconditions for the application of the new rules on causation on the assumption that they would be limited to employees who had been exposed to asbestos. Lord Rodger was prepared to allow the new approach to be used more generally but subject again to certain pre-conditions. Lord Bingham took an approach that limited the new rules to the facts of the cases before their Lordships on this occasion but went on, interestingly, to say:

> It would be unrealistic to suppose that the principle here affirmed will not over time be the subject of incremental and analogical development. Cases seeking to develop the principle must be decided when and as they arise.

It was held in the later case of *Barker v Saint-Gobain Pipelines plc* [2004] EWCA Civ 545 that if the claimant was self employed for part of his working life the Fairchild principle could still apply.

The Fairchild principle continues to be applied in appropriate cases. For example, in *Cox v Rolls Royce Industrial Power (India) Ltd* [2007] EWCA Civ 1189, the Court of Appeal held that it had been clearly open to the judge to decide that the extent of the exposure to asbestos amounted to a significant increase in the risk that the claimant's husband would contract mesothelioma, and concluded that the case against the appellant had therefore been proved, and the approach required by *Fairchild v Glenhaven Funeral Services Ltd*. However, there have been further developments in this area of law, which have complicated matters. In *Barker v Corus* [2006] UKHL 20, the House of Lords held that liability of employers is not joint but several. This means that each individual employer would be liable only for the degree of exposure to which he had subjected the claimant. Interestingly, Parliament intervened almost as soon as the case was decided, to introduce an additional section in the Compensation Act 2006, reversing that aspect of the decision in *Barker v Corus*. Section 3 of the Act states that there will be joint liability in claims for mesothelioma arising from asbestos exposure, and in order to clarify the law, the provision is to be treated as 'always having effect'.

Finally, it is important to recognise that exposure to asbestos can give rise to a lung condition which is not recognised as 'damage' in the legal sense, and which does not give rise to a claim in tort. The appellants in *Johnston v NEI International Combustion* [2007] UKHL 39, had been exposed to asbestos dust because of the negligence of their employers, and had developed pleural plaques as a result of the presence of asbestos fibres. Pleural plaques do not usually cause any symptoms, and they do not cause asbestos related diseases. However, they do indicate the presence of asbestos fibres in the lungs and pleura, which could independently cause life-threatening diseases and even death. One claimant had developed clinical depression, as a result of worry experienced on discovering that his pleural plaques indicated that he had been exposed to a significant amount of asbestos, and that there was a risk that he would develop future disease. All the claims in this case failed on the grounds that there was no actionable damage – no injury caused by the defendants which was capable of giving rise to liability in tort (though there may have been liability in contract).

8.3.2 Loss of a chance

There has been considerable confusion about the nature of claims for loss of a chance, as it is sometimes argued that such claims belong with issues of quantification of damages rather than with causation considerations. It is possible for a claim in tort to be framed as the 'loss of chance' where the claim is for economic loss as a result of negligent advice. This is a complex situation involving the relationship between quantum and causation (*Allied Maples v Simmons* [1995] 1 WLR 1602). Attempts to value a lost chance of recovery in a clinical negligence claim may have the effect of alleviating the claimant's difficulties in proving causation. In *Hotson*, this approach was rejected by the House of Lords. In *Dixon v Clement Jones* [2004] EWCA Civ 1005, the Court of Appeal made it clear that when assessing loss of a chance in the context of solicitors' negligence the Courts should conduct a reasonable assessment into the outcome.

The matter came before the House of Lords again in *Gregg v Scott* [2005] UKHL 2. The result of the House of Lords' ruling is that liability for the loss of a chance of a more favourable outcome will not feature in future clinical negligence claims. This is an interesting case to read for a variety of reasons. In particular, it offers insights into the policy issues regarded as important by the most senior members of the judiciary. The facts of the case were as follows. The appellant had found a lump and consulted his GP, Dr Scott, the respondent, who misdiagnosed the lump as a benign collection of fatty tissue and reassured him. However, about a year later, the appellant consulted another GP who immediately referred him to hospital for tests. Cancer of the lymph glands (non-Hodgkin's lymphoma) was diagnosed and by then the appellant's condition had deteriorated. The cancer had spread and he was suffering considerable pain. A course of high-dose chemotherapy was given, which initially destroyed the cancer, but he later suffered a relapse and his prospects of survival were poor. The appellant argued that he should have been referred to hospital when he first saw his GP, and that if cancer had been diagnosed at that stage he would have had a strong chance of a cure. However, deterioration in his condition because of the delay had reduced his prospect of disease-free survival for ten or more years from 42%, which it had been when he first consulted the respondent, to 25% as it was at the date of the trial.

The trial judge held that if the appellant had been diagnosed and treated promptly, he would probably have achieved remission without having to undergo high doses of chemotherapy. He dismissed the claim, concluding that the cause of the delay had not deprived the appellant of the prospect of a cure, because at the time he was misdiagnosed the appellant had less than a 50% chance of surviving for more than 10 years in any event. Although his condition had deteriorated, it was impossible to conclude on a balance of probabilities that if the respondent GP had not been negligent the appellant's condition would have been any better, or that the painful and unpleasant treatment would have been avoided. The judge reasoned that even before he had the treatment the appellant had a less than 50% chance of avoiding deterioration in his condition, and the delay had merely reduced the chance by around half. It followed that on the balance of probabilities, since he would probably not have been cured anyway, the delay had not deprived the appellant of a cure. This conclusion was reached relying on *Hotson v East Berkshire Area Health Authority* [1987] AC 750.

The Court of Appeal considered two arguments by the appellant. First, as he had proved that the delay had caused him injury, the appellant could be compensated and any compensation should include a sum to cover the reduction in his chances of survival. The second was that apart from any other damage, there was a compensatable head of damage in its own right for reduction in chances of survival. The Court of Appeal dismissed the appeal. On appeal to the House of Lords the appellant argued that the delayed diagnosis and treatment had caused him physical injury consisting of the spread of the cancer before his chemotherapy therapy began, and that the losses he had suffered were consequential on that physical injury. He further contended that apart from any other injury, the reduction in his chances of survival (loss of a chance), was itself a compensatable head of damage.

The House of Lords held by a three-to-two majority that even if the quantification of future losses was decided on an evaluation of risks and chances, it would still be necessary for the appellant to show that the loss was consequential on injury caused by

the respondent's negligence. The majority view was that in this case it had not been shown that on the balance of probabilities the delay in the start of treatment, which was attributable to the respondent's negligence, had affected either the course of the illness, or the appellant's prospects of survival, which had never been as high as 50%. It was held that liability for the loss of a chance of a more favourable outcome should not be introduced into personal injury claims. Lord Nicholls and Lord Hope, dissenting, took the view that the significant reduction in the prospects of a successful outcome that had been caused by the respondent's negligence was a loss for which he was entitled to be compensated. The appeal was dismissed.

The decision is interesting in the light of the rather more flexible approach taken by the House of Lords in *Chester v Afshar*, decided just three months before *Gregg v Scott*. In *Chester* wider interests, such as the autonomy of patients, were considered relevant but in *Gregg v Scott* the majority in the House of Lords was not prepared to sacrifice established principles of law for what the minority perceived to be 'justice' and established principles of law were given priority. In *Chester v Afshar*, the House of Lords was prepared to modify long-established principles and held that the mere fact that the appellant had suffered a wrong was sufficient for her to be able to claim a remedy, so by-passing the conventional rules on proof of causation in tort. In both cases policy issues were important factors. Lord Hoffman, who had dissented in *Chester v Afshar*, again in favour of adhering to established legal rules, was in the majority in *Gregg v Scott*, and rejected the argument that the court should take into account possibilities that do not amount to probabilities. In his view, such an approach is only appropriate in cases where damage is proved to have been attributable to the respondent's wrongful act. *Gregg v Scott* was not such a case, since the question was not whether the appellant would be likely to survive for more than ten years, but whether his premature death was attributable to the negligence of the respondent.

Lord Hoffman rejected the argument that 'loss of a chance' should be a recoverable head of damage in clinical negligence cases, confirming the stance taken in the cases of *Hotson* (*supra*), and *Wilsher v Essex Area Health Authority* [1988] AC 1974. He concluded that the exception created in Fairchild strengthened the conventional rules, and that it was irrelevant in this case because it was confined to its own narrow set of facts. He rejected the view that the present rules on causation were too restrictive of liability in clinical negligence cases and was against abandoning 'a good deal of authority', and 'dismantling all the qualifications and restrictions with which it had so recently hedged the Fairchild exception'. He could find no justification for so radical a departure from recently established precedent, and did not favour introducing into the law in this area the same sort of artificial 'control mechanisms' that characterised the law on psychiatric injury, making the boundaries of liability a fertile area for disputes and consequent litigation. He proposed that any change in the law should be a matter for Parliament.

Lord Phillips, outlining the policy issues, and examining the practical consequences that would follow any change in the law, paid detailed attention to the expert medical and statistical evidence. Very real difficulty arose in *Gregg* because the patient's condition at the time of the negligence was only identified on a balance of probabilities. Medical opinion was unable to predict with certainty what the outcome would have been if the negligence had never occurred. Baroness Hale, also dismissing the appeal, acknowledged that the appellant's approach was based on policy, and examined the arguments

for dealing with this case in common sense terms. She did not favour a reformulation of the compensatable damage in terms of 'loss of a chance', because such an approach could lead to some liability in almost every case, and would undermine the doctor/patient relationship, saying:

> In such a case as this, if there is only ever a less than evens chance of a cure or avoiding an adverse outcome, what incentive is there for the doctor to take proper care of the patient?

However, she did express some disquiet in the creation of different rules for different types of negligence, commenting:

> Why should my solicitor be liable for negligently depriving me of the chance of success when my doctor is not liable for depriving me of the chance of getting better, even if I never had a better than evens chance of getting better? Is this another example of the law being kinder to the medical profession than to other professionals?

Despite recognising this difficulty, she concluded that there is a valid counter argument that there is a clear distinction between personal injury and financial loss. Baroness Hale also examined the justice of the all-or-nothing approach taken in established law, but rejected the view embraced by the dissenting Lord Nicholls, because she could not see the justice in such an approach. She envisaged more complex personal injury litigation in the dissenting view, involving more difficult expert evidence, as well as longer trials and negotiations, making recovery more unpredictable:

> Whether or not the policy choice is between retaining the present definition of personal injury in outcome terms, and redefining it in loss of opportunity terms, introducing the latter would cause far more problems in the general run of personal injury claims than the policy benefits are worth.

Lord Nicholls rejected the policy arguments relied upon by the majority, and his opinion can be summed up in his own memorable words.

> It cannot be right to adopt a procedure having the effect that in law a patient's prospects of recovery are treated as non-existent whenever they fall short of 50%. If the law were to proceed in this way it would deserve to be likened to the proverbial ass.

Taking examples of cases concerning material losses in tort, he explained that what the court measures as actionable damage on a balance of probability is the opportunity that the appellant lost, rather than the outcome that he desired. In this case the problem faced by the House of Lords was how to deal with this situation in the context of clinical negligence claims, in which the outcome of medical conditions is still beyond anyone's control and is difficult to predict despite advances in medical science. There are obvious imponderable factors in such cases, such as the way in which each individual responds to particular forms of treatment, which cannot be dealt with by statistical evidence alone. He believed that justice demands that the law should match medical reality; that the purpose of imposing a duty of care on a doctor is to promote the patient's prospects of recovery by exercising due care and skill, adding:

> The law would rightly be open to reproach were it to provide a remedy if what is lost by a professional advisor's negligence is a financial opportunity or chance but refuse a remedy where what is lost by a doctor's negligence is the chance of health or even life itself. Justice requires that in the latter case as much as the former the loss of a chance should constitute actionable damage.

Relying on the decision in *Fairchild v Glenhaven Funeral Services Ltd* [2003] 1 AC 32, as a recent example of the way in which judges can prove themselves to be flexible and willing to leap an evidential gap in the interests of justice, and he called for a similar approach in this case. He distinguished the present case from *Hotson*, pointing out that Lord Bridge had noted in *Hotson* that there may be cases, especially those involving medical negligence, when a court can only measure statistical chances, as in this case. That had not been necessary in *Hotson*, where there was no real uncertainty about what would have happened if there had been no negligence. Lord Nicholls dismissed the 'floodgates' argument as an unconvincing reason for allowing an injustice to pass unremedied. He took the view that in any event it would be possible to restrict any new approach to clinical negligence claims by placing explicit limitations on the scope of liability. The other policy objections that Lord Nicholls rejected were the claim that an extension to the existing law would place too great a burden on NHS resources. He thought that such fears need not be exaggerated, as an award of damages where a patient's prospects of recovery were diminished, should only be made where the diminution was significant. The government, he reasoned, could introduce legislation to deal with the problem of NHS litigation. Finally, he rejected the argument that wasteful defensive practices would be adopted by doctors if the appellant in this case was successful. He pointed out the every doctor is already fully aware of the possibility of being sued for negligence.

The pragmatic conclusion reached by Lord Nicholls was based on the reasonable expectations of patients:

> A patient should have an appropriate remedy when he loses the very thing it was the doctor's duty to protect. To this end the law should recognize the existence of poor and indifferent prospects as well as those more favourable.

Lord Hope, also dissenting, agreed with many of the points made by Lord Nicholls. He made the observation that the key to the decision in this case lay in the way in which the cause of action was identified. To describe it as a claim for loss of a chance might have been appropriate if this had been a claim for economic loss, but this case, he argued, was about something quite different – namely loss and damage caused by the enlargement of a tumour, a physical injury caused by a delay in diagnosis.

This case will end speculation that there may be room for further radical developments in this area of law for the time being, despite some sensible minority views expressed by Lord Nicholls and Lord Hope.

It is worth contrasting the factual situation in *Gregg v Scott* with that in *The Official Solicitor, Suing On Behalf Of The Estate Of Adekanmbi, (Deceased) v Allinson* [2004] EWHC 923 (QB). In this instance a GP was held was for the negligent failure to review a patient following a breast examination, or to refer her to a specialist. The patient later died from breast cancer. Expert evidence indicated that the doctor's initial examination of the claimant's breast was adequate and no breach of duty was established concerning the conduct of the examination. However, his findings at that time demonstrated sufficient abnormality at least to suggest the need for a review within a short time and, on the findings that would have been made at that review, a referral to a specialist. The judge took the view that the doctor had been wrong not to require a review and was in breach of duty in that respect. The weight of the expert evidence was that the abnormality

complained of in September 1997 was the same tumour that had been diagnosed in March 1999. It was likely that the diameter of the breast tumour in September 1997 was 0.6 to 0.7 centimetres, and if there had been a referral to a specialist, the cancer would probably have been detected. On a balance of probabilities there would have been no spread of the cancer in 1997, and her condition would probably have been treatable at that time, and would probably have been cured. Accordingly breach of duty and causation were proved, and there was judgment for the claimant in the sum of £252,861.

The difference between the two cases is that in the second there was a more than 50% probability that the claimant would have been cured if she had been diagnosed and treated sooner. In *Gregg v Scott* there was no such likelihood.

8.4 CONTRIBUTORY NEGLIGENCE AND CAUSATION

Causation is relevant in deciding whether the claimant has contributed to the damage suffered by not taking sufficient care for his or her own safety.

In traffic accident cases in which the claimant suffered injury and was not wearing a seat-belt, the percentage of the contribution made by the claimant to the damage suffered is assessed in order to establish how much should be deducted from the compensation available to account for the claimant's own contributory conduct. This is a question of fact which must be considered in each case.

There may be an act of the claimant which operates as a *novus actus interveniens* and so absolves the defendant from all liability. If this is the case, the claimant is denied a remedy by operation of the maxim *volenti non fit injuria* because he or she has consented to run the risk of harm (this is dealt with in Chapter 20). This argument was relied upon but rejected by the courts in *Sayers v Harlow BC* (discussed above) and *Gough v Thorne* [1966] 1 WLR 1387.

On the other hand, the claimant's own carelessness, while not amounting to a *novus actus interveniens*, may well amount to contributory negligence. This was the case in *Sayers v Harlow BC* where the claimant's damages were reduced in proportion to her own contributory act, but not in *Gough v Thorne*, where the Court of Appeal decided that the 13 year old had not been contributorily negligent, so there was no reduction from the award.

8.5 REMOTENESS OF DAMAGE

It is not sufficient merely for the claimant to establish a factual causal connection between the act of the defendant and the damage which the claimant suffers. It is also necessary to establish that the damage was not too remote. This is a matter of law, and legal rules have been formulated to determine the question of remoteness of damage which have been established in answer to the question: 'For how much of the damage is the defendant liable? All the direct consequences or only those that are reasonably foreseeable?'

8.5.1 Direct consequences

Originally, the defendant was liable for all the damage which was the direct consequence of the wrongful act whether or not the extent or type of harm was foreseeable.

In *Re Polemis and Furness, Withey & Co* [1921] 3 KB 560, a stevedore negligently dropped a plank of wood from a great height into the hold of a ship. Benzine had leaked into the hold, and the movement of the plank caused vapours to ignite. Eventually, the whole ship was destroyed. It was held that the stevedore firm was liable for the destruction of the ship because that was a direct consequence of their employee's negligent act. It did not matter that total destruction of the vessel was not a foreseeable consequence of the act. The test for remoteness of damage was the direct consequences test.

8.5.2 Was the direct consequences rule fair?

This rule may seem rather hard on defendants. The negligent stevedore could probably have foreseen that a workman in the hold would have been injured, or that damage might have been caused to the fabric of the ship, but his employers were made to pay for such an unforeseeable consequence as a fire. In cases involving large business enterprises, the rule is probably not too difficult to understand. Insurance companies pay the damages if the defendant is properly insured and the case will usually be settled out of court. If the defendant is a private individual who does not carry insurance, it would not be worth the expense of bringing a legal action. In one sense, the fairness or otherwise of the rule does not matter, as long as the law is able to fix liability.

It seems eminently fair that if someone has to suffer a loss as a result of a wrongful act, it should be the perpetrator of the act, the defendant, who should do so, rather than the claimant who has done nothing wrong. The more so if the defendant is insured and can bear the loss.

However, the rule in *Re Polemis* was much criticised as being unfair and out of step with modern notions of morality. It seemed to operate in a punitive fashion once liability for the negligent act had been established and it failed to distinguish between 'small' acts of negligence and gross negligence. As Viscount Simonds said in *The Wagon Mound (No 1)* [1961] 1 AC 388, which made some headway in changing the rule, though not as much as is apparent at first sight:

> It does not seem consonant with current ideas of justice or morality, that for an act of negligence, however slight or venial, which results in some trivial foreseeable damage, the actor should be liable for all the consequences, however unforeseeable and however grave, so long as they can be said to be direct.

The judges seemed to be bent on changing the law, and a new rule was formulated by the Privy Council in *The Wagon Mound (No 1)*, a case on appeal from Australia. This rule was soon adopted by the House of Lords in *Hughes v Lord Advocate* [1963] AC 837. The new formula complicates matters considerably and, as will be seen, also produces some apparently unjust results.

The Wagon Mound (No 1) concerned an accident which occurred when a ship was loading oil in Sydney harbour. Some of the oil leaked onto the water, where it floated and mixed with flotsam and debris already in the water. Eventually, it was ignited by sparks

from welding operations on the other side of the harbour. The ensuing fire caused enormous damage. It was held that since the particular type of oil did not easily ignite, the type of harm which occurred was not foreseeable by the officers in charge of the ship though property damage of some kind, through oil pollution, was foreseeable. *Re Polemis* was strongly criticised. The new test for remoteness of damage in tort was to be: 'Was the way in which the accident happened (the type of harm) reasonably foreseeable?' If so, the defendant will be liable for the full extent of the damage, no matter how unforeseeable that was.

The cases below demonstrate the difficulties involved.

8.5.3 What damage must be foreseeable?

In *Hughes v Lord Advocate* {1963] AC 837, two boys decided to climb down into a manhole which the Post Office employees had negligently left open in the street, though they covered it with a striped canvas tent, and surrounded it with paraffin lamps. As part of the prank, the boys took one of the paraffin lamps into the manhole to explore. The lamp was dropped into the manhole and there was an explosion which caused one of the boys severe burns. Although the evidence suggested that an explosion was unforeseeable, a fire certainly could have been foreseen, and the House of Lords held that damage caused by fire was in this case indistinguishable from damage caused by an explosion and subsequent fire. The exact details of how the accident occurred did not need to be foreseen, as long as the damage was broadly of a type which was foreseeable.

The explosion was a variant of what was foreseeable and the precise circumstances did not need to be foreseeable. By contrast, in *Doughty v Turner Manufacturing Co Ltd* [1964] 1 QB 518, the circumstances of the accident were wholly unforeseeable.

In *Doughty v Turner*, the claimants were injured in a work accident, but recovered nothing because the way in which the accident happened was unforeseeable. At a time when it was believed that asbestos was a safe and inert substance, several workmen were injured when an asbestos lid slipped into a vat of boiling sulphuric acid. There was an unforeseeable explosion resulting in a serious fire in which the men were burned. The Court of Appeal held that although splash injury was foreseeable, an explosion and fire were not, so the employers were not liable for any of the damage. This case is also an illustration of the principle that there is no breach of duty if the circumstances of an accident could not have been known at the time, in the light of existing scientific knowledge (see *Roe v Minister of Health* [1954] 2 QB 66).

Some of the earlier cases suggested that it should be possible to foresee the category of damage which results from the negligent act, such as economic loss, damage to property, or personal injury. However, this approach does not seem to have been adopted consistently by the courts. It seems that what must usually be foreseeable is *the way in which the accident happens* as well as the category of harm, for example, personal injury caused by burning. In *Tremain v Pike* [1969] 3 All ER 1303, a farm labourer contracted a disease, leptospirosis, from handling material on which rats had urinated. He failed in the claim brought against his employer because, while a rat bite was foreseeable, the court held that the method by which this disease was contracted was not. The decision has attracted a good deal of criticism, partly because the evidence which was

accepted about the unusual nature of the disease which the claimant suffered was doubtful, and partly because the judge took too narrow a view of the scope of the test for remoteness of damage.

In *Crossley v Rawlinson* [1981] 3 All ER 674, the claimant was hurrying to extinguish a fire in a motor vehicle. He had a fire extinguisher in his hands and, when he tripped in a hole in the road, he could not break his fall with a free hand and was injured. The defendants were not liable for his injury as this was not a foreseeable consequence of their negligence. The way in which the injury had occurred was not foreseeable.

In *Bradford v Robinson Rentals* [1967] 1 All ER 267, the claimant was requested by his employers to travel for several hundred miles in a van with no heater in extremely bitter weather. He suffered frostbite and succeeded in his claim against his employer because the damage which he suffered was held to have been of a kind which was reasonably foreseeable.

In *Margereson v JW Roberts Ltd*, *Hancock v Same* [1996] PIQR P358, the Court of Appeal upheld the High Court finding in favour of the claimants who had developed mesothelioma many years after they had inhaled asbestos dust when they played as children near an asbestos factory operated by the defendants. The defendants admitted that they had not taken adequate steps to control the dangerous emissions of asbestos dust from the factory. The Court of Appeal took the view that the defendants should have been aware of the dangers of asbestos dust even before 1925 when the first claimant was born. The only legal issue concerned the duty of care owed to the claimants and it was decided that the defendants would be liable only if the evidence demonstrated that they should reasonably have foreseen that there was some risk of injury to the lungs, not necessarily the specific injury which was eventually suffered by the claimants. It was not possible to draw any distinction between the position of the claimants and that of employees who worked within the factory.

Difficulties may arise if damages are claimed for further losses which are incurred after the initial loss or damage is suffered, as in cases such as *McKew v Holland* and *Lamb v Camden LBC* which have been discussed under the general umbrella of causation, but which illustrate that causation and remoteness are inextricably intertwined. The question arises as to whether these problems properly belong to the causation stage of the case or to the remoteness stage.

In *Jolley v Sutton LBC* [2000] 1 WLR 1082, the Court of Appeal allowed an appeal by the council against a finding of liability under s 2 of the Occupiers' Liability Act 1957. Although the appellants had been negligent in allowing a boat to remain on land, knowing that the vessel was in a dangerous condition and was an allurement to children, the accident which occurred was of a different type to anything that the council could have foreseen. What had happened was this: the 14 year old claimant and a friend had decided to repair the boat and for six weeks they had worked on it at evenings and weekends. They had raised the boat off the ground using a car jack and some pieces of wood. The boat fell on the claimant while he was underneath it, causing him to suffer severe injuries to his spine. He was a paraplegic by the time of the trial and was confined to a wheelchair. The Court of Appeal decided that, while it was difficult for the council to anticipate exactly what children would do when they were playing, what the boys had been doing in this case was very different from normal play and the circumstances of the accident were unforeseeable.

The House of Lords disagreed and found in favour of the claimant, ruling that occupiers should not underestimate the power of children to do self-mischief.

There are several cases in which the damage was of an unusual type but was nevertheless recoverable. These include *Jones v Jones* [1985] QB 704 in which it was held that divorce was a foreseeable consequence of the defendant's negligence, though this was not followed in *Pritchard v Cobden* [1988] Fam 22. In *Meah v McCreamer* [1986] 1 All ER 943, it was decided that the claimant could obtain compensation for having suffered a personality change which resulted in a term of imprisonment for rape, though the remoteness issue concerning Meah's clear intention to rape was not argued in this case. See also *Gray v Thames Trains* [2007] EWHC 1558, QB, the facts of which are outlined in Chapter 21 in relation to the *ex turpi causa* defence.

The Court of Appeal held in *Corr v IBC Vehicles* [2006] EWCA Civ 331 that for the purpose of foreseeability it is no longer necessary to distinguish between physical and psychological injury, and the injury in this case (suicide as a result of depression), was not a separate type of damage from personal injury. The claim was brought by the widow of a man who committed suicide six years after he had been injured in a work accident which had caused him to suffer severe depression. It was also held that on the facts of this case, the suicide was not a *novus actus interveniens*.

Some writers support the view that, if the damage in question is property damage, the approach of the courts is narrower than in cases of personal injuries or economic loss.

8.5.4 Confusion between the duty and remoteness levels

One factor which has caused some confusion is the use of foresight as a test to establish liability when considering both whether there is a duty of care owed and also whether the damage is too remote. This has been a particular problem in some nervous shock cases (see *Bourhill v Young* [1943] AC 92).

8.5.5 The thin skull rule

Once it is established that the type of harm is foreseeable, it is not necessary to prove that the defendant could foresee the extent of the likely damage. This situation is brought about by the existence of a rule which also occurs in criminal law, which is that a defendant must 'take the victim as he finds him'. This is also known as the 'thin skull rule', taking its name from a medical condition which means that people who suffer from it incur serious injury and often death, from what to other people would only be a minor bump on the head. The rule is best illustrated by the cases themselves, but is based on the principle that there needs to be a pre-existing susceptibility in the claimant which will result in a high award for damages in some cases.

In *Smith v Leech Brain & Co* [1962] 2 WLR 148, the claimant's husband was splashed on the lip at work with molten metal. He suffered, as was foreseeable, a splash injury, a minor burn. However, it transpired that the particular body cells which were damaged were in a pre-cancerous condition at the time, and he developed cancer and died of the disease. The defendants were liable for the man's death. Even though the only foreseeable injury was a splash injury causing a burn, the man was a 'thin skull' individual, and developed an unforeseeable and much more serious condition than that which a normal

person would have suffered in the circumstances (compare *Doughty v Turner* (see 8.5.3, above)).

In recent years, it has been established that there will be liability for nervous shock even if the claimant has an 'egg-shell personality' which predisposes the development of psychiatric illness (*Page v Smith* [1994] 4 All ER 522; see Chapter 4). The same principle applies to psychiatric illness caused by work stress providing there is foresight of the type of harm (*Walker v Northumberland CC* [1995] 1 All ER 737, and *Barber v Somerset County Council* [2004] UKHL 13).

Although there is no direct authority on the point, there is a view that the thin skull rule would apply to property damage as well as to personal injury. As to economic loss, the authority is the *Liesbosch Dredger v SS Edison* [1933] AC 449. The defendants negligently caused the claimant's dredger to sink, and the claimants were forced to hire another vessel at an inflated rate in order to fulfil contractual obligations. They claimed that they were too poor to buy another dredger and for that reason had been forced into the hire contract. It was held by the House of Lords that the claimants could not claim for the additional expense which they had incurred under the hire contract. That was the result of their own impecuniosity and was not foreseeable by the defendants.

Doubts have been expressed about the rule in the *Liesbosch Dredger* case. Soon after the decision, there was an indication that some judges did not approve of the rule and, more recently, in *Dodd Properties (Kent) v Canterbury CC* [1980] 1 WLR 433, Lord Donaldson expressed the opinion that the rule might need to be reviewed by the House of Lords. In that case, the Court of Appeal was prepared to distinguish the situation from that which arose in the *Liesbosch Dredger* case. Building operations being carried out by the defendants caused damage to the claimant's property and the defendants denied liability until shortly before the trial was due to take place. The claimants did not carry out the necessary repairs to the damage during this time because if they lost the case they feared that they would not be able to pay for them. By the time of admission of liability the cost of carrying out the repairs had risen, but the claimant was allowed by the Court of Appeal the full cost of the repairs. The reasons for the distinction are somewhat dubious. One was that the claimant had reasons other than lack of funds (that is, the doubtful outcome of the trial) for delaying the repairs. The other was that the claimant in the *Dodd* case was not poor in the true *Liesbosch Dredger* sense because he did have funds but did not want to risk losing them. Surely both of these factors could apply in almost any case, and it might be possible to make these distinctions in many future instances.

In *Jarvis v Richards* (1980) 124 SJ 793, the *Liesbosch Dredger* case was again distinguished, this time because it was decided that the defendant could have foreseen the claimant's impecuniosity. In *Mattocks v Mann* [1993] RTR 13, the claimant's car was damaged by the negligence of the defendant and he took it off the road to be repaired and hired a cheaper car. However, from time to time, the claimant would run out of money because he was unemployed, and would send back the hire car and use public transport. The Court of Appeal did not deny the claimant the cost of recovering for the car hire. He had acted reasonably and with commercial prudence and should not be penalised.

It seems that, in today's climate, the *Liesbosch Dredger* rule is barely relevant and it remains to be seen what approach the House of Lords would take if called upon to review it.

8.5.6 Policy issues in remoteness

There is clearly a strong element of policy involved in the law that has developed on the issue of remoteness of damage. Reasoning based on the scope of the duty is sometimes presented in cases on remoteness as it was in relation to duty of care in *Caparo Industries plc v Dickman* [1990] 2 WLR 358. In *Banque Bruxelles Lambert SA v Eagle Star Insurance Co Ltd* [1995] 2 All ER 769, the House of Lords held that a valuer of property was not liable for all the direct consequences of his negligent conduct; he was liable only for those that fell within the scope of the duty of care he owed to the person relying on the information he had supplied. Here, a valuer had been negligent in overvaluing a property, on the security of which a lender had advanced money to a borrower. The property market had fallen in value and the lender suffered losses, but the House of Lords held that the valuer would not be liable for that part of the lender's loss which was the result of the fall in value of the property market.

Lord Hoffman, who gave the leading speech, distinguished between the breach of a duty to provide information and the breach of a duty to provide advice. He took the view that if the scope of the duty is merely to provide information upon which another person can make a decision as to how to proceed, the defendant will not be liable for unforeseeable losses. However, if the duty is to provide advice the defendant is liable for all the losses flowing from negligent advice. Losses which can be attributed to the fall in the property market could not be said to be caused by the defendant's negligence because they did not fall within the scope of the duty. The actual loss was quantified as the difference between the negligent valuation which had been given and the amount of a non-negligent valuation that should have been given at the time.

8.5.7 Applying the rules: an example

In reality, there is little practical difference between the test in *Re Polemis* and that in *The Wagon Mound*. In most cases, consequences which are reasonably foreseeable are also the direct consequences of the defendant's act. It is only in very extreme cases that this is not so. The thin skull test ensures that, except in the case of economic loss, even unforeseeable consequences attract liability once it is established that the type of accident is reasonably foreseeable. It may be of interest to note that this makes it very difficult for examiners to set problem questions in this area because, by its very nature, an unforeseeable type of damage is difficult to dream up. As a result, the problems which are set are often extremely bizarre. There follows a possible examination question which required a good deal of imagination and ingenuity to draft.

Jerry bought a tin of canned herring from a supermarket. He opened the tin and noticed that the fish was an odd colour. Deciding not to risk eating it himself, he gave it to his cat, Tom, for tea. Tom ate the fish and immediately had an epileptic fit, in the course of which he bit the milkman who had called to be paid. The milkman, a haemophiliac, bled to death and the cat was seriously ill for several weeks. Tom was a specially trained cat and was due to appear in a film the next day. Jerry could not afford to buy another trained cat and, in order to meet his contractual obligations, he hired another cat at a much inflated price.

Discuss the issues of causation and remoteness of damage which arise in this situation.

8.6 JUSTIFICATION FOR THE REMOTENESS RULES

The restrictions which are placed on the scope of liability by the remoteness rules can be justified, in that they do succeed in preventing indeterminate liability to an indefinite number of people. A theme which runs throughout policy discussions in tort is that it is necessary to place a limit on the amount of damage which is recoverable. However, it is questionable as to whether justice is served by the rules of remoteness in their present form. Some may consider that the just approach is that taken in *Re Polemis*, as enunciated by Viscount Simonds (see 8.5.2, above), while others might argue that it would be more just for innocent victims of negligent conduct to be better served by the remoteness rules.

FURTHER READING

Lunney, 'What price a chance?' (1995) 15 *LS* 1
Stapleton, 'Loss of a chance of cure from cancer' (2005) 68 *MLR* 296

For regular monthly up-dates on this area of law, see *Personal Injury Compensation*, published monthly by Informa UK Ltd.

CHAPTER 9

BREACH OF STATUTORY DUTY

It is sometimes possible to bring a claim in tort for breach of a duty imposed by statute. This tort is known as a claim for 'breach of statutory duty'. Although this is an important area of tort in English law, especially in relation to employers' liability (see Chapter 14), other jurisdictions, notably the USA and Canada, have criticised English law and have tended to assimilate breach of statutory duty into the general law of negligence.

In English law if there is no liability for breach of statutory duty a duty may still arise in the law of negligence (*Thames Trains v Health and Safety Executive* [2002] EWHC Civ 1415).

The first question that arises is whether a claim in tort will be available for the breach of duty created in a statute which does not specifically contemplate a tort claim. An essential element in this tort is the interpretation of the statute in question and, for this purpose, the basic principles of statutory interpretation apply. This in itself creates a problem because there are few fixed 'rules' as such in the interpretation of statutes and it is not easy to predict which 'rule' or canon of construction an individual judge will follow, unless precedent already exists on the interpretation of the particular words of the statute.

In general, the statutory provisions that give rise to tortious liability for breach of statutory duty are relatively few but, once it is established that a claim in tort could arise, there may be advantages to the claimant because the burden of proof is reversed and in some cases liability will be strict.

Section 40 of the Health and Safety at Work, etc, Act 1974 provides that in proceedings for an offence consisting of failure to comply with a duty to do something so far as is reasonably practicable, it is for the defendant to prove that it was not reasonably practicable to do so. This reversed burden of proof has been challenged.

In *Davies v Health and Safety Executive* [2002] EWCA Crim 2949, the Court of Appeal held that the reversal of the burden of proof brought about under s 40 of the Health and Safety at Work, etc, Act 1974 was justified, necessary and proportionate, and was therefore not incompatible with Art 6 of the European Convention on Human Rights (The right to fair trial).

The statutes under consideration are usually criminal in nature and are often aimed at preventing accidents and injuries by imposing controls upon certain types of conduct. In particular, industrial safety legislation is frequently used as a basis for a claim for breach of statutory duty and this area of tort finds a natural place for discussion along with employers' liability. Indeed, with the implementation of EU directives imposing ever more stringent duties on employers, breach of statutory duty has become a very significant cause of action for employees injured at work, so note the overlaps between this chapter and Chapter 14 dealing with employers' liability.

Although the criminal law framework was designed to deter employers from exposing their workers to unnecessary risks, there have been many criticisms of the reluctance to prosecute employers for breaches of the law and of the low levels of fines

imposed by the courts when there are successful prosecutions (see, for example, the comments and guidance of the Court of Appeal in *R v Howe and Son (Engineers) Ltd* (1999) *The Times*, 27 November). This is a matter which the Law Commission has considered and reforms have been recommended (Law Commission, *Accidents at Work*, 58/17, London: HMSO).

9.1 WHAT MUST BE PROVED?

A claim for breach of statutory duty is complex and involves proving a number of propositions. The claimant must prove:

- the statute was intended to create civil liability. The court may here consider the general context of the statute and the precise nature of the statutory provision;
- the statutory duty was owed to the individual claimant;
- the statute imposed the duty on the defendant;
- the defendant was in breach of the duty;
- the damage was of a type contemplated by the Act.

9.1.1 The statute was intended to create civil liability

The claimant must first establish that the statute relied upon imposed a duty upon the defendant which gives rise to civil liability, even though the statute in question does not mention the possibility of compensation in civil claims. It might seem an impossible task, given the traditional predominantly literal approach favoured by the English courts to statutory interpretation, to prove that the intention of Parliament was to support civil liability in a statute which is essentially criminal or quasi-criminal in nature. Indeed it is difficult to establish initially that a claim for breach of statutory duty arises.

If a statute was introduced solely to create civil liability (for example, the Occupiers' Liability Acts 1957 and 1984) it will not create a claim for breach of statutory duty, which is a separate tort in its own right.

The courts take various factors into account when deciding upon the intention of Parliament in relation to a particular statute. This is often a matter of guesswork and the consideration of policy issues, and there is a good deal of inconsistency in the cases. In *R v Deputy Governor of Parkhurst Prison ex parte Hague* [1992] AC 58, the House of Lords, not surprisingly, held that Parliament could not have intended that a breach of statutory duty owed under the prison rules could give rise to a tort claim.

Again, in *Cullen v Chief Constable of Royal Ulster Constabulary* [2003] 1 WLR 1763 the House of Lords took the view that Parliament had not intended claims for breach of Statutory duty to arise as a result of breaches of a statute designed to protect suspects in custody by giving them access to a solicitor.

Some statutes explicitly state whether they give rise to civil as well as criminal liability (for example, the Health and Safety at Work, etc, Act 1974, the Management of Health and Safety at Work Regulations 1992 and the Building Act 1984).

Others specifically exclude liability for breach of statutory duty, for example, the Guard Dogs Act 1975. Most are silent on the matter.

- **What was the general context of the statute?**
  The courts consider the general context of the statute and the nature of the statutory duty in question. In *Cutler v Wandsworth Stadium Ltd* [1949] AC 398, Lord Simonds said:

  > The only rule which in all circumstances is valid is that the answer must depend on a consideration of the whole Act and the circumstances, including the pre-existing law, in which it was enacted.

  In practice, the courts have tended to rely on certain presumptions that they have developed. It should be noted that many cases concern the interpretation of subordinate legislation, where the approach is similar to that taken in cases concerning the interpretation of statutes generally.

  If the Act was intended primarily for the general benefit of the community, rather than for the particular benefit of individuals or a class of individuals, it will not usually give rise to a right of action for the benefit of individuals in tort (*Lonrho v Shell Petroleum Co Ltd* [1982] AC 173).

  While there are no hard and fast rules, it appears that, if the Act in question was intended to give guidance on matters of welfare, such as the provision of facilities for the general public benefit, it will not give rise to claims by individuals for beach of statutory duty. If, however, the Act is concerned with the welfare of an identifiable group of individuals, such as homeless persons, a claim for breach of statutory duty may arise (*Thornton v Kirklees BC* [1979] QB 626 (since overruled)). In *Rice v Secretary of State for Trade and Industry* [2007] EWCA Civ 289, the Court of Appeal held that it was fair, just and reasonable to impose a common law duty of care on the National Dock Labour Board to protect employees against a known serious risk to their health, as part of the statute enacting the board's training and welfare scheme was aimed at protecting the health of dock workers employed by the board. In *O'Rourke v Mayor and Aldermen of Camden LBC* [1997] 3 All ER 23, the claimant had just been released from prison and had nowhere to live. He applied for accommodation to the defendant council, on the basis that he was homeless and in 'priority need' because of his vulnerability. The council investigated his application and carried out the inquiries specified in s 62 of the Housing Act 1985. He was housed in temporary accommodation for a time, then evicted by the defendants. He sought damages for breach of the statutory duty under s 63(1) of the Housing Act 1985, which states:

  > If the local housing authority have reason to believe that an applicant may be homeless and have a priority need, they shall secure that accommodation is made available for his occupation pending a decision as a result of their enquiries under s 62.

  The House of Lords rejected his claim for breach of statutory duty, ruling that the *Kirklees* case, which had been cited by the council, had been wrongly decided. Lord Hoffmann found several factors to support the view that Parliament did not intend to confer private rights of action here. He pointed out that many functions of the housing authority contained elements of discretion, and expressed the view that it would be strange if errors of judgment in broad areas of discretion incurred liability to compensate private individuals.

Both negligence and breach of statutory duty need to considered in cases of this kind, and the cases also concern negligence arising out the careless exercise of a discretion provided by a statute. The test in the leading case of *Caparo Industries plc v Dickman* [1990] 2 WLR 358 is used to determine the issue of whether a duty exists, and both negligence and breach of statutory duty are relevant to the duty problem. Although many of the cases are decided in negligence, the law of negligence is still developing in ways which might assist people who have been aggrieved by the incompetent exercise of statutory functions. Thus, in *Barrett v Enfield BC* [2001] 2 AC 550 the House of Lords held that a claim by a person who alleged that he had not been properly cared for in local authority care under the Children Act 1989 should not be struck out (see 6.10, above).

In the employment context, it seems that safety provisions (for example, those in the Mines and Quarries Act 1954) are more likely to give rise to civil liability than those concerned with health and welfare of employees. The general duties in ss 1–9 of the Health and Safety at Work, etc, Act 1974 specifically do not give rise to civil actions, but, by s 47 of the same Act, the Regulations made under the Act do give rise to civil liability unless they state otherwise.

The Health and Safety at Work, etc, Act 1974 is the product of comprehensive reform of the previous law relating to the health and safety of the workplace following recommendations by the Robens Commission. The general duties in ss 1–9 are concerned with securing the health, safety and welfare of all employees and visitors to all work environments. They create duties 'so far as is reasonably practicable' to ensure healthy and safe places of work, safe plant and machinery and safe use of substances in the workplace. Uniquely, employees as well as employers are involved in the safety process. In addition, the Act makes provision for Regulations to be formulated which are specific to particular industries, processes and work environments, and which in turn give rise to specific duties. Many of the Regulations must conform with EC standards.

There are numerous examples to be found in the law reports of claims against employers and of breaches of regulations made under the Health and Safety at Work framework. In some instances it is very difficult for an employer to escape liability because the statutory duty is strict. Thus in *Ball v Street* [2005] EWCA Civ 76 the Court of Appeal ruled that even though the type of accident was unforeseeable the employer could not escape liability for breach of an absolute duty under the Provision and Use of Work Equipment Regulations. Another, drawn from many examples of successful claims, is *Gravatomb Engineering Systems Ltd v Raymond Parr* [2007] EWCA Civ 967, where the Court of Appeal held that an employer who had not taken adequate steps to reduce the risk involved in a manual handling operation to the lowest level that reasonably practicable, was in breach of the substantive duty under the Manual Handling Operations Regulations 1992 reg 4(1)(b)(ii).

The Act and Regulations made under it are concerned with enforcing safety standards and with preventing health and safety problems rather than with providing compensation to employees who become sick or injured, and for that reason its general sections specifically exclude civil actions.

If the statute concerned creates a duty but does not mention a penalty for its

breach, it is usual for a court to find that a claim for breach of statutory duty in tort exists (*Cutler v Wandsworth Stadium Ltd*).

If the statute under scrutiny provides a penalty or a remedy of some kind, it is unusual for it to be held to give rise to a claim for breach of statutory duty (*Cutler v Wandsworth Stadium Ltd*), unless it is clear that the statute intended to provide an enforceable right to a particular individual or class of people, but it is impossible to state general rules and it is possible to find cases which contradict these propositions.

- **What was the precise nature of the statutory provisions?**
  The more precise the wording of the statute the more likely it is that the breach of duty will give rise to civil liability. In *Monk v Warby* [1935] All ER 373, it was held that if a person who is not insured to drive a car uses the vehicle with the permission of the owner and negligently injures a third party, the person who is injured can sue the *owner* of the vehicle for breach of his clearly defined duty under s 143 of the Road Traffic Act 1988 (a duty not to allow an uninsured person to drive the vehicle).

  In *Groves v Wimborne (Lord)* [1898] 2 QB 402, it was held that a manufacturer was liable to an employee who was injured when the defendant was in breach of a precise statutory duty to fence certain dangerous machinery.

  More general and vague statutory provisions are less likely to give rise to a claim for beach of statutory duty. For example, duties to see that machinery is 'properly maintained' do not usually give rise to a civil action.

9.1.2 The statutory duty was owed to the individual claimant

Unless the claimant is able to establish that the duty which was created by the statute was intended to be owed to him as an individual or as a member of a class of individuals, there will be no claim available (see above).

It can be an advantage to a claimant, whatever the nature of the statute under consideration, if it can be proved that he or she is a member of an ascertainable class of people for whom the legislation was enacted. Where the statute was passed for the protection or benefit of a particular class of people, rather than the public at large, there is a presumption that a claim for breach of statutory duty will be available to the individual member of the class who has suffered injury. There is scope for the exercise of judicial discretion at this point. Even if the claimant does fall into such a class, the courts might be unwilling to find that a right to a civil claim exists if the nature of the obligation was not such that, if broken, it would be likely to give rise to personal injury, injury to property or economic loss. Thus, in *Pickering v Liverpool Daily Post* (1991) unreported, the House of Lords held that a patient at a psychiatric hospital had no right to a civil claim for breach of privacy when information about his application to a mental health tribunal had been issued contrary to regulations. The statute could not be used to provide a cause of action where no such action previously existed at common law.

It is difficult to state with certainty that the presumption relating to membership of a class will be applied in every case. There have been some cases in which no claim for breach of statutory duty has been available, even though a statute was clearly passed for

the protection of a particular class, as in *X (Minors) v Bedfordshire CC* [1995] 2 AC 633. This case suggests that, if the statute involves difficult policy issues and there is an element of discretion involved in the performance of the duty, there must be no doubt in the wording of the Act that Parliament intended it to give rise to civil liability. However, that particular decision was based on policy issues and has been questioned before the European Commission.

This will be a matter of interpretation in each case. The scope is very wide and the potential for civil claims is great. For example, in *Garden Cottage Foods v Milk Marketing Board* [1984] 2 All ER 770, it was held that a claim for breach of statutory duty could arise out of breach of an Article of the EC Treaty. For that reason, the courts approach this problem with caution.

In *Knapp v Rly Executive* [1949] 2 All ER 508, a railway worker was injured when a gate at a level crossing swung back and hit him. It was held that there was no liability for breach of statutory duty because the statute in question which required the defendant to keep gates of level-crossings in the correct position at all times, was intended for the protection of road users crossing the lines, not of railway employees.

In *Atkinson v Croydon Corpn* (1938) unreported, it was held that the defendants were liable for breach of statutory duty to the father of a girl who had contracted typhoid because of the breach of their statutory duty to provide a pure supply of water. He was able to claim for expenses which he had incurred in the treatment of his daughter's illness, and his claim arose from his being a rate-payer and one of the class of people to whom the duty was owed. The daughter who was not a rate-payer had no claim for breach of statutory duty.

In *Hewett v Alf Brown's Transport* [1992] ICR 530, the claimant, the wife of a lorry driver, suffered lead poisoning as a result of exposure to lead when cleaning her husband's overalls. The Control of Lead at Work Regulations 1998 (SI 1998/543) and code of practice imposed duties upon employers to protect their employees from the dangers of exposure to lead. The Court of Appeal held that this did not apply to the claimant and she was without a remedy.

In *PRP Architects v Reid* [2007] EWCA Civ 1119, on the other hand, the claimant succeeded in proving that the relevant Regulations applied to her. She left work after a day at the office, using a lift located in the common part of a shared office building. The Court of Appeal concluded that she had been using the lift 'at work' within the meaning of the Provision and Use of Work Equipment Regulations 1998 reg 3. The lift was a piece of 'work equipment', so her employers were liable for the injury she suffered because the lift was defective.

In *Maguire v Hartland & Wolff plc* [2005] EWCA Civ 01, the Court of Appeal held that simply because the defendants should have appreciated the risk of harm to the claimant's husband, as their employee, who was exposed to asbestos dust, this did not mean that they should have foreseen a risk to his wife, the claimant. She had contracted mesotheliana after handling her husband's clothes. However it was not reasonably foreseeable at the time that she was at risk from this source, so the defendants escaped liability.

These principles were referred to by the Court of Appeal in *Clunis v Camden and Islington HA* [1998] 3 All ER 180 in which it was held that there was no indication in s 117

of the Mental Health Act 1983 that Parliament intended to confer a right on private individuals to bring a claim for breach of statutory duty in respect of that section (see Chapter 6).

9.1.3 The statutory duty was imposed on the particular defendant

The precise words of the Act must be interpreted in order to establish whether the particular defendant has a duty under it. Only if the statute imposes a duty on the defendant can a civil claim be maintained against him. There is some flexibility here. For example, in *Shell Tankers v Jeremson* [2001] EWCA Civ 101 the Court of Appeal accepted that the Asbestos Industry Regulations 1931 (SI 1931/1140) applied to the incidental use of asbestos in other industries.

In *Majrowski v Guy's and St Thomas's NHS Trust* [2006] UKHL 34 the House of Lords held that the defendants could be vicariously liable for breach of the statutory duty owed under the Protection from Harassment Act 1997 s 3 by one of its employees. The duty had been imposed on the employee who had bullied the claimant and harassed and intimidated him in the course of his employment.

9.1.4 The defendant was in breach of the statutory duty

Here, the standard of care imposed by the statute is of vital importance. In some cases, the claimant will be assisted by the fact that there will be strict liability for breach of the statutory duty, depending on the construction of the Act in question.

Unfortunately, there is a good deal of inconsistency in the application of the law in these cases, and there is a suspicion that policy plays an important part in the decisions. Lord Denning has said that 'You might as well toss a coin in order to decide the cases'.

However, it may be possible to elicit some principles from the cases.

- If the provision uses the words 'must' or 'shall' in relation to a particular duty, it is likely that the duty will be absolute and liability strict. In *John Summers & Sons v Frost* [1955] 1 All ER 870, it was held not to be a defence to an employer to demonstrate that it was impracticable to fence machinery because the relevant statute, s 14(1) of the Factories Act 1961, provided that any part of the machinery *must* be securely fenced. However, in other claims for breach of statutory duty arising out of the same section, it has been held that it did not apply to materials in the machine.
- Statutes creating criminal law penalties are construed strictly. For example, in *Chipchase v British Titan Products Co Ltd* [1956] 1 QB 545, the claimant was denied a remedy for breach of statutory duty. Regulations in the particular industry specified that a platform placed at a height of more than 6 ft 6 in from the ground should be at least 34 in wide. The platform from which the claimant fell was only 9 in wide, but it stood only 6 ft above the ground. It was held that the claim for breach of statutory duty could not succeed.
- The House of Lords, in *Nimmo v Alexander Cowan and Sons* [1968] AC 107, held that the term 'reasonably practicable', as used in s 19 of the Factories Act 1961, required the employer to demonstrate that he or she had taken such precautions as were reasonably practicable or that precautions were impracticable.

- If the statutory provision uses, as is very common, the words 'in so far as is reasonably practicable', the duty is not absolute and the standard of care probably lies somewhere between the standard of reasonable care in negligence and that of strict liability. This is even more likely to be the case if the word 'reasonably' is omitted. In *Edwards v National Coal Board* [1949] 1 All ER 743, Asquith LJ described the duty as a balance between the sacrifice which is necessary to avoid a risk and the magnitude of the risk involved.
- The Health and Safety at Work, etc, Act 1974 and regulations made under it have the aim of preventing accidents, but lawyers have found that the industrial safety legislation has been used very successfully as a starting point for civil liability when employees are injured in accidents. There have been many successful claims by injured employees, a large number of whom receive financial support from trade unions. The regulations made under the Health and Safety at Work, etc, Act 1974 should be studied carefully in order to determine their scope. Many specifically state that they do give rise to civil liability in the event of a breach and the burden of proof is frequently reversed by s 4C of the 1974 Act – for example, five of what have become known as the 'Six-pack' Regulations (Workplace Health, Safety and Welfare Regulations 1992; Provision and Use of Work Equipment Regulations 1992; Personal Protective Equipment at Work Regulations 1992; Manual Handling Operations Regulations 1992; Health and Safety (Display Screen) Regulations 1992. The only Regulation in the set that does not give rise to civil liability is the last of the six called the Management of Health and Safety at Work Regulations 1992 state that breaches do create civil liability. The regulations almost all require employers to carry out risk assessments and to train employees adequately in the use of equipment and other procedures. Failure to provide evidence that these matters have been undertaken almost always results in early settlement or successful claims.

  A recent example is *Lewis v Avidan* [2005] EWCA Civ 230. The claimant had been injured when she had slipped on a patch of water in the nursing home where she worked. A water pipe had burst shortly before the accident and no-one was aware of the water on the floor. It was held that the claimant should succeed. The Court of Appeal ruled that the nursing home was 'work premises' and that the employer was in breach of reg 5(1) of the Workplace (Health, Safety & Welfare) Regulations 1992.
- The liability of employers can sometimes extend far beyond their usual premises. In *Fraser v Winchester HA* (1999) *The Times*, 12 July, a claim for damages arose out of a situation which had come about when the claimant was assisting as a support worker on a holiday for disabled young people. She was usually employed by the defendant as a resident support worker at a home for disabled young people. The residents took an annual holiday and the claimant agreed to go camping with one resident, as she had been his sole carer. A camping gas cylinder which the claimant had been inserting into a camping stove exploded and she was badly injured. She was given no instructions about the use of the camping stove, nor about changing the gas cylinders. The claimant brought proceedings against the health authority, claiming damages for negligence and for breach of statutory duty under the Provision and Use of Work Equipment Regulations 1992 (SI 1992/2932). The defendant argued that

there was no breach of any duty, as the risk was so obvious that no warning, nor any training or instruction, was necessary. The Court of Appeal held that considerable responsibility had been placed on the claimant, but she had been provided with inadequate and hazardous equipment and no training. In these circumstances, the defendant was in breach of its duty towards her. As there was an obvious risk, the claimant had been one-third contributorily negligent.

In *Dugmore v Swansea NHS Trust and Morriston Hospital NHS Trust* [2002] EWCA Civ 1689, the Court of Appeal held that an absolute duty was imposed on the defendants by regulations to ensure that the claimant's exposure to latex in surgical gloves was adequately controlled. The claimant had a life-threatening allergy to latex and the defendants were held to be in breach of their duty in failing to supply her with vinyl gloves.

- Highway accidents fall into a special category – see Chapter 11. In *Day v Suffolk County Council* [2007] EWCA Civ 1436, one of a line of cases concerning the duty of Highway Authorities, the Court of Appeal held that the trial judge had been entitled to conclude that an inspection carried out by a local authority as part of its maintenance programme, was inadequate, and that a dangerous defect had been overlooked, in breach of the authority's duty under the Highways Act 1980. The judge had held that the local authority was liable, since the special defence available to it under s 58(1) of the Act, that of taking reasonable care to ensure that a highway was not dangerous to users, had not been proved.
- Courts frequently lean against the imposition of strict liability unless the statute specifically states that strict liability will apply. This is a general presumption of statutory interpretation (*Sweet v Parsley* [1965] 1 All ER 347) and applies equally to breach of statutory duty when the court is considering the nature of the statutory duty in question. In *Brown v National Coal Board* [1962] 1 All ER 81, it was held that the words to 'take such steps as may be necessary for the keeping of the road or working place secure' did not create a strict liability situation. The manager responsible had exercised reasonable care and skill in all the circumstances and was not liable.

  The burden of proving that the measures taken by the employer were within the notion of what was practicable or reasonably practicable is on the defendant and, in this respect and because in some cases liability is strict, the claimant is at an advantage in comparison with the claimant in ordinary negligence actions.
- Should the claimant allege that the exercise of statutory powers is careless, it must be demonstrated that there would have been a duty of care at common law in the same circumstances. If the exercise of a discretion is in question and the decisions complained of fall within the ambit of the statutory discretion, they cannot be the subject of a common law action. If, however, the decision falls outside the discretion because it is so unreasonable, there is not necessarily any reason to exclude all.
- In cases not concerned with industrial safety legislation the courts interpret the words of the relevant statute to determine the scope of the duty (see 11.7.1, below, in relation to duties of highway authorities).
- A defendant will only be liable for damage resulting from risks of which he is aware. See *Maguire v Harland & Wolff* [2005] para 9.1.2.

9.1.5 The damage must be of a type which the statute contemplated

The nature of the remedy given in the statute is a consideration in determining whether the statute gives rise to civil liability. It seems that, if no remedy is provided by the statute, and this is coupled by an intention to benefit a particular class of people, it is interpreted as indicating that Parliament intended the statute to create civil liability. The reason for this may be that, without a civil remedy, there would be no other way for the statute to provide the intended benefit. However, where the statute creates its own framework of procedures for decision making and enforcement, it is unlikely to give rise to separate civil liability.

In *Lonrho v Shell Petroleum Co Ltd*, Lord Diplock said that the rule is this: if a statute provides for a *criminal* sanction, it will not give rise to *civil* liability. There are two exceptions to this rule. The first is where the duty is imposed on the defendant for the protection or benefit of a particular class of individuals, and the second is where the statute creates a public right and the claimant suffers some damage over and above that suffered by the public. However, even in this there is no consistency.

There will only be a claim for breach of statutory duty if damage which was suffered was within the contemplation of the objects of the statute. In *Gorris v Scott* (1874) 9 LR Exch 125, there was no action for breach of statutory duty because the claimant suffered the loss of his sheep from the deck of a vessel when they were swept overboard. The statute in question was concerned with the loss of livestock through the spread of disease. The point at issue here concerned with the question of remoteness of damage. In *Young v Charles Church (Southern) Ltd* (1997) 33 BMLR 101, the Court of Appeal held that nervous shock was among the kinds of injury contemplated by the Construction (General Provisions) Regulations 1961 (SI 1961/1580), reg 44(2).

9.1.6 The injury must have been caused by the defendant's breach of statutory duty

The claimant will not succeed unless it can be proved that the breach of statutory duty caused the injury of which he or she complains. Again, the scope of the duty of care depends upon the construction of the statute, and no single standard of care exists. The rules for establishing causation applicable in common law negligence also apply to breach of statutory duty. In *Stringer v Bedfordshire CC* (1999) unreported, which involved a claim for breach of statutory duty arising out of a breach of s 41 of the Highways Act 1980, the judge held that, although there were defects on the highway, these did not cause the accident, in which an inexperienced driver lost control of her car. In *Brett v Lewisham London Borough Council* (1999) unreported, it was held that the ordinary test of reasonable foresight was applicable in claims for breach of statutory duty. It follows that as long as the damage is of a type that was reasonably foreseeable, the extent of the damage does not need to be foreseeable. In *Corr v IBC Vehicles* [2006] EWCA Civ 331, the defendant was liable for a suicide, where the deceased had become depressed following injuries sustained as a result of a breach of duty. It was held by the Court of Appeal that it is not necessary to prove that suicide was a type of damage that was separate from psychiatric injury or personal injury.

If the breach made no difference there will be no liability. In *Sussex Ambulance NHS Trust v King* [2002] EWCA Civ 953, it was held that even if specialist training in lifting had

been carried out, the claimant would probably still have suffered an injury and the employer was not liable. A similar decision was reached in *Warner v Huntingdon DC* [2002] EWCA Civ 791.

9.1.7 Breaches of European legislation

Some emerging issues arise as a result of the relationship between UK law and European law concerning private law remedies in the UK law of tort, and in the European context. Many recently introduced regulations have their origins in EC directives. A large number of these have now been implemented in the UK. In *Garden Cottage Foods v Milk Marketing Board*, the House of Lords concluded that it might, in certain circumstances, be possible for a breach of statutory duty claim to arise when there had been a breach of an obligation arising under EC legislation which is 'directly effective'. However, in *Bourgoin SA v Ministry of Agriculture, Fisheries and Food* [1986] QB 716, the Court of Appeal turned down a claim for breach of the duty arising under Art 30 (now Art 28) of the EC Treaty, concluding that judicial review would be a more appropriate remedy. There are more recent decisions of the European Court of Justice which suggest that, if a state fails to implement a directive, there may be an obligation to compensate private persons for any damage suffered as a result. This topic probably has its niche in EC law rather than tort, and is a complex area of law concerning the relationship between UK law and European law as well as the relationship between private law remedies in UK tort law and European law remedies. In *Francovitch v Italy* [1995] ICR 585 the European Court of Justice ruled that a member state may be liable to compensate for damage suffered by individuals when the state failed to implement a Directive. It appears from the authorities that this approach is wider in scope than the tort at common law claim for breach of statutory duty, but there are similarities between the two, and it should be noted that community law may intend to confer rights on particular groups without conferring on them a right that would be enforceable in the courts of individual member states. In *Three Rivers DC v Bank of England (No 3)* [1984] AC 130 the House of Lords, in an attempt to clarify the issues, ruled that the Banking Directive 1977, which was intended to harmonize banking practices in member states, did not create a right of action for depositors who had lost money as a result of the failure of measures intended to supervise the process. Despite the difficulties in finding a satisfactory place for this line of cases in the conceptual framework of tort, the decision in *R v Secretary of State for Transport ex part Factortame (No 5)* [2000] 1 AC 524 makes it clear that breaches of certain rights protected by Community law can be actionable in damages, in a similar way to breaches of statutory duty at common law, in the domestic courts. The problem of classification needs time to be satisfactorily resolved.

9.2 DEFENCES

If the statutory duty is not absolute, there will be a defence (as there is for breach of the common law duty) if a safety precaution is not provided by an employer but the claimant would not, on a balance of probabilities, have made use of it even if it had been available. This is a matter of causation (*McWilliams v Sir William Arrol & Co Ltd* [1962] 1 All ER 623) and should not be confused with the defence of *volenti* (see Chapter 20).

9.2.1 The employment context

Volenti non fit injuria is not normally available, for reasons of public policy, in an action by an employee against his or her employer for breach of statutory duty (*ICI v Shatwell* [1965] AC 656).

A defence will be available if the claimant's own wrongful act puts the employer in breach of statutory duty. In *Ginty v Belmont Building Supplies Ltd* [1959] 1 All ER 414, the claimant was working on a roof and chose not to use special crawling boards as a safety measure. This was a breach of the relevant statutory regulations. It was held that the employer was not vicariously liable to the employee for his own wrongful act. This defence will not apply, however, if the employee is injured through the wrongful act of another employee.

9.2.2 Contributory negligence

The defence of contributory negligence will be available in appropriate cases in a claim for breach of statutory duty (*Caswell v Powell Duffryn Collieries Ltd* [1940] AC 152) and it is possible for an employee who is 100% contributorily negligent to be denied any compensation (*Jayes v IMC (Kynoch) Ltd* [1985] ICR 155).

In *Rushton v Turner Asbestos* [1960] 1 WLR 96, the Court of Appeal held that an employee who was ordered into a dark, cramped area to carry out a task was only one-third contributorily negligent when his error resulted in an injury to himself. In *Marlton v British Steel* (1999) unreported, an employee who was burned was one-third contributorily negligent when he worked too close to hot coke ovens without wearing fire resistant clothing, even though the employer had failed to provide protective clothing.

9.2.3 Delegation

Although in some cases the defence of delegation has been raised, it is not normally successful. This defence involves alleging that the person on whom the duty was imposed had delegated that duty to another person, such as an independent contractor. The defence appears to have fallen into disuse in recent years, but it may become more important with the implementation of the comprehensive duties imposed by the regulations made under the Health and Safety at Work, etc, Act 1974.

9.3 HUMAN RIGHTS DEVELOPMENTS

Note that since the introduction of the Human Rights Act 1998 even if a claim for breach of statutory duty fails and no other tort is established, there has been an attempt to claim against a public authority when the claimant alleged interference with Convention rights. Human Rights arguments were, however, rejected by the House of Lords in *Marcic v Thames Water Utilities Ltd* [2003] UKHL 66. However, in *Secretary of State For Justice v Walker; Secretary of State For Justice v James* [2008] EWCA Civ 30, it was held that the Secretary of State had acted unlawfully by failing to provide measures to allow the respondent prisoners, who were serving long sentences to protect the public, to demonstrate to the Parole Board when their minimum terms had expired, that their

detention was no longer essential for the protection of the public. Both respondents were placed in an unacceptable situation since they had been denied reviews of the lawfulness of their detention, which, if continued, could amount to a breach of Art 5(4). Their detention would not be justified under Art 5(1)(a) when it was not longer necessary for the protection of the public, or if it had been so long since there had been a proper review that their detention was disproportionate or arbitrary.

FURTHER READING

Craig, 'Once more unto the breach: The Community, the state and damages liability' (1997) 113 *LQR* 67

Stanton, 'New forms of the tort of breach of statutory duty' (2004) 120 *LQR* 324

For regular monthly up-dates on this area of law, see *Personal Injury Compensation*, published monthly by Informa UK Ltd.

CHAPTER 10

OCCUPIERS' LIABILITY

10.1 INTRODUCTION

It is thought that around 27% of reported accidents occur in the home (Pearson Report, *Report of the Royal Commission and Civil Liability Compensation for Personal Injury*, Cmnd 7054, 1978, vol 2, para 16), yet, although reliable statistics on the matter are difficult to obtain, it appears that few claims arise out of domestic accidents (see Harris, *Compensation and Support for Illness and Injury*, 1989, Oxford: Woolfson Centre for Socio-Legal Studies). A number of reasons have been suggested for this. It could well be that people are unaware of the possibility of making a claim in such circumstances, or that they are reluctant to sue relatives and friends (most claims for accidents on property are brought against companies by members of the public).

Another possible reason for the relatively small number of claims is that while property owners are required by mortgage lenders to insure their buildings under the terms of most mortgages, occupiers' liability is covered by house contents insurance which is not compulsory, and many house owners choose to skimp on this. A lawyer is unlikely to advise a client to sue the average uninsured householder.

Occupiers' liability is a field in which until relatively recently there was only a limited duty owed in law to others, but which has been extensively overhauled by statute and common law developments to include the imposition of liability akin to that in negligence in numerous situations (*Atiyah's Accidents, Compensation and the Law*, Cane (ed), 1993, London: Butterworths).

In modern law, the liability of occupiers for people who are injured on their premises is governed by the Occupiers' Liability Acts of 1957 and 1984. Before 1957, the common law applied, and liability depended upon the type of entrant; for example, the highest standard of care was that owed to people entering the land as contractors. The next highest standard of care was owed to people who had some mutual business interests with the occupier and who were called invitees, and so on. Trespassers were owed only a minimal duty and in most cases no positive duty of care at all. The position at common law was complex and confusing and for that reason the law was simplified by the Occupiers' Liability Act 1957.

10.1.1 Application of common law

Before embarking upon a detailed study of the statutes themselves, it is still necessary to consider where any of the previous common law still applies. For example:

- It is important to establish whether a person who was once a trespasser has become a licensee or lawful visitor and is therefore owed a duty of care under the Occupiers' Liability Act 1957. There is a considerable amount of common law on this subject and this will be discussed in detail later, but the Act itself is silent on the matter.
- 'Premises' are not defined by statute and the common law definitions still apply.

- The Act is silent on the position of users of public and private rights of way, and the common law still applies here.

The House of Lords tackled a difficult matter concerning the legal position of users of rights of way in *McGeown v Northern Ireland Housing Executive* [1994] 3 WLR 187. The claimant lived on a housing estate belonging to the Northern Ireland Housing Executive and her house was in a terrace on one side of a small cul-de-sac. She was injured on a footpath which belonged to the defendants, and which began as an informal footpath between the terraces but which had become a public right of way. Her injury was caused by tripping on a hole which had developed through lack of repair to the footpath (non-feasance). Her claim was for negligence and/or breach of statutory duty. Lord Keith in the leading speech confirmed the old rule in *Gautret v Egerton* (1867) LR 2 CP 371 that the owner of land over which a right of way passes owes no duty towards members of the public in relation to nonfeasance (doing no repairs). He thought that this rule was justified by the fact that an impossible burden would be placed on landowners if they had not only to submit to letting people walk over their land, but also to keep the rights of way in a good condition. His view was that a person exercising a right of way does so not by permission, but in the exercise of a right and, therefore, falls outside the definition of a 'visitor' under the Occupiers' Liability Act 1957. If the path had not become a public right of way, the defendants would have owed the claimant a duty of care and would have been liable for her injuries. The question here was whether the previous licence to cross the land had been merged into the public right of way and been extinguished as a result, or whether it still had an independent existence of its own. He took the view that the establishment of a public right of way ruled out the element of permission, so no duty of care was owed. Lord Browne-Wilkinson, while agreeing that *Gautret v Egerton* was good law, thought it best to leave open the question as to whether people using public rights of way could still have visitor status, bearing in mind the fact that some land-owners encourage people to cross their land and use facilities which they provide, so allowing them to continue as invitees under the old law. The claimant was not entitled to any compensation. In this confusing situation, the claimant appears to have fewer rights than casual visitors. The Occupiers' Liability Act 1957, on its wording, suggests that people in the claimant's position might be entitled to more generous treatment, as s 2(6) states:

> . . . that for the purposes of the section persons who enter premises for any purpose in the exercise of a right conferred by law are to be treated as permitted by the occupier to be there for that purpose, whether they have permission or not, thereby falling within the category of persons to whom the common duty of care is owed.

This wording seems to include those using public or private rights of way, but judges have decided that the old law survives and such people are not 'visitors'. This was the decision in *Greenhalgh v British Rlys Board* [1969] 2 QB 286 in which Lord Denning held that the operative words were 'For the purposes of this section', that is, for the purposes of s 2 of the Occupiers' Liability Act 1957, which defines only the extent of the occupier's duty to visitors rather than extending the categories of people who can be defined as visitors.

The Law Commission has considered these anomalies but so far nothing has been done to clarify the situation.

However, the Countryside and Rights of Way Act 2000 sets out to remedy this situation:

- It seems that the ordinary law of negligence applies in situations where injury is caused through something other than the state of the premises. For example, if a person is injured on someone's property because a tractor is driven negligently the law of negligence will probably apply (see below).

  In the case of *Ogwo v Taylor* [1987] 2 WLR 988, Brown LJ stated that a fireman who had been injured while fighting a fire on premises was covered by the ordinary law of negligence because the injury was not caused by a defect in the state of the premises.

  Compare this case with the sort of situation that routinely arises under the Occupiers' Liability Act 1957, such as that in *Taylor v Bath and North East Somerset DC* (2000) (unreported). There, the claimant recovered damages after falling on the slippery surface of tiles at the side of a swimming pool. This is one of many cases involving accidents in swimming pools. By contrast, in *Ingram v Davison-Lungley* (2000) unreported the owner/occupier of a private swimming pool was not in breach of the common duty of care under s 2 of the 1957 Act when a visitor fell and injured herself on the swimming pool steps. She had been trying to climb down into the water in an unusual way.

  The law is still not absolutely clear on this subject and some of the writers take the view that it is possible that the Occupiers' Liability Act 1957 might apply even when injury is caused by something other than the state of the premises because sub-s 1 of the Act states that the Act applies 'in respect of dangers due to the state of the premises or to things done or omitted to be done on them'. Nevertheless, it is widely accepted that 'vehicles' fall within the definition of 'premises' and, as there is virtually no litigation involving accidents caused by negligent handling of vehicles under the Occupiers' Liability Act 1957, and a definite preference for the ordinary law of negligence in such circumstances, it is likely that the Act does not usually encompass dangerous activities which do not arise out of the state of the premises. In practice, it is of little importance which action applies, unless the defendant is covered by insurance for one form of liability rather than the other, and unless there is a definite distinction between the rules for determining breach of duty. It is likely that the approach in occupiers' liability could be more sympathetic to claimants, however, in that it requires the occupier to have consideration for the position of the particular visitor.
- Common law still applies in assessing the legal status of 'regular trespassers', when considering whether they have become licensees.

10.2 LIABILITY UNDER THE OCCUPIERS' LIABILITY ACT 1957

The duty of occupiers to their lawful visitors is clearly set out in s 2(1) of the Occupiers' Liability Act 1957 which states:

> An occupier of premises owes the same duty, the common duty of care to all his visitors except insofar as he is free to and does extend, restrict, modify or exclude his duty to any visitor or visitors by agreement or otherwise.

In order to understand the scope of the duty and the operation of the law, it is necessary to break down this section into its various elements.

10.2.1 What is meant by the word 'occupier'?

As the Occupiers' Liability Act 1957 is silent on the meaning of 'occupier', the common law applies. Originally, the test to identify an occupier was that of control. Basically, the person who had control over the premises was the occupier. In the case of *Wheat v E Lacon & Co Ltd* [1966] AC 522, it was held that there could be more than one occupier of the premises at a time. In that case, the defendant owned a pub which was managed by an employee. The employee and his wife had rooms on the first floor of the pub as their private house but they had no interest in the premises. It was provided under an agreement with the defendants that there should not even be a tenancy between them. The wife was given permission to take in paying guests in part of the first floor, the only access to which was by means of an outside staircase at the rear of the premises. The hand rail of the staircase ended above the third step of the staircase which was unlit. When the claimant and her husband were guests at the pub one night, the claimant's husband fell downstairs and died from his injuries. It was held that both the employees and the defendant (the owner of the pub) were occupiers.

In *Revill v Newbury* [1996] 1 All ER 291, it was held that the person who rents an allotment is the occupier for the purposes of the Occupiers' Liability Act 1984.

In *Harris v Birkenhead Corpn* [1976] 1 All ER 1001, it was held by the Court of Appeal that a person could be an occupier even if he was not actually present on the premises to be in control. In fact, in this case a local authority had the legal control of premises because they had issued a compulsory purchase order on the house, and notice of entry. They were the occupiers even though they had not actually taken possession of the premises.

As in other areas of law, the determining factor in cases such as these could well be the question of which potential defendant carries liability insurance.

10.2.2 What is meant by the word 'premises'?

There is no definition of the word 'premises' in the Occupiers' Liability Act 1957. Once again it is necessary to turn to the common law for guidance. Clearly, 'premises' will include houses, buildings, land and so on, but it is likely also that ships in dry dock (*London Graving Dock Co v Horton* [1951] 2 All ER 1; *Hartwell v Grayson* [1947] KB 901), vehicles, lifts (*Haseldine v Daw & Son Ltd* [1941] 3 All ER 156) and aircraft (*Fosbroke-Hobbes v Airwork Ltd* [1937] 1 All ER 108) will also be considered premises for the purposes of the Act as they were at common law. In *Wheeler v Copas* [1981] 3 All ER 405, it was held that a ladder could be regarded as premises (see also *Donaldson v Brighton and Hove Council* (2001) unreported). Claims for the disaster at Bradford City football stadium were founded in occupiers' liability rather than the ordinary law of negligence, so structures like stadiums for spectators are 'premises'. In *Siddorn v Patel & Anor* [2007] EWHC 1248 (QB), a landlord was held not liable as occupier of land, for injuries suffered by a tenant who had fallen through a skylight whilst dancing on a garage roof, which formed no part of her tenancy. The danger had arisen from the tenant's activity and not the state of the premises.

10.2.3 What is 'the common duty of care'?

The word 'common' is used to demonstrate that the new duty under the Occupiers' Liability Act 1957 is common to all types of 'visitor', that is most categories of *lawful* visitor. Trespassers were still not owed a duty under this Act. 'Visitors' does not include users of public or private rights of way (*McGeown v Northern Ireland Housing Executive* (see 10.1.1, above)). The common duty of care is defined in s 2(2) of the Occupiers' Liability Act 1957 as:

> . . . the duty to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purpose for which he is invited or permitted by the occupier to be there.

It should be noted that it is the visitor who must be made safe and not necessarily the premises. This could mean that dangerous parts of the premises can be fenced off and need not themselves be repaired so long as the visitors are safeguarded while on the premises. It is important to consider carefully the nature of the activity on the premises, as in some cases the 1957 Act may not be applicable at all, and the claim should be brought in negligence or breach of statutory duty. *Poppleton v Trustees of the Portsmouth Youth Activities Committee* [2007] EWHC 1567 (QB) concerned occupiers' liability as well as liability at common law and the failure to comply with the Management of Health and Safety at Work Regulations 1999. The judge at first instance explained the nature of the duty of care imposed by the Act. This was either an 'occupancy duty' or an 'activity duty'. In this case, there was nothing wrong with the state of the premises so there was no question of an 'occupancy duty'. Activity duties related to activities that the occupier permitted to take place that might endanger others, but that was not the scenario at the material time and had no relevance to the circumstances of the accident. T were therefore not in breach of their duties under the 1957 Act. The defendants were, however, liable for injuries suffered by a man who fell when he was participating in an activity involving free climbing on a specially constructed wall. He had not been asked to sign a participation statement nor had he been shown rules or given any instructions. There was no discussion of the risks involved in the activity and he was not asked if he had climbed before. It was held at first instance that there was a breach of the common law duty of care to inform and warn a participant as to the latent danger of falling off a climbing wall onto the safety matting provided. However, the Court of Appeal reversed that ruling [2008] EWCA Civ 646.

It is surprising how many claims are brought against occupiers in relation to what in practice are called 'slipping and tripping' injuries. Most of these are settled out of court, but recent examples that reached Court of Appeal level include *Searson v Brioland* [2005] EWCA Civ 26. The claimant who had been attending a wedding at a hotel run by the defendants tripped over a threshold that was 3 cms above floor level and sustained serious injuries. Although there had been no previous incidents of this kind the Court of Appeal held that the defendant was in breach of duty. A warning notice should have been placed near the doorway. In *Maguire v Lancashire County Council* [2004] EWCA Civ 1637 the defendants were liable for an ankle injury suffered by the claimant on a dangerous surface on a footpath.

There was considerable media interest in *Piccolo v Larkstock Ltd and Chiltern Railways and others*, unreported, QBD, 17/7/07, in which a man who slipped on a flower petal at a

station concourse was awarded a very large sum of money by way of compensation. The case generated discussion of the notion of a compensation culture, fuelling a flood of claims on the basis of what might at first appear to be relatively trivial accidents. The owner of a flower shop situated on the station concourse was found liable for the injuries suffered by the claimant. The defendants were held to have been negligent in failing to operate a reasonably safe system of work for dealing with the risk of slipping accidents caused by falling petals. The judge held that the station operator was not liable, as it had discharged its duty of care as occupier of the premises, by placing contractual duties upon the florist, and also by supervising the area. The claimant was not held to have been contributorily negligent, since he was walking with reasonable care at the time of the accident. As the judge said:

> This was a route taken by very many pedestrians walking through the station every day, and was a well-used walk-way. I find that simply because of the presence of the flower stall, it was not negligent to use that route.

The duty is only owed to the visitors while they are undertaking the purpose for which they are permitted or invited to be on the premises. If the visitor decides to do something which he is *not* permitted to do, the duty of care under the Occupiers' Liability Act 1957 would not be owed. For example, tradesmen are permitted to visit premises in order to deliver goods but if the postman decided to take a trip around the garden and climb the apple tree, then the 1957 common duty of care would not be owed to him. He would, in those circumstances, be a trespasser and the duty owed would be that imposed on the occupier under the Occupiers' Liability Act 1984.

In *Glenie v Slack and Others* (1998) unreported, the owner and occupier of an unsafe track built for motorcycle side-car races was held to have been in breach of the duty of care in negligence and of his duty under s 2 of the Occupiers' Liability Act 1957. The track and the fencing were held to have been inadequate and inherently unsafe. The passenger in the side-car was killed and the claimant was very seriously injured when a motorcycle combination crashed. There was a finding of 50% contributory negligence.

10.3 CHILDREN

One important aspect of the Occupiers' Liability Act 1957 is that it gives examples of the operation of the duty of care. Section 2(3)(a) of the Occupiers' Liability Act 1957 provides that an occupier must be prepared for children to be less careful than adults. This is an important point in that it demonstrates what is meant by the duty to see that the *visitor* will be safe. Thus, the duty is a subjective rather than an objective duty, judged from the point of view of the visitor.

10.3.1 The allurement principle

It is in this context that it is necessary to consider the cases in which courts have found occupiers liable to children who have been attracted by 'traps' onto certain parts of premises and injured there.

For example, in *Glasgow Corpn v Taylor* [1922] All ER 1, a seven year old child was playing in a public park when he noticed some attractive poisonous berries on a bush. The bush was not fenced off and the child picked the berries and ate them. He died later

as a result. It was held that the occupiers were liable because the berries constituted a 'trap' or 'allurement' to the child.

In *Jolley v Sutton LBC* [2000] 1 WLR 1082, it was held that an abandoned boat in a dangerous condition constituted an allurement to two boys (see Chapter 8).

An allurement will not necessarily make a child trespasser a lawful visitor. So, for example, in *Liddle v Yorkshire (North Riding) CC* [1944] 2 KB 101, it was held that the defendants were not liable when a child who was a trespasser was playing on a high bank of soil close to a wall. He jumped off the bank of soil trying to show his friends how bees flew and he was injured. It was clear in this case that the child was a trespasser as he had been warned off by the defendant on previous occasions. The pile of soil could not therefore make him a lawful visitor.

It used to be the case that the courts were prepared to assume that for very young children the responsibility was that of their parents to ensure that they were safe.

In *Phipps v Rochester Corpn* [1955] 1 QB 540, a child aged only five was walking across the defendant's land when he fell into a trench. The child was a licensee because he played there often with other children and the defendant had done nothing to warn the children away. However, it was held that, even though as a licensee he was a lawful visitor, the occupiers of the land were not liable, because the parents should have been taking care of the child.

This reasoning was also followed in *Simkiss v Rhondda BC* (1983) 81 LGR 640. In that case, a seven year old girl fell off a slope opposite the flats where she lived. Her father had allowed her to picnic there because he considered that the slope was not dangerous. As the children sat on a blanket, they were able to slide down the slope, and this was how the accident happened. Nevertheless, the local authority was not liable according to the reasoning of the Court of Appeal. Since the child's father did not consider the area dangerous, it could not be argued that the defendants should consider it dangerous.

Despite these two cases, there are many cases in which the courts have been particularly lenient towards child trespassers and it is very unusual nowadays for a court to find that there is no liability on the part of an occupier towards children on the grounds that their parents should have been taking care of them. Nevertheless, as a general principle, children should normally be supervised.

10.3.2 Duties to contractors

The second example in the Occupiers' Liability Act 1957 of the operation of the common duty of care is that given in s 2(3)(b), in which it is stated that an occupier may expect that a person in the exercise of his calling will appreciate and guard against any special risks ordinarily incidental to it, so far as the occupier leaves him free to do so.

10.3.3 Risks ordinarily incidental to particular occupations

In the case of *Roles v Nathan* [1963] 1 WLR 1117, the Court of Appeal considered the scope of s 2(3)(b) of the Occupiers' Liability Act 1957 in relation to the death of two chimney sweeps. The men had died after inhaling carbon monoxide fumes while they were cleaning the flue of a boiler through a hole in the chimney. The occupier had warned

them not to continue with their work while the boiler was alight because of the danger from the fumes and indeed had removed them bodily from the danger area on two occasions. It was held that the occupier was not liable because he had in fact discharged his duty of care under the Occupiers' Liability Act 1957 by warning them of the particular risks. Lord Denning also stated that the risks involved were ordinarily incidental to a chimney sweep's trade and, therefore, the men should have been aware of them and taken steps to guard against them. He went on to explain that if the deaths had been caused by something unrelated to the business of being chimney sweeps, for example, if the stairs leading to the cellar had collapsed, then the occupier would have been liable. So, a window cleaner who falls off a dangerous ledge while cleaning windows could not complain to the occupier. However, if the same window cleaner had been injured while walking through the house to clean inside a window, then that would be a breach of the common duty of care.

In the case of *Salmon v Seafarer Restaurants Ltd* [1983] 3 All ER 729, a fireman was badly injured while fighting a fire at a fish and chip shop. It was held that the occupier was in breach of the common duty of care even though fighting fires was something which the fireman was obviously employed to do. The fireman had exercised the ordinary skills of firemen.

In *Ogwo v Taylor* [1987] 2 WLR 988, a fireman was injured by steam when fighting a fire in an attic. Again, it was held that the occupier was liable. However, it was pointed out in this case that the occupier would not have been liable had the fireman taken some unnecessary risk which could break the chain of causation. In fact, the claimant won the case in negligence. The House of Lords took the view that there would only have been liability under the Occupiers' Liability Act 1957 if, for example, there had been failure to warn of a hazard.

10.4 DISCHARGE OF THE DUTY OF CARE

There are a number of ways in which the occupier may discharge the duty of care. Whether there has been a breach of duty usually involves similar considerations to those in common law negligence. Thus in *Lewis v Six Continents plc* [2005] EWCA Civ 1805, the Court of Appeal held that it was not reasonably foreseeable that a guest in a hotel would lean out of his window so far that he would fall from a second-floor bedroom window.

He could, for example, personally guide his visitors around his property to avoid all dangerous obstacles. However, it is much more common practice for occupiers to place notices on property warning of particular dangers.

Section 2(4)(a) states:

> Where damage is caused to a visitor by danger of which he has been warned by the occupier, the warning is not to be treated without more as absolving the occupier from liability unless, in all the circumstances, it was enough to enable the visitor to be reasonably safe.

This is a matter for the judge to decide on the basis of the evidence presented to the court. For example, in *Zucchi v Waitrose* (2000) unreported, the Court of Appeal held that there

was no breach of duty under s 2 of the 1957 Act, as Waitrose had properly considered its duty of care to all of its visitors. It was not liable when a customer was hit on the leg by a two litre bottle of mineral water, as it had carried out regular assessments of the risks of goods falling, as this bottle did, from the conveyors at the checkouts in its stores.

In *Laverton v Kiapasha* [2002] EWCA Civ 1656, it was held that a shop owner was not in breach of his duty of care in failing to mop a wet floor at a time when the shop was very crowded. It would have been unreasonable to have expected such precautions. In accidents on premises the test is whether a reasonable person would have considered that this was a source of danger (see the Court of Appeal in *Nessa v Walsall MBC* (2000) WL 1918542).

If it is impracticable to take extreme steps to warn or fence off a dangerous area such as a beach with several entrances there will be no breach of duty if such measures are not taken (see the Court of Appeal in *Kincaid v Hartlepool BC* (2000) WL 33148901).

Each case will, of course, turn on its own facts. In some circumstances, a warning notice will be perfectly adequate but in others it will not. For these purposes, the law is concerned with the particular visitor and the effect of a notice upon the individual in question. The test is subjective. For example, if the visitor is a child who has not learned to read, or somebody who cannot understand English, or a person who is blind, a warning notice will not be adequate. This should be compared with the rules in the law of contract relating to notice of exclusion clauses where the test is objective, and it is sufficient merely that there is notice at the time of contracting. So far as occupiers' liability is concerned, the Occupiers' Liability Act 1957 specifically states that a warning notice is not enough unless in all the circumstances it was enough to enable the visitor to be reasonably safe. In some cases, *res ipsa loquitur* may apply (see Chapter 7).

In *Beaton v Devon CC* [2002] EWCA Civ 1675, the Court of Appeal ruled that too high a standard of care had been applied by the trial judge, and reversed his finding of liability on the council's part. The claimant had been injured when using a well worn cycle tunnel that had lighting throughout and was in good condition. The history of the cycle track through the tunnel showed that it was safe, despite the presence of two gullies.

In *Fryer v Pearson* (2000) *The Times*, 4 April, house owners were found not liable for an accident involving a visitor kneeling on a needle in the carpet. It was not established that they knew that it was there or had allowed it to remain there. This was not a suitable case for the operation of *res ipsa loquitur*. The Court of Appeal took the view that the position of a householder was different from the case of a customer slipping on the floor of a shop, as in *Ward v Tesco Stores* [1976] 1 WLR 810. Here, it was simply not possible to infer from the evidence that the respondents had caused or permitted the needle to remain in the carpet.

Cole v Davis-Gilbert & Ors [2007] EWCA Civ 396 concerned a person who had stepped into a hole left by a maypole, which had become exposed on a village green, and she had broken her leg. There was no evidence of negligence on the part of the organisation responsible for digging the hole, and there was no breach of duty of care as it had previously sealed the hole. The main cause of the accident was the unexplained removal of the infill, not the infill itself. The Court of Appeal, no doubt mindful of the Compensation Act 2006, concluded that the trial judge had been correct to hold that the defendants were not liable for the accident. The Court pointed out that there was a danger in setting

too high a standard of care as it could lead to inhibiting consequences, such as the prohibition of traditional activities on village greens.

The Court of Appeal concluded, in *Evans v Kosmar Villa Holidays plc* [2007] EWCA Civ 1003, that the reasoning applicable in occupiers' liability cases that there is no duty to protect people against obvious risks, also applied in the context of package holiday contracts. The result was that the Court held that a tour operator's contractual duty did not cover any duty to guard a holidaymaker against the risks involved in diving into a swimming pool. In the early hours one morning, the claimant dived into the shallow end of a swimming pool at a holiday complex, and hit his head on the bottom. He sustained serious injuries resulting in incomplete paralysis. There were 'no diving' signs at various points around the pool, indicating that it was not safe for diving, and the trial judge held that the defendant was liable for the accident, but there was a finding of 50% contributory negligence on E's part. The Court of Appeal decided that the judge had been in error in ruling that K was in breach of its duty of care under the contract, as well as being liable under the Package Travel, Package Holidays and Package Tours Regulations 1992 reg 15 for inadequate performance of the contract. There was reference to authorities dealing with Occupier's Liability, which established that individuals should accept responsibility for risks which they run, and that there is no duty to protect against risks that are obvious – *Ratcliff v McConnell* [1999] 1 WLR 670 and *Tomlinson v Congleton BC* (2003) UKHL 47, [2004] 1 AC 46. The trial judge had distinguished those cases on the facts, but the Court of Appeal said that was a mistake. The Court concluded that the basic reasoning in the occupiers' liability cases also applies to lawful visitors under a contract as well as to trespassers.

In *Parker v Robin Levy (T/A Essex Marinas)* (2007) it was held that there was an obvious risk that a person who stood on the end of a pontoon at a marina might lose their balance. A gap in the pontoon did not give rise to an increased risk of injury, and pontoons with gaps were one of the many acceptable designs available. They were provided by suppliers at another marina because they were considered suitable, and the defendants could not be criticised for adopting a similar design. There was no breach of duty.

10.4.1 Examples of warning notices

It is important at this point to distinguish between warning notices which are genuine attempts by the occupier to discharge the duty of care and make visitors safe, and exclusion clauses which are attempts by the occupier to escape liability and avoid the common duty of care. A warning notice can mean that the occupier will not be liable because he has done sufficient to discharge the duty. An exclusion clause will not operate in many circumstances because of the Unfair Contract Terms Act (UCTA) 1977 (see Chapter 7).

In the case of a dangerous staircase, a warning notice might read:

> Take care – these stairs are dangerous. Under no circumstances should members of the public attempt to use them.

An exclusion clause might read:

> Under no circumstances will the occupier of these premises be liable for injury to people using these stairs.

The situation is confused because many notices are a mixture of warning and exclusion. For example:

> These stairs are very dangerous, please take care. Under no circumstances will the occupier be liable for injury to people who use them.

If a danger is obvious, even a warning notice may add no further information to assist a visitor in taking care, and the occupier is entitled to assume that visitors will take care when danger is apparent for all to see. In *Staples v West Dorset DC* (1995) 93 LGR 536, the Court of Appeal ruled that the council had no additional duty to warn visitors of obvious danger caused by wet algae on a high wall on the Cobb at Lyme Regis. Visitors should be able to evaluate the danger involved.

There are some cases in which the courts have taken the view that warning notices would be of no use because they would be ignored or are beyond the scope of an occupier's duty. In *Whyte v Redland Aggregates Ltd* [1998] CLY 3989, the Court of Appeal held that an occupier's duty did not extend to erecting 'no swimming' signs at disused gravel pits.

The warning need not take the form of a notice. In *Simpson v A1 Dairies Ltd* [2001] EWCA Civ 13, the Court of Appeal held that an occupier should have given an oral warning to firemen, who were on the premises, about a concealed drain.

The substance of a warning can be significant, and in *Darby v National Trust* [2001] EWCA Civ 189, the Court of Appeal took the view that the defendant's failure to warn of the possible danger of contracting Weil's disease did not mean that there was a breach of duty to warn of possible drowning. Swimmers in open ponds should be aware of such an obvious danger.

10.5 EXCLUSION OF LIABILITY

How far is the occupier free to extend, restrict, modify or exclude his duty to any visitors? The situation is now governed by UCTA 1977.

10.5.1 Business occupiers

UCTA 1977 applies to business premises which are defined in s 1(3). 'Business' includes professions, government and local authority activities. Thus, hospitals and schools would be regarded as businesses for the purposes of UCTA 1977 in the same way as shops, stately homes and so on.

By s 2(1) of UTCA 1977, any attempt to exclude liability for death or personal injuries caused by negligence, including breach of the common duty of care under the Occupiers' Liability Act 1957 will be void.

Any attempt to exclude liability for property damage will be subject to the reasonableness test.

Occupiers cannot, therefore, on business premises exclude liability for death or personal injury caused by their negligence arising out of the state of the premises, and if they do try to exclude liability for property damage this will only be possible if such exclusion is, in the view of the court, reasonable in all the circumstances of the case.

10.5.2 Private occupiers

It should be noted that, since UTCA 1977 only applies to business premises, private occupiers will still be able to exclude liability even for death and personal injury. It is therefore still necessary to consider the state of the law before UTCA 1977 was passed.

In the case of *Ashdown v Samuel Williams & Sons Ltd* [1957] 1 QB 409, notices had been placed on the defendant's land which excluded liability for negligence, and the Court of Appeal held that when the claimant entered the land, her entry was subject to the conditions in the notice and, therefore, she was merely a conditional licensee. Sufficient steps had been taken to bring her attention to the conditions. The defendants were therefore not liable for her injury.

In *White v Blackmore* [1972] 3 All ER 158, the claimant's husband was killed in a field when a car in a race became entangled with safety ropes. A notice at the entrance had stated that the organisers would not be liable for any accidents causing damage or injury. The Court of Appeal held that this notice was effective.

In the same way, it is still open to non-business occupiers to exclude liability by means of notices. There are some grey areas where it is not easy to determine the status of the occupier. For example, although schools and hospitals are regarded as business premises, suppose a hospital decided to allow employees to use the swimming pool outside working hours. At this point, would the premises be business premises? Or, suppose a school registered as a charity had a gymnasium which it allowed parents to use during the evenings, would the premises for these purposes be business premises?

10.5.3 The Occupiers' Liability Act 1984 concession to business occupiers

One problem which arose after UCTA 1977 was passed was that certain occupiers, for example, farmers, were restricting entry to their land to hikers and hill walkers who had previously enjoyed recreational activities on the land. Section 2 of the Occupiers' Liability Act 1984, therefore, amends UCTA 1977 by providing that liability may be excluded towards people who enter business premises for the purpose of recreation or education unless access to the premises falls within the main business purpose of the occupier.

Thus, it may now conceivably be possible for a charity which allows their swimming pool to be used by people purely for recreation, to exclude liability for death or personal injury.

Note, also, the effects of the Countryside and Rights of Way Act 2000, which is outlined at the end of this chapter.

10.5.4 Exclusions of liability to contractors

Section 3(1) provides that where an occupier is bound by contract to allow strangers to the contract to enter the premises, the duty owed to the stranger cannot be restricted or excluded by the contract.

10.5.5 Liability of occupiers for damage and injury caused by independent contractors

Section 2(4)(b) of the Occupiers' Liability Act 1957 states:

> Where damage is caused to a visitor by a danger due to the faulty execution of any work of construction, maintenance or repair by an independent contractor employed by the occupier, the occupier is not to be treated without more as answerable to the danger if in all the circumstances he acted reasonably in entrusting the work to an independent contractor and had taken such steps (if any) as he reasonably ought in order to satisfy himself that the contractor was competent and that the work had been properly done.

It should be noted that this section should only be applied to faulty execution of construction, maintenance or repair work. In the case of any other type of work the occupier will be liable under the old common law rules.

However, provided the work does fall within the section, occupiers can escape liability for damage caused by their contractors provided they have taken reasonable steps to ensure that the contractor was competent. Obviously, it is not easy for ordinary people who know nothing about technical work to be sure that they are employing competent people, but a simple check perhaps with local trades associations or local authorities may clarify the position.

In *Gwilliam v West Hertfordshire Hospital NHS Trust* [2002] EWCA Civ 1041, the Court of Appeal held that the hospital had a duty to ensure that independent contractors providing fairground rides on its premises were adequately insured. Here the Trust had allowed a contractor to operate a fundraising fair on its premises, which included a 'splat wall'. A visitor was injured when the splat wall failed to work correctly. The Court of Appeal found that the Trust had discharged its duty by insisting in its contract with the contractor that the contractor's insurance should cover liability to members of the public using the fairground.

By contrast, in *Bottomley v Todmorden Cricket Club* [2003] EWCA Civ 1574 the Court of Appeal held that the defendants were liable for an accident caused by contractors putting on a firework display. This was an 'ultra-hazardous' activity, so the occupiers had a duty to check on the competence of contractors and also to discover whether they were insured.

The occupier must also take steps to check the work has been done properly. Once again, if the work is particularly technical, an ordinary person would not be expected to know of defects. In *Haseldine v Daw* the occupiers employed what appeared to be a competent firm of lift engineers to maintain the lift on their premises. The claimant was killed when the lift suddenly fell from the top to the bottom of the lift shaft. The occupiers were not liable because they had appointed apparently competent engineers to do the work. They could not be expected to check whether the work had been done in a satisfactory way as it was too technical.

The Court of Appeal has taken the view that s 5 of the Act was meant to do away with the common law distinction between non-contractual visitors and visitor entering under a contract. In *Maguire v Sefton Metropolitan Borough Council* [2006] EWCA Civ 316 it was held that there was no distinction between the liability owed under the Occupiers' Liability Act 1957 to a contractual visitor and that owed to non-contractual visitors. The

local authority was not liable to a visitor to a leisure centre who was injured when using gymnasium equipment. The authority had a maintenance agreement with a third party to inspect and maintain the equipment, and the third party had recently carried out an inspection of the equipment.

There are some circumstances where independent contractors have control over premises in such a way as to make them occupiers of the premises for purposes of the Occupiers' Liability Acts 1957 and 1984. In such circumstances, the duty owed would be the common duty of care under s 2 of the Occupiers' Liability Act 1957 or the duty imposed in relation to trespassers under the Occupiers' Liability Act 1984.

If, however, the contractor is not an occupier then liability will be in the ordinary law of negligence.

10.6 DEFENCES AVAILABLE UNDER THE OCCUPIERS' LIABILITY ACT 1957

The general tort defences apply to occupiers' liability. The defences of *volenti* and contributory negligence are considered here.

10.6.1 *Volenti* (Consent)

The defence of *volenti non fit injuria* applies by s 2(5). Occupiers do not owe a duty to visitors in respect of risks willingly accepted by them.

Some illustrations are as follows:

- ***Clare v Roderick Perry* [2005] EWCA Civ 39**
  The claimant and her partner had attempted to leave the premises of a public house by climbing in the dark over a wall adjacent to a road instead of using the normal exit. The claimant was injured when she fell from the wall onto the road. The Court of Appeal held that the claimant's conduct had been foolish and the defendant had not fallen below the required standard of care by not fencing the area in question.
- ***Simms v Leigh Rugby Football Club Ltd* [1969] 2 All ER 923**
  The claimant was a professional rugby player. It was held that he had accepted the risk of playing on a rugby ground that complied with bylaws of the Rugby League.
- ***Bunker v Charles Brand & Sons Ltd* [1969] 2 QB 480**
  It was held in this case that mere knowledge of danger was insufficient for the defence of *volenti* to operate unless that knowledge was enough to enable the visitor to be reasonably safe for the purpose for which he wanted to use the premises.

Again, it is important to distinguish between warning notices and exclusion clauses. Duties to third parties who enter the premises under a contract cannot be excluded by the terms of that contract (s 3(1)).

10.6.2 Contributory negligence

Damages may be apportioned in the usual way under the Law Reform (Contributory Negligence) Act 1945 if the visitor suffers damage through lack of care on his own part.

10.7 LIABILITY FOR PERSONS OTHER THAN 'VISITORS'

In occupiers' liability law, 'visitors' for most practical purposes means 'lawful visitors', that is, all visitors other than trespassers, though there are certain relatively obscure further categories of non-visitors (see 10.2.3, above).

Most people who fall into the category of 'persons other than visitors' are in fact 'trespassers' under the Occupiers' Liability Act 1984 though the term 'trespasser' is never used in the legislation.

Initially, at common law, there was no positive duty to trespassers. There was a limited and negative duty not to disregard trespassers in a reckless fashion and a duty not to set man-traps or to put anything on land with the deliberate intention of harming trespassers (*Illott v Wilks, Bird v Holbreck* [1828] All ER 277), although it was possible to take deterrent measures to keep people out (*Clayton v Deane* (1817) Taunt 489 – broken glass on top of a wall). However, that was as far as common law duty extended.

On the surface, it was simple: an occupier owed a duty to visitors and no duty at all to trespassers. The early common law was extremely harsh in this respect and it led to a number of devices being developed by the courts in order to do what judges saw as justice in particular cases. So, for example, if it was at all possible to find on the facts that the trespasser had become a lawful visitor through repeated acts of trespass which were not objected to by the occupier, the court would do so. Once it had been established that a trespasser had, through this process, become a lawful visitor (or licensee) then a duty of care was owed both at common law and later under the Occupiers' Liability Act 1957.

10.7.1 Trespassers defined

A trespasser may be defined as a person whose presence on land is unknown to the occupier or, if known, is objected to by the occupier in some practical way. Each case turns on its own facts. Thus, in many instances, it has been possible for the courts to find that people who had been repeatedly trespassing on land had become lawful visitors, though there was no fixed period of time or number of occasions on which the trespass had to occur in order to establish a lawful presence on land.

Note also the effects of the Countryside and Rights of Way Act 2000, which is outlined at the end of this chapter.

10.7.2 The harsh common law cases

The early case of *Robert Addie & Sons (Collieries) Ltd v Dumbreck* [1929] All ER 1 illustrates the harsh nature of the rule that occupiers owed no liability to trespassers. In that case, children frequently played on machinery belonging to the colliery but were regularly warned away by servants of the occupier. On one occasion, a child was seriously injured when playing on the property and it was held that the occupier owed no duty of care since the child was a trespasser. This decision reflects the prevailing social attitudes that land was sacred and the trespassers deserved no protection since they were behaving in a manner which could be described as morally wrong.

Following this decision of the House of Lords, the only way in which a court could come to the assistance of a child trespasser was to find either that the occupier had

recklessly disregarded him (*Excelsior Wire Rope Co v Callan* [1930] AC 404; *Mourton v Poulter* [1930] 2 KB 183) or that the child had, through repeated acts of unchallenged trespass, become a lawful visitor. In fact, there are many cases in which the courts were able to find in favour of the child by stretching the rules.

10.7.3 A change of policy

However, in the case of *British Rlys Board v Herrington* [1972] 1 All ER 749 it was impossible for the court to find that the child in question had become a licensee. He had been injured on an electrified line belonging to British Rail and was one of several children who had repeatedly climbed through a hole in a fence to play on the railway line and had frequently been warned away by servants of British Rail.

By this time, it was possible for the House of Lords to effect a change in the law, as the case occurred after the Lord Chancellor's practice statement in 1966 which permitted the House of Lords to depart from a previous decision in circumstances when it appeared 'right to do so'. In the press release which accompanied the Lord Chancellor's practice statement, he made it clear that it would be possible to depart from a previous decision if social conditions and attitudes had changed during the years which had intervened since the earlier case. It is for this reason that the House of Lords was prepared to depart from the decision in *Robert Addie v Dumbreck* in order to find in favour of the child. Their Lordships established a new, but limited, duty of care owed by occupiers to child trespassers. This duty became known as the duty of 'common humanity'. In effect, this meant that where an occupier has the knowledge, skill and resources to avoid an accident he or she should take steps as a humane person to do so.

In the *Herrington* case, it would have been a fairly simple matter for British Rail to have repaired the hole in the fence, which was in a dilapidated condition, to stop people getting onto the railway line. Had this been done, the occupier would have taken the steps which were reasonable in the circumstances and the child would probably not have been injured.

10.7.4 The duty of common humanity

In considering the 'duty of common humanity', the courts were able to take into account the occupier's wealth, skill and ability, and the financial resources available to him to take steps to prevent an accident. As the test is subjective, it is more akin to some of the nuisance cases (see, for example, *Leakey v National Trust* [1980] QB 485), than the cases on breach of duty in negligence.

A review of all the cases which were decided after *Herrington* will demonstrate that in each case the defendant occupier was a large public concern. Presumably, individuals would not have been worth suing as considerable resources, both financial and in terms of person-power, would be needed to keep trespassers out of premises. We do not, however, know how many cases were settled out of court, and whether any of these were actions against private individuals as opposed to public corporations.

In only one of the cases was it held that the occupier was not liable to the child trespasser. That case was *Penny v Northampton BC* (1974) 72 LGR 733, in which a child was injured when he threw an aerosol can onto a fire which was burning on a rubbish tip

which covered an extremely large site of about 50 acres, belonging to the corporation. It was decided that it would be too costly and impractical for the council to fence in the rubbish tip and the court did not look in depth at the financial resources available to the council on that particular occasion.

The occupier was liable to the child trespasser in each of the following cases, though there are different approaches taken as to the test for liability. In some the approach is subjective, that is, 'what should the particular occupier, with his own particular special knowledge, skill and resources have done to prevent the accident?'. In others, the test is closer to an objective approach, that is, 'what should the reasonable occupier, with the knowledge that the defendant ought to have inferred from the circumstances, have done to prevent an accident?'.

Some illustrations are as follows:

- ***Southern Portland Cement Ltd v Cooper*** **[1974] 1 All ER 87**
  A 13 year old was injured playing on a large pile of waste cement which had been allowed to accumulate close to an overhead wire on the defendant's premises. The court took the view that since the danger had been created by the positive activity of the occupier the test for liability should be objective rather than subjective.
- ***Pannett v McGuinness*** **[1972] 3 All ER 137**
  A five year old child was playing on a building site where advertising hoardings were being burned. He had been warned away several times with other children with whom he was playing. It was held that the occupier was liable as his employees knew of the presence of children and steps could have been taken to prevent the accident to the child.
- ***Harris v Birkenhead Corpn*** **[1976] 1 WLR 279**
  The defendants had attempted to board up empty properties which were the favoured haunt of vandals, particularly children. However, on one occasion, a child entered a building through a smashed door, went up to the top floor and fell out of a window, suffering severe brain injury. The defendants were liable to the child trespasser, and in this case the test applied to establish liability was closer to an objective test, that is, a reasonable man with the knowledge which that particular occupier possessed should have appreciated that a trespasser could come onto the premises, and therefore should have realised that it would be inhumane not to give a warning of the danger.

Cases decided after *Herrington* and before the Occupiers' Liability Act 1984 came into force in which occupiers were held liable to trespassers all concerned children. However, after the Law Commission report (*Report on Liability for Damage or Injury to Trespassers*, Law Com 75, 1976, London: HMSO) in which it was recommended that the kind of protection afforded by *Herrington* ought to be extended to adults the Occupiers' Liability Act 1984 was passed.

10.8 LIABILITY UNDER THE OCCUPIERS' LIABILITY ACT 1984

The Occupiers' Liability Act 1984 is concerned with the duty of an occupier to persons 'other than his visitors'.

Technically, the Occupiers' Liability Act 1984 covers three categories of entrants though, for most practical purposes, the most important is trespassers.

10.8.1 Persons exercising a statutory right of way

People who enter land exercising rights conferred by an access agreement or order under s 60 of the National Parks and Access to the Countryside Act 1949 are entrants.

10.8.2 Persons exercising a private right of way

Persons exercising a private right of way form a category of entrants which appears to have slipped through the net of both sets of legislation, leaving the law in a somewhat confused state though, in the view of some authors, the purpose of the occupiers' liability legislation was to restrict the categories of visitors to two, rather than to create duties where none had previously existed.

It had been decided in the case of *Holden v White* [1982] 2 All ER 382 by the Court of Appeal that people using a private right of way were not visitors, for the purposes of the Occupiers' Liability Act 1957, of the occupier of the servient tenement, and therefore no duty of care had been owed to them. While it is clear that the Law Commission intended that people using a private right of way should be covered by the Occupiers' Liability Act 1984, there may still be some circumstances in which the Act does not apply to such people. If the owner of the servient land is not an occupier, the Act does not apply. Common law would then need to be relied upon, in which case there would be no liability for omissions, that is, non-feasance.

The position of people using public rights of way is governed by s 1(7) of the Occupiers' Liability Act 1984, which states that the Act does not apply to people using the highway. This means again that the liability of the occupier of a highway would be governed by the common law which states that he will only be liable for negligent misfeasance, that is, positive acts and not for omissions (that is, non-feasance). Therefore, failure to repair public rights of way will not incur any liability (see *Gautret v Egerton* (1867) LR 2 CP 371). In *McGeown v Northern Ireland Housing Executive*, the House of Lords confirmed the rule in *Greenhalgh v British Rlys Board* that the law which imposes minimal duties on occupiers survives the statute and that users of public rights of way are not 'visitors'. (This is discussed at 10.2.3, above.) However, under s 1 of the Highways (Miscellaneous Provisions) Act 1961, highway authorities are liable both for negligent misfeasance and for non-feasance. This is now enacted in s 58 of the Highways Act 1980. This is further confirmed by the Countryside and Rights of Way Act 2000, s 13 of which places certain classes of entrants in the same position as highway users.

10.8.3 Trespassers, both children and adults

The Occupiers' Liability Act 1984 replaces the rules of common law to determine whether a duty is owed by an occupier:

> . . . to persons other than visitors, in respect of injury on the premises by reason of any danger due to the state of the premises or things done or omitted to be done on them.

The scope of this duty is limited to personal injury, as property damage is not covered. This reflects in part the attitude of many people that trespassers are still not worthy of full protection in law.

Section 1(3) deals with the circumstances in which the occupier owes this new duty. The duty is owed if:

(a) he is aware of the danger or has reasonable grounds to believe it exists;

(b) he knows or has reasonable grounds to believe that the other person is in the vicinity of the danger concerned, or that he may come into the vicinity of the danger (in either case whether the other has lawful authority for being in that vicinity or not); and

(c) the risk is one against which in all the circumstances of the case he may reasonably be expected to offer the other some protection.

Clearly, the Act recognises that it would be unfair to hold occupiers responsible for injury to trespassers whom he does not know are present or likely to be present on the property. In *Higgs v WH Foster* [2004] EWCA Civ 843 the Court of Appeal held that an occupier owed no duty to a trespasser who had fallen into an inspection pit. He did not know and did not have reasonable grounds to believe that the trespasser would come into the vicinity of the pit.

The law does not impose an impossible burden on occupiers, even in situations where they know that trespassers are likely to be present. For example, in *Bailey v Asplin* (2000) unreported, the Court of Appeal ruled that an occupier was not liable to a child who was injured when a wall fell on him. The occupier had inspected the wall and had not found any signs of a defect, and this had been sufficient to discharge the duty of care to trespassers.

Keown v Coventry Healthcare NHS Trust [2006] EWCA Civ 39 concerned an 11 year old who had climbed up the outside of a fire escape. He was not at risk of injury by reason of a danger due to the state of the premises under the Occupiers' Liability Act 1984 s 1(1)(a), as he had placed himself in danger through his own choice by indulging in a dangerous activity. In essence the Court explained that premises that were not dangerous to an adult could be dangerous to a child, but this was a question of fact and degree. In this instance it had been found as a fact that the child had appreciated that there was a risk of falling, and also that what he was doing was dangerous. However if there had been a danger arising from the state of the premises and the risk had arisen because the fire escape was unguarded or unfenced, the claimant would have fallen within s 1(3)(a) of the 1984 Act, if the Trust knew that the fire escape was unguarded and unfenced, and was aware that children played in the vicinity. However, it was doubtful whether he could have brought himself within s 1(3)(c) as it would not be reasonable to expect the Trust to offer him protection from such a risk.

There may, in some circumstances, be a duty to fence dangerous areas, but it is not necessary to establish the existence of such a duty if trespassers would have entered the premises in any event (see *Scott v Associated British Ports and Others* (2000) (unreported), a case in which the claimants had been '*train surfing*' on the defendant's land).

The scope of s 1(3) of the Occupiers' Liability Act 1984 was examined in *Revill v Newbury* [1996] 1 All ER 291. In that case, a trespasser had entered an allotment and attempted to break into a shed. The defendant, who rented the allotment, was sleeping in

his shed when he heard the intruder and fired a shotgun through a hole in the door, injuring the intruder quite seriously. The Court of Appeal decided that the trespasser was entitled to compensation for his injuries and in so deciding Neill LJ stated that s 1 of the Occupiers' Liability Act 1984 was concerned only with the safety of premises and dangers arising out of the state of the premises. Therefore, the fact that the defendant was the occupier was irrelevant. Section 1 was helpful in so far as it defined the scope of the duty owed at common law to an intruder on premises who was caught there at night. The issue of liability had to be decided here on the same basis as the criteria under s 1(4) which defines the standard of care as involving the duty to take such care as in all the circumstances of the case is reasonable to see that the intruder does not suffer injury on the premises by reason of the danger in question. He considered that there was no justification for the application of a two-stage decision by which the court should first decide whether there had been a breach of duty and then whether despite that breach the claimant should be denied a remedy because he was engaged in criminal activities. To establish whether there was liability at common law, the question was that which should be asked under s 1(3)(b) if the statute had applied, that is, whether the defendant had reasonable grounds to believe that the claimant was in the vicinity of the danger. The force which the defendant had used to deter the trespasser was out of all proportion to the force used by the claimant to enter the property so the defence of self-defence could not apply here. Nor would the defence of *volenti non fit injuria* be appropriate as the claimant had not consented to run the risk of being shot. The defence of *ex turpi causa* also failed for reasons discussed in Chapter 11.

Section 1(5) provides that the duty may be discharged by taking such steps as are reasonable in all the circumstances of the case to warn of the danger concerned, or to discourage persons from incurring the risk. This section contemplates the posting of notices on land to warn of danger but once again, as under the Occupiers' Liability Act 1957, it is likely that the effect of such notices on the visitor in each case will be considered by the court, and notices may not be enough of themselves to warn of danger. It could well be that adults are more likely to be found to have accepted the risk of injury and to be *volenti*, a defence provided for by s 1(6) if a notice is posted on the property.

In *Ratcliffe v McConnell* [1999] 1 WLR 670, it was held that a student who trespassed in a college swimming pool at night had willingly accepted the risk of injury under s 1(6). The swimming pool was enclosed by high walls and the entrance was through changing rooms, which were kept locked at night and when the pool was not in use. At the entrance to the pool was a notice with the word 'WARNING' printed in red, which prohibited taking glasses or bottles into the pool area and contained a statement giving the times when the pool was locked and entrance prohibited as between 10 pm and 6.30 am. The shallow end and deep end of the pool were also clearly marked. There was a security light which was activated by movement, but this gave little light. On the morning in question, the claimant, who said he had drunk four pints of beer, and two friends went to the pool at 2 am. The claimant climbed over the gate and took a running dive into shallow water. He hit his head and, as a result of his injuries, became tetraplegic, with no hope of recovery.

The Court of Appeal found that the claimant was aware of the dangers of diving into shallow water and had known that the pool was closed for the winter and contained less water than usual. The court unanimously ruled that the defendants had done all

that could reasonably have been expected of them in the circumstances, and that the claimant had consented to run the risk of injury under s 1(6) of the Occupiers' Liability Act 1984.

The case is very instructive and is well worth reading, because Stuart-Smith LJ examines the history and development of the law concerning duties of occupiers to trespassers, concluding that the nature and extent of what it is reasonable to expect of the occupier will vary very much depending on numerous factors, such as the age and mental capacity of the trespasser, the character of the danger and the resources of the occupier.

This case is also authority for the proposition that the test for the existence of a duty under s 1(3) of the 1984 Act should be determined in the light of circumstances prevailing at the time of the breach of duty resulting in the injury. In *Donoghue v Folkstone Properties* [2003] EWCA Civ 231, the claimant had been severely injured when he dived into the sea from a slipway in a harbour, as a trespasser. It was held that no duty was owed to the claimant because the accident had happened at midnight in midwinter when the occupier had no reason to believe that a trespasser might be present.

In *Rhind v Astbury Water Park* [2004] EWCA Civ 756 a young man was injured when he dived into a lake. Notices stated 'Private Property. Strictly no Swimming'. The occupier was not liable because he did not know that a dangerous object was under the water, nor could he reasonably be expected to know of it.

In *Jolley v Sutton LBC* [2000] 1 WLR 1082, the House of Lords ruled that occupiers should not underestimate the power of children to harm themselves. This same principle would apply to both lawful visitors and trespassers.

The scope of the duty under the 1984 Act was again examined in *Young v Kent County Council* [2005] EWHC 63 (QB).

The claimant was aged twelve when he incurred injuries as a result of a fall through a skylight on the roof of a school building. The incident had occurred during the time when a youth club was holding a meeting on the school premises. The claimant had climbed onto the roof using the flue of an extractor fan that was attached to the side of the building. The skylight through which the claimant fell was brittle, and a Health and Safety Executive report suggested that there had been a problem with access to the roof before the incident. The claim was brought under section 1(3) of the Occupiers' Liability Act 1984.

It was held that a local authority had a duty of care under the Occupiers' Liability Act 1984 to protect children from known risks that they might incur when climbing onto the roof of a school building. The High Court judge ruled that there had been a breach of that duty because the council had failed to protect child trespassers despite the existence of a low cost solution. However there was a substantial reduction in the award as a result of a finding of 50% contributory negligence. This meant that the common law and subsequent statutory developments designed to protect children had a much reduced effect in this case.

By contrast, in *Swain v Natui Ram Puri* [1996] PIQR 442 CA, the Court of Appeal rejected the claim of a child trespasser who had fallen through a skylight. The occupier had no actual knowledge of the possible presence of child trespassers, nor should he have known about them on the facts of the case.

10.9 THE NATURE OF THE STATUTORY DUTY

The duty under the Occupiers' Liability Act 1984 is a duty to take such care as is reasonable in all the circumstances, to prevent injury to the non-visitor. This is intended to be an objective standard of care, and what should be done by the occupier will be dependent upon the particular facts of the situation prevailing in each case.

The greater the danger the more important it is for an occupier to take precautions to warn trespassers to keep away from it. In *Westwood v Post Office* [1973] 1 All ER 184, it was held in the case of an adult trespasser that a notice on a door stating 'only authorised attendant is permitted to enter' was enough to inform the average intelligent person that there was danger and that people should keep out.

In some circumstances, the white lie 'beware of the bull' is a very effective deterrent to prospective trespassers.

It is not only warning notices with which the Occupiers' Liability Act 1984 is concerned. Any appropriate measures may be taken to discourage people from taking risks. However, in the case of children, even fencing off dangerous areas may not be enough since it is well known that children enjoy the challenge of climbing over fences which are designed to keep them out. In *Simonds v Isle of Wight Council* [2004] ELR 59 it was held that a school need not be under a duty to immobilise swings during a sports day in order to prevent young children playing on them.

Maloney v Torfaen County Borough Council [2005] EWCA Civ 1762 is a case in which the Court of Appeal considered various aspects of the 1984 Act. A local authority was found not liable as an occupier for injuries suffered when the appellant had been taking a short cut across land, and had stumbled over an unfenced retaining wall and fallen onto the concrete floor of a pedestrian subway. The appellant was drunk at the time of the accident. No permission, express or implied, had been given by the authority for the use of the area as a footpath, and the appellant was not a lawful visitor and was not owed a duty under the 1957 Act. The trial judge had held that that the accident had happened as a result of a danger due to the state of the premises within the meaning of the Occupiers' Liability Act 1984 s 1(1)(a), but had also found the authority did not know and had no reasonable grounds to believe that the man might come into the vicinity of the danger within the meaning of s 1(3)(b) of the 1984 Act. The authority was not liable, even though there had been a fatal accident in the same place not long before the appellant's accident.

10.10 EXCLUDING LIABILITY UNDER THE OCCUPIERS' LIABILITY ACT 1984

A particular problem in relation to exclusions of liability has arisen since the Occupiers' Liability Act 1984 was passed. This Act does not refer at all to the question of whether occupiers can exclude liability under the Act – that is to trespassers. However the Occupiers' Liability Act 1957 does permit occupiers to restrict, modify or exclude their common duty of care.

The Unfair Contract Terms Act 1977 probably did not apply to exclusions of liability to trespassers, to whom at that time only a limited duty of common humanity was owed,

and it is clear that the Act cannot apply to the new duty to trespassers created by the Occupiers' Liability Act 1984. It is arguable that since the duty owed to trespassers is and was the absolute minimum which the law permits, occupiers should not be allowed to exclude that particular duty (Mesher, 'Occupiers, trespassers and the Unfair Contracts Terms Act 1977' [1979] Conv 58). It is certainly arguable that it would be against public policy for lawful visitors to be in a worse position than trespassers as regards exclusions of liability upon non-business premises. As Parliament did not choose to do so, it is now up to the courts to develop the law in this area and to clarify this difficult and confusing point.

In *Tomlinson v Congleton BC* [2002] EWCA Civ 309, the Court of Appeal held that the defendants were liable under the 1984 Act despite having put up warning notices at a dangerous lake. They knew that this was a popular place to swim and that was the reason for the notice, but they should have done more than simply warning people of the dangers and employing rangers to patrol the area.

However, the House of Lords [2004] 1 AC 46 held that the risk of injury to the claimant, who had dived into shallow water, had not been caused by the state of the premises. It was the claimant's misjudgement which had caused his injuries. There was no risk present which gave rise to a duty under the Occupiers' Liability Acts.

10.11 LIABILITY OF PEOPLE OTHER THAN OCCUPIERS FOR DANGEROUS PREMISES

It is well established that not only will occupiers be liable for dangers arising out of the state of premises, but other classes of people such as independent contractors, landlords and builders may also be held responsible for accidents which arise out of the state of premises for which they are regarded as having responsibility.

10.11.1 Independent contractors

If an independent contractor has control over premises, he will probably be treated as an occupier and will owe the respective duties of an occupier under the Occupiers' Liability Acts 1957 and 1984. If, however, a contractor is not an occupier then it is likely that the ordinary law of negligence applies (*AC Billings & Sons Ltd v Riden* [1958] AC 240).

10.11.2 Landlords

If a landlord retains control through the granting of a licence to occupied premises, then he may himself be an occupier and owe the requisite duties under the Occupiers' Liability Acts 1957 and 1984. Even if the landlord grants a tenancy, he may be treated as an occupier if he has retained control over parts of the building which are used in common, for example, in a block of flats where the landlord retains control of stairways and corridors.

When the landlord lets premises he no longer has control over them and a different set of rules applies. The law in this area is very complex because the Defective Premises

Act 1972 is regarded as a confusing statute and quite independently of that, the law has been developed by judges sometimes contradicting provisions of the Act. In addition, the Defective Premises Act 1972 and the common law have developed to create duties where none previously existed.

In the early cases, the courts treated landlord and tenant situations as basic contract situations, and therefore the approach was that of *caveat emptor* (let the tenant beware).

In *Cavalier v Pope* [1906] AC 428, the wife of a tenant sued a landlord when she was injured falling through the kitchen floor which was defective because of the landlord's negligent failure to maintain the premises (that is, non-feasance or omission). The House of Lords held that there could be no claim in negligence against the landlord for harm suffered as a result of danger on the premises. Any duty which did exist would be towards the husband who was the tenant, and would not extend any further.

In 1932, the case of *Bottomley v Banister* [1932] 1 KB 458 extended this immunity to vendors of premises. Later cases extended the immunity even to situations in which the landlord had actually created the danger (misfeasance) before letting or selling the premises. There was a series of decisions in later years in which the judges attempted to restrict the scope of these earlier cases by abolishing immunity which had previously existed in relation to dangers which had been created after the premises were let or sold. However, these cases did not affect the landlords' and vendors' immunity in respect of negligent non-feasance, that is omissions. The Defective Premises Act 1972 was passed in a climate when it was believed that tenants were treated harshly, both by landlords and the law, and therefore the Act was intended to introduce extensive changes to the liability of landlords for defects in their premises.

Section 4 of that Act provides that:

> (1) where premises are let under a tenancy but which puts on the landlord an obligation to the tenant for the maintenance or repair of the premises, the landlord owes to all persons who might reasonably be expected to be affected by defects in the state of the premises a duty to take such care as is reasonable in all the circumstances to see that they are reasonably safe from personal injury or from damage to their property caused by a relevant defect.

The duty is owed if the landlord knows of (whether as the result of being notified by the tenant or otherwise), or if he ought in all the circumstances to have known of, the relevant defect. Relevant defects are comprehensively defined in s 4(3) as defects:

> . . . in the state of the premises existing at or after the material time and arising from or continuing because of an act or omission by the landlord which constituted or would, if he had had notice of the defect, have constituted a failure by him to carry out his obligation to the tenant for the maintenance or repair of the premises.

These provisions apply to landlords who have powers to enter and repair the premises (express or implied) and to landlords who are under an obligation to repair, but no duty is owed in respect of defects which arise out of the failure by the tenant to carry out express obligations under the tenancy agreement (s 4(4)).

Landlords' obligations to repair may be found in the tenancy agreement itself, either expressly or by implication, or may be imposed by statute.

One important statutory obligation is that in the Landlord and Tenant Act 1985 which requires the lessor of a dwellinghouse for a term of less than seven years to keep the structure and exterior of the premises and installations for the supply of water, gas, electricity, sanitation, space heating or water heating in good repair.

The duties under s 4 of the Defective Premises Act 1972 cannot be excluded or restricted by any term of any agreement.

Duties are not only owed to the tenant, but to any person who might reasonably be expected to be affected by a defect in the premises, for example, the wife or husband of a tenant or people using a highway adjoining the premises, people on adjoining land and visitors to the premises.

The obligations under the Landlord and Tenant Act 1985 have been further extended by the Housing Act 1988 to cover the situation where the disrepair is not in the premises itself, as in the basement of a building or where it affects the common parts of a building such as the roof.

The Court of Appeal considered the implications of the Human Rights Act 1998 in relation to failure by a landlord to repair premises in *Lee v Leeds CC, Ratcliffe v Sandwell MBC* [2002] EWCA Civ 6. It was held that nothing in the jurisprudence of the European Court of Human Rights supported the view that Art 8 of the Convention imposed an unqualified obligation on local authorities to keep their housing stock in good repair. However, that was not to say that in individual cases there could be no breach if a local authority let a property that was unfit for human habitation.

10.11.3 Builders

At common law, there was an anomalous rule that if a builder owned the premises, but had sold or let them he would not be liable in tort for any dangers he had created (see *Bottomley v Banister*). However, if the builder did not own the premises, the ordinary law of negligence applied if people were injured as a result of work which was done negligently on the premises.

Section 3 of the Defective Premises Act 1972 is aimed at removing this anomaly. It provides that where work of construction, repair, maintenance or demolition or any other work is done on or in relation to premises any duty of care owed because of the doing of the work, to persons who might reasonably be expected to be affected by defects in the state of the premises created by the doing of the work, shall not be abated by the subsequent disposal of the premises by the person who owes the duty.

10.11.4 Developments at common law

In 1972, judges removed the immunity of builders who were vendors and builders who were lessors in the case of *Dutton v Bognor Regis UDC* [1972] 1 All ER 462. This decision was later approved by the House of Lords in *Anns v Merton BC* [1978] AC 728. Although on certain other points these two cases have now been overruled by the House of Lords' decision in *Murphy v Brentwood DC* [1990] 2 All ER 908, there is clear authority that the ordinary law of negligence as stated in *Dutton v Bognor Regis* and *Anns v Merton* still applies to builders. In the words of Lord Keith:

> In the case of a building, it is right to accept that a careless builder is liable on the principle of *Donoghue v Stevenson* where a latent defect results in physical injury to anyone . . . or to the property of any person.

However, this only covers damage in the form of personal injury or damage to property but not damage to the building itself, which is treated as an economic loss and is therefore not recoverable. If the claimant wishes to claim for damage to the building itself, there may be a claim for breach of statutory duty for breach of building regulations under s 38 of the Building Act 1984, or there may be a claim against the builder under s 1 of the Defective Premises Act 1972. Indeed, since *Murphy*, unless there is a contract between the parties, the owner of property which suffers a mere defect in quality, as opposed to a defect which gives rise to danger, will find the most appropriate remedy to be a claim under the Defective Premises Act 1972 if, bearing in mind its various drawbacks, such a claim is available. This is somewhat ironic, as at the time the Act came into force, and in the years immediately following, the common law remedies before *Murphy* considerably eclipsed the Defective Premises Act 1972.

Murphy was distinguished by the Court of Appeal in *Targett v Torfaen BC* [1992] 3 All ER 27 on the grounds that *Murphy* was concerned with recovering the cost of putting a defective product back into good order. *Targett*, on the other hand, concerned a tenant who succeeded in a claim for personal injuries against the designer and builder of an unsafe property. He had fallen down a flight of unlit steps that had no handrail in a council property (see also *Rimmer v Liverpool CC* [1984] 1 All ER 930).

Section 1 applies only to people taking on work in connection with the provision of a dwelling and covers building of dwellings and also conversion and enlargement. The duty in s 1 is owed to the person who requests or orders the dwelling to be built, enlarged, extended, and so on, and to every person who acquires an interest whether legal or equitable in the dwelling. The duty is to see that the work which he takes on is done in a 'workmanlike' or, as the case may be, 'professional' manner with proper materials and so that as regards that work the dwelling will be fit for habitation when completed.

10.11.5 Limitations to s 1

Section 1 does, however, have a number of limitations.

First, there is a defence which provides that a person who takes on any such work for the other person on terms that he or she is to carry it out in accordance with instructions given by, or on behalf of that other, shall to the extent to which he does it properly, in accordance with those instructions, be treated for the purposes of this section as discharging the duty imposed on him by s 1(1), except where he owes a duty to that other to warn him of any defect in the instructions and fails to discharge that duty.

The *second* limitation is that s 1 applies only to dwellings.

The *third* limitation is that s 2 of the Defective Premises Act 1972 excludes dwellings covered by 'approved schemes'. This, in practice, means that virtually all new houses are excluded from the operation of s 2 because most new houses are covered by the National Housebuilding Council (NHBC) insurance scheme. This means that s 1 is probably confined to extensions and conversions. This scheme, provides that builders agree that

they will obtain insurance cover for the dwelling at the same time guaranteeing the house is properly constructed. The insurance will cover any unfulfilled judgment or award against a builder.

The *fourth* limitation is that it is unclear whether s 1 applies to professional people other than builders who take on work for or in connection with the provision of a dwelling. This means that the positions of architects and surveyors have not yet been clarified. In the case of *Sparham-Souter v Town and Country Developments (Essex) Ltd* [1976] 2 All ER 65, the point was left undecided. However, as the words 'professional manner' are used in the Defective Premises Act 1972, it is likely that it was intended to extend to professional people such as architects, surveyors, engineers, and so on, as well as builders.

The *fifth* limitation is that it is unclear whether the Defective Premises Act 1972 covers pure economic loss. There has been some difficulty in the cases in distinguishing pure economic loss from damage to the building itself. For example, if a crack appears in a wall, is that an economic loss created by the extent of putting the building back into a safe condition? Or, if the building is no threat to safety or health, is the loss a pure economic loss or is it damage to the building itself which according to *Donoghue v Stevenson* [1932] AC 562 would not be recoverable in negligence? (See Chapter 5 on economic loss.)

Since the common law did not allow recovery of pure economic loss in these circumstances, it was expected that the Defective Premises Act 1972 would provide a remedy for such a loss but this is not clear from the Act itself. If economic loss is not covered, then the Act goes no further than the common law in providing a remedy.

The *sixth* and perhaps the most serious limitation on s 1 is that the limitation period for the purpose of litigation is six years from the date when the building was completed. This is far worse then the common law position in negligence which provides that time runs for the purposes of limitation from the date of the damage which may of course occur long after the building has been completed (with the possibility of an extension under the Latent Damage Act 1986).

The limitation period under the Defective Premises Act 1972 is not even capable of providing as much protection as the limitation period under the NHBC scheme as, under that, there is provision for insurance cover from 10 years from the date the work is completed.

All these problems must be borne in mind by lawyers advising clients how to approach the problem of defects in construction work. However, the Court of Appeal has held that s 1 applies to active negligence, that is misfeasance, and also to omissions, that is non-feasance (see *Andrews v Schooling* [1991] 3 All ER 723) where there is a failure to carry out necessary remedial work on a building.

The correct approach to any problem concerning liability of builders, architects, vendors and so on, is first to establish when to sue and whether the action would best lie at common law or under the Defective Premises Act 1972.

In some cases, the common law of nuisance provides a remedy, for example, where there is strict liability to structures which adjoin a highway under the rules in *Wringe v Cohen* [1940] 1 KB 229 (see 11.7.2, below) or under *Cambridge Water Co v Eastern Counties Leather plc* [1994] 2 AC 264.

Moreover, there may be a claim under the rule in *Rylands v Fletcher* (1868) 100 SJ 659, (1868) LR 3 HL 330, (1868) LR 1 Ex 265. Here again, liability is strict and it is a much simpler matter for the claimant to base a claim in *Rylands v Fletcher* than under the more complex rules of common law or the Defective Premises Act 1972 in which it is necessary to prove fault.

Bearing in mind that, at present, liability in negligence is in the process of being curtailed by the courts, whereas liability in nuisance and indeed strict liability may be expanded, it seems sensible first of all to consider the question of strict liability before proceeding to look at the common law of negligence under the Defective Premises Act 1972.

However, the possibility of common law claims should always be considered as should claims for breach of statutory duty where there has been a breach of building regulations made under the Building Act 1984.

10.12 COUNTRYSIDE AND RIGHTS OF WAY ACT 2000

The Countryside and Rights of Way Act contains measures intended to improve public access to the open countryside and registered common land, while also recognising the interests of landowners. It has some impact on the law relating to occupiers' liability and the law of trespass. The Act amends the law relating to rights of way and nature conservation and is intended to give people greater freedom to explore the countryside. It provides a new statutory right of access for open-air recreation to mountain, moor, heath, down and registered common land (the 'right to roam').

In some instances the Act amends the Occupiers' Liability Act 1984 by inserting new sections, notably s 1(6A) and (6B) to relieve the burden on landowners in respect of people crossing their land to enjoy the countryside. Section 2(1) of the Countryside and Rights of Way Act 2000 provides that an occupier owes no duty of reasonable care in relation to a risk which is the result of the existence of any natural feature of the landscape, nor in respect of any river, stream, ditch or pond whether or not this is a natural feature. Nor is any duty owed in relation to a risk of injury caused when passing over or through any wall, fence or gate, except when making correct use of the gate or style. Plants, shrubs and trees are treated for the purposes of the Act as natural features of the landscape even when they have been planted on purpose. However, the new s 1(6A) of the 1984 Act does not exclude the occupier's duty if he has done something on the land either recklessly or with the express intention of creating a risk to entrants.

When a court is considering whether a duty is owed, and the nature of any such duty to persons in the exercise of their rights under the Countryside and Rights of Way Act 2000, it is required to have regard to the fact that the right should not place any undue burden on the occupier, to the importance of maintaining the character of the countryside and to any relevant guidance given under the Act. The character of the countryside could include any historic or archaeological features of interest. Clearly, the Act creates situations when people entering land with a right to do so under the 2000 Act are in a less advantageous situation than trespassers under the 1984 Act.

FURTHER READING

Elvin, 'Occupiers' Liability, Free Will, and the Dangers of a "Compensation Culture" ' *EdinLR*, Vol 8, 127–32

Hutton, 'The Mechanics of Law Reform', *The Modern Law Review*, Vol 24, No 1 (Jan, 1961), 18–31

For regular monthly up-dates on this area of law, see *Personal Injury Compensation*, published monthly by Informa UK Ltd.

CHAPTER 11

TORTS RELATING TO LAND

11.1 INTRODUCTION

Some of the earliest actions known to English law were concerned with the protection of interests in land. The strict rules governing the old categories of claims concerning land and other interests, and indeed the actions themselves, were abolished in the 19th century during a period of reform and rationalisation of the legal system and its procedures, but the ancient forms of action still influence the way in which the law of tort is classified and continue to have a bearing on the elements of the torts themselves. The introduction of negligence as a separate tort in 1932 has complicated matters by providing an alternative and, in some instances, some would argue, a more useful remedy to people who complain of interference with property rights.

Although many pages of textbooks are devoted to nuisance, trespass, the rule in *Rylands v Fletcher* (1868) 100 SJ 659, (1868) LR 3 HL 330, (1866) LR 1 Ex 265, and other actions which involve land, in practice these torts only rarely require consideration by the courts, as the vast majority of claims are for negligence. Nevertheless, as academic topics the torts relating to land cannot be ignored, not least because these torts provide a very fertile area for examiners when setting problem-type questions, the solutions to which often involve untangling the various threads of the torts from a complex fact situation. This demands the ability to distinguish clearly between each of the various actions. The chart at the end of this section may help students to do this. The following summary of the torts relating to land outlines their main elements in a structured form to provide a sound basis for learning and understanding the topics and relates these torts to the tort of negligence.

11.2 TRESPASS TO LAND

Trespass to land was one of the earliest actions to emerge in the common law. A detailed study of all aspects of the law of trespass would involve consideration of matters which are traditionally covered in texts dealing with Land Law and the Law of Landlord and Tenant. These matters will not be dealt with in this chapter.

Although trespass to land is important primarily as a civil action, there are forms of statutory trespass which are crimes under various bylaws and other legislation such as the Criminal Law Act 1977. The Public Order Act 1986 created criminal offences in connection with the mass trespass of vehicles on land. Further forms of criminal trespass were created by the Criminal Justice and Public Order Act 1994.

The Anti-Social Behaviour Act 2003 extended the forms of aggravated trespass to cover trespass in buildings, and more specialised forms of criminal trespass have been created by the Serious Organised Crime and Police Act 2005.

Many of the cases that reach the courts concerning trespass to land concern disputes between neighbours, in which feelings can run high over small strips of garden. These

boundary disputes cases frequently involve complications relating to Ordnance Survey maps and old conveyances, and can be extremely time consuming.

11.2.1 Outline definition

The tort of trespass to land consists of 'directly entering upon land, or remaining upon land, or placing or projecting any object upon land in the possession of the claimant, in each case without lawful justification'. The tort is actionable *per se*, without the need to prove damage. The right to privacy in Art 8 of the European Convention on Human Rights could be relevant in some cases of trespass (see *Jones v University of Warwick* [2003] EWCA Civ 151).

11.2.2 Direct interference

The element of directness is what distinguishes trespass from nuisance. Nuisance applies where invasion or entry on property is indirect. This may consist of entering upon the land, however slight that entry may be (for example, leaning on a wall, as in *Gregory v Piper* (1829) 9 B & C 951), or by walking across a field, or by throwing objects onto the land, or refusing to leave when permission to be there has been withdrawn. Indirect interference would consist, for example, of allowing smoke to drift onto neighbouring land or tree roots or branches to encroach onto neighbouring property. The defendant's state of mind is irrelevant in trespass, and he will be liable irrespective of negligence. However, the situation may be different if animals for which the defendant is responsible are allowed to trespass on land (*League Against Cruel Sports Ltd v Scott* [1986] 1 QBD 240, [1985] 2 All ER 459).

11.2.3 Entering upon land

To amount to trespass, entry can be above or below the surface of the ground or into the airspace above the land.

Land is defined in s 205 of the Law of Property Act 1925 to include: 'Land of any tenure, mines and minerals, corporeal and incorporeal hereditaments.'

It includes any buildings and fixtures attached to the land as well as the land itself, the airspace above and the ground beneath to the centre of the earth. The Latin maxim *cuius est solum eius est usque ad coelum at ad inferos* is often used to describe the possession of land in this context. Roughly translated, this means 'whoever possesses the land also possesses the sky above it to the highest heavens and the earth beneath it to the greatest depths'. This maxim cannot be regarded as decisive in modern times when mineral exploitation and air travel and satellites are commonplace. Even 100 years ago, it was described as 'fanciful' by Bowen LJ in *Wandsworth Board of Works v United Telephone Co Ltd* (1884) 13 QBD 904, and it has virtually no significance today.

People using the highway do not commit a trespass against the person in possession of the sub-soil as long as they 'pass and repass' on the highway and use that right reasonably. In some cases even using the highway for the purposes of protesting will not be trespass (see the majority in the House of Lords in *DPP v Jones and Another* [1999] 2 AC 240, though this case should be viewed in the light of Art 11 of the European Convention

on Human Rights (the right of assembly) which must be balanced against Art 8 (the right to respect for private and family life of landowners).

11.2.4 Trespass to the airspace

The defendant committed trespass by allowing an advertising hoarding to project eight inches into the claimant's property at ground level and just above ground level in *Kelsen v Imperial Tobacco Co Ltd* [1957] 2 QB 334. However, it was held that trespass to the airspace is not committed unless it is at a height that interferes with the claimant's ordinary use of the property. In *Bernstein v Skyviews and General Ltd* [1978] QB 479, the defendant flew over the property of Lord Bernstein and took aerial photographs. It was held that trespass was not committed because a landowner's rights only extend to a reasonable height above the property, not to a height of several hundred feet above the land. The judge, Griffiths J, could not find a case to support the claimant's argument that his property should be protected to an unlimited height from trespass. He took the view that the Latin maxim could not be applied literally because it would lead to the absurdity that every time a satellite passed over any land the tort of trespass would be committed.

Although this approach is laudable from a practical point of view, it is merely one of a number of first instance decisions on this point and does not take account of the Civil Aviation Act 1982 nor the international agreements concerning satellites.

However, in *Anchor Brewhouse Developments Ltd and Others v Berkley House (Docklands Developments)* (1987) 38 BLR 82, the claimant obtained interim injunctions to prevent the boom of a crane swinging across his land. This was necessary even when the crane was not in use to prevent it being blown over in high winds. Scott LJ distinguished between missiles, bullets, satellites which fly over land, and cranes and other structures which project onto it. In the latter case, he regarded the matter as inappropriate for balancing competing rights and treated the claimant's interest in land as of paramount importance. It is clear from this decision that invasion of airspace emanating from *land* will always be a trespass and over-flights will only be a trespass within an unreasonable height over property.

In *Woolerton v Costain* [1970] 1 WLR 411, counsel for the defendants conceded that the boom of a crane swinging 50 feet above the claimant's land amounted to a trespass.

In the light of the conflicting first instance decisions, what is needed is a ruling on this point by the Court of Appeal or the House of Lords in order to clarify the law.

Laiqat v Majid [2005] EWHC 1305 (QB) concerned an overhanging extractor fan, that projected 4.5 metres above ground level into adjoining property. The judge ruled that it was an interference with airspace amounting to trespass. The judge relied on *Anchor Brewhouse Developments Ltd v Berkley House (Docklands Developments)* (1987) 284 EG 625 in arriving at his decision.

Section 76(1) of the Civil Aviation Act 1982 provides that no action shall lie in nuisance or trespass:

> By reason only of the flight of an aircraft over any property at a height above the ground which . . . is reasonable.

The same Act provides that compensation shall be payable without proof of fault, for damage or injury caused by anything falling from a civil aircraft.

11.2.5 Trespass to the ground beneath the surface

Trespasses to the sub-soil, of the type caused by mining operations in *Bulli Coal Mining Co v Osborne* [1899] AC 351, have been limited by the Nationalisation Acts under which mineral rights beneath land in the UK were vested in the Crown.

11.2.6 Trespass by entry onto the land itself

Any entry onto the land amounts to a trespass and, often the remedy which is sought is an injunction to deter repeated acts of trespass. Even leaning a ladder against a wall can amount to trespass (*Westripp v Baldock* [1938] 2 All ER 799). Many disputes arise about the exact location of boundaries and there have been cases which have lasted many years involving claims for trespass relating to very small areas of land. In *Anderson v Bryan* (2000) unreported, 16 June, the Court of Appeal held that laying a concrete driveway over the holes in which fence posts had once been placed amounted to trespass.

Entry onto property by private inquiry agents for the purposes of obtaining covert video evidence for use in defending personal injuries litigation has been a matter of concern for some time. Expert medical evidence can be vital to the success or failure of a claim, and has traditionally been supported by covertly obtained video evidence that is frequently the determining factor in the outcome of litigation. The legality of evidence of this kind was challenged in the light of the European Convention on Human Rights in *Jones v University of Warwick*. The Court of Appeal concluded that on balance, such evidence is legitimate and can be admitted at the discretion of the judge. An inquiry agent acting for the defendant's insurers, had obtained access to the claimant's house posing as a market researcher, and filmed the claimant using a hidden camera. The Court of Appeal ruled that a defendant to a personal injury claim should be allowed to adduce video evidence of the claimant that had been obtained by filming the claimant in her home without her knowledge, after the person taking the film had obtained access to the house by deception. The court recognised that since the coming into force of the Human Rights Act 1998 there were competing public interests to be reconciled. It was clear that the defendant's insurers had been responsible for the tort of trespass by entering the claimant's house and infringing her privacy contrary to Art 8 of the European Convention on Human Rights, and this was a relevant consideration to weigh in the balance when deciding how it should properly exercise its discretion in making orders as to the management of the proceedings. The court took the view that nowhere was it stated what the consequences should be if evidence was obtained in breach of Art 8. That was a matter for the domestic courts, and if it could be said that a court had been in breach of Art 8(1) by making the order that it had decided the law required in accordance with the Civil Procedure Rules 1998 it would nevertheless be acting within Art 8(2) in doing so. In the view of the Court of Appeal this was not a case in which the defence should be struck out. However, while not excluding the evidence, it was appropriate for the court to confirm that the conduct of the insurers was improper and unjustified. For that reason, subject to further argument, the Court of Appeal took the view that the defendant should pay the costs of the proceedings to resolve this issue of admissibility.

11.2.7 Trespass by remaining on land

Every day that a trespass continues it gives rise to a new claim.

If a person who entered land under a licence has that permission withdrawn, there will be an obligation to leave the property (by the most obvious convenient route) but, should that person refuse to leave the land or to remove objects from it when asked to do so, the tort of trespass will be committed from the moment of that refusal.

If the person who entered the land did so by lawful authority, and he or she abuses that authority, he or she will be treated as having been a trespasser from the moment he or she entered the property (see *The Six Carpenters Case* (1610) 8 Co Rep 146). This is known as trespass *ab initio*, and does not apply if the defendant entered with the permission of the occupier rather than by authority of the law. It would apply in situations when police or customs officers enter a property for a specific purpose authorised by law, but then proceed to search for something unconnected with that purpose. In *Jeffrey v Black* [1978] 1 All ER 555, the claimant was arrested for stealing a sandwich from a pub and he successfully sued for trespass to land when the police called in the drug squad to search his flat for illegal drugs. The law only permits the police to conduct a search in such cases in connection with the crime for which a suspect has been arrested. Any other type of search amounts to a trespass.

Trespass *ab initio* was criticised by Lord Denning in *Jones v Chic Fashions (Llanelli) Ltd* [1968] 2 QB 299 but, despite such criticism, it can provide an important source of compensation for the abuse of power by officials with the same objective as an award of exemplary damages which may also be made in such cases.

11.2.8 Trespass by placing things on land

A common form of trespass is the dumping of rubbish but the cases also involve parking of vehicles and allowing objects to project onto adjoining land. The occupier may take reasonable steps to remove such objects.

In *Arthur v Anker* [1995] QB 564, it was held that a motorist who had trespassed by parking his car on private property was taken to have consented to wheel-clamping because he had read a notice warning that wheel-clamping would be carried out. The fee charged for release of the vehicle was reasonable, the vehicle was released without delay and there were means by which the motorist could offer payment of the fee. No tort or crime had been committed by the clampers. The remedy of distress damage *feasant* was not available to the defendants, however. There was no evidence that they had suffered any damage. In *Vine v Waltham Forest LBC* [2000] 1 WLR 2883, the Court of Appeal held that although the claimant had trespassed by parking her car on the defendant's property, she had not consented to it being wheel-clamped. The defendants had not established that she had seen and understood the significance of a warning notice when she had parked the car there and left it to vomit, as she was feeling ill. In *Jones v Stones* [1999] 1 WLR 1739 (see 11.2.11, below) placing flowerpots and an oil tank on a boundary wall amounted to trespass. In *Rabett v Poole* (2001) unreported, it was held that a temporary electric fence enclosing a limited area of the claimant's land amounted to a trespass.

The Court of Appeal, in *Department for Environment, Food & Rural Affairs v Feakins* [2004] EWHC 2785 (Ch), held that farmers were entitled to damages for trespass and

negligence. DEFRA had entered premises and burned and buried carcasses there in various pits and other structures.

11.2.9 Trespass to the highway

As the highway may only be used for passing and re-passing, blocking a highway or remaining stationary on it for longer than is reasonable will amount to trespass (*Randall v Tarrant* [1955] 1 WLR 255). It will also be trespass to interfere unlawfully with the rights of the person who owns the sub-soil beneath a highway (*Harrison v Duke of Rutland* [1893] 1 QB 142). Similar acts could also amount to public nuisance. However, in the criminal case of *DPP v Jones and Another*, it was held that a non-obstructive peaceful assembly on the verge of a road at Stonehenge was a peaceful, non-criminal use of a highway.

In *Jones v DPP* [1999] 2 AC 240, the House of Lords held that people carrying out protests on a highway may be acting in a way which falls within the scope of public access to the highway in question. In this instance they were involved in a small protest for a short time, but each case will turn on its own facts. However, it should be noted that *Jones v DPP* was decided before the Human Rights Act came into force. The ECHR provides that everyone has a right to freedom of peaceful assembly and association (Art 11). Any form of assembly would need to be balanced and proportionate bearing in mind a number of factors, including the rights and freedoms of others, the protection of health and morals and so on, as specified in Art 11(2) which permits derogations.

11.2.10 'In the possession of the claimant'

Trespass is a tort which evolved to protect a person's possession of land, and as such the claimant must be the occupier of the land. This means that, in some circumstances, the fee simple owner can be sued by a tenant or other person in occupation of the land. Any person in *de facto* possession can sue anyone who does not have an immediate right to recover possession of the property. In *Manchester Airport plc v Dutton* [2000] QB 133, [1999] 3 WLR 524, [1999] 2 All ER 675, the Court of Appeal upheld the right of a licensee to claim possession against a trespasser, even though that licensee might not be in actual possession at the time of the trespass.

It has been suggested that Art 8 ECHR might give rise to the need for reconsideration of some aspects of the law on trespass to land. As Art 8 provides that everyone has the right to privacy and family life, it is possible that it might extend to cover any premises occupied as a home – even hotel rooms and prison cells.

11.2.11 'Without lawful justification' (defences)

There are certain circumstances when the law regards trespass as justifiable, and these form defences to a claim for trespass to land. They are as follows:

- **Statutory rights of entry**
  Defences to trespass are provided by numerous statutes which give rights of entry to various people. For example, the Police and Criminal Evidence Act 1984, the Public Order Act 1986 and the prevention of terrorism legislation are among the many statutes which allow the police to enter property for specified purposes, including

arrest and search. Other public servants, including social workers, Inland Revenue and immigration and customs officials and officers of bodies such as the electricity boards can enter property for different purposes specified by statute but, if the purpose for which entry was permitted is exceeded, the tort of trespass is committed. The Access to Neighbouring Land Act 1992 permits entry onto neighbouring land by court order in circumstances when a landowner refuses a neighbour entry onto land in order to carry out repairs. The order will only be available if the applicant can show that the work is necessary for the preservation of his or her property and that it cannot be carried out satisfactorily without entry onto the neighbour's land. The works involved must not include the development or improvement of land and the court has power to attach numerous conditions to the entry order. The Access to Neighbouring Land Act 1992 might be regarded as a statutory extension to the defence of necessity. The Party Wall, etc, Act 1996 allows a similar right of entry to demolish, build or repair party walls between properties (see 11.12.4, below).

The Countryside and Rights of Way Act 2000 provides a right to roam across certain areas of land (see Chapter 10, above).

- **Common law rights of entry**
  At common law, people are permitted to enter land in the possession of some other person in certain circumstances, for example, to abate a nuisance (see below). There are several instances of everyday acts of trespass by abuse of rights of entry which are virtually ignored in modern times. For example, there is a common law right to use the foreshore, which belongs to the Crown, for the sole purpose of passing and re-passing on foot or with boats. It is an abuse of such a right to sit or lie to sunbathe on the foreshore or to bathe in the sea.
- **Necessity**
  There is a defence if the act of trespass was necessary provided there was no negligence on the defendant's part. However, the defence probably only applies when there is a threat to life or property. In *Rigby v Chief Constable of Northamptonshire* [1985] 2 All ER 985, the defendant successfully pleaded necessity when he caused a fire by firing CS gas into a shop owned by the claimant in an attempt to eject a dangerous psychopath. In *Esso Petroleum Co Ltd v Southport Corpn* [1956] AC 218, a case which caused some difficulty in distinguishing between trespass and nuisance, the defence of necessity succeeded when a ship's captain was forced to discharge oil, which later polluted the shore, in order to save his ship which had run aground.

  For the defence of necessity to apply, it is not sufficient for the defendant to argue that his or her actions were necessary to draw public attention to what he or she believed to be a genuine danger to the public at large. In *Monsanto plc v Tilly and Others* [2000] Env LR 313, the defendants were campaigners against genetically modified crops. They had entered onto the land of the claimant as trespassers and had damaged crops as part of a publicity programme. The Court of Appeal concluded that the real purpose of the campaign was to give the defendants the opportunity to publicise their views in court and that their defence of necessity was not a genuine defence at all. It was only in exceptional circumstances that necessity would apply as a defence to trespass. Mummery LJ explained that, even in an emergency situation, the defence of necessity could not be justified unless there were very exceptional circumstances, if there is in existence (as there was in this case, in

the Department of the Environment) a public authority responsible for looking after the relevant public interests.

- **Licence or consent of the claimant**
  A licence is permission to enter land. Such licences may be express or implied and are granted for specific purposes. For example, tradesmen have an implied gratuitous licence to enter property to deliver their goods. People attending cinemas or concerts have an implied licence to enter premises and attend performances. In some circumstances an implied licence might arise to allow a tenant to carry out a remedy of self-help by entering a landlord's premises to carry out repairs that should have been done by the landlord (*Metropolitan Properties v Wilson* [2002] EWCA 1853). Lodgers have a licence to stay in the rooms which they hire, and so on. Many licences can be revoked at the will of the licensor, and in each case it will depend upon the circumstances under which the licence was granted. If it was granted under a contract, it would be necessary to study the terms of the contract in order to discover how the licence may be revoked. There are some authorities to the effect that a contractual licence can be revoked at will, even if it means that the licensor could be sued for breach of contract (*Wood v Leadbitter* (1845) 13 M & W 838) and others which suggest that if an equitable remedy would be available to prevent the breach of contract, the licence is irrevocable for that very reason (*Winter Garden Theatre (London) Ltd v Millennium Productions Ltd* [1948] AC 173). A licence coupled with an interest, in property, for example, can never be revoked.

  Repeated acts of trespass which are not objected to can give the trespasser an implied licence to use property. This makes such a person a lawful visitor for the purposes of the Occupiers' Liability Act 1957, and the resulting duty of care owed to such people is greater than that which is owed to trespassers under the Occupiers' Liability Act 1984.

  Moreover, if all the parties concerned were under a common assumption that there was a right of access over land, a claimant will be estopped from claiming damages for trespass – *Valentine v Allen* [2003] EWCA Civ 915.

  If the purpose for which the licence was granted is exceeded, the tort of trespass is committed. For example, the tradesman who leaves the path to the door and wanders around the garden is a trespasser, and the theatre-goer or party guest who is disruptive is also a trespasser. Reasonable force may be used to ensure that such people leave the property if they refuse to do so when so requested (*Collins v Renison* (1754) 1 Say 138). People who break restrictions imposed on behaviour by the Countryside and Rights of Way Act 2000 also become trespassers.

  If a claimant delays before bringing a claim for trespass, this will not necessarily mean that a licence has been granted for the trespass to be committed, nor that the claimant has acquiesced and is estopped from bringing a claim. Much depends on the type of act which constitutes the trespass and on the length of time involved. In *Jones and Another v Stones*, the Court of Appeal held that mere delay in complaining about relatively minor acts of trespass was not sufficient to establish estoppel by acquiescence within the tests laid down in the leading case of *Wilmott v Barber* (1880) unreported. The criteria established in that case for what amounts to acquiescence indicated that it would also be necessary for the defendant to prove that the claimant had encouraged or allowed the acts of trespass, that the trespasser had acted upon

that encouragement to his or her detriment and that it would be unconscionable to allow the claimant to assert his or her legal rights.

Trespass is a tort protecting possession and it is irrelevant that some person other than a party to the claim has a better right to possession than the claimant, so the defence of *jus tertii* cannot apply (*Ezekiel v Fraser and Others* [2002] EWCA 2066).

- **Reasonable defence of people or of the property itself**
  A person in possession of land has a defence to a claim for trespass to the person if he or she can prove that he or she acted in good faith in the course of defending property or people on the property, including him or herself. However, any force used must not be disproportionate to the force used by the intruder. If the defendant uses excessive force, a claim may be brought against him or her by the trespasser. In some cases, prosecutions are brought against landowners who overstep the mark. In *Revill v Newbury* [1996] 1 All ER 291, the defendant was prosecuted and was acquitted of malicious wounding when a trespasser on his allotment was hit in the arm and chest by more than 50 pellets. However, the civil claim brought by the burglar succeeded and resulted in the payment of more than £4,000 damages. See also *Cross v Kirby* (2000) *The Times*, 5 April (see Chapter 20), in which the defence was pleaded alongside that of illegality in a claim by a hunt saboteur against a landowner who tried to remove him from his property. Tony Martin, a landowner, was convicted of murder after he killed an intruder with an illegal shotgun. The sentence was later reduced to manslaughter, and another intruder who survived is bringing a claim for assault and battery against him (*R v Martin* [2001] EWCA 2245).

  It has been held in *DPP v Bayer* [2003] EWHC (Admin) 2567 that a defence of lawful justification based on 'protective force' cannot, it seems, apply in the case of aggravated trespass. Here the defendants had trespassed on land where GM maize was being cultivated and had attached themselves to tractors in a field. As such they were committing the crime of aggravated trespass under s 68 of the Criminal Justice and Public Order Act 1994.

- **Adverse possession**
  For centuries the rule was that after 12 years' adverse possession, the right to recover land was lost. This was held to be incompatible with Protocol 1, Art 1 of the European Convention on Human Rights in *Beaulane Properties Ltd v Palmer* [2005] EWHC 25 (Ch D). However, in any event the rule was changed by statute in 2003.

11.2.12 Trespass is actionable *per se*

There is no need to prove damage in order to succeed in a claim for trespass. All that is necessary to prove is that the alleged act was committed. Even the most trivial acts of trespass are actionable and this principle is an illustration of the importance attached by the law from the earliest times to protection of the possession of property.

It is always necessary to prove that the trespass caused any damage complained of (*BRB (Residency) Ltd v Cully* (2001) WL 1476357), if that damage is to be compensated.

11.3 REMEDIES FOR TRESPASS

Several remedies exist once trespass has been proved. Some of these are, like the tort of trespass itself, of very ancient origin, and are little known and seldom used.

11.3.1 Damages

Damages may be a suitable remedy for trespass to land. For example, in *Sinclair v Gavaghan* [2007] EWHC 2256 (Ch), a landowner had trespassed on neighbouring property in order to access a development site. Damages were assessed on the basis of the sum which would have been payable to obtain a temporary licence to access the site.

As the most trivial acts of trespass can be actionable, the physical damage to the land may be very slight. In such cases the damages awarded will only be nominal. If there is substantial damage to the property, then an appropriate award of reasonable compensation can be made. In suitable cases, an injunction may be awarded in addition to damages. However, in *Nelson v Nicholson* (2001) *The Independent*, 22 January, the Court of Appeal held that it is not open to a judge to award only nominal damages in lieu of an injunction to restrain a trespass that is continuing.

11.3.2 Injunctions

In many instances what the claimant requires is an injunction to prevent further acts of trespass. In cases in which the physical damage is only very small this is usually the remedy which is sought, and the only remedy which is likely to be obtained except in the most exceptional circumstances. For example, when people persist in trespassing by walking over land or by parking on private property the landowner needs to be able to keep them out in future, and this is best achieved by means of an injunction. Often, the mere threat of legal action is enough. Hence the common, but legally inaccurate, notice 'Trespassers will be prosecuted'. Often, a more effective deterrent is that favoured by some householders of putting up a notice which reads 'Beware of the dog'. An injunction was granted in *Udal v Dutton* [2007] EWHC 2862 (TCC), as the court did not regard damages as an appropriate remedy. Part of a party wall between neighbouring properties was in the process of being demolished by the owner of one property without the consent of the owner of the adjoining property. The same order required the party responsible for demolishing the wall to build a suitable barrier on the boundary.

11.3.3 A claim for recovery of the land

If the claimant has been deprived of lawful possession of the land by the defendant, it may be possible to obtain from the court an order to enable him or her to recover the property. The claimant must show that he or she has better title to the property than the defendant.

If a possession order is sought under CPR 55.1(b), and there is real danger of further trespass, the court has jurisdiction to include in the order a further area of land – *Drury v Secretary of State for the Environment & Rural Affairs* [2004] EWCA Civ 200.

11.3.4 Re-entry and defence of property

The person entitled to possession of the land may re-enter and use reasonable force to remove the trespasser, his or her property, or to prevent the acts of trespass (see *Hemmings v Stoke Poges Golf Club* [1920] 1 KB 720). If a disproportionate amount of force is used, this will amount to trespass to the person, and the trespasser could bring a successful claim for assault, battery or false imprisonment. In *Harrison v Duke of Rutland* [1893] 1 QB 142, the claimant, in an attempt to interrupt the defendant's grouse shooting, stood on the highway and waved his umbrella and handkerchief. He was held down and restrained by the Duke's servants, and later sued for trespass to the person. His claim failed. It was held they were merely taking lawful steps to prevent a trespass.

The law may provide protection to trespassers even when they are engaged in criminal activities. In *Revill v Newbury* [1996] 1 All ER 291, the defendant, aged 76, was sleeping in his shed on an allotment when he was disturbed at 2 am by a trespasser who was trying to break in. He fired his shotgun through a small aperture in the shed door and shot the claimant in the arm and chest at a range of five feet. The claimant was later prosecuted for the offences which he had committed that night and pleaded guilty to the criminal charges, but the defendant was acquitted on charges of wounding. However, the intruder claimed damages in tort for assault and battery, breach of the duty owed to trespassers under the Occupiers' Liability Act 1984 and negligence. The defendant put forward defences of *ex turpi causa* (illegality), accident, self-defence and contributory negligence. The judge at first instance had rejected the defences of *ex turpi causa* (illegality), accident and self-defence, though he did make a finding of contributory negligence, and awarded damages of £4,033 to the claimant trespasser. The Court of Appeal confirmed that a claimant in a personal injuries case is not debarred from recovering damages even is he or she is a trespasser embarking upon a criminal act, if the force used against him is disproportionate to the force which he is using. The defence of self-defence cannot apply if the person under attack used greater force than a reasonable man would have used in the circumstances. The defences of *ex turpi causa* (see Chapter 20) and accident were also rejected. This case is discussed more fully in connection with the Occupiers' Liability Act 1984.

By contrast, in a criminal prosecution in 1995, the owner of a vineyard was acquitted of deliberately wounding two burglars whom he shot when he startled them in the course of stealing on his property on which £12,000 worth of wine was stored. The injuries which he inflicted were found to have been accidental. He had fired at a door and into the air when he heard the intruders and panicked, but had shot both of them. No civil claim has been brought by either of the burglars, one of whom was quoted as saying, 'We knew what we were doing that night. We were on his property stealing his stuff. He should not have been prosecuted'.

It is now common practice for people to employ wheel-clamp firms and to remove vehicles parked on private property. This kind of self-help is permitted provided the fine imposed for recovery of the vehicles is not excessive.

If a person uses or threatens violence to re-enter the land, he risks prosecution under s 6 of the Criminal Law Act 1977, unless he or she is a displaced residential occupier.

11.3.5 An action for *mesne* profits

An action for *mesne* profits is available to people who have suffered financial losses through being deprived of possession of their land. Such losses include the deterioration of the property and the cost of recovering it.

11.3.6 Distress damage *feasant*

If goods or animals are left unattended on land, the occupier may retain these until any damage done by them has been paid for. Actual damage to the property, for example, broken windows, must be suffered and this remedy is an alternative to bringing a claim which means that no claim may be initiated while the object is still in the possession of the occupier.

11.4 NUISANCE

Nuisance may be classified into various categories. The most common division is into statutory nuisance, public nuisance and private nuisance, and although there are distinct differences between all three categories, it is sometimes still possible for the same fact situation to give rise to all three actions. For the sake of clarity, it is essential to preserve the distinctions by dealing with each category separately.

11.5 STATUTORY NUISANCE

A number of nuisance actions have been created by statute, often on an *ad hoc* basis, and usually in response to pressing social need. For example, the work of Edwin Chadwick and others resulted in the great public health legislation of the 19th century which was responsible for the control of infectious diseases and a radical improvement in living conditions. This legislation, which included the Public Health Acts of 1845 and 1875, created many statutory nuisances. More recently statutes have included legislation to improve the environment, such as the Clean Air Act 1956, the Control of Pollution Act 1974 and the Clean Neighbourhoods and Environment Act 2005 – to name but a few. These nuisances are quasi-criminal in nature and are enforced by officers of local authorities, whose usual policy is to prevent nuisance by serving abatement notices and who only prosecute in the magistrates' courts as a last resort. The advantage of this system to private individuals is that they can complain to the appropriate local authority department about whatever nuisance is troubling them, such as noise or noxious fumes, and if the situation is covered by one of the relevant Acts, it can be dealt with without the expense and inconvenience of bringing an individual civil claim, and also, in some instances, without the acrimony which such a civil claim can create between neighbours. A solicitor consulted by a client who complains of what could be a statutory nuisance will usually explore this avenue before advising the client to resort to the trouble and expense of a civil claim. It is not unusual to invoke both statutes and common law rules in support of a claim for relief. In *Roper v Tussauds Theme Parks Ltd* [2007] EWHC 624 (Admin), it was held that the court should take into consideration all relevant circumstances, including commercial considerations, when deciding whether to make an

order that abated statutory nuisance. In this instance it was not considered irrational to conclude that a reduction in noise level at a theme park from 43 decibels to 40 decibels would be sufficient to abate a statutory nuisance.

11.6 PUBLIC NUISANCE

Public nuisance is primarily a crime. As a tort it bears little relationship to private nuisance and, to some extent, is a misnomer, perhaps being best described as a 'conceptual dustbin' into which a number of disparate and unconnected acts of interference with peoples' interests have been dumped. It is only available when the claimant has suffered damage over and above other members of the public.

11.6.1 Outline definition

Public nuisance has been defined as an act 'which materially affects the reasonable comfort and convenience of life of a class of Her Majesty's subjects': *per* Romer LJ in *Attorney General v PYA Quarries* [1957] 2 QB 169.

In *Attorney General v PYA Quarries*, dust and vibrations caused by the operation of a quarry amounted to a public nuisance, although the defendants tried to argue that too few people were affected by their acts for them to amount to anything more than a private nuisance, if that.

It is useful to examine each element of this definition.

11.6.2 Materiality

In many of the other cases on nuisance, the relevant question was the degree of interference which the activity caused. The acts complained of must have been such as to cause real disturbance, but this is a question of fact in each case.

Some examples of acts amounting to public nuisance are: organising a pop festival, which caused noise and a large amount of traffic (*Attorney General of Ontario v Orange* (1971) 21 DLR 257); blocking a canal (*Rose v Miles* (1815) 4 M & S 101); queuing on a highway, so causing an obstruction (*Lyons v Gulliver* [1914] 1 Ch 631); picketing on a highway (*Thomas v NUM* (*South Wales Area*) [1985] 2 All ER 1); interference with navigation rights in the River Thames (*Tate and Lyle Industries v GLC* [1983] 1 All ER 1159). In *R v Johnson (Anthony Thomas)* (1996) 160 JP 605, the Court of Appeal held that making obscene telephone calls to numerous women on many occasions constituted a public nuisance. The conduct materially affected the reasonable comfort and convenience of a class of people. In *R v Gaud* (1999) unreported, a surgeon who operated on a large number of patients knowing that he was suffering from an infectious disease was convicted of causing a public nuisance.

11.6.3 Reasonable comfort and convenience

The requirement of reasonable comfort and convenience is thought to be the common factor between public and private nuisance, which have little else in common. In both

torts, the claimant must establish that the interference with comfort and convenience is substantial enough to amount to a nuisance and is beyond what would reasonably be expected. To succeed in a claim in tort for public nuisance, however, the claimant must prove that he or she has suffered special or extra damage over and above that suffered by other members of the community. The criminal law is adequate to prevent repetitions of the harm, but the object of the civil law is to compensate, and tort is limited to those cases in which extra harm has been suffered. For example if, as has happened in recent years, large numbers of 'new age travellers' were to congregate on farmland, the whole neighbourhood may complain of the crime of public nuisance, and the farmer whose land had been camped upon could sue for trespass. People whose livelihoods had been affected by close proximity to loud noise, which had for example interfered with breeding animals, could sue in tort for public, and possibly private nuisance. One important distinction between public and private nuisance here is that for acts to amount to private nuisance there must be continuity or repetition of the acts over a period of time whereas, in public nuisance, there appears to be no such requirement and a single act is probably enough to amount to the tort.

The requirement of interference with comfort covers noise damage to public health and other disturbances, but there is no need, as there is in private nuisance, to prove injury to health or even substantial interference in order to succeed in a claim for public nuisance. Interference with convenience could include the obstruction of entrances to land and highway obstruction. It is unusual for inconvenience caused by delay to the claimant to amount to sufficient inconvenience to be a public nuisance.

If the public nuisance arises from a condition on land that arises naturally, the tort is committed by the failure of the defendant to remedy the situation, as in *Wandsworth LBC v Railtrack plc* [2001] EWCA Civ 1236 in which pigeons had roosted in large numbers under a railway bridge to the knowledge of the defendant and he had done nothing about it.

11.6.4 A class of Her Majesty's subjects

There must be sufficiently large numbers of people affected by the defendant's behaviour before a claim for public nuisance can be sustained. Essentially, the tort is concerned with protecting the interests of the public and individuals can only be protected by the tort as part of the wider community. The Court of Appeal in *Attorney General v PYA Quarries* did not define how many people constitute a 'class', but Lord Denning indicated that there would be a claim for public nuisance if the disturbance was so widespread that it would be unreasonable to expect only one individual to try to prevent it. The question is more one of the effect upon the community than one of the numbers involved. In *Attorney General v Hastings Corpn* (1950) SJ 225, noise from occasional stock-car racing did not amount to public nuisance because the area was sparsely populated and too few people were affected on too few occasions in the year. In *Cheung v Southwark London Borough Council*, Ch D 19/12/2007, a civil claim failed because the claimant was unable to prove damage suffered over and above that of the general public.

Public nuisance as a common law criminal offence has been held to be compliant with the European Convention on Human Rights. In *R v R* [2003] EWCA Crim 3450 the Court of Appeal ruled that the common law as sufficiently clear to allow individuals

with legal advice if necessary, to foresee the legal consequence of their actions and modify their behaviour if so required. Here the appellant had been prosecuted for causing panic at a postal sorting office by sending salt to a friend in an envelope, pretending that it was 'anthrax'. It was held that any interference with the appellant's Art 8 rights by the prosecution had been necessary and proportionate in order to protect public safety.

In some instances a local authority will exercise its powers under s 222 of the Local Government Act 1972 to bring proceedings for an injunction to protect the inhabitants of an area, for example, against drug dealing activities (*Nottingham City Council v Zain* [2002] 1 WLR 607). Anti Social Behaviour orders are available in certain cases under the Housing Act 1996.

In *Corby Litigants v Corby BC* [2008] EWCA Civ 463, the Court of Appeal confirmed that damages for personal injury are recoverable in public nuisance.

11.7 HIGHWAY NUISANCE

Nuisances which affect the highway are covered by the tort of public nuisance, but an individual would only succeed in a tort claim if there was special damage suffered as a result of the obstruction of the highway. This type of nuisance claim has been used in the public order situation as a criminal offence for many years to control demonstrations and picketing and has now been superseded to some extent by statutes such as the Highways Act 1980 and the Public Order Act 1986. There are still some civil claims brought for highway nuisance. These fall into two broad categories: obstruction of and interference with highways and objects falling, or likely to fall, onto highways.

11.7.1 Unreasonable use and obstruction of the highway

Strictly speaking the highway may be used only for passing and re-passing. Any other use of the highway, such as standing or sitting on the road or placing objects upon it could constitute a public nuisance if the conduct involved is unreasonable.

Highway nuisance was defined by Lord Simmonds in *Jacobs v London CC* [1950] 1 All ER 737 as:

> Any wrongful act or omission upon or near a highway, whereby the public are prevented from freely, safely, and conveniently passing along the highway.

Examples of highway nuisance include: queues for theatres (*Lyons v Gulliver* [1914] 1 Ch 631); putting up a stand to watch the King's funeral procession (*Campbell v Paddington Corpn* [1911] 1 KB 869); unreasonable use of the highway during the night by heavy lorries (*Halsey v Esso Petroleum* [1961] 2 All ER 415); unreasonable parking of an unlit vehicle on a highway at night (*Ware v Garston Haulage* [1944] KB 30); constantly slicing golf balls onto a highway, one of which caused a taxi-driver to lose an eye (*Castle v Saint Augustine's Links* (1922) 38 TLR 615); putting up advertising hoarding around a building site (*Westminster City Council v Ocean Leisure* [2004] EWCA Civ 970).

As in private nuisance, there must be unreasonable use of the highway for the tort to

be committed. Anything which constitutes unreasonable use, even of a minor nature and particularly if it is solely for the defendant's convenience will be a public nuisance, as in *Farrell v John Mowlem & Co Ltd* [1954] 1 Lloyd's Rep 437, in which the claimant was injured tripping over a pipeline laid across a pavement.

Under s 41 of the Highways Act 1980, highway authorities are responsible for maintaining the highways but under s 58(1) can escape liability if it can be demonstrated that reasonable care had been taken to ensure that the particular part of the highway concerned in a legal action was not dangerous for traffic. Section 58(2) provides that in deciding on the question of reasonable care regard must be had to the nature of the highway and the appropriate standard of maintenance. There is an unresolved problem as to whether, as the majority of judges held in the Court of Appeal decision of *Griffiths v Liverpool Corpn* [1974] 1 QB 374, liability is almost absolute, except for the s 58 defence, or whether negligence should be proved, as the wording of the Act suggests.

It should be noted that for most accidents on a highway the usual claim is negligence and it is somewhat anomalous that highway nuisance has been singled out for special treatment at a time when proof of fault is the normal expectation.

In *Goodes v East Sussex CC* [2000] 3 All ER 603, the appellant had suffered very serious injuries in a motor vehicle accident when his vehicle skidded on ice and left the road. It was agreed between the parties that, on the day in question, a lorry had salted the roads, including the relevant one, but in a sequence different from that which was expected. There was no allegation of a want of care on the claimant's part. The House of Lords held that the duty under s 41(1) of the Highways Act 1980 does not encompass a duty for highway authorities to prevent the formation and accumulation of ice and snow on a highway. Nor is there a duty under that section to remove ice and snow after it has accumulated. Their Lordships reviewed the law on highway nuisance and concluded that if highway authorities were to be subject to a duty to prevent or remove the accumulation of ice and snow that was a matter for Parliament. The decision was quickly reversed by statute. The Railways and Transport Safety Act 2003, s 111 added a new sub-section 1A to s 41:

> In particular, a highway authority is under a duty to ensure, so far as is reasonably practicable, that safe passage along a highway is not endangered by snow or ice.

In *Gorringe v Calderdale MBC* [2004] UKHL the House of Lords held that the defendant local authority owed no duty to the claimant to warn her to slow down as she approached a dangerous part of the road. There were no road markings and no 'go slow' signs and the claimant had been driving too fast for the road. She had skidded into the path of a bus. The House of Lords drew a distinction between failing to repair a highway, which would have been covered by s 41 of the Highways Act 1980, and failing to warn or paint markings on the road, which were not defects in the state of the road. A failure to take reasonable care to ensure that a highway was not dangerous to users, had not been proved.

Further consideration was given to the scope of the law in *Shine v Tower Hamlets London Borough Council* [2006] EWCA Civ 852, which concerned the responsibilities of highway authorities under s 66 of the Highways Act 1980, as well as s 41. The Court of Appeal, relying on *Gorringe v Calderdale MBC* ruled that neither of the sections imposed

any liability on a highway authority for personal injuries caused by defective barriers, which included bollards, on a public highway. Section 66 was only permissive allowing the council to install 'street furniture' as reasonably necessary to ensure public safety, and did not create any private law duty actionable in damages. Section 41 did not apply because the complaint concerned the bollard, not the maintenance of the highway. Liability for any injuries caused by objects such as street furniture arose only in negligence.

The Court of Appeal again considered the responsibilities of highway authorities in *Sandhar v Department of Transport, Environment and the Regions* [2004] EWCA Civ 1440, and here considered whether there could be liability in negligence if accidents occurred because roads had not been salted to prevent the formation of ice. It was held that the defendants did not owe motorists a common law duty of care to prevent the formation of ice on trunk roads, and could not be taken to have assumed a general responsibility to every road user to ensure that all or any trunk roads would be salted in freezing conditions. The claimant's husband had died in a highway accident when the road was icy after he had lost control of his vehicle when negotiating a slight bend on a trunk road at about 45–50 mph, because there was patchy ice on the road. The Secretary of State had delegated his functions of snow clearing and salting trunk roads to the local authority. The local authority's winter maintenance programme was established in accordance with Department's Trunk Roads Maintenance Manual. There was evidence that if the road had been salted the accident would probably not have happened.

The claim was for common law negligence, as it was accepted by the claimant that the duty of a highway authority to maintain the highway under s 41(1) of the Highways Act 1980 (before the amendment on 31 October 2003 to reverse the decision in *Goodes v East Sussex County Council* [2000] 1 WLR 1356), did not include a duty to prevent the formation of ice or remove an accumulation of snow on the highway. The claimant argued that a common law duty arose in negligence because there was public expectation at the time of the deceased's accident that local authority assumed responsibility to salt the roads in accordance with its agreement with the defendant Department.

The Court of Appeal held that the claimant had failed to establish the existence of a relevant common law duty of care. It was the primary responsibility of motorists to take proper care for their own safety, as well as that of passengers and other road users. Simply because there was a delegation agreement, between the defendants and the local authority did not mean that the defendants had assumed a general responsibility that the system for salting roads would always be carried out. Any assumption of responsibility that was sufficient to create a duty of care normally required a particular relationship with an individual or individuals (*Barrett v London Borough of Enfield* (1998) 8 PIQR; *Phelps v Hillingdon London Borough* (2000) LGR 651). The mere fact that there was a general expectation by the public could not support an assumption of responsibility. Reliance was an intrinsically necessary ingredient of a common law duty of care, and in cases such as this motorists could not properly rely on the highway authority to have salted a potentially icy road. This negatived the existence of a duty of care, and the deceased had not been entitled to assume that the road had been salted. He had a primary duty to have regard for his own safety.

In *Day v Suffolk County Council* [2007] EWCA Civ 1436, the Court of Appeal held that

the trial judge had been entitled to conclude that an inspection carried out by a local authority as part of its maintenance programme was inadequate, and that a dangerous defect had been overlooked, in breach of the authority's duty under the Highways Act 1980. The judge had held that the local authority was liable, and that the special defence under s 58(1) of the Act had not been met. By way of contrast, in *Pace v Swansea City Council* 10/07/07, one of many cases of this kind heard in the County Court, the highway authority was able to rely on the statutory defence in s 41(1A) of the Highways Act 1980. The highway authority was able to prove that it had an adequate policy for salting the roads which had been implemented on the occasion in question. It was impossible for a highway authority to eliminate all risk of ice forming on the roads and provide the very highest level or protection to the public using them.

11.7.2 Threats to the highway from adjoining premises

The rule in *Wringe v Cohen* [1940] 1 KB 229 sets a standard equivalent to strict liability for man made structures which cause a danger to highways from adjoining premises. In that case, the Court of Appeal held that the person responsible for repairing premises which adjoin a highway is liable for dangers created by those premises if he or she knew or *ought to have known* of the danger. Liability is not absolute. The exceptions to this are when the danger was caused by a trespasser, or was the result of some natural process causing a latent defect of which the occupier was unaware. Indeed, some writers, including Sir Percy Winfield, take the view that the cases fall into two clear categories, those involving man made structures, when liability is strict, and those involving natural projections such as trees, when liability depends upon proof of negligence. In *Caminer v Northern and London Investment Trust Ltd* [1951] AC 88, the landowner was not liable when a tree with diseased roots fell across a highway, as it was not possible to detect that the tree was in danger of falling. In *British Road Services v Slater* [1964] 1 All ER 816, a landowner was not liable when a branch of a tree growing on his land but overhanging the highway knocked a large package off a high vehicle, damaging the claimant's lorry which was travelling behind. The defendants were found not liable because the breach could not be regarded as a foreseeable source of danger.

In *Devon CC v Webber* [2002] EWCA Civ 602, the Court of Appeal held that the defendants were not liable for a breach of s 150(4)(c) of the Highways Act 1980, nor in nuisance or negligence. A violent and unforeseeably heavy rainstorm had washed 400 tonnes of rubble and soil from their land onto the highway and no reasonable person could have predicted this.

However, in *Chapman v Barking and Dagenham LBC* [1998] CLY 4053, the Court of Appeal upheld the decision of the trial judge, who had found the defendants liable for injuries caused by a tree branch. The branch had broken off in high winds, crushing the claimant in the cab of his van. Following *Noble v Harrison* [1926] 2 KB 332, it was held that there would be liability in nuisance if a landowner neglects to remedy a natural defect on his or her land within a reasonable time.

Occupiers of premises which adjoin the highway are responsible for their maintenance and would also bear responsibility for any damage caused by their disrepair if this amounted to a danger to the highway or persons using it. In *Tarry v Ashton* (1876) 1 QBD 314, an adjoining land occupier was liable to a passer-by who was injured by a

lamp which fell from the premises. Although the occupier attempted to escape liability on the grounds that he had employed an independent contractor to keep the premises in repair, it was decided that the duty to maintain premises so close to a highway could not be delegated. This is one of the exceptions to the rule that an employer is not liable for the torts of an independent contractor.

11.7.3 Defences to public nuisance

The general defences in tort apply to public nuisance (see Chapter 20) but, in addition, the defence of statutory authority has proved useful. For example, in *Allen v Gulf Oil Refining Ltd* [1981] 1 AC 1001, it was held that where Parliament has expressly or impliedly authorised the construction of works, in this case the installation of an oil refinery, that authorisation carries with it the right to do all that is necessary for the authorised purpose, without the fear of a claim for nuisance being brought.

A further analogous defence based on planning permission was successfully pleaded in the first instance decision of *Gillingham BC v Medway (Chatham) Dock Co* [1993] QB 343. In this case, Buckley J held that as planning law operates through delegated powers within a statutory framework approved by Parliament, the character of a neighbourhood can be changed by planning permission to such an extent that what would previously have been a public nuisance may not be so after the change of use. Here, the council had given the defendants permission to operate a commercial port on the site of the old naval dockyard at Chatham. This had generated heavy commercial traffic by day and night, which passed through what had previously been a quiet residential area. The council, despite their previous assurance to the defendants that they would have unrestricted access to the dock area, brought this claim on behalf of the residents seeking a declaration that heavy traffic through the area at night was a public nuisance, and seeking an injunction to restrain the traffic. It was held that there was no public nuisance here in the light of the changed use of the area under properly considered planning regulations.

However, *Wheeler v Saunders* [1995] 2 All ER 697 demonstrates that planning decisions do not necessarily give developers immunity from a nuisance claim, even if the development is the inevitable consequence of that planning consent.

The defence of act of a stranger has also proved useful (see *Wringe v Cohen*, 11.7.2, above).

Prescription, which is a good defence to private nuisance does not apply to public nuisance.

11.8 REMEDIES FOR PUBLIC NUISANCE

The basic remedies of damages and injunctions are sought by claimants in public nuisance cases. Often a remedy provided to one claimant can be of benefit to a whole community.

11.8.1 Damages

If the claimant has suffered personal injuries or financial loss, this would have to be pleaded as particular damage over and above that suffered by the general public, and damages will be awarded accordingly. However, only compensatory damages will be payable. In *Gibbons v South West Water Services Ltd* [1993] QB 507, the Court of Appeal held that exemplary damages would not be awarded to claimants who had suffered illness as a result of drinking water which had been contaminated by a grossly excessive dose of aluminium accidentally introduced into the water supply at a treatment works. The defendants had acted in a high handed manner and had sent a misleading letter which stated that the water was safe to drink. Even before the rule in *Rookes v Barnard* [1964] AC 1129, and *Cassell & Co v Broome* [1972] 1 All ER 801, which laid down the limits for the awarding of exemplary damages, it had never been contemplated by the House of Lords that exemplary damages could be awarded for public nuisance, and it was not for the courts to consider such an award now, given the much restricted use of exemplary damages. Even if it had been possible to apply *Rookes v Barnard* to this case, the court could not award exemplary damages, as the defendants were not exercising executive power derived from government, nor was their behaviour calculated to make a profit by committing the tort, as was required by that case. The Court of Appeal made it clear in claimants appearing on the *Register of the Corby Group Litigation v Corby Borough Council* [2008] EWCA Civ 463, that *Hunter v Canary Wharf Ltd* [1997] AC 655 and *Transco Plc v Stockport MBC* [2003] UKHL 61, [2004] 2 AC 1 had not reversed, by implication, the principle that damages for personal injury could be recovered in public nuisance. Observations concerning public nuisance in those cases were *obiter dicta*.

11.8.2 Injunctions

The claimant will frequently be seeking an injunction to restrain further repetition of acts of public nuisance. As an equitable remedy this is discretionary, and could be refused in some circumstances. In *Gillingham BC v Medway (Chatham) Dock Co* [1993] QB 343, Buckley J held that, even if a public nuisance had been committed, he would have exercised his discretion and refused an injunction because the claimant had assured the defendant when granting planning permission for change of use, that access to the area would be unrestricted. *Heathrow Airport Ltd v Garman* [2007] EWHC 1957 (QB) is a case which demonstrates the comprehensive protection afforded by the law to land-owners in certain cases. Here, an injunction was granted to prevent people protesting at Heathrow airport. Protestors were organising demonstrations in the wake of concerns about the impact of airports on climate change, and were in the process of setting up a camp close to the airport. The court took the view that the protests would have serious and damaging consequences on the running of the airport, and had the potential to increase the risk of a terrorist attack on the users of the airport, and an injunction was awarded.

11.9 THE DISTINCTION BETWEEN PUBLIC AND PRIVATE NUISANCE

The torts of public and private nuisance are distinct and separate and have evolved independently of one another though there are some conceptual overlaps:

Public nuisance	Private nuisance
• Protects land and other interests.	• Essentially protects land.
• Primarily a crime.	• Only a tort.
• Claimant must prove special damage over and above that of public.	• Claimant must prove damage.
• Single act can be enough.	• Single state of affairs is necessary.
• No defence of prescription.	• Prescription is a defence.
• Exemplary damages are not available.	• Exemplary damages may be available.
• Strict liability for some forms of highway nuisance.	• Fault must usually be proved, some exceptions.

11.10 PRIVATE NUISANCE

Private nuisance complements the tort of trespass, and offers options for action to a claimant who is unlikely to succeed in a claim for trespass. Traditionally, this tort has protected against physical interference of an indirect nature with crops, land and the use or enjoyment of land. Although it is a very ancient tort, the law of nuisance is continuing to develop. The Tort of Harassment was recognised by the courts within the framework of nuisance in *Khorasandjian v Bus*h [1993] QB 727, though more recently doubts have been cast on that decision. Harassment is now treated as a statutory tort created by s 3 of the Protection from Harassment Act 1997. The new statutory tort affords protection to victims of stalkers and other forms of harassment regardless of the mental state of the defendant. The claimant must prove 'a course of conduct' on the part of the defendant, and may be awarded damages and/or an injunction.

11.10.1 Outline definition

A working definition of private nuisance is as follows: private nuisance consists of continuous, unlawful and indirect interference with the use or enjoyment of land, or of some right over or in connection with it. Proof of damage is usually necessary.

Each element of this definition will be discussed and clarified, and a useful approach to dealing with problem-type questions on the topic is to memorise the definition and to work through it systematically, applying it to the facts of the problem.

11.10.2 Continuous interference

Claims for private nuisance arise when there has been continuous interference over a period of time with the claimant's use or enjoyment of land. In *Delaware Mansions and Fleckson Ltd v Westminster CC* [2001] UKHL 55, the House of Lords held that a local authority had a duty to abate a nuisance caused by tree roots undermining the foundations of a block of flats. That duty was not nullified simply because the damage had occurred before the freehold interest was obtained.

There was a continuous nuisance in this case which could have been remedied at very little cost if immediate action had been taken. There is no set period of time over which the events must occur to amount to a private nuisance. Much depends upon the neighbourhood and the other surrounding circumstances but the common law imposes a fair and just duty as between neighbours. A situation that may not have been a nuisance in the past can become a nuisance later. In *Bybrook Barn Garden Centre Ltd v Kent CC* [2001] BLR 55, it was held that a culvert had not been a nuisance when it was created, but became a nuisance later when the volume of water passing through it greatly increased. However, a different approach may be taken in cases involving landlords and tenants in which case the *maxim caveat* lessee may apply. In *Jackson v JH Watson Property Investment Ltd* [2008] EWHC 14 (Ch) it was held that a landlord would not be liable to a leaseholder in nuisance because the defect existed before the lease was granted.

Temporary interferences do not usually amount to actionable nuisances. However, a temporary, but very substantial state of affairs may amount to a nuisance, as in *De Keyser's Royal Hotel Ltd v Spicer Bros Ltd* (1914) 30 TLR 257, in which noisy pile driving at night during temporary building works was held to be a private nuisance. Some nuisance claims involve regular temporary events such as the ringing of church bells (*Calvert v Gardiner* [2002] EWHC 1394 QB).

A single act giving rise to a complaint will not normally constitute private nuisance, though it could be a public nuisance. However, there are one or two instances of cases in which what appears to be a single act has been held to amount to a private nuisance. On closer examination, it will be observed that these apparently isolated acts were the culminating event in a state of affairs which has prevailed for some time. In *SCM v Whittall & Son Ltd* [1970] 1 WLR 1017, Thesiger J explained that a single escape of materials from the defendant's land may constitute a private nuisance, if the same event had occurred before as a result of activities on the land as it had in *British Celanese v Hunt (Capacitators) Ltd* [1969] 2 All ER 749. In that case foil had blown from the defendant's land where it was stored and had damaged an electricity substation, causing the electricity to a small industrial estate to be cut off. The same problem had occurred once a few years previously and had arisen because of the way in which the material was stored on the defendant's property. The judge had no difficulty in finding that what had occurred was a private nuisance.

However, the case of *Crown River Cruises Ltd v Kimbolton Fireworks Ltd and Another* [1996] 2 Lloyd's Rep 533 is difficult to reconcile with these cases. Here, a barge moored on the Thames close to the Battle of Britain fireworks display in 1990, and a passenger vessel moored to it, had been set alight after a firework display of about 20 minutes which had been held close by. Potentially inflammable material had fallen for 15 or 20 minutes onto the barge, and several hours later the passenger vessel caught alight and was very badly

damaged. The time involved was so short that it could hardly have amounted to 'continuous interference' and the case is best explained by reference to the authorities on fire and liability for its spread which rest on principles not directly applicable to the ordinary law of private nuisance (see 11.14, below).

Temporary building works may amount to nuisance, but builders will not be liable if they can show that they have used all reasonable care and skill to avoid disturbance or annoyance. However, if there is more than mere inconvenience, and if what is done amounts to physical damage to the claimant's land, damages may be recoverable (*Clift and Another v Welsh Office* [1999] 1 WLR 796. Also *Video London Sound Studios Ltd v Asticus (GMS) Ltd* (2001) WL 542314).

11.10.3 Unlawful interference

The unlawfulness of the defendant's conduct is to be found in the element of unreasonableness which the claimant must prove. Reasonable activities on the defendant's land do not amount to nuisance. It is only when they become unreasonable in character because of the way in which they interfere with the claimant's use or enjoyment of neighbouring property that they are unlawful and may be actionable. The factors which courts take into account in assessing the reasonableness or otherwise of the defendant's use of land are as follows:

- **The defendant's conduct in the light of all the circumstances**
  In reality, what the courts are considering here is the question of fault, but the approach is more flexible than that taken in negligence actions. Thus less is expected of defendants who are poor or infirm In relation to nuisance arising from naturally occurring hazards, the courts have adopted a subjective approach to the reasonableness or otherwise of the defendant's conduct, based, among other matters, on his or her financial circumstances. This distinguishes nuisance from negligence, where the approach is ostensibly objective. An example of the way in which the courts deal with the question of reasonableness is to be found in *Leakey v National Trust* [1980] QB 485. The National Trust owned land upon which was located a large mound of earth which was being gradually eroded by natural processes, and was sliding onto the claimant's property. It was held by the Court of Appeal that natural encroachments of this kind could amount to nuisances in some circumstances, and that landowners had a duty to do all that was reasonable in the circumstances to prevent encroachments onto adjoining property, but that in these cases, the relevant circumstances included the ability of landowners, both physically and financially, to take steps to prevent the danger, and also the neighbours' ability to protect themselves from the danger. Megaw LJ said:

  > The criteria of reasonableness include, in respect of a duty of this nature, the fact of what the particular man, not the average man, can be expected to do, having regard, amongst other things, where a serious expenditure of money is required to eliminate or reduce the danger, to his means.

  The same approach used in *Solloway v Hampshire CC* (1981) 79 LGR 449, in which a claim by householders whose property had been damaged by encroaching tree roots which were the responsibility of the local authority, was defeated because the

authority lacked the resources to undertake checking and remedial work to all buildings in their area which might be affected by encroaching tree roots. As Sir David Cairns explained:

> If it could be said to be a reasonably foreseeable risk, I am satisfied that it was a risk such that the cost and inconvenience of taking steps to remove or reduce it would be quite out of proportion to the risk.

In *Delaware Mansions and Fleckson Ltd v Westminster CC* [2001] 3 WLR 1007, the council had refused to remove a tree despite knowing that its roots were causing damage to a block of flats. All the damage had been caused and had occurred before Fleckson became the freeholder of the flats. The House of Lords applied the concept of 'reasonableness between neighbours' and viewed the situation from the perspective of reasonable foresight. It was held that there was a continuing nuisance about which the defendants knew or ought to have known and ruled that reasonable remedial expenditure was recoverable by the landowner who was forced to incur that expenditure. The question of damage caused by tree roots arose again in *Eiles v Southwark London Borough Council* [2006] EWHC 1411 (TCC), in which it was decided that subsidence to the rear of a property had been the result of the desiccating effect at the front of the property of the tree roots extending from the local authority's birch tree. The roots had extended under the house and the local authority was liable for the damage caused by the tree.

Another example of the flexible approach taken by the courts in nuisance cases is *Arscott v The Coal Authority* [2004] EWCA Civ 892. Here the Court of Appeal held that the occupier of land which was susceptible to flooding was not liable in nuisance if it took steps to prevent flooding and the result was damage by flood water to adjoining property. The flood waters were a 'common enemy'.

- **The locality**

  Whether the defendant's activities amount to a nuisance will depend upon the area in which they are carried out. It was explained in *Sturges v Bridgman* (1879) 11 Ch D 892 that: 'What would be a nuisance in Belgravia Square would not necessarily be so in Bermondsey.'

  An area like Bermondsey which was full of tanneries using excreta in the tanning process, and which was accustomed to the noise and pollution of heavy industry is less likely to provide fertile ground for successful private nuisance claims than a quiet residential suburb, but this does not mean that people living in industrial areas will never be able to succeed in nuisance, as much will depend upon the extent and degree of the activities of the defendant in the light of what is customary in the particular area, and there will be limits as to what people are able to tolerate even in commercial or industrial localities.

  It has been argued that this rule as to the locality of the nuisance only applies to cases in which a claimant complains of interference with use or enjoyment of land, and that if the activities cause physical harm to the land itself, the character of the neighbourhood is not a relevant consideration. This view is based on the old case of *St Helen's Smelting Co v Tipping* (1865) 11 HL Cas 642, in which the claimant complained of damage to trees as a result of fumes from copper smelting by the defendants. He succeeded in his claim despite the fact that he lived in a

manufacturing area. The House of Lords drew a rather forced distinction between nuisances which caused damage to the land and to crops, and those which merely affected the use or enjoyment of the land, stating that the character of the neighbourhood is only of relevance in the case of the latter.

However, despite this case, there have been instances much more recently in which damages have been awarded for private nuisance when the only complaint in private nuisance has been one connected with the use or enjoyment of the land and the locality has been highly industrialised. In such cases, other factors which are of relevance in assessing the lawfulness of the defendant's conduct have carried greater weight, and this is illustrative of the fact that locality is only one of several factors which the judges weigh in the balance.

Nevertheless, in *Blackburn v ARC Ltd* [1998] Env LR 469, it was held that permission to fill in a quarry was granted for only a temporary period, and this should not mean that nuisances were inevitable. The smells and noise generated by the work amounted to a nuisance because they were held to be more than those which must be tolerated in modern living conditions. The position was revised in *Murdoch v Glacier Metal Co Ltd* [1998] Env LR 732 in which the Court of Appeal confirmed the principle that noise must be judged in the context of the character of the locality. The character of a locality can change over the years.

- **Sensitivity of the claimant**

It is consistent with the notion of 'give and take' which pervades the law of nuisance that abnormally sensitive claimants are unlikely to succeed in their claims for private nuisance, since their perceptions of the defendant's conduct are not the criterion by which the activities are to be judged. The standard of tolerance is that of the 'normal' neighbour. The leading case is *Robinson v Kilvert* (1889) 41 Ch D 88, in which the claimant's claim was for damage to abnormally sensitive paper stored in a cellar which was affected by heat from adjoining premises. The claim failed because ordinary paper would have been unaffected by the temperature.

However, if the ordinary use of land would have been affected by the defendant's activities, the claim will succeed. In *McKinnon Industries v Walker* (1951) 3 DLR 577, a crop of delicate orchids was damaged by fumes from the neighbouring premises, and although the plants were unusually delicate the claimant succeeded in a nuisance claim because ordinary flowers would have suffered a similar fate.

Similar principles operate in relation to personal discomfort. In *Gaunt v Finney* (1827) 8 Ch App 8, Lord Selbourne LC explained the situation in this way:

> A nervous or anxious or prepossessed listener hears sounds which would otherwise have passed unnoticed, and magnifies and exaggerates into some new significance originating within himself sounds which at other times would have been passively heard and disregarded.

The maxim *sic utere tuo ut alienum non laedas* has been said to apply in cases of nuisance, and it means, in rough translation, 'you should use your own land in such a way as not to harm other people'. Although this notion has been described as 'mere verbiage', it still has some influence on the way in which nuisance cases are decided, and the principle of sensitivity is an example of this. The courts do not regard use of

land as unreasonable merely because an unduly sensitive neighbour objects to such use.

The courts are prepared to move with the times. In *Network Rail Infrastructure Ltd v Morris (t/a Soundstar Studio)* [2004] EWCA Civ 172, the Court of Appeal held that the use of electronic equipment was part of modern life and should not be regarded as ultra-sensitive.

In *Abbahall v Smee* [2002] EWCA Civ 1831, the Court of Appeal emphasised the importance of reasonableness between neighbours when apportioning the cost of abating a nuisance equally between the owners of properties on different floors of a building. The nuisance in that case was the roof that was in a serious state of disrepair.

In order to overcome the subjective approach to the problem, technical standards are sometimes referred to, but these are not conclusive. For example, in *Murdoch v Glacier Metal Co*, the Court of Appeal ruled that the World Health Organisation guidelines on the standard of night time noise which is likely to disturb sleep was not conclusive. Neither would the fact that there was evidence that sleep was disturbed necessarily mean that there was a nuisance. In any event, eyewitness accounts from neighbours and other local people are accepted in evidence by the Courts. For example in *Lyons v Gardner* [2007] EWCA Civ 259, the Court of Appeal approved the approach taken by the trial judge who had decided that the critical test in a claim in nuisance between the owners of adjacent properties was by reference to the eye-witness evidence of the owners who lived in the properties on a daily basis.

- **The utility of the defendant's conduct**
  In nuisance cases judges are concerned with balancing the conflicting interests of neighbouring landowners and householders, and will be less inclined to consider that an activity amounts to a nuisance if it is useful for the community as a whole taking into account all the surrounding circumstances, such as locality and the duration of the activities. Although it has been stated on several occasions that 'public benefit' is no defence to nuisance, if an activity is beneficial to the community as a whole, the judge will sometimes be prepared to find that the defendant has not behaved unreasonably. In *Miller v Jackson* [1977] 3 WLR 20, the Court of Appeal held that the playing of cricket on a particular ground had been for many years a benefit to the whole community but that, since the construction of houses close to the cricket ground, it had become a nuisance because the interference with the use and enjoyment of the adjoining properties was substantial. (Note Denning MR's famous dissenting judgment in this case.) In *Goode v Owen* [2001] EWCA Civ 2101, the Court of Appeal held that golf balls falling from a driving range onto the claimant's agricultural land constituted a nuisance. On the other hand, there are several cases in which activities are of benefit to the community, and because of their temporary nature they have been found not to be a nuisance. Among such activities is building work, provided it is carried out at reasonable times of the day, as in *Harrison v Southwark and Vauxhall Water Co* [1891] 2 Ch 409. In *Dennis v Ministry of Defence* [2003] EWHC 793, it was held that aircraft noise amounted to a nuisance, but that public interest demanded that flights continue.

  Damages were awarded to the claimants.

We must conclude from the various cases that 'public benefit', while not a defence in itself is one of a number of relevant factors, and the courts do not simply dismiss out of hand arguments based on it.

- **Malice**
  Malicious behaviour on the part of the defendant will certainly contribute to the impression that his or her conduct has not been reasonable, and may therefore amount to a nuisance. It is not necessary to establish malice in order to succeed in a nuisance claim but, if it is possible to prove that the defendant's activities were motivated by malice, the claimant has a good chance of succeeding. In *Christie v Davey* [1893] 1 Ch 316, the claimant had for several years been giving music lessons and holding musical evenings in his semi-detached house. The defendant, irritated by the noise, banged the party walls, shouted, blew whistles and beat tin trays with the malicious intention of annoying his neighbour and spoiling the music lessons. An injunction was granted to restrain the defendant's behaviour.

  In *Hollywood Silver Fox Farm v Emmett* [1936] 2 KB 468, the defendant was liable in nuisance when he deliberately fired guns close to the boundary with his neighbour's land where silver foxes were kept, so interfering with their breeding habits, as they are nervous animals and likely to eat their young if frightened. It appears that here the court was prepared to accept that what might otherwise have been a lawful act on the defendant's own land had become a nuisance because of the malice involved, although other factors, such as the frequency of the shots may also have been relevant.

  There is a line of cases concerning the right to abstract water from one's land which do not appear to be easy to reconcile with the cases on malice in nuisance. These cases include *Bradford Corpn v Pickles* [1895] AC 587, in which the House of Lords held that even where the defendant was deliberately diverting water from his neighbour's property with the intention of forcing them to buy his land at an inflated price, he was committing no legal wrong because no one has a right to uninterrupted supplies of water which percolates through from adjoining property. Here, dubious and even malicious motives alone could not create a cause of action where none had previously existed (*damnum sine injuria:* a wrong that is not recognised by the law as deserving a remedy).

  More recently, this case has been approved and applied several times, for example, in *Langbrook Properties v Surrey CC* [1969] 3 All ER 1424 and *Stephens v Anglia Water Authority* [1987] 1 WLR 1381, and it seems that these cases do not directly contradict the nuisance cases which deal with malice as they are distinguishable on the ground that cases concerning percolating water stand as a category on their own, being based upon ancient rules relating to water rights which can be separated from the general law of nuisance.

- **The state of the defendant's land**
  It is no longer the case, as it appears to have been at common law, that the defendant is able to leave the processes of nature to do their worst on his or her land without the fear of a nuisance claim by neighbours. The law was changed in *Goldman v Hargrave* [1967] 1 AC 645, a Privy Council decision. This case is rather confusing as it appears to equate nuisance and negligence, and much of the terminology used in it by the

judges is the language of negligence. An occupier of land in Australia did not take steps to extinguish a burning tree which had been struck by lightning, even though it was foreseeable that a wind, common in that area, could fan the flames and cause danger to adjoining land. He was liable for nuisance when the fire damaged neighbouring property. This was adopted into English law by the Court of Appeal in *Leakey v National Trust* [1980] QB 485, in which it was held that an occupier must take such steps as are reasonable to prevent or minimise dangers to adjoining property from natural hazards on his land, in this case the risk of landslides caused by the processes of nature.

In *Holbeck Hall Hotel Ltd v Scarborough BC* [2000] 2 All ER 705, the Court of Appeal held that the owner of land which formed the lower part of a cliff owed a 'measured' duty to prevent higher land being damaged by lack of support caused by erosion. This duty would only arise, however, if the owner of the lower land knew, or ought to have known, that there was some patent defect on his or her own land which gave rise to the danger, and it was reasonably foreseeable that the defect would damage the higher land if nothing was done to remedy the situation. The Court of Appeal emphasised that there would be no duty to remedy the fault if the defect was latent or hidden and could only be discovered by further investigation. In this respect, the law has moved forward since the decision in *Leakey*. Much of the reasoning in the case was based on considerations that are usually taken into account in negligence cases and the three-stage test in *Caparo Industries plc v Dickman* [1990] 2 WLR 358 was referred to.

In *Marcic v Thames Water Utilities* [2003] UKHL 66, the claimant's house had frequently been affected by a back-flow of foul water from the defendant's sewerage system between 1992 and 2000. The house smelled musty and was showing signs of subsidence that made it virtually unsaleable. The House of Lords held that the Water Company were not liable to the claimant, either in nuisance or in a claim for damages under the Human Rights Act. To impose liability would be inconsistent with limitations concerning drainage obligations under the Water Industry Act 1991, which struck a fair and proportionate balance between the interests of the individual and those of the community.

In *Bradburn v Lindsay* [1983] 2 All ER 408, it was held that the owner of one semi-detached house was liable in nuisance to the adjoining house owner for the spread of dry rot, a naturally occurring fungus which damages the fabric of buildings and which he should have attempted to eradicate.

In *Rees v Skerrett* [2001] EWCA Civ 760, the Court of Appeal held that the owner of a terraced house was under a duty to take reasonable steps to provide weather-proofing for a dividing wall that he had exposed to the elements by demolishing his house.

The subjective test for reasonableness, based on the defendant's financial ability to remedy the nuisance, has so far been confined to naturally occurring nuisances and, although it is an unusual approach, it has been approved by the Court of Appeal on at least two occasions. With the weight of this authority behind it, there is no reason why the principle could not be extended by the courts to all claims for nuisance, if it were to prove useful as a device for imposing or negating liability in the particular case. This is yet another example of the operation of policy, and is an

important instance of judicial reasoning in which the courts have, unusually, been prepared to enter into an explicit cost–benefit analysis in reaching a decision as to liability. A similar analysis was to be found in the pre-1984 cases on liability for injury to trespassers, which began with *British Rlys Board v Herrington* [1972] 1 All ER 749, in which the House of Lords was prepared to impose the responsibility for preventing an accident upon an occupier if he had 'the knowledge, skill and resources to do so'.

11.10.4 Indirect interference

The requirement that the interference with the claimant's use or enjoyment of land be indirect distinguishes nuisance from trespass, which covers only direct entry onto land, and negligence, which encompasses both direct and indirect acts.

Indirect interference includes the following: allowing smoke and fumes to drift onto the neighbouring land (*St Helen's Smelting Co v Tipping* (1865) 11 HLC 642); allowing unpleasant stenches to invade adjoining land (*Bliss v Hall* (1838) 4 Bing NC 183); smells and fumes from candle-making (*Bone v Searle* [1975] 1 All ER 787); smells from manure; disturbing neighbours' sleep by noise and vibrations (*Halsey v Esso* [1961] 2 All ER 145); allowing tree roots to suck moisture from adjoining soil, so causing subsidence (*Solloway v Hampshire CC* (1981) 79 LGR 449); quarry blasting (*Harris v James* (1876) 45 LJ QB 545); pollution of rivers with factory effluent (*Pride of Derby and Derbyshire Angling Association v British Celanese* [1953] Ch 149).

In *Younger v Molesworth* [2006] EWHC 3088 (QB), it was held that a nuisance claim could arise as a result of indirect interference, when the defendant had been aware of the serious ingress of water into the claimant's property and knew that his drainage system was not satisfactory to prevent a build-up of pressure in the adjoining wall, but had done nothing to remedy the situation.

11.10.5 Interference with the use or enjoyment of land or some right over or in connection with it

The tort of private nuisance is concerned primarily with land, and provided the damage complained of is physical damage to the land itself, including buildings, fixtures, crops, rights of way and anything else which falls within the definition of land in s 205 of the Law of Property Act 1925, there is no doubt that such damage will be covered by private nuisance. In the case of interference with servitudes, that is, rights of way and other easements, *profits à prendre*, rights of support, riparian rights and so on, liability is strict in many cases, and there is no need to prove damage. This, however, is an exception to the general rule in nuisance. In the case of rights of way, the test for nuisance is whether a right of way can be exercised as conveniently as it could before the interference (*B & Q plc v Liverpool and Lancashire Properties Ltd* [2000] 1 EGLR 92).

In *Crown River Cruises Ltd v Kimbolton Fireworks Ltd and Another* [1996] 2 Lloyd's Rep 533, it was held in a first instance decision that damage to a floating barge on the Thames permanently attached to a mooring on the river bed of which the claimants had exclusive possession under a licence was actionable in private nuisance. There were two vessels involved, a 'dumb' barge which acted as a mooring for other barges and vessels, and

a passenger barge which was attached to it. The barge which was itself also used as mooring was for the better use and enjoyment of the claimant's mooring right, and thus gave rise to the possibility of a claim for private nuisance. There was also a finding of negligence against the defendants who had not themselves taken any steps to inspect the contents of the barge for inflammable material, but had relied on the diligence of the second defendants. The fire on board the passenger vessel was caused by the negligent failure of the second defendants to attend to flammable material which had fallen onto the barge.

There has been some doubt as to whether other types of damage will be protected by private nuisance. 'Enjoyment' of land is a somewhat nebulous concept, but it is protected by the tort as long as the court is satisfied that the interference is substantial after balancing all the various interests involved, including those of the defendant. Much depends on the degree of interference. Interference with purely recreational activities, such as watching television, has been held not to be actionable in private nuisance (*Bridlington Relay v Yorkshire Electricity Board* [1965] 1 All ER 264). Where the interference was carried out by electrical means, doubt has been expressed as to whether this type of case would be decided in the same way today, when television serves educational and other purposes besides mere recreation (see the Canadian case of *Nor-Video Services Ltd v Ontario Hydro* (1978) 84 DLR (3d) 221).

However, in *Hunter and Another v Canary Wharf Ltd; Hunter and Another v London Docklands Development Corpn* [1997] 2 All ER 426, the House of Lords held that interference with television reception by a tall building with stainless steel cladding could not amount to an actionable public or private nuisance. This view was reached by analogy with a well established line of cases, some of them very old, in which the same conclusion was reached in relation to the presence or erection of a building in the line of vision, on the basis that this was not interference with use or enjoyment of land.

In the first claim, the claimant with many others, was seeking damages in nuisance for years of interference with television reception caused by Canary Wharf Tower which is 250 metres high and 50 metres square. In the second claim, the claimants were suing the London Docklands Development Council in negligence for deposits of dust on their properties caused by the building of the Limehouse Link Road. The issues raised in both cases were heard together as preliminary issues.

In *Network Rail Infrastructure v CJ Morris* [2004] EWCA Civ 172 it was held that a claim based on an allegation that a railway signalling system interfered with a recording studio must fail. It was not foreseeable that the interference could occur.

If injury to health, such as headaches caused by noise, is complained of, then providing the claimant is not unusually sensitive there will be a remedy in private nuisance.

One serious limitation which the English courts had imposed on claims for personal injuries in nuisance is that only a person who has a proprietary interest in the land affected by the nuisance will succeed in a claim. In *Maloney v Laskey* [1907] 2 KB 141, the claimant failed in her claim for personal injuries caused by a lavatory cistern falling on her head because of vibrations from machinery on adjoining property. She was merely the wife of the tenant and had no proprietary interest herself in the land. The view of the Court of Appeal was:

> No principle of law can be formulated to the effect that a person who has no proprietary interest in property, no right of occupation in the proper sense of the term can maintain an action of nuisance arising in an adjoining house.

It is logical that this rule should have applied to private nuisance in the light of its history, and it is of little significance now that the negligence claim has been highly developed and would cover such situations.

However, in *Hunter v Canary Wharf*, the Court of Appeal held that in the light of the trend towards giving additional legal protection to occupiers, the relevant criterion is 'occupation of property as a home'. Pill LJ, who gave the leading judgment, said:

> It is no longer tenable to limit the sufficiency of that link by reference to proprietary or possessory interests in land. I regard satisfying the test of occupation of property as a home as providing a sufficient link with the property to enable the occupier to sue in private nuisance.

This trend has been observed in other jurisdictions (in Canada in *Devon Lumber v McNeill* (1988) 45 DLR (4th) 300 and New Zealand in *Howard Electric v Mooney* (1974) 2 NZLR 762) and in England in *Khorasandjian v Bush*, in which it had been held by the Court of Appeal that the wife of the owner of the matrimonial home had the right to an injunction to prevent harassing telephone calls to the property. In this last case, Dillon LJ had justified the decision as follows: 'The court has at times to consider earlier decisions in the light of changed social conditions.'

He continued:

> If the wife of the owner is entitled to sue in respect of harassing phone calls, then I do not see why that should not also apply to a child living at home with her parents.

This approach was to be welcomed, though it remained to be seen how far it would extend the scope of actionable nuisance to relatives, carers and casual lodgers. It seems strange that the Court of Appeal was prepared to move with the times in this respect but was not minded to regard the interference with television reception affecting some 30,000 people as capable of amounting to an actionable nuisance in modern law. This ambivalence has been described by one writer as an example of the 'great British compromise' (Burnet, *Housing Law*, 2nd edn, 1999, London: Cavendish Publishing).

When *Hunter v Canary Wharf* reached the House of Lords [1997] AC 655, the Court of Appeal decision was reversed. After carefully reviewing the law of nuisance in detail, their Lordships concluded that landowners are entitled to build on their land as they wish, provided planning requirements are met. Accordingly, they will not be liable in nuisance for erecting large buildings which interfere with the television reception of other people living in the vicinity. However, their Lordships did not rule out the fact that on occasion interference with television reception might be protected by the law of nuisance in appropriate circumstances, but the mere fact that a building was in the way, as in this case, was not enough.

On the separate point concerning the right to sue in nuisance, it was decided by a majority (Lord Cooke dissenting) that a claim in private nuisance can only be brought by a person with a proprietary interest in the land affected, so no claim is available in nuisance to other people sharing the same house who do not have a proprietary interest in the land. This decision is a restatement of the long established law of nuisance and the

House of Lords has not taken the opportunity to extend the law which had been offered by the Court of Appeal in this case and in the earlier case of *Khorasandjian v Bush*. One reason for that may be that the position is to some extent covered by the statutory recognition of the tort of harassment in the Protection from Harassment Act 1997 which deals with the problems of nuisance telephone calls which arose in that case. In *Khorasandjian v Bush*, the Court of Appeal had been prepared to extend the right to sue in nuisance to people who, in the words of Pill LJ, have a 'substantial link' with the land, such as the use of the land as a home. The House of Lords considered that it would be too difficult to decide who should be included in that category, and that, in any event, such an extension of the right of action would transform nuisance from a tort to land into a tort to the person which was not an acceptable way for the law to develop. The tort of negligence was the correct action in such cases. Lord Hoffmann considered whether there was any policy reason why the old rule should be abandoned and stated:

> Once nuisance has escaped being a tort against land, there seems no logic in compromise limitations, such as that proposed by the Court of Appeal, requiring the claimant to have been residing on land as a home . . . There is a good deal in this case and in other writings about the need for the law to adapt to modern social conditions. But the development of the common law should be rational and coherent. It should not distort principles and create anomalies merely as an expedient to fill a gap.

Lord Lloyd took a similar approach, expressing the view that 'it is one thing to modernise the law by ridding it of unnecessary technicalities, it is another thing to bring about fundamental change in the nature and scope of a cause of action'.

The House of Lords' decision in *Hunter v Canary Wharf* is of great importance and should be read carefully. It reviews all the major decisions on the points in issue and reasserts the common law principles, concluding that it remains necessary to maintain a distinction between nuisance and negligence and ending much of the academic speculation on the subject.

In *McKenna and Others v British Aluminium Ltd* [2002] Env LR 30, it was held that even though claims in nuisance could not be brought by people with no proprietary interest in their homes, such people had an arguable case under the Human Rights Act 1998 where there had been an interference with their rights under Art 8 (the right to family and private life).

11.10.6 Who can claim in private nuisance?

Private nuisance protects anyone who has the use or enjoyment of the land affected. Anyone who owns rights over or in connection with that land may also bring a claim for nuisance. Thus in *Cheung v Southwark London Borough Council* Ch D 19/12/2007 it was held that the claimant did not have *locus standi* to bring claims for public and private nuisance and breach of s 130 of the Highways Act 1980 in respect of a certain piece of land, because the claimant did not have a proprietary interest in the land, and had not suffered damage over and above the general inconvenience to the public.

The Court of Appeal held, in *Pemberton v Southwark LBC* [2000] 1 WLR 1672, [2001] 1 WLR 538, [2000] 3 All ER 924, that even a tolerated trespasser may sue for nuisance, if he or she has sufficient interest in the land affected by the nuisance. However, in *Delaware Mansions and Fleckson Ltd v Westminster CC*, it was held that a management company

which was owned by tenants who had purchased the freehold of a block of flats had insufficient interest in the property to establish a right to sue in private nuisance. Their individual claims in negligence also failed and, as the right to sue had not been assigned to the management company, there could be no claim by the company in negligence. The formation and running of a management company of this type is the usual way in which tenants proceed in organising the maintenance of blocks of flats after purchasing the freehold, and this case is important because it indicates that those who are involved in advising the tenants must be aware of the pitfalls of the situation.

In *Dobson v Thames Water Utilities* [2007] EWHC 2021 (TCC), a case that demonstrates the complexities of overlapping statutory and common law nuisances, the court was asked to decide preliminary issues. It was held that as the claims related to odours and mosquitoes from a sewage works under s 94(1)(b) the Water Industry Act 1991, claims for nuisance in the absence of negligence would not be available. However, claims arising in negligence would not be precluded as long as they were not inconsistent with the statutory process under the Act.

Concerns about the indeterminacy which afflicts nuisance and negligence claims may also arise from the case of *Hunter v Canary Wharf; Hunter and Others v London Docklands Development Corpn*. The second claim in this case was for negligence resulting in annoyance, discomfort and damage to property caused by deposits of dust when a new road was being constructed. The Court of Appeal, taking the view that dust is an inevitable consequence of modern life, and that a reasonable amount of cleaning is to be expected of householders, nevertheless held that if the dust was excessive and could be shown to have caused physical damage to the property rendering a diminution in its value, there could be a claim for damages in negligence to cover the cost of cleaning and repair. Pill LJ said:

> In my opinion, the deposit of dust is capable of giving rise to an action in negligence. Whether it does depends on proof of physical damage and that depends on evidence and the circumstances.

Such an approach is more consistent with the law of nuisance.

Habinteg Housing Association v James (1994) 27 HLR 299 is a case which illustrates that a claimant who has suffered considerable damage may be unable to claim any compensation if the facts of the case mean that there is no action available in English law, despite the fact that, at first sight, it would appear that there might be a claim for nuisance or negligence. In such circumstances, the conclusion must be that the law of tort, even in conjunction with the patchwork provided by related public law, is inadequate to meet the demands of individual justice. The case concerned the tenant of a flat owned by a housing association. Under a standard form agreement signed in 1986, there were covenants by which the landlord agreed to maintain and keep in good repair the structure and exterior of the premises. There was no specific mention in the tenancy agreement of responsibility for vermin control. The tenant soon discovered that the flat was infested with cockroaches and that, with the tenants and people on the same estate, her food, carpets and furniture were contaminated and damaged. The infestation was eventually cured after five years when the local authority, acting under powers conferred on them by the Public Health Act 1936, served notice on the landlords requiring them to put an end to the problem. The infestation was eradicated, by means of disinfestation of

the whole block, by means of public health law which is aimed at preventing further damage. However, the tenant sought tort damages for £10,000 to cover past loss and inconvenience. The Court of Appeal held that as there was no evidence that the infestation had started in and spread from the landlord's flat as a result of breach of the repairing covenants, there could be no claim for nuisance. Nor could there be a claim for negligence, though it was conceded that this might be possible in certain circumstances on the collapse of a nuisance claim. However, it was impossible to construct a duty of care in this situation because both physically and legally the block disinfestation only became possible once the abatement notice had been served on the landlords by the local authority.

The Law Commission (*Landlord and Tenant: Responsibility for State and Condition of Property*, Law Com 238, 1996, London: HMSO) has considered the problems raised by this particular case and other gaps in the law relating to the responsibility of landlords for the condition of property in both the private and public sectors, and its main recommendation is the updating of the implied covenant for fitness for human habitation in s 8 of the Landlord and Tenant Act 1985.

11.10.7 Proof of damage is usually necessary

Yet another factor which distinguishes nuisance from its companion trespass, is that, in order to succeed in nuisance, the claimant must prove that damage has been suffered. Private nuisance is not actionable *per se*, with the exception of interferences with servitudes, discussed above.

11.10.8 The relationship between private nuisance and negligence

The claim has been made that negligence is gradually encroaching upon some of the other torts, especially private nuisance, and that one day negligence will take over from nuisance. Glanville Williams (*Foundations of Tort*, 1984, London: Butterworths) explains the trend in this way:

> Why should we not say that people are under a duty of care not to allow a noxious escape of such a nature that the claimant cannot reasonably be expected to tolerate it? It follows that nuisance is a branch of the law of negligence. It merely adds to the list of duties of care.

These are many examples of cases in which both nuisance and negligence are claimed, and the boundaries are not always blurred between the two torts. One such case is *Thames Water Utilities Ltd v London Underground* [2004] EWHC 2021 (TCC). A water main owned by the claimants had burst after there had been extensive drilling and tunnelling in the area during the construction of the Jubilee Line on the London Underground. It was held the claim for negligence for failure to use reasonable care and skill should succeed. The claim for nuisance for removing ground support also succeeded.

There are a number of confusing judicial statements on the subject and, in some instances, judges use the terminology associated with negligence in nuisance cases. For example, in *Leakey v National Trust*, Lord Megaw said:

> The considerations with which the law is familiar must all be taken into account in deciding whether there has been a breach of duty, and if so what the breach is.

In *Bolton v Stone* [1951] AC 850, counsel admitted that the case could not be one of nuisance as there was no negligence involved and in *Hurst v Hampshire CC* (1997) it was said that foreseeability is a prerequisite for nuisance.

More recently, the three-stage test for duty of care in negligence was used in *Holbeck Hall Hotel Ltd v Scarborough BC* [2000] QB 836, a nuisance case in which the two torts clearly merged.

Further problems are created by the fact that the courts appear to distinguish between the two torts without giving reasons for the distinction, and without explanation of how the distinction is to be made.

It is true that the same fact situation may give rise to claims in both private nuisance and negligence, and that fault of some kind must be proved in order to succeed in both, except in nuisance cases involving interference with servitudes.

Most of the problems arise in relation to the concept of 'reasonableness', which is referred to in determining liability in both nuisance and negligence.

The notion of reasonableness frequently involves foresight of harm, and this issue gave rise to crucial considerations in *Cambridge Water Co Ltd v Eastern Counties Leather plc* [1994] 2 WLR 53. The claimant used a borehole to extract groundwater for domestic use and consumption, and it emerged that the water in this borehole had become polluted by spillages of solvents over many years at the defendant's tannery. The claimant's claim in negligence, nuisance and *Rylands v Fletcher* failed. The House of Lords decided that there had been reasonable use of the land on the basis of 'give and take' and, therefore, the nuisance claim must fail. Lord Goff explained the position in the following words:

> If the user is reasonable, the defendant will not be liable for consequent harm to his neighbour's enjoyment of his land; but, if the user is not reasonable, the defendant will be liable, even though he may have exercised reasonable care and skill to avoid it . . . But, it by no means follows that the defendant should be held liable for damage of a type which he could not reasonably foresee; and the development of the law of negligence in the past 60 years points strongly towards a requirement that such foreseeability should be a requirement of liability for damages in the law of nuisance. For if a claimant is in ordinary circumstances only able to claim damages in respect of personal injuries where he can prove such foreseeability on the part of the defendant, it is difficult to see why . . . he should be in a stronger position to claim damages for interference with the enjoyment of his land where the defendant is unable to foresee such damage.

This in effect means that there is a similar 'state of the art' defence in nuisance to that which exists in negligence cases such as *Roe v Minister of Health* [1954] 2 QB 66 (see 7.2.2, above) and in product liability under the Consumer Protection Act 1987. The law thus provides no incentive to those developing new techniques in manufacturing to ensure that their products and methods are safe to use or environmentally friendly. However, it is arguable that the test of substantive liability is still reasonable user, and a foresight of the kind of damage is merely the application of remoteness to nuisance. While it would be unfair to impose strict liability retrospectively through nuisance or the rule in *Rylands v Fletcher* for the mistakes of the past when there is no such strict liability in the ordinary law of negligence or the law of product liability, this does mean that the relationship

between the various torts is now closer than ever despite the fact that there were precedents in existence before the *Cambridge Water* case which ruled that liability in relation to ground water pollution was strict (*Ballard v Tomlinson* (1885) 29 Ch D 115). In view of the serious threat which manufacturing industry still presents to the environment through phenomena, such as acid rain and the hole in the ozone layer, the arguments in favour of strict liability for situations such as that arising in the *Cambridge Water* case are strong.

However, the notion of fault in negligence involves different considerations to that in private nuisance, although the reasonableness of the defendant's behaviour is assessed in both torts. As we have seen, nuisance allows explicit consideration of the claimant's economic position in some cases, whereas, in negligence, cost-benefit analysis is shunned, at least openly. The relevant factors for determining fault in nuisance include the nature of the locality and other factors which would not usually be relevant in negligence, but that is merely because of the importance of land in the equation. In both torts, it is possible for the judges to arrive at decisions on grounds of policy, using the reasonableness test to justify such decisions.

Lord Reid summed up the situation in *The Wagon Mound (No 2)* [1967] 1 AC 617, when he said:

> It is quite true that negligence is not an essential element in nuisance. Nuisance is a term used to cover a wide variety of tortious acts, and in many negligence in the narrow sense is not essential . . . Although negligence in the narrow sense may not be necessary, fault of some kind is almost always necessary, and generally involves foreseeability.

In effect, the standard of care in nuisance is more variable than that in negligence, and nuisance appears, despite its ancient origins, to be capable of flexible development in the light of social trends. As Shaw LJ points out in *Leakey v National Trust*:

> Seen in the light of Megaw LJ's analysis and exposition of the long line of cases, the judgment in *Goldman v Hargrave* may represent the climax of a movement in the law of England expanding that part of the law which relates to liability for nuisance.

Quite apart from the obvious historical difference, there are further important distinctions between nuisance and negligence, particularly in relation to who can sue and to what type of damage may be recoverable, and also to the remedies which may be required and, despite the claims that have been for negligence, the two torts remain conceptually distinct from one another. However, the Court of Appeal held in *Rupert St John Loftus Brigham v London Borough of Ealing* [2003] EWCA Civ 1490, that the rules for determining causation were the same in nuisance and negligence.

11.10.9 Who can be sued for private nuisance?

Any person who creates the nuisance can be sued, whether or not that person is the occupier of the land at the time of the action. However, it is most usual for the occupier to be sued, and the occupier may also be vicariously liable for the nuisances of servants and independent contractors if the duty concerned is non-delegable. Occupiers who adopt and continue to allow nuisances on their land may also be liable, even if such nuisances are created by predecessors in title, trespassers or third parties (*Sedleigh Denfield v O'Callaghan* [1940] AC 880).

A single individual or enterprise may be identified and sued for nuisance in cases where the accumulation of several activities causes interference with adjoining property. It is not a valid defence for the individual who has been singled out to attempt to prove that the contributory acts of others are responsible for the nuisance, even though the activities of each one, taken alone would not amount to a nuisance. In *Pride of Derby and Derbyshire Angling Association v British Celanese Ltd*, fishing in a river was ruined by pollution from several factories, but the defendants could not escape liability by pleading that they were not the only polluters.

A landlord may be liable for nuisances emanating from land in certain exceptional circumstances, for example if the landlord had knowledge of the nuisance before letting, or where the landlord reserved the right to enter and repair the premises.

In *Hussain and Another v Lancaster CC* [1999] 4 All ER 125, the Court of Appeal held that a local authority could not be liable in nuisance or negligence for failing to take the necessary steps to prevent council tenants and members of their households or families from committing acts amounting to criminal harassment of owners of property nearby. The acts involved in this case were committed by several identifiable people and included the shouting of threats, racial abuse and various forms of intimidation. The Court of Appeal reviewed the cases concerning responsibilities of landlords and local authorities in nuisance for the acts of their tenants and rejected arguments advanced by counsel for the claimants that local authorities are responsible for common parts of their land such as avenues and walkways, and that this responsibility creates the necessary links between the tenants' properties and the land of the claimants. It was held that the harassment did not, as the judge at first instance had found, emanate from common parts of the estate. A similar view was taken in a claim against a landlord for nuisance caused by the anti-social behaviour of other tenants (*Mowan v Wandsworth LBC and Another* [2001] 33 HLR 56). Arguments based on negligence also failed, on the basis that it would not be fair, just or reasonable to hold the council liable in the circumstances (see *X (Minors) v Bedfordshire CC* [1995] 2 AC 633).

By contrast, local authorities have been held liable in nuisance for the repeated acts of travellers whom officials knew were on council property as licensees. In *Lippiatt and Another v South Gloucestershire CC* [1999] 4 All ER 149, the Court of Appeal distinguished the *Hussain* case on the grounds that the conduct of the people who created the nuisance in *Hussain* was not linked to, and did not emanate from the houses in which they were tenants. As identifiable individuals, each of the offenders could have been personally liable in public nuisance. In the present case, however, the travellers were permitted by the council to congregate in a particular, relatively small area of land, and they used this as a base for committing the criminal acts in question. The council could, therefore, be regarded as responsible for the nuisance because of the continuing presence of the travellers on council land, from which they committed acts of trespass on the claimants' properties.

In the case of licensees, the preconditions for a landowner's liability are, in the words of Mummery LJ, as follows:

> The claimant's use and enjoyment of his rights in his land was interfered with by the continuing presence on the defendant's land, of persons whose actual or apprehended activities included, to the knowledge of the defendant, harmful acts repeatedly

committed by them on the claimant's land from their base on land occupied (that is, owned) by the defendant.

It seems that landlords are not responsible for the nuisances of tenants in the absence of authorisation, express or implied (*Smith v Scott* [1973] CR 314). This lighter burden on landlords presumably reflects the fact that they have parted with possession of the property and have less control over what happens on it than a licensor has over licensees such as travellers.

The law on landlords' liability for nuisance is still developing. For example, in *Southwark LBC v Mills* (1998) unreported, the Court of Appeal held that a landlord cannot be compelled to carry out soundproofing of flats to prevent one set of tenants from annoying others. Mantell LJ, faced with conflicting lines of authority on the point, was reluctant to construe a covenant of quiet enjoyment in a lease 'as encompassing a promise to alter or improve' the premises. The House of Lords (2000) confirmed that the covenant for quiet enjoyment could not be used to demand repairs or improvements.

11.11 DEFENCES TO PRIVATE NUISANCE

The general tort defences apply to nuisance. These include consent, *volenti non fit injuria* (consent), contributory negligence, Act of God, act of a stranger and, possibly, inevitable accident (see Chapter 20).

In addition there are other defences which are of particular importance in private nuisance. These are listed here.

11.11.1 Prescription

If the nuisance has been continued for 20 years without interruption the defendant will escape liability by pleading a prescriptive right to commit the nuisance.

The 20 years is counted from the time that the claimant becomes aware of the nuisance for the first time, even if the nuisance had been continued for many years before the claimant moved into the neighbourhood. The leading case is *Sturges v Bridgman* (1879) 11 Ch D 852, in which the defendant had operated a confectionary manufacturing business for more than 20 years when the claimant, a doctor, built a new set of consulting rooms in his garden immediately adjacent to the building which housed sweet making machinery. The claimant then complained of nuisance from the noisy machinery and brought a successful legal action against the defendant. The court decided on the facts that there was no nuisance until the consulting rooms were built, and that the 20 years began to run from that date, so the defence of prescription was not available.

In *Miller v Jackson* [1977] 3 WLR 20, the argument favoured by Lord Denning that the claimants who had bought property near a place where they knew that cricket had been played for many years had no right to complain of the nuisance it caused, was rejected by the majority of the Court of Appeal, as it is not a defence to argue that the claimant 'came to the nuisance'.

11.11.2 Statutory authority

There will be a defence to private nuisance if it can be shown that the activities complained of by the claimant were authorised expressly or impliedly by a statute. As Lord Dunedin explained in *Corpn of Manchester v Farnworth* [1930] AC 171:

> When Parliament has authorised a certain thing to be made or done in a certain place, there can be no action for nuisance caused by the making or doing of that thing if the nuisance is the inevitable result . . . The onus of proving that the result is inevitable is on those who wish to escape liability for nuisance.

In *Allen v Gulf Oil Refining Ltd*, it was held that the defence of statutory authority operated to the benefit of the oil refinery which was causing great inconvenience and annoyance to local residents who complained of unpleasant odours, noxious fumes, vibrations, heavy traffic and loud noise in their previously quiet rural setting.

In *Hunter v Canary Wharf*, the Court of Appeal took the view that, in establishing fast track planning permission procedures by statutory instrument under the Local Government Planning and Land Act 1980, Parliament had not granted immunity to a nuisance claim by means of a defence of statutory authority in relation to a particular structure built as a result of the procedure. In *Wheeler v Saunders* [1995] 2 All ER 697 it was held that unlike Parliament, planning authorities have no power to authorise a nuisance except in so far as they have statutory authority to allow a change in the character of a particular neighbourhood and the nuisance was the inevitable result of authorised use. In this case, there was no change in the character of the neighbourhood but only a small change of use allowing the building of pig units which did not amount to a strategic planning decision. The defence of statutory authority did not apply in a claim for nuisance arising out of the foul smells which emanated from the pig units.

The character of different localities will change over the years as they are developed, and the way in which this happens depends on the judgment of the planning authorities to whom Parliament has delegated the delicate task of balancing the interests of the community with those of the individuals. This point was made in *Gillingham BC v Medway (Chatham) Dock Co* [1993] QB 343, where the local authority was bringing a claim in public nuisance against the defendant company, to whom they themselves had granted planning permission.

11.12 REMEDIES FOR PRIVATE NUISANCE

There are a number of remedies for private nuisance. Some are self-help remedies for which the aggrieved party need not trouble the courts.

11.12.1 Damages

Compensation will be paid if it can be proved that damage to land, personal injuries or substantial inconvenience have been caused. Reasonable remedial expenditure may be recovered (*Delaware Mansions and Fleckson Ltd v Westminster CC*). The amount payable will be calculated according to the basic principles for assessing damages in tort.

The appropriate measure of damages has been questioned since the implementation of the Human Rights Act 1998. In addition to an award for past losses, it appears that in appropriate cases damages may be awarded for future losses if there has been a breach of the claimant's Convention rights.

In *Fowler v Jones* (2002) unreported, the claimants complained of nuisances from barking dogs, smoke and smells. The judge ruled, applying *Hunter v Canary Wharf*, that the claimants were entitled to damages for the diminution in the amenity value of their property during the continuation of the nuisance.

11.12.2 Injunction

A very common remedy for nuisance is the award of an injunction, and this will be almost automatic in many cases, though the court does have a discretion to award damages in lieu of an injunction. An injunction will be refused if the interference with the claimant's land is trivial (*Shelfer v City of London Electric Lighting Co* [1895] 1 Ch 287), as the courts do not wish to collude in allowing defendants to 'buy off' the rights of claimants (*Kennaway v Thompson* [1981] QB 88). However, an injunction was refused in *Miller v Jackson*, and damages were paid instead, which would have been small consolation to the claimants who were in real physical danger in their gardens from stray cricket balls. A similar situation arose in *Goode v Owen* where an injunction was refused because the defendants could not be expected to put up a 40 foot fence to protect an area of only one and a half acres from falling golf balls.

The prerequisite for damages being awarded in lieu of an injunction is that it would be oppressive for the defendant if an injunction were to be granted. In *Gafford v Graham* [1999] EGLR 75, the basis for the award of damages was the sum which the claimant might reasonably have demanded for relaxing the relevant restrictions in perpetuity. The claimant in that case was refused an injunction because he had stood by and watched while the defendant had built a structure and had made no complaint at the time (see also *Dennis v Ministry of Defence* [2003] EWHC 793).

An injunction was granted in *Mika v Chetwynd* (2000) unreported when unpleasant odours from the defendant's knackers yard interfered with the claimants' caravan business. However, in *Jacklin v Chief Constable of West Yorkshire* [2007] EWCA Civ 181, the Court of Appeal approved the decision of judge to grant a mandatory injunction requiring the police authority to remove a container obstructing a stretch of land over which a landowner had a right of way. Damages in lieu would not have been appropriate. Although the police authority had been able to satisfy the first three criteria in the rule in *Shelfer v City of London Electric Lighting Co (No 1)* [1895] 1 Ch 287, it had been unable to satisfy the fourth, since it had not shown that granting such an injunction would be oppressive. The matter was further considered in *Regan v Paul Properties Ltd* [2006] EWCA Civ 1391, in which the Court of Appeal ruled that the trial judge who had found it proved that there had been an infringement of the claimant's right to light, misdirected himself by placing the burden of proof on the claimant to persuade the court as to why he should not be left to a remedy in damages but should be awarded a mandatory injunction.

11.12.3 Abatement of the nuisance

This ancient self-help remedy involves the claimant in taking steps to prevent the nuisance by entering the defendant's property and removing the source of the nuisance. Anything belonging to the defendant must be left on his property; even tree branches which have spread from adjoining land should, strictly, be returned. A person entering land in the process of abating a nuisance will have a defence to trespass.

The claimant must normally give notice of the abatement, but need not do so in an emergency or if the nuisance can be abated without entering the defendant's land. Tree roots and overhanging branches are often the subject of abatement (*Jones Ltd v Portsmouth CC* [2002] EWCA Civ 1723).

Even this remedy can give rise to problems as the landowner who feels aggrieved by damage to boundary trees or hedges may seek an injunction and damages against the neighbour attempting to abate the nuisance. This is what happened in the much publicised case of a dispute between neighbours over a 22 feet high hedge (*Stanton v Jones* (1995) unreported).

In *Burton v Winters* [1993] 1 WLR 1077, [1993] 3 All ER 847, there had been a long standing boundary dispute between the parties, which arose out of the fact that a garage had been built along the boundary line by the defendant's predecessors in title. The wall did encroach onto the claimant's property by four and a half inches, and technically this amounted to a trespass, but the judge refused an injunction because the encroachment was minimal, but he ordered the payment of damages because of the diminution in value of the claimant's property. There continued a campaign of harassment by the claimant which meant that the garage was damaged and eventually the defendants obtained an injunction to prevent the claimant interfering further with their property. Despite this the criminal damage and harassment continued and the claimant was sentenced to two years' imprisonment for contempt of court. The claimant continued to argue for the right to abate the nuisance and self-help to remedy the trespass and the Court of Appeal held that these remedies were no longer available to her, expressing the view that the common law remedies should be limited in scope because they can lead to further problems in disputes between neighbours.

It is not always necessary for the person seeking to abate a nuisance to consult the landowner first. In *Dayani v Bromley LBC* [2001] BLR 503, it was held that the defendant was not liable for damage to the claimant's property where it had acted reasonably, despite not consulting the claimant before abating the nuisance incurred by a dangerous tree.

11.12.4 Anti-Social Behaviour Orders

Under the Housing Act 1996, especially s 153, there are broad provisions for ousting people from their homes and excluding them from certain areas. The Court of Appeal decision in *Moat Housing Group v Harris* [2005] UWCA Civ 287 illustrates that limitations can sometimes be placed on orders if they are too wide. There is now a considerable body of law concerning antisocial behaviour orders in relation to nuisance. Although ASBOs are matters for the criminal courts, they can sometimes solve nuisance problems in civil law. See *R v Doughan* [2007] EWCA Crim 598.

11.12.5 Party Wall, etc, Act 1996 and High Hedges Act 2003

This Act allows landowners to demolish, build or repair walls between their own and adjoining properties. 'Party Structure Notices' must be served on adjoining landowners before the work is carried out and, if the owner of the neighbouring land objects, the dispute can be settled by a surveyor, who has the power to apportion the cost of the work. The Act allows disputes to be settled without going to court.

Under the High Hedges Act 2003, a person who believes that his neighbour's hedge is too high may complain to the local authority and seek a remedial notice.

11.13 THE RULE IN *RYLANDS v FLETCHER*

The mid-19th century saw the emergence of a new form of strict liability in the rule in *Rylands v Fletcher*, at a time when fault was beginning to dominate liability in tort.

Although Blackburn J and the House of Lords, in expounding the rule, claimed merely to be stating a long standing principle of the common law, most writers now agree that in fact new law was being made. A number of attempts have been made to explain the policy reasons which lay behind the formulation of this new law, the most popularly accepted view being that the judges, who were drawn from the landed gentry, resented the newly emerging wealth of the industrial developers, and wished to burden them with strict liability for polluting adjoining land. In fact, despite its claim to be a rule of strict liability, the rule in *Rylands v Fletcher* has many attributes of fault liability today. As will be seen, the concept of reasonableness, akin to that in nuisance, has crept into the law through the notion of 'non-natural user', and the rule has not been developed in English law to provide protection against all hazardous activities, and Scots law has completely rejected the rule. In Australia the rule in *Rylands v Fletcher* has been abandoned altogether in favour of referring everything to 'proximity'.

11.13.1 Facts of the case

In *Rylands v Fletcher*, the defendants employed independent contractors to construct a reservoir on their land. When digging the reservoir, the contractors found mine workings on the land, and failed to seal these properly before completing their work and filling the reservoir with water. As a result, water flooded through the mine shafts into the claimant's mines on the adjoining property. The defendants could not be held liable in nuisance because the flood was caused by a single act rather than a continuous state of affairs, nor could they be liable for trespass because the entry onto the land was indirect. There was no evidence of negligence on the part of the landowner and at that time negligence had not developed as an independent tort. Ultimately, the judge stated a new principle of liability to cover this situation.

11.13.2 The rule

Per Blackburn J:

> The person who, for his own purposes, brings onto his land and collects and keeps there something likely to do mischief if it escapes must keep it in at his peril and if he does not

> do so, he is *prima facie* liable for all the damage which is the natural consequence of its escape.

To this the House of Lords added the additional requirement that there must be non-natural user (that is use) of the land for the rule to apply.

11.13.3 The person who brings onto his land

The law distinguishes between things which grow or occur naturally on the land and those which are accumulated there artificially by the defendant. Thus, rocks (*Pontadawe RDC v Moore Gwyn* [1929] 1 Ch 656), thistles (*Giles v Walker* (1890) 24 QBD 656) and naturally collecting water do not fall within the rule. However, vegetation deliberately planted, water collected in bulk or in artificial configurations (*Rickards v Lothian* [1913] AC 263) and rocks or minerals, such as colliery waste which are dug up and left on land by the defendant, do fall within the rule.

In *Attorney General v Corke* [1933] Ch 89, it was held that gypsies are 'things likely to do mischief if they escape'.

11.13.4 For his own purposes

It seems that the rule will only apply if the landowner brings something inherently dangerous onto his land for his own purposes, rather than for those of another person, such as a tenant (*Rainham Chemical Works v Belvedere Fish Guano Co* [1921] AC 465).

11.13.5 Non-natural user

The above examples explain why the House of Lords clarified the rule by stating that the use of the land must be non-natural. However, the concept of non-natural user has proved a useful policy device in later cases, by which the ambit of the rule has been restricted. For example, in *Read v Lyons Ltd* [1947] AC 156, it was argued that running a munitions factory in wartime is natural use of land. Lord Porter said:

> All the circumstances of the time and place must be taken into consideration, so that what might be regarded as dangerous or non-natural may vary according to those circumstances.

Much will depend upon the prevailing social and economic climate. In *Musgrove v Pandelis* [1919] 2 KB 43, it was held that it was non-natural use to keep a car with petrol in its tank in a garage. There is little doubt that a similar case would be decided differently today.

In *Mason v Levy Auto Parts Ltd* [1967] 2 QB 530, the defendants were liable under the rule in *Rylands v Fletcher* when flammable material stored on their land ignited and fire spread to neighbouring property. The storage of the materials amounted to non-natural use of the land. The issue of non-natural user was also considered in the *Cambridge Water* case in which the question of spillages of industrial effluent which affect ground water could not be regarded as 'non-natural' since chemical spillages were regarded as normal in the particular industry at the time.

Water for domestic consumption, carried in a service pipe was held not to be

non-natural user of land through which the pipe ran in *Stockport MBC v British Gas plc* [2001] EWCA Civ 212. In *Transco plc v Stockport Metropolitan BC* [2004] 1 All ER 589 the House of Lords held that the supply of water to a tower block was a natural use of land. This is an important decision because it limits still further the development of this strict liability tort.

In *Transco plc v Stockport MBC* [2004] UKHL 61, the House of Lords gave further guidance on the concept of non-natural user. Water had escaped from a service pipe to a block of flats owned by the defendant council. That had resulted in damage to an embankment which had left the claimant's gas pipe exposed. The escape of water had not been the result of negligence, and as it was a sudden event, there was no possibility of a successful claim in nuisance. The question arose in the claim based on the rule in *Rylands v Fletcher*, as to whether the supply of water to a block of flats had been non-natural user. Dismissing the claim, the House of Lords held that such a supply of water is natural user of the land, and that strict liability under *Rylands v Fletcher* would only apply in extraordinary circumstances. Lord Bingham preferred to use the term 'ordinary' rather than 'natural' use of the land to explain the position. In this case nothing had been accumulated that was 'quite out of the ordinary' bearing in mind the time and place in which the events occurred. It was suggested by Lord Hoffman that it would be helpful in identifying non-natural user, to ask whether the risk was one against which the occupier would reasonably expected to carry insurance. On the other hand, Lord Hobhouse was unconvinced, and reasoned that in some cases where the risk was high the cost of insurance cover might well be prohibitive.

11.13.6 Something likely to do mischief

The substances which are collected must be inherently dangerous but this is open to interpretation by the courts and has been subsumed into the 'non-natural user' rule.

11.13.7 Escape

There will be no liability in *Rylands v Fletcher* unless there is an escape of the dangerous materials from the defendant's land. In *Read v Lyons*, the House of Lords clarified the requirement of escape. The claimant was working in a munitions factory during the Second World War when she was injured by an explosion. There did not appear to have been negligence on the part of the employers, and as the explosion had occurred on their own premises, there was no escape from their property. The result was that the claimant was without a remedy. This case has been criticised for restricting the development of strict liability for dangerous activities at a time when it could be argued that developing industry was creating yet more hazardous uses of land. Indeed, in the USA the rule of strict liability has been so extended.

11.13.8 Who can sue under *Rylands v Fletcher* and for what damage?

There is some authority to the effect that in order to sue under *Rylands v Fletcher*, the claimant must have an interest in land in the area which is affected, but there are also many cases in which the opposite view has been expressed. If the purpose of the rule is to control and compensate for ultra-hazardous activity, then logically there

is no need for the claimant to have any interest in land. If, however, the rule is merely an extension of nuisance, then some interest in land would be expected as a basis of a claim.

In *Rigby v Chief Constable of Northamptonshire* [1985] 2 All ER 985, the view was expressed that if there is an escape from the defendant's control on the highway onto the claimant's land the rule in *Rylands v Fletcher* can apply. This was approved in *Crown River Cruises Ltd v Kimbolton Fireworks Ltd and Another*, where the judge was of the opinion that there were strong arguments to extend the same principle to accumulations in or on a vessel in a navigable river.

In *McKenna and Others v British Aluminium Ltd* [2002] Env LR 30, a High Court judge held that there was an arguable case that where pollution from a factory had interfered with the Art 8 rights of claimants with no proprietary interest in their homes, they could be compensated under the Human Rights Act 1998. It may be the case that the law in *Rylands v Fletcher* is moving closer to that in nuisance (see *Hunter v Canary Wharf*), and that it will become increasingly difficult to succeed in a claim for that tort without being able to demonstrate an interest in the land onto which the dangerous thing escaped.

11.13.9 Is *prima facie* answerable for all the damage which is the natural consequence of the escape?

The owner of land close to the escape can recover damages for physical harm to the land itself and to other property (in *Halsey v Esso*, the owner of a car recovered compensation for damage to its paintwork when it was parked on a public road). There was clarity in the earlier cases in that an adjoining landowner could also recover damages for personal injury. In *Hale v Jennings* [1938] 1 All ER 579, the claimant was injured when a chair-o-plane escaped from the defendant's fairground machine onto his property. The judge had no difficulty in awarding him damages for personal injury. In *Read v Lyons*, however, a much more cautious approach was taken to the question of recovery for personal injuries, but with no definite conclusion. The matter was side-stepped in *Hunter v Canary Wharf* [1997] AC 65, as the claim in *Rylands v Fletcher* was abandoned at an early stage. Later, in *Transco v Stockport Metropolitan BC* [2003] UKHL 61, Lord Bingham said of *Rylands v Fletcher* liability:

> The claim cannot include a claim for death or personal injury, since such a claim does not relate to any right in or enjoyment of land. This proposition has not been authoritatively affirmed by any decision at the highest level. It was left open by Parker LJ in *Perry v Kendricks Transport Ltd* [1956] 1 WLR 85, 92, and is inconsistent with decisions such as *Shiffman v Order of St John of Jerusalem* [1936] 1 All ER 557 and *Miles v Forest Rock Granite Co (Leicestershire) Ltd* (1918) 34 TLR 500. It is however clear from Lord Macmillan's opinion in *Read* at pp 170–171 that he regarded a personal injury claim as outside the scope of the rule, and his approach is in my opinion strongly fortified by the decisions of the House in *Cambridge Water* [1994] 2 AC 264 and *Hunter v Canary Wharf Ltd* [1997] AC 655, in each of which nuisance was identified as a tort directed, and directed only, to the protection of interests in land.

However, this statement was made obiter, as the claim did not itself involve personal injuries. Nevertheless, since the tort in *Rylands v Fletcher* is closely related to nuisance it is

possible that a claim for personal injuries would be unsuccessful in modern law. In any event, the question of whether a person who is not an occupier of land close to the escape can obtain damages for personal injuries is even more open to doubt.

It is uncertain whether damages for economic losses are recoverable under the rule in *Rylands v Fletcher*. In *Weller v Foot and Mouth Disease Research Institute* [1966] 3 All ER 560, it was held that a claim for *pure* economic loss could not be sustained in *Rylands v Fletcher* because auctioneers who lost money through the escape of a virus from the research establishment had no interest in the land affected.

In the *Cambridge Water* case, the conclusion of the House of Lords in relation to *Rylands v Fletcher* was that the damage must be of a kind which is a foreseeable consequence of the escape. Economic losses that depended on physical damage to property were held to be recoverable in *LMS International Ltd v Wallaby Investments Ltd* [2005] EWHC 2065 (TCC). The claim in that case was for damages to cover building reinstatement costs and loss of rent. Since the claim for negligence and nuisance, also succeeded, it is not clear whether the economic losses were recovered in negligence, nuisance or under the *Rylands v Fletcher* rule. The judge simply said:

> The damages are likely to be encompassed by the *Rylands v Fletcher* claim as well as the primary and secondary negligence/nuisance claims.

Damage which is too remote will not be recoverable. In *Cambridge Water v Eastern Counties Leather* [1994] 2 AC 264 case, it was held that foreseeability of harm is a prerequisite of liability in *Rylands v Fletcher*.

11.13.10 Defences

A number of well established defences to the rule in *Rylands v Fletcher* mean that liability is not absolute, although it is strict:

- **Act of a stranger**
  If a trespasser or other person acting independently, and over whom the defendant has no control, causes the escape, the defendant will not be liable. The intervention must be unforeseeable for the defence to apply, and this aspect has been criticised, as it has the capacity to remove the tort from the realms of strict liability almost into the province of negligence. Examples are:
  - *Perry v Kendricks Transport Ltd* [1956] 1 WLR 85: a child threw a lit match into the empty petrol tank of an old motor coach parked on the defendant's land. The petrol cap had been removed by some unknown person. As their actions were unforeseeable, the defendant escaped liability, and much of the language used in the course of the case was that of negligence.
  - *Rickards v Lothian*: the defendant was not liable when an unknown person blocked a basin on his property and caused a flood which damaged a flat below. In India, it has been held that *whenever* there is an escape of something dangerous stored on premises, such as chlorine gas, the occupier will nevertheless be strictly liable in *Rylands v Fletcher*. This would be the case regardless of who caused the accident and whether or not it was foreseeable. In *Mehta v Union of India* (1987) AIR (SC), the Supreme Court held:

> If an enterprise is engaged in a hazardous or inherently dangerous activity and harm results to anyone on account of such activity, the enterprise is strictly and absolutely liable to compensate all those affected by the accident.

- **Default of the claimant**
  If the escape is wholly the fault of the claimant there will be no liability (*Eastern and SA Telegraph Co Ltd v Cape Town Tramway Co Ltd* [1962] AC 381). If the claimant's acts were merely contributory, damages will be reduced for contributory negligence.
- **Statutory authority**
  It may be the case that a statute exists which obliges a person or body to carry out a particular activity. If so, the defence of statutory authority may apply, but all hangs upon the construction of the statute. Often, statutes which authorise hazardous activities impose strict liability for accidents which may occur as a result of such activities, for example, the Nuclear Installations Act 1965.
- **Act of God**
  An act of God is an event which 'no human foresight can provide against, and of which human prudence is not bound to recognise the possibility' (*per* Lord Westbury in *Tennent v Earl of Glasgow* (1864) 2 M (HL) 22). In *Nichols v Marsland* (1876) 2 Ex D 1, the defendant was not liable in *Rylands v Fletcher* when exceptionally heavy rain caused artificial lakes, bridges and waterways to be flooded and damage adjoining land. In *Attorney General v Cory Bros* [1921] 1 AC 521, however, it was held that exceptionally heavy rain in the Rhondda valley in Wales (where the Aberfan disaster occurred in 1967) was not an act of God.
- **Consent**
  If the claimant has consented to the accumulation of the dangerous things, there will be a defence to *Rylands v Fletcher*, particularly if the activity is for the benefit of the claimant (*Peters v Prince of Wales Theatre Ltd* [1943] 1 AC 521).

11.13.11 What will become of the rule in *Rylands v Fletcher*?

It is clear that the scope of strict liability for hazardous activities has been restricted over the years, and the courts in the UK have never taken the opportunity to extend the rule in *Rylands v Fletcher* even in an age of environmentally conscious pressure groups.

From as recently as 1996, there is evidence that judges are very reluctant to extend the scope of this tort. In *Crown River Cruises Ltd v Kimbolton Fireworks Ltd and Another*, Potter J considered and rejected the opportunity of extending the rule in *Rylands v Fletcher* to the escape of accumulations of dangerous material on a barge to a vessel moored alongside it. His reason was based on the trends detectable in current judicial and academic opinion.

In *Cambridge Water Co Ltd v Eastern Counties Leather*, Lord Goff expressed the view that the storage of dangerous chemicals on land is a 'classic case of non-natural user', and this could have important implications for the future though, in that particular case, there was no imposition of strict liability for 'historic' pollution, that is damage done at a time when it was not realised that the storage of the chemicals was dangerous. Lord Goff continued (at para 17):

> I incline to the opinion that as a general rule it is more appropriate for strict liability in respect of operations of high risk to be imposed by Parliament than by the Courts.

In the event, the House of Lords rejected the idea of extending *Rylands v Fletcher* into a tort for hazardous activities as has been done in the US and India, and there appears to be little judicial appetite for any change or development in the common law in respect of the tort in the UK.

The House of Lords imposed restrictions on the development of the tort in *Rylands v Fletcher* and in *Transco v Stockport Metropolitan BC* [2004] 1 All ER 589.

In 1970, the Law Commission produced its *Report on Civil Liability for Dangerous Things and Activities* (Law Com 32, 1970, London: HMSO) and recommended rationalising and extending the rule in *Rylands v Fletcher* where activities are 'abnormally dangerous'.

In 1978, the Pearson Commission recommended that there should be a statutory scheme for compensating personal injuries caused by certain dangerous activities. The controllers of unusually hazardous activities could be required to take out insurance cover and the activities which would fall into the special categories could be identified by an advisory committee and legislated for by statutory instrument. The defences available would be more limited than at present.

None of the recommended changes has been implemented and it is extremely unusual for a claim under the rule in *Rylands v Fletcher* to reach the courts today. Recent examples include *E Hobbs (Farms) Ltd v The Baxenden Chemical Co Ltd* [1992] 1 Lloyd's Rep 54, and *LMS International Ltd v Wallaby Investments Ltd* [2005] EWHC 2065 (TCC).

11.14 LIABILITY FOR FIRE

The law relating to damage caused by fire and its spread is confused. Most fire damage today is compensated by insurance, and it is only very occasionally that liability at common law or by statute requires consideration.

11.14.1 Common law

The law has been concerned about liability for the spread of fire since mediaeval times and, in very early common law, the usual remedy was by means of a special action on the case for allowing the escape of the fire. However, none of the writers is clear as to the exact basis of liability for fire or its spread, or as to whether liability was strict or required proof of fault.

Three possible actions are available at common law:

- ***Rylands v Fletcher***
  If the fire was deliberately started, in the sense of being accumulated on the defendant's land, there could be liability under the rule in *Rylands v Fletcher*. However, it appears from the case of *Mason v Levy Auto Parts Ltd* that the approach of the courts is to consider the reasonableness of the defendant's conduct in keeping things on the land in the process of non-natural use, which are likely to ignite and the fire spread to the claimant's land. This appears to be closer to negligence than strict liability, and is in keeping with the views expressed in cases such as *H and N Emanuel Ltd v GLC*

[1971] 2 All ER 835, in which Denning MR said that an occupier would not be liable for the escape of fire which was not caused by negligence. In *E Hobbs (Farms) Ltd v The Baxenden Chemical Co Ltd*, in which a fire started in some debris below a workbench and spread to an adjoining building, it was held that there was liability under the rule in *Rylands v Fletcher*.

- **Nuisance**
  In the case of *Goldman v Hargrave* [1967] 1 AC 645, the Privy Council held that an occupier may be liable for the spread of a fire which began naturally, through lightning or even deliberately through the act of a stranger, if he failed to take steps to prevent its foreseeable spread to adjoining land.

- **Negligence**
  If a person is injured (*Ogwo v Taylor* [1987] 2 WLR 988) or suffers property damage (*Attia v British Gas* [1987] 3 All ER 455) in a fire, there will be the possibility of a claim for negligence or under the Occupiers' Liability Act 1957. If the activity which causes the fire is ultra-hazardous, an employer will be liable for the acts of his independent contractors (*Balfour v Barty-King* [1957] 1 All ER 156; *Spicer v Smee* [1946] 1 All ER 489).

In *Johnson v BJW Property Developments* [2002] EWHC 1131, it was held that the defendant was liable in negligence and nuisance caused by spread of fire from a domestic grate to the claimant's property. The fire had escaped as a result of the negligence of an independent contractor, and the defendant was liable primarily and vicariously.

In *Crown River Cruises Ltd v Kimbolton Fireworks Ltd and Another*, it was held that there was liability in nuisance and negligence for the spread of fire after debris from a firework display had landed on a barge on the River Thames and ignited and spread after some hours to a vessel moored to it.

In *Ribee v Norrie* [2001] HLR 69, the Court of Appeal held that an absent landlord was liable in negligence for damage to the claimant's property and for personal injury. The landlord was the occupier of common parts of a hostel where a tenant had carelessly started a fire. Smoke and fumes had spread to the claimant's property.

LMS International Ltd v Wallaby Investments Ltd [2005] EWHC 2065 (TCC) is one of the few claims reported in recent years for the spread of fire, and the claimant succeeded in establishing liability under the rule in *Rylands v Fletcher*. A fire had spread from the factory premises occupied by the defendant to the claimants' adjoining premises. Expanded polystyrene, which is recognised as a particularly dangerous substance, was made at the factory in question. Fire had broken out when an employee was cutting expanded polystyrene blocks with a hot wire machine. It spread quickly, causing extensive damage to the factory and the adjoining premises owned by the claimants. The claim was for damages to cover building reinstatement costs and loss of rent. The court also held that the decision not to install a safety system was negligent and in breach of the Fire Precautions (Workplace) Regulations 1997, and there was negligence in failing to deal with or abate the fire immediately. Moreover, the defendants were liable to in nuisance for failing to maintain the party wall after the fire.

11.14.2 Statute

In addition to the common law remedies, there is a statute which despite its name covers the whole country.

The Prevention of Fires (Metropolis) Act 1774 provides that no one shall be liable for the spread of a fire which begins 'accidentally'. However, this Act has been interpreted very restrictively. In *Filliter v Phippard* [1847] 11 QBD 347, it was held that the Act did not apply to fires which were started negligently, or which started intentionally but which spread accidentally. The word 'accidentally' in the Act was held to refer to fires which started by mere chance or whose exact cause was not known. In *Collingwood v Home and Colonial Stores* [1936] 3 All ER 200, fire broke out on the defendant's premises as a result of defective wiring. It was not possible to prove negligence and the defendants escaped liability. In *Johnson v BJW Property Developments*, it was confirmed that the 1774 Act did not apply to fires that had begun in domestic grates.

The Railway Fires Acts 1905 and 1923 provide for payment of a small amount of statutory compensation for damage to land caused by sparks from railway engines (hardly applicable in these days of diesel power).

The rule in modern law appears to be that there is no statutory liability for the spread of fire unless there is negligence. However, the rule in *Rylands v Fletcher* could apply, creating strict liability at common law, but this has been so manipulated over the years that it is very close to liability requiring proof of fault. The basis of the claim in *Stan James (Abingdon) Ltd v Peter Walker Partnership* [2004] EWHC (QB) was negligence. The judge held that the defendant, who had negligently allowed an electrical installation on his property to become inundated with rainwater, was liable for the spread of a resulting fire. The risk of damage by fire was reasonably foreseeable.

11.15 DISTINGUISHING BETWEEN THE VARIOUS TORTS TO LAND

It is often difficult, when faced with a fact situation which is particularly complex, to establish which of the torts relating to land apply, and to distinguish between them. Sometimes, several claims will arise out of the same series of events. In *Halsey v Esso*, for example, residents in a previously quiet area complained of noise made by lorries entering and leaving an oil refinery by day and night, of smuts from the refinery damaging washing on their clothes lines, of fumes affecting the paintwork on their cars parked on a public highway, and of nauseating smells which affected their enjoyment of their property. Their claims succeeded as follows: loss of sleep and smells – private nuisance; damage to cars on the highway – public nuisance and *Rylands v Fletcher*.

The summary chart on p 281, below, attempts to identify the main points of distinction between the more important torts discussed in this section. However, it must be remembered that a chart of this kind is, by its very nature, a rough and ready exercise, and is unable to deal with several of the finer points of distinction which are dealt with in the text. Nevertheless, it should provide a useful rough guide and working model in tackling the basics of the subject. Note that the tort of negligence is included because a claim for negligence may be available as an alternative to the other torts in certain cases.

	RYLANDS v FLETCHER	PUBLIC NUISANCE	PRIVATE NUISANCE	TRESPASS	NEGLIGENCE
Who can sue?	Anyone who can prove damage caused by 'escapee'	Any members of the public who can prove 'special damage'	Usually person with a proprietary interest in land affected	Person in possession	Anyone who can prove breach of duty and damage
Who can be sued?	Person in control of non-natural user on land, usually landowner	The perpetrator	The creator or adopter	Person committing act of trespass	Person causing damage
Frequency of wrongful acts?	Single act is enough	Single act is enough	Must be 'state of affairs' – some element of continuity	Single act is enough	Single act is enough
Directness?	Act may be direct or indirect	Direct or indirect act	'Indirect act only'	Direct act	Direct or indirect act
Must 'fault' be proved?	No need to prove fault	Fault must usually be proved – exception *Wringe v Cohen*	Must prove 'unreasonableness' – which is akin to fault. Strict liability in *Cambridge Water* case	Strict liability. No need to prove fault	Must prove fault – breach of standard of care
Is the locality relevant? Sensitivity of claimant relevant?	Not relevant. Not relevant (except thin skull rule)	Marginally relevant in some cases Not relevant (except thin skull rule)	Relevant – unusually sensitive claimant may not succeed	Not relevant Not relevant (except thin skull rule)	Not usually relevant but may be a consideration. Not usually relevant except in thin skull rule
Are damages for personal injuries available?	Probably not any more, but the law is still unclear	Yes	Only to people with a proprietary interest in land affected and the damage arises out of the interference with the land and is more than just trivial	Yes – but no need to prove damage at all	Yes
Are damages for economic loss available?	Not for pure economic losses but probably for financial losses arising out or damage caused by the escape	Possibly	Must prove economic loss arising out of damage to use/enjoyment of land	Yes – but no need to prove damage at all	Yes
Special defences?	Act of God, act of stranger, general defences	General defences	Ultra-sensitive claimant. Prescription. Statutory authority. General defences	Many statutory defences – PACE, involuntary trespass, general defences	General defences
Could there be a prosecution on same facts?	No, unless there is a statutory nuisance	Yes, if statutory nuisance	No, unless there is also a public nuisance	Criminal trespass – very narrow circumstances. Public Order Act 1986	Gross negligence may result in prosecution – eg, driving and medical cases

FURTHER READING

Stanton, Skidmore, Harris, Wright, *Statutory Torts*, Sweet and Maxwell, 2003
Wightman, 'Nuisance – the Environmental Tort? *Hunter* v *Canary Wharf* in the House of Lords' (1998) *MLR* 61(6), 870–85

For regular monthly up-dates on this area of law, see *Personal Injury Compensation*, published monthly by Informa UK Ltd.

CHAPTER 12

LIABILITY FOR ANIMALS

12.1 COMMON LAW RELATING TO ANIMALS

Civil liability for damage caused by animals has its origins in the feudal tradition and in pre-enclosure days when in many areas the main form of wealth was livestock and attitudes to straying animals were very different to those which pertain today. Indeed, it was not until after the much overdue rationalisation and reform of the law concerning animals in the Animals Act 1971 that the law recognised that the safety of drivers of vehicles on the highway should take priority over the rights of landowners to leave their property unfenced. In *Searle v Wallbank* [1947] AC 341, among the earliest precedents ever cited in English law, was accepted as supporting that view, but that very early case was now largely overruled by s 8 of the Animals Act 1971.

Although animals are responsible for a relatively large number of injuries (estimated in 1978 by the Pearson Commission at about 50,000 per annum), very few civil claims are brought as a result, and as in the case of the torts relating to land it is important not to take a distorted view of the importance of this topic which in practice rarely requires consideration.

In addition to the Animals Act 1971, the general principles of common law still apply to provide compensation for harm done by animals.

12.1.1 The common law rules

Basic common law rules apply to the keeping of animals. For example:

- The owner of a dog which bolted across a road on a dangerous bend was liable for negligence (*Gomberg v Smith* [1962] 1 All ER 725).

  The relevance of negligence is well established, as stated by Lord Atkin:

  > Quite apart from the liability imposed upon the owner of animals or the person having control of them by reason of knowledge of their propensities, there is the ordinary duty of a person to take care either that his animal or his chattel is not put to such a use as is likely to injure his neighbour.

  Negligence claims concerning animals are still important despite the reforms in the Animals Act 1971, because liability under the Act for non-dangerous animals is dependent on actual knowledge. In negligence the position is that it is 'sufficient if the defendant knew or *ought to have known* of the existence of the danger, which does not necessarily arise from a vicious propensity of the animal, although perhaps some special propensity is required' (*per* Pearson LJ in *Ellis v Johnstone* [1963] 1 All ER 286). In addition, the abolition of the rule in *Searle v Wallbank* means that some of the relevant sections of the Act operate in negligence in relation to animals straying onto the highway.

A farm manager was found to have been negligent in keeping a herd of frisky Charolais cows in a field which was unfenced. It was known that the cows chased dogs and, therefore, it was foreseeable that they could injure anyone walking a dog in the field (*Birch v Mills* [1995] 9 CL 354).

The owner of a pack of Jack Russell terriers was liable in negligence for failure to prevent them escaping and causing foreseeable harm to the claimant (*Draper* v *Hodder* [1972] 2 All ER 210).

The owner of a Rottweiler was held to have been negligent when the dog bit a child in a shopping precinct. The dog was on a lead but was not muzzled and the defendant was paying insufficient attention, as there were several ways in which he could have prevented the attack (*Mason v Weeks* (1966) unreported).

12.1.2 Nuisance

- The owner of a dog which tripped someone up on a pavement by allowing the lead to become entangled with his legs was liable in public nuisance and negligence (*Pitcher v Martin* [1937] 3 All ER 918).
- Excessive noise from crowing cockerels is a nuisance (*Leeman v Montague* [1936] 2 All ER 1677).
- Large numbers of pheasants congregating on the claimant's lawn and damaging the claimant's crops amount to a nuisance (*Seligman v Docker* [1949] Ch 53).
- The owner of horses which created foul stenches was liable in nuisance (*Rapier v London Tramways Co* [1893] 2 Ch 588). The test for liability in nuisance was formulated in *Peech v Best* [1931] KB 1; by Lord Justice Scrutton, as that of 'extraordinary, non-natural or unreasonable action'.
- The owner of pigs was liable for the smell they created. *Wheeler v JJ Saunders Ltd* [1996] Ch 19.

12.1.3 Trespass

- A person who teaches a dog to steal golf balls would be liable for trespass to goods (*Manton v Brocklebank* [1923] 2 KB 212).
- The keeper of a fox in captivity who allowed it to escape could be liable under the rule in *Rylands v Fletcher* (1868) 100 SJ 659, (1868) LR 3 HL 330, (1866) LR 1 Ex 265 (*Brady v Warren* [1900] 2 IR 632).
- The keeper of foxhounds may be liable for allowing them to trespass on land (*League Against Cruel Sports Ltd v Scott* [1986] QB 240, [1985] 2 All ER 489).

12.1.4 Defamation

The owner of a parrot who teaches it to repeat defamatory remarks would be liable in defamation.

12.1.5 Statutory nuisances

It should be noted that local authorities have powers under s 80 of the Environmental Protection Act 1990 to seek abatement of statutory nuisances. Statutory nuisances are defined as those 'prejudicial to health, or a nuisance'. 'Prejudicial to health' means 'injurious, or likely to cause injury, to health'. In *Budd v Colchester BC* [1999] Env LR 739, there was an enforcement action under this Act relating to a dog barking.

12.2 THE ANIMALS ACT 1971

Concurrent with common law liability for animals is liability under the Animals Act 1971.

The duty owed to other people by the owner or keeper of an animal will depend upon the type of animal and the nature of the harm it causes.

The Act distinguishes between animals which are dangerous by nature because they belong to an inherently dangerous species (termed *ferae naturae* in the old common law) and animals which are not normally dangerous by nature (*mansuetae naturae*).

12.2.1 Dangerous species

Section 2(1) of the Animals Act 1971 deals with animals which are of a dangerous species. Under this section, the keeper of a dangerous animal is strictly liable for damage caused by it. A dangerous species is defined by the Animals Act 1971 as:

> . . . a species which is not commonly domesticated in the British Isles and whose fully grown animals have such characteristics that they are likely, unless restrained, to cause severe damage, or that any damage they may cause is likely to be severe (s 6(2)).

Although property damage is not expressly mentioned in the Animals Act 1971, which does specifically encompass personal injuries, it is likely that it is covered. Dangerous species include obviously dangerous animals found in other countries – such as lions, wolves, bears and so on, but also wild animals commonly found in the British Isles – such as foxes.

Whether or not a particular species is dangerous is, as before the Animals Act 1971, probably a question of law, rather than one of fact. The deciding factor is the species rather than the animal itself, and it would not be possible for a defendant to argue that the particular animal was a tame member of a dangerous species.

The justification produced by the courts for this rule is that it is a matter of judicial notice. In *Tutin v Mary Chipperfield Promotions Ltd* (1980) 130 NLJ 807, it was held that camels were a dangerous species, even though the camel in that instance was quite docile. This contradicts the decision in *McQuaker v Goddard* [1940] 1 KB 687 that a camel is a domestic rather than a wild animal, because there is nowhere in the world where a camel is wild.

The 'keeper' is defined as:

- the owner of the animal if it is in his possession; *or*
- the head of the household if the keeper is under 16 years old; *or*

- if the animal ceases to be in the ownership or possession of any person, the 'keeper' is the person who was the keeper immediately beforehand, until the animal is taken over by a new keeper. However, a person is not deemed to be the keeper merely because he has taken care of an animal to prevent it causing harm (s 6).

It is theoretically possible for there to be more than one keeper of a particular animal at any one time and it has been held that one keeper can sue another (*Flack v Hudson* [2001] QB 698).

The keeper will be liable for *any* damage which is caused by the dangerous animal. This includes damage other than that which the animal was likely to cause – for example, falling off a camel (*Tutin v Mary Chipperfield*). It should be relatively easy for a potential claimant to trace the keeper, as it is necessary for keepers of dangerous animals to obtain a licence from the local authority under the Dangerous Wild Animals Act 1976. As insurance against liability for damage caused to third parties by dangerous wild animals is also compulsory under the same Act, and as the keeping of dangerous animals is comparatively unusual, it is unlikely that there will be much litigation in this area.

Claims under s 2(1) of the Act are most likely to concern animals that have escaped from zoos and circuses – *per* Lord Walker in *Mirvahedy v Henley* [2003] 2 WLR 882; 2 All ER 401.

Note that there is provision for the licensing of activities involving certain animals under the Dangerous Wild Animals Act 1976. This Act identifies such animals and provides for liability insurance as a condition of a licence being granted. Under s 7 of the Act, a 'circus', which is defined as including 'any place where animals are kept or introduced wholly or mainly for the purpose of performing tricks or manoeuvres', is exempt from the licensing requirements.

The Dangerous Dogs Act 1991, as amended by the Dangerous Dogs (Amendment) Act 1997, defines some breeds as dangerous and creates offences such as keeping a dangerous dog in a public place without a muzzle and having a dog dangerously out of control in a public place.

12.2.2 Non-dangerous species

If damage is caused by an animal which belongs to a non-dangerous species, the keeper is liable for any damage caused by it (except as otherwise provided by the Animals Act 1971) if:

- the *damage* is of a kind which the animal, unless restrained, was likely to cause, or which if caused is *likely to be severe*;
- the *likelihood* of its being caused or of its being severe was due to characteristics of the animal which are not normally found in animals of *the same species* or not normally found except at particular times or in particular circumstances;
- those characteristics were *known to the keeper* or were at *any time known* to a person who at that time had charge of the animal as that keeper's servant or, where the keeper is head of a household, were known to *another keeper* of the animal who is a member of *that household and under 16 years of age* (s 2(2)).

The question of the causal relationship between the 'characteristics' of animals and the damage which they inflict arose in *Jaundrill v Gillett* (1996) *The Times*, 30 January, when the Court of Appeal held that the keeper of horses which had been released onto a highway by a malicious third party was not liable to a motorist who was injured by them. It was held that there had to be a causal link between the unusual characteristics of an animal and the damage. Here, the real cause of the injury suffered in the accident was the release of the animals onto the highway, so the defendant keeper escaped what appeared to be absolute liability. In any event, serious reservations were expressed by Russell LJ as to whether horses which panic in the dark after being driven onto a highway are displaying abnormal characteristics.

An example of a 'permanent' idiosyncrasy within the first limb would be a dog with a habit of biting people carrying bags, as in *Kite v Napp* (1982) *The Times*, 1 June. The second type of characteristics 'not normally so found except at particular times or in particular circumstances' was thought to be intended to emphasise the common law on intermittent 'viciousness'. An illustration is to be found in *Barnes v Lucille Ltd* (1906) unreported, where a bitch suddenly became fierce after producing puppies and bit the claimant. The justification for liability was stated by Darling J, who said:

> If the owner knows that at certain periods the dog is ferocious, then he has knowledge that, at those times, the dog is of such a character that he ought to take care of it.

Section 2(2) of the Animals Act 1971 has been criticised for the problems of interpretation which it poses. These difficulties are illustrated by the case of *Curtis v Betts* [1990] 1 WLR 459, [1990] 1 All ER 769. In this case, the claimant was unexpectedly attacked by a bull-mastiff dog which was usually docile and which he had known all his life. The Court of Appeal found in favour of the claimant because the damage was 'likely to be severe'. However, the court criticised the wording of the opening of the sub-section as awkward and probably wrong, suggesting that what was probably intended by the Animals Act 1971 was that a causal link be established between the animal's characteristic and the damage. The House of Lords clarified s 2(2)(b) of the Act in *Mirvahedy v Henley* [2003] 2 All ER 401, ruling that the keeper of an animal that caused injury was strictly liable for the damage. The horses, in this case, were frightened by something and bolted out of their field into a road, crashing into the claimant's car and injuring him. Although the horses' behaviour was not normal under usual circumstances, it was normal in the particular circumstances that had occurred. The behaviour was normal when horses were sufficiently alarmed. Social policy issues were discussed, including the question of who should bear the loss, but their Lordships concluded that these were matters for Parliament, and focused on interpreting the Act. Admitting that the section caused considerable difficulties of interpretation, the House of Lords concluded that liability was strict in the circumstances of this case.

The reasoning in *Bowlt v Clark* [2006] EWCA Civ 978 demonstrates the difficulties encountered by courts in grappling with s 2(2) of the Act. The case is rather difficult to fathom, since the Court of Appeal appeared to be prepared to follow the reasoning in the Mirvahedy case, but reached a different conclusion to the majority in the House of Lords.

12.2.3 Damage

It is necessary for the defendant to have known that the damage was such as the particular animal with its special propensities, unless restrained, was likely to cause, or that any damage which that particular animal with its special propensities could cause would be severe.

This requirement is centred on the nature of the damage if the animal is not properly restrained. Obviously, there are some animals which are likely to do more damage than others, by reason of their size and qualities.

12.2.4 Characteristics of the particular animal

At first sight it appears that this sub-section is designed to prevent an argument being advanced by the defendant that it was normal for the particular animal to behave in the way that it did because at that particular time, for example, in the mating season, many animals of the particular species behaved in the same way. However, the words 'except at particular times and in particular circumstances' have been treated, rather illogically, by the courts as referring to particular 'abnormal' tendencies. For example, the Court of Appeal held in *Cummings v Grainger* [1977] QB 397 that Alsatian dogs are not normally vicious, but they may be so in special circumstances, as when posted as guard dogs. In *Curtis v Betts*, the characteristic was the tendency of the dog to act aggressively when protecting its property.

In *Chauhan v Paul* (1998) unreported, a Rottweiler playfully chased a postman down a drive, causing him to fall and injure himself. The dog was of previous good character and was described as a 'big softie'. The Court of Appeal was sceptical that this was a blameworthy characteristic within s 2(2)(b) of the Act. However, in any event, there was no evidence to suggest that such behaviour was known to the keeper as stipulated by s 2(2)(c) and, therefore, there was no liability under the Act. The dog's previous good character also ruled out a successful claim under the Occupiers' Liability Act 1957.

It may be difficult for a claimant to establish liability based on the characteristics of a particular animal, especially in the case of animals which are usually kept in herds. In *Livingston v Armstrong* (2003), a case decided at County Court Level, it was held that there was no liability under the Animals Act 1971. A cow had escaped onto a highway and the claimant was injured when he struck it while driving in the dark. The was no evidence of any peculiar characteristic of the animal. Claims in negligence and nuisance also failed. The defendant's field and fences were in excellent condition and he had taken reasonable care.

In *McKenny v Foster* [2008] EWCA Civ 713, it was held that exceptional behaviour of an animal not known to its keeper did not give rise to strict liability.

12.2.5 The likelihood of the damage being caused or of its being severe

If the animal is of a non-dangerous species, the claimant must prove that the damage was caused by a characteristic of the particular animal which is not normally found in animals of that species, and that the defendant knew of the characteristic. In *Wallace v Newton* [1982] 2 All ER 106, the claimant succeeded in obtaining damages for injuries caused by a horse which became uncontrollable when being put into a trailer for

transportation. It was known that the horse was unreliable in this way, and horses are not usually unreliable.

It appears that comparisons need to be drawn between the particular animal and others of the same breed (*Hunt v Wallis* (1991) *The Times*, 10 May), rather than other animals of the same species, despite the fact that the word 'species' is used in the Act. This is but one example of the difficulties of interpretation with which the courts have been faced in dealing with the Animals Act 1971.

12.2.6 Characteristics known to that keeper, etc

The knowledge which is required for there to be liability is actual knowledge. It is not enough if the keeper did not actually know of the dangerous characteristic of the animal, nor if an employee who does not have charge of the animal knows about the dangerous propensity. Similarly, if a minor under 16 who is not a keeper of the animal knows of the dangerous qualities of the animal but does not tell the keeper, there will be no liability under s 2(2). Nor will there be liability under s 2(2) if the keeper did not actually know of an animal's dangerous characteristic, but ought reasonably to have known, though there may be liability in negligence. In *Draper v Hodder* [1972] 2 QB 556, the only liability was in negligence because the keeper did not know of any particular characteristic of the particular animals which are not peculiar to the Jack Russell breed as a whole but, as the harm was foreseeable, there was liability in negligence.

The determination of the animal's 'characteristics' is very difficult. In *Hunt v Wallis*, it was held that assessment of characteristics should be based on the breed, rather than on 'dogs' more generally.

12.2.7 Defences

Under the Animals Act 1971, there are a number of defences to s 2.

- ***Volenti* (s 5)**
  The defendant will escape liability if the damage was due 'wholly to the fault of the person suffering it'. If a person is an employee of a keeper, he is not to be treated as voluntarily accepting a risk if that risk is ordinarily incidental to the employment (s 6(5)). A person who is injured by an animal when trespassing on the defendant's premises may be treated as *volenti*, subject to proper warnings being given of the existence of the dangerous animal (*Cummings v Grainger*). The question of what constitutes consent in this context was considered by the Court of Appeal in *Dhesi v Chief Constable of West Midlands Police* (2000) *The Times*, 9 May. Here, a suspect ignored clear warnings by a police officer that he must come out of his hiding place among brambles, or a dog would be sent in. The suspect brought a claim alleging a breach of s 2(2) of the Animals Act 1971. The Court of Appeal ruled that the claimant only had himself to blame when he refused to come out and was bitten several times.
- **Contributory negligence (s 10)**
  If there is contributory negligence on the part of the claimant damages will be apportioned.
- **Trespass (s 5(3))**
  If the claimant was a trespasser on the defendant's property, the keeper will not be

liable if he can prove that the animal was not kept on the premises for the protection of persons or property *or* if it was there to protect the premises or people on them, keeping it there for that purpose was not unreasonable. In *Cummings v Grainger* [1977] QB 397, it was held that the keeping of a dog to guard a scrap yard was not unreasonable because there was no other realistic way of protecting the premises. This decision might now be different in the light of the Guard Dogs Act 1975 which had not come into force when the events of the case occurred. Although the Guard Dogs Act 1975 does not confer a right to a civil action, it might affect civil liability indirectly by the suggestion that keeping such a dog is 'unreasonable'.

After several tragic incidents in which young children were savaged by guard dogs, Parliament passed the Guard Dogs Act 1975 which makes it a criminal offence to allow a guard dog to roam on premises without a handler.

The Animals Act 1971 does not contemplate the defences of act of God and act of a stranger which apply in other areas in which strict liability exists.

12.2.8 Damage by dogs to livestock

The keeper of a dog which injures livestock is liable for any damage so caused by s 3 of the Animals Act 1971, except where the Act provides defences. Liability is strict and it is not necessary to show that the animal was known to have a dangerous propensity to chase livestock.

There is a defence if the dog injures the animals straying onto land belonging to its owner, or on land where the dog was permitted to be by the occupier.

Fault of the claimant and contributory negligence are also defences.

There is a defence to the killing or injuring of a dog in order to protect livestock on land belonging to the defendant or his or her employer. The defence is available to any person acting on the authority of the owner of the land and livestock.

However, if a dog is injured or killed in this way, the police must be notified within 48 hours.

This defence will not be available if the person whose dog was involved in the incident would not have been liable because the livestock had strayed (see s 5(4)).

The defence will only apply if the person was properly acting in defence of livestock, which means according to s 9(3) that either:

- the dog was worrying or about to worry livestock and there are no other reasonable means of ending or preventing the worrying; or
- the dog has been worrying livestock, has not left the vicinity and is not under the control of any person, and there are no practical means of ascertaining to whom the animal belongs.

Reasonable belief that the above is true will be enough for the purposes of the defence.

12.3 LIVESTOCK

In country areas solicitors are not infrequently asked to deal with problems which arise when livestock stray onto highways and farmland.

12.3.1 Trespassing livestock

The problem of livestock straying onto other people's land was dealt with in the old common law by the very ancient action of cattle trespass. This is now covered by s 4 of the Animals Act 1971 which creates strict liability for the owner of such livestock where damage is caused by the livestock to land or to property on land in the occupation or possession of another person; or any expenses are reasonably incurred by the other person in keeping the livestock while it cannot be restored to the person to whom it belongs, or while it is detained, or in ascertaining to whom it belongs.

12.3.2 Definition

Livestock is defined as: cattle, horses, asses, mules, hinnies, sheep, pigs, goats, poultry and deer not in the wild state (s 11).

Personal injuries are not covered by the section, the common law rule having been abolished by the Animals Act 1971 (s 4(1)(a)).

12.3.3 Defences

Defences include the following:

- **Fault of the claimant (s 5(1)) and contributory negligence (s 10)**
  There will be no defence if the animals strayed onto the claimant's land merely because there was no adequate fencing which could have prevented the animals straying onto the land; but there will be a defence if it can be shown that the straying of the livestock onto the land would not have occurred but for a breach by any other person (being a person with an interest in the land) of a duty to fence (s 5(6)). This means that although there is no general duty on landowners to fence their property to keep out straying livestock, if an obligation to fence does exist (and in some areas such duties arise customarily, and on other occasions they may arise as a result of easements or contracts), there will be a defence if the fencing was not carried out.
- **Animals straying from the highway**
  There will be a defence if animals which had previously lawfully been on the highway, stray onto the claimant's land (s 5(5)) (*Tillet v Ward* (1882) 10 QBD 17). At common law, it was considered to be a hazard of living close to a highway that animals which were being driven along it might stray onto property which adjoined the highway. By virtue of s 5(5): 'A person is not liable under s 4 of this Act where livestock strayed from a highway and its presence there was a lawful use of the highway'. What is lawful use of the highway will depend on the circumstances of the case. At common law, when animals were regularly driven along highways to market, there was considerable tolerance of the presence of animals on the roads. However, the more modern approach is probably that in *Matthews v Wicks* (1987) *The Times*, 25 May, when the Court of Appeal held that it was not lawful use of a highway for the defendant to allow animals to wander there at will, so the defence under s 5(5) did not apply.

  It is not clear whether there will be strict liability or liability in negligence for animals which escape first from land onto the highway and thence onto other land.

- **Animals which stray onto the highway**
  It may be possible to bring a claim under s 2 of the Animals Act 1971 against the keeper of domesticated animals which escape onto a highway and cause injuries there if the animals exhibit abnormal characteristics in so doing. However, an attempt to rely on this was unsuccessful in *Jaundrill v Gillett*. Here, a third party maliciously released horses onto a highway. The court held that horses which were galloping and panicking did not display abnormal characteristics. It seems that judges tend to exonerate claimants who cannot themselves be regarded as blameworthy.

  The rule at common law that landowners had no duty to keep their animals off the highway was abolished by s 8(1) of the Animals Act 1971. The ordinary principles of negligence now apply in this context.

  However, in a claim for negligence to compensate for damage done by animals straying onto the highway from land which is unfenced, the person responsible for such animals will not be regarded as having committed a breach of duty to take care by reason only of placing the animals on the land if the land is common land, or is in an area where fencing is not customary, or is a town or village green, and he had a right to place the animals on the land.

  Under the Registration of Commons Act 1971, everyone who had a right to graze animals on land such as common land was obliged to register that right or to lose it. It is thus easier now to prove such rights than it was before the Act.

12.4 REMOTENESS OF DAMAGE

The Animals Act 1971 does not deal with the question of remoteness of damage, and the only means of discovering the correct approach to this matter is by examining the common law relating to animals in particular and to strict liability generally.

Most writers take the view that as many of the actions concerning damage caused by animals have several features in common with the rule in *Rylands v Fletcher*, the same basic principles should apply in relation to the torts concerning animals as would apply under the rule in *Rylands v Fletcher*, which was excluded by the Privy Council from *The Wagon Mound (No 1)* [1961] AC 388 test for remoteness of damage. This would at any rate apply in the case of cattle trespass, now modified under the Animals Act 1971 as liability for straying livestock. Keepers of dangerous animals are liable for all the damage they cause under s 2(1), and the test seems to be one of directness rather than foreseeability once a causal link has been established.

In the case of animals of non-dangerous species, it has been seen that liability is limited to damage which is the result of unusual characteristics in the particular animal which were known to the keeper (*Granville v Sutton* [1928] 1 KB 571). The precise damage suffered by the claimant does not, it seems, if the common law is followed, need to be foreseeable (*Behrens v Bertram Mills Circus* [1957] 1 All ER 583). There are cases which take the contrary position, however, and the law remains unclear on this point.

12.5 REMEDIES

A range of different remedies may be appropriate, depending on the circumstances of each case. For example, in *Bryant v Harvey* [2005] EWCA Civ 762, the Court of Appeal took the view that as trespassing livestock had damaged mature trees it would be most appropriate to make an award of damages based on the cost of reinstatement with young trees, on the basis that a reasonable person would do as much to restore the amenity if he was paying for it out of out his own pocket.

Damages are assessed in the usual way, and compensation may be available for psychiatric injury as well as physical harm. In *James v Oatley* (1995) unreported, the claimant who had been bitten by a dog received damages for loss of use of a limb, pain and suffering and post-traumatic stress disorder.

FURTHER READING

Barker, 'The Animals Act 1971 – A Dog's Breakfast', *Holdsworth Law Review* 1993, HeinOnline
Burnet, 'Bowlt v Clark', *Rights of Way Law Review*, February 2007, 53

For regular monthly up-dates on this area of law, see *Personal Injury Compensation*, published monthly by Informa UK Ltd.

CHAPTER 13

TORTS TO THE PERSON

13.1 INTRODUCTION

In early English law, physical interference with the person was given special protection, partly to avoid the unhappy consequences of people taking the law into their own hands by revenge attacks. Until the abolition of the old forms of action in the 19th century, *direct* attacks upon the person were protected by the action of trespass, which required no proof of damage. *Indirect* interference with the person was protected by the action on the 'case', which did require proof of damage.

Today, the basic position is that direct and intentional acts of interference are still dealt with by the tort of trespass, while indirect and unintentional acts fall under the tort of negligence. However, the situation is more complex than this suggests and some authorities suggest that even in trespass the claimant must now establish intention or negligence in addition to the act of interference.

In *Fowler v Lanning* [1959] 2 WLR 124, Diplock J stated the position as follows:

> Trespass to the person does not lie if the injury to the claimant, although the direct consequence of the act of the defendant, was caused unintentionally and without negligence on the defendant's part.

This appears to suggest that there is a form of negligent trespass, which is almost a contradiction in terms.

In *Letang v Cooper* [1965] 1 QB 232, Denning MR took the view that the deciding factor between trespass and negligence was that, if the act was intentional, it should be remedied by a claim for trespass, if unintentional, by a claim for negligence.

In *Wilson v Pringle* [1986] 2 All ER 440, the Court of Appeal decided that the claim must be brought in negligence if the defendant acted unintentionally, even if in other respects the fact situation might have fallen within the tort of trespass.

The situation will be clarified by detailed study of the torts which fall under the general heading of 'trespass to the person'.

There are three forms of trespass to the person: assault, battery and false imprisonment. The tort in *Wilkinson v Downton* [1897] 2 QB 57, which falls into a separate category of intentionally caused harm, will also be dealt with in this chapter.

13.2 THE RELATIONSHIP BETWEEN CIVIL LAW AND CRIMINAL INJURIES COMPENSATION

Before dealing with the torts in detail it is necessary to place them in the general context of compensation for criminal injuries, as it is not only the law of tort which compensates the victims of assaults and batteries.

As assault and battery are also criminal offences, there may be *ex gratia* compensation forthcoming from the state under the Criminal Injuries Compensation Scheme in the same fact situations as give rise to the civil claims. The Criminal Injuries Compensation Scheme was first introduced in 1964, and was designed to provide financial support by the state for the victims of violent crime who suffer personal injuries as a result. The scheme was administered by the Criminal Injuries Compensation Board, staffed by lawyers, and responsible for the distribution of financial compensation on behalf of the government. The present scheme has been developed under the Criminal Injuries Compensation Act 1995. It applies to clams received by the Criminal Injuries Compensation Authority after 1 April 2001, by any individual, or his or her dependants who suffered a criminal injury on or after 1 August 1964. There is no need for the criminal who perpetrated the injury to have been convicted of an offence relating to the injury in question. 'Criminal injury' includes personal injury directly attributable to a crime of violence, or to the apprehension or attempted apprehension of a suspect, or to the prevention or attempted prevention of a criminal offence, including going to the assistance of a police officer involved in such activity. Under the new statutory system awards are no longer assessed in accordance with the rules for calculating tort damages and the Board has been replaced by a Criminal Injuries Compensation Authority. Compensation is assessed according to a tariff system by which the amount awarded is related to the type of injury and applications are handled by claims officers. The case of *Hill v Chief Constable of West Yorkshire* [1988] 2 WLR 1049 demonstrates that the courts are influenced by the fact that a remedy may be available under the Criminal Injuries Compensation Scheme when considering whether a duty of care is owed in negligence. Fox LJ took the view that if there had been no provision for compensation under the scheme, there might have been a good reason for imposing a duty of care on the police in relation to the victims of crime. See also *Brooks v Metropolitan Police Commissioner* [2005] UKHL 24. Compensation under the Scheme tends to be less generous than compensation awarded by the courts in civil claims. There is also a limit to the payments available for loss of earnings. Once the victim of the crime in question has received money under the Scheme, he is under a legal obligation to reimburse the Scheme if he succeeds in a civil claim relating to the same injuries.

There has been an arrangement in force since January 2006 whereby the UK has the extra duty to operate as a central body for claims by UK citizens under schemes applicable in other EU states (see Directive 2004/80/EC).

It should be noted that it is comparatively rare for civil claims to be brought as a result of injuries which have been inflicted intentionally, unless the defendant or his employer is wealthy enough to afford substantial compensation and the claimant wishes to make an example of him, as in some of the claims brought against police officers in recent years.

13.3 COMPENSATION ORDERS

The courts have power to order people who are convicted of criminal offences to pay compensation to their victims. Such compensation is not limited to violent offenders, nor to cases involving personal injuries (see ss 35–38 of the Powers of Criminal Courts Act

1973, as amended). There will be no compensation orders made when the crime involved a road accident, unless the offender stole the car, or for some reason compensation was not payable by the Motor Insurers' Bureau. Nor can an award, except for bereavement or funeral expenses, be made to the dependants of a deceased person. The courts must assess the compensation payable in the light of the offender's ability to pay.

Compensation by offenders receives the approval of most of the writers on the subject, as it is seen to benefit the offender by offering some means of rehabilitation, and the criminal justice system as a whole by encouraging more victims to report crime and co-operate with the police. However, the court must take the means of the offender into account when assessing how much is payable to the victim, and no award can be paid to the dependants of a victim who has died. Thus, the statute is of limited usefulness.

13.4 IMPORTANT DRAWBACKS

If a summary criminal prosecution is brought for *assault and battery* (that is, in the magistrates' court), no civil claim can follow in respect of the same events (ss 42–45 of the Offences Against the Person Act 1861). It is therefore necessary to claim before any criminal proceedings begin, though from the claimant's point of view, it is easier to prove a civil claim once there has been a successful prosecution, as the standard of proof in civil cases is lower than that in criminal cases. Many solicitors advise their clients to let the prosecution proceed and to apply for a compensation order if a conviction is likely and the suspect has sufficient means to be able to pay compensation. At least this has the advantage of being quicker and cheaper than bringing a civil claim, though the victim would need to bear in mind that the criminal standard of proof cannot always be met and that there may be various complicating factors such as plea bargaining, where the offender is charged with several offences involving other victims, which could mean that there is no conviction for the particular crime in which he suffered injury. One advantage of claims for trespass over negligence is that as it is actionable without proof of damage it is able to protect civil rights.

13.5 CLAIMS AGAINST THE POLICE

Claims for trespass to the person are frequently brought to deal with allegations of police misconduct. In these cases, the claimant may only be wanting to make a point of principle, rather than to seek compensation, and may not have suffered any actual damage. Although claims for negligence are sometimes brought against the police, in these, unlike in trespass, it is necessary to prove damage in order to succeed, and many negligence claims against the police fail at the duty stage (*Hill v Chief Constable of West Yorkshire*).

The Police and Criminal Evidence Act (PACE) 1984, as amended, places obligations on the police in relation to people held in custody for questioning during the investigation of crimes. Codes of Practice made under the Act set out guidelines which the police are expected to follow when dealing with suspects.

Breaches of the Act and Codes of Practice may also amount to breaches of the civil law, and could result in claims for compensation. It is significant that many of the provisions which create additional police powers are contained in PACE 1984 (as amended) itself, and appear to have greater authority than the safeguards for the citizen which are to be found in the Codes of Practice.

A new system for handling complaints against the police was established by the Police Reform Act 2002. The Independent Police Complaints System (IPPC) replaces the Police Complaints Authority. It is hoped that this will prove to be a more robust system than the earlier complaints system. Further amendments have been introduced by the Serious Organised Crime and Police Act 2005. The tort system provided a better alternative than the 1984 complaints system.

There have been many successful civil claims for assault, battery and false imprisonment against the police in recent years, and as it is possible to obtain exemplary damages in these cases, some of the awards have been very high indeed, for example, in *Taylor v Metropolitan Police Comr* (1992) *The Times*, 6 December, the claimant was awarded £100,000 after he had cannabis planted on him and was held against his will in a police station for several hours. He was a BBC engineer, and a lay-preacher, and had been on his way to a dominoes match at the time he was arrested. Malicious prosecution and false imprisonment are tried by jury, and there can be considerable sympathy excited in cases like that of Mr Taylor which result in extra compensation being awarded to express the jury's strong disapproval of the way in which the police have behaved.

In *Goswell v Comr of Police for the Metropolis* (1998) unreported, the claimant received an award when he was hit very hard with a truncheon and was falsely imprisoned for a short time. The Court of Appeal reduced the award from £302,000 to £47,600.

In *Holden v Chief Constable of Lancashire* [1986] 3 All ER 836, the Court of Appeal held that an unconstitutional act by a police officer which is arbitrary and oppressive can attract exemplary damages. The officer in this case had unlawfully arrested the claimant and held him for only 20 minutes.

The House of Lords took a restrictive approach, however, in *Secretary of State for the Home Department v Wainright* [2003] UKHL 53. The appellants wanted to visit a relative who was held on remand, and was under suspicion of dealing in drugs in prison. The appellants were strip-searched before they were allowed to see him. Later they brought claims for damages for emotional distress and post traumatic stress disorder. The House of Lords held that there was no tort for invasion of privacy and it was not necessary to adopt such a tort under Art 8 ECHR. There were already remedies available in UK law for breaches of Art 8 under the Human Rights Act 1998. Even if it were the case that there was a remedy in tort for intentional harassment causing psychiatric injury, there was no evidence in this case of such an intention. The trial judge had found that prison officers had acted in good faith, though they may have been sloppy in failing to comply with prison rules. There was no reason why a remedy should be available for distress merely because privacy was affected.

13.6 ASSAULT AND BATTERY

The torts of assault and battery are usually dealt with together because it is unusual, though possible, for them not to be committed concurrently.

Assault is putting a person in fear of an immediate battery, and battery is the actual application of physical force, however slight, without lawful justification.

13.6.1 Assault

Although assault seldom occurs without battery, it may be possible to sue for assault alone.

- **Putting a person in fear**
  It is possible for there to be an assault without a battery, as in *Stephens v Myers* (1830) 4 C & P 349, in which the defendant made a violent gesture at the claimant by waving a clenched fist, but was prevented from reaching him by the intervention of a third party. The defendant was liable for assault. It is not necessary to prove that the claimant actually experienced fear. What must be proved is that it was reasonable for the claimant to expect an immediate battery.

- **Immediate battery**
  If it is clearly impossible for the defendant to carry out the threat, a claim for assault will not succeed. In *Thomas v NUM (South Wales Area)* [1985] 2 All ER 1, there was no assault when the picketing miners made violent gestures to working miners who were safely in vehicles behind police barricades. Here there was no danger of an immediate battery. The defendant may by his own words negate the possibility of a battery, as in *Tuberville v Savage* (1669) 1 Mod 3, in which the defendant said, with his hand on his sword: 'If it were not Assize time, I would not take such language from you.' It was held that there was no assault in this case. Threatening words alone, unaccompanied by a threatening act, may amount to an assault, but opinion is divided on this point.

  An innocent act can be made into an assault by words which contain a threat (*Read v Coker* (1853) 13 CB 850).

13.6.2 Battery

Battery is the application of direct physical force to the claimant. The merest touching is probably enough to amount to a battery. Holt CJ said in the early case of *Cole v Turner* (1704) 6 Mod 149: 'The least touching of another in anger is a battery.'

- **The application of force**
  It has been held that certain forms of 'social touching' which are reasonable and generally acceptable are not batteries. These would include jostling in a crowd during the January sales, touching to catch a person's attention and a hearty slap on the back by way of congratulation. A factor common to these socially acceptable batteries is that they lack the element of hostility, but bearing in mind that from the earliest times battery could be committed without the intention to injure, the real answer to the fact that such acts are not regarded as tortious would seem to be that in

such cases there is implied consent to the touching. Surprisingly, *Wilson v Pringle* [1986] 2 All ER 440, a relatively recent decision in the long history of this tort, appears to place a new limitation on the tort of battery by imposing the requirement of 'hostile touching'. In that case, a schoolboy was injured when a bag he was carrying over his shoulder was pulled roughly by another boy. Despite the defendant's argument that what had happened was mere horseplay, it was held that the court must decide whether the conduct was hostile.

Although it is generally accepted that the force must be applied directly to the victim, the tort may also be committed if the inevitable and immediate consequence of the defendant's act is physical injury. Thus, in *Haystead v Chief Constable of Derbyshire* [2000] 3 All ER 890, the defendant was found to have committed assault and battery to a child, when he hit the mother of the child, who dropped him onto the ground as a result.

- **Intention**

The intention which is required in battery is not the intention to hurt the claimant, but the intention to apply physical force. The tort thus protects the claimant's dignity as well as bodily integrity (see *Wilson v Pringle*, 13.1, above). A surgeon who performs an operation or other medical procedure without the consent of the patient commits the tort of battery, but in such a case there may well be every intention to act in the patient's best interests as the doctor sees them, and no intention to harm the patient (*Potts v North West RHA* (1983) unreported). Even if the defendant intended to injure someone other than the claimant, this could still amount to battery if as a consequence the claimant suffers some application of force. In *Livingstone v Minister of Defence* [1984] NI 356, NICA, the claimant succeeded in battery when he was hit by a bullet intended by a soldier for someone else.

Some examples of incidents which have amounted to batteries include:

- *Nash v Sheen* [1953] CLY 3726: the defendant, a hairdresser, gave the claimant an unwanted tone rinse, a form of hair dye, when she had requested a perm.
- *Various Claimants v Ayling* (2002) unreported: former patients of the defendant, a GP, received damages for indecent assaults he had carried out on them between 1992 and 1998.
- *Pursell v Horn* (1838) 8 A & E 602: the defendant threw water over the claimant.
- *Connor v Chief Constable of Cambridgeshire* (1984) *The Times*, 11 April: a football supporter was hit by a police truncheon.
- *Leon v Metropolitan Police Comr* [1986] 1 CL 318: a Rastafarian suspected of carrying drugs, was pulled off a bus by police officers and punched and kicked.
- *Ballard, Stewart-Park and Findlay v Metropolitan Police Comr* (1983) 113 NLJ Law Rep 1133: three feminists were attacked by police officers during a demonstration in Soho. One was dropped and spread-eagled onto the ground after being carried away unceremoniously by officers, one was straddled by another officer when she lay on the ground, and poked in the stomach with a truncheon and hit over the eye. The third was hit in the head with a truncheon.

It is possible to bring civil claims for assault and battery in certain circumstances

when the Crown Prosecution Service (CPS) refuses to prosecute. For example, a woman recently succeeded in a county court claim against her former employer for rape and was awarded £50,000 by the jury. The CPS had refused to prosecute the man because they did not consider that a prosecution would succeed on the evidence. The claimant was able to satisfy the lower standard of proof required in a civil claim (*Griffiths v Williams* (1996) unreported).

- **Without lawful justification**
  Defences to assault and battery will be discussed at the end of the section on false imprisonment, as many of the defences are common to all three torts.

13.7 FALSE IMPRISONMENT

False imprisonment consists of depriving the claimant of freedom of movement without lawful justification. In *Collins v Wilcock* [1984] 3 All ER 374, false imprisonment was defined as 'the unlawful imposition of restraint on another's freedom of movement'.

Many claims for false imprisonment are brought against the police or store detectives and others attempting to arrest people for committing crimes. There is no need to prove fault (see 13.7.4, below).

In *Austin and another v Commissioner of Police of The Metropolis* [2007] EWCA Civ 989, the Court of Appeal held that only if there is a reasonable belief on the part of the defendant, in this case a police officer, that there are no other possible means of preventing an imminent breach of the peace, might the lawful exercise by third parties of their rights be curtailed by the police. Here there was an appeal against a decision dismissing claims for damages for false imprisonment, and also under s 7 of the Human Rights Act 1998 for breach of the appellants' right as stated in the European Convention on Human Rights 1950 Art 5. Around 2 pm on May Day 2001, a crowd of demonstrators marched into Oxford Circus in central London. The organisers of the demonstration had told the police that the demonstration was planned, but they had purposely omitted to tell them what would happen during the event. Virtually all the people who entered Oxford Circus at 2 pm were prevented from leaving the area by the police. More demonstrators entered Oxford Circus during the course of the same afternoon, making a crowd of 3,000 people. A large number of demonstrators were prevented from leaving for more than seven hours, and conditions in the area were becoming very unpleasant. The two appellants were L, who had made some speeches in the course of the demonstration, and G, who was not a demonstrator but had been detained within the area cordoned off by the police. L was exercising her right to demonstrate peacefully and G was innocent but became caught up in the crowd. Both L and G had wanted to leave the cordoned area, but neither was permitted to do so for a long time. Neither tried to leave the area even after their requests to do so had been refused, but they later brought claims for false imprisonment on the basis that they should have been allowed to leave when they asked to do so. The Court of Appeal held that there had been an interference with the liberty of both appellants amounting to the tort of false imprisonment, unless the respondent could establish that this was lawful. The relevant cases were discussed, from *O'Kelly v Harvey* (1883) LR 14 Ir 105 to *R (on the application of Laporte) v Chief Constable of Gloucestershire* (2006) UKHL 55, [2007] 2 AC 105. In the event, the Court of Appeal ruled that the

containment had been lawful because on the basis of findings of fact made by the trial judge, the situation was wholly exceptional and there was no alternative open to the police but to act as they had in order to avoid the imminent risk of serious violence by other people. Since the actions of the police in containing the crowd had been necessary to avoid an imminent breach of the peace, what had happened was lawful at common law. Not only was this the case when the cordon was imposed, but also during the entire time that it was maintained. The Court of Appeal also held that in the circumstances the original setting up of the cordon could not be regarded as the sort of arbitrary detention which could amount to deprivation of liberty within Art 5, as opposed to an interference with the appellants' liberty of movement – *Guzzardi v Italy* (A/39) (1981) 3 EHRR 333; *Guenat v Switzerland* (24722/94); *X v Germany* (1981) 24 DR 1578; and *HM v Switzerland* (39187/98) (2004) 38 EHRR 17.

13.7.1 Restraint is necessary

As the case discussed above demonstrates the tort is committed if there is any act which prevents free movement. This does not necessarily mean that the claimant must be imprisoned, although some of the most serious examples of false imprisonment in recent years have involved the detention of people for questioning in respect of crimes which they did not commit, and for which there were no reasonable grounds of suspicion (*White v WP Brown* [1983] CLY 972). Any restriction which prevents a person leaving a place amounts to false imprisonment. This means that simply turning a key in a lock or posting a guard outside a door is false imprisonment. A simple police cordon is enough to create a potential false imprisonment (*Austin & Another v Commissioner of Police for the Metropolis* [2007] EWCA Civ 989, above). An unlawful stop and search in the street would be false imprisonment if the claimant was trapped against a wall. Sitting a person between two police officers in the back of a police vehicle would also be false imprisonment if it was not part of a lawful arrest or there was no consent (see *Goswell v Comr of Police for the Metropolis*).

13.7.2 Restraint must be 'total'

The restraint imposed upon the claimant must be total restraint to amount to false imprisonment, so if there was a reasonable escape route, there will be no false imprisonment (*Bird v Jones* (1848) 7 QB 742). If the occupier of premises decides to place reasonable conditions on people who use the premises, this will not amount to false imprisonment. In *Robinson v Balmain Ferry Co* [1910] AC 259, a ferry company put up notices that a penny had to be paid to enter or leave the wharf on one side of the river. The claimant changed his mind about taking the ferry crossing after he had paid his penny and passed through a turnstile. He refused to pay another penny to leave, and was prevented from doing so by the defendants unless he paid. It was held that this was not false imprisonment because the conditions imposed by the defendants were not unreasonable. The claimant did have a means of free exit, even if it meant taking the ferry, which he had chosen not to do.

In *Herd v Weardale Steel, Coal and Coke Co Ltd* [1915] AC 67, it was held that there was no false imprisonment when a miner decided to strike when he was already in the mine,

because he did not wish to carry out a task which he considered to be particularly dangerous. The defendants would not allow him to leave the mine before the end of his shift. The House of Lords held that the defence of consent was available to the employer. This decision is difficult to reconcile with other decisions and can perhaps be explained by the fact that the defendants were omitting to act rather than committing a positive act.

In the rather anomalous case of *R v Bournewood Community and Mental Health NHS Trust ex p L* [1998] 3 All ER 289, the majority of the House of Lords held that it was not false imprisonment to retain a voluntary mental patient in an open ward, despite the fact that he would have been prevented from leaving if he had attempted to do so. It appears that the restraint must be actual rather than potential.

13.7.3 Knowledge of the restraint at the time is not necessary

The claimant does not need to know that he has been restrained in order to succeed in his claim. In *Meering v Graham White Aviation Co Ltd* (1920) 122 LT 44, it was held that a person could be falsely imprisoned while unconscious. This was confirmed in *Murray v Minister of Defence* [1988] 2 All ER 521 by the House of Lords.

The person who initiated the imprisonment may be liable even if the physical act of restraining the claimant was performed by someone else. This can happen sometimes when store detectives call the police and there is no justification for the original citizen's arrest.

There is no fixed period of restraint required, and even a very short period of confinement will amount to false imprisonment, though any damages payable in such a case would be nominal, unless there is an award of exemplary damages as in *Holden v Chief Constable of Lancashire*.

13.7.4 Examples

Some examples of false imprisonment are as follows:

- ***Treadaway v Chief Constable of the West Midlands* (1994) *The Times*, 25 October**
  The claimant alleged that while he was being interviewed by the police they had placed a bag over his head, threatening to suffocate him in order to extract a confession from him. Medical evidence confirmed his version of events. He was awarded £2,500 compensatory damages and £7,500 aggravated damages, with an additional award of £40,000 exemplary damages to reflect the serious misconduct of the police officers concerned, even though he was a convicted criminal.

- ***Hsu v Comr of Police for the Metropolis* [1997] 3 WLR 402**

  A hairdresser was arrested after he refused to allow police officers to enter his house without a warrant following a dispute with a tenant. He was grabbed and handcuffed and thrown into a police van where he was punched and used as a footstool. He was verbally abused at the police station with expressions such as 'I have never arrested a chink before'. When he was finally released, he was sent out into the street wearing only jeans at 11 pm, and had to walk the two miles home in flip-flops. When he arrived home, he discovered that his front door had been left open and some of his

property had been stolen. Doctors at King's College Hospital confirmed that he had extensive and severe bruising to his back and kidneys and had blood in his urine, all of these injuries being consistent with his story of police misconduct. A complaint to the Police Complaints Authority was turned down, so Mr Hsu sued and was awarded damages, reduced on appeal to £50,000.

It is now possible for the judge to give guidance to the jury in cases like these as to the range of awards most appropriate in the circumstances (*Scotland v Comr of Police of the Metropolis* (1996) *The Times*, 30 January; *Hsu v Comr of Police for the Metropolis*).

It should be noted that because false imprisonment is a tort of strict liability, a defendant who is unaware that he is committing the tort may be liable. In *R v Governor of Brockhill Prison ex p Evans (No 2)* [2000] 3 WLR 843, the House of Lords found a prison governor liable for a prisoner's detention for a longer period than had been prescribed. The governor was guilty of false imprisonment even though he had not been to blame for miscalculating a prisoner's date for release.

However, if a person already in the process of serving a prison sentence is detained within a prison in some unusual way – for example in solitary confinement, that does not amount to false imprisonment. According to the case law a prisoner has no residual freedom that can be taken away (*Hague v Deputy Governor of Parkhurst Prison* [1991] 3 All ER 733, HL). Lawful detention under s 12 of the Prison Act 1952 deprives prisoners of all their liberty. A prisoner is likely to be able to bring a claim where fellow prisoners or prison officers, acting without authority, detain him against his will.

A recent example of a claim for false imprisonment also involved a claim for malicious procurement of a search warrant. In that case, *Keegan v Chief Constable of Merseyside* [2003] EWCA Civ 936 it was held that both claims must fail because no malice had been proved on the part of the police officers.

13.8 DEFENCES TO ASSAULT, BATTERY AND FALSE IMPRISONMENT

There can on occasion be lawful justification for committing the torts of assault and battery and false imprisonment. General tort defences such as necessity and inevitable accident will apply, and the claimant may be found to be contributorily negligent and damages may be reduced as a result. Certain defences require special consideration.

13.8.1 Self-defence

There has been a common law right of self-defence for centuries, and this is now supplemented by a statutory right to use reasonable force to prevent a crime (s 3(1) of the Criminal Law Act 1967).

The key to a successful defence of self-defence is the element of 'reasonableness', as the defence will only operate if the force used by the defendant is proportionate to that being applied by an attacker (*Lane v Holloway* [1968] 1 QB 379). Although it seldom operates in trespass cases, contributory negligence may sometimes apply as a

defence in some situations (*Murphy v Culhane* [1977] QB 94; *Revill v Newbury* [1996] 1 All ER 291).

This defence is not limited to situations when the attacker threatens personal injury. It can also be used if there is a threat to property. Occupiers may use reasonable force to eject or deter trespassers (*Bird v Holbrook* (1828) 4 Bing 628).

In *Revill v Newbury*, it was held that the firing of a shot through a hole in a door in the direction of a trespasser, causing serious injury, was excessive force and the defence of self-defence could not apply.

The defence is probably limited to situations in which the defendant reasonably believes that an attack is likely.

It did not succeed in *Bici v Ministry of Defence* [2004] EWHC 786 (QB). Here, soldiers who had deliberately fired on a vehicle full of people were unable to prove that they had done so in self-defence.

In some cases the CPS decides to prosecute landowners who use unreasonable force. In 1985, Kenneth Noye, who has since been convicted of a road rage murder, stabbed and killed an undercover police officer in the grounds of his home. He was prosecuted, but was acquitted on the basis of self-defence. In 1993, Dean Davis, a jeweller, stabbed and killed an armed intruder who broke into his house, intending to steal. The two men faced each other in a confined space and there was a scuffle, during which the intruder let off CS gas. Dean Davis was not prosecuted because it was thought that he had acted reasonably in self-defence in a very frightening situation. In April 2000, Tony Martin, a landowner who shot and killed a burglar who was trespassing on his property was convicted of murder and sentenced to life imprisonment. His conviction was later reduced to one of manslaughter by the Court of Appeal. One of his victims is bringing a claim against him in tort. His defence of self-defence failed when the jury heard evidence that he had fired an illegally held shotgun at the intruder until it was empty of bullets. He had previously boasted of his intention to shoot burglars and had an unusually aggressive attitude towards gypsies and burglars.

13.8.2 Consent

As a general proposition, the question of whether the claimant consented to the assault and battery is clearly relevant. It is unclear, however, whether consent is a true defence or whether it is for the claimant to prove lack of consent in order to succeed in the first place as was decided in *Freeman v Home Office* [1983] 3 All ER 589.

If the claimant consented either expressly or impliedly to the torts of assault and battery, there will be a complete defence. This defence is important in the context of medical treatment, as when a patient signs a consent form or impliedly consents to treatment, he or she is consenting to the torts of assault, battery and sometimes false imprisonment. See 13.8.6.

Those who participate in sport consent to reasonable contact within the rules of the particular game. However, there are cases in which actions for assault and battery have succeeded when the game has involved considerable hostility and deliberate punches have been thrown (*Macnamara v Duncan* (1979) 26 ALR 584). Players consent only to

reasonable force in all the circumstances and not to negligence (*Condon v Basi* [1985] 2 All ER 453).

Fights in the street or in pubs or clubs will tend to attract the defences of consent and/or self defence. If, however, force used by one of the participants greatly exceeds that used by the claimant, the defence will not operate. In *Barnes v Nayer* (1986) *The Times*, 19 December, the claimant's wife was killed by the defendant who had been involved in a long campaign of abuse against the whole family. It was held by the Court of Appeal that the defence could not apply in this case, nor could the defence of *ex turpi causa* (illegality) succeed in such circumstances.

13.8.3 Reasonable chastisement

It has traditionally been the case that parents and others with parental responsibility have the legal right to smack their children as part of the administering of reasonable punishment. Any force used to restrain or punish a naughty child must always be reasonable or it will amount to a tort. The burden will be on the defence to prove that the punishment was reasonable in the light of prevailing social standards. Much will depend on the age and physical characteristics of the child and on the type and duration of the punishment, as well as the size and strength of the person inflicting it.

Many parents disagree with smacking or hitting of any kind and it is no longer permitted in schools, following a series of European Court of Human Rights rulings (see *A v United Kingdom* [1998] 2 FLR 959). Corporal punishment was first banned in state schools in 1987 and has been banned in all schools since 1998.

A 48 year old Scottish teacher who pulled down his eight year old daughter's pants and spanked her at a health centre was convicted of assault and battery. He had exceeded the bounds of reasonableness.

The defence was further clarified by the House of Lords in *R (on the Application of Williamson) v Secretary of State for Education & Employment* [2005] UKHL 15. The court held that abolition of corporal punishment in schools under s 548 of the Education Act 1996 (as amended) did not infringe parental rights of those parents who believed that such punishment was consistent with Christian faith (Art 9 of the European Convention on Human Rights). The ban on corporal punishment applied to all schools and could not be mandatory in some and optional in others at the choice of parents. The ban did interfere materially with parental rights under Art 9, but that interference was necessary in a democratic society for the protection of the rights of freedoms of vulnerable children.

13.8.4 Medical treatment

The patient who consents to receiving medical treatment is consenting to the torts of assault and battery and possibly false imprisonment in some cases. This is not the same as consenting to negligent treatment.

Patients who are about to undergo surgery are asked to sign a standard consent form. Patients who go to the doctor or attend hospital for treatments other than surgery, for example, for treatment with medicines or various forms of therapy, are taken to have given implied consent merely by consulting the doctor. There are two possible claims available to patients who allege that they have been treated without consent:

(1) If a doctor treats patients *against their will* or by giving *a different treatment* to that for which consent has been given, he or she commits the torts of assault and battery. It is only in very limited circumstances that these tort claims are available. Thus, if a patient refuses treatment which doctors consider necessary, it has become the practice to seek the advice of the court (*Re C (Adult: Refusal of Medical Treatment)* [1994] 1 WLR 290). In *Re MB* (1997) *The Times*, 18 April, the Court of Appeal issued detailed guidance for doctors in cases where patients refuse essential surgery. In order for consent to be real, the patient must be broadly aware of the type of treatment and when and where it will be carried out (*Chatterton v Gerson* [1981] 1 All ER 257). Consent must be given freely, without duress or misrepresentation as to the nature of the treatment. See *Appleton v Garrett* [1996] PIQR 1 in which a dentist carried out extensive and unnecessary treatment.

(2) If the case is one in which the patient has been made aware of the type of treatment but the doctor has failed to give sufficient detail of the risks or side-effects involved, the patient would only have a remedy in negligence, which is of course, more difficult to prove than trespass to the person. In a claim for negligence brought by a patient who complains of lack of information about details of risks and side-effects, the court judges the doctor by the standard of the *Bolam* test (see *Bolam v Friern HMC* [1957] 2 All ER 118) as modified by *Bolitho v City & Hackney HA* [1997].

There is evidence that the UK courts are moving towards a position similar to that in Australia which demands greater respect for patient autonomy (*Pearce v United Bristol Healthcare Trust* [1999] 1 PIQR 53). In *Chester v Afshar* [2004] UKHL 41 the House of Lords held that a claim may succeed even thought the claimant is unable to establish causation if it can be proved that the defendant doctor negligently withheld information about risks and side effects of the treatment. See Chapter 7 for a detailed account of this case.

The claimant must establish whether negligence or trespass is the correct cause of action, and this could be important for several reasons. First, trespass is actionable without proof of damage, whereas in negligence damage must always be proved. Second, it is easier to prove causation in trespass than negligence.

A mentally competent patient is entitled to refuse life-saving treatment, no matter how irrational that decision may appear to others. In *B v An NHS Hospital Trust* [2002] EWCA 429, it was held that a competent woman being kept alive on a ventilator had a right to refuse that treatment which had in fact amounted to trespass to the person.

In *Secretary of State for the Home Department v Robb* (1994) 22 BMLR 43, a prisoner went on hunger strike. Although he had been diagnosed as suffering from a personality disorder, he was found on the medical evidence to be of sound mind when he was on hunger strike. As he had the capacity lawfully to refuse food and hydration, it was held that the Home Office was under no duty to prolong his life by force feeding him. Prison officials and the prison medical staff could lawfully abstain from providing him with food and hydration by artificial or natural means. A declaration to that effect was granted by Thorpe J. Authorities from other common law jurisdictions indicate that a similar approach, taking into account the need to recognise the autonomy of prisoners, is taken in some US states (see *Thor v Superior Court* (1993) 5 Cal 4th 725).

In February 2000, Ian Brady a notorious murderer held at Ashworth special hospital under conditions of high security appeared before Kay J in the High Court to argue for the right to die by starving himself to death (*R v Collins and Ashworth HA ex p Brady* (2000) unreported). His lawyers argued that it was unlawful for the hospital authorities at Ashworth to force feed him on the grounds that to do so was assault and battery. They based their position on the argument that Brady's decision to starve himself to death was that of a rational, sane man, and not of a person suffering from a psychiatric disorder. They relied on arguments based on the fact that the Mental Health Act 1983 had been misapplied. They also argued that, in force feeding him, the prison authorities had breached Brady's fundamental human rights. The hearing took place *in camera*, but the judgment was given in open court.

Kay J ruled that Brady should not be allowed to starve himself to death, and that force feeding was not illegal. He based his decision on the psychiatric evidence and concluded that Brady still had symptoms of a mental illness and a psychopathic personality and needed to be hospitalised for reasons of his own health and safety and for the safety of other people. The position in English law in such cases is clear.

In *B v Croydon District HA* (1994) 22 BMLR 13, the Court of Appeal held that the force feeding of B, who suffered from a mental illness and was detained under s 3 of the Mental Health Act 1983, was not unlawful, and that she could be given treatment which included feeding through a naso-gastric tube or intravenous feeding without consent under s 63 of the Mental Health Act 1983. It was held that the wording of that section, namely, 'any medical treatment given . . . for the mental disorder from which he is suffering', included treatment given to relieve any symptoms and consequences of the mental disorder, as well as treatment intended to deal with the cause of the illness. In *Re KB (Adult) (Mental Patient: Medical Treatment)* (1994) 19 BMLR 144, it was held by a judge of the Family Division that a patient suffering from anorexia nervosa could lawfully be force fed, as feeding by naso-gastric tube in a case of this kind fell within the provisions of s 63 of the Mental Health Act 1983.

If a person is competent, any bodily interference may not take place without the consent of the individual concerned. The case law on this matter concerns refusal of Caesarean section operations and other medical procedures such as blood transfusions, and guidelines were issued by the Court of Appeal on the correct approach for healthcare professionals to follow in *Re MB (Adult)(Refusal of Caesarean Section)* (1997) 38 BMLR 175. These, and other cases involving refusal of medical treatment, indicate that, if a person is competent to make a decision, even if that decision is irrational in itself, there is a need for that person to give consent to any acts that would amount to assault and battery (*Re L* (1996) 35 BMLR 44). In the early case of *Leigh v Gladstone* (1909) 26 TLR 139, it was held that the defence of necessity would apply in a case of battery involving the prolonged force feeding of a suffragette, but as explained above, the more recent decisions on refusal of consent to medical treatment by competent persons indicate an approach which places greater emphasis on personal autonomy. The human rights framework has added a new dimension to the law in the UK. There is a positive obligation on states, under Art 2 of the European Convention on Human Rights, to protect the right to life. However, this needs to be balanced against the right of an individual not to be subjected to torture or inhuman or degrading treatment. Force feeding could certainly be described as painful, but it probably does not fall within the high level of severity of

pain and suffering required to invoke the protection of the Convention. According to Keir Starmer (Starmer, *Blackstone's Human Rights Digest*, 2001, Oxford: OUP) who cites *X v FRG* (1985) 7 EHRR 152:

> It would appear that the positive obligation incorporated in Art 2 can require the authorities to force feed a prisoner who is on hunger strike. Where the authorities do so, it appears that a prisoner cannot claim that the force feeding violated his rights under Art 3.

In *R (Vaclovas v Secretary of State for Justice* [2008] EWHC 1197 (Admin) it was held that it was lawful to restrain a prisoner with handcuffs while receiving chemotherapy in an NHS hospital. There was a high risk that he would try to escape, and he was a danger to the public.

The Mental Capacity Act 2005 came into force in October 2007. This Act aims to protect people who are unable to make decisions for themselves about treatment, for whatever reason. It states that everyone should be treated as having capacity to make their own decisions until it is demonstrated that they are unable to do so. The capacity of an individual to make decisions may vary from time to time and from one decision to another, and that is recognised by the Act, which is aimed at protecting people who lose capacity. It is possible for an individual who has capacity to appoint someone (for example a trusted relative or friend) to make decisions on their behalf should they lose the ability to do so. It is important that any decisions made by others are made in the best interests of the person who lacks capacity, and the Act provides a checklist for decision makers. It also introduces a Code of Practice for people who support those who have lost the capacity to make their own decisions.

There is also a new criminal offence under the Act of neglect or ill-treatment of a person who lacks capacity.

The subject of consent to medical treatment is complex and detailed discussion of the Mental Capacity Act is well beyond the scope of this book.

13.8.5 Children and consent to treatment

There are special cases which pose particular problems in relation to consent to medical treatment. The case of children under age 16 years is governed by *Gillick v West Norfolk and Wisbech HA* [1985] 3 All ER 402. The child's capacity to consent depends upon whether he or she has sufficient maturity and understanding as to the nature of the treatment and what it involves. If the child lacks such understanding, the parents may be asked to provide the consent on behalf of the child, but the court has jurisdiction in some cases to give or refuse consent for the child (*Re B (A Minor) (Wardship, Sterilisation)* [1987] 2 WLR 1213). Several cases have been decided on this point in recent years and a detailed discussion of them is beyond the scope of this book.

However, an example of a decision of the Court of Appeal in this area if law is *Re C (a child) (immunisation: parental rights); Re F (a child) (immunisation: parental rights), The Times*, 31 July 2003, dismissing an appeal by the mothers of two girls against an order of a judge of the Family Division granting the girls' fathers specific issue orders under s 8 of the Children Act 1989 that the girls be given vaccinations against the wishes of their mothers. In arriving at the decision, the Court of Appeal criticized expert witnesses who are prepared to use 'junk science' to support their arguments. The mothers of C and F, girls aged four and 10 years, had not had their children vaccinated against a range of

childhood infections. The girls' fathers had succeeded in obtaining orders from Sumner J, a Family Division judge, that the vaccinations be given to their daughters, as appropriate to children of their respective ages. In the course of his judgment Sumner J had rejected a submission on behalf of the mothers based on the case of *In re J* [2000] 1 FLR 571, that the court should not order any non-invasive medical treatment if the child's primary carer strongly objected. He had concluded that no useful lesson could be drawn from that case as it offered no guidance on the question of immunisations, which in any event were not nonessential invasive medical treatment. Immunisations were, in his Lordship's view, preventive healthcare, the promotion of which is an obligation on states under Art 6.2 of the UN Convention on the Rights of the Child 1989 (Treaty Series No 44) (1992) (Cm 1976). The Court of Appeal gave its full support to the decision of the judge, agreeing that some of the evidence presented on behalf of the mothers was 'junk science' that was unsupported by independent research. In the words of Lord Justice Sedley, 'not to mince words, the court below was presented with junk science'. By contrast, the evidence of the expert witnesses for the fathers had been presented by two eminent clinical scientists, who had been aware of the general parental concerns about immunisation, but had agreed that there was strong scientific evidence that considerable risks arise if children are not vaccinated. Accordingly, the appeal was dismissed.

13.8.6 Emergencies

Adults who require emergency treatment are taken to give implied consent, even if unconscious and unable to decide for themselves. The Mental Capacity Act 2005 is of relevance here.

A common law defence of necessity would also apply in cases involving incompetent patients (*F v West Berkshire HA* [1989] 2 All ER 545), and the doctor has a right to decide what treatment would, according to the *Bolam* test as modified by *Bolitho* (see *Bolitho v City and Hackney HA* [1992] PIQR P334, (1997) 39 BMLR 1, HL), be in the best interests of the patient. However, as a result of the decision in *F v West Berkshire HA*, doctors are now advised to seek a declaration that non-urgent treatment is lawful before proceeding. The position was further considered in *Re SL (Adult Patient) (Sterilisation: Patient's Best Interests)* (2000) 55 BMLR 105 by the Court of Appeal, where the appropriate approach to be taken by a court was considered in deciding whether an incompetent patient should undergo radical and irreversible surgery in order to achieve sterilisation. This was an appeal against a decision by S, a woman with severe learning difficulties who was represented by the Official Solicitor. S, aged 28, attended a day care centre five days a week. Her mother found it increasingly difficult to cope with her. She feared that her daughter might become pregnant. Evidence was presented to the effect that she would find it impossible to cope with pregnancy.

The Court of Appeal considered that the concept of 'best interests' was wider in scope than the medical considerations, and a judge must decide whether to accept or reject the expert medical opinion as to whether an operation is, or is not, in the best interests of a patient.

The court was of the view that in cases of this kind judges have a discretion. However, in the present case, the weight of evidence appeared to be impressive in support of a less invasive method of preventing pregnancy. The starting point of any medical decision

could be found in the principles set out in the *Bolam/Bolitho* test but a final decision should incorporate broader ethical, social, moral and welfare considerations. It was held that the judge had misapplied the *Bolam* test by concluding that the proposed treatment was within the range of acceptable opinion among responsible practitioners. The decision for surgery was premature and the declarations would be set aside. The appeal was allowed.

Under the Mental Health Act 1983, certain forms of medical treatment for serious mental illness do not require consent by the patient but these are subject to checks and safeguards which have satisfied the concerns of many who fear that such provisions create unreasonable restrictions on the freedom of the individual. As in the case of police powers, there is constant concern that the need to protect the public should be balanced against the freedom of the individual. This is a highly specialised area of law that is beyond the scope of this book.

13.8.7 Consent to the taking of bodily samples from detainees

A number of procedures carried out at police stations to assist criminal investigations can only be undertaken with the consent of the suspect and/or the permission of a senior police officer, of at least the rank of superintendent. Intimate samples, such as swabs from bodily orifices may only be taken with the permission, in writing, of the suspect (ss 62(4) and 63(2) of PACE 1984, as amended). Non-intimate samples, such as finger-nail scrapings can only be taken after the suspect has given written permission (s 61(2)), and fingerprints can only be taken at a police station with the written consent of the suspect (s 65). Further modifications have been introduced under the Police Reform Act 2002 which are designed to ensure that blood samples can be taken from drivers even if they have been injured in car accidents.

As long as the correct procedures are followed, there will be a defence to an action brought against the police for assault and battery, and the strict rules concerning written consent are important safeguards for suspects.

13.8.8 Lawful arrest, detention and stop and search

Lawful arrest does not amount to false imprisonment, whether it is a citizen's arrest or is carried out by a police officer. Under s 1 of PACE 1984, the police have a power to stop and search persons whom they reasonably suspect may be carrying stolen or prohibited articles. Such a power to stop people in the street in full view of the public is regarded as a serious infringement of personal freedom and is seen by many as being unjustifiable, given that existing police powers were adequate before the Act to achieve the same objective.

An arrest may be made by warrant from a magistrate, and private citizens and police officers have powers of arrest without warrant. Under PACE 1984 and other statutes, the police have extensive powers to make arrests without warrant.

What constitutes an arrest has been the subject of much discussion and arrest is still not easily defined (see *Murray v Minister of Defence* [1988] 2 All ER 521). However, it is clear that if an arrest is made lawfully, there will be a defence to claims for assault, battery and false imprisonment.

While it is not certain exactly what an arrest entails, it is clear that the requirements of a lawful arrest include:

- an arrest made within the powers granted by statute and common law;
- a 'reasonable suspicion' on the part of the person making the arrest. Note this requirement is also present for stop and search;
- force which is used must be in proportion to the amount of force exerted by the suspect (s 117 of PACE 1984).

The common law and statutory powers, although complex, are not difficult to discover, and every police officer, customs officer, and indeed people like store-detectives who are likely to make arrests in their employment, will receive detailed instruction on this matter. What is much more difficult to establish is what exactly the term 'reasonable suspicion' means. The concept is not defined in PACE 1984, though the Codes of Practice made under PACE does attempt to do so. A mere 'hunch' is not enough, there must be enough circumstantial evidence to lead a reasonable officer to deduce that the suspect might be guilty. What is reasonable is determined objectively (*Castorina v Chief Constable of Surrey* [1988] NLJ 180).

When an arrest is made, the arresting officer must inform the suspect in general terms and, if possible, precisely, the grounds for the arrest (s 28(3) of PACE 1984). If a person accompanies an officer to a police station merely to help with inquiries without being arrested, he must be told of his right to leave at any time (s 29 of PACE 1984).

The Codes of Practice aim to ensure that conditions in custody are comfortable under the legislation and that detention and questioning are not oppressive.

People may only be kept in custody during the investigation of crimes according to the conditions and time limits laid down in the legislation, until such time as it is possible to charge them. If there is not enough evidence to charge the suspect when regular custody reviews are made, and it is unlikely that further questioning will lead to a charge, the custody officer must order the suspect to be released. If a person is charged with an offence, he or she must be brought before a court as soon as possible and will be remanded in custody or on bail, or, alternatively, may be released on police bail.

The European Court of Human Rights has been critical of the long periods of custody before charge which are permitted in PACE 1984 as amended and the legislation to deal with terrorism (*Brogan v UK* (1989) 11 EHRR 117). New rules concerning the length of time for which terrorist suspects may be detained are being consulted upon at present,

If excessive force is used in making an arrest, even if the arrest itself is lawful, in that it complies with common law or the provisions of PACE 1984 (as amended), there will be grounds for a claim for assault, battery and/or false imprisonment (s 3(1) of PACE 1984). Whether the force used was unreasonable is a question of fact in each case (*Farrell v Secretary of State for Defence* [1980] 1 Lloyd's Rep 437; *Ballard, Stewart-Park and Findlay*).

Another claim sometimes made against the police is that of malicious prosecution (see Chapter 18).

There is no space here for detailed discussion of police powers and students are referred to specialist texts on that topic.

13.8.9 Proportionality

If there is a claim involving an alleged breach of the European Convention on Human Rights the question arises as to whether the alleged deprivation of liberty can be justified as proportionate. This question was considered by the Court of Appeal in relation to crowd control during demonstrations which causes problems for police and demonstrators, in *Austin and Another v Commissioner Of Police For The Metropolis* [2007] EWCA Civ 989. See 13.7.

13.8.10 Limitations

Note that although it was held in *Stubbings v Webb* that there was no discretion to extend the time-limit for bringing claims for trespass to the person, the House of Lords departed from its own decision and established a new approach in *A v Hoare; C v Middlesbrough Council; X v Wandsworth LBC; H v Suffolk County Council; Young v Catholic Care* [2008] UKHL6, and a more just approach has been achieved. See Chapter 20.

13.9 REMEDIES

The usual remedy sought for trespass to the person is damages, and as has been seen there may be an award of aggravated and exemplary damages in an appropriate case.

Guidance was issued to juries on the appropriate levels of damages in *Thompson v Metropolitan Police Comr* [1998] QB 498.

The remedy of self-help may also be used. For example, a person who has been falsely imprisoned may escape, and someone who has been unlawfully arrested may resist arrest by use of reasonable force.

The ancient prerogative remedy of *habeas corpus* is theoretically available for false imprisonment, though this is rarely sought today. For examples, see *R v Secretary of State for Home Dept ex p Cheblak* [1991] 2 All ER 319 and *R v Park Royal Centre ex p Thompson* [2003] EWCA Civ 330. This would mean an application to the Divisional Court for an order to release the person unlawfully detained, and is only sought in emergency cases.

13.10 THE TORT IN *WILKINSON v DOWNTON*

A tort which it is difficult to classify is to be found in the case of *Wilkinson v Downton* [1897] 2 QB 57 which was decided before liability in negligence for nervous shock was established. It did not fit comfortably with trespass to the person, as the damage, in this case, was indirect and there was no application of physical force, though there was an intention to commit the act.

The facts were that the defendant as part of what may have been a malicious or at best, stupid, practical joke told the claimant that her husband had been seriously hurt in an accident. She rushed to see him and suffered nervous shock, even though he was completely unharmed. The defendant was found liable in tort by Wright J who said:

> The defendant . . . has wilfully done an act calculated to cause physical harm to the claimant . . . and has in fact thereby caused physical harm to her. That proposition appears to me to state a good cause of action.

The legal basis for this proposition is unclear, and the case has only been followed in one other case in this country (*Janvier v Sweeney* [1919] 2 KB 316), though there are Australian and Canadian cases. The rule has been rejected and disapproved by Lord Diplock, and is probably not part of a wider principle.

However, in situations where intentional and malicious acts are committed with the object of causing humiliation and distress, the tort in *Secretary of State for the Home Department v Wainright* [2003] UKHL 53, the facts of which are set out at 13.5. The claimants had been strip-searched in breach of prison rules when visiting a relative suspected of dealing with drugs in prison. The House of Lords considered *Wilkinson v Downton* in depth and held that it was not authority for the proposition that damages for emotional distress not amounting to psychiatric injury could be recovered on proof of intention to cause distress. Before the Protection from Harassment Act 1997 there was no tort of intentional harassment which gave a remedy for anything less than psychiatric injury.

Wilkinson v Downton and *Janvier v Sweeney* were the basis of reasoning in the Court of Appeal in *Khorasandjian v Bush* [1993] 3 WLR 476 to stop the defendant harassing the claimant by making persistent telephone calls. That case may be regarded as an extension to the earlier law and came close to recognising a common law right of privacy, though the authority of that decision is now questionable in the light of the House of Lords ruling in the *Wainright* case, in which it was held that even if the Human Rights Act 1998 had been in force at the relevant time there would have been no remedy available for distress merely because it affected privacy as opposed to some other interest. The Protection from Harassment Act 1997 creates civil remedies and criminal offences for harassment.

Although it is unusual for a claim to be brought for the tort in *Wilkinson v Downton*, it is possible to find some successful modern applications. For example, in *C v D and Another* [2006] EWHC 166 (QB) a headmaster has been found liable under the principle in *Wilkinson v Downton* (1897) 2 QB 57 for psychiatric injury caused by an act of sexual abuse against a pupil which had not involved touching. The claimant alleged that he had been sexually abused by D, the headmaster, as well as by a priest at the same school, and also argued that S, as D's employer, was vicariously liable for that abuse. The judge found that D's deliberate touching of C's genitals constituted the tort of trespass to the person – here battery. C had made it clear that no claim in negligence was made against D. C also succeeded under the principle in *Wilkinson v Downton*, which was only available if the harm suffered was a recognised psychiatric injury. The judge ruled that C's psychiatric injury could be attributed to a several causes, and D's conduct was one of those causes. D had been reckless as to whether he would cause such injury to C, and this brought his conduct and state of mind within the *Wilkinson v Downton* principle. Damages were assessed at £20,000, and S was vicariously liable for the abuse that D had inflicted on C.

FURTHER READING

Cane, 'Mens Rea in Tort Law' (2000) *OJLS* 20(4): 533–56
Conaghan, 'Tort Law, Harm and Redress: A Feminist Perspective' (2002) *Legal Studies* Vol 22, No 3
Mason and Laurie, 'Misfeasance in Public Office: An Emerging Medical Law Tort?' (2003) *Medical Law Review* 11(2): 194–207
Hocking, 'Parenthood, Childhood and Injury: Some Dilemmas for the Law of Torts', *Liverpool Law Review*, Vol 21, No 1, Jan 1999

For regular monthly up-dates on this area of law, see *Personal Injury Compensation*, published monthly by Informa UK Ltd.

CHAPTER 14

EMPLOYERS' LIABILITY

14.1 AN OVERVIEW

Common law duties are important from the employment law perspective, but one factor which complicates this area of law is that it is interspersed with statutory provisions, breaches of which may give rise to an action for breach of statutory duty in some cases. Indeed, most claims for breach of statutory duty arise in the employment situation, as so many statutes have been enacted to provide safer work environments and to protect employees from exploitation by unscrupulous employers who are prepared to cut corners on safety in order to increase productivity. The tort of breach of statutory duty is dealt with in Chapter 9. However, it must not be forgotten that conditions for employees have also improved considerably through the efforts of judges in modifying the common law rules which for many years prevented successful claims by employees against their employers. Claims for breach of statutory duty are of greater assistance to employees than ordinary negligence claims because the burden of proof is reversed once the statutory duty is established.

The large volume of case law in this area indicates that many employees have benefited from compensation for breach of regulations.

At one time, employees stood little chance of succeeding in claims against their employers for injury, even if they were prepared to risk losing their jobs by doing so. Many who were seriously injured in the days when conditions in some factories were extremely dangerous were thrown on the mercy of relatives or the Poor Law. Before the advent of trade unions and employment protection legislation, there were few people with the means for, or interest in, championing the cause of workers.

Employers were protected from legal action by the doctrine of 'common employment' (not abolished by statute until 1948) which prevented an employee whose injury was caused by a fellow worker from succeeding in an action against the employer (*Priestly v Fowler* (1837) 3 M & W 1).

In addition, the defences of *volenti non fit injuria* (consent) and contributory negligence often meant that employees had little chance of success.

Judges during the 20th century slowly modified these hurdles which had been created in a different social and economic climate, by introducing the notion of the non-delegable duties of employers discussed above, and by refusing to allow the defence of common employment to apply to breach of statutory duty (*Groves v Wimborne (Lord)* [1898] 2 QB 402). The defence of *volenti non fit injuria* was also modified when the House of Lords ruled that any consent had to be given freely (*Smith v Baker & Sons* [1891] AC 325). The carelessness of employees has also been treated with considerable leniency by the courts when considering the issue of contributory negligence.

There has been a form of no-fault compensation for work accidents since as long ago as 1897 when the first Workmen's Compensation Act was passed. This was extended over the years and finally became part of the welfare state legislation introduced after the

First World War. Today, victims of work accidents with long term disabilities receive periodic payments under the Industrial Injuries Scheme, and there are those who would argue that such people do not deserve the preferential treatment which they undoubtedly receive when compared with the victims of other accidents, such as road accidents and medical accidents. The scheme is funded by contributions made by employers and employees, and the claims are made by injured employees from the state rather than the employer. However, a report by the National Audit Office in 1994 concluded that almost half the victims of serious industrial accidents and disease do not apply for state compensation.

Employers, with the exception of very large employers who are permitted to act as their own insurers, are required to take out compulsory liability insurance cover for all their employees (Employers' Liability (Compulsory Insurance) Act 1969). This means that injured employees have better protection, through insurance, than many other accident victims.

Injured employees have the option of tort claims if the industrial injuries system is inadequate to provide the necessary compensation, and some 12% resort to these. So there is considerable support, both from the state and from the tort system, which has tended to lean in favour of injured employees to mitigate their previous harsh treatment. This has reinforced the conclusion that they are in a better position than other accident victims. In addition to payments made out of the industrial injuries fund, the Pearson Commission in 1978 estimated that about £70 million is paid to victims of work accidents by the tort system each year.

Important developments have taken place in relation to causation and employers' liability. This is especially so in the case of work related asbestos diseases which are discussed in Chapter 8.

The law imposes considerable burdens upon employers both in relation to torts committed by their employees and in respect of duties owed by employers to their employees. Employers may also be vicariously liable for the torts of their employers, see Chapter 16.

The nature of the duties of employers varies according to the circumstances and, in some instances employers will be liable irrespective of any fault of their own, while in others it is necessary to prove that an employer has been in breach of duty.

It is important to maintain and develop a clear picture of the framework of the common law and statutory liability of employers in order to untangle the maze of liabilities that may arise in the employment situation. In addition to the various legal remedies available to employees for injuries arising out of the course of their employment, the state provides support through the system of social security, which has particularly well developed mechanisms for dealing with illness and injury sustained at work.

14.2 PRIMARY LIABILITY

Employers may, in certain circumstances, be liable in tort in their own right. This is termed 'primary liability'. It applies in limited circumstances even when independent contractors have been employed, and much more widely at common law to non-delegable duties.

14.2.1 Independent contractors

Employers are under a duty to ensure that the contractors whom they employ are reasonably competent to carry out the specific tasks for which they are employed. The duty of an employer is a personal duty which means that the employer cannot simply wash his hands of all responsibility just by employing a competent contractor (*Wilsons and Clyde Coal Co v English* [1938] AC 57. Beyond this, the employer will not normally be liable for the wrongful acts of contractors, although once an employer discovers and condones the tort of an independent contractor, he or she may be liable for that tort. Such liability would be primary rather than vicarious.

Of course, primary liability may also arise if the contractor was acting as the agent of the employer or on his or her explicit instructions.

14.2.2 Non-delegable duties

Primary liability also extends to exceptional situations in which the duty on the employer is so onerous that it cannot be delegated to anyone else. An employer would not be able to rely on the defence that he had appointed someone else to carry out his duty. Such duties are described as 'non-delegable' duties, and arise in circumstances when there is a duty imposed by statute or common law 'to see that care is taken', rather than the ordinary duty to take reasonable care (*The Pass of Ballater* [1942] P 112, (1942) 167 LT 290). The circumstances in which such duties arise are listed below:

- **By statute**
  Statutes sometimes place non-delegable duties upon employers and such duties are those statutory duties which are absolute in character. In order to ascertain the nature of the duty created, it is always necessary to look at the construction of the statute in question. It appears that duties to take care as well as duties which create strict liability can be non-delegable (*Darling v Attorney General* [1950] 2 All ER 793).

- **Common law: ultra-hazardous activities**
  Those activities which are inherently dangerous in character carry special responsibility for the person who ordered them to be undertaken. As a result, it is not possible to delegate responsibility should anything go wrong, even though the work which has been commissioned is performed by an independent contractor. Examples of such activities include: a photographer used a magnesium flash lamp close to curtains in a cinema (*Honeywill and Stein v Larkin Bros Ltd* [1934] 1 KB 191); a contractor tried to thaw water pipes in an attic with a blow lamp (*Balfour v Barty-King* [1957] 1 All ER 156).

- **Common law: torts of strict liability**
  If the tort which is committed is one of strict liability, the employer is not able to delegate responsibility for it. For example, the duty to prevent the escape of dangerous things collected on land cannot be delegated (*Rylands v Fletcher* (1868) 100 SJ 659, (1868) LR 3 HL 330, (1866) LR 1 Ex 265). The contractor who caused the escape of water which flooded into neighbouring mines was not liable to the claimant. The landowner who employed him was liable.

- **Common law: activities on or adjoining a highway**
  If work is carried out on or adjoining the highway, there is a risk that the tort of highway nuisance could be committed. The duties on the employer cannot be delegated to an independent contractor. For example, in *Holliday v National Telephone Co* (1899) 2 QB 392, a contractor employed by the defendants caused an explosion on the highway which injured a passer-by. The employer, a telephone company engaged in laying wires, was liable. In *Tarry v Ashton* (1876) 1 QBD 314, an occupier of land adjoining a highway employed a contractor to repair a dangerous lamp overhanging the highway. The occupier was liable when the lamp was allowed to fall and injured a passer-by. But note that the employer is not liable if the work is carried out close to, but not adjoining, the highway (*Salisbury v Woodland* [1970] 3 All ER 863); nor does the rule that duties are non-delegable apply to the normal use of the highway, which is for passing and re-passing in vehicles or on foot.

- **Common law: activities in public places**
  The principle that activities on or adjoining highways attract non-delegable duties probably also applies to activities carried out in public places such as railway stations (*Pickard v Smith* (1861) 10 CB (NS) 470).

- **Common law: miscellaneous cases**
  Although the duty not to commit private nuisance can usually be delegated, it is possible to find isolated examples of duties in private nuisance which are non-delegable, for example, the duty not to allow support for adjoining property to be withdrawn (*Bower v Peate* (1876) 1 QBD 321).

- **Common law: bailments**
  Duties of bailees who are paid for their trouble (bailees for reward) cannot be delegated (*Paton v British Steam Carpet Cleaning Co Ltd* [1977] 3 WLR 93) though as these duties are contractual, it is possible, though unusual, for the bailment contract to specify particularly that the duties are to be delegated.

- **General duties**
  Implied terms exist in contracts of employment to the effect that the employer will have due regard for the health and safety of all employees (*Johnstone v Bloomsbury AHA* [1991] 2 All ER 293), and it is duties of this nature which cannot be delegated (*Wilsons and Clyde Coal Co Ltd v English* [1938] AC 57); nor can the duty to provide a safe system of work be delegated (*McDermid v Nash Dredging and Reclamation Co Ltd* [1987] AC 906; *Walker v Northumberland CC* [1995] 1 All ER 737). The duty of employers to provide safe equipment has been reinforced by statute, and is non-delegable. Section 1 of the Employers' Liability (Defective Equipment) Act 1969 provides that employers are liable for defects in equipment provided by them which cause personal injuries to employees, even if the fault involved is attributable to some third party. Fault and causation must be established if the employee is to succeed, and these requirements can cause problems in themselves for injured employees. If a case is proved, however, the employer will be able to claim an indemnity from the person who is proved to be at fault.

  It should be noted that a claim under the Consumer Protection Act 1987 is not precluded by the existence of the 1969 Act and remedies under the later Act are more likely to be available to workers, since it does not require proof of fault.

14.3 COMMON LAW DUTIES OF EMPLOYERS TO EMPLOYEES

Contracts of employment contain several terms which impose duties upon both employers and employees. We are not concerned here with express terms, except in so far as it is relevant to explain that certain express terms cannot override some of the implied terms because the provisions of the Unfair Contract Terms Act (UCTA) 1977 prevent this from happening (see *Johnstone v Bloomsbury AHA*, 14.2.5, below). An employer's common law duties involve special applications of the ordinary duty of care in negligence and contractual duties between employers and employees. The duties at common law are positive duties to take affirmative action to protect employees.

Note the exceptional circumstances relating to members of the armed forces (*Matthews v Ministry of Defence* [2003] UKHL 4).

14.3.1 Duty to employ competent staff

Employers must ensure that the staff whom they employ are competent to undertake the tasks which they are required to perform, and must train them to use any equipment in the correct manner. This even extends to ensuring that known trouble makers and practical jokers are disciplined or dismissed. In *Hudson v Ridge Manufacturing Co Ltd* [1957] 2 QB 348, the company's notorious practical joker injured another employee in the course of one of his pranks, and the employer was liable for the injury. However, in *Smith v Crossley Bros Ltd* (1951) 95 SJ 655, it was held that a single isolated prank did not attract liability for the employer.

14.3.2 Duty to provide proper plant and equipment

There is a duty at common law imposed upon all employers to ensure that any equipment provided for the use of employees is of a safe standard. This also includes a duty to ensure that the equipment is properly maintained. Although there is a duty to inspect equipment regularly to ensure that it is of a proper standard, the employer will not be liable if there was a latent defect which could not have been detected. However, employers are not liable if the employees, once properly trained, do not make adequate use of the equipment supplied. In *Parkinson v Lyle Shipping Co Ltd* [1964] 2 Lloyd's Rep 79, an employee was injured when he tried to light a boiler. His claim failed because the fault did not lie with the equipment but with himself. From the point of view of causation, if the employees would not have used safety equipment had it been supplied, the employer will not be liable for their injury merely because the equipment was not available to use. If a statute requires the supply of safety equipment, much depends upon the construction of the particular statute if a problem arises about its not being used.

The common law duty has been enacted in the Employers' Liability (Defective Equipment) Act 1969, discussed above, and injured employees will be considerably assisted by the Consumer Protection Act 1987.

14.3.3 Duty to provide a safe workplace

Employers are required at common law to take reasonable steps to ensure that places of work are safe. There is a duty to take positive steps to safeguard employees.

This duty applies even though the employee may not be working at the time on the employer's own premises. In such circumstances, it may not be practical for the employer to take as much care of the employee as could be taken on 'home' premises. In *Wilson v Tyneside Window Cleaning Co* [1958] 2 QB 110, an employee was injured while cleaning windows on a client's premises. It was held that the employer had done all that was reasonable in the circumstances to ensure the safety of the employee. Employers would not normally be expected to inspect every place in which their workers are to be deployed, as in many instances enormous problems could exist for employers. Take, for example, the employers of health visitors and social workers who spend large amounts of time on the premises of patients and clients. As a matter of common sense, it would be unreasonable to expect the employer to check every possible place of work. The role of insurance may also be important in cases in which workers are engaged in tasks on the premises of people other than their employers. Such people would, in many instances (though possibly not some of the clients of social workers), carry insurance to cover occupiers' liability, and injured workers would be compensated by the insurers.

Employers are, however, expected to provide proper tools and equipment for use on other people's premises, and satisfactory instructions and training if necessary.

There has been much controversy surrounding claims for repetitive strain injury (RSI), a condition which typists and keyboard users, among others, claim to develop as a result of frequent use of such equipment. However, in *Mughal v Reuters* [1993] IRLR 571, it was held that no damages could be awarded unless the employee could prove that a definite physical injury had been suffered. The claimant in this case was a journalist who claimed damages for personal injury as a result of using visual display units (VDUs) and keyboards in his employment. Although he could prove that he had suffered discomfort in his arms, there was no evidence of any definite pathological condition such as teno-synovitis, so he could not succeed in his claim. It was also held that the employer had taken all reasonable care to provide a safe system of work in their office by regularly checking the equipment and providing work stations and monitoring what was found wanting. Members of staff knew that they could ask for footrests, document holders and other equipment and it would be provided. In other cases, when the employee has been able to prove that a recognised clinical condition has been suffered and that the employer took no steps to educate employees about the correct methods to use in doing the work and how to recognise warning symptoms, there have been successful claims against the employer. In *Mountenay (Hazzard) and Others v Bernard Matthews* (1993) (unreported), employees were handling and preparing poultry for the market using production lines, and this work involved certain wrist and arm movements which caused recognised clinical conditions. It was held that the employer was liable because he had not ensured that the jobs were rotated to relieve the continuous use of the same muscles, nor had there been any proper education of employees about the dangers of the task. The claimant was also successful in *Mitchell v Atco* (1995) (unreported), because she had suffered clinical symptoms after using heavy equipment for testing motors, and the employers had failed to introduce job rotation and had given her no advice about how to approach the work. However, in *Pickford v ICI* (1998) 43 BMLR 1, the House of Lords ruled that employers are not obliged to warn employees about a medical condition which has a psychological aspect, if the very warning might induce the condition.

Employers are constantly faced with new and varied problems and good systems of risk management are essential if they are to avoid legal action, bearing in mind the fact that there are also pressures on them from the Management of Health and Safety at Work Regulations (SI 1999/3242). For example, Hepatitis B, a serious blood-borne disease, can be transmitted by medical staff who are carriers. Employers of people who are classified as being at risk of contracting this illness, for example certain health care workers, police officers, social workers and prison officers, need to control the risk in order to avoid liability. This could be very expensive if testing and vaccination programmes are introduced, and difficulties can arise if employees, who fear that they may be carriers of the disease, refuse to co-operate. However, it must be remembered that employees also have duties to their employers, one of which is to obey all reasonable orders, and failure to co-operate in a risk assessment scheme could result in dismissal.

14.3.4 Duty to provide safe work systems

Not every operation which is undertaken by employees requires that a special system of work should be devised and put in place to ensure the safety of employees. This is a question of fact in each case. The concept of a safe system of work is extremely broad. For example in *Piccolo v Larkstock Ltd and Chiltern Railways and others*, [2008] EWCA Civ 647, the owner of a flower shop situated on a station concourse was found liable for injuries suffered by the claimant who had slipped on a flower petal. The defendants were negligent in failing to operate a reasonably effective and safe system of work for dealing with the possibility of accidents caused by falling petals.

In *Lloyd v Ministry of Justice* [2007] EWHC 2475 (QB), a prison officer succeeded in a claim for damages for personal injury following an attack he had sustained at the hands of a prisoner. He argued that he would have taken additional precautionary measures if he had been informed about the prisoner's violent history and previous attacks on prison officers. He based his arguments on the fact that there was no safe system of work in place. The judge found that the defendants had a duty to keep the claimant reasonably safe, and that the prisoner's history sheet should have included a warning about his violent propensities, including his record of assaulting prison officers. The history sheet had never been transferred down from the wing to the segregation unit, and the internal computer system did not hold all the relevant information in a comprehensible form. This meant that there was no safe system of work in place at the prison.

The duty may exist in relation to specific jobs or to the general running of the operation, and particular industries tend to have their own systems in place from which it may be difficult for individual employers to deviate except by ensuring an even safer work environment. The law does not condone dangerous practices merely because all other industries of the same kind follow them.

In *Re Herald of Free Enterprise Litigation* (1989) *The Independent*, 5 May, it was found that it was standard practice to leave the ferry door open when leaving port, but the practice was still condemned as dangerous by the tribunal. However, there is no duty on the Ministry of Defence to provide a safe system of work in battle conditions (*Mulcahy v Minister of Defence* [1996] 2 All ER 758), nor does a soldier owe a duty of care to his colleagues in battle.

Employers are expected not only to devise safe work systems where necessary, but also to ensure that their employees are trained in their use and follow them on a regular basis, even to the point of appointing supervisors to ensure that workers use necessary safety equipment (*Nolan v Dental Manufacturing Co Ltd* [1958] 1 WLR 936).

In *Alexander and Others v Midland Bank plc* [2000] ICR 464, the bank appealed from a decision made in favour of five of its employees who claimed that they had suffered injury as a result of high pressure work on batch processing keyboards. The claimants had been employed by Midland Bank from 1989 to 1990 at a centre which dealt with the processing of documents. In the course of their employment, they had to enter the details of cheques and other documents into a main computer – a process called 'encoding'. This process demanded great accuracy and, in seeking to increase its efficiency, the bank sought increasingly higher encoding speeds from its employees. The claimants alleged that the workstations were operated on principles which were ergonomically unsound, and that, as a result, they had suffered musculo-skeletal pains which gradually became worse. Over a period of time, breaks were cut and the pressure of the work increased.

The defendant bank denied that the pressure of work had resulted in any injury. It alleged in its defence that the injuries of which the claimants complained were psychogenic rather than physical in nature, and denied any breaches of duty, arguing that the claimants had sustained no injuries and, in the alternative, that any injuries they may have suffered were not sustained as a result of employment.

The Court of Appeal held that the judge had correctly found that he had a simple choice between two alternative explanations, as there had been no suggestion that the employees had been malingering. The claimants had to demonstrate that their injuries were more likely to have been caused by physical than psychogenic factors. The judge had to weigh the strength of the arguments about the psychogenic factors before reaching his conclusion, but it did not matter whether he did this before or after considering the claimants' case that the injuries were physical.

In *Mountenay v Bernard Matthews*, it was held that employers have a duty to warn employees of risks of injury and to educate them so as to enable them to draw symptoms to the attention of doctors.

If after appropriate training, an accident is the result of a one-off situation, rather than a routine work operation, an employee is expected to use common sense and take sensible precautions against being injured. In *Chalk v Devizes Reclamation Co Ltd* (1999) unreported, the claimant had been employed as a labourer at a scrap metal yard owned by the defendants. He had been trained in safe lifting techniques for routine objects, but, on one occasion, a large lump of lead had fallen off a pallet unexpectedly and the claimant had injured his back while attempting to lift it. He alleged that his injury had been caused by the employer's failure to provide a safe system of work. The Court of Appeal held that this was a one-off accident in which the claimant could have been expected to use his common sense and initiative, and that no advance advice or training could have been given in respect of this incident.

Employers must warn employees of any dangers inherent in the work which they are required to do. In *Pape v Cumbria CC* [1992] 3 All ER 211, a part time cleaner contracted dermatitis because of exposure to irritant cleaning products. Although the employers had provided gloves, it was held that they should have pointed out the dangers of

contracting dermatitis if gloves were not worn and that the information should have been included in a safe system of work. They must take steps to protect employees from violent clients and customers. Hospitals are undertaking risk management exercises to prevent violent injuries to accident and emergency staff, and protocols are in place to ensure that these are introduced throughout the NHS.

In *Cook v Bradford Community NHS Trust* [2002] EWCA Civ 1616, the Court of Appeal found the employers liable for injury caused to a healthcare assistant by a violent patient in a psychiatric unit. There was a foreseeable risk and the system in place was clearly negligent.

The position of the Crown as an employer is governed by specific legislation. In *Multiple Claimants v Ministry of Defence* [2003] EWHC 1134 (QB) it was held that the Crown was protected by immunity under s 10 of the Crown Proceedings Act 1947 as regards claim for psychiatric illness, as long as the act or omission occurred before 15th May 1987. The Ministry of Defence had no duty to maintain a safe system of work for members of the armed forces in the course of combat.

In *Rahman v Arearose Ltd* [2000] 3 WLR 1184, an employer was found liable to an employee who was assaulted and seriously injured by violent customers while working at a Burger King Restaurant in King's Cross, London. Other members of staff had also been assaulted on previous occasions, and the employer was well aware of the risks.

However, employers like other defendants can only take precautions and warn employees against *known* risks. Thus in *Gray v Vesuvins Premier Refractories (Holdings) Ltd* (2004) Sheffield County Court, an employer was not liable for vibration white finger suffered by the claimant, as at the relevant time it was not a risk that was known in the industry.

In *Walker v Northumberland CC* [1995] 1 All ER 685, the scope of the duty to provide a safe system of work was extended to include the need to provide working conditions which do not cause undue stress to employees. The claimant was a senior social worker who had suffered a previous nervous breakdown because of the pressure of work. After a three month break, he had returned to work and discussed his problems with his superior who had reassured him that he would provide extra assistance to relieve him of some of the burden of work. However, when he did start work again, the claimant discovered that he had a huge backlog of work to complete and only very limited additional assistance. He had a second nervous breakdown six months later which resulted in his permanently stopping work. He was later dismissed on grounds of ill health and brought a claim for negligence against his employer. It was held that the employers were in breach of the duty to provide a safe system of work. He eventually accepted a settlement of £175,000. This case is of great significance because it establishes beyond doubt the existence of a duty of care in English law in relation to work stress of a psychological nature. In the US, this is an important basis of claims by employees and there is extensive case law on the subject but, in Commonwealth jurisdictions, it is a relatively new concept. In *Petch v Comrs of Customs and Excise* [1993] ICR 789, the Court of Appeal had held that liability could exist in relation to work stress if the employer knows that an employee has had a previous breakdown and is susceptible, though here the case failed on causation because the employers had done their utmost to persuade the claimant not to return to work. The repercussions of the *Walker* case are likely to mean that trade unions press for

greater awareness by employers of the symptoms of stress at work, and that employers will need to ensure that they have sound risk assessment policies in place in order to obtain adequate insurance cover.

In May 2000, it was reported that a record £30,000 settlement had been announced in a case involving a teacher who had suffered work stress. However, in the case of work stress an employer will only be liable if he was aware of the danger to the employee. In *Pratley v Surrey CC* [2002] EWHC 1608, there was no liability because the employee had deliberately concealed her psychiatric illness.

In relation to other types of danger it need not be known that an employer was aware of a risk that had materialised if the judge rules that the employees ought to have known of the risk (*Baker v James Bros* [1921] 2 KB 674).

It is not only the question of psychiatric problems which employees develop as a result of work pressure that has been occupying the courts. There is a developing line of case law in which employees are claiming that their employers owe them a duty of care to ensure that they do not suffer psychiatric injury in accidents in the course of their employment, even as secondary victims. The House of Lords clarified this matter in *White v Chief Constable of South Yorkshire* [1999] 1 All ER 1 and, although it appears that employees who are rescuers are not in a privileged position by virtue of the employment, there does seem to be a duty to provide counselling to employees who, although not present at the scene of accidents, might suffer psychiatric illness as a result (see Chapter 4).

14.3.5 Duty to ensure health and safety

At common law there is a term implied into all employment contracts, which no employer has power to exclude, that reasonable care will be taken by the employer to ensure the health and safety of his or her employees. This is closely related to the duty to provide a safe system of work. However, an employer is entitled to place reasonable reliance on employees' abilities to look after themselves. Local Regulations can be important as a basis for liability. Thus in *Buck & Others v Nottinghamshire Healthcare NHS Trust* [2006] EWCA Civ 1576, an NHS Trust was found liable for injuries inflicted by a patient on nursing staff at a high security hospital, because it had not implemented the policy recommended by the Safety and Security in Ashworth, Broadmoor and Rampton Hospitals Directions 2000. If an appropriate risk assessment had been carried out on the patient, as stated in the policy, the patient would have been assessed as presenting an exceptionally high risk of causing serious injury to others, and would have been kept in her room at night, so minimising the risk of incidents. The Court of Appeal took the view that the duty owed by employers to their employees could be measured by applying the simple question of whether what had happened amounted to a breach of duty in terms of *Bolam v Friern Hospital Management Committee* (1957) 101 SJ 357.

The duty owed to employees can extend to foreseeable psychiatric illnesses and even suicide arising as a result of physical injuries sustained in a work accident, see *Corr v IBC Vehicles Ltd* [2008] UKHL 13.

In recent years the most significant development in the law relating to employers' liability has been the development of claims for 'work stress'. One of the most important

of the earlier cases was *Johnstone v Bloomsbury AHA* [1992] QB 333. A junior hospital doctor employed by the defendants was required by his employers to work exceptionally long hours, including up to 48 hours overtime, on average, every week, and explicit provision was made for this in his contract of employment. The doctor claimed that working for such long periods (in some weeks, more than 100 hours) had made him ill, and he sued his employers for breach of the term implied into his contract of employment at common law that his employer would take reasonable steps to care for his health and safety. The Court of Appeal when asked to consider the contract of employment took the view that the employer was not entitled by an express term to exclude this implied term. By s 2(1) of UCTA 1977, liability for death or personal injuries caused by negligence cannot be excluded by a contract term.

All three judges in the Court of Appeal agreed that there is an implied term in all contracts of employment that the employer will take reasonable care of the health and safety of employees.

Ten years later, in *Young v Post Office* [2002] EWCA Civ 661, the Court of Appeal concluded that the defendant had breached its employer's duty of care and that the claimant employee was entitled to damages for stress that eventually caused him to suffer a nervous breakdown. Here the claimant was expected to familiarise himself with new computer systems without any formal training although the personal computers were regarded as an optional tool. He began to show signs of stress and started taking anti-depressants. Eventually, he suffered a nervous breakdown that meant he needed four months sick leave. During that time two of the claimant's managers visited him and arranged for him to return to work on a flexible basis, arriving and leaving whenever he wanted. The Post Office (PO) stated that the aim was to allow him to return to work gradually. He did return to work 80% recovered, but seven weeks later was unable to continue as a result of stress and had to leave permanently. During that seven week period, the claimant had been required to attend a one week residential training course and had also covered for the new manager who had been on holiday for a period of one week. The court ruled that the PO knew that the claimant needed to be looked after and it was not his responsibility to tell the PO when he felt stressed at work. Moreover, the 'rehabilitation package' was not followed by the PO. The case against the PO was not as strong as that against the employer in the leading *Walker* case (*Walker v Northumberland CC* where no 'special' arrangements had been made).

It is for the claimant to establish that insensitivity on the part of an employer to a psychiatric condition was the cause of a depressive or other illness. Thus in *Sparks v HSBC plc* [2002] EWHC 2707, the Court of Appeal held that a judge had been correct to dismiss a claim for damages for loss of earnings alleged to have arisen as a result of a depressive illness cause by the defendant's negligence. The claimant was unable to prove that the defendant's negligence had caused, or materially contributed to, his illness. The claimant had been employed by HSBC since 1969 and at the age of 51 was suffering from periods of depressive illness. The illness developed in 1994, and he suffered his first bout of depressive illness in 1995. He was offered retirement but chose to work part time, transferring to another branch of HSBC to become a junior lending officer. In 1996, it was discovered that the claimant had made some mistakes in his work and he was fully appraised, but no further action was taken against him and he was eventually promoted to a more senior post. He consulted his GP about chest pains suggesting they were

caused by stress, and began to show signs of stress at work, such as losing his temper and slamming down the phone. At this point the claimant was referred to the firm's occupational health department, and a memo was sent by that department stating that he required support in the workplace. Nothing was done to support him and he made further mistakes after being given extra duties. The claimant was referred to a psychiatrist and he was diagnosed to have a moderate reactive depression due to stress at work. He retired on grounds of ill health in June 1998, and issued proceedings on the grounds that his employer's negligence had caused or exacerbated his depressive illness and sought damages for, *inter alia*, loss of earnings.

The trial judge rejected the claim. The claimant argued on appeal that the trial judge had applied the wrong test for causation, claiming that the correct test was whether the negligence had caused recoverable damage of some kind. The Court of Appeal held that the judge had reached the correct decision, as he obviously had in mind all possible losses and types of losses including increased or decreased efficiency at work. He had applied that correct test for causation, as it was clear that the judge was not only dealing with the claimant's loss of the job. Accordingly, the appeal was dismissed.

In *V v A School Trust* [2004] UKHL 620 (QB) the claimant failed to establish that the episode of psychiatric illness from which she was suffering could be attributed to stress at work, even though she had been put under pressure by her employer.

There can be difficult issues of causation for the courts to determine when employees have unusual reactions to accidents at work. In *Simmons v British Steel* [2004] UKHL 20, a Scottish case, the pursuer (claimant) had suffered an exacerbation of a pre-existing skin condition and a depressive illness after an industrial accident at a steel plant operated by the defendants. He had developed a personality change as part of his severe depressive illness. The House of Lords arrived at their decision on the basis that the claimant was a primary victim of the accident. It was held that the fact that the claimant had sustained physical injuries for which the defendants had been found liable meant that he was primary victim. Therefore it was unnecessary to ask whether the psychiatric injury from which he had also been suffering was reasonably foreseeable – *Page v Smith* [1996] 3 All ER 272. Since the starting point was that the claimant was a primary victim the defendants had to take him as they found him, and the exacerbation of his skin condition and the anger that led to his severe depression could be assumed to fall within the scope of its liability, as long as there was a causal connection between the symptoms and the accident. The claimant's anger was one of the results of the accident, and although emotional reactions such as anger, distress or fear did not of themselves give rise to damages, emotional reactions could lead to other conditions, both physical and psychiatric, for which damages could be awarded.

The claimant's anger about the accident could not be dismissed under the de minimis principle. It amounted to a material contribution to the development of the skin condition and the depressive illness that followed. Thus a sufficient causal connection had been established and the claimant was entitled to payment in full of damages.

In *Sutherland v Hatton and Others* [2002] EWCA Civ 76, the Court of Appeal established guidelines for judges dealing with claims for negligence against employers in circumstances where claimants were forced to stop work because of stress-induced psychiatric illness. The case involved appeals by four separate employers from four different county court decisions. In every case claimants had been awarded damages

for negligence after they had been forced to stop working because of stress-induced psychiatric illness. Two of the claimants were teachers in comprehensive schools, the third was an administrative assistant at a local authority training centre and the fourth was a raw materials operative at a factory. The employers argued that negligence had not been established against them. The Court of Appeal emphasised that it was necessary to return to basic principles of duty of care, foreseeability, breach of duty and causation in each individual case. The following guidelines were set out:

- There were no special control mechanisms that applied to claims for psychiatric illness suffered as a result of the stress of doing the work the employee was required to do. It was necessary to distinguish cases in which the relationship was only in tort (eg, *Alcock v Chief Constable of South Yorkshire*) and cases involving a claim by a secondary victim within an employment contract (*White v Chief Constable of South Yorkshire*). However, note that in *Harrhy v Thames Trains* [2003] UKHC 1230 (QB), the judge held that an employee who was also a rescuer had at least an arguable claim for psychiatric injury suffered after assisting at a rail disaster (see Chapter 4 for the facts).
- The ordinary principles of employers' liability applied.
- The 'threshold' question was whether this type of harm to this particular employee was reasonably foreseeable. Foreseeability depended upon what the employer knew or ought reasonably to have known. An employer was usually entitled to assume that an employee could withstand the normal pressures of the job unless he knew that the employee had some particular problem or vulnerability.
- The test was the same whatever the type of employment.

Factors likely to be relevant were the nature and the extent of the work done by the employee and signs from the employee of possible harm to health:

- The employer was entitled to take what he was told by an employee at face value.
- To trigger a duty of care to take steps, indications of impending harm to health arising from stress at work ought to be plain enough for any reasonable employer to realise that he should take action and do something positive about it.
- The employer was only in breach of duty if he had failed to take the steps that were reasonable in the circumstances.
- The size and scope of the employer's enterprise and workforce, its resources and the demands it faced were relevant when deciding what was reasonable.
- An employer could only be expected to take steps that were likely to do some good: expert evidence was required on this.
- An employer who offered a confidential advice service with referral to counselling or treatment services was unlikely to be found in breach of duty.
- If the only reasonable and effective step would have been to dismiss or demote the employee, the employer would not be in breach of duty to allow a willing employee to continue in the job.
- In every case it was necessary to identify the steps the employer could and should have taken before finding him in breach of duty.

- The claimant had to show that breach of duty had caused or materially contributed to the harm suffered. It was insufficient simply to show that occupational stress had caused the harm.
- Where the injury suffered had more than one cause, the employer should only pay for that proportion of the harm suffered that was attributable to his wrongdoing unless the harm was truly indivisible.
- Assessment of damages would take account of the any pre-existing disorder or vulnerability and of the chance that the claimant would have succumbed to a stress-related disorder in any event.

The matter was again considered by the Court of Appeal in *Pratley v Surrey County Council* [2003] EWCA Civ 1067. The trial judge had dismissed this claim for personal injury arising from the alleged negligence of the respondent council. The appellant had been employed by the council as a care manager, and had brought a claim for damages for depression which she had allegedly suffered as a result of stress at work. She alleged that the council had been in breach of its duty to care for her health, as she had complained on two occasions about the stress she was suffering as a result of her excessive workload. Her immediate superior had promised to introduce a system to prevent new cases being allocated until existing workloads had been reduced, but this system had not been implemented. The claimant stopped working as a result of her illness two days after returning from a three week holiday when she discovered that her workload had not been reduced.

The Court of Appeal held that the trial judge had been correct to approach the question of foreseeability by considering whether the risk of immediate collapse was foreseeable, rather than whether collapse at some time in the future was foreseeable. The judge had also been correct in finding that the risk of illness through continuing work overload was foreseeable, but that the risk of an immediate collapse was not. Finally, the judge had also taken the correct approach when he had concluded that the failure to implement the new system was reasonable. An expressed intention to implement a new system did not set the standard for what was reasonable. Accordingly, the appeal was dismissed.

The House of Lords turned its attention to the growing volume of claims for psychiatric injury at work in *Barber v Somerset County Council* [2004] UKHL 13 in which the appellant was one of the claimants in the conjoined appeals heard by the Court of Appeal in *Sutherland v Hatton* (2002). In this case, which has implications for all employers, the House of Lords held that a local authority was in breach of its duty of care to an employee when it was aware that difficulties at work were having an adverse effect on his mental health, but took no reasonable measures to help him.

The Court of Appeal had ruled that the Council had not been in breach of the duty of care that it owed to the claimant to avoid injury to his health. The claimant had been a teacher employed by the Council as head of the mathematics department at the East Bridgwater School in Somerset. In September 1995 he was informed that if he was to maintain his salary level after a restructuring of staff at the school, he would be required to take on additional responsibilities as 'mathematical area of experience co-ordinator' and 'project manager for public and media relations'. Following that advice, the claimant increased his hours of work to between 61 and 70 hours a week, and often worked in the

evenings and at weekends. Some months later he complained about 'work overload' to the deputy head teacher. In March and April 1996 he consulted his GP about the stress he was experiencing at work, and made enquiries about taking early retirement. In May 1996 the claimant was absent from work for three weeks, and was certified by his GP as suffering from stress and depression. When he returned to work the claimant had discussions with the head teacher and the two deputies about the fact that he felt he was not coping with the increased workload and that he felt this was detrimental to his health. However, no measures were introduced by the school to assist him. The claimant consulted his GP between August and October 1996 on several occasions, complaining of stress. Finally, in November 1996 the claimant lost control and shook a pupil, then left the school permanently. He had been unable to work as a teacher since that time, and could only manage to undertake undemanding on a part-time work. Two psychiatrists, expert witnesses, agreed that he was suffering from moderate to severe depression. The trial judge had concluded that there was a breach of the duty of care owed by the school management team to the claimant, as 'it must have been apparent' that the risk of injury to the claimant's mental health was significant and 'higher than that which would have related to a teacher in a similar position with a heavy workload'.

The House of Lords held (Lord Scott dissenting) that the question of the breach of the duty of care owed by the Council to the claimant was not clear-cut. The test for determining liability was 'whether the employer had fallen below the standard properly to be expected of a reasonable and prudent employer taking positive steps for the safety of his workers in the light of what he knew or ought to have known' (*Stokes v Guest Keen & Nettlefold (Bolt & Nuts) Ltd* [1968] 1 WLR 1776). The House of Lords took the view that the Court of Appeal had failed to give adequate weight to the fact that the claimant, an experienced and conscientious teacher, had been absent for three weeks with no physical ailment, and that the reason for his absence had been certified by his GP as stress and depression. The Council's duty to take some steps to remedy the situation had arisen in June or July 1996 when the claimant had been in discussion with the management team, which should have made enquiries about his health problems. They should have discovered what might have been done to ease his difficulties and just because the entire school staff was facing severe problems, with every teacher stressed and overworked, did not mean that there was nothing that could have been done to assist the claimant. In the opinion of the majority, the trial judge had been entitled to conclude that the school's senior management team were in a position of continuing breach of the employer's duty of care, and that this had been the cause of the claimant's breakdown in November 1996. The employer's duty to keep up to date with information about managing employees' stress was considered by the House of Lords to be particularly important in the light of advice published by the Health and Safety Commission on occupational stress and how to manage it.

Psychiatric injury caused by work stress is increasingly blamed for days lost to employees, particularly in the teaching and healthcare professions, and although the implementation of the Working Time Directive and other measures aimed at improving health and safety in the workplace are operational, the number of claims arising out of stress at work is increasing. The basic legal principles have been established for some time, but the decision of the House of Lords in *Barber v Somerset County Council*

could well encourage employees, with the support of Trade Unions, to bring claims for psychiatric injury if they believe that employers have been unsympathetic about their complaints of being unable to cope with the additional demands brought about by the restructuring of the professions. Larger employers with occupational health departments are aware of the need to monitor and assist those employees who are known to be vulnerable to work stress, but all employers should be warned of the danger of ignoring the legal implications of placing too heavy a burden of stress on their employees. Any employees who are themselves aware that they may have psychiatric problems are advised not to attempt to hide that position from their employers, since under the principles approved by the House of Lords, an employer who cannot reasonably foresee that an employee is likely to suffer harm will not be liable for illness sustained as a result of stress at work.

Soon after the House of Lords decided the Barber case, the Court of Appeal applied the general principles in relation to claims for psychiatric injury arising out of stress at work. The appeals involved six claims for psychiatric injury arising out of stress at work – *Hartman v South Essex Mental Health & Community Care NHS Trust; Best v Staffordshire University; Wheeldon v HSBC Bank Ltd; Green v Grimsby & Scunthorpe Newspapers Ltd; Moore v Welwyn Components Ltd*, and *Melville v The Home Office* [2004] EWCA Civ 06.

The claimants each suffered varying degrees and types of psychiatric illness as a result of events in the workplace, in most cases pressure of work, but in one incident, as a result of persistent bullying by a colleague. The principles set out in *Barber v Somerset CC* [2004] UKHL 13 were applied, and it was pointed out that nothing was said by the House of Lords when it had heard the appeal to alter the practical guidance given by the Court of Appeal in *Barber v Somerset CC* [2002] EWCA Civ 76. The basic rule was that foreseeable injury flowing from the employer's breach of duty gave rise to liability for stress at work, and that an employer had to be aware of the vulnerability of the employee to stress before liability would arise. It is interesting to consider the facts of each of the appeals.

Mrs Hartman had been employed as a nursing auxiliary in a centre for children with learning difficulties, but her employment had been terminated as a result of her ill health from depression and anxiety. The trial judge had accepted evidence that had it not been for the work pressures, her condition would not have become chronic nor would it have been so long-lasting. He ruled that this was a high-risk occupation, and that in the employers had to observe a higher than normal standard of alertness in respect of the risk of psychiatric injury. In his view Mrs Hartman's employer had failed to protect her from foreseeable harm, since it was aware of her vulnerability to mental illness, and had received complaints about staff shortages.

Mr Best had retired because of ill health from his position as a senior lecturer in a university, following a 'nervous breakdown'. The trial judge ruled that the university knew of the excessive work burden placed on him, and that his managers had sufficient information to realise that he was at a real and immediate risk of suffering a breakdown.

Mrs Wheeldon had given up her job as a part-time senior customer services representative for a bank as a result of what the trial judge had described as a moderate depressive episodes with panic attacks. The trial judge held that the bank had been aware,

through their occupational health department, of possible harm to the claimant but had not discussed the situation with her.

Mr Green had retired from his job as a chief sub-editor as a result of ill health, following a 'breakdown'. He had written a memorandum complaining about his workload. However, the trial judge found that his employer could not have foreseen that his inability to cope was more than occupational stress.

Mr Moore had retired through ill health, which the judge found had been caused by sustained bullying by a colleague, for which his employer was held liable. The employer appealed, arguing that the damages for loss of earnings should have been apportioned to take account of non-negligent factors causing the stress.

Mr Melville, a prison health care officer, had retired with a stress-related illness having had to deal with an incident involving the suicide of one of the prisoners. The question of the foreseeability of his illness was tried as a preliminary issue and was decided in his favour. His employer appealed, on the grounds that the trial judge had been in error in finding them liable for X's stress-related injury, because he had identified a risk of harm to a group of workers rather than giving due consideration to whether X had shown signs of impending injury.

The Court of Appeal, applying *Barber*, held that care was needed in the application of the *Barber* principles to the facts of each individual case.

In the case of Mrs Hartman there was no basis for the conclusion that caring for children with learning difficulties gave rise to the imposition on her employer of a higher standard of alertness to the risk that its employees would sustain psychiatric injury. Her vulnerability to mental illness had been knowledge of a confidential nature, and her employer had no knowledge of it. Although there had been general complaints of staff shortages, in the absence of any sign that the claimant was especially vulnerable, there was nothing to indicate that she could not cope with her work. It was not reasonably foreseeable to her employer that she would suffer psychiatric injury, and it was not in breach of its duty to her.

In Mr Best's case, the Court of Appeal decided that the finding that his breakdown was reasonably foreseeable was vitiated by errors in the findings of fact made by the judge, and was contrary to the weight of the evidence. There were sufficient indications of harm to the claimant's health that arose from work stress. Although the outcome of this claim was not entirely dependent on the claimant's failure to use the university's counselling service, this was a factor for which the judge should have given credit when considering whether the university was in breach if its duty of care. The Court of Appeal pointed out that it would only be in exceptional circumstances that a person working part-time would be able to succeed in a claim for injury caused work stress.

The Court of Appeal decided that the bank had been in breach of its duty to Mrs Wheeldon in its failure to act on its own advice and introduce measures to reduce the stress on her. On the medical evidence available to the court, the judge had been correct to conclude that this breach of duty had caused her to suffer an identifiable psychiatric injury.

In Mr Green's case, the Court of Appeal ruled that the trial judge had been justified in concluding that the employer's response to the claimant's memo had been reasonable, so the claim failed.

In the case of Mr Moore, once the work-related stress had been shown to have been the cause of his loss of earnings, the onus was on his employer to demonstrate that there were other potential causes, in order for damages to be apportioned. It had failed to do this, and the only non-negligent stress factors identified related to the claimant's work.

Mr Melville's employer had foreseen the risk of injury for the type of work undertaken. However, in this case it had failed to implement a system that it had designed to deal with and minimise the risk. The fact that an employer offered an occupational health service did not necessarily mean that the employer had foreseen risk of psychiatric injury as a result of work stress to any particular individual or class of employees.

Other areas of law outside tort may be involved in claims for psychiatric stress at work. In some situations an employee suffering from work stress might bring a claim for unfair dismissal. The cases of *Eastwood and another v Magnox Electric plc; McCabe v Cornwall County Council and Others* [2004] UKHL 35 both concerned psychiatric illness claims and in each case the claimants had pursued claims for unfair dismissal in the employment tribunal. The claims were settled and they commenced proceedings in the county court alleging negligence and breach of the implied term of mutual trust and confidence in their employment contracts and also claiming damages for psychiatric injuries caused by deliberate misconduct in the disciplinary processes used against them. The House of Lords held that the cause of action existed independently of the dismissal, and when an employee suffered financial loss from psychiatric or other illness caused by his pre-dismissal unfair treatment, that employee had a common law cause of action that was independent of, his subsequent dismissal. However, if proceedings were brought both in court and before an employment tribunal the employee could not recover any overlapping heads of loss twice over. A similar situation arose in the case of *McCabe v Cornwall County Council* [2002] EWCA Civ 1887.

Electronic Data Systems v Travis [2004] EWCA Civ 321 indicates that an employee may bring a successful claim for breach of the employer's duty under the Disability Discrimination Act 1995.

A steady stream of claims for psychiatric injury caused by occupation stress can be expected to follow over the next few years, and occupational stress claims appear to be replacing claims for injured backs as a major source of litigation.

The common law duties may be added to from time to time. Thus, it was suggested in *Spring v Guardian Assurance* [1992] IRLR 173 that there is an implied duty owed by employers to write fair and careful references for employees who seek employment elsewhere.

It now seems clear that there is a duty on employers to ensure that their employees are not subjected to bullying in the workplace. In *Ratcliffe v Dyfed CC* (1998) *The Times*, 17 July, a former deputy headmaster was awarded damages of over £100,000 in a successful claim of this kind. A factory worker who was bullied by colleagues was awarded £28,000 compensation.

In *Unwin v West Sussex CC* (2001) WL 825227, it was held that although the defendant's conduct fell short of bullying it was nevertheless in breach of its duty of care as work related stress was foreseeable. The claimant, a part time teacher, succeeded in proving that staff at her college had been unsympathetic and unsupportive.

In addition to common law duties, there are also duties imposed on employers in relation to workplaces, as employers are also occupiers of premises on which work is carried out. For example, in *Silk v Comr of Police for the Metropolis* (1999) unreported, a police officer who slipped on oil in a police station car park and was injured recovered £470,933 damages from his employer.

The shortcomings created by the common law were circumvented by the House of Lords in *Majrowski v Guy's and St Thomas's NHS Trust* [2006] UKHL 34 when it held that an employer can be vicariously liable under the Protection from Harassment Act 1997 s 3 if an employee follows a course of conduct amounting to harassment in breach of s 1 of the Act. The advantage of using vicarious, rather than primary liability, is that there is no need to prove that the employer knew that bullying was happening and failed to take steps to prevent it, see 14.5 below.

14.3.6 Mutual duty of trust and confidence

There is a mutual duty of trust and confidence between employer and employee implied in every contract of employment. In *Bunning v GT Bunning & Sons* [2005] EWCA Civ 104 it was held that the defendant's repeated failure to carry out risk assessments under the Management of Health & Safety Regulations 1999 amounted to a fundamental breach of the implied term of trust and confidence.

14.4 BREACH OF STATUTORY DUTY

Injured employees may be able to maintain a claim for breach of statutory duty against an employer (see Chapter 9). This action has a number of advantages to employees, once the hurdle of establishing that a particular statute gives rise to civil liability has been surmounted. Indeed, it is well worth exploring the possibility of a claim for breach of one of the many statutes and regulations which place obligations on employers in relation to their workforce and the work environment before considering whether to sue in negligence or under the contract of employment for breach of a term. The reason for this is that the burden of proving that the statutory requirements have been met is placed upon the employer, and in some instances liability is strict. However, the law is riddled with inconsistencies, individual applications are notoriously unpredictable, and the initial hurdle of statutory interpretation is extremely difficult to deal with. The Health and Safety at Work, etc, Act 1974 contains an explicit statement that the first few sections which are general in nature do not give rise to civil liability.

14.5 NEW STATUTORY DUTIES

The EU Framework Directive on Health and Safety (89/391/EEC) is being implemented by regulations, many of which state explicitly that they do give rise to civil liability. In practice, this is an important area of law in which employees injured at work are able to claim compensation more easily now than under the old UK legislation. For example, nurses who suffer back injuries are given financial support by their trade union to sue for compensation. Most of the new regulations require regular assessment of risks by

employers. They cover matters such as manual handling, using VDUs and the use of personal protective equipment.

In *Fraser v Winchester HA* (1999) *The Times*, 12 July, a claimant who had not been properly trained in the use of a camping stove succeeded in obtaining damages for breach of the Provision and Use of Work Equipment Regulations 1992 (SI 1992/2932).

Most of the regulations require employers to train employees in the safe use of equipment and other safety measures, and failure to provide this type of training usually gives rise to strict liability. In practice, this makes it very much easier than before for employees who have been injured to obtain compensation from their employers, as long as they are also able to prove causation. For example, employers are expected to make a precise evaluation of the level of risk involved in manual handling operations and should issue precise instructions to employees if any precautions are impracticable (see *Koonjul v Thameslink NHS Trust* [2002] PIQR P123).

Ball v Street [2005] EWCA Civ 76 illustrates that it can be easier for employees to succeed in claims since the recent implementation of regulations. Here it was held that the mere fact that the type of accident that had occurred was unforeseeable did not allow the employee to avoid the absolute obligation under reg 5 of the Provision & Use of Work Equipment Regulations 1998. In *Fytche v Wincanton Logistics* [2004] UKHL 31, the claimant had suffered frostbite in a toe after because water had entered his protective boots through a tiny hole. The claim for negligence failed because it was not foreseeable that the claimant would be exposed to freezing conditions on a regular basis, so weather-proof boots were not necessary. As the Personal Protective Equipment at Work Regulations provided that safety equipment had to be kept in an efficient state, in efficient working order and in good repair, the House of Lords considered the scope of the Regulations, and held by a majority that equipment should only be maintained in good repair for the purposes of the risk for which it is provided. The result of this decision is that the two tier system will continue in which negligence and breach of statutory duty both form the basis of claims for employers' liability.

Nevertheless, since employers must comply with safety regulations, breaches have given rise to many successful settlements and claims. Some examples are as follows:

- *Nixon v Chanceoption Developments Ltd* [2002] EWCA Civ 558: an employee was injured falling from scaffolding that was insecure and without guardrails. The employer was liable.
- *O'Neill v DSG Retail Ltd* [2002] EWCA Civ 1139: an employee who, contrary to regulations, had received no training in lifting, succeeded in obtaining damages for a back injury.
- *Knott v Newham Healthcare NHS Trust* [2003] EWCA Civ: A nurse succeeded in a claim for a back injury. There were inadequate arrangements for lifting patients at the hospital where she worked.

It has been predicted that claims involving MRSA may be set to increase because lawyers are beginning to realise that the most appropriate solution in such cases lies not in negligence claims, which were attempted in the past, but in the health and safety framework, and in particular the regulations governing the control of hazardous

substances (the COSSH Regulations). It can be difficult to establish causation when a patient develops an infection, as many infections are widespread in the community. The MRSA infection is cited on the death certificates of more than 1,000 people every year, and leaves many thousands more patients severely ill or disabled, but it is just one of several infections acquired in hospital which will be the subject of future litigation. Although some cases have been settled out of court, none has involved an admission of liability. The Control of Substances Harmful to Health 2002 (COSHH) Regulations require employers to control exposure to hazardous substances in order to prevent danger to health, and it is arguable that MRSA falls within the statutory definition. These Regulations require employers to control exposure to substances likely to put health at risk, and such substances are defined as those used at work, such as paint, those generated at work, such as fumes, and those naturally occurring, such as dust. The regulations include biological agents such as bacteria and other micro-organisms. The advantage of bringing a claim for breach of statutory duty based on the COSHH Regulations is that the burden on defendants to prove they are meeting the statutory requirements.

The criminal aspects of the Health and Safety legislation have also been used in another novel way against the NHS to indicate public disapproval of a Trust which failed to supervise two junior doctors whose gross negligence resulted in the death of a patient, see *R v Southampton University Hospitals NHS Trust*, CA (Crim Div) 14/11/2006.

It is possible for new statutory duties to be added by Parliament even if they do not directly concern employment, but in the employment situation, it may be easier for the claimant to succeed because the employer may be vicariously liable. In *Majrowski v Guys and St Thomas's NHS Trust* [2006] UKHL 34, the statutory duty under the Protection from Harassment Act 1997 s 3 was considered by the House of Lords in a claim for damages for harassment committed by one of the Trust's employees in breach of s 1 of the Act. The Trust was held to be liable to pay damages to the claimant, an employee who had been bullied by a colleague.

Section 1 of the Act, which was originally designed to deal with 'stalkers', prohibits, with certain exceptions, harassment. It states:

> (1) A person must not pursue a course of conduct –
>
> (a)which amounts to harassment of another, and
>
> (b)which he knows or ought to know amounts to harassment of the other.
>
> (2) For the purposes of this section, the person whose course of conduct is in question ought to know that it amounts to harassment of another if a reasonable person in possession of the same information would think the course of conduct amounted to harassment of the other.

Harassment is not defined in the Act, but case law has established that it includes causing anxiety or distress. A course of conduct is stated to mean conduct on at least two occasions: s 7(2), (3).

Section 2 of the Act creates the criminal offence of harassment, consisting of the pursuit of a course of conduct in breach of s 1. Criminal proceedings are concerned only with offences which have been committed, but s 3 goes further, affording victims a civil remedy for actual breaches of s 1 and also for threatened breaches. Section 3 states:

(1) An actual or apprehended breach of section 1 may be the subject of a claim in civil proceedings by the person who is or may be the victim of the course of conduct in question.

(2) On such a claim damages may be awarded for (among other things) any anxiety caused by the harassment and any financial loss resulting from the harassment.

The claimant alleged that he had been harassed, bullied and intimidated by his manager in the course of employment. She had imposed unrealistic performance targets for him and had isolated him by refusing to talk to him. He suggested that this treatment was caused by homophobia, as he is a gay man. After an investigation the Trust concluded that harassment had occurred, and the claimant sought damages from the Trust under s 3 of the Act. He did not base the claim Trust on negligence or breach of his contract of employment, as it was based exclusively on the Trust's vicarious liability for his manager's breach of the statutory prohibition of harassment.

The Trust argued that any award of damages under the section was purely discretionary in nature, and that the statutory harassment claim was not of the same nature as a common law tort claim.

The House of Lords held that the vicarious liability was not confined to common law torts, and that it could also be applicable to equitable wrongs and breaches of statutory duties, ruling that unless a statute expressly or impliedly indicated otherwise, vicarious liability would be applicable whenever an employee, in the course of employment, committed breach of a statutory obligation – *Dubai Aluminium Co Ltd v Salaam* (2002) UKHL 48, [2003] 2 AC 366; *Nicol v National Coal Board* (1952) 102 LJ 357; and *National Coal Board v England* [1954] AC 403.

The conduct of the employee in question was closely connected with authorised acts. undertaken in the course of her employment – *Lister v Hesley Hall Ltd* (2001) UKHL 22, [2001] 2 WLR 1311. The effect of s 3(1) of the Act was to make a breach of s 1 a wrong that gave rise to the ordinary remedies provided by law for civil wrongs. Parliament had created in s 3 a new cause of action, which was in fact a new civil wrong, and damages were one remedy for that wrong.

FURTHER READING

Cane (ed), *Atiyah's Accidents Compensation and the Law*, 6th edn, Cambridge University Press, 2006, Chapters 4, 8 and 9.

Suff and Bone, *Essential Employment Law*, 2nd edn Routledge-Cavendish, 2006.

For regular monthly up-dates on this area of law, see *Personal Injury Compensation*, published monthly by Informa UK Ltd.

CHAPTER 15

PRODUCT LIABILITY

The 20th century witnessed the development of a comprehensive legal framework for consumer protection. This revolution was achieved partly through late-19th century legislation and partly through the efforts of the judiciary, in keeping with social and economic changes in the light of mass-production of goods. After the Second World War, further comprehensive legislation was introduced as a result of the work of pressure groups representing the interests of consumers, and UK membership of the EU. This chapter concentrates on protection afforded to consumers from injuries caused by defective products.

15.1 THE POSITION IN CONTRACT

Initially, the law of contract provided the basis of consumer protection. The purchaser of defective goods could bring a claim for breach of an express or implied term in the contract. The Sale of Goods Act 1893 (later updated by further statutes), provided statutory protection by implying terms into contracts for the sale of goods, the breach of which gave rise to a number of remedies depending on the gravity of the situation.

The advantage of these contractual remedies is that they are available without the need to prove fault. For example, in a contract for the sale of goods, there is an implied term that the goods will be reasonably fit for the purpose for which they are sold (s 14(3) of the Sale of Goods Act 1979). If the goods do not prove to be fit for that purpose, there is no need for the purchaser to prove that the seller was in any way to blame for that fact. Most of the terms implied into contracts for the sale of goods now also apply to contracts for the repair and exchange of goods, to hire purchase contracts, and to contracts for the supply of goods and services.

15.1.1 Disadvantages of contract

The disadvantage of the contractual remedies is that they are normally only available to parties to the contract. Outsiders, such as the recipient of goods as a gift, or the user of goods who was not also the purchaser, had no remedy in contract until the changes introduced by the Contracts (Rights of Third Parties) Act 1999. This Act, in certain circumstances, allows third parties to enforce or rely on contractual provisions.

15.2 CREDIT USERS

Consumers are provided with an additional remedy by the Consumer Credit Act 1974 if they purchase goods on credit. The user of a credit card can bring a claim against the credit card company if he or she is dissatisfied with the goods or services paid for by credit card, providing the cash price was between £30 and £10,000 (s 75).

In the case of goods acquired on hire purchase, the acquirer, in effect, contracts with the finance company which takes the place of the seller for the purposes of the law of contract, providing the credit was no more than £25,000.

While the development of remedies in tort did provide an important supplement to contract, and no doubt the quality of manufactured products improved, it will be clear from the above discussion that there were still a number of disadvantages for consumers. Pressure for reform continued to grow and this came to a head with the EC Directive on Product Liability (85/374/EEC) which member states were required to implement into their national law. In the UK, this was achieved in the Consumer Protection Act 1987. The legislation in this country is not, however, as comprehensive as that introduced in some of the other jurisdictions and, in suitable cases, instances of 'forum-shopping' occur, whereby claimants seek to bring their claims in the states which offer the most comprehensive sets of remedies.

15.3 THE POSITION IN TORT

The case of *Donoghue v Stevenson* [1932] AC 562 established for the first time that even in the absence of a contract, there may be a remedy in tort for defective goods, providing the goods also present a threat of injury to health or safety. The remedy may be sought from the manufacturer who owes a duty of care to the ultimate consumer of goods, and it must be established that the manufacturer was at fault before the remedy will be available.

Any person affected by the defect in the product could sue the manufacturer. Claims have been made by a wide range of injured persons, including purchasers, members of the purchaser's family, recipients of gifts, employees of the purchaser and complete outsiders who have been affected by the defect.

The range of possible defendants has gradually been extended beyond the manufacturer of the goods to include those who assemble goods using components from elsewhere, those who repair goods and those who supply goods, in appropriate cases.

15.3.1 Disadvantages of tort

Although this case provided a new focus for consumer protection, it was subject to some important limitations. The disadvantages of tort in protecting the consumer are:

- **Quality of goods**
  Tort is not concerned with defects in the quality of goods, as opposed to defects which give rise to dangers to health and safety of consumers. Although there was an attempt to extend liability in negligence to cover damage to the manufactured product itself, that is, defects in quality in *Junior Books Ltd v Veitchi Co Ltd* [1983] AC 520, this type of loss (pure economic loss) is no longer recoverable since *Murphy v Brentwood DC* [1990] 2 All ER 908. However, it may still be possible to recover in negligence by claiming that damaged property is separate from the product which was manufactured by the defendant, though it must clearly be separate, and not part of the final structure as in the case of a building. In effect, there will be a claim if a product damages something or someone, but not if it merely damages itself.

- **Proof of fault**
  Tort requires proof of fault. It is extremely difficult to obtain evidence that manufacturers are at fault, as this would require evidence from some internal source, and detailed knowledge of the manufacturing processes used. Employees are reluctant to give evidence against their employers. To some extent, this limitation was gradually eroded by the *res ipsa loquitur* principle which was applied with increasing frequency to consumer cases in the second half of the 20th century, particularly to cases of foreign bodies in foodstuffs. (In *Donoghue v Stevenson* itself, it was never actually proved that there was a snail in the ginger beer bottle as the case was eventually settled out of court.) The Thalidomide cases demonstrated the difficulties of proving fault coupled with problems of proving causation which will exist under any regime, whether contract, tort or strict liability.

  A negligence claim will not succeed if the claimant is unable to establish that the defendant failed to exercise reasonable care. Moreover, there will be no negligence if the defendant could not have known of possible dangers because of the lack of existing scientific or technical knowledge (*Roe v Minister of Health* [1954] 2 QB 66). However, it has been established through the cases that, if a danger becomes apparent after products have been put into the marketplace, a manufacturer has a duty to warn potential users and, in extreme cases, to operate a system of product recall. Manufacturers insure against this possibility and most have efficient systems of product recall, many of which depend upon the completion of a 'guarantee card' by the consumer, which has little value as a guarantee because of statutory protection, but which is an essential source of information as to the distribution of products for manufacturers (and also a means of targeting future advertising).

- **Application**
  Donoghue v Stevenson applied only to products, and originally only to foodstuffs. Later, the principle was extended to any manufactured products, for example, in *Grant v Australian Knitting Mills* [1936] AC 85. The claimant suffered dermatitis as a result of chemicals used in the process of manufacturing woolly underpants. He succeeded in his claim against the manufacturer for negligence.

- **Examination of goods**
  Donoghue v Stevenson was limited to instances in which there was 'no reasonable possibility of intermediate examination of the goods' (*per* Lord Atkin). However, this restriction has been interpreted generously by the courts and it appears that the manufacturer will be liable if there was no reason to believe or imagine that some intermediate examination of the goods might occur. If, on the other hand, the manufacturer issues a warning about the product or suggests that it should be tested or sampled before use, he may escape liability. In effect this goes to the issue of whether or not the defendant has acted reasonably in disseminating the goods. A warning would be evidence of reasonableness on the part of the manufacturer, permitting him to escape fault. In *Kubach v Hollands* [1937] 3 All ER 907, a schoolgirl was injured when a chemical exploded. The manufacturer was not liable because a warning had been issued that the chemical should be tested before use. The retailer had neither tested the chemical nor warned the school of the need to test it. Warnings may be sufficient to discharge the duty of care but each case must be taken on its own

facts and if an intermediary is involved it may or may not be sufficient merely to warn that intermediary rather than the ultimate consumer (*Buchan v Ortho Pharmaceuticals (Canada) Ltd* (1986) 25 DLR (4th) 658). Any warnings should be distinguished from attempts to exclude liability for death or personal injuries, which are totally void since the Unfair Contract Terms Act 1977. One possible reason for this rule is that there is a similar limitation in contract cases.

The statutory protection discussed in the next paragraph is usually relied upon in place of tort.

15.3.2 Continued relevance of negligence

Despite its drawbacks, the common law of negligence continues to be relied upon in the following circumstances when the legislation does not apply:

- Where there is damage to property not intended for private use.
- Where there is an award relating to property damage of less than £275 but this only applies to the amount awarded, not to the total amount of the claim (a factor which is relevant if there has been contributory negligence).
- Where a claim is brought against a person who certified or inspected goods.
- Where a product was not supplied in the course of a business.
- Where the 10 year limitation period under the legislation has expired.

15.4 CONSUMER PROTECTION ACT 1987

The provisions of this statute provide, at first sight, a comprehensive set of remedies for consumers in the case of defective products. Not all of the measures are civil, as the criminal law may also be used to regulate unsafe products, and from a practical point of view this may ultimately prove more effective by preventing the introduction of defective goods into the marketplace. A framework for regulating product safety is now contained in the General Product Safety Regulations 1994 (SI 1994/2328). However, this discussion is limited to the civil law measures in Pt 1 of the Act which is dealt with in outline only.

The Consumer Protection Act 1987 places strict liability for defective products on a range of possible defendants. By s 2(1), it is provided that:

> Where any damage is caused wholly or partly by a defect in a product, every person to whom sub-s 2 applies shall be liable for the damage.

Liability cannot be limited or excluded by any contract term or otherwise (s 7).

15.4.1 Who is liable?

The 'producer' of the defective article is liable under the Consumer Protection Act 1987, and the definition of producer is very wide, but does not usually mean the individual employee, rather the company or employer:

- Producers are not only those who manufacture the final product, but also the manufacturers and assemblers of component parts and the producers of raw materials.
- The term includes not only, as one would expect, manufacturers, but also, in the case of substances which have been 'won' or 'abstracted' from other sources (for example, minerals), the person who undertook that process.
- The definition also includes the person who is responsible for any process, industrial or otherwise, which attributes essential characteristics to products. For example, where ingredients are mixed together by a pharmacist in a small pharmacy.
- 'Own branders', for example, large scale food and clothing retailers who employ other firms to manufacture products and then put their own brand name on the goods, are also liable as producers if they hold themselves out as such. In order to avoid strict liability as the producer, a retailer who sells own brand products would need to give an indication that the goods are made for them by another manufacturer, for example, 'specially made for Spar'.
- The importer into the European Economic Area is also treated as 'the producer' for the purposes of strict liability.

The supplier of goods direct to the customer, that is, the retailer, installer or distributor will not be primarily liable for defects under the Consumer Protection Act 1987 (though there may still be liability in contract). However, a supplier does become liable (s 2(3)) if the goods are anonymous and he or she has no record or other means of tracing his or her supplier, or if he or she refuses to identify his supplier. This means that even small corner shops must now keep detailed records of the suppliers of all their products for many years, because of the limitation periods, if they are to be sure of escaping strict liability. The injured party is required to ask the supplier for details of his suppliers within a reasonable time of the damage. The liability of direct suppliers is thus known as 'secondary liability'.

15.4.2 Joint and several liability

Liability is joint and several, which means that consumers have the option of suing all or any of the potential defendants. This overcomes many of the problems previously experienced by victims who were unable at common law to find or identify the defendant, particularly if that person or company had ceased to trade. Obvious targets for legal action under the Consumer Protection Act 1987 are the manufacturers or any person in the chain with good insurance cover, 'deep pockets' and the ability to pay substantial damages.

Any person in the chain of manufacture and distribution is potentially fully liable without proof of fault for any damage which is caused, wholly or partly, by the product.

15.4.3 Definition of a product

A 'product' is defined in s 2(1) of the Consumer Protection Act 1987 as:

> . . . any goods or electricity and (subject to subsection (3)) includes a product which is comprised in another product, whether by virtue of being a component part, raw material or otherwise.

Goods are defined in s 45(1) as:

> . . . substances, growing crops, and things comprised in land by virtue of being attached to it and any ship, aircraft or vehicle.

The scope of this definition is not clear, and it remains to be seen whether it will be interpreted to include such things as computer programs which have been held to be 'goods' in another context (see *St Albans CC v International Computers* [1996] 4 All ER 481).

Damage which is caused by a break in the supply rather than a defect in the generation of electricity is not covered.

Buildings as 'immovables' are not included in the definition, but building materials are, though defects in design and construction are not. Thus, if a part of a building collapsed through defects in the materials used, this could fall within the Consumer Protection Act 1987.

Primary (unprocessed) agricultural produce and game was specifically excluded from the ambit of the Consumer Protection Act 1987. If it had undergone an industrial process to give it its essential characteristics, the produce was no longer 'primary' agricultural produce. This raised difficult questions as to what constitutes the industrial processing of agricultural produce. Clearly, eggs in their unchanged state were excluded, but if they were broken and mixed with other ingredients to make mayonnaise on a large or small scale, they probably fell within the Consumer Protection Act 1987 and there would be strict liability if they proved to be infected with salmonella.

It was not clear whether freezing or canning of agricultural produce is an industrial process, nor what is meant by changing the essential characteristics of produce. This was clarified later and industrial processing is that which 'could cause a defect'.

Primary agricultural produce, originally excluded from the definition, is now included. The UK implemented this provision in the Consumer Protection Act 1987 (Product Liability) (Modification) Order 2000 (SI 2000/2771). As a result primary agricultural produce now falls within the operation of the Act, though agricultural produce and game supplied before that date is not covered.

Human body products such as semen and blood fall within the Act. In *A v National Blood Authority* [2001] 3 All ER 289, in which the claimants had contracted Hepatitis C after receiving blood transfusions, it was conceded that blood products are covered by the 1987 Act. In the US, however, concerns about the possibility of contaminated body products have led to exemptions from strict liability for human body products.

If the product in question was used for conveying information, for example unreliable computer software or a textbook on medicines containing inaccurate statements as a result of reliance on which a person is injured, opinion is divided as to whether the Act would apply.

15.4.4 Definition of a defect

Goods are defective if their safety is not such as 'persons generally are entitled to expect, taking into account all the circumstances'.

The burden of proof is on the claimant to demonstrate that the damage was caused by a defect in the product which made it 'unsafe'. Defects in quality alone do not attract strict liability, leaving the claimant to his or her remedies (if any) in contract.

Much will depend on the circumstances of each individual case, and the courts are entitled to take into account the following circumstances:

- the manner in which and purposes for which the product has been marketed, its get-up, the use of any mark in relation to the product and any instructions for, or warnings with respect to, doing or refraining from doing anything with or in relation to the product (see *Richardson v LRC Products Ltd* [2000] Lloyd's Rep Med 280, in which a woman had become pregnant when the condom used by her husband had broken. The judge decided the case on the basis that the manufacturer's standards were more rigorous than the British Standard. The claimant had not used additional emergency contraception by taking the 'morning after' pill);
- what might reasonably be expected to be done with or in relation to the product;
- the time when the product was supplied by its producer to another; and 'nothing in this section shall require a defect to be inferred from the fact alone that the safety of a product which is supplied after that time is greater than the safety of the product in question' (s 3(2)).

These are all important factors since, in effect, they provide defences to the producer. The onus is on the claimant to prove that the product is defective. In *Boyle and Others v McDonalds Restaurants Ltd* [2002] EWHC 490, several claimants had suffered burns as a result of having very hot drinks spilled onto their skin in McDonalds Restaurants. It was held that there was no liability in negligence, nor under the Consumer Protection Act 1987. The cups and lids used were adequately designed and tested and it would have been unreasonable to expect the defendants to serve drinks at a lower temperature; nor was there a duty to warn customers that the drinks were very hot, as it was assumed that they could reasonably be expected to know it. In *XYZ and Others v Schering Health Care Ltd* [2002] EWHC 1420 QB, it was held that the claimants, all of whom had suffered serious cardio-vascular injuries after taking third generation oral contraceptives, had failed to establish that these pills carried an increased relative risk than second generation contraceptive pills.

15.4.5 Warnings, labelling and get-up

A warning may make a potentially unsafe product safe, and misuse of a product by a consumer could provide a defence (for example, apocryphal tales about disastrous results of putting poodles in microwave ovens to dry, and electric paint-strippers being used to dry hair). The question arises, however, as to what use of a product is reasonable and manufacturers frequently include warning labels covering many possible uses of products in order to cover themselves.

In *Relph v Yamaha* (1996) unreported, a claim for personal injuries under the Act failed. The claimant had used an 'all terrain' three-wheeled vehicle contrary to the instruction manual and labelling.

When a woman who suffered from toxic shock syndrome after using a tampon brought a claim under the Act, the court held that there had been adequate warnings given in the information leaflet (*Worsley v Tambrands* [2000] PIQR P95) and her claim did not succeed under the Act.

15.4.6 Timing

The time of supply is an important factor, as a defence may apply if the product has become unsafe after it left the manufacturer and moved down the distribution chain. Much will depend on the type of product (for example, perishable goods) and the handling which it subsequently receives.

If products made and supplied after the time in question are safer than those manufactured and supplied earlier, this will not necessarily make earlier products unsafe. Manufacturers are constantly improving the design and quality of their products, partly through market competition and partly because safety measures are introduced, though not retrospectively, by legislation. However, many manufacturers, in keeping with previous common law requirements, do operate efficient systems of product recall.

As long as the claimant succeeds in establishing that the product is defective as defined above, liability will be strict, though it is questionable whether in fact liability under the Act goes much further than ordinary negligence liability, given the similarity to negligence which is detectable in the application of the tests for defectiveness (see Stapleton, 'Products liability reform – real or illusory?' (1986) 6 OJLS 392).

The conclusion must be that the legal goalposts have shifted further from the notion of strict liability which the Consumer Protection Act 1987 purports to promote and closer to the ordinary law of negligence. However, in *A v National Blood Authority* [2001] 3 All ER 289, the judge was critical of attempts to re-introduce fault-based liability, as this was contrary to the spirit of the EU Directive.

15.4.7 The type of damage to which strict liability applies

The Consumer Protection Act 1987 only creates strict liability in relation to unsafe products. There are certain types of damage which are specifically excluded from the ambit of the Act:

- It does not cover damage to the product itself, and in this respect provides no better remedies than the common law of tort:

  > A person shall not be liable in respect of any defect in a product for the loss of or any damage to the product itself, or for the loss of or damage to the whole or any part of any product which has been supplied with the product in question comprised in it.

  This means that if a car, for example, were to catch fire because of a wiring defect, there would not be strict liability under the Act, though there could of course be a

claim in contract by the purchaser. If the fire injured the driver or passengers, there would be strict liability and, if the car caught fire and caused damage to other property, there would be strict liability under the Act.

If, however, the defect was caused by new wiring, say in a radio fitted after the purchase of the vehicle, there would be liability for damage to the car because the radio was not originally 'comprised' in the car.

These issues are raised in *Carroll v Fearon* [1988] PIQR P46 in which the victims of a car accident caused by defective tyres succeeded in a claim against Dunlop, the tyre manufacturers, for the injuries which they suffered when tyres suffered 'blow outs' after only moderate wear.

- The Consumer Protection Act 1987 does not cover damage to business property, that is, property which is not ordinarily intended for private use, occupation or consumption and not intended by the person who suffers the loss or damage mainly for his or her own private use, occupation or consumption.

  If a word processor used for purely private purposes in a domestic dwelling were to catch fire because of a defect and the house was destroyed in the subsequent blaze, there would be strict liability under the Act, but, if the same thing happened in a commercial office building, there would be a need to prove negligence or breach of contract in order to recover damages.

- The Consumer Protection Act 1987 does not cover small property damage, that is, losses of less than £275. Contributory negligence on the part of the person injured may bring the damages below this threshold.

  Small claims for damage to property would need to be brought in the law of contract or negligence.

  All personal injuries damages, however small, are covered by the Consumer Protection Act 1987.

15.4.8 Limitations

The right to bring a claim under the Consumer Protection Act 1987 is lost after 10 years from the date that the defendant supplied the product.

The claimant must begin proceedings within three years of becoming aware of the defect, the damage or the identity of the defendant, or if the damage is latent, the date of knowledge of the claimant, provided that it is within the 10 year limit. In the case of personal injuries, there is a discretion vested in the court to override the three year limitation period.

In all cases, the 10 year period is the absolute cut off point and there will be no discretion whatsoever to override this under any circumstances, even if the claimant was under a legal disability or the defendant could not be traced before that date.

15.4.9 Defences under the Consumer Protection Act 1987 (s 4)

There are several defences listed in the Consumer Protection Act 1987:

- **The defect in the product was attributable to compliance with a statutory or EC requirement**
  It would seem that the producer must demonstrate that the defect was the inevitable result of complying with a requirement which was itself misguided, an occurrence which is likely to be extremely rare. In any case, most of the standards laid down by regulations are minimum standards and difficulties are unlikely to arise in such cases, unless the manufacturer has over-used a product, for example a chemical in a weed killer or fertiliser which later turns out to be dangerous. In such circumstances, the court would be required to consider the question of what safety standards people generally would be entitled to expect.
- **The person proceeded against did not supply the product**
  There will be a defence if the person against whom the claim is brought did not supply the product but someone else did, and it will be for the defendant to prove that he or she did not do so. This will not always be as easy as it may appear, particularly in the case of clever fakes, which are becoming more common, of certain products from car components to designer jeans.
- **The product was not supplied in the course of a business, or not with a view to profit**
  The Consumer Protection Act 1987, like the Sale of Goods Act 1979, was designed to impose liability on businesses rather than private individuals. Thus, people who sell home made products at village fairs are not caught by the Act.
- **The defect did not exist at the relevant time**
  The relevant time is the time the product was supplied or put into circulation. Certain products which are perishable and must be used within a certain time, or require regular servicing can often leave one person in the chain of distribution in a perfect condition but may have deteriorated by the time they reach the consumer, having passed through several distributors. This defence means that as long as a producer can demonstrate that at the time the goods left him they met the reasonable expectations of the consumer, he will escape strict liability. This requires proof on a balance of probabilities and producers are advised to keep detailed records of their products and to have checking systems in place with records of dates of inspection in order to be able to provide evidence if necessary of the state of goods leaving their hands.

  If a product is deliberately sabotaged before it leaves a factory, the manufacturer would be strictly liable under the Consumer Protection Act 1987.
- **The development risks defence**
  This defence is similar to the 'state of the art defence' in negligence (*Roe v Minister of Health*). It applies: If the state of scientific and technical knowledge at the relevant time was not such that a producer of products of the same description as the product in question might be expected to have discovered the defect if it had existed in his products while they were under his control. Once again, the relevant time is the time the defendant supplied the product. As in the law of negligence, there will be a complete defence if the supplier can show that it was simply not known at the time that the product could be defective. The same defence does not apply in contract, however. This is one of the most fiercely criticised aspects of the Consumer

Protection Act 1987, and it is one which some of the other EU member states have chosen not to adopt, as there exist sufficient loss bearing mechanisms through insurance for producers rather than consumers to be able to cope with the burden of paying for the risks which are inherent in developing new products, particularly pharmaceutical products. It has been claimed that the Consumer Protection Act 1987 does not implement the first EC Directive on Product Liability properly, as the defence in English law is far easier to establish than the defence recommended by the Directive which used the *general* state of scientific knowledge by which to decide liability rather than the particular state of knowledge in a certain industry. The Consumer Protection Act 1987 states that there will be a defence if the state of scientific and technical knowledge at the relevant time was not such *that a producer of products of the same description as the product in question* might be expected to have discovered the defect if it had existed in his products while they were under his control. The Directive provides a defence if the state of scientific or technical knowledge at the time when the product was put into circulation was not such as to enable the existence of the defect to be discovered. The discrepancy between these two provisions has led to a claim being brought against the UK by the EU for failure to implement the first Directive properly. However, the ECJ ruled that there was no inconsistency between s 4(1)(e) and Art 7 of the first Directive (*Commission v UK* (1997) unreported).

It must be remembered that the development risks defence does not apply to manufacturing defects that are unrelated to 'development' of a product. Also, once a risk becomes manifest there may be a duty at common law to recall the product in question.

- **The defect was in the subsequent product not the component part**
  The defect was in the subsequent product not the component part and was wholly attributable to the design of the subsequent product or compliance with the instructions of the producer of the subsequent product. This defence allows a component producer in a chain of manufacture to escape liability in appropriate circumstances, and is yet another indication that the Consumer Protection Act 1987 was not intended to create absolute liability (s 4(1)(f)). It would not be fair for a manufacturer who had produced a perfectly safe component, or one which complied with instructions, to be saddled with liability if that part was subsequently misused.

15.5 WHAT DIFFERENCE DOES THE CONSUMER PROTECTION ACT 1987 MAKE?

Much of the previous discussion of the application and scope of the Consumer Protection Act 1987 has been concerned with the numerous exceptions and defences which are permitted to apply.

The Consumer Protection Act 1987 does not apply to all products, nor does it cover all defects, nor all kinds of damage. The limitation period under the Act is strict and, in any case it does not apply to products supplied before 1988. There are numerous defences permitted under the Consumer Protection Act 1987 and, if any of these are applicable, the consumer or injured party will be thrown upon the mercy of the common law which, in

almost every case, is less adequate; there would never have been any need for the legislation to be introduced otherwise.

One of the most serious criticisms of the Consumer Protection Act 1987 is that it permits too many of the factors which fall to be considered in the ordinary law of negligence to play a part in establishing whether the product in question is defective, almost to the extent that there is very little difference between the standard of care in negligence and that under the Consumer Protection Act 1987. The development risks defence contributes to this picture.

Even after due consideration of the question of the standard of care, it is still necessary to prove causation, that is, that the defect in the product in question caused that particular damage of which the person affected complains. This burden of factual proof is equally difficult in negligence and the Consumer Protection Act 1987 does little to help consumers. However, s 2 does provide that the producer will be liable if the damage is caused partly by the defective product and partly by some other event, which could arguably make it less difficult to pin liability on the defendant than it would in negligence.

It could be that the opportunity has been lost to develop really comprehensive remedies for those affected by defective products, with the cost of this being distributed by pricing and insurance throughout society. Numerous reasons for this lost opportunity have been suggested, including the work of pressure groups such as farmers who insisted on the exclusion of primary agricultural products from the ambit of the Act. Another possible reason is that English law is rooted in the fault system and our lawyers find it difficult to break free of a system which will not provide compensation unless there is someone to 'blame'. Even the development risks defence was introduced into the legislation because of the self-interest of the then Conservative Government which feared that British goods would not be competitive in Europe if price increases were required to meet the cost of insuring against liability for possible defects in newly developed products.

Ironically, there may in effect be more instances of strict liability in the common law than under the Consumer Protection Act 1987, through the *res ipsa loquitur* principle and through the imposition of stricter standards of care in practice than the abstract rules would at first suggest. For example, the settlement of most small claims by insurance companies almost without question suggests that liability is virtually strict as the issue of fault is not inquired into. Cases like *Nettleship v Weston* [1971] 2 QB 691, in which a set objective standard of care is applied, are a further indication of this trend.

Ultimately, however, the Consumer Protection Act 1987 does put manufacturers and distributors on their guard. It does give the injured party a better chance of obtaining a remedy by providing the possibility of bringing legal action against more people in the chain of manufacture and distribution of defective products. Better product recall systems have been developed in recent years and there is a greater awareness of the need to establish checking systems in the manufacturing process, and to keep accurate records of product distribution.

An EU directive which is intended to reverse the burden of proof in the case of defective services is currently under consideration.

In 1995, the European Commission conducted a review of the implementation of the Directive on Product Liability throughout all member states. No proposals for reform

were suggested as a result of this review, though various matters were highlighted, and it is interesting to observe the way in which the various member states have approached the implementation of the Directive. France has still to introduce any legislation on the matter, claiming that its own national laws already provide better protection than that afforded by the Directive. The Directive permits member states to choose between certain options when implementing the Directive. As a result, unprocessed agricultural products and game are excluded from the definition of a product in all member states except Sweden and Luxembourg, and the development risks defence is permitted in all member states except Luxembourg and Finland, though not for medicinal products in Germany and not for medicinal products, foodstuffs and food products for human consumption in Spain. These various options will interfere to some extent with the removal of trade barriers throughout the EU. There is also a financial ceiling on liability in Germany, Greece, Portugal and Spain of 17 million Euros (though with certain variations).

The Commission noted that the Directive is generally regarded as very important throughout Europe, and that its implementation makes it easier to obtain compensation for damage caused by defective products by eliminating costly arguments about liability at an early stage and encouraging and expediting settlement of claims. There is no evidence of an increase in the number of civil claims as a result of the implementation of the Directive. However, there is evidence in the UK that consumer claims are being brought under the Directive and being settled at an early stage, which is exactly what was intended by the Directive (*Unsafe Products*, Report of the National Consumer Council, November 1995). It will be many years before the full impact of the Directive on certain types of claims will be appreciated, particularly those concerning pharmaceutical products and transport where there can be a long time-lag between manufacture and injury. The Commission indicated in its report that it has a policy to wait for the collection of firm evidence about any benefits or difficulties associated with the Directive before deciding whether to recommend changes in the law. Nevertheless, it is still the case that the law on product liability has not been fully harmonised throughout the EU.

The question arises as to why those injured by defective products should be singled out for special treatment, as opposed to the many people who are injured in other ways or are born with inherited disabilities and illnesses. Once again, the question arises of the need for a comprehensive system of compensation for all such people, regardless of fault and irrespective of the cause of their misfortune.

FURTHER READING

Howells, *The Law of Product Liability*, Butterworths, 2007
Stapleton, *Product Liability* (*Law in Context*), Butterworths, 1994
Whittaker, 'European Product Liability and Intellectual Products' (1989) 105 *LQR* 125

For regular monthly up-dates on this area of law, see *Personal Injury Compensation*, published monthly by Informa UK Ltd.

CHAPTER 16

VICARIOUS LIABILITY

16.1 VICARIOUS LIABILITY

Employers are said to be 'vicariously' liable for the torts of their employees which are committed during the course of employment. In effect, this means that employers will be liable to third parties with whom they have usually had no direct contact in situations when they cannot be said to have any personal blame, merely because they have employed someone who has committed a tort. Several justifications have been suggested since the 19th century for the existence of the rule, which may appear to be particularly harsh as it seems to contradict the fault principle and it was originally based on the legal fiction that employers have 'control' over their employees and order them to do the tortious acts in question but, more recently, it has been recognised that the rule has a more pragmatic basis, which is that employers, as opposed to employees, can best afford to bear the cost of compensating injured third parties. Large companies usually insure against this type of liability, or are their own insurers. The question as to who has the benefit of insurance cover may influence the court in deciding who should be regarded as the employer (see *British Telecommunications plc v James Thomson & Sons (Engineers) Ltd* [1999] 1 WLR 9). A distinct advantage of vicarious liability to claimants is the fact that even if the particular individual who committed the tort is unidentifiable or cannot be traced, it will usually be possible to identify the employer, and if that employer is a corporation it will be possible to bring a claim even if the employee/tortfeasor has fled the jurisdiction to escape legal action. However, it should be noted that there are limits to vicarious liability. In general, it is confined to situations involving employers and employees and does not extend to husbands and wives or parents and children. Nor does vicarious liability cover 'looser' relationships. For example, in *Hussain and Another v Lancaster CC* [1999] 4 All ER 125 the Court of Appeal held that a council could not be liable for tenants' torts (see Chapter 11). However, it is difficult to find consistency in the cases, and in *Banks v Ablex Ltd* [2005] EWCA Civ 173 it was held that in principle an employer could be vicariously liable for bullying acts of an employee, in breach of the Protection from Harassment Act 1997, though in this instance the claim failed. Particular difficulties can arise in relation to public organisations like local authorities, especially when they use specialists such as educational psychologists (see the House of Lords decision in *Phelps v Hillingdon London Borough Council* [1999] 1 WLR 500).

In claims against police officers for assault and battery and false imprisonment, the notion that there is someone to sue is particularly important, despite the existence of the Police Complaints System (see *Weir v Bettison Chief Constable of Merseyside* [2003] EWCA Civ 111). It may even be possible to claim exemplary damages against an employer who is vicariously liable, as in *Rowlands v Chief Constable of Merseyside* [2006] EWCA Civ 1773, in which two police officers who worked under the direction and control of the respondent Chief Constable went to the claimant's home after she had complained about noisy neighbours. She was arrested in front of her children, handcuffed and detained for an hour-and-a-half. She was later charged with obstructing a

police officer in the execution of his duty, but was acquitted at trial because the court rejected the evidence of the police. She later brought a successful claim against the chief constable and was awarded a sum which the Court of Appeal held should include exemplary damages.

In *Lister v Hesley Hall Ltd* [2001] UKHL 22 the theoretical basis for vicarious liability was examined by the House of Lords, and Lord Clyde commented that there was probably no principle or policy that could be guidance in applying the rules in any particular case.

Two questions must be asked in order to establish liability:

- was the person who committed the tort an employee?
- was the employee acting in the course of employment when the relevant tort was committed?

16.2 EMPLOYEES OR INDEPENDENT CONTRACTORS?

Employers or 'masters' will only be liable for the torts of their employees or 'servants' as they are called in law. They will not usually be liable for the torts of their independent contractors (subject to some exceptions). It is therefore necessary to establish the status of the person who committed the wrongful act. The task of the court is to interpret the contract of employment.

Besides tort, a number of other areas of law are concerned with the distinction between servants and independent contractors, and the matters which fall to be considered are roughly the same across all branches of law, though throughout there is little consistency of principle.

For example, in tax law, it is necessary to decide whether a person should be paying income tax under Sched D as an independent contractor, which could carry tax advantages for that individual, or whether he is an employee and should have tax deducted at source under Sched E. Similarly, the state is concerned about an individual's employment status for the purposes of national insurance contributions. In employment law, only an employee, not an independent contractor, can bring an action for unfair dismissal and is entitled to statutory employment protection.

It is difficult, despite the existence of similar tests in each area of law, to establish any true consistency of principle, as the policy issues in each branch of law are different. In tax law, it seems that the employment status of an individual will be almost what the HMRC wishes it to be for the practical purpose of facilitating the collecting of tax. The same is true of the cases on national insurance contributions. In tort rather different considerations are at play, such as loss distribution and possibly moral issues relating to compensating the victims of accidents.

Various tests for establishing an individual's employment status have been developed through the cases, but it will always be necessary for the court to follow the well established practice of looking at all the relevant facts. The liability of employers can extend well beyond their usual place of business (see *Fraser v Winchester HA* (1999), *The Times*, 12 July, 9.1.4, above).

In *Carmichael v National Power* [1999] 1 WLR 2042, the House of Lords held that casual staff engaged on an 'as required' basis to act as guides at a power station were not employees. They were not guaranteed that work would be available and were not obliged to take work when it was offered to them.

16.3 THE NATURE OF THE EMPLOYMENT TEST

What was the nature of the contract by which the employment was established? One accepted view is that people who have a 'contract of service' (an employment contract) are employees, but people who have a 'contract for services' (a service contract) are independent contractors.

A contract may specify that the person doing the work is an independent contractor, or that the contract is a contract for services, but this is not conclusive and it is open to the court to consider, as a matter of fact, the precise nature of the employment (*Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* [1968] 2 QB 497).

16.4 THE CONTROL TEST

How much control did the employer have over the manner in which the work was carried out? If the employer is able to tell the person engaged to do a particular job how the work should be done, the contract will usually be an ordinary employment contract and the person doing the work will be a servant rather than an independent contractor. This control test favoured in some of the earlier cases lacks authority if the person doing the work is a 'trained' or 'professional' person who has worked for many years to qualify and to gain particular skills, which the employer, who could merely be an entrepreneur or perhaps a public authority, probably does not possess.

Take, for example, an oil company which employs ships' captains to navigate its ships. It is highly unlikely that senior management in the company's central office have the knowledge, skill and experience required to take a ship from the Middle East to the UK. Yet, in law, it is likely that the ship's captain is an employee if he or she is paid a regular salary by the company and contributes to the company's pension scheme.

There are many employment situations of this type; for example, hospital doctors are employees rather than independent contractors, even though they are employed by National Health Service (NHS) Trusts controlled by managers, very few of whom have medical qualifications.

In *Calvert v Gardiner* [2002] EWHC 1394, it was held that a bishop was not vicariously liable for an alleged nuisance caused by bell-ringing in a parish church. There was no evidence that he had authorised the bell-ringing.

16.4.1 Professional people's perceptions and the control test

Professional people regard it as an unjustifiable imposition and interference with their professional discretion for managers to try to be too directive as to the manner in which they carry out their work. In the NHS, there is a fear among clinicians that managers in

the current consumer orientated climate, in which the emphasis is on containing costs, will interfere too much with the way in which medical practice is conducted, by imposing certain clinical procedures upon them. This fear was recognised by the White Paper, *Working for Patients*, in 1989.

Hospitals and now health authorities are vicariously liable for the torts of the doctors, nurses, radiographers and other medical staff whom they employ (*Gold v Essex CC* [1942] 2 KB 293; *Cassidy v Minister of Health* [1951] 1 All ER 575). Application of the 'control' test is meaningless, and it would be much more realistic to concede that health authorities are vicariously liable for pragmatic reasons.

Reginald Dias and Basil Markesinis make the point that in the past hospitals were operating on slender financial resources, and this was the reason why they were not vicariously liable for the torts of their employees in the early cases, such as *Hillyer v St Bartholomew's Hospital* [1909] 2 KB 820. The switch to vicarious liability came with the introduction of the NHS which placed hospitals on a safer financial footing. It is now established that health authorities are vicariously liable for the torts of their employees (*Gold v Essex; Cassidy v Minister of Health*). Disputes do still arise in some cases involving hospital consultants, as in *Martin v Kaisary & The Royal Free Hospital* [2005] EWCA Civ 513. Until 1991, hospital doctors were contractually required to pay premiums to the Medical Defence Union and the Medical Protection Society, so that, in the event of a malpractice claim the health authority could seek an indemnity from the doctor concerned. However, partly because the Medical Protection Society introduced differential premiums for doctors to meet increasingly high awards of damages against those practising in certain high risk areas of medicine, the Government introduced changes in the funding of the defence of medical negligence cases in 1990 through the system of NHS indemnity. This means that NHS Trusts now fund and defend their own cases, and pay damages out of their budgets. Hospital doctors are no longer required to pay premiums to the defence organisations. Effectively, this means a return to the old system, and creates a problem for health authorities which already find it difficult to provide for all the needs of patients, let alone to pay large sums by way of damages for negligence.

The pre-NHS economic environment described by Dias and Markesinis has therefore been re-imposed, but because the vicarious liability of health authorities is well established through precedent, it would be difficult for the courts to regress to reintroducing personal liability for doctors.

16.4.2 Skilled workers' perceptions and the control test

In *Mersey Docks and Harbour Board v Coggins and Griffiths (Liverpool) Ltd* [1947] AC 1, the crane driver who was hired out with his crane by his employer, the harbour authority, to another company of stevedores, was outraged at the suggestion that anyone should be able to tell him how to operate his crane, yet he was treated as servant of the harbour authority for the purposes of the law, even though the contract under which he was hired to the stevedores specified that he should be their servant.

In some circumstances, both parties in an employment situation may have their own reasons for wanting the relationship to be classified as one of independent contracting. People commissioning work may want to avoid expensive employee national insurance contributions and administrative responsibility for collecting tax from employees. They

may well wish to be free from what they see as the encumbrances of employment protection legislation for employees, and the legal obligation to carry insurance cover for them. Those doing the work might prefer to have greater control over their tax and the advantage of more tax allowances by being classified as liable to Sched D income tax. In *Lane v Shire Roofing Co (Oxford) Ltd* [1995] PIQR P417, the Court of Appeal held that there was often a real public interest in ensuring that the law discriminates properly between employees and independent contractors, especially if health and safety issues are at stake. One reason for this is that employers ought not to be able to avoid their statutory responsibility under such Acts as the Employers' Liability (Compulsory Insurance) Act 1969. The various tests for establishing the nature of the employment were referred to, including the control test, which the Court of Appeal considered important, though not always decisive especially in cases involving skilled employees with the discretion to decide how the work is to be done. In such instances, the test should be broadened to consider whose business it was. Was the workman carrying on his own work or that of the employer? The view was that the answer to that question might involve considering where the financial risk lay and how far the worker had any opportunity to take advantage of good management in performing his tasks. Even the answer to that question might not be conclusive because ultimately this was a question of law. A distinction was drawn between the situation in employment today and that which prevailed when the *Ready Mixed Concrete* case was decided in 1968. At the beginning of the 21st century, there is greater flexibility in employment, with fewer people employed, more independent contractors, and more temporary and shared employment. In the *Lane* case, it had been agreed that the defendant would be paid a lump sum for the job in question, the claimant had used his own tools but had provided no materials. He had taken his own ladder to the site and had fallen from it when he was working on a roofing job, suffering serious brain damage. The Court of Appeal, reversing the decision of the High Court, held that the worker was an employee even though he had traded on his own as a roofer/builder since 1982 and had attained self-employed tax status. The defendants were a new roofing business and they found it financially more advantageous to treat the men whom they engaged as subcontracting, self-employed workers. The outcome of this case may be surprising in the light of the pre-existing case law, and it does illustrate the importance of public policy in influencing judicial decision making in this area of law.

The matter is clearly too complex and too dependent upon policy considerations such as loss distribution, insurance and so on, to be covered by a single simple test with prescribed rules as to how a 'servant' is to be identified. As Lord Pearce explained in *ICI v Shatwell* [1965] AC 656, the doctrine of vicarious liability has grown out of rough justice and social convenience rather than from the application of clear and logical principle.

In *Hawley v Luminar Leisure plc* [2005] EWHC 5 (QB) it was held that where a nightclub owner exercised detailed control over 'bouncers' employed by a security services company as to how they were to do their job, the nightclub owner was vicariously liable as the bouncers were treated as employees of the club.

The conclusion must be that as a means of assessing contractual status for the purpose of vicarious liability the control test is artificial, outdated and only partially helpful, and indeed this is reflected in the fact that judges now place less emphasis upon this test.

16.5 THE 'INTEGRAL PART OF THE BUSINESS' TEST

A further test was proposed by Lord Denning in *Stevenson Jordan and Harrison Ltd v McDonald and Evans* [1969] 2 QB 173. The reasoning is that:

> Under a contract of service, a man is employed as part of the business; whereas under a contract for services, his work, although done for the business, is not integrated into it but is only accessory to it.

With this approach also, however, there are difficulties which were recognised in the *Ready Mixed Concrete* case. Often, people who are casual or part time employees are treated as part of a business, whereas they would not necessarily regard themselves as totally committed to it. Part time teachers and markers and examiners for public examination boards are treated as employees for the purposes of income tax, but this type of employment is often regarded by them as a supplement to their main income, and a secondary source of employment, and most would regard themselves as independent contractors.

The court will decide the status of each individual in the light of all the circumstances. Thus, it has been held that even a controlling shareholder may be an employee (*Secretary of State for Trade and Industry v Bottrill* [2000] 1 All ER 915).

16.5.1 Who owns the tools?

If the person doing the work owns the tools which are used in that employment, he or she will usually be an independent contractor. This is not conclusive, however.

16.5.2 Is the worker paid a wage or a lump sum for the job?

Independent contractors usually negotiate a single lump sum price for a particular job, which may be payable in instalments (*WHPT Housing Association Ltd v Secretary of State for Social Services* [1981] 1 ICR 737). Employees are usually paid a salary or wage at regular intervals during their employment. Again, it is possible to find exceptions to this general rule.

16.5.3 Was the worker in business on his own account?

If the person who does a particular job regards himself as running a business of his or her own, with responsibility for his or her own accounts, tax and equipment, he or she will usually be an independent contractor.

This test is based on economic reality, and was explained by Lord Wright in *Montreal v Montreal Locomotive Works Ltd* (1947) 1 DLR 161 and later adopted and expanded upon in *Market Investigations Ltd v Ministry of Social Security* [1969] 2 QB 173 when six possible factors were identified for consideration.

16.5.4 Who had the power to hire and fire the employee?

The person who retains the power of dismissal is usually the master for the purposes of vicarious liability.

It is clear that it is impossible to formulate a single test which covers all situations, but it may be possible to distil from the various tests principles which can be applied in particular cases. However, in practice, it is difficult to predict which tests the courts will apply and almost impossible to assess in advance the outcome of individual cases. In common with so many other areas in the law of tort, this is subject to the vagaries of policy and the prevailing economic and social attitudes and the approach of particular judges to the individual cases they are called upon to decide.

16.6 SOME MISCELLANEOUS MATTERS

There are some situations which have presented particular problems.

16.6.1 Employees on loan

If a person is the servant of one employer but is 'lent' to another for a particular job, the question may arise as to who is the employer at the time of an accident. However, a full transfer of employment can only take effect if the employee has knowledge of the change (see *Bolwell v Redcliffe Homes* [1999] PIQR P243).

In general, if an employee is 'on loan' to another employer, the first employer will be treated as the employer for the purposes of vicarious liability. In *Mersey Docks and Harbour Board v Coggins and Griffiths* [1947] AC 1, a crane driver was hired out with his crane to a firm of stevedores under a contract which stated that he was to be the servant of the stevedores. His wages, however, were to be paid by his normal employer. The firm of stevedores gave instructions as to the jobs to be done on any particular day, but were in no position to instruct the driver how to operate his crane.

The House of Lords took all the facts into account, but regarded it to be of paramount importance that the original employer retained control over the manner in which the work was to be done. Accordingly, it was held that the original employer carried vicarious liability for the tort of the driver. The original employer bears the burden of proving that responsibility for the torts of the employee has shifted to the second employer, and statements in the contract of hire are not to be treated as conclusive on this matter.

In *Chief Constable of Lincolnshire v Stubbs* [1999] IRLR 81, an employment law case, it was held that police officers seconded to another force remained, for all purposes, employees of their home force.

16.6.2 Cars on loan

There are some cases in which cars have been driven by someone other than the owner for a purpose in which the owner has an interest. The question then arises as to whether the owner of the vehicle could be vicariously liable for the negligence of the driver. In *Britt v Galmoye* (1928) 44 TLR 294, the driver of a car was allowed, for his own convenience, to borrow a vehicle from its owner. The owner was not vicariously liable for his negligent driving. By contrast, in *Ormrod v Crossville Motor Services Ltd* [1953] 1 WLR 1120, the owner of a car asked someone to drive the vehicle to Monte Carlo, where he

planned to join him for a holiday. As there was a joint purpose here, the owner was vicariously liable when the driver had an accident.

In *Morgans v Launchbury* [1973] AC 127, Denning MR attempted to extend this principle to a situation in which a wife had lent the family car, registered in her name, to her husband to go on a drinking spree with some friends. He had promised his wife that if he became too drunk to drive, he would ask one of his friends to take the wheel. Unfortunately the friend who did the driving was also drunk, and there was a very serious accident as a result of his negligent driving. As he was uninsured, it became important, for the purposes of obtaining compensation, to fix liability. Lord Denning, using the notion of the 'matrimonial car', was determined to establish that the wife was vicariously liable. However, the House of Lords held that the mere fact that she had given permission for her husband or his friend to use the car, while she had no other interest in the venture, was no reason why she should be vicariously liable, as there was no such rule in English law, and, if the law was to be changed, it was for Parliament, and not for Lord Denning, to do so.

It seems that, in such cases, there must be an interest in the venture which is common to both the owner and the driver of a vehicle, before there will be vicarious liability. This is straying rather a long way from the notion of 'employment' but the courts do appear to be prepared to take those steps.

16.7 THE COURSE OF EMPLOYMENT

A master will only be liable for torts which the employee commits in the course of employment. Although this is a question of fact in each case, there is little consistency in the decisions and once again the only sensible conclusion must be that the judges are influenced by considerations of policy which fall outside the facts and are seldom discussed. It is therefore extremely difficult to state the law simply.

There are two lines of cases, those cases in which acts of employees are held to be within the scope of employment, and those which fall outside it. Examining each line of cases in an attempt to elicit general principles is futile, but it appears that an employer will usually be liable for wrongful acts which are actually authorised by him, and for acts which are wrongful ways of doing something authorised by the employer, even if the acts themselves were expressly forbidden by the employer.

16.7.1 Authorised and unauthorised acts

If an employer expressly authorises an unlawful act, he or she will be primarily liable. The position is more difficult in cases in which the employer is said to have authorised a wrongful act by implication. This 'implied authority' approach seems to have lost currency, but it was accepted in the early years of the 20th century (see *Poland v Parr & Sons* [1927] 1 KB 236) and it was even then probably little more than a means of justifying the outcome which the courts desired.

In *Bici v Ministry of Defence* [2004] EWHC 786 (QB) the defendants conceded that they were vicariously liable for torts committed by soldiers deployed in Kosovo as part of the United Nations Peace Keeping Force.

16.7.2 Wrongful modes of doing authorised acts

In the following cases, it was held that the employer *was* vicariously liable for the torts of the employee:

- ***Limpus v London General Omnibus Co* (1862) 1 H & C 526**
  Bus drivers were in the habit of racing, a practice which was strictly forbidden by the companies. In the course of a race, the claimant was injured. The employer was vicariously liable because this was merely an unauthorised way of performing the job of driving, which the driver was employed to do.

- ***Rose v Plenty* [1976] 1 WLR 141**
  A milkman had been forbidden by his employer to allow young boys to ride on the milk floats and assist in delivering milk. A 13 year old boy was injured partly as a result of the driver's negligence and partly through his own carelessness, and the employer was vicariously liable. The Court of Appeal held that the milkman was carrying out, albeit in a prohibited manner, the task which he had been employed to do, so the employer was liable. Lord Denning's suggested justification for the decision was that the boy had been furthering the interests of the employer.

- ***Weir v Chief Constable of Merseyside Police* [2003] EWCA Civ 111**
  A police officer 'borrowed' a police vehicle without permission to help his girlfriend move house. He manhandled and assaulted a youth who was interfering with his girlfriend's belongings outside her flat. He identified himself as a police officer. His employer was liable for his wrongful acts.

- ***Fennelly v Connex South Eastern Ltd* [2001] IRLR 390**
  The Court of Appeal held that the employers of a ticket collector were liable when he assaulted a customer after an argument in the course of employment.

- ***C v D and Another* [2006] EWHC 166 (QB)** a headmaster was liable under the principle in *Wilkinson v Downton* (1897) 2 QB 57 for psychiatric injury caused by an act of sexual abuse against a pupil which had not involved touching, and the school that employed him was vicariously liable.
- In ***C v Middlesbrough Council; X v Wandsworth LBC; H v Suffolk County Council; Young v Catholic Care* [2008] UKHL 6**, employers of people who carried out acts of abuse on children were vicariously liable for the torts of their employees, even though the acts were also criminal in nature.
- ***Century Insurance Co Ltd v Northern Ireland Transport Board* [1942] AC 509**
  The employee threw down a lighted match while petrol was being transferred from the lorry which he was employed to drive into a large petrol tank at a garage. It was held that the employer was vicariously liable for this negligent act because at the time the employee was engaged upon his duties.

- ***Bayley v MSL Rly Co* (1873) LR 8 CP 148**
  One of the company's porters, who was charged with the job of ensuring that passengers were on the correct coaches, pulled the claimant from a train, injuring him. The company was liable.

- ***Lister v Hesley Hall*** **[2002] AC 215**
  A school for children with educational and behavioural problems was held to be vicariously liable for sexual abuse of children by the warden of a boarding house. As the wrongdoing was intentional, the conduct of the employee was difficult to categorise as a wrongful mode of carrying out an authorised act. The House of Lords took the view that the acts were so closely connected with the warden's employment that it was fair and just to hold the employers liable. In *Green v DB Group Services (UK) Ltd* [2006] EWHC 1898 (QB) it was held that an employee should succeed in her claim for damages for psychiatric injury she suffered as a result of harassment and bullying by her fellow employees. Their behaviour fell within the scope of their employment, and connected to their work, giving rise to vicarious liability, but in any event the employer was in breach of its duty of care to the employee as he had failed to take steps to protect her from such behaviour.

- ***Majrowski v Guys and St Thomas NHS Hospital Trust*** **[2006] UKHL 34**
  An employer was vicariously liable for harassment under s 3 of the Protection from Harassment Act 1997, even though the employer had no reason to know that the harassment was taking place.

- ***Colle v Chief Constable of Hertfordshire*** **[2007] EWCA Civ 325**
  A Chief Constable was liable for the negligence of his officers who had failed to protect a crucial witness whom they knew to be in danger.

In the following cases, it was held that the employer was *not* vicariously liable:

- ***Beard v London General Omnibus Co*** **[1900] 2 QB 530**
  A bus conductor decided to try driving the bus. The employer was not vicariously liable for his negligence, as he was doing something outside the scope of what he was employed to do.

- ***Hilton v Thomas Burton (Rhodes) Ltd*** **[1961] 1 All ER 74**
  A group of workmen decided to take an unauthorised tea break and on the return journey the driver negligently crashed their employer's van, killing the claimant's husband. They were on 'a frolic of their own'. The employer was not liable.

- ***Heasmans v Clarity Cleaning Ltd*** **[1987] IRLR 286**
  The Court of Appeal held that employers were not liable for unauthorised use of the claimant's telephone by a cleaner. The cleaner was not engaged in cleaning the telephone but was using it for an entirely different purpose.

Although it is difficult to extract a general principle from the cases, it appears that, if the person who is injured was performing some act which contributed to, or provided some benefit to, the business of the employer, there will be vicarious liability (*Rose v Plenty*). If the employer derives no benefit from the forbidden act (*Twine v Beans Express* [1946] 1 All ER 202) there may be no vicarious liability.

Employers will not usually be liable for deliberate criminal acts of employees which also give rise to civil liability. However, if the criminal act is part and parcel of the employment, the employer may be liable. If the employment involved the employee being entrusted with particular goods, then any theft or mishandling of the goods by the employee will give rise to vicarious liability. In *Morris v Martin & Sons* [1966] 1 QB 792, an

employer was liable when an employee who worked at his dry-cleaning business stole a fur coat. This was a bailment situation, however, in which particularly onerous duties are placed upon those who are entrusted with goods. Such duties cannot be delegated, and the decision of the Court of Appeal is not surprising.

In *Barwick v Joint Stock Bank* (1867) LR 2 Ex 259, it was held that an employer could be vicariously liable for the frauds of an employee and, in *Lloyd v Grace Smith & Co* [1912] AC 716, an employer, a solicitor, was vicariously liable for the mortgage fraud committed by an employee, even though the employer did not stand to derive any benefit from the crime. The employee did, however, have ostensible authority from the employer to carry out the act involved (arranging a mortgage), and the employer had placed him in that position of authority.

In the past, employers were not usually liable for assaults committed by their employees (see *Keppel Bus Co Ltd v Ahmad* [1974] 1 WLR 1082, in which a bus conductor hit a difficult passenger with his ticket machine but this is by no means settled law). In *Vasey v Surrey Free Inns* [1996] PIQR 373, an employer was liable to the claimant who was assaulted by two doormen and a manager defending the employer's property. In the New Zealand case of *Petterson v Royal Oak Hotel Ltd* [1948] NZLR 136, a nightclub bouncer committed assaults in the process of protecting his employer's property, and the employer was held vicariously liable. He was perceived to be furthering the interests of the employer, in much the same way as the boy in *Rose v Plenty*.

Mattis v Pollock [2003] EWCA Civ 887 is an illustration of the unpredictable nature of the law in this area. Here a night club 'bouncer' who was 6 foot 7 inches and weighed 20 stone, was employed by the nightclub owner. Following a disagreement with the claimant and his friends, the bouncer went home to fetch a knife and stabbed the claimant in the neck causing him very serious injuries. The Court of Appeal held that the nightclub owner was vicariously and personally liable to the claimant. He should have expected the doorman (bouncer) to behave aggressively, and the stabbing was directly linked to the employment, although it was an act of personal revenge.

In *Generale Bank Nederland v Export Credits Guarantee Department* [2000] 1 AC 486, it was decided by the House of Lords that an employer was *not* vicariously liable when, in the course of employment, an employee had committed acts which were not in themselves tortious but had been carried out to assist fraudulent acts committed by an outsider. In this case, the employee had knowledge of the scheme to defraud the bank. It was necessary for all the wrongful acts to be done in the course of employment.

The position in relation to crime *per se* is that employers will not normally be prosecuted for the crimes of their employees, unless the employee was instructed to commit the crime in question, or committed it under duress. However, tort actions may arise out of the same fact situations as certain crimes (for example, assault and battery) and it is these torts for which the employer may be vicariously liable. The House of Lords in *Lister v Hesley Hall Ltd* emphasised the requirement for it to be 'fair and just' to hold an employer vicariously liable. It seems that this will depend not only on the question of carrying out wrongful acts in an authorised or unauthorised manner, but also upon the nature of the relationship between the employer and the victim of the torts in question.

16.8 THE *LISTER v ROMFORD ICE* PRINCIPLE

There is a term implied at common law into contracts of employment that an employee will exercise all reasonable care and skill during the course of employment. An employee who is negligent is in breach of such a term and theoretically, the employer who has been held vicariously liable for the tort could seek an indemnity from the employee to make good the loss. In *Lister v Romford Ice and Cold Storage Co Ltd* [1957] AC 555, a father was injured by his son who was employed by the respondents. The employers were vicariously liable for the son's negligence and met the father's claim. Exercising their right of subrogation under the contract of insurance, the employers sued the son. The House of Lords held that the son was liable to indemnify the employer and consequently the insurers.

This situation can clearly cause problems for relations between employers and employees, and as a consequence of the difficulties which have been predicted, insurers have entered into a gentleman's agreement not to enforce their rights in such circumstances in the future if there is no wilful misconduct or collusion between the employer and employee.

FURTHER READING

Cane, *Atiyah's Accidents, Compensation and the Law*, 7th edn, Cambridge University Press, Chapter 4

For regular monthly up-dates on this area of law, see *Personal Injury Compensation*, published monthly by Informa UK Ltd.

CHAPTER 17

TRESPASS TO GOODS

From the earliest days of the common law a number of torts were developed specifically to protect interests in goods in a similar way to those torts which developed to protect interests in land. However, by the 1970s, it had become clear that the torts relating to goods were badly in need of reform and, in 1977, the Torts (Interference with Goods) Act was passed in an attempt to clarify the law. Although this statute did introduce radical changes, it was not sufficiently comprehensive to remove all of the difficulties and there are some areas of ambiguity. Many of the common law rules still apply and the Torts (Interference with Goods) Act 1977 must be read in the light of these. For example, the defences applicable to other forms of trespass still apply to trespass to goods, alongside the defences supplied by the 1977 Act and by the Police and Criminal Evidence Act 1984. This chapter contains a very brief summary of this complex area of law, which is dealt with in much greater detail by other authors in the context of the law relating to goods more generally.

17.1 THE COMMON LAW

At common law, the most important torts which could be used to protect or recover chattels were trespass to goods and conversion. Another tort developed later to protect goods by means of an action on the case for damage to reversionary interests in goods. In order to understand the changes which were introduced in the legislation it is also necessary to consider the common law rules.

17.1.1 Trespass to goods

Trespass to goods can be defined as 'direct, immediate interference with personal property belonging to another person'.

This tort essentially provides protection for the person entitled to immediate possession of the chattels in question, and in that and other ways it resembles trespass to land.

In common with other forms of trespass the act in question had to be direct (as in trespass to land). For example, in *Fouldes v Willoughby* (1841) 8 M & W 540, it was said to be trespass to goods to scratch the panel of a coach.

Any form of deliberate destruction of the goods could amount to trespass, but even using goods without permission could constitute trespass, and it is no defence for the defendant to claim honest but mistaken belief that the goods belonged to him (*Kirk v Gregory* (1876) 1 Ex D 55).

Acts of trespass to goods, like trespass to land, are actionable *per se* (that is, without proof of damage) but since the decision in *Letang v Cooper* [1965] 1 QB 232, it may be the case that trespass to goods will follow trespass to the person and require the act to be deliberate, though the extension has never been made judicially.

This tort survives today after the Torts (Interference with Goods) Act 1977 and the Act specifically states that the defence of contributory negligence will not be available in answer to this tort (s 11(1)).

In *A & Others v Leeds Teaching Hospital NHS Trust* [2004] EWHC 644 (QB) it was held that English law did not recognise a tort of 'wrongful interference with a body'.

It appears that a dead body does not amount to 'goods' for the purposes of this tort.

17.1.2 Conversion

The tort of conversion consists of dealing with goods in a manner inconsistent with the rights of the true owner, so denying the right of the owner to the goods, or asserting a right which is inconsistent with the owner's right. It is an intentional tort that may be committed in a wide variety of ways. It is actionable by the person entitled to possession of the goods. It follows that a range of different people may be able to claim for conversion, depending on the circumstances, as the law allows claims by a person who had a right to immediate possession as well as to a person who enjoyed actual possession at the time the tort was committed. The claimant must prove that he had possession of the goods or the right to immediate possession of them at the time of the wrongful act.

It is necessary to prove that the defendant had the intention to deal with the goods, though there is no need to prove the intention to deny the owner his or her right or title to the goods. Thus, the only relevant intention is that of committing the act of interference. Indeed, the tort may be committed even in circumstances when the defendant had no knowledge that the goods belonged to the claimant, for example when goods are purchased in good faith from a thief. The tort features prominently in considering the issue of title to goods when there is a question of mistaken identity in contract (*Lewis v Averay* [1972] 1 QB 198).

Examples of conversion are:

- Contradicting the title of the true owner.
- Detaining goods which belong to the claimant without permission when there has been a demand for the goods which has been refused. It has been suggested that if cars are wheel-clamped or towed away from land on which they are parked without the permission of the occupier, there could be a claim for conversion available to the car owner. However, it was held by the Court of Appeal in *Arthur v Anker* [1997] QB 564 that as long as certain reasonable steps were taken by the clamper, no tort would be committed. These steps included the placing of a notice to warn trespassing motorists of the possibility of being wheel-clamped, the provision of information as to how to communicate with the clamper and the imposition of a reasonable release fee.
- Destruction of goods belonging to the claimant, or intentionally risking the confiscation or destruction of goods. In *Moorgate Mercantile Co v Finch* [1962] 1 QB 701, the defendant had used a car belonging to a finance company for smuggling drugs. When the car was confiscated by the Customs & Excise authorities, the defendant was guilty of conversion.
- Selling goods without the claimant's permission.
- If goods are taken or damaged by police officers in the course of a search, there will be a successful claim for conversion if the police acted beyond their common law or

statutory powers (see Police and Criminal Evidence Act 1984) in so doing. People whose property has been confiscated by the police have a right to bring a claim in a magistrates' court under the Police (Property) Act 1892 for its recovery. However, if a recipient of goods merely keeps them for someone whom he or she honestly believes to be entitled to them, there is no conversion (see Blackburn J in *Hollins v Fowler* (1875) LR 7 HL 757).

- Receiving goods which have been obtained by fraud, and selling them in good faith to someone else (see *Hollins v Fowler*).
- Misdelivering goods.

The Torts (Interference with Goods) Act 1977 provides that the receipt of goods under a pledge which is unauthorised is also conversion (s 11(2)).

A change brought about by the Torts (Interference with Goods) Act 1977 is that if the defendant merely makes a verbal statement denying the claimant's title to goods, there is no conversion (s 11(3)). Otherwise liability in tort for conversion remains as it was before the Act. The new tort introduced by the Act of 'wrongful interference with goods' is not strictly new at all. It is simply a way of describing all the torts that cover loss or damaged goods. These include conversion, trespass and negligence (see 17.1.4).

Contributory negligence is not a defence to conversion (s 11(1) of the Torts (Interference with Goods) Act 1977). Many of the cases concerning title to goods which are studied in the law of contract are conversion cases.

17.1.3 Action for damage to reversionary interests in goods

In circumstances when the defendant unlawfully interfered with goods at a time when the claimant did not have possession or an immediate right to possession of them, there could be no action available under the three existing common law torts. In the mid-19th century, the courts developed the action on the case for interference with the reversionary interests of the claimant. This has a parallel with the development of the action on the case relating to land in similar circumstances, when there was a less direct relationship between the parties and the property concerned.

17.1.4 Torts (Interference with Goods) Act 1977

This statute, acknowledging the overlaps and ambiguities of the common law, attempted to tidy up the rules in this area. The Act defines wrongful interference with goods (s 1) as:

(a) Conversion – also called trover.
(b) Trespass to goods.
(c) Negligence resulting in damage to goods or to an interest in goods.
(d) Any other tort so far as it results in damage to goods or to an interest in goods.

Among the reforms introduced were these:

- the right to sue for negligent loss by a bailee of goods entrusted to him was transferred to the tort of conversion by s 2(2);

- a general concept of tortious liability was introduced for wrongful interference with goods, with corresponding remedies which the court is given the power to order;
- contributory negligence was extinguished as a defence to conversion and intentional trespass, except in relation to banks;
- new rules were introduced whereby goods which had not been claimed could be disposed of;
- people who had improved goods while they were in possession of them were provided with the means of claiming an allowance for their efforts;
- provision was made to deal with claims between co-owners, a problem area at common law;
- reversal of the old rule that defendants were not allowed to plead as a defence that a third party had a better title to the goods than the claimant;
- common law detinue was abolished and the tort of conversion was extended to cover what remained of detinue.

17.1.5 Remedies for conversion

Damages obtainable for conversion allow recovery of the market value of the goods and special damages. This extinguishes the claimant's title. Alternatively, the true owner of the goods can have them restored plus special damages.

Statutory reforms were introduced by the Torts (Interference with Goods) Act 1977. For example, the Act contemplates that a judge may make an order for delivery up of the goods in an interim application in the course of proceedings for wrongful delivery of the goods. These orders are discretionary. Again, there may be an order plus damages, or with damages as an alternative. Although damages may be awarded under the Act, there is little guidance as to how damages are to be assessed and it is assumed that common law principles apply.

Recent examples of remedies for interference with goods are:

- *Neave v Neave* [2002] EWHC 784: the defendant trespassed on land belonging to his widowed mother and took a number of historic cars that belonged to her. The judge ordered that the vehicles should be returned and that £3,000 damages be paid.
- *Scotland v Soloman* [2002] EWHC 1886: the defendants had unlawfully seized and kept certain goods belonging to the claimants in the course of executing a charging order. A Chancery Division judge held that there was at least an arguable case that the defendants were bailees of the goods and had no right to dispose of them.

FURTHER READING

Curwen, 'Title to Sue in Conversion' [2004] *Conv* 308
Lunney, *Law of Tort*, 2nd edn, Butterworths, 2003, Chapter 11

For regular monthly up-dates on this area of law, see *Personal Injury Compensation*, published monthly by Informa UK Ltd.

CHAPTER 18

DEFAMATION AND OTHER TORTS AFFECTING THE REPUTATION

There are some torts which have been developed to compensate for damaged reputations, just as others have emerged which compensate for bodily injury. In addition to compensation, equally important is the need for injunctions to prevent threatened damage to the reputation. The relevant torts are libel, slander, injurious falsehood, malicious prosecution.

18.1 FREEDOM OF SPEECH, THE MEDIA AND THE LAW

Although not exclusively concerned with the activities of the media, the majority of defamation claims do concern statements made by the press. Freedom of communication is jealously guarded by the media, and as there is no written constitution in the UK it is the judges who have undertaken the role of guardians of this freedom, although they have no overriding obligation to protect freedom of speech. Rather, the role of judges is to undertake an exercise which aims to achieve a fair balance between the right to free expression and the need to protect the reputation of the individual. Freedom of speech, in the absence of a written constitution, exists only so far as it has not been removed or eroded by common law or statute, including the Human Rights Act 1998, and the balance between the various countervailing interests changes from one time to another according to the political climate. Art 10 of the European Convention on Human Rights protects freedom of expression. The role of the law of defamation is to ensure that freedom of speech does not outweigh the interests of the individual, although it is arguable that, certainly in the past, the damages awarded in defamation cases distorted the extent of the protection which the individual should reasonably expect. There are also some who would argue that the conflicting interests involved cannot be balanced and that the role of the courts should not be regarded as a balancing exercise, as the interests are not of equal weight. It was also argued that in some instances in the past the parties did not have equal financial standing, as in the 'McLibel' case.

Libel claims are no longer confined to what is published within each jurisdiction. It appears that a decision of the Australian High Court allows litigants to bring claims anywhere in the world for alleged libels published on the worldwide web, regardless of the website's country of origin.

How much the law on defamation actually protects all individuals is debatable, as in general it has only been the rich who could afford the luxury of suing for defamation. There is no public funding available for these claims, and the costs involved can be extremely high, partly because juries are required to hear them and partly because the lawyers who deal with such cases regard them as particularly complex and difficult and justifying high fees. Sometimes people bringing libel claims are able to obtain funding from friends and supporters or on a no-win, no-fee basis (18.6.2). If the claim is unsuccessful the funders may be liable for costs, though the judge may exercise discretion in such cases. In a case involving those who funded Neil Hamilton in a notorious and

unsuccessful libel claim against Mohamed Al Fayed, the Court of Appeal held that the trial judge had been correct to refuse costs orders against them under s 51 of the Supreme Court Act 1981 (*Hamilton v Al Fayed (Costs)* EWCA Civ 6651). In *Taylforth v Metropolitan Police Comr and The Sun Newspaper* (1994) unreported, Gillian Taylforth was left with a bill for costs of around £500,000 after an 11 day hearing. In 1993, a libel claim brought by Anita Roddick of the Body Shop cost £1 million for the claimant alone. In *Joyce v Sengupta* [1992] NLJ 1306, the claimant circumvented the rule about legal aid by bringing her claim for malicious falsehood instead of defamation, with the approval of the Court of Appeal.

In *Spring v Guardian Assurance* [1992] IRLR 173, an ex-employee of the defendant brought a claim for *negligence* because he had been unable to obtain employment after the defendants had written a damaging reference for him. Not only did this circumvent the legal aid problem, but it also prevented the defendant relying on the defence of qualified privilege which would have been available to a claim for libel.

The Third Royal Commission on the Press defined press freedom as:

> That degree of freedom from restraint which is essential to enable proprietors, editors and journalists to advance the public interest by publishing facts and opinions without which a democratic electorate cannot make responsible judgments.

Press freedom is protected by the defences to the defamation claim, many of which influence editors and their legal advisors in arriving at the decision of whether or not to publish dubious material. Cynically, as far as the media and its legal advisors are concerned, the real question is how far they will be able to exploit the notion of press freedom in order to sell copy, without the fear of a libel claim. Newspapers are commercial concerns and depend for their existence on the number of copies they are able to sell. Publication of potentially defamatory material is a calculable risk, given that juries are unpredictable and defences such as justification and fair comment may operate to the advantage of the press. Moreover, although libel damages generally are not tax-deductible expenditure (*Fairie v Hall* (1947) 28 TC 200, as when a solicitor wrote a defamatory letter), there are authorities which suggest that for newspapers libel damages are tax deductible (see the Australian case of *Herald Weekly Times Ltd v FTC* (1932) 48 CLR 113). Against the advantages of increased sales, editors must set the disadvantages of high awards of damages, including exemplary damages in cases where it is obvious that a libel has been published for reasons of sensationalism with a view to making a handsome profit (*Broome v Cassell & Co Ltd* [1971] 2 QB 354).

It should not be forgotten that journalists, like members of the public, also have the opportunity to claim for libel. In 1995, an investigative journalist received £31,500 plus costs of £55,000 when he was libelled by Michael Heseltine. Taxpayers met this bill under Treasury guidance which allows public resources to be used to deal with matters arising in the course of official duties of ministers and civil servants.

The European Convention on Human Rights attaches special importance to freedom of expression. Article 10(1) states:

> Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.

The Article does recognise certain exceptions to this freedom which initially appear to curtail it greatly, and it identifies the protection of the reputation in particular (Art 10(2)):

> The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence or for maintaining the authority and impartiality of the judiciary.

In practice, despite these exceptions, the European Court of Human Rights has tended to lean in favour of the media in its interpretation of Art 10, and the Article does require much clearer statements of the legal limits to freedom of speech than are available in English law.

Article 10 has now been incorporated into English law by the Human Rights Act 1998, but it was referred to in the case of *Derbyshire CC v Times Newspapers* [1993] AC 534 in the Court of Appeal, where it was accepted that it had affected the right of a governmental body to claim for libel. In the House of Lords, it did not appear to be necessary to invoke Art 10, and the decision was reached by reference to common law alone.

Article 8 also provides some degree of protection for the reputation of the individual, since it aims to protect private life (see Chapter 19 for an account of the law of privacy).

In the cases of *Rantzen v Mirror Group Newspapers* (1993) NLJ 507 and *Elton John v MGN Ltd* [1996] 2 All ER 35, the Court of Appeal referred to Art 10 in an effort to understand the correct approach to reviewing the jury's award of damages. Their Lordships recognised that Art 10 must be regarded as underlying common law principles relating to freedom of expression.

In July 1995, the European Court of Human Rights was critical of the approach taken by the English courts when it reviewed the award of damages which a jury had made to Lord Aldington in 1989 (see *Tolstoy v United Kingdom* (1995) 20 EHRR 442). The English jury had found that Lord Aldington had been libelled by Count Nikolai Tolstoy in a pamphlet written about his alleged wartime involvement in the deaths of 70,000 Cossacks and Yugoslavs. Count Nikolai Tolstoy had been forced into bankruptcy by the huge award of damages fixed by the jury at £1.5 million and by the costs involved in the claim. The European Court ruled that the award of damages was excessive and that it amounted to a violation of the Count's right to freedom of expression, as 'taken in conjunction with the state of the national law at the time' it was 'not necessary in a democratic society'. The Court accepted that there is no upper or lower limit on the award of damages in English law which a jury can make and that the role of the judge in giving guidance is limited, perhaps because of the firm line taken in this case by the European Court of Human Rights. There has been a realistic opportunity for the courts to introduce more realistic levels of awards through the case of *Elton John v MGN Ltd* and the Defamation Act 1996. These changes are discussed later in this chapter.

A pre-action protocol now governs the conduct of the early stages of defamation claims. This important document is available on the Department for Constitutional Affairs website (www.lcd.gov.uk).

18.2 LIBEL AND SLANDER

Defamation consists of the torts of libel and slander. There are distinctions between libel and slander which are attributable to their origins and development, and have little real justification in modern law. The differences between libel and slander have been abolished in some commonwealth jurisdictions and in 1975 the Faulks Committee recommended that they should be abolished in English law, but the distinction remains, despite the Defamation Act 1996.

Note also that there is a claim available for slander of goods where the words complained of relate on the face of them to a product (see *Patterson v ICN Photonics Ltd* [2003] EWCA Civ 343).

18.2.1 Distinction

The basic differences between the two torts are as follows:

- **Libel is a defamatory statement in some permanent form, for example, writing, recorded film or speech**
  Some examples of libel are: *Monson v Tussaud's Ltd* [1894] 1 QB 671 (the placing of a wax image of the claimant in the chamber of horrors at Madam Tussaud's waxwork exhibition amounted to libel); *Youssoupoff v MGM Pictures Ltd* (1934) 50 TLR 581 (the claimant was portrayed in a film as having been seduced by Rasputin; this was a permanent form of defamation and therefore amounted to libel).

  By s 16 of the Defamation Act 1952, and ss 166 and 201 of the Broadcasting Act 1990, defamatory statements in radio and television broadcasts are libel. Under s 4 of the Theatres Act 1968, defamatory statements made in public performances of plays are libel.

  A purely transitory defamatory statement is slander. Examples are gestures and words which are spoken but not recorded.

  There is some doubt as to whether defamatory words recorded on disc, tape or CD are libel or slander.

- **Libel is actionable *per se* (without proof of special damage which is calculable as a specific sum of money), slander is not**
  To succeed in a claim for slander, damage must be proved except in four instances, which are as follows:

  (a) Where there is an allegation that the claimant has committed an imprisonable offence. The offence must be one which carries a sentence of imprisonment at first instance, rather than one which merely carries a possible prison sentence or a fine.

  (b) Where there is an imputation that the claimant is suffering from a socially undesirable disease, such as smallpox, or perhaps more relevant today, venereal disease or AIDS. There has been a suggestion that the list of diseases in this category is now fixed.

  (c) Where there is an imputation that a woman has committed adultery or otherwise behaved in an 'unchaste' fashion (Slander of Women Act 1891). It has been held

that an allegation of lesbianism is included in the term 'unchastity' (*Kerr v Kennedy* [1942] 1 All ER 412).

(d) Where there is an imputation that the claimant is unfit to carry on his trade, profession or calling. The statement must disparage the claimant in the way in which he or she exercises his or her profession or job. In *Hopwood v Muirson* [1945] KB 313, it was held that an allegation that a headmaster had committed adultery was not actionable *per se* but it would have been had the adultery been alleged with a pupil or a teacher at his school. This common law position has been altered by s 2 of the Defamation Act 1952 which merely requires that the claimant could possibly have been injured in relation to his or her trade or calling by the statement.

- **Libel may be a crime as well as a tort, whereas slander is only a tort**
  It was thought that criminal libel had become virtually obsolete, but the mere threat of proceedings by Sir James Goldsmith in 1977 succeeded in forcing *Private Eye* to withdraw copies of its magazine from bookshops (*Goldsmith v Pressdram* [1977] QB 83). Criminal libel is very similar to civil libel but it does not require the person defamed to be alive, nor is it necessary to publish the statement to a third party. Both of these elements are required for a successful action for civil libel. In criminal libel, it appears that the requirement that there should be a threatened breach of the peace no longer applies (*R v Wicks* [1936] 1 All ER 384). This has never been a requirement of civil libel. In other respects, the two types of libel are the same.

18.3 WHO CAN SUE FOR DEFAMATION?

Only living persons can sue for defamation. It is permissible to speak ill of the dead, at least in law. Even if a claim has been initiated, if the claimant dies immediately before the trial the claim is said to die with him. This is important from the point of view of defendants who might be tempted to spin out the pre-trial periods for as long as possible waiting for a sick or elderly claimant to die, as has happened in some cases. Measures taken recently to speed up litigation should remedy this situation, but it must be remembered that, in any case, the defendants will have to pay their own costs if the claimant does die before the trial commences.

Any person who can prove that the defamatory words refer to him can sue for defamation. However, there is some doubt as to the position of corporate bodies. It appears that trading corporations do have a right to sue for defamation (*Upjohn v BBC and Others* (1994) unreported, in which the makers of the drug 'halcion' sued over allegations that they had concealed dangerous side-effects for 20 years, and *South Hetton Coal Co v North Eastern News Association Ltd* [1894] 1 QB 133). However, in *Derbyshire CC v Times Newspapers Ltd* [1993] AC 534, the House of Lords held that local authorities do not have a right at common law to maintain a claim for defamation. The decision was explained by Lord Keith in these terms:

> It is of the highest public importance that a democratically elected governmental body, or indeed any governmental body, should be open to uninhibited public criticism. The threat of a civil action for defamation must inevitably have an inhibiting effect on freedom of speech.

The Court of Appeal had held that to allow a local authority to sue for libel would greatly inhibit freedom of speech and would be contrary to Art 10 of the European Convention on Human Rights.

Individual officers of a local authority would be able to sue in their own right for libel and local authorities are at present able to rely on criminal libel.

18.4 A WORKING DEFINITION OF DEFAMATION

Whether a statement amounts to libel or slander it must satisfy the general requirements of the law to be actionable. A useful starting point is a definition of defamation which is as follows: defamation consists of publishing a defamatory statement which refers to an identifiable claimant, without lawful justification.

This definition will be examined in detail to identify and explain the various elements of the tort.

18.4.1 Publication

The statement must be published to a person other than the claimant alone. It is not actionable in civil law merely to make a defamatory statement to the claimant alone out of ear-shot of a third person, nor to write a letter to the claimant containing defamatory material. If the claimant decides to show a potentially defamatory letter to someone else, there is a defence of *volenti* as the claimant, not the defendant, has published the statement.

In *Hinderer v Cole* (1977) unreported, the claimant was sent a letter by his brother-in-law which was addressed to 'Mr Stonehouse Hinderer'. It contained a vicious personal attack on his character, describing him as 'sick, mean, twisted, vicious, cheap, ugly, filthy, bitter, nasty, hateful, vulgar, loathsome, gnarled, warped, lazy and evil'. The defamatory words in the letter were shown by the claimant to other people, but the defendant had only sent them to him. There was, therefore, no publication by the defendant to a third party and those words could not form the basis of a libel claim. However, the claimant did obtain damages of £75 because the word 'Stonehouse' was held to be defamatory, as it implied that the claimant was like John Stonehouse, an MP who had recently disappeared by faking his death from drowning to escape paying his debts.

Every fresh publication of the statement will give rise to a fresh cause of action, so that each repetition will be important. This is evidenced by the libel allegations against *Scalliwag* and the *New Statesman* by John Major and Clare Latimer. The avowed purpose of the *New Statesman* article was to quash defamatory rumours about Mr Major, but that involved repetition of them, even though the article was critical of the rumours. Potentially, in the case of a libel in a newspaper, the journalist, the sub-editor, the editor, the publisher, the distributor and newsagent could be sued (subject to the defence of innocent dissemination, discussed later). However, the claimant will be advised to sue those who can best afford to pay. Newspapers and broadcasting companies will usually be vicariously liable for the statements of their employees, and there can be difficult situations in relation to phone-in programmes, which explains why they are usually subject to a five second time-lag.

In *McManus v Beckham* [2002] EWCA Civ 939 the claimant argued that Victoria Beckham had entered his shop and told customers that a signed photograph of her husband on sale there was a forgery. The subsequent press coverage had damaged his business, and the question arose as to whether the media attention was a natural and probable consequence of Victoria Beckham's statement. The Court of Appeal held that a just and probable result would be achieved in imposing liability if it could be proven that the defendant was actually aware that her words would be reported, or she should have appreciated that there was a significant risk that this would happen.

18.4.2 Examples of publication

The following situations *will* amount to publication:

- words written on a postcard or open message;
- defamatory statements placed in an envelope and addressed to the wrong person (*Hebditch v MacIlwaine* [1894] 2 QB 54);
- speaking in a loud voice about the claimant so that people nearby can overhear (*White v JF Stone (Lighting and Radio Ltd)* [1939] 2 KB 827; also now *McManus and Others v Victoria Beckham* [2002] EWCA Civ 939;
- sending a letter to the claimant in circumstances when it is likely to be opened by a third party (*Pullman v Hill* [1891] 1 QB 524 – a secretary/clerk opened a letter; *Theaker v Richardson* [1962] 1 WLR 151 – a husband opened a letter addressed to his wife);
- allowing unauthorised defamatory statements to remain on one's premises (*Byrne v Deane* [1937] 1 KB 818). In *Cunningham v Essex CC* (2000) WL 1274149, it was held that the casual onward transmission of a draft letter in preparation for a reference, alleging criminal proceedings against the claimant, could not attract a defence of qualified privilege. This was an actionable publication for the purposes of a libel claim;
- making a statement which carries the natural consequence of being repeated by someone else (*Slipper v BBC* [1991] 1 All ER 165. In this unusual decision, the defendant was liable not only for the original statement in a television broadcast, but for later newspaper reviews which repeated the 'sting' of the statement);
- making the statement to the claimant's spouse;
- a publication on the internet (*Godfrey v Demon Internet Ltd* [2001] QB 201).

18.4.3 Statements which were not 'published'

The following situations *will not* amount to publication:

- placing defamatory material in an unsealed letter (*Huth v Huth* [1915] 3 KB 32);
- making defamatory statements which are later repeated by someone else (*Ward v Weeks* (1830) 7 Bing 211). This usually breaks the chain of causation and the original maker of the statement will not be liable for repetitions, though there have been exceptions to this (see *Slipper v BBC*);
- making the statement to one's own spouse (*Wennhak v Morgan* (1888) 20 QBD 635);

- there is some doubt as to whether communications in inter-departmental memos sent or circulated within an organisation would be 'published'. Opinion on this was divided in *Riddick v Thames Board Mills Ltd* [1977] QB 881. In any case, in such situations, there could well be a defence of qualified privilege.

18.4.4 A defamatory statement

As a basic definition of a defamatory statement, that which was formulated by Lord Atkin in *Sim v Stretch* [1936] 2 All ER 1237 is a good starting point:

> A statement which tends to lower the claimant in the estimation of right thinking members of society generally, and in particular to cause him to be regarded with feelings of hatred, contempt, ridicule, fear and disesteem.

It is possible to find many cases to illustrate what is defamatory, and simple vulgar abuse is not defamatory, other statements which are intended only as humour or satire could be actionable. Indeed, political opinion frequently finds expression in satire which has the effect of ridiculing prominent people. However, satirists can often escape liability for defamation by using the defence of 'fair comment on a matter of public interest'.

A useful test to establish defamatory meaning was stated in *Skuse v Granada Television Ltd* [1996] EMLR 278 and approved by the Privy Council in *Bonnick v Morris and Another* [2002] UKPC 31. The test is that the words should be given the natural and ordinary meaning that would be conveyed to the reasonable reader, who was presumed not to be naive, to be capable of reading between the lines, and not to be unduly suspicious so that he would choose a defamatory meaning over a non-defamatory meaning.

Statements which reflect on a person's moral character or professional competence clearly will be defamatory, as well as statements making adverse comments about a person's physical appearance. What is defamatory in one age will not necessarily be so in another. The following are examples of defamatory statements:

- ***Cosmos v BBC* (1976) unreported**
  The BBC broadcast a programme giving details about holidays, and the dangers of choosing holidays from glossy brochures. When showing a film of a Cosmos holiday camp in Majorca, they used the music which accompanied a popular series entitled 'Escape from Colditz' about a notorious prisoner-of-war camp. Cosmos succeeded in obtaining damages from the BBC.

- ***Cornwell v Daily Mail* (1989) unreported**
  Actress Charlotte Cornwell successfully sued for a statement made by a columnist that she had 'a big bum' and 'the kind of stage presence that blocks lavatories'.

- ***Koo Stark v Mail on Sunday* (1988) unreported**
  Actress Koo Stark successfully sued the *Mail on Sunday* for an article headed 'Koo dated Andy after she wed', alleging that she still had a 'lingering love' for Prince Andrew after she had married the Green Shield Stamp heir Timothy Jeffries.

- ***Gillick v Brook Advisory Centres* (2002) WL 825452**
  The claimant had attracted much media interest in the 1980s when she had challenged the Department of Health advice to doctors on providing contraceptives to people under 16. The defendants had later published a pamphlet containing

statements to the effect that her legal action had been responsible for a rise in the number of teenage pregnancies. It was held that this statement was not defamatory because it did not imply any blameworthiness on her part.

- ***Liberace v Daily Mirror* (1959) *The Times*, 18 June**
  Musician Liberace was described as 'the summit of sex, the pinnacle of the masculine, feminine and neuter ... This deadly, winking, sniggering, snuggling, chromium-plated, scent-impregnated, ice-flavoured heap of mother love'. Liberace was famous before and since for his flamboyant stage act, but he toned down his performances for a time, appearing in a sober suit, and successfully sued for defamation.
- ***Roach v Newsgroup Newspapers Ltd* (1992) *The Times*, 23 November**
  It was held to be defamatory to describe the well known actor who played the part of Ken Barlow in 'Coronation Street' as 'boring'.
- ***Lillie and Reed v Newcastle CC and Others* [2002] EWHC 1600**
  The publication of a report after the claimants had been acquitted of various child abuse offences, alleging that they had in fact committed the offences, amounted to libel.
- ***Mark v Associated Newspapers* [2002] EWCA Civ 772**
  The claimant, former nanny to the children of the Prime Minister, Tony Blair, had written a book about her experiences with the family despite having signed a confidentiality agreement. Mrs Blair obtained an injunction to prevent publication and the following day the *Mail on Sunday* published an article about these events. The article contained statements as follows: 'Rosalyn Mark vehemently denied authorising publication of material in the book' and 'She had misrepresented her position'. The Court of Appeal ruled that there was an innuendo that the claimant was lying.

18.4.5 Who decides?

Juries are now used less frequently in defamation cases (see 18.5.9). Under the previous practice the judge explained to the jury the legal meaning of defamation, but if he considered that no reasonable man would actually conclude that the words in question were defamatory, the case was withdrawn from the jury and failed at that point. If the judge thought that the words were capable of being defamatory in the eyes of a reasonable man, he would put the words to the jury and ask them to decide whether the words were defamatory (see *Capital and Counties Bank v Henty* (1882) 7 App Cas 741; *Lewis v Daily Telegraph* [1964] AC 234). By s 7 of the Defamation Act 1996, the court shall not be asked to rule whether a statement is 'arguably' capable of bearing a particular meaning. This rule was introduced to enable the court to fix in advance the ground rules on possible meanings. Either party may now apply for an order to determine before the trial whether the words in question are *actually* capable of bearing a particular meaning.

In *Mapp v Newsgroup Newspapers Ltd* (1997) *The Times*, 10 March, the Court of Appeal held that the judge should evaluate the words and delimit the range of possible meanings in the light of the authorities. Such an application should not be treated as an application to strike out part of the pleadings. If it appears that none of the words

complained of is capable of having a defamatory meaning the judge may dismiss the claim or make any other appropriate order.

The role of the jury is to establish the standard of 'right-thinking members of society'. The meaning of this phrase was tested in the case of *Byrne v Deane* [1937] 1 KB 818, in which the claimant had informed the police that there were illegal gambling machines on the club premises, and, sometime later, a notice appeared on the club notice board in these words: 'But he who gave the game away, may he byrne in hell and rue the day.'

The claimant claimed that he had been libelled, but the Court of Appeal held that he had not, because right-thinking people would approve of his informing the police of illegal goings-on. See also *Prinsloo v SA Associated Newspapers Ltd* (1959) unreported, in which it was held that an allegation that a student had been spying for the police could not be defamatory.

Sometimes, the words 'reasonable people', 'ordinary people' and 'sensible people' are used to describe the relevant standard in defamation cases.

In modern conditions the decision by the judge as to which matters should be put to the jury and which the judge should deal with is regarded as a case management decision (*Gregson v Channel Four Television* [2002] EWCA Civ 914). The Court of Appeal is reluctant to interfere. As will be seen, the judge must also direct the jury about the appropriate award of damages, but must also explain that the decision is theirs.

18.4.6 Innuendo

The jury must also consider certain statements which are not defamatory on the face of them but which contain an innuendo which has a defamatory meaning. The hidden meaning must be one that could be understood from the words themselves by people who knew the claimant (*Lewis v Daily Telegraph*) and this special esoteric hidden meaning must be pleaded by bringing additional information before the court to explain the meaning.

In *Allsop v Church of England Newspaper Ltd* [1972] 2 QB 161, it was held that, if the words of which the claimant complains (in this case, the claimant was said to be 'pre-occupied with the bent') are capable of any meaning or implication outside the dictionary meaning, details of all such meanings should be explained in the statement of case to give the defendant the opportunity to know what case has to be answered. In this case, the court had considerable difficulty with the word 'bent', referring to the *Oxford English Dictionary* for assistance.

The following are examples of innuendo:

- ***Tolley v JS Fry & Sons Ltd* [1931] AC 333**
  The claimant was an amateur golfer who was shown in a drawing on an advertising poster with a bar of Fry's chocolate and a speech bubble praising the chocolate. He successfully claimed that there was an innuendo that he had prostituted his amateur status by accepting money for the advertisement.

- ***Cassidy v Daily Mirror* [1929] 2 KB 331**
  The claimant was the wife of a man who had been pictured with a young woman at a race meeting and described as engaged to her. The newspaper reporter had been

given that information by Mr Cassidy and had no reason to doubt his word, but the claimant succeeded in proving an innuendo because the implication was that she would be regarded as a mistress not a wife.

- ***Plumb v Jeyes Sanitary Compounds* (1937) unreported**
  The claimant, a retired policeman, had been photographed on traffic duty some eight years previously. His photograph appeared in a newspaper with the words 'Phew, I'm dying to get my feet into a Jeyes Fluid foot bath'. His successful claim was based on the fact that the innuendo was that his feet were so disgusting that no ordinary soap and water could ever drown the smell!

18.4.7 Referring to the claimant

The claimant must be able to demonstrate that the defamatory words referred to him or her. This does not mean that his or her name has to appear, merely that anyone who knew the claimant would know that the words referred to him or her. Indeed, the satirical magazine *Private Eye* regularly refers to people by odd names, but they are still identifiable. For example, Sir James Goldsmith, a regular target of the magazine, was referred to as 'Goldenballs'. A similar approach was taken sometimes in the satirical radio programme 'Week Ending', and the television programme 'Spitting Image'.

If a class of people is defamed, there will only be a claim available to individual members of that class if they are identifiable as individuals. It would not be defamatory to describe all jurors as incompetent, but it would be defamatory to describe all 12 members of a particular jury as incompetent. In one case the *Spectator* paid damages to the group of journalists who covered trials in the Old Bailey for describing them as 'beer sodden hacks'.

In *Knupffer v London Express Newspaper Ltd* [1944] AC 116, the House of Lords held that where a class of people is defamed no individual can succeed in defamation proceedings unless he or she can prove that the statement was capable of referring to him or her and that it was in fact actually understood to refer to him or her.

A claim for libel in *O'Shea v MGN Ltd* [2001] EMLR 40 (QBD) failed. The judge held that to impose liability on the defendant newspaper which had published an advertisement for an adult internet website carrying a pornographic photograph resembling the claimant would be contrary to Art 10 of the European Convention on Human Rights. The claimant's reputation did not require protection as part of a pressing social need and imposing liability would impose an impossible burden on the newspaper.

There have occasionally been cases in which writers of fiction have innocently chosen a name for a character, which is also by chance the name of a living person. That person has then claimed that he or she could be taken to be the character in the book and if the character is depicted in an unfavourable light a successful libel claim has followed. A similar situation could exist if someone claims that a character in a book is intended to be based upon him or her. These situations are now covered by the difficult defence of 'unintentional defamation' and will be dealt with later.

18.4.8 Malice

In many areas of the law of tort, the presence or absence of malice is irrelevant, or if it is relevant, it may only go to enhancing the amount of damages payable. However, in defamation claims it may be especially important to consider whether the statement was published maliciously, not only to allow the claimant to recover a higher award of damages, but because it is a necessary element in the law itself.

It is important to appreciate the meaning of the term 'malice' as it is used in the law of defamation, as it is often alleged in the statement of case, virtually as a formality, that the publication was made 'maliciously'. This means that the publication was made spitefully or with ill will or recklessness as to whether it was true or false. The bad feeling must have led to the words being published and must, in particular, have been directed towards the claimant.

The presence of malice will destroy defences of justification in relation to 'spent' convictions, unintentional defamation, fair comment on a matter of public interest and qualified privilege.

18.5 'WITHOUT LAWFUL JUSTIFICATION' – DEFENCES

There are a number of important and extremely complex defences to defamation, and the complexity reflects the difficulty in satisfying the desire to balance the need for freedom of speech against the need to protect the reputation of the individual. The media are constantly reminded of this balancing exercise by the high awards of damages made against them in well publicised cases brought by leading politicians, actors and public figures. The threat of legal proceedings is often enough to deter publication of salacious material which would greatly increase the circulation of newspapers, but sometimes the decision is to publish, and in such cases the press often claim that it was their 'duty' to make the revelations, even at the risk of having to pay exemplary damages. Robert Maxwell was notorious in Fleet Street for the use of 'gagging' libel writs, and countless libel actions died with him.

The defences will be considered in detail, and careful note should be made of the particular circumstances in which each may apply. In some cases more than one defence may be applicable.

18.5.1 Innocent dissemination

The defence of innocent dissemination is designed to protect booksellers and distributors of materials which may contain libellous statements. This defence was explained in *Vizetelly v Mudie's Select Library Ltd* [1900] 2 QB 170, in which publishers had requested the defendants, a circulating library, to return certain books which were likely to contain libels. They did not do so and were liable for defamation. It was held that the defence could apply to libraries, booksellers and other 'mechanical' publishers of libels, provided that:

- the publication is innocent, in the sense that they did not know that it contained a libel; and

- there were no circumstances which ought to have made them aware that the publication could have contained a libel; and
- there was no negligence on their part in not knowing of the libel.

The position of those who sell or distribute certain satirical magazines is difficult. Indeed, *Private Eye*, which has been sued many times for libel, even has a 'libel fund' to which readers are invited to contribute. It could be argued that extreme caution should be taken by its sellers and distributors. In *Goldsmith v Sperrings Ltd* [1977] 1 WLR 478, Sir James Goldsmith, in an alleged mission to close down *Private Eye*, brought a series of libel actions, some criminal and some civil, including some against booksellers, in respect of statements which he considered to be libellous in *Private Eye*. Many settled on the understanding that they would cease to sell *Private Eye*. Section 1 of the Defamation Act 1996 modernises this defence to reflect technological advances.

By s 1 of the Defamation Act 1996, the defence of innocent dissemination was made available to internet service providers (ISPs). However, certain problems are becoming apparent in relation to internet libel, and an application is being made to the European Court of Human Rights concerning the liability of ISPs for libels published inadvertently by them.

In *Godfrey v Demon Internet Ltd*, the judge ruled that an ISP was not the publisher of defamatory statements made to a newsgroup, and could rely on the defence in s 1(1)(a). Once the defendants had been notified of the defamatory statements and refused to remove them they did become liable. The judge took the view that ISPs are in a similar position to booksellers or distributors.

In *Loutchansky v Times Newspapers* [2001] EWCA Civ 536, the defendants had put an article that had originally been published in their newspaper onto their website. The claimant brought libel proceedings in respect of the newspaper article and, more than a year after that publication, brought another claim relating to the website publication. The Court of Appeal held that the one year limitation period in the Limitation Act 1980 did not apply here. In relation to the rule that each publication is a fresh libel, the court ruled that this was not contrary to Art 10 of the European Convention as there was no disproportionate fetter on freedom of expression. If material was held in archives it should carry a warning if it was potentially defamatory.

18.5.2 *Volenti* (consent)

It has already been explained that consent of the claimant to the publication of a statement, by showing other people defamatory material which the defendant meant for his or her eyes alone, will create a situation in which technically there has been no publication by the defendant (see *Hinderer v Cole*).

If the claimant in some way invited the recording, and later publishing of the material this will also amount to *volenti*.

In *Moore v News of the World* [1972] 1 QB 441, singer Dorothy Squires, in an attempt to launch a musical come-back, gave a detailed account to the *News of the World* reporter of her life with her former husband Roger Moore. The piece was written in the first person as though she actually made the statements, but she said that it was complete fiction and sued for libel because she claimed that the article portrayed her as the sort of person who

was prepared to discuss her private life in intimate detail for the entire world to read. She succeeded in her claim, but had she been willing to give an account of herself in that way, the newspaper would have had a defence of *volenti*.

18.5.3 Accord and satisfaction

Accord and satisfaction is a contract to settle the case, whereby the claimant agrees to give up the claim in return for a cash settlement and/or an apology. There are a number of factors which lead to the settlement of libel claims, not the least being the anxiety of escalating costs, and the fear that if the case is unsuccessful the claimant may have to pay the costs of the defence in addition to his own costs.

18.5.4 Apology and payment into court

The defence of apology and payment into court under s 2 of the Libel Act 1843 is only available to newspapers and periodicals, but it is seldom used because of its practical disadvantages. The following steps must be followed:

- the defendant must prove that the statement was made with no malice and no gross negligence;
- the defendant must prove that at the earliest opportunity he published a full apology or, if the periodical appears at intervals of more than one week, has offered to publish an apology in another newspaper of the claimant's choice;
- a sum of money has been paid into court by way of amends.

18.5.5 Apology and mitigation

Although an apology will not be a defence to a defamation claim, it may operate as a mitigating factor in the assessment of damages if the case is continued and the claimant succeeds. The defendant must have made the apology as soon as possible.

18.5.6 Offer of amends procedure under s 3 of the Defamation Act 1996, embodied in CPR Pt 53

This procedure contemplates the making of an award and agreement between the parties without necessarily the commencement of proceedings (see 18.5.9, below) In *Cleese v Associated Newspapers Ltd* [2003] EWHC 137 guidelines were issued for assessing compensation. John Cleese, the comedian, complained about an article published in the *Evening Standard* attacking his reputation. The newspaper acknowledged the unfairness of the article and published a correction and an apology, but John Cleese considered that the apology was insufficiently prominent and there followed a disagreement about the level of damages. Eventually, a figure of £13,800 was arrived at by the judge, who took into account equivalent awards in personal injury claims.

18.5.7 Unqualified offer of amends under s 2 of the Defamation Act 1996

This replaces s 4 of the Defamation Act 1952, and allows an exit route to a journalist who mistakenly publishes untrue statements and is prepared to admit this and make amends. The defence applies even if the journalist was negligent (*Milne v Express Newspapers* [2001] EWHC 2564). If the offer is not accepted the party is entitled to rely on the defence unless he knew the statement was false and defamatory.

18.5.8 Justification or truth

It would seem logical that only false statements can be the subject of defamation proceedings, so if the statement made about the claimant is true, there can be no action for defamation. Although this is the principle which underpins the defence of justification, the defence is by no means as simple as might be expected, for three main reasons.

Sometimes, people bring defamation actions simply to clear themselves of damaging allegations. As the case of *Hamilton v Al Fayed (No 4)* [2001] CMLR 15 demonstrates, this can be a risky enterprise and can result in financial ruin if the defence can convince the jury of the truth of the statements.

In *Irving v Penguin Books* (2000) WL 362478, the judge delivered a devastating condemnation of the claimant when he failed to establish that the defendants had published false information about the existence of the Holocaust. The claimant's reputation here was damaged further by his efforts to vindicate himself and he faces a bill of £2.5 million in legal costs.

The burden of proof is on the defendant to prove that the statement made is true, rather than on the claimant to prove that it was false. As Dias and Markesinis point out in *Tort Law*, 2nd edn, 1989, Oxford: OUP):

> A ludicrous side effect of this is that a claimant may leave court with substantial compensation, but with his name not necessarily cleared. For this award does not necessarily imply that what the defendant said of him was false, but only that he failed to prove that it was true.

The rule also makes matters exceptionally difficult for the defendant, who will need to satisfy the jury that on a balance of probabilities, his or her version of events is true. Unless affidavits were taken from witnesses as the story was investigated, a procedure which is frequently carried out by the press in cases of doubt, witnesses may have disappeared and be difficult to trace or their evidence may be discredited for a variety of reasons.

Thus, in the case of *Jeffrey Archer v The Star* (1987) unreported, in which the claimant was alleged to have visited a prostitute, much of the defence case turned on evidence given by the woman concerned, who was never treated as a credible witness, while the claimant relied on evidence from his wife, a woman of high professional and social standing, described by the judge to the jury as 'elegant' and 'fragrant'. The result was that the defence, given the general background and reputation of their main witness, never really stood a chance and, for the claimant, the memory of the allegations lingers on. In 2002, Jeffrey Archer was convicted of perjury in connection with the earlier libel case (*R v Archer* [2002] EWCA Crim 1996).

Section 5 of the Defamation Act 1952 deals with the defence of justification in the following terms:

> In an action for libel or slander in respect of words containing two or more distinct charges against the claimant, a defence of justification shall not fail by reason only that the truth of every charge is not proved if the words not proved to be true do not materially injure the claimant's reputation, having regard to the truth of the remaining charges.

For example, if the defendant called the claimant 'a liar, a thief and tone deaf', and the defence could prove the first two statements but not the third, the defence of justification would succeed, unless the claimant was a professional singer.

The defence would appear at first sight to be of great assistance to defendants. However, the almost incredible decision of the House of Lords in *Plato Films v Speidel* [1961] 2 WLR 470 appeared to encourage the practice of 'selective defamation' by permitting the claimant to choose which allegations upon which to sue, so leaving the defendant without recourse to s 5. In that case, the defendant made a film about the claimant's activities during the Second World War, when he had been supreme commander of the Axis Land Forces in Europe. Much of the film concerned the war crimes and atrocities allegedly committed by the claimant, but he chose only to base his action on allegations that he had been involved in the murder of the King of Yugoslavia and that he had betrayed Rommel. The House of Lords held that evidence of the wider context of the film, including specific facts about the war crimes and atrocities, of which apparently the defendants had proof, could not be introduced either as part of their defence or in mitigation of damages. They were, however, entitled to show that the claimant had a bad reputation in general, in order to mitigate the damages payable. The reasoning seems to be that to permit the introduction of specific details of numerous events in the claimant's life would turn the trial into a series of detailed allegations and counter-allegations which would place an unfair burden on the claimant and lead to protracted litigation. Nevertheless, the approach was now unfair to defendants and attracted much criticism from the Press Council. The Faulks Committee recommended that the law should be changed to allow the defendant to rely on all the allegations in the publication as part of the defence. They also recommended that any matter, general or particular, which is available at the date of trial about the claimant's character, and which relates to the defamation, should be admissible as part of a plea in mitigation, provided adequate notice of the allegations is given to the claimant. Currently, the case of *Scott v Sampson* (1882) 8 QBD 491 prevents specific acts of the claimant being referred to in mitigation.

The s 5 defence should be read in the light of the related issues which were raised in the case of *Charleston v News Group Newspapers Ltd* [1995] 2 All ER 313 which did not concern the defence under s 5 of the Defamation Act 1952, but which gave rise to consideration of whether the claimant is entitled to sue on specific defamatory matters in a publication when the rest of the publication clearly negates the apparent libel. In that case, the claimants were actors who appeared in the Australian soap opera 'Neighbours' which is popular in the UK. They played the characters of Madge and Harold. A Sunday newspaper published photographs of two people apparently engaged in an act of sexual intercourse, the woman dressed in tight leather gear with her breasts bare. The headline read 'Strewth! What's Harold up to with our Madge?'. Smaller print below read 'Porn shocker for Neighbours Stars'. The rest of the article made it very clear throughout that the photographs were produced by the makers of a pornographic computer game, and

that the faces had been superimposed on the bodies without the knowledge or permission of the stars. The House of Lords held that the headlines and photographs could not be read in isolation from the rest of the text which was not defamatory when read as a whole, because it was not permitted for the claimants to sever part of a publication from the other parts of the article in order to negate the defamatory sections; nor could the claimant rely on the fact that the defamatory meaning was conveyed to the very limited category of readers who only read the headlines. However, making it clear that their Lordships were not pronouncing on questions of journalistic ethics, Lord Bridge commented:

> Whether the text of a newspaper article will, in any particular case, be sufficient to neutralise the defamatory implication of a prominent headline will sometimes be a nicely balanced question for the jury to decide, and will depend not only on the nature of the libel but also on the manner in which the whole of the relevant material is set out and presented.

It appears that two different situations may arise, in one of which the claimant can choose certain false allegations on which to base the claim knowing that the defence of justification will not succeed (*Plato Films*), and another in which the libellous material is clearly cancelled out by the rest of the publication (*Charleston*). In the first of these situations, the claimant may well succeed because the defence of justification cannot be relied upon because of the way in which the courts have interpreted s 5 of the Defamation Act 1952. In the second situation, because the defence under s 5 is not relevant, the claimant is without a remedy.

The defence of justification is complicated by the Rehabilitation of Offenders Act 1974 which provides that certain criminal convictions, depending upon their seriousness, are to become 'spent' after certain periods of time have elapsed, and treated as if they had never happened. Very serious sentences such as life imprisonment for murder will never become 'spent', while an absolute discharge is 'spent' after six months.

Section 8 provides that in defamation claims which are based on allegations that the claimant has committed offences which would otherwise be 'spent', justification can be used as a defence except where the publication was made with malice. The meaning of 'malice' in this context has not yet been settled by judicial interpretation.

If the defendant is merely repeating a defamatory statement which he or she has heard from another source, it is not enough merely to prove that it came from that source. The truth of the statement must also be proved. This can often be extremely difficult if the original maker of the statement did not swear an affidavit and can now no longer be found, particularly if the person who is being sued is a better bet as far as the claimant is concerned because he has more money than the person who first uttered the defamatory statement.

Moreover, if the original statement contained an innuendo, the truth of that must also be proved.

18.5.9 Unintentional defamation

Section 4 of the Defamation Act 1952 provided the defence of 'unintentional defamation' to cover situations in which the defendant was unaware that certain statements could be defamatory, and for which at common law he or she was liable for defamation.

For example, in *C Hulton & Co v Jones* [1910] AC 20, the claimant, who was called Artemus Jones, was a barrister. He succeeded in a defamation claim against the defendants who had published a story about a fictitious character called Artemus Jones, a church warden in Peckham, who was portrayed as having a mistress in Dieppe. It contained this statement:

> Whist! There is Artemus Jones with a woman who is not his wife, who must be, you know, the other thing . . . Really, is it not surprising the way our fellow-countrymen behave when they come abroad? Who would suppose by his goings on, that he was a church warden in Peckham?

The claimant called several witnesses who swore that they thought the article referred to Artemus Jones, the barrister, even though he had never lived in Peckham and had never been a church warden.

Although s 4 was intended to remedy such situations as these, in fact, it complicated matters further and was much criticised.

One of the aims of the Defamation Act 1996 was to modernise the defence of unintentional defamation and produce a more straightforward and usable defence (ss 2–4). There is now a presumption of innocent publication which can be rebutted under this Act (see 18.5.6 and 18.5.7, above).

In order to encourage libel cases to settle before trial, under new rules that came into effect in February 2000 under the Defamation Act 1996, newspapers are able to avoid expensive litigation by making an offer of amends that includes an agreement to make a correction and apology and to pay appropriate damages and costs. The court can fix the sums to be paid in the event of the parties not reaching an agreement. If the offer is rejected, that factor may be used as a defence to any subsequent trial and as a means of persuading the court to make a lower award.

Judges are able to dispose of cases quickly without a jury if there is no prospect of the parties arriving at an agreement or if there is no realistic defence. They can award damages of up to £10,000 and order the defendant to publish a summary of the judgment. Judges have the power to force claimants to accept this new procedure in certain cases, but not in complex libel proceedings. Although the new procedure was intended to make defamation claims accessible to ordinary people, there are few defamation cases which are simple enough to qualify for the fast track.

18.5.10 The Electronic Commerce (EC Directive) Regulations 2002

The Electronic Commerce (EC Directive) Regulations 2002 came into effect in August 2002, and they define the circumstances when internet intermediaries may be liable for material which they hosted, cached or carried but did not create. These Regulations, which are highly technical, provide a defence to a defamation claim in the circumstances set out in regs 17, 18 and 19. These provide as follows:

> **Mere Conduit**
>
> 17(1) Where an information society service is provided which consists of the transmission in a communication network of information provided by a recipient of the service or the provision of access to a communication network, the service provider (if he otherwise would) shall not be liable for damages or for any other pecuniary remedy

or for any criminal sanction as a result of that transmission where the service provider –

(a) did not initiate the transaction;

(b) did not select the receiver of the transmission;

(c) did not select or modify the information contained in the transmission.

(2) The acts of transmission and of provision of access referred to in paragraph (1) include the automatic, intermediate and transient storage of the information transmitted where:

(a) this takes place for the sole purpose of carrying out the transmission in the communication network, and

(b) the information is not stored for any period longer than is reasonably necessary for the transmission.

Caching

18 Where an information society service is provided which consists of the transmission in a communication network of information provided by a recipient of the service, the service provider (if he otherwise would) shall not be liable for damages or for any other pecuniary remedy or for any criminal sanction as a result of that transmission where –

(a) the information is the subject of automatic, intermediate and temporary storage where that storage is for the sole purpose of making more efficient onward transmission of the information to other recipients of the service upon their request, and

(b) the service provider

(i) does not modify the information;

(ii) complies with conditions on access to the information;

(iii) complies with any rules regarding the updating of the information, specified in a manner widely recognised and used by the industry;

(iv) does not interfere with the lawful use of technology, widely recognised and used by industry to obtain data on the use of the information; and

(v) acts expeditiously to remove or to disable access to the information he has stored upon obtaining actual knowledge of the fact that the information at the initial source of the transmission has been removed from the network, or access to it has been disabled, or that a court or an administrative authority has ordered such removal or disablement.

Hosting

19 Where an information society service is provided which consists of the storage of information provided by the recipient of the service, the service provider (if he otherwise would) shall not be liable for damages or for any other pecuniary remedy or for any criminal sanction as a result of that transmission where –

(a) the service provider

(i) does not have actual knowledge of the unlawful activity or information and, where a claim for damages is made, is not aware of facts or circumstances from which it would have been apparent to the service provider that the activity or information was unlawful;

(ii) upon obtaining such knowledge or awareness, acts expeditiously to remove or disable access to the information, and

(b) the recipient of the service was not acting under the authority or the control of the service provider.

The Regulations only afford a defence to providers of an 'information society service' and cover the commercial internet service providers who charge a fee for their services, and probably those which are free to users, but a charge is made to advertisers for advertising on the service,

Regulation 17 offers a defence to those who simply provide a system allowing others to communicate with each other by or electronic bulletin boards, but the defence is only available as long as the information is not stored for longer than is reasonably necessary

Regulation 18 is aimed at protecting internet intermediaries in respect of material for which they are not the primary host. They store information on a temporary basis to enable the efficient availability of internet material. Internet service providers may 'cache' or store on their systems for a short time pages commonly accessed by users. There is no liability for caching as long as the sole purpose was to render more efficient onward transmission of information. The service provider must act expeditiously to remove access to the information if the initial source has been removed or access is prevented, or a court has ordered its removal.

Regulation 19, as long as certain conditions are met, gives a defence to providers of information society services that host, or store more permanently information given by the recipient of the service. The defence is only available if the service provider does not know or is not aware of facts from which he ought to have known that the information he was hosting contained defamatory imputations; and if he obtained actual or imputed knowledge, he must have acted expeditiously to remove or disable access to the information and must not have been acting under the authority or control of the service provider.

It may be seen from the brief outline above that there is some overlap between the Regulations and s 1 of the Defamation Act 1996, so the position is complex and detailed analysis is beyond the scope of this book.

18.5.11 Absolute privilege

There are certain occasions on which the law regards freedom of speech as essential, and provides a defence of absolute privilege which can never be defeated, no matter how untrue or malicious the statements may be. All communications in the situations listed below are protected from defamation proceedings, and are described as 'absolutely privileged'.

Absolute privilege applies to:

- Statements made in either House of Parliament. MPs frequently say very rude things about one another and about people in the public eye. They are permitted to say whatever they like in Parliament, but are frequently challenged to repeat the statements outside the House, as a means of testing whether they would be prepared to make such remarks unprotected by the defence of absolute privilege.

However, although it was stated in the Bill of Rights 1688 that the freedom of speech and debates or proceedings in Parliament ought not to be impeached in any court, this privilege may be waived under s 13 of the Defamation Act 1996. This matter and other issues of constitutional importance concerning the relationship between the courts and Parliament were discussed at length by the House of Lords in *Hamilton v Al Fayed* [2001] AC 395. The House of Lords held that the waiving of the parliamentary privilege has the effect of allowing challenges, in the course of defamation proceedings, to evidence given before parliamentary committees, without it being treated as an infringement of the autonomy of Parliament.

- Parliamentary papers of an official nature, that is papers, reports and proceedings which Parliament orders to be published (s 1 of the Parliamentary Papers Act 1840). Extracts from parliamentary papers are covered by qualified privilege by s 3 of the same Act.
- Statements made in the course of judicial proceedings or quasi-judicial proceedings. This covers statements made by judges, witnesses, jurors and advocates in any superior or inferior court, providing the statements relate to the proceedings.
- Fair, accurate and contemporaneous reports of public judicial proceedings before any court in the UK (s 3 of the Law of Libel Amendment Act 1888). The same privilege was extended to radio and television broadcasts of judicial proceedings in similar circumstances by s 9(2) of the Defamation Act 1952. However, the Law of Libel Amendment Act 1888 does not state whether the privilege is absolute or qualified and Parliament did not clarify the matter when it had the opportunity to do so in enacting the extension to broadcasts of judicial proceedings in 1952. The assumption in the leading textbooks is that the privilege is absolute, and the only two reported cases on the matter take it as read that the privilege is absolute. Now that courts are permitted to refer to *Hansard* (*Pepper v Hart* [1992] BTC 591), it will be possible, should the matter be raised judicially in the future, for the matter to be clarified by reference to *Hansard*, in which the intention that the defence of absolute privilege should apply was expressed. The Faulks Committee recommended that this point should be clarified by statute.

  Note, also, that there are certain restrictions placed upon the reporting of some court proceedings by other statutes, for example, the Contempt of Court Act 1981.

  This defence is of particular importance to the press, and particular attention should be paid to the terms 'fair' and 'accurate' in relation to court reporting. Reports must state both sides of cases, and it is not acceptable, for example, only to report an outline of the prosecution case and not to include a summary of the defence in a report of a criminal trial. This should be done even if several days pass, other more important news supervenes and space is short. Accuracy is also of the utmost importance as even a slight inaccuracy will destroy the absolute nature of the privilege. Names and addresses of parties and witnesses must be correct, and the facts must be correctly reported.
- Communications between lawyers and their clients. Such communications are regarded as of vital importance to those people who need to give confidential information in the process of seeking legal advice. They, therefore, attract the defence of absolute privilege though it is not clear whether the privilege extends to

communications unconnected with judicial proceedings (*Minter v Priest* [1930] AC 558).

- Statements made by officers of state to one another in the course of their official duty (*Chatterton v Secretary of State for India* [1895] 2 QB 189).

18.5.12 Qualified privilege

Qualified privilege operates only to protect statements which are made *without malice*. The defence applies both at common law and by statute, and is frequently relied upon by the media.

In each case, the judge must decide whether the situation is one in which privilege may apply and whether the information was related to the privileged occasion. If so, the jury must then decide whether the defendant acted in good faith or whether there was malice which defeats the privilege.

Qualified privilege has the potential for being very broad in its scope, and in some ways it provides a more useful defence than absolute privilege, which is limited to very specific circumstances. In *Watts v Times Newspapers* (1997) unreported, Hirst LJ remarked that 'the categories of qualified privilege are never closed'.

'Malice' in the context of qualified privilege could amount to attempting to use the privileged occasion as an excuse to make defamatory statements (see Faulks Committee, *Report of the Faulks Committee*, Cmnd 5909, 1975, London: HMSO), or it could mean recklessness as to whether the statements made were true or not. If, as in *Horrocks v Lowe* [1975] AC 135, the defendant honestly believed that the statements were true when he made them, there will be no malice. In that case, the defendant, enraged by the actions of a councillor from the opposition party over the compulsory purchase of a piece of land, made the following statement:

> I don't know how to describe his attitude, whether it was brinkmanship, megalomania or childish petulance . . . I suggest that he has misled the committee, the leader of his party and his political and club colleagues, some of whom are his business associates.

It was held that, even though the defendant was guilty of gross and unreasoning prejudice, he believed that everything he said was true and justifiable, and therefore the defence of qualified privilege could apply.

The onus is on the claimant to establish an improper motive, and if he cannot do so the judge must withdraw the matter from the jury (*Alexander v Arts Council for Wales* [2001] 1 WLR 1840).

18.5.12.1 Statements made in pursuance of a legal, moral or social duty

Qualified privilege will attach to statements made in pursuance of a duty only if the party making the statement had an interest in communicating it and the recipient had an interest in receiving it. For example, in *Watt v Longsden* [1930] 1 KB 595, the claimant was the overseas manager of a company of which the defendant was a director. When the defendant received a letter about the claimant which claimed, among other things, that he 'lived exclusively to satisfy his own lusts and passions', he showed the letter to the chairman of the company and also to the claimant's wife, who started divorce

proceedings. It was held that the communication to the company chairman was privileged, as there was a duty to inform him, and he had an interest in receiving the information, but that the communication to the claimant's wife was not privileged as no one should interfere between man and wife, and there was no legal, moral or social duty to make the contents of the letter known to her.

In *Stuart v Bell* [1891] 2 QB 341, the test for the existence of a duty was suggested to be this: 'Would the great mass of right-thinking men in the position of the defendant have considered it their duty under the circumstances to make the communication?'

In *Spring v Guardian Assurance*, it was held that the person who gives a reference owes a duty of care in *negligence* to the person about whom the reference is written. The difficulties arising from this case are discussed in Chapter 5. The remedy available in defamation may well be defeated through the defence of qualified privilege unless there is malice.

It may be that communications between lower ranking public officials do not, like those between their superiors, attract the defence of absolute privilege, but only carry a defence of qualified privilege (see *Merricks v Nott-Bower* [1965] 1 QB 57).

In *Reynolds v Times Newspapers Ltd and Others* [1999] 4 All ER 609, the Court of Appeal gave careful consideration to the application of qualified privilege in relation to newspaper publications and, after reviewing the Porter Committee Report of 1948 and the Faulks Committee Report of 1975, laid down a series of tests. In order to maintain a proper balance between freedom of speech and the right of individuals in public life to protect their reputations, the Court of Appeal had held that the defence of qualified privilege was available to newspapers, as long as the following tests were satisfied:

- the newspaper must have had a legal, moral or social duty to the general public to publish the material in question;
- the general public must have had a corresponding interest in receiving the information; and
- the nature, status and source of the material and the circumstances of its publication must have been such as to justify the protection of such privilege in the absence of malice.

When this case proceeded to the House of Lords [2001] 2 AC 127 (HL), the last of these three criteria was rejected. It was made clear that, if the statement or communication goes beyond the class of persons with a reciprocal interest or duty to receive it, the communication to the wider class of people is in excess of the privilege and the defence cannot be relied upon in respect of this further communication. The appellants had attempted to argue that there was scope for the common law, through incremental development, to create a new category of qualified privilege arising from political information – that is, 'information, arguments and opinions concerning government and political matters that affect the people of the UK'. They had argued that, with the exception of malicious publications, political information should be privileged regardless of its source or status and the circumstances of the publication. The House of Lords rejected that contention on the grounds that it would put the judge in the position of an editor, rendering the outcome of cases unpredictable and giving the court an undesirable role as a censoring body. In the view of the House of Lords, that would not provide sufficient

protection to the reputations of individuals but the defence of fair comment on a matter of public interest does allow the court to give appropriate weight to the importance to the media of freedom of expression.

Despite the reservations expressed above, Lord Nicholls, expressing the majority view, laid down 10 criteria for the operation of the defence of qualified privilege. These are thought to have widened the scope of qualified privilege, making it difficult to predict the outcome of cases involving media publications. He suggested that these 10 matters were illustrative only and were not to be regarded as exhaustive, and the decision as to whether common law qualified privilege applied was always a matter for the judge. They are:

(1) the seriousness of the allegation;
(2) the nature of the information;
(3) the source of the information;
(4) the steps taken to verify the information;
(5) the status of the information;
(6) the urgency of the matter;
(7) whether the claimant was invited to comment;
(8) whether the article contained the gist of the claimant's story;
(9) the tone of the article;
(10) the circumstances, including the timing of the publication.

The House of Lords made its ruling in the light of European human rights law and was satisfied that the decision was not inconsistent with the case of *Lingens v Austria* (1986) EHRR 103. The decision was hailed as a victory for press freedom, but, on close examination, much of the ruling is unclear and there is still confusion as to what constitutes malice. It does seem, however, that there is still no generic defence of qualified privilege covering political information.

Following the *Reynolds* decision, the Court of Appeal held that telephone conversations and letters between a chief constable and an assistant principal in an education welfare department, containing factually accurate statements, were protected by qualified privilege (*Halford v Chief Constable of Hampshire Constabulary* [2003] EWCA Civ 102).

In *Jameel v Wall Street Journal Europe (No 2)* [2005] EWCA Civ 74, the Court of Appeal held that the type of qualified privilege identified in the *Reynolds* case required the defendants not only to demonstrate responsible journalism but also that it was in the public interest to publish the material in the light of the subject matter of the publication.

In *W v Westminster City Council* [2005] 10 February (QB) the claimant brought a libel action against the local authority and social works on the grounds that a report, prepared by the social workers and supervised by the local authority as part of a child protection conference, contained defamatory material. It was held that the defence of qualified privilege could not be relied upon by the local authority or the social workers, and that they were in breach of the claimant's Art 8 rights. However, all that was required was an apology and no damages were awarded.

18.5.12.2 Statements made in protection of an interest

If a statement was made to protect an interest, it will attract a defence of qualified privilege. The relevant interests may be public interests or the defendant's own interests in property or even in his reputation. The following are some examples of successful application of the defence:

- *Bryanston Finance v De Vries* [1975] QB 703: the defendant was permitted by the operation of the defence to make statements in the protection of business interests, by dictating a memo to a secretary.
- *Osborn v Thomas Butler* [1930] 2 KB 226: the defendant relied on the defence after making potentially defamatory statements in protection of his own character.
- *Knight v Gibbs* (1834) 1 A & E 43: the defendant was a landlord who was able to rely on the defence after making statements about the character of lodgers to a tenant. There was a common interest involved here.
- *Beech v Freeson* [1972] 1 QB 14: a complaint by the Law Society to an MP about the behaviour of a solicitor was protected by qualified privilege.

18.5.12.3 Fair and accurate reports of parliamentary proceedings

Such reports fell within the scope of the defence of qualified privilege even at common law, and also now under s 3 of the Parliamentary Papers Act 1840. Extracts from reports and papers published by order of Parliament carry a defence of qualified privilege. Broadcasts of extracts from parliamentary papers are protected by Sched 20, para 1 of the Broadcasting Act 1990.

18.5.12.4 Fair and accurate reports of public judicial proceedings in the UK

The defence of qualified privilege will apply in circumstances when absolute privilege may not be available as, for example, when the report is not published contemporaneously with the proceedings, or the court is acting outside its jurisdiction or the report does not appear in a newspaper. This privilege has been extended by the Defamation Act 1996 to cover all court and other public proceedings and official publications worldwide.

18.5.12.5 Statements privileged by s 7 of the Defamation Act 1952

Section 7 of the Defamation Act 1952 applies to statements made in newspapers and radio and television broadcasts. The statements fall into two categories, those which are privileged without any explanation or contradiction, and those which are privileged subject to explanation or contradiction.

Some of the statements which fall into these two categories are listed below, but the lists are not exhaustive and the Defamation Acts of 1952 and 1996 should be consulted for further details:

- **Statements privileged without explanation: Pt I of the Schedule**
  These are listed in the Schedule to the Defamation Act 1952 and include (in summary) fair and accurate reports of the following: proceedings of the Parliaments of HM Dominions; proceedings of international organisations of which the UK is a member; proceedings of International Courts; proceedings of Courts Martial; copies of extracts from public registers (for example, of births).

- **Statements privileged subject to explanation: Pt II of the Schedule**
  The defence will not apply if the claimant has requested the defendant to publish a letter by way of explanation or contradiction of the statement and he or she has refused to do so. This is the only approximation to a 'right of reply' existing in English law. Statements in this category include the following: fair and accurate reports of the decisions of trade, professional and industrial associations, associations to promote art, science, religion, associations for promoting the interests of any game, sport or pastime to which the public are invited; public meetings. Also included are fair and accurate reports of: meetings of local authorities which the press are permitted to attend; proceedings before tribunals of inquiry and commissions, etc; meetings of public companies; official notices issued by public figures such as chief constables and government officials.

18.5.13 Fair comment on a matter of public interest

The defence of fair comment probably originated in the 18th century, and is frequently relied upon by the press, as it is designed to protect statements of opinion on matters of public concern. There are many examples of seemingly outrageous libels contained in satirical and other controversial publications and broadcasts, which pass unchallenged by defamation claims, presumably because of legal advice that the defence of fair comment would apply.

The defence has been criticised for the many technical difficulties which it presents, and for the fact that it suffers from a misleading misnomer, in that it applies even in the absence of 'fairness'.

The main elements of the defence will be considered in detail.

The defence is called 'fair' comment, but unfair and exaggerated expressions of opinion are also protected by it. The Faulks Committee suggested that a more accurate name for the defence would simply be 'comment'.

The cases suggest that the test is subjective to the defendant and is not based upon what a reasonable man would consider 'fair', but on whether the defendant honestly held the view which was expressed. In *Merrivale v Carson* (1887) 20 QBD 275, Lord Esher stated the test in these terms: 'Would any fair man, however prejudiced he may be, however exaggerated or obstinate his views, have said that?' This test, which appears to be almost a contradiction in terms, does attempt to import a certain element of objectivity but, in *Slim v Daily Telegraph* [1968] 1 All ER 497, the suggested test was whether the *defendant* was: 'An honest man expressing his genuine opinion.'

In *Telnikoff v Matusevitch* [1991] 3 WLR 952, it was the view of the Court of Appeal that the defendant does not need to prove that he or she held an honest belief as long as the opinion is considered fair by application of an objective test. It is for the claimant to prove malice if he or she claims that the defendant has not acted in good faith.

Like qualified privilege, the defence of fair comment will be defeated by malice, though in this context 'malice' is difficult to define and to prove, as some of the statements which have been protected by the defence appear on the face of them to be laced with malice. It is the element of malice which will make the comment unfair and therefore defeat the defence. If the defendant suggests that the claimant is guilty of a bad motive in the sense of corruption or dishonesty, the defence appears to be narrower and

imputations which are 'honest' comment will not be protected unless it is put to the jury to decide whether the defendant had an honest belief and that the belief was in fact a correct one (see *Dakhyl v Labouchère* [1908] 2 KB 325, in which a doctor was described as a 'quack').

An example of malice defeating the defence is found in *Thomas v Bradbury Agnew* [1906] 2 KB 627. A review of a book written by the claimant was more an attack on the writer personally than a genuine review of the material in the book. Moreover, during the trial, the defendant made it clear that he disliked the claimant personally, so the claimant succeeded in proving express malice. It is precisely this element of independently actuated spite which is necessary for the defence to be defeated.

In *GKR Karate UK Ltd v Yorkshire Post Newspapers* [2000] 2 All ER 931, the Court of Appeal ruled that it was reasonable, in order to save time, for a judge to order that qualified privilege and malice be tried as separate preliminary issues before the main hearing.

There is a problem for newspapers which publish letters criticising works of art and popular television or radio broadcasts, as it is not always possible to trace authors. It was held in *Lyon v Daily Telegraph* [1943] KB 746 that a newspaper will not necessarily be liable if it cannot prove that a statement which it published on its letters page was not the writer's honest opinion.

Only 'comments', that is, expressions of opinion, are protected, and any facts stated must be set out accurately, as the defence does not protect statements of opinion which are based on incorrect facts. For this reason, the defence of justification is usually pleaded in conjunction with fair comment. Clearly, opinion must be based on something, and that 'something' must be factually correct. Writers do not need to set out all the facts on which they rely in arriving at their opinions. In writing a review of a play or book, the reviewer need only make passing reference to the particular aspects upon which the opinion is based. One of the leading cases is *Kemsley v Foot* [1952] AC 345, which concerned an attack by Michael Foot on an article in the *Evening Standard* which he described as 'one of the foulest pieces of journalism perpetrated in this country in many a long year'. This comment was protected by the defence. However, the article appeared under the headline 'Lower than Kemsley'. Kemsley was a newspaper proprietor who had no connection with the *Evening Standard*, and the comment would, the House of Lords held, be taken to refer to the quality of the Kemsley press, rather than to the character of its proprietor. As there was sufficient reference, though only a passing reference, to the Kemsley press, a fact upon which the comment was based, the defence could apply in this context too.

If a libellous comment is made with no reference to fact, the defence can fail. For example, to say 'X is a megalomaniac', without stating why and giving no indication as to how that opinion has been arrived at, would probably not derive any protection from the defence of fair comment.

By s 6 of the Defamation Act 1952, the defence of fair comment, like that of justification, will not fail merely because 'the truth of every allegation of fact is not proved if the expression of opinion is fair comment having regard to such of the facts alleged or referred to in the words complained of as are proved'. The difficulties of this in relation to justification, which have already been explained, will also apply to fair comment.

The defence only applies to comments made on matters of public interest. Such matters include comments on works of literature, music, art, plays, radio and television programmes. Public figures such as politicians, actors, clergymen and members of the royal family and indeed anyone who comes into the public eye are considered to be interesting to the public and will attract comment which is covered by the defence. Since it is often the press who place unsuspecting people in the public eye by focusing attention on them, it hardly seems fair that the press can then claim to be making fair comment on such people.

18.5.14 Limitation period

In the case of claims arising after 3 September 1996 there is a 12 month limitation period (s 4A of the Limitation Act 1980). In the case of libel the cause of action accrues when the statement is published. In the case of slander the cause of action accrues when the special damage is sustained. However, every publication gives rise to a new and separate cause of action. There is a discretion on the part of the court not to apply the strict limitation period if to do so would prejudice the claimant or defendant.

18.6 REMEDIES FOR DEFAMATION

The remedies for defamation are damages which may include exemplary damages and injunctions.

It is becoming increasingly common for statements to be made in open court in which the defendant acknowledges errors, agrees not to repeat the defamation and to pay damages and costs. Many claimants are satisfied by this form of public vindication. For example, the parents of Madeleine McCann, the girl who disappeared from a hotel room in Portugal, were awarded £550,000 in libel damages in March 2008 from two newspapers which had alleged that they had killed their daughter. They also had an apology at the High Court from the publishers of the *Daily Express* and the *Daily Star* over more than 100 defamatory stories along the same lines.

18.6.1 Injunctions

The person who fears an imminent threat to their reputation may obtain an injunction to prevent the publication of the defamatory material. Initially, an interim injunction will be obtained, and this often happens immediately prior to the publication or broadcast of potentially defamatory statements, but later a permanent injunction may be granted. The media often regard injunctions as procedures for gagging free speech. However, all the drawbacks associated with the discretionary nature of the remedy will apply.

18.6.2 Damages

Damages in libel claims are difficult to predict despite developments that allow judges to give guidance to the jury on acceptable levels of awards. The Court of Appeal now has the power to amend awards that are excessive (s 8 of the Courts and Legal Services Act 1990). Juries have a tendency to regard defamation claims as David and Goliath

situations, in which the little person is pitted against the might of the media. Yet, often, in the past, before the introduction of no-win no-fee funding for claims, the ordinary person of moderate means was denied the possibility of bringing a libel action by lack of funding.

It is still the case that no public funding is available in defamation cases, and it would be difficult for individuals with no financial backing to defend defamation claims brought against them by multinational companies (see, for example, *McDonalds v Steel and Morris* (1997) unreported). However, the development of conditional fee (no-win, no-fee) arrangements is making defamation claims available to a larger number of private individuals. Conditional Fee Arrangements (CFAs) were introduced for defamation claims following the Woolf reforms, and the Human Rights Act (Art 6 of the ECHR gives the right to a fair trial), making libel no longer a claim only available to the wealthy. For example, Lynn Walker, a person in receipt of income support, was able to obtain a figure of £100,000 from the Newcastle *Evening Chronicle* after being wrongly accused of murder. Of course, as success fees payable to the lawyers in a CFA case are related to the degree of risk in a claim, the greater the risk, the higher the level of fee payable, which makes defamation cases attractive to lawyers. Costs can be a real problem for defendants, as it is possible for the costs to amount to as much as £90,000 when the damages are only £5,000. Lord Hoffmann, in *Campbell v Mirror Group Newspapers* [2004] UKHL 22, described this as the 'blackmailing effect' of CFAs in libel cases,

Among the considerations that are important when damages are assessed are:

- The seriousness of the allegation.
- The breadth of the circulation.
- Whether any financial losses were suffered by the claimant.
- Whether the claimant suffered real and tangible injury to his or her reputation.
- The conduct of the defendant (which might in serious cases lead to an award of aggravated damages).
- Whether there was an element of truth in what was said.
- Information provided to the jury by the judge about of the level of awards made in respect of pain and suffering in personal injury cases.

In some cases only nominal damages will be awarded if the jury consider that the case is proved, but that the claimant has suffered very little damage. However, the award is usually intended to be compensatory.

If the jury is of the opinion that the conduct of the claimant was reprehensible, even though technically a case of defamation is proved, contemptuous damages may be awarded. In *Dering v Uris* [1964] 2 QB 669, the jury awarded a halfpenny damages to the claimant, who was clearly guilty of serious war crimes, but had succeeded in proving that certain statements made about him were false and defamatory. There was a very small award in *Plato Films v Speidel* for the same reason.

In *Grobbelaar v News Group Newspapers* [2002] UKHL 40, the House of Lords held that an award of substantial damages could not be made when the claimant had been in flagrant breach of his legal and moral obligations. Bruce Grobbelaar, the well known footballer, was awarded £1 damages, even though he had succeeded in his claim relating to allegations of match-fixing made in the *Sun* newspaper.

The implementation of the Human Rights Act 1998 has had an impact on the attitudes of courts towards damages. In *Dow Jones & Co v Jameel* [2005] EWCA Civ 75, the Court of Appeal held that a libel claim in respect of material published on the internet was an abuse of process when all the publications that took place in England failed to add up to a real and substantial tort having been committed. The cost of bringing a claim would be out of all proportion to the damage and the vindication to the claimant. The Court of Appeal explained that since the HRA 1998 courts were more willing to hold that a libel claim was an abuse of process, especially in the light of the Civil Procedure Rules. See also *W v Westminster City Council* 10 February 2005 (unreported) in which no award of damages was made, though an apology was issued to vindicate the claimant.

In personal injuries cases, it is a judge who decides on the size of the award, and this decision will be based upon rigorous academic and practical education and training followed by many years of experience as a practising lawyer. Judges are familiar with the usual awards that are made for particular injuries and have access to the standard texts and precedents to help them to arrive at the final figure.

In defamation cases, however, it must be the jury who decide on the sum to be awarded by way of compensation, and the judge can do little more than attempt to give some guidance as to the rough outline of the award. In some cases, judges and counsel speak in terms of 'coins rather than notes', or 'the cost of a good foreign holiday', or 'the price of a modest three bed-roomed house in the home-counties', exhorting juries to avoid 'a Mickey mouse award' and so on.

A complicating factor in defamation cases is the fact that exemplary damages may be awarded, particularly if it emerges that the defendant published the statement in a calculated attempt to increase sales or circulation. The award of damages will then be inflated in an attempt to express disapproval of the unscrupulous conduct of the defendant. In *Cassell & Co v Broome* [1972] 1 All ER 801, the House of Lords upheld what was then an extremely high award of damages against the defendants because they had been reckless about the statements made and hoped that their sensational nature would increase sales.

Claimants have to contend with certain procedural difficulties when deciding whether to accept an offer to settle. In *Roach v Newsgroup Newspapers Ltd*, the claimant, who played the part of Ken Barlow in 'Coronation Street' sued the defendant publishers for an article which described him as 'boring'. He obtained an injunction to prevent repetition of the statement, and eventually, an award of £55,000 damages, the same sum as had been paid into court by way of an offer to settle before the start of the trial. The Court of Appeal held that the claimant had to pay his own costs and those of the defendant from the date of paying in. The total sum involved would almost certainly have exceeded the award of damages.

A major criticism of the awards for defamation in the past was that they appeared to be disproportionately high in comparison with awards for personal injuries. Does an injured reputation deserve a higher award than brain damage and its attendant pain, suffering and humiliation? Many people believe that it does not.

Excessively high awards by juries in defamation cases are no longer commonplace and the judges are now permitted to draw the attention of juries to awards made to other claimants, such as those who are seriously injured in accidents.

18.7 HUMAN RIGHTS CONSIDERATIONS

The coming into force of the Human Rights Act 1998 has resulted in a new approach to defamation cases.

18.7.1 Art 10 of the European Convention on Human Rights

A new approach was sanctioned by the Court of Appeal in *Rantzen v Mirror Group Newspapers* [1993] 4 All ER 975, by reference to a new Act, the Courts and Legal Services Act 1990, to reduce an award of damages made to Esther Rantzen. Section 8 of the Courts and Legal Services Act 1990 permits the Court of Appeal to substitute a fresh award of damages if it considers the original jury award to be 'excessive or inadequate'. The court accepted the argument that the term 'excessive' must be interpreted in the light of Art 10 of the European Convention on Human Rights, which must be regarded as 'underlying' common law principles where freedom of expression is concerned (*per* Lord Goff in the *Spycatcher* case: *Attorney General v Observer Newspaper & Others* [1987] 1 WLR 1248). Article 10 provides that freedom of expression can only be limited by such restrictions or penalties as are 'necessary' in a democratic society. The test for the Court of Appeal should be 'Could a reasonable jury have thought that this award was necessary to compensate the claimant and re-establish his reputation?' (*per* Neill LJ). However, the Court of Appeal did not consider it appropriate to use previously decided cases on personal injuries as a guide to awards for libel damages; nor should previous awards in defamation cases be referred to. Rather, a new body of law should be built up under s 8 of the Courts and Legal Services Act 1990 to give guidance as to the amount of damages which should properly be awarded for defamation. Meanwhile, juries should be invited to assess libel damages in the light of their 'purchasing power' and should be asked to consider the award of such sums as are proportionate to the damage suffered and necessary to re-establish the claimant's reputation. In this particular case, the award to Esther Rantzen was reduced from £250,000 and substituted by an award of £110,000. She had succeeded in proving that she had been libelled in articles which had accused her of protecting a teacher who had sexually abused children.

The position was clarified by the case of *Elton John v MGN Ltd* [1996] 2 All ER 35. The case was brought by the singer Elton John about an article which had been published about him in a national newspaper. His photograph had appeared on the front page with the words 'World exclusive', and 'Elton's diet of death'. The article had alleged that Elton John had been observed chewing food and spitting it out at a party in Los Angeles, and continued with a description of the eating disorder known as *bulimia nervosa*. The claimant sought exemplary damages on the grounds that the defendants had been reckless in not checking whether he had attended the party in question, and the judge at first instance had found sufficient evidence of recklessness to justify referring the jury to the matter of exemplary damages. The jury found that the statement was defamatory and awarded damages consisting of £75,000 compensatory damages and £275,000 exemplary damages. The defendants appealed on the grounds that the damages were excessive and the judge had misdirected the jury on the correct approach to assessing exemplary damages. The Court of Appeal reviewed the principles of law relating to damages in

defamation cases and held that in making the assessment of compensatory damages a judge can in future refer the jury to conventional scales of damages in personal injury cases by way of comparison, as well as to previous awards made or approved by the Court of Appeal in libel cases, and that there was no reason why the judge or counsel should not give some idea of what level of award they considered to be suitable. As far as references to other libel awards were concerned, the court agreed with the *Rantzen* decision not to remind juries of the awards made by juries in previous libel cases, as these would not have been subject to specific judicial guidelines. However, again in accordance with the *Rantzen* case, the court took the view that previous Court of Appeal awards could be referred to and that eventually a framework of guidance could be built up. Reference to awards in personal injury cases would be permitted because it is rightly offensive to public opinion that a claimant in a defamation case could receive larger damages than a personal injuries claimant who had been seriously injured or permanently crippled. There was no reason why counsel and judges should not indicate to the jury what the appropriate level of the award should be.

Admitting that these were changes of practice, the Court of Appeal considered that they would support the constitutional role of the jury by rendering their decision more acceptable to public opinion. The sums of £25,000 compensatory damages and £50,000 exemplary damages were substituted. It was further held that exemplary damages would only be appropriate if the jury were satisfied that the publisher had no genuine belief in the truth of the statement, and suspecting that it was untrue took no steps to check. Even then, it would only be when the sum of compensatory damages was insufficient to punish the defendant and to deter others that exemplary damages would be appropriate. Referring to Art 10 of the European Convention on Human Rights, Bingham MR said:

> The European Convention is not a free standing source of law in the United Kingdom. But there is . . . no conflict or discrepancy between Art 10 and the common law. We regard Art 10 as reinforcing and buttressing the conclusions we have reached.

In *Kiam v MGN Ltd* [2002] EWCA Civ 43, the Court of Appeal held that the test for whether damages are excessive is 'whether the award exceeds the highest sum that any reasonable jury might have considered appropriate'. A jury's award should not be overturned unless it was out of all proportion.

18.7.2 Art 8 considerations

The House of Lords in *Campbell v Newsgroup Newspapers* [2004] UKHL 22, held that the claimant was entitled to damages for wrongful publication of detailed information that she had received treatment at Narcotics Anonymous. This was based on a breach of her right to privacy under Art 8 of the European Convention on Human Rights which outweighed the competing interests of the defendants in relation to their freedom of expression under Art 10. However, her previous public statements that she had not taken drugs prevented her from claiming protection for information that she had taken drugs and was seeking treatment.

18.7.3 A fair trial? Art 6 considerations

One of the most notorious libel cases to come before the UK courts was the so-called McLibel case in which two campaigners who criticised McDonald's, the fast food chain, were sued for libel after publishing leaflets accusing the company, among other things, of paying low wages and being cruel to animals. In 1996, after the longest trial in English legal history, the two were ordered, after a complicated mixed verdict, to pay £40,000 damages. They refused to pay on the basis that the findings of the judge justified the stance they had taken.

In February 2005, the European Court of Human Rights ruled that the UK had breached their right to a fair trial under Art 6 of the European Convention on Human Rights, as they had been forced to conduct their own defence because there was no legal aid available to them. It is thought that the case has cost McDonald's around £10 million. The transcript of the case is 20,000 pages long, but the leaflet the defendants produced was read by only a few hundred people. The case highlights the injustices and absurdities of the libel laws in the UK.

18.8 REFORM OF THE LAW OF DEFAMATION

There have been many criticisms of the law of defamation, and over recent years several proposals for reform have been suggested, only some of which have been implemented in the Defamation Act 1996. Others have been implemented by means of a procedural protocol accompanying the Civil Procedure Rules, and by the developing case law on the use of juries in the light of Human Rights consideration outlined in para 18.7.

18.8.1 Defamation Act 1996

The Defamation Act 1996 implements some of the proposed reforms. The Act provides a new fast track procedure for libel cases involving up to £10,000, with judges assessing the damages in these cases and dismissing claims which are weak before the costs escalate. The aim is to dispose of small libel cases quickly and cheaply. This is what happened in *Ferguson v Associated Newspapers Ltd* (2002) unreported, in which Sir Alex Ferguson, manager of Manchester United Football Club, was awarded £7,500 damages for an article in a newspaper alleging that he was greedy and mercenary and more interested in exploiting opportunities to give match interviews than in speaking to supporters of the club. It also introduced a new 'offer of amends' defence for newspapers where the libel was unintentional and the newspaper is willing to publish a suitable correction and apology, with damages assessed by a judge. There is a facility for some cases to be heard by a judge alone. The Act also envisages that the smaller libel cases may eventually be heard in the county court. The limitation period for defamation and malicious falsehood claim has been reduced from three years to one, with a discretion for the court to allow later action to proceed if reasonable.

However, the Defamation Act 1996 has been criticised because it will do little to afford the realistic possibility of libel claims to less well off claimants and because it might even result in lower awards with little reduction in costs. It has also been suggested that the Defamation Act 1996 is too heavily weighted in favour of the media. If

the parties cannot agree on the wording of the apology it would be up to the judge to adjudicate, and this is seen as an unwarranted interference with press freedom. A recent example of the advantages held by the media is the calculated risk taken by the *Daily Mail* in publishing a story accusing five men of the murder of Stephen Lawrence with the words 'sue us if we are wrong'. To date, none of the men has brought a claim.

The UK libel laws are likely to be challenged in the European Court of Human Rights. An example of a case giving rise to serious concern is one in which the Court of Appeal upheld the allegations of libel in a case brought by McDonalds the fast food company, against Dave Morris and Helen Steel. The original trial lasted for 314 days and arose out of criticisms which the two environmental campaigners had made of McDonalds in a leaflet which they had drafted and distributed. The award of damages made by the trial judge was reduced by £20,000 to £40,000 by the Court of Appeal, but the case highlighted the inequities of the UK libel laws and emphasised the fact that it is very difficult for the courts to uphold the concept of freedom of speech. Despite the fact that some of the serious allegations made by the defendants against McDonalds were found to be true and the comments of the defendants were part of an important public debate about health, the defendants, who could not afford lawyers, were subjected to the ordeal of a long trial while the claimant company had the best legal advice and representation at its disposal.

18.9 THE IMPACT OF RECENT DEVELOPMENTS

After many years of relative stagnation, recent years have seen a number of significant changes of direction in the law of defamation, most involving the promotion of trial by judge alone, or settlement out of court. These are summarised below:

- The introduction of conditional Fee Agreements has made a startling difference to the number of libel cases reaching court as was explained in para 18.6.2.
- The role of the jury has diminished in importance in defamation cases in the 1996 Act and Lord Bingham took a particularly strong view on the use of juries, describing them in *Elton John v MGN* as in 'the position of sheep loosed on an unfenced common, with no shepherd'. In 1997 he refused trial by jury in the claim by Johnathan Aitkin. Then, dramatically, in 2002 Lord Bingham condemned the jury's verdict in *Grobbelaar v News Group Newspapers* [2002] UKHL 40 on an appeal to the House of Lords, and the damages were reduced from £85,000 to £1.
- The offer of amends procedure introduced by the Defamation Act 1996 has been interpreted in such a way as to mean that claimants seldom have the opportunity of a jury trial. Claimants can defeat the offer of amends defence if they can prove to the jury's satisfaction that the newspaper concerned knew or had reason to believe that the article was false and defamatory, and this has been equated with the need to prove bad faith on the part of the newspaper – something which is extremely difficult to achieve.
- The role of the jury in determining whether there was malice has been eroded by judicial decisions favouring trial by judge alone where the question is whether the journalist concerned acted 'responsibly'. See *Loutchansky v Times Newspapers (No 2)* [2001] EWCA Civ 1805.

- Summary judgment (ie without a jury) is now available under the Defamation Act 1996, if the court considers that the statutory cap on damages of £10,000, will provide adequate compensation to the claimant. In *Mawdsley v Guardian Newspapers* [2002] EWHC 1780 (QB) summary judgment was considered appropriate by the judge even though he thought that £30,000 would be the adequate minimum award of the case went to trial.
- In only one case, *Kiam v Mirror Group Newspapers* [2002] EWCA Civ 66, has an award of damages made by a jury been upheld by the Court of Appeal since the law was changed in the Courts and Legal Services Act 1990.

18.10 MALICIOUS FALSEHOOD

Malicious or injurious falsehood consists of publication of disparaging remarks about a person's goods and/or services.

The claimant must prove that there has been publication, that there was malice on the part of the defendant and that he has suffered actual loss as a result. In *Allason v Campbell* (1996) *The Times*, 8 May, a claim for malicious falsehood failed because the claimant did not show a monetary loss. 'Malicious' means that the defendant knew that the statement was false or did not care as to whether it was true or false.

Unlike defamation, it is possible to sue the estate of a deceased person for malicious falsehood.

A further distinction between defamation and malicious falsehood is that public funding is available only for the latter.

While claims for malicious falsehood are rare in comparison with those for defamation, in *Joyce v Sengupta* [1993] 1 All ER 897, a relatively recent case, but before the introduction of no-win, no-fee claims, the claimant used malicious falsehood as the basis of a claim in order to circumvent the rule that no legal aid was available for libel. The case afforded the Court of Appeal the opportunity to review this tort. In *Joyce v Sengupta* [1993] 1 All ER 897, the claimant sued for malicious falsehood when the defendants had published false statements accusing her of stealing intimate letters from the Princess Royal and giving them to a national newspaper. She was able to obtain legal aid to pursue her claim but, at first instance, the judge agreed to strike out her claim because it should have been based on libel, not malicious falsehood, and was therefore an abuse of process.

On appeal, the Court of Appeal held that a claimant must be permitted to take full advantage of all the remedies which the law affords. The Court of Appeal pointed out that the claimant did have an arguable case, in that there could have been malice on the part of the defendants, and the claimant could well have suffered a financial loss in that she would find it difficult to obtain future employment which placed her in a position of trust and confidence. Once a financial loss has been established it is also possible to obtain damages for injured feelings and distress in cases of malicious falsehood. Aggravated damages may be awarded for malicious falsehood (*Khodaparast v Chad* [2000] 1 WLR 618).

Malicious falsehood is therefore more difficult to prove than defamation since the claimant has to establish malice, a false statement, and actual or likely financial loss. It

would appear that in modern law the only advantage in bringing a claim for malicious falsehood is that it can apply to any statement, while for defamation, the statement must be defamatory, in accordance with the test in *Sim v Stretch* [1936] 2 All ER 1237.

18.11 MALICIOUS PROSECUTION

The tort of malicious prosecution provides redress for those who are prosecuted without cause and with malice. It is, however, notoriously difficult to prove because of the onerous requirements on the claimant. A research study for the Royal Commission on Criminal Procedure in 1980 presented the view that the tort is 'no obstacle to the dishonest prosecutor and no real protection to the innocent who are prosecuted'. Indeed, it is usually preferable for the claimant and his lawyers to explore other remedies before delving into the difficulties of an action for malicious prosecution. If a claim is brought, it is usually one of several, including possibly trespass to the person, libel and slander.

In order to succeed, the claimant must prove that there was a prosecution without reasonable and probable cause, initiated by malice, and the case was resolved in the claimant's favour. It is necessary to prove that damage was suffered as a result of the prosecution.

The elements of the tort will be considered in detail.

18.11.1 A prosecution

There must have been a prosecution initiated by the defendant. The person to be sued is the person who was 'actively instrumental in putting the law in force' (*Danby v Beardsley* (1840) 43 LT 603). This will usually be a police officer, but sometimes store detectives are sued for malicious prosecution, as in *Warby and Chastell v Tesco Stores* (1987) unreported. Any person who is prepared to sign a charge sheet and appear as a witness will be liable for action for malicious prosecution if the other elements of the tort are proved.

The House of Lords held in *Martin v Watson* [1996] 1 AC 71 that what is required here is for the defendant to have been actively instrumental in the instigation of proceedings, and that merely giving information to a police officer, who then goes on to make an independent judgment on the matter, will not be sufficient to form the basis of a claim for malicious prosecution. In this case, the defendant was a person with a long history of ill feeling against the claimant, and she had gone out of her way to deceive the police, intending them to take action and to prosecute the claimant. This did amount to her having been sufficiently instrumental in the prosecution to provide the basis for a successful civil claim.

Since the introduction of the Crown Prosecution Service (CPS), it is a moot point as to whether a Crown Prosecutor would be open to a claim for malicious prosecution. This is doubtful, as Crown Prosecutors do not initiate prosecutions by charging people. Their function is to review cases which are sent to them by the police and to decide whether to continue with the prosecution process. Occasionally, however, a prosecution may be initiated by the Director of Public Prosecutions, the head of the CPS. Whatever the role of the CPS, prosecutors are Crown servants and as such their decisions would be challengeable by judicial review rather than by a civil action. The test which would then be

applicable to establish liability would be the administrative law test laid down in the case of *Associated Provincial Picture Houses v Wednesbury Corpn* [1948] 1 KB 223, [1947] 2 All ER 680. The Court of Appeal indicated in *Mahon v Rahn (No 2)* [2000] 4 All ER 41 that it is necessary to distinguish between straightforward cases and more complex cases in which prosecuting authorities conduct their own inquiries and are trained to assess evidence more critically.

In *Gregory v Portsmouth CC* [2000] 1 All ER 560, the House of Lords held that the malicious institution of disciplinary proceedings would not give rise to a claim for malicious prosecution. Other remedies, such as defamation, malicious falsehood, conspiracy and/or misfeasance in Public Office might be available.

Proceedings for recovery of rates or community charge are not criminal proceedings and cannot be subject to a claim for malicious prosecution (*Williams v Warrington BC* (2002) unreported).

18.11.2 Without reasonable and probable cause

Here, the claimant is required to prove a negative, a most difficult task at the best of times, but even more so when the defendant and his colleagues are probably in possession of all the evidence. It is difficult to ascertain exactly what is meant by 'reasonable and probable cause' from the cases, as the judges do not agree on what approach should be taken. If an objective test is applied, it is rather easier to establish liability than when a subjective test is applied. The objective approach would be to ask whether a reasonable person in possession of all the facts, would conclude that there was sufficient evidence to cause the police to think that the accused was probably guilty and should face trial. The subjective approach would be to ask whether the police actually believed in the particular case that the accused was probably guilty and should face trial.

18.11.3 Initiated by malice

Here, 'malice' means motivation by some desire other than that of bringing the accused to justice (*Stevens v Midland Counties Rly* (1854) 10 Exch 352). If there are mixed motives for the prosecution, the claim will succeed if the malicious motive was dominant. The presence of malice is a question for the jury to decide, but it is difficult to prove unless a witness, possibly another police officer, is prepared to give evidence against colleagues. In *Taylor v Metropolitan Police Comr* (1992) *The Times*, 6 December, the police officer who had planted cannabis on the claimant in a deliberate attempt to frame him had been involved in a similar case the previous week, and Mr Taylor's claim for malicious prosecution was successful. However, it is possible for the police to act with reasonable and probable cause even if they also act with malice. In such a case a claim for malicious prosecution would fail (see also *Martin v Watson* [1996] 1 AC 74).

18.11.4 The case must be resolved in the claimant's favour

If the claimant is acquitted, or the proceedings are dropped or discontinued, or the claimant is convicted but the conviction is quashed on appeal, there will be a good basis for a claim for malicious prosecution.

18.11.5 Damage

In order to succeed, the claimant must prove that he or she has suffered loss of reputation, loss of life or limb or liberty, or financial loss. Once damage under one of these heads is established, other damage which flows from it, such as distress, may also be compensated. In *Rowlands v Chief Constable of Merseyside* [2006] EWCA Civ 1773, the Court of Appeal referred to the principles set out in the seminal case of *Commissioner of Police of the Metropolis v Thompson* [1998] QB 498 when considering a claim by a woman against a police officer who had physically restrained her, detained her in custody and given false evidence to secure her conviction. The Court held that the jury who heard the case should have been able to consider an award of exemplary damages, and commented that the arrest and prosecution had caused the claimant to feel humiliated and resentful, factors that would have been exacerbated by the fact that the police gave false evidence in support of the prosecution. There was also evidence that the officer's behaviour was capable of being regarded as oppressive, arbitrary and unconstitutional. The award of exemplary damages against a chief constable was a way in which the jury's 'vigorous disapproval' of the conduct of the police force as a whole could be expressed, even though the Chief Constable was not himself the tortfeasor. The Court of Appeal explained that the power to award exemplary damages was a policy matter, and courts can make punitive awards against people who are vicariously liable without being constrained by the financial circumstances of the person who had committed the wrongful acts. A substantial award of exemplary damages could be made against the chief constable under the Police Act 1996 s 88, in line also with the principles established in the Thompson case. Accordingly, the appropriate award of exemplary damages was £7,500, and a total award was £19,850.

18.12 MALICIOUS ABUSE OF PROCESS

This unusual tort is a claim brought against a person who has begun a process against the claimant, falling short of prosecution, for example, requesting the issue of warrants for search or arrest of the claimant. It is necessary to prove lack of reasonable and probable cause and malice but it is not necessary to establish any particular head of damage.

Some decisions suggest that if a claimant starts a civil action for the purpose of a collateral attack on a decision against him or her in criminal proceedings this may amount to abuse of process (see *Hunter v Chief Constable of West Midlands* [1981] 3 WLR 906; *Walpole v Partridge and Wilson* [1994] QB 106).

FURTHER READING

Articles published by Carter-Ruck (www.carter-ruck.com/articles/index.html)
McNamara, *Reputation and Defamation*, Oxford University Press, 2007
Milo, *Defamation and Freedom of Speech*, Oxford University Press, 2008

CHAPTER 19

THE PROTECTION OF PRIVACY

19.1 INTRODUCTION

There is no single long-standing nominate tort designed to protect privacy. In 1972, long before the enactment of the Human Rights Act 1998, the Younger Committee considered the protection of privacy. The Committee regarded the broadest interpretation of privacy as the state of being left alone, free from any kind of human interference. However, the Committee also identified elements within that definition which it considered to be of equal importance – protection from physical harm and restraint, freedom from direction and the peaceful enjoyment of one's surroundings. There are several ways in which these aspects of the privacy of individuals may be protected by the law of tort. For example, the torts of nuisance and trespass protect various aspects of privacy in relation to land, trespass to the person protects from bodily interference, and defamation protects individuals from having untrue details of their lives made public. The Committee concluded that if the concept of privacy were to be embodied into a right:

> its adaptation to the dominant pressures of life in society would require so many exceptions that it would lose all coherence and hence any valid meaning.

By 1990, the Calcutt Committee on Privacy and Related Matters attempted to define a possible statutory tort of infringement of privacy relating specifically to the publication of personal information – which they defined broadly to include:

> those aspects of an individual's personal life which reasonable members of society would respect as being such that an individual is ordinarily entitled to keep them to himself, whether or not they relate to his mind or body, to his home, to his family, to other personal relationships, or to his correspondence or documents.

Predictably, the report went on to document a range of defences.

What is considered in this chapter is the scope of the law of tort in the protection of privacy since the enactment of the Human Rights Act 1998. The law in this area is changing rapidly, partly because of the development of new technology which brings with it new ways of holding and communicating information, and the legal rules are also hedged about by codes of professional ethics, common law, statutory exceptions and the law on Data Protection and Official Secrets.

19.2 THE TYPE OF ACTION

First, it is important to note that there is currently no over-arching cause of action designed to protect all forms of privacy in UK law. It seems that the judiciary have been loath to declare the existence of a specific tort of invasion of privacy in the absence of legislation on the matter. In the most frequently cited case on this area of law, *Campbell v MGN Ltd* [2004] UKHL 22, Lord Nicholls stated, on the basis of earlier authority: 'there is no overarching, all-embracing cause of action for "invasion of

privacy" '. However, there has been judicial recognition of privacy as a value underpinning rules of law.

19.2.1 The claim for breach of confidence

Information imparted in the in the course of a confidential relationship such as that of doctor and patient, should be treated as confidential, and misuse of that information by publication may give rise to a claim for breach of confidence. This action has a long history (see *Prince Albert v Strange* (1849) 2 De G & Sm 293), and traditionally the focus of this wrong was on confidentiality rather than privacy. The fundamentals of the action are set out by Lord Greene in *Saltman Engineering Co Ltd v Campbell Engineering Co Ltd* [1948] 65 RPC 203, and these were extended by the House of Lords in *AG v Guardian Newspapers No 2* [1990] 1 AC 109:

- the information must have the necessary quality of confidence;
- it must have been imparted in circumstances implying a confidential relationship;
- it must have been, or be about to be, published outside that relationship without the permission of the person who confided it; and
- it must not already be in the public domain.

The action still survives in modern law, but has been supplemented by human rights considerations. The juridical basis for claims to protect confidence is not confined to tort. There may be a claim for breach of contract available if the information is divulged contrary to the terms of a contract, such as an employment contract. In other cases there may be a claim derived from equity (see *R v Department of Health ex p Source Informatics* [2001] QB 424 for a discussion as to the origins of the claim).

There are several defences available to a claim for breach of confidence, and probably the most important is the 'public interest' defence which applies when the public interest in disclosing the confidential information outweighs the duty of confidentiality. As in privacy claims, the defence involves a balancing exercise carried out by the court.

After the Human Rights Act 1998 became law in the year 2000, it became clear that UK law needed to broaden the scope of protection given to confidential information and that private information should also be included to comply with Art 8 of the ECHR. The difficulty with simply expanding the common law on breach of confidence was that it was subject to a large range of defences, so it has been necessary for the judges to adapt the law, and this was a difficult and sometimes unacceptable exercise, resulting in the majority in the House of Lords in *Campbell v MGN Ltd* [2004] UKHL 22 refusing to recognise the extended form of the breach of confidence action as an independent tort.

Thus the tort of breach of confidence has in part been overtaken by the incorporation of the European Convention on Human Rights into English law, and the courts may now be prepared to prevent the publication of private information and even photographs, in circumstances when there is no specific relationship of confidence between the parties. Although the law is still in a state of development, as will be seen, there are several relevant factors that the courts take into account in assessing whether a person's privacy has been infringed.

19.2.2 The development of a UK law of privacy

It appears from recent decisions that the UK to be moving towards a more comprehensive and effective privacy law since the implementation of the Human Rights Act 1998. Although there is no specific law of privacy in the UK, the application of the European Convention on Human Rights (ECHR) is providing more effective protection of privacy than was afforded by the previous law. For example, in *McKennitt v Ash* [2005] EWHC 3003 (QB) the folk singer Loreena McKennitt successfully defended an appeal by the author of a book which she contended had violated her right to privacy. Among the items in dispute were details of the claimant's personal and sexual relationships; her health and diet and her emotional vulnerability. The claimant's right to privacy under Art 8 of the ECHR was upheld by the Court, after the competing right to freedom of expression under Art 10, claimed by the author of the book, had been weighed in the balance. Lord Buxton emphasised the fact that the claim was:

> brought against the background that Ms McKennitt is unusual amongst world-wide stars in the entertainment business, in that she very carefully guards her personal privacy.

He explained the complexities of the law as follows:

> There is no English domestic law tort of invasion of privacy. Accordingly, in developing a right to protect private information, including the implementation in the English courts of articles 8 and 10 of the European Convention on Human Rights, the English courts have to proceed through the tort of breach of confidence, into which the jurisprudence of articles 8 and 10 has to be 'shoehorned'.

Another case which demonstrates the difficulties faced by the judiciary soon after the Human Rights Act 1998 became law is *Douglas v Hello!* [2005] EWCA Civ 595, in which Michael Douglas and Catherine Zeta-Jones succeed in a High Court claim against Hello! magazine for breaching their rights of commercial confidence by publishing photographs of their wedding. However, the court found that there was no invasion of privacy involved, and Lindsay J, who heard the case, warned that the law as it then stood was inadequate and that 'if Parliament does not step in then the Courts will be obliged to'.

19.3 THE HUMAN RIGHTS ACT 1998

There is little doubt that the Human Rights Act 1998 has made a significant difference to judicial attitude towards the need to develop better protection of privacy in the UK. The relevant Article of the European Convention for the Protection of Human Rights and Fundamental Freedoms is Art 8, which provides a right to respect for private and family life, home and correspondence (see 19.5.6).

19.3.1 The scope of the human rights jurisprudence

Within human rights jurisprudence Art 8 has been interpreted as going beyond limiting the extent to which public authorities can interfere with the privacy of an individual, and it imposes a positive obligation on the States to ensure that the privacy of individuals can be protected from interference by other private individuals, including the media – *Von*

Hanover v Germany (2005) 40 EHRR 1. Thus a new positive obligation was introduced into English domestic law by the Human Rights Act 1998 when it came into force, as by s 6 it is now unlawful for any public authority, including a court, 'to act in a way which is incompatible with a Convention right'. It should however, be noted that, as was emphasised in the leading case of *Campbell v MGN* [2004] UKHL 22, [2004] 2 AC 457, this prohibition has not permitted the courts to create new causes of action. In the words of Baroness Hale, again citing the case of *Wainwright v Home Office* [2003] UKHL 53: 'the courts will not invent a new cause of action to cover types of activity which were not previously covered'. Despite this, she continued, 'If there is a relevant cause of action applicable, the court as a public authority must act compatibly with both parties' Convention rights'.

19.3.2 UK responses to claims based on protection of privacy

What in fact has happened in the UK, is that the action for breach of confidence, which has been in existence since at least the 19th century, has been treated as the appropriate way to protect individuals from wrongful disclosure of their confidential information. Despite the advent of the Human Rights Act 1998, for the time being there is little prospect of extensive development of *tort* as a means of protecting privacy because of judicial reluctance to move beyond the present position – see the Court of Appeal views stated above in para 19.2.2, expressing concerns about 'shoe-horning' protection of privacy interests into existing causes of action (*Douglas v Hello! Ltd (No 3)* [2005] EWCA Civ 595).

19.4 HUMAN RIGHTS CLAIMS FOR WRONGFUL DISCLOSURE

It is now fairly routine for common law claims for breach of confidence to include some reference to Art 8 and Art 10 of the ECHR. Courts are clearly faced with the need to balance these two apparently conflicting articles in order to arrive at a just solution. See 19.5.6 for the content of these Articles.

19.4.1 The two articles must be balanced

Article 8 is linked to the existence of a private law cause of action for wrongful disclosure of private information or breach of confidence. Article 10 requires that cause of action to be restricted by the need for freedom of expression in a democratic state. In the leading case of *Campbell v MGN Ltd* [2004] UKHL 22 the House of Lords confirmed that the structure of claims in UK private law should be based on the balance between them. The two articles are now much more than persuasive, and are now regarded by the courts as 'the very content of the domestic tort that the English court has to enforce' (see Buxton LJ in *McKennitt v Ash* [2006] EWCA Civ 1714).

It is not a simple matter for a court to deal with the balance between Art 8 and Art 10, and it cannot be said that one has priority over the other, as each case must be dealt with on its own merits once it has been established that the information which has been published is private in nature and deserving of protection by the law. The court would then need to consider whether the publication by the defendant is the kind of expression

that is deserving of protection under Art 10. The complex process of balancing the relative merits of protecting privacy and protecting freedom of expression will then be undertaken by the court (see Lord Steyn's guidance in *Re S (A Child) (Identification: Restrictions on Publication* [2004] UKHL 4). This states that since neither article has precedence over the other at the start, if there is a conflict between the two, the specific rights being claimed in the particular case must be examined carefully. The justifications for interfering with the rights under consideration must be taken into account, and the proportionality test must be applied to each. In *HRH Prince of Wales v Associate Newspapers* [2006] EWCA Civ 1776, the Court of Appeal held that the test when dealing with the question as to whether it was necessary to restrict freedom of expression in order to prevent disclosure of information given or received in confidence, was not simply whether the information was a matter of public interest. What should be considered was whether it was in the public interest that the duty of confidence should be breached in all the relevant circumstances. See also para 19.5.

In *Mosely v Newsgroup Newspapers Ltd* [2008] EWHC 1777 (QB), Eady J held that a newspaper article headed 'F1 BOSS HAS SICK ORGY WITH 5 HOOKERS' was a breach of the claimant's Art 8 rights, and could not be justified in the light of Art 10.

19.4.2 Human Rights Act 1998 s 12

Section 12(4) of the Human Rights Act indicates that courts should have 'particular regard to the importance of the Convention right to freedom of expression' and this might appear to complicate the balancing exercise. However, it was held in *Douglas v Hello!* [2001] QB 967 that this does not in fact mean that *precedence* should be given to freedom of expression over the right to privacy and family life.

19.4.3 What is private information in Human Rights law?

The test adopted by the English courts as to define private information which should not be disclosed is the 'objective reasonable expectation test'. The approach in *Campbell v MGN Ltd* [2004] UKHL 22 was whether 'in respect of the disclosed facts the person in question had a reasonable expectation of privacy'. Lord Hope explained that:

> a duty of confidence will arise whenever the party subject to the duty is in a situation where he knows or ought to know that the other person can reasonably expect his privacy to be protected.

As in the case of the reasonable man test in negligence, there is considerable scope for the exercise of judicial discretion in this definition. Difficulties arise in situations where it may be possible to argue that a claimant is unusually sensitive about some aspect of the information and the defendant took advantage of that fact, knowing about the sensitivity. This matter has yet to be settled in UK law.

19.4.4 Factors indicating the reasonable expectation of privacy

There are several matters to be considered in deciding whether a person of 'ordinary sensibilities' could reasonably expect a defendant not to publish a particular item of information because it is considered private in nature, and there are many parallels with

the tort of breach of confidence at common law and the criteria set out by Lord Greene in Saltman Engineering as modified by the *AG v Guardian Newspapers No 2* [1990] 1 AC 109 (*The Spycatcher* case).

Among the relevant factors are:

- The nature of the information.
- The form in which the information was held.
- The relationship between the parties.
- The means by which the information was obtained.
- The results of publication.

19.4.5 The nature of the information

Clearly, the nature of the information itself is important, as in the case of the tort of breach of confidence – material of a sexual nature is likely to be considered private, as are personal medical details. Medical records fall within 'sphere of private life' – *Z v Finland* (1998) 25 EHRR 371 for the purposes of Art 8, and much of the academic literature on confidentiality concerns the law and ethics relating to medical confidentiality. In *Bluck v Information Commissioner* 17/9/2007, in which the Information Tribunal held that the duty of confidence relating to medical records was capable of surviving the death of the patient, the court considered the competing interests involved. Namely the public interest in ensuring that patients could trust the NHS to keep their records confidential, and the countervailing public interest in disclosure of the medical records of a deceased patient, and concluded that disclosure would be contrary to the right to privacy of the husband of the deceased.

There are several judicial statements indicating that details about a person's home are 'private'. In *McKennitt v Ash* [2005] EWHC 3003 (QB) at [135] Eady J said:

> to describe a person's home, the décor, the layout, the state of cleanliness, or how the occupiers behave inside it, is generally regarded as unacceptable.

Personal financial information may fall into the category of private material – see *Australian Broadcasting Corporation v Lenah Game Meats Ltd* (2001) 208 CLR 199, and is capable of engaging Art 8 – see *Long Beach v Global Witness Ltd* [2007] EWHC 1980 (QB).

19.4.6 The form in which the information was held

A related factor is the form in which the information was kept, so diaries and personal journals, as in *HRH Prince of Wales v Associated Newspapers Ltd* [2006] EWCA Civ 1776. Closely guarded documents held in locked boxes and correspondence marked 'Private and Confidential' might reasonably be considered to be private in nature. On the other hand, people who place personal information on 'Facebook' or other networking internet sites would probably not be seen as expecting that information to be treated as confidential among the circle of people in their network.

Publications may come in various formats and there has been much litigation concerning photographs. In *Douglas v Hello!* [2003] EWCA Civ 595, the Court of Appeal described photographs as being a particularly intrusive invasion of privacy, and it has

emerged that the publication of a photograph can be wrongful disclosure of private information, with the courts taking the view summed up by Lord Hoffmann in *Campbell v MGN* [2004] UKHL 22 in this way:

> A photograph is in principle information no different from any other information. It may be a more vivid form of information than the written word ('a picture is worth a thousand words'). That has to be taken into account in deciding whether its publication infringes the right to privacy of personal information.

The publication of photographs can amount to wrongful disclosure if the information they contain is private and involves intrusion. Somewhat surprisingly, in *Von Hannover v Germany* (2005) 40 EHRR 1 the European Court of Human Rights ruled that the publication of photographs of Princess Caroline carrying out everyday activities in public engaged Art 8, even though it gave very little information that was not already in the public domain and which was, in any event, hardly of interest.

19.4.7 The nature of the relationship

The claimant is more likely to be able to argue that the material in question was reasonably expected to be treated as private if his relationship with the other party was confidential in some way, though the question as to whether the information is private could well be distinct from that of whether the relationship was private. Of course, not all information that passes between close friends can reasonably be expected to be treated as confidential, but the nature of the relationship is a factor for the court to consider when deciding what information should be protected. Thus the Court of Appeal considered that the information in *McKennitt v Ash* [2006] EWCA Civ 1714 could have been private in nature, and finally concluded that it should be protected from disclosure on taking into account the nature of the close friendship between the claimant and defendant. So the nature of the relationship may add greater weight to the privacy claim when it is balanced against a claim for freedom of expression.

A claimant who can prove that there was an intimate relationship with the other party is more likely to be able to establish that physical intimacy was information which he or she could reasonably expect the other person not to disclose. The Court of Appeal commented in *A v B plc* [2002] EWCA Civ 307 that there was an important difference between permanent relationships, such as marriage, and more temporary relationship that are intimate in nature. That case concerned the casual affairs that a married footballer had with two women, which were described as being 'at the outer limits of relationships which require the protection of the law' by the judge at first instance, a view endorsed by at least one of the judges in the Court of Appeal. However that does not mean that a person engaged in an extra-marital affair can never expect a certain amount of privacy – *CC v AB* [2006] EWHC 3183.

19.4.8 The way in which the information was obtained

There are many and various ways in the modern world in which information held by other people can be obtained by those who are determined to find it. Computer hacking is just one example. Another is video surveillance by defendants' insurers of individuals who are in the process of making personal injury claims, a matter considered by the

Court of Appeal in *Jones v University of Warwick* [2003] EWCA Civ 151. This type of surveillance is carried out to obtain evidence of claimants taking part in activities which are incompatible with a claim for damages for personal injuries. The question arose in that case as to whether that kind of interference was in breach of Art 8 of the ECHR. The authorities in Strasbourg do not generally interfere with the rules developed by States relating to the admissibility of evidence in Court, so there is very little case law in this issue. In Application No. 44866/98 (1) *Raymond* (2) *Sheila Arnott v United Kingdom*, 3 October 2000, the Court dealt with a complaint about the alleged infringement of Art 8 by a private surveillance company, but the case was eventually settled before a ruling was made. In the *Jones* case the claimant had dropped a cash box onto her wrist during the course of her work, and brought a claim alleging continuing disability and seeking substantial special damages. The defendant had admitted liability but argued that the claimant had no significant disability. An enquiry agent entered the claimant's house, posing as a market researcher and filmed her with a hidden camera (a common practice at the time). The film was disclosed to the claimant. The Court of Appeal held that since the coming into force of the Human Rights Act 1998 there were competing public interests which should be balanced and reconciled by the Court as far as possible. There had been an act of trespass involved in entering the claimant's house and infringing her privacy contrary to Art 8 of the European Convention on Human Rights was relevant, and this should be weighed in the balance by the Court in deciding how it should exercise its discretion in making orders under the Civil Procedure Rules about the management of the litigation.

The Court of Appeal recognised that the Convention did not state what consequences should ensue if evidence was obtained in breach of Art 8, leaving that matter to domestic courts. In the view of the Court of Appeal, this was not a case where defendant's insurers had acted so outrageously that the defence should be struck out, so the case should proceed to trial and it would be undesirable if any evidence that was relevant was not placed before the judge trying the case. However, while not excluding the evidence, it was important to make it clear that the conduct of the insurers was improper, so the defendant was ordered to pay the costs of the proceedings concerning the issue of admissibility.

The case creates a precedent for courts in balancing the interests of justice on the one hand, and the right to privacy on the other. The Strasbourg Court had considered a similar situation in *MS v Sweden* (1997) 28 EHRR 313, in which the applicant had claimed compensation from the Social Insurance Office for a back injury suffered as a result of a fall at work. The office obtained her medical records, without first seeking her consent, and discovered as a result that she had had an abortion because of previous back problems, so her claim was rejected. The Court held that there had been an interference with her right to privacy under Art 8, but that the interference was justified in the interests of protecting of the economic well-being of the country. Both cases suggest that if there is evidence of underhand behaviour by the complainant, the courts might be more willing to condone the infringement of privacy by the defendant.

The media have developed codes of practice dealing with a range of matters, including potential invasions of privacy, and s 12(4)(b) of the Human Rights Act 1998 states that when a court is dealing with a case involving 'journalistic, literary or artistic material' it must 'have particular regard' to 'any relevant privacy code'. In the UK the Press

Complaints Commission has the task of enforcing the codes of practice applicable to the press, which contains references to particular topics which might assist Courts determining matters of privacy. The Ofcom (Office of Communications) Broadcasting Code applies to television and radio broadcasts.

19.4.9 The results or consequences of publication

If the result of any publication of material which could be regarded as private would interfere disproportionately with the private lives of an individual – for example with the private grief of parents whose child had been murdered, that would be a matter to be put into the balance. In *Campbell v MGN* [2004] UKHL 22, Lord Hoffmann indicated that the courts might consider the consequences of the publication, in that instance, of a photograph, especially if it might cause humiliation or embarrassment, and whether it was obtained by intrusive methods. On occasion, the information is already in the public domain and in such circumstances there would not be a breach of privacy unless there followed serious and repeated intrusions – see *Green Corns Ltd v Claverley Group Ltd* [2005] EWHC 958 (QB).

19.5 BALANCING THE COMPETING RIGHTS

The balancing exercise which the courts are required to undertake is a difficult matter. Lord Steyn provided guidance on this point in *Re S (A Child) (Identification: Restrictions on Publication)* [2004] UKHL 47 as is explained above. In some instances a satisfactory compromise can be reached. For example, in *T v British Broadcasting Corporation* [2007] EWHC 1683 (QB), the judge held that the Art 8 rights of a vulnerable mother who was the subject of a television programme about adoption had been infringed by the BBC and granted an injunction preventing her from being identified in the broadcast, taking the view that her Art 8 rights outweighed the BBC's Art 10 right to freedom of expression, and that it would be possible to satisfy the public interest without identifying the mother or child. This outcome was reached after the judge had undertaken a balancing exercise as to whether the claimant's Art 8 rights should have precedence over the BBC's Art 10 rights. The cases of *A Local Authority (Inquiry: Restraint on Publication), Re* [2003] EWHC 2746 (Fam), (2004) Fam 96 and *S (A Child) (Identification: Restrictions on Publication), Re*]2004] UKHL 47,]2005] 1 AC 593 were considered, and the judge found that the medical opinion was powerful evidence to be weighed in the balance.

19.5.1 The legal arguments

It is possible to find the arguments about competing rights under Art 8 and Art 10 discussed at length in recent cases. To take but one recent example, *Long Beach v Global Witness Ltd* [2007] EWHC 1980 (QB), where it was held that the applicants would not be entitled to interim injunctions requiring the respondent to remove information and documents relating to the applicants' financial and business affairs from their website. Although the documents were by their nature and content confidential, and the applicants' rights under Art 8 were undoubtedly engaged, there was an overwhelming case for refusing relief on the ground that there was an important public interest in the publication of the documents.

While Art 8 rights will almost always be relevant, these may not be competing against Art 10 rights in every case, as there are other relevant countervailing rights. Art 8 rights are not absolute and might have to give way to such interference as is necessary:

> in accordance with law, and necessary in a democratic society in the interests of national security, public safety, economic wellbeing of the country, prevention of crime or disorder, the protection of health or morals, or the rights and freedoms of others.

Thus the courts might be asked to consider the question of privacy in relation to court proceedings, as in the *Jones v University of Warwick* outlined above in para 19.4.8, and in *R (on the application of B) v Stafford Combined Court* [2006] EWHC 1654 (Admin), in which the lower court had ordered the applicant, a vulnerable young person who had been receiving psychiatric treatment, to disclose her medical records. The High Court held that medical records should be treated as confidential and that patients have a right of privacy under Art 8 which deserves particular respect and that the duty of confidence owed by medical professionals to competent young people should not be overridden unless there were very powerful reasons for doing so.

19.5.2 Material already in the public domain

Several factors are relevant when the court undertakes the exercise of weighing in the balance the competing rights of the parties under Art 8 and Art 10. Some of these factors have emerged in the preceding discussions. One important question which has already been touched upon is whether the information is already in the public domain, as may be the case where the claimant is someone who has courted publicity. In *Campbell v MGN Ltd* [2004] UKHL 22, the claimant, a super-model had made special efforts to proclaim publicly that she did not take drugs. Yet she based her claim on the fact that the defendants had disclosed information that she was a drug addict receiving treatment. Commenting on this in his speech, Lord Nicholls said:

> By repeatedly making these assertions in public Miss Campbell could no longer have a reasonable expectation that this aspect of her life should be private.

Lord Hoffmann considered that the false impression given to the public by the claimant had created a public interest in correcting the impression she had previously given.

Private information is not to be treated as being in the public domain just because there are some people who are aware of it, and in Lord Browne of *Madingley v Associated Newspapers Ltd* [2007] EWCA Civ 295 the Court of Appeal drew a distinction between information which is available to a small circle of friends or colleagues and information which is provided to the public at large in a newspaper. The leading case on this point is *AG v Guardian Newspapers (No 2)* [1990] 1 AC 109, in which the rule was first established, where Lord Goff commented that the key question is whether the information has become 'so generally accessible that, in all the circumstances, it cannot be regarded as confidential'.

19.5.3 Those who court publicity

In similar vein, in *Woodward v Hutchins* [1977] 1 WLR 760, many years earlier, the Court of Appeal had not been prepared to continue an injunction restraining the former publicity

officer of a band from publishing information about the lives of the members of the band, As Bridge LJ said:

> Those who seek and welcome publicity of every kind bearing upon their private lives so long as it shows them in a favourable light are in no position to complain of the invasion of their privacy by publicity that shows them in an unfavourable light.

This approach should be viewed with caution, as the desire of an individual for publicity in relation to some aspects of his life might not mean that the same person would like other aspects of his private life to be exposed to the public.

19.5.4 Public interest and public figures

Many of the cases concern the question of whether there is public interest in the disclosure of private information about the private lives of people who are prominent public figures, and it has emerged very clearly that people in the public eye must expect media attention and scrutiny. However, in *Von Hannover v Germany* (2005) 40 EHRR 1, the European Court of Human Rights refused to accept the notion that if a person has status and general importance, the public has a legitimate interest in knowing how they have behaved in their private life.

19.5.5 The degree of distress that a person may suffer

It may be necessary to weigh the importance of protecting private information if it is regarded as of such personal sensitivity that it might affect the life of the individual concerned. For example, in *Campbell v MGN* [2004] UKHL 22, the claimant might have been dissuaded from continuing essential rehabilitation treatment by the adverse publicity that was generated by the publication of details of her undergoing treatment. Other people might also be adversely affected by the revelation of confidential information about a particular individual – his wife and children for example – *CC v AB* [2006] EWHC 3083 (QB), and *Bluck v Information Commissioner* [2007] 98 BMLR 10.

In *Murray v Express Newspapers plc* [2007] EWHC 1908 (Ch), the judge held that the photographing of the child of a public figure in the street when he was with his parents was not a breach of his Art 8 rights and did not amount to a breach of confidence. The photograph had appeared in a magazine with a quotation attributed to M's mother setting out some of her ideas about motherhood and family life. The judge took the view that the starting point should be the test for deciding whether the conduct of the defendant engaged Art 8. The question whether a child had a reasonable expectation of privacy should be determined on the basis of an objective view, which included the reasonable expectations of his parents in the same circumstances, as to whether the lives of their children in public places should remain private. There was no allegation that they were distressed about the photograph being taken, nor was there a suggestion that it revealed information which put the child in danger. The judge identified conflicts between various decisions but held that he was bound by *Campbell, Kay v Lambeth LBC* [2006] UKHL 10. He drew a distinction between a person carrying out family activities and a simple trip to the corner shop to buy milk. The first type of activity was part of a person's private recreation. In the event, however, he held that the facts of this case were not sufficient to engage M's Art 8 rights.

19.5.6 Right to freedom of expression under Art 10

The UK Courts had decided many cases concerning breach of confidence long before the coming into force of the Human Rights Act 1998, and the common law had developed to take account of many of the factors that are now considered under Art 8 and Art 10, including the weighing of the public interest in maintaining confidence against the interests of the press and the public in favour of disclosure. It was a matter of some debate as to whether the action for breach of confidence belonged to the law of tort or to equity, and there were certainly important references to equitable origins in some of the cases. For example, after the Human Rights Act 1998 was implemented, it was possible to discern distinct differences in the terminology used by the judiciary in the light of the jurisprudence of the European Court.

Article 10(1) states:

> Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.

The Article does recognise exceptions to this freedom which might initially appear to curtail it greatly (Art 10(2)):

> The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence or for maintaining the authority and impartiality of the judiciary.

As was explained in Chapter 18, there are many instances in which Art 10 has been interpreted in favour of the media and against the individual, and it is the terminology used in the Convention which has crept into the case law.

This is an area of law that is still under development, and it does not fit neatly into the law of tort. Indeed, time will tell whether the law concerning protection of privacy properly belongs in a textbook on tort. While there are several nominate torts which do protect a range of interests that can be described as 'private', there are still inconsistencies in this part of the legal landscape, together with numerous statutory and common law exceptions which are not covered here for reasons of space, but which would require consideration by the Courts under Art 8.

FURTHER READING

Kenyon and Richards, *New Dimensions in Privacy Law*, Cambridge University Press, 2006
Pattenden, *The Law of Professional-Client Confidentiality*, Oxford University Press, 2005
Phipps, *Confidentiality*, Sweet and Maxwell, 2006

CHAPTER 20

REMEDIES IN TORT

People seek the aid of tort in order to achieve remedies for the wrongs they believe that they have suffered at the hands of others. If a claimant is successful, the law of tort provides one or more of a range of remedies, and the most usual remedy in tort is that of an award of money by way of compensation, known as 'damages'. The basic principle is that damages should be calculated with the aim of putting the claimant into the same position as he or she would have been in if the tort had never been committed – *Livingstone v Rawards Coal Co* (1888) 5 App Cas 25. However, other remedies may be considered more appropriate – for example, the obtaining of an injunction to prevent a trespasser from entering the claimant's land. The various remedies available in tort are outlined in this chapter.

20.1 DAMAGES

In the vast majority of tort claims, the claimant is seeking compensation for personal injuries or damage to property which arise out of accidents. As previously explained, very few cases ever actually reach the courts, the majority being settled out of court. However, such awards as are made by the courts form the basis of out of court settlements.

It is therefore very important for all lawyers practising in the field of personal injuries to be aware of the current figures which the courts are awarding for particular types of injuries. These figures are published regularly in *Kemp and Kemp* (Kemp and Kemp, *Quantum of Damages*, 82, London: Sweet & Maxwell) and in *Current Law*. The *New Law Journal* also carries details of recent awards and the Judicial Studies Board publishes regular updates of the broad bands of damages awards. Lawyers also need to be aware of the principles that underpin the awards of damages.

The Law Commission keeps under review aspects of the law relating to damages and practical matters concerning the way in which compensation is paid. Some of its recommendations are have been implemented by primary legislation and by the developing case law.

20.1.1 How accurate is tort compensation?

Assessment of damages involves a prediction of what would have happened to the claimant if the accident had not occurred. The object of tort damages is to put the claimant in the position he would have been in if the accident had never happened, and this, of course, is impossible to achieve. While it is possible to calculate almost exactly the award of special damages, that is, actual financial losses to the date of trial (for example, lost earnings, the cost of private medical care and so on), it is impossible ever to predict exactly what the claimant has lost for the future, or to translate intangible losses such as pain and suffering into money, and it is in this area, the assessment of general damages,

that most of the problems arise and most of the injustice or unfairness is seen to exist. The judge must take into account the claimant's current medical condition and the prognosis for the future. This is a difficult exercise, and medical witnesses are called at great expense to try to help in the calculation. Although it is now also possible for provisional awards of damages to be made in some cases in which the medical prognosis is uncertain, even this procedure has drawbacks and is not available in every case.

The question of assessing future economic losses is no simpler. In fact, as Lord Scarman said of this in the case of *Lim Poh Choo v Camden and Islington AHA* [1980] AC 174: '. . . there is really one certainty: the future will prove the award to be either too high or too low'.

Although the courts aim for full compensation, in many cases this can lead to over-compensation, particularly if the injury is only small and could be covered entirely by social security benefit. This highlights yet another problem with our system which is that there are no consistent rules governing the interrelationship between tort compensation and state compensation. It is possible that many claimants are under-compensated.

The fact that a claimant may attempt to exaggerate his injuries in order to obtain a higher award should not be overlooked. The Courts take a very firm line when this happens – see *Painting v University of Oxford* [2005] EWCA Civ 161.

20.1.2 How fair is tort compensation?

It will be seen from a study of the cases that awards of damages to rich people for loss of future earnings are considerably higher than awards of damages to poor people, even though the injuries may be identical. Some people regard this as unfair because it means that the rich person is taking out of the system relatively more than he or she is putting in insurance and other payments. Moreover, the rich may be awarded a higher sum for loss of amenity than the poor since they are able to enjoy a better lifestyle and recreational activities.

Another reason why calculation of tort damages is regarded as unfair is that some 'heads of damage' have been developed in relation to general damages, which only certain people can claim. For example, in the case of bereavement damages, introduced under the Administration of Justice Act 1982, only parents of people under 18, and husbands and wives may be awarded damages for bereavement. Yet, who is to say that parents of people over 18 and short-term cohabitees suffer less than these categories of people? The sum is currently £10,000, an arbitrary figure fixed by the Lord Chancellor which can be varied. To take an example of the operation of the law: in the Hillsborough football stadium disaster, parents whose children died there under the age of 18 were awarded damages for bereavement; those whose children were over 18 received nothing. It is difficult to see why those who lost loved ones in this way should be treated differently.

A further criticism of our tort system is that it singles out people with disabilities which have been caused through the *fault* of others, and places them in a better position than those who are unable to prove fault. For example, if a person is born with an illness which cannot be attributed to anything other than a genetic cause, that person will no

doubt suffer as much as a person who is injured through the negligence of the doctor who delivered him. Yet, providing fault can be proved, the person damaged at birth will be compensated and receive possibly a very large award, whereas the person with a genetic or inherited disorder will simply be dependent on state benefits. As Professor Atiyah pointed out, we do not know what the current sense of justice expects.

Studies (for example, as long ago as 1978 when the Pearson Commission reported) have been undertaken into the question of whether people injured through fault should expect more by way of compensation than those who are injured or become ill through some natural cause, and these have concluded that it is morally impossible to justify compensating one category rather than the other, except on the grounds of punishing the wrongdoer and general deterrence, which are not the primary objects of the law of tort.

A further problem which has contributed to the unfairness of the system over the years is the fact that liability insurance underpins the law of tort. This means that insurance companies are able to influence the way in which the law has developed. For example, the lump sum payment which has for many years been criticised by commentators (see Pearson Report) is often impracticable from the victim's point of view and a series of periodic payments would be much better. The claimant who receives a large lump sum could spend it all on a trip around the world and come back merely to rely on state benefit, yet damages are assessed by the court on the assumption that claimants will invest an award to beat, or, at the very least, keep pace with inflation. The Damages Act 1996 requires the courts, when deciding on the return to be expected from a lump sum, to take account of such a rate of return as may be prescribed by the Lord Chancellor. The real advantage of periodical payments is that they can now be varied depending upon the victim's condition at any given time. The plain fact is, however, that insurance companies do not like their files being kept open in order to pay periodic payments. Administratively, it is much more convenient, once the claim has been concluded, to pay a lump sum and close the file. Lawyers might also prefer to be paid their fees in one lump sum once the case is settled. The scenario in which lump sum payments of damages reigned above all other forms of payment has now changed, partly because courts are able to make changes to periodical payments under the Damages (Variation of Periodical Payments) Order 2005 (see para 20.1.3).

The system of structured settlements, which will be discussed later, has provided a means of paying claimants their damages over a period of time, but this is only used in a limited number of cases.

Claimants are almost always at a psychological disadvantage in litigation because the forensic process requires the claimant to prove the case by amassing sufficient evidence against the defendant and establishing fault. This is a lengthy process, and witnesses are not always ready to come forward, particularly in the case of work accidents and medical accidents. Defendants, on the other hand, are usually insured, or are large concerns such as health authorities, NHS Trusts, or local authorities which are self-insurers, or they would not be worth suing. As such, they are in the business of fighting claims on a regular basis, and have developed tactics with which claimants, however well advised by good lawyers, may not be able to cope, from a psychological point of view. Many claimants are worn down by the negotiating process which precedes settlement or trial. If they are not supported by a trade union or by public funding, or some other financial assistance, such as no-win, no-fee arrangements, or in the chance event of being injured

in a mass accident, by the report of a public inquiry, many claimants will discontinue their claims or settle for less than they deserve. The whole process of making a claim is a major event in the life of an individual, whereas, to an insurer it is merely part of an elaborate 'game'.

20.1.3 How efficient is tort compensation?

Assuming that an efficient system of compensation should compensate all deserving victims quickly and cost-effectively, tort fails on almost all possible counts.

There are many delays involved especially if the medical prognosis is uncertain. For example, a musician who had been severely burned in the King's Cross fire fought for eight years for his damages and was disappointed with the final sum.

Many accident victims fail even to initiate legal claims because they are unable to obtain the necessary evidence to prove fault on the part of the defendant, or because they lack sufficient financial resources, are considered ineligible for no-win, no-fee funding, and since the withdrawal of legal aid for personal injury claims, are ineligible for public funding, or simply because they are unaware of the possibility of making a claim.

Compared with other systems of support which are available for the victims of injury or sickness, such as the social security system, tort is inefficient because it often takes several years before settlements or court awards are made, during which time the claimant may well have to endure pain, sickness, poverty, hardship and the fear of impending litigation.

As explained above, even when tort does pay its accident victims, they are frequently still paid in the form of a lump sum, with all its attendant disadvantages already discussed. However, since the Damages Act 1996 came into force, periodical payments are now more common than before, but the Lord Chancellor's Department issued a consultation paper in 2002 to seek views on whether courts should have the power to order periodical payments of personal injury damages to cover future losses (*Damages for Future Loss*, 2002, London: HMSO). This has resulted in some reforms which mean that it is now more common for courts to make awards in the form of periodical payments, and this can happen even if the parties do not consent. The periodical payment regulations come into force on 1 April 2005, and apply to all ongoing cases. The courts also have power under the Regulations to order variable periodical payments where proceedings are issued on or after that date.

Tort is also inefficient from a financial perspective when compared with other systems of compensation. The administrative costs of tort amount to approximately 85% of the sums which it pays to victims (approximately 45% of the total compensation and administration costs), while Social Security runs at 11% of the sums which it pays out (figures based on the Pearson Commission Report 1978).

Nor can tort, like Social Security, claim to be an egalitarian system, as for reasons already discussed, it does not compensate all victims equally.

A Law Commission report, *Personal Injury Compensation: How Much is Enough?* (Law Com 225, 1994, London: HMSO) concluded that many claimants who had originally thought that their award would be adequate to cover all their future needs, found years later that it was inadequate to cover the long term effects of their disability,

including their medical and general care. Four out of five of those interviewed were still experiencing pain, and a high proportion had either given up work because of their injuries or had been unable to return to work as they had hoped. Few had received adequate financial advice as to how they should invest their award, and the majority were very concerned that they should make good use of their capital, so dispelling the myth that many successful claimants are profligate. In fact, the report concluded that only a small percentage of the accident victims were able to maintain a lifestyle similar to that before their accidents.

This report is still the best evidence to date that in many instances the tort system probably fails even those whom it compensates.

Lord Woolf, after a thorough review of the present system for compensation, made proposals for procedural reforms, which have now been implemented in the Civil Procedure Rules 1998 (see Chapter 21), which have removed some of the obstacles preventing claimants obtaining compensation within a reasonable time.

Already the introduction of no-win, no-fee claims has opened up the possibility of litigation to people who, because they do not qualify for public funding, might not otherwise have been able to afford it. There have been criticisms of this new system, and although imperfect, it is the best compromise which is likely to be achieved in the near future. Suggestions for introducing 'no-fault' compensation have been made from time to time, but at present this is not on the political agenda, as a comprehensive no-fault system would prove far too expensive and a limited no-fault scheme for particular categories of accident victims, such as those injured in medical mishaps, would be unfair to other categories of victims. It is hoped that changes to be implemented under the NHS Redress Act 2006 will provide speedier justice for the victims of clinical negligence.

20.2 TYPES OF DAMAGES

It is possible to classify the various kinds of damage which are payable. The categories listed below are not definitive, and there may be some overlaps – as for example, between restitutionary damages and exemplary damages.

20.2.1 Nominal damages

Nominal damages are awarded if the claim is proved but the claimant has suffered no loss. The claimant in such a case would receive a very small sum of money and this would in fact merely demonstrate to the world that the claimant has won the case. One example of when this happens is in defamation cases where there is an element of truth in the statement that has been published, but the evidence is not strong enough to justify a defence of justification.

20.2.2 Compensatory damages

Most damages are intended to be compensatory – that is intended to compensate the claimant for loss which has been suffered. If the damages can be calculated exactly, they are described as special damages. Other types of damages which are not capable of

financial assessment in any accurate way are called general damages. General damages include pain and suffering, loss of amenity, and so on.

The aim of compensatory damages is to put the claimant in the position he or she would have been in had the tort never been committed.

20.2.3 Contemptuous damages

Contemptuous damages are usually awarded in libel claims in which the claimant has technically proved the case, but the court wishes to express its disapproval that the claim was ever brought in the first place. The sum awarded will usually be the smallest coin of the realm.

20.2.4 Aggravated damages

Aggravated damages may be awarded if the court wishes to express disapproval of the defendant's behaviour, as a result of which the claimant has suffered more than would normally be expected in the situation.

In *Commissioner of Police of the Metropolis v Thompson* [1998] QB 498 and *Hsu v Comr of Police for the Metropolis* [1997] 3 WLR 402, there were detailed guidelines as to the directions to be given to juries in assessing damages in claims against the police, indicating that aggravated damages could only be awarded where they were claimed by the claimant and there were aggravating features in the defendant's conduct which justified the award. An award of £220,000 was reduced to £35,000.

Such damages may be awarded when a defendant persists in denying liability despite clear evidence to the contrary and warnings by the judge (*Khodaparast v Chad* [2000] 1 WLR 618, [2000] 1 All ER 525).

20.2.5 Exemplary damages

Punitive damages may be distinguished from aggravated damages in that here the intention of the court is to punish the wrongdoer by an additional award on top of the award of compensatory damages, and perhaps to deter others who might be tempted to act in the same way as the defendant. In the leading case of *Rookes v Barnard* [1964] AC 1129, it was stated that damages of this type would only be awarded in specific cases and then only very exceptionally. Three classes of cases were considered. First, where servants of the government behave in an oppressive, arbitrary or unconstitutional way. Cases concerning police misconduct and racial discrimination fall into this category, for example, *Holden v Chief Constable of Lancashire Police* [1986] 3 All ER 836. An award of this type of damages can be made even in cases of vicarious liability – *Rowlands v Chief Constable of Merseyside* [2006] EWCA Civ 1773.

In the case of *Broome v Cassell & Co Ltd* [1971] 2 QB 354, the House of Lords explained that the term 'servants of the government' could be interpreted to include people who were not actually servants of the Crown, for example, local government officers and police officers. The category does not extend to private individuals or corporations (*Gibbons v South West Water Services Ltd* (1992) *The Times*, 26 November).

The second category includes cases where the conduct of the defendant was calculated to profit from the tort in the sense that any compensation payable would be less than any profit which might be made. The cases in this category usually involve some form of libel. Some of the damages awarded in libel cases are examples of this.

Guidance on these damages was set out by the House of Lords in *Elton John v MGN Ltd* [1996] 2 All ER 35, and this is outlined in Chapter 17.

The third category of cases is where some statutes have expressly permitted payment of exemplary damages, for example, s 17(3) of the Copyright Act 1956.

It was thought that exemplary damages were confined to certain specific causes of action and could not be awarded for negligence, deceit or public nuisance. However, in *Kuddus v Chief Constable of Leicestershire Constabulary* [2001] UKHL 29, the House of Lords said that the cause of action was not relevant. What is important is the nature of the defendant's conduct and whether it falls within the categories stated by Lord Devlin in *Rookes v Barnard*.

These three categories of exemplary damages are strict and the only one which might allow for expansion in the future is the second category, in which the defendant's conduct was calculated to make a profit for himself. It is only rarely that exemplary or punitive damages are awarded, probably because to award such damages would be to usurp the function of the criminal law and to stray from the boundaries of tort itself. Nevertheless, it is possible to find high awards of exemplary damages in cases involving misconduct by police officers (see Chapter 13 on trespass to the person), for example, *George v Metropolitan Comr of Police* (1984) *The Times*, 31 March, where the claimant was the mother of a young man whom the police needed to question. Some officers forced their way into her house and ransacked it for a full half hour. They hit and kicked the claimant and then invented a false allegation to deceive the court. She was awarded £6,000 for trespass and assault and £2,000 exemplary damages.

In *Scotland v Metropolitan Police Commissioner* (1996) *The Times*, 30 January, the Court of Appeal held that if a judge provided guidance to a jury on the range of appropriate compensation in a claim for personal injuries for malicious prosecution and/or false imprisonment, it was essential that the jury understood that it was only guidance. This was analogous to the new practice approved by the House of Lords in defamation cases in *Elton John v MGN Ltd* which is discussed at length in Chapter 18.

In the rare tort cases when juries are used, s 8 of the Courts and Legal Services Act 1990 lowers the threshold for intervention by the Court of Appeal in the award made by the jury (*Clark v Chief Constable of Cleveland Constabulary* (1999) *The Times*, 13 May). This applies both where the damages are excessive and where they are inadequate.

For recent developments in relation to calculating awards in defamation cases, see Chapter 18. Note that the Law Commission is in favour of retaining aggravated and exemplary damages, but suggests renaming them 'punitive damages' and leaving the decision to award them to the judge. It is hoped that judges would make more rational and consistent awards than juries, and Courts continue to refer to the principles set out in *Commissioner of Police of the Metropolis v Thompson* [1998] QB 498 when considering claims against the police for aggravated damages.

20.2.6 Restitutionary damages

Restitutionary damages are awarded to take away from the defendant any benefits received by committing the tort at the expense of the claimant. Although tort damages are usually calculated by reference to the claimant's loss rather than the defendant's gain there are some torts in which the defendant has gained extra benefits by taking advantage of the claimant – conversion and defamation claims for example.

20.3 DEDUCTIONS FROM DAMAGES

From 1 October 1997, most state benefits received by the claimant over £2,500 for a period of five years are deductible only from special damages (Social Security (Recovery of Benefits) Act 1997). Examples include social security benefits listed under the Act and subsequent regulations which introduced a claw back scheme. The relevant social security benefits which are subject to claw back are income support, invalidity pension and allowance, jobseeker's allowance, reduced earnings allowance, severe disablement allowance, sickness benefit, statutory sick pay, unemployability supplement, unemployment benefit, attendance allowance, care component of disability living allowance, statutory disablement pension increases, mobility allowance, and the mobility component of the disability living allowance. State and other collateral benefits which are not recoverable because they would have been payable regardless of the injury suffered by the claimant are: charitable benefits (see *Redpath v Belfast and County Down Railway* [1947] NI 167; insurance payments (*Bradburn v Great Western Railway Co* (1874) LR 10 Exch 1); pensions (*Parry v Cleaver* [1970] AC 1; *Smoker v London Fire and Civil Defence Authority* [1991] 2 AC 502; child benefit; family credit; earnings top-up; guardian's allowance; one parent family benefit; maternity allowance; Industrial Injuries and Diseases (Old Cases) Act 1975 benefits; statutory maternity pay; retirement pensions; retirement allowance; social fund payments; war pensions; and widows' benefits. If a particular benefit is not mentioned in the statutory provisions it may well be deducted under the rules set out in *Hodgson v Trapp* [1989] AC 807 if it covers a loss for which tort damages are payable.

There are discussed in more detail in para 20.5.5, and it should be noted that the technical rules which determine which of the many recoverable benefits are deducted from which particular head of compensation, and how this is done, are complex. The Compensation Recovery Unit has issued guidance to assist on this matter. These issues are of great importance on a day to day basis to lawyers in personal injuries practice, but are beyond the scope of this text. Details can be obtained from the Compensation Recovery Unit.

20.4 CALCULATION OF SPECIAL DAMAGES

For the purpose of calculating the award, damages are divided into two kinds. These are special damages and general damages.

Special damages are quantifiable pecuniary losses up to the date of trial. These are assessed separately from other awards since they can be pleaded, because the exact amount to be claimed is known at the time of the trial. The amount is certain and

relatively easy to calculate. Nevertheless, basic principles of assessment apply to these in the same way as the future losses.

20.4.1 Reasonable expenses to the date of the trial

Only such expenses as are considered reasonable by the court are recoverable, and this is a question of fact. There are many cases in which the parties are in dispute about the minute details of a claim, and long and detailed schedules of damages are drawn up by both sides. This aspect of our adversarial system can be exceptionally difficult for accident victims to cope with and, although it is desirable to prevent fraudulent claims, there are some matters which should be dealt with in a particularly sensitive fashion. An example of a case which caused considerable embarrassment to a claimant is that of Margaret Westmoquette, outlined in an article in *The Times* on 22 July 1998, in which Bill Braithwaite QC explained that the claimant had suffered terrible injuries in a car accident in which her husband was killed. She had lost both legs and one arm and had been very badly burned. Defence counsel argued that her part of claim should be calculated on the basis that she would not need to buy tights, as she no longer had legs.

In the case of *Cunningham v Harrison* [1973] QB 942, the claimant claimed that he needed a housekeeper and two nurses to live in his home and look after him. He claimed that the total cost at 1973 rates was £6,000 per annum. The court refused to allow this amount on the grounds that it was unreasonably large.

Medical expenses can also be claimed under this head if they are calculable to the date of the trial. Under s 2(4) of the Law Reform (Personal Injuries) Act 1948, the rule is that in a claim for damages of personal injuries there shall be disregarded, in determining the reasonableness of the expenses, the possibility of avoiding those expenses by taking advantage of NHS facilities. Medical expenses cover any services or treatment or medical appliances or the unpaid services of relatives or friends.

In *Fish v Wilcox and Gwent HA* (1993) 13 BMLR, the 40 year old appellant gave birth to a child in 1985 who suffered from spina bifida. She had previously suffered a miscarriage and the foetus had been found on that occasion to be anencephalic and suffering from a condition called exomphalus, but the appellant had never been informed of the abnormalities in that foetus. She became pregnant again and gave birth to a normal child in 1979 but, when she was pregnant with the child who had spina bifida, she had not been given any tests or scans which might have enabled her to decide on a termination of that pregnancy. There was no dispute about liability. It was accepted that the defendant should have informed her of the abnormalities of the 1977 foetus and given her the opportunity to have her pregnancy terminated later, after appropriate scans and tests. The appellant had since developed multiple sclerosis and her marriage had dissolved. She had given up her job to care for the child, who needed constant attention but, because of her own medical condition, she would be unable to nurse her unassisted after another six months, it was estimated, from the date of the trial. The only legal issue in this case was as to the amount of damages recoverable in negligence. The appellant claimed that she should have been awarded a sum for lost earnings, in addition to the sum for the cost of nursing care which they had provided for the child. The Court of Appeal upheld the decision of the judge at first instance and held that, under the rule of *Housecroft v Burnett* [1986] 1 All ER 332, she could not claim damages twice. She would only be entitled either

to the cost of her lost earnings after giving up work or to the cost of nursing care, but not to both. As Lord Stuart Smith explained the situation: 'She cannot do two jobs at once and she is not entitled to be paid for doing two jobs at once'.

In *Lowe v Guise* [2002] EWCA Civ 197, the Court of Appeal stated that if a claimant was giving care over and above what is usual in a household, to another member of the household, damages can be awarded to cover the cost of substitute care.

In relation to private medical care and treatment, s 5 of the Administration of Justice Act 1982 discriminates between claimants who receive private medical care and those who receive NHS care. The Act states:

> Any saving to an injured party which is attributable to his maintenance wholly or partly at public expense in a hospital, nursing home or other institution shall be set off against any income lost by him as a result of his injuries.

At present, the courts do not treat as unreasonable a claimant who opts not to make use of NHS facilities (*Harris v Brights Asphalt Contractors* [1983] 1 All ER 395). Moreover, the cost of paying relatives who give up employment in order to care for their injured loved ones can also be claimed (*Donnelly v Joyce* [1973] 3 All ER 475). This is in line with the underlying principle that the law of tort compensates accident victims for expenses which are reasonably incurred, so that they may be restored to the pre-accident position, in so far as money can achieve this. Also in accordance with this is the rule that, if a tort victim receives NHS care, any saving made because he or she has been kept at public expense in an NHS institution must be set off against any income lost through injury (s 5 of the Administration of Justice Act 1982). Although these principles do have internal logic and consistency, nevertheless, in this respect, the law appears to discriminate between people who choose NHS treatment and those who decide to use private sector care. Although the law may indeed be in need of some short term amendment in this area, perhaps the long term solution lies in more radical changes than merely tinkering with the provisions of statutes.

If the claim arises on the death of an accident victim the expenses of a memorial service cannot be claimed, though ordinary funeral expenses can – *Harding v Scott-Moncrieff* [2004] EWHC 1733 (QB).

The Road Traffic (NHS Charges) Act 1999, which amends the Road Traffic Act 1988, enables NHS hospitals to recover the costs of treating accident victims on the NHS from defendants' insurers. Under the Act, the Secretary of State is responsible for collecting the charges and there is a centralised national administrative agency. The body which undertakes the collection is the Compensation Recovery Unit, which is part of the Benefits Agency. The charges are made on the basis of a simple tariff which mirrors the real cost of treatment. The Injury Cost Recovery Scheme (ICR) Regulations, introduced following a Law Commission consultation, came into force on 29 January 2007, and allow the NHS to recover costs from insurance companies for treating patients in cases in which personal injury compensation is paid. Hospitals can already recover the costs of treating people who have successfully claimed compensation for injuries suffered in road accidents. The RTA scheme now recovers around £115 million per year for the NHS and NHS costs are paid by the insurer paying the compensation.

The scheme will be most relevant where people are injured in work accidents, and it is hoped that the policy will encourage employers to raise their safety standards.

When the scheme has been fully implemented it is predicted to increase the total sum recouped annually by the NHS to around £300 million.

The Regulations follow the framework for the ICR scheme set out in Part 3 of the Health and Social Care (Community Health and Standards) Act 2003 and the Health Act 2006, which provide for the establishment of a scheme to recover costs of providing treatment to an injured person where that person has made a successful personal injury compensation claim against a third party.

The NHS charges recovery scheme is operated by the Compensation Recovery Unit (CRU) of the Department of Work and Pensions. The schemes apply only to NHS treatment in NHS hospitals, but the ICR scheme will also facilitate the recovery of the costs of ambulance services to take the injured person to an NHS hospital, which are not covered by the RTA scheme. The cost of treatment provided in the primary care sector (GP treatment) is not recoverable under either scheme.

20.4.2 Expenses to cover special facilities and living accommodation

Expenses to cover the cost of special living accommodation or other capital assets can also be claimed as part of the award of special damages. The measure of damages in this case will be the sum spent to obtain the special facility and its running costs, but not the capital cost of any facility, such as a car, which the claimant would have had anyway. Therefore, in the case of a car, the cost of its special adaptation to suit certain disabilities would be claimed, but not the full cost of the vehicle itself.

In the case of *Povey v The Governors of Rydal School* [1970] 1 All ER 841, the claimant received an award of £8,400 to cover the cost of the renewal of a special hydraulic lift to take a wheelchair in and out of a car.

A large amount of money can be spent to adapt a house for people with particular disabilities, for example light switches may need to be moved lower down the wall for people in wheelchairs, special lifts may need to be installed to allow people to negotiate stairs, special equipment may be needed in bathrooms and so on. All this can be claimed as part of special damages to the date of trial. This usually consists of the net loss from the date of the accident to the date of the trial with salary updated covering promotions, increments and so on, but of course the situation is more complicated if the claimant was previously self-employed and has lost commission. A claimant receiving sick pay equivalent to normal pay has suffered no loss, and as tort damages are intended to compensate for losses there will be no recovery (*Turner v The Minister of Defence* (1969) SJ 585). If an employer lends money to the claimant until the trial which covers the difference between wages and sick pay, this can be claimed.

If the claimant was covered by first party insurance, any payment by the insurance company will not be deducted.

The Court of Appeal held in *Hardwick v Hudson and Another* [1999] 1 WLR 1770, [1999] 3 All ER 426 that if the claimant's wife gives her unpaid services to her husband's business because he is unable to run it as a result of his injury, no award will be made to compensate for her time and effort. Contrast this principle with that relating to the awards payable for voluntary nursing and personal care given to injured claimants.

The Courts are cautious about including sums to cover new technologies to support disabilities. In *Patel v Wright* [2005] EWHC 347 (QB) a modest award was given to cover the cost of video telephone calls at current prices where the claimant had suffered traumatic brain injury at the age of 30.

In appropriate cases it is possible to obtain an interim award. For example, in *Osunde v Guy's and St Thomas' Hospital NHS Trust* [2007] EWHC 2275 (Fam), it was held to be in the claimant's interests that an interim award be made so that appropriate accommodation could be secured in which a disabled child could live more comfortably even before the final award has been decided upon. A second interim sum of £850,000 was paid to a child who had been born with severe disabilities as a result of the admitted negligence of the defendants. Although the final award of damages had not yet been calculated, the parties were in agreement that the claim was worth at least £1.7 million. One interim payment of £50,000 had already been made, and the court found that the second sum that was sought was well within the final award that was likely to be made, so the interim payment here would be appropriate. It was emphasised that it was not for that court to decide how any money paid to the claimant would be spent – *Tinsley v Sarkar* [2004] EWCA Civ 1098 and *Stringman v McArdle* [1994] 1 WLR 1653.

These awards cover the net loss from the date of the accident to the date of the trial with salary updated covering promotions, increments and so on, but of course the situation is more complicated if the claimant was previously self-employed and has lost commission. A claimant receiving sick pay equivalent to normal pay has suffered no loss, and as tort damages are intended to compensate for losses there will be no recovery (*Turner v The Minister of Defence* (1969) SJ 585). If an employer lends money to the claimant until the trial which covers the difference between wages and sick pay, this can be claimed.

20.5 CALCULATION OF GENERAL DAMAGES

Although some solicitors refer to all financial losses as 'specials', in fact, the correct classification of future financial losses is under the heading 'general damages'. The term 'general damages' covers all losses which are not capable of exact quantification.

20.6 PECUNIARY LOSSES

General damages can be subdivided into pecuniary and non-pecuniary damages.

20.6.1 Loss of future earnings and initial care

The court needs to arrive at a sum which is the present value of a future loss, and the way in which the courts approach this problem is to employ the notions of multiplicand and multiplier.

The multiplicand is an annual sum to represent the claimant's net annual lost earnings at the date of the trial. This essentially is a question of fact.

The multiplier, on the other hand, is a notional figure which represents a number of years by which the multiplicand must be multiplied in order to calculate the future losses. It is impossible to predict an exact figure.

A number of possibilities are taken into account when arriving at the notional figure given to the multiplier, for example, the likelihood that a young woman might give up work to care for her children should she get married.

In *Sowden v Lodge* [2004] EWCA Civ 1370 the Court of Appeal accepted that an award of damages could be made on the basis that local authority residential care would be topped up by payment for further care provision, as long as that was proved necessary.

Essentially, the multiplier is extremely arbitrary. It can never be precise and is calculated by looking at previous comparable cases. Even in the case of young accident victims who would have had a lifetime of earning before them, it is unusual to see a multiplier of higher than 19. The prospect of introducing higher multipliers has been discussed and rejected in several cases. For example, in *McIlgrew v Devon CC* [1995] PIQR P66, the Court of Appeal reduced a multiplier of 22 to 18 in a case involving a seriously injured claimant. Sir John May said:

> Unless there is some really radical change in the economic situation or in the rates of interest commonly obtainable, I think that the maximum award on the conventional basis should still not exceed its present maximum of 18 years' purchase.

The multiplier never represents the actual number of potential years of earning left to the claimant because it is intended to take into account the uncertainty of prediction, for example, the possibility that a claimant may have lost his job at some future point, or perhaps, looking at family history, the claimant would have a heart attack in 20 years' time and have to give up work. If the wage earner had been claiming benefit and 'moonlighting', he or his dependants will not be able to claim for loss of the illegally acquired income on grounds of public policy (*Hunter v Butler* [1996] RTR 396).

The expectation is that the claimant will invest any money which he or she receives in a lump sum and use the income, and possibly some of the capital, to cover living expenses during the years when he or she would have been earning, so that, by the time of retirement, the whole of the sum awarded would be exhausted. Multipliers used to assume that the capital sum which will be invested would yield 4.5% after tax and inflation are taken into account. The real rate of return at any given time may be substantially higher than that, however. Interest rates often change many times in any given year and there are occasions when investors make losses, and other occasions when they can make substantial gains. So, the figure of 4.5% was purely notional. The real problem is that the claimant's investments are expected to keep pace with inflation because rates of inflation also vary from time to time.

The rationale for this approach was stated in *Cookson v Knowles* [1979] AC 556 by Lord Diplock, who explained that:

> Inflation is taken care of in a rough and ready way by the higher rates of interest obtainable as one of the consequences of it, and no other practical means of calculation has been suggested that is capable of dealing with so conjectural a factor with greater precision.

However, the possibility of a practical solution was provided by the introduction of Index Linked Government Securities (ILGS) in 1981 which make it possible to predict almost exactly the loss of income for which the claimant is to be compensated. ILGS carry no risks when compared with even the most careful investment policies. Thus, if the loss is £10,000 per annum, for example, the claimant can be awarded compensation which, if invested in ILGS, will provide that sum. The Law Commission in its report, *Structured Settlements and Interim and Provisional Damages* (Law Com 224, 1994, London: HMSO), favoured moving away from the present arbitrary system towards a system in which the rate of return would be based on ILGS net return.

The House of Lords ruled in favour of claimants in three cases concerning the rate at which the courts should assume lump awards should be invested when calculating damages. In *Page v Sheerness Steel, Wells v Wells* and *Thomas v Brighton HA* [1999] 1 AC 345 (conjoined appeals), it was decided that lump sum payments of compensation should be based on a rate of return of 2.5–3% to allow for the fact that claimants are entitled to invest their awards in safe, index linked government securities. Before this decision, damages were lower because claimants were expected to take greater risks by investing in equities and the courts based the calculation on a rate of return of 4.5%. In arriving at their conclusions, their Lordships referred to the views of textbook writers and to Law Commission Report No 224 (1994), which was based on comprehensive research. As was widely expected, new record awards of damages have been made following these decisions.

Although the NHS was promised a large increase in funding, this decision of the House of Lords could mean that much of the extra allocation of cash could be swallowed up in higher damages paid to claimants who bring successful medical negligence claims. This would make conditional fee agreements more attractive in cases where there are large claims for future care.

There followed several very high awards, and the trend continues. For example, in *Mansell v Dyfed Powys HA* (1998) unreported. The claimant was 11 years old when the case was settled. The incident which led to the claimant's injuries had occurred at or around the time of his delivery, when he was starved of oxygen during two failed attempts to deliver him using obstetrics forceps. He was born by emergency Caesarean section but was severely brain damaged and now requires constant 24 hour care. Although his life expectancy is normal, the claimant has problems communicating and is unable to use his arms and legs. It is necessary to turn him up to 50 times every night and he cannot wash or dress without assistance. His IQ is within the normal range, but the long term prognosis is that his physical condition will never improve. A global award of £3,281,199.10 was made, and the cost of future care for the claimant was estimated at around £100,000 per annum.

It had been predicted that awards of damages could be as much as 40% higher, following the House of Lords ruling. However, this is merely one factor which will lead to spiralling awards of damages. Solicitors and counsel are more meticulous than ever before in the compilation of schedules of damages. Details of the sums of money which will be necessary to provide adequately for the claimant's future care are painstakingly collected in consultation with numerous experts who assess in detail what equipment, nursing, medical and other care the claimant is likely to need. Another factor adding to the expense is the development in technologies which are leading to the provision of ever

more sophisticated and expensive equipment to enable injured claimants to have better quality of life and to communicate their needs to their carers.

Of course, all this presupposes that the claimant will invest the money responsibly and not simply spend it on having a good time. Courts have, in the past, refused to consider expert actuarial evidence and the likely future rates of inflation and will not take inflation into account at all in relation to the future (see *Cookson v Knowles*). In *Taylor v O'Connor* [1971] AC 115 the House of Lords explained that courts are right to be wary of admitting actuarial evidence because it can give a false impression of accuracy. Logically, this means that claimants are under-compensated because of inflation which seldom runs at 0%. It would seem sensible to use actuarial evidence in order to work out more exactly what the claimant should be awarded. However, although the courts have shown a distrust of this type of evidence, the publication of the 'Ogden' tables by the Government Actuaries department, now in their 4th edition, have changed the approach to some extent. In *Wells v Wells* [1999] 1 AC 345 the House of Lords indicated that the Ogden Tables could be used as a starting point for calculations. In *Barry v Ablerex Construction (Midlands) Ltd* [2001] EWCA Civ 433, Latham J had made reference to the fact that the Lord Chancellor had, at that time, not acted to set a new discount rate under s 1(1) of the Damages Act 1996. Accordingly, he made an award of damages in a personal injury claim on the basis that it was appropriate to reduce the discount rate applicable in calculating multipliers to 2%. The Court of Appeal did not accept this rate and put the figure at 3%.

The Lord Chancellor finally fixed the rate of return that should be applied to calculations of damages for future pecuniary losses at 2.5% (The Damages (Personal Injuries) Order 2001).

In *Cooke v United Bristol Health Care and Others* [2003] EWCA Civ 1370 the Court of Appeal held that expert evidence concerning the method of calculating future loss had correctly been excluded because it amounted to an illegitimate attack on the discount rate set by the Lord Chancellor under s 1 of the Damages Act 1996. The case involved conjoined appeals against separate orders refusing to admit expert evidence concerning the calculation of future losses in personal injury claims. The claimant in each case had been permanently disabled. The claimants had sought to introduce the evidence of an experienced chartered accountant who advised litigants on the financial aspects of legal disputes. His evidence would have been that the future cost of care in the case of each claimant would have been grossly underestimated if the conventional method of assessing damages were applied, because the cost of care rose at a greater rate than retail price index. The accountant would have argued that to deal with the resulting shortfall it was necessary to produce revised multiplicands with stepped increases over time. The defendants contended that acceptance by a trial court of the accountant's submissions would nullify the discount rate set by the Lord Chancellor in the Damages (Personal Injury) Order 2001 SI 2001/2301 under s 1 of the Damages Act 1996 and would therefore be illegitimate.

The Court of Appeal held, accepting the defendants' submissions, that the introduction of the accountant's evidence amounted to an illegitimate attempt to subvert the Lord Chancellor's discount rate. The multiplicand was necessarily based on current costs at the date of trial. The substance of the appeals constituted an illegitimate assault on the Lord Chancellor's discount rate and on the efficacy of this type of case which did not fall

within the exception in s 1(2) of the Act as meriting exceptional treatment. Accordingly the appeals were dismissed.

This is one of several attempts to challenge the rate of 2.5%. See also *Warriner v Warriner* [2002] EWCA Civ 81, and *Page v Plymouth Hospitals Trust* [2004] EWHC 1154 (QB).

Index linking can be unfair to accident victims in some cases, and a Court of Appeal ruling in *Flora v Wako (Heathrow) Ltd* [2007] EWCA Civ based on research at Cardiff University could lead to fairer compensation to reflect the true cost of accidents. The research was conducted by a labour economist, and her evidence questions the use of the Retail Price Index in every case to increase future earning-based losses, by demonstrating that historically earnings have increased faster than prices. It is now open to the courts to use its discretion to choose an index other the Retail Price Index for the escalation of future losses and expenses when compensation is paid using periodical payments.

20.6.2 Income tax

Loss of future earnings can form a substantial portion of an award, depending on the prospects of the claimant. In *Dixon v John Were* [2004] EWHC 2273 (QB) a university student who was rendered unemployable by his injuries was awarded damages on the basis that he would have obtained a good job in the financial services sector which would have included a range of additional benefits.

When calculating loss of future earnings, the court considers the net annual earnings of the claimant after tax which would have been deducted. This rule was established by the House of Lords in the case of *British Transport Commission v Gourley* [1956] AC 185. This, like future inflation, presents a problem as it is impossible to predict future rates of income tax and the calculation must be made according to current rates. Such a calculation will mean that the claimant may be over-compensated or under-compensated and, worse, the rule means that the claimant may have to pay double the tax on the money, because after it has been invested it will, of course, be subject to taxation. This was pointed out by Lord Oliver in the case of *Hodgson v Trapp* [1988] 3 All ER 870 (see also the Law Commission Report 224 (1994) for further discussion of this matter).

Although the damages award is not subject to income tax, tax is payable on investments made using the sum awarded by way of damages. The House of Lords ruled in *Hodgson v Trapp* that it is not in order for the courts to increase a multiplier to allow for higher rate taxation.

It should be noted that even if the case does not involve compensation for personal injuries, the income tax position should be taken into account when the award is assessed. In *Deeny v Gooda Walker Ltd (No 2)* [1996] 1 WLR 426, the House of Lords held that damages awarded to the Lloyds' names against their managing agents for negligently conducting their underwriting business were taxable in the hands of the claimants. The receipt of damages by the names constituted a receipt of the names' underwriting business and was therefore taxable.

It is the insurance company which gains as a result of this rule, not the defendant, since the tax which has been deducted is never claimed back by the state.

Social security contributions are also deducted in the calculation of future loss of earnings in the same way as income tax, and like income tax deductions these can never be accurately calculated.

Although loss of pension rights as a result of occupational and other pensions not being paid (as the taxpayer will no longer be earning) are compensatable, these are calculated as a separate head of damages.

Furthermore, in calculating loss of future earnings, the courts will take into account any possible promotions and salary increases from which the claimant may have benefited during his career.

If the multiplier is likely to be on the low side the claimant may benefit from the settlement being delayed, and during that time special damages would be allowed to accumulate and would, in fact, reflect the actual loss suffered.

An example of the calculation of damages to be found in a recent case is that in *Shanks v Swan Hunter Group plc* 24/5/2007, where the claimant, had suffered mesothelioma as a result of negligent exposure to asbestos whilst he was employed by the defendant. The claimant was 59 years old at the date of the trial, and had been employed as an electrician by the defendant for four years, during which he had been working in close proximity to people who were working with asbestos. That was the claimant's only exposure to asbestos during his working life, and he had eventually emigrated to Australia, where he again found work as an electrician and later moved into supervisory and management roles and eventually set up his own electrical company. The claimant was married, and had two children, but his son had died leaving a wife and two children, and the claimant had promised to help his grandchildren financially where necessary. He had enjoyed professional success and was contracted to complete several projects. There was sufficient work for him for several years, to his retirement, but he and his wife had returned to the UK. As a result of his serious illness the claimant could perform only minimal tasks and he suffered constant chest pain and fatigue, and he had an estimated life expectancy of about 2 years.

General damages of £70,000 were awarded for pain, suffering and loss of amenity. The claimant had experienced mild symptoms of mesothelioma for two years, and would suffer increasing symptoms and greater disability for another two years until his death. He had been fit before contracting the disease, but at the time of the trial could manage walking very slowly. He would have expected to work an average of 2,500 hours a year at a wage of A$90 – (A$130 per hour) until the age of 70. A deduction of 40% was made to reflect the claimant's personal expenditure, taking account of his increasing future commitment to his grandchildren, so awards of £139,180 and £551,163 were made for past and future loss of earnings respectively. The rest of the award was made to cover the addition of expenses for medical treatment, loss of other contractual benefits, relocation costs and care costs and a total sum of £948,565.71 was awarded.

20.6.3 The lost years

At one time, the prevailing rule was that established in the case of *Oliver v Ashman* [1962] 2 QB 210. The Court of Appeal had held in that cases in which the claimant's life expectancy was reduced, damages for future loss of earnings would not be available

during the years of life which were lost to him. He would, in effect, only be able to obtain damages for the years that were left.

This rule was regarded as unfair and the House of Lords took the opportunity to change it in the case of *Pickett v British Rail Engineering Ltd* [1980] AC 136, so that claimants who are still alive at the time of trial may now recover damages from lost earnings even for the years which are lost to them, although there is a deduction for living and other expenses during that period.

The present position, then, is that dependants of claimants who are still living at the time of the trial will not lose out on the money which they would have inherited as long as they are favoured in the claimant's will, or can take on intestacy.

Relatives of deceased claimants can, of course, claim in their own right for loss of the breadwinner under the Fatal Accidents Act 1976, and this claim subsumes the lost years of the deceased.

The right to claim for the lost years does not survive for the benefit of the claimant's estate under the Law Reform Act 1934 if the claimant has died by the time the trial is held. This is to avoid double compensation.

20.6.4 Loss of future earnings and very young claimants

Calculation of the awards of loss of future earnings for very young people who have not yet started to earn is, of course, extremely difficult and the awards in these cases are usually very low (*Gammel v Wilson* [1981] 1 All ER 578). Exceptionally, there may be an award if a child, for example, showed great promise perhaps as a pianist. There are several cases in which the courts have used the average earnings index as the multiplicand, which does make a significant difference to the final figure.

20.6.5 Deductions

As the victims of accidents often receive financial support from several sources in addition to tort, for example, income support, sick pay, private insurance and, in some cases, from charities, there may be certain deductions made from the damages to account for these. These are listed below:

- **Private insurance payouts**
  These are not deducted from damages. The reasoning behind this appears to be that the claimant's foresight and prudent planning before the accident should not benefit the defendant by reducing any damages which he or she may have to pay (*Bradburn v Great Western Rly* (1874) LR 10 Ex 1).

- **Payments by charities and other gifts**
  Often, when there is a major disaster such as the Hillsborough stadium accident in which many people were killed or injured in a crush at a football ground, or the *Marchioness* disaster, when a pleasure boat collided with another vessel in the Thames, and several people were killed and injured, charitable funds are established, on a wave of public sympathy, to collect money to assist potential claimants. Other long established charities such as the Royal National Institute for the Blind also give

payments to accident victims who may have been involved in individual incidents rather than mass accidents. Any payments made from such charitable sources are not deducted from damages. Gifts from friends are treated as 'benevolence exceptions' in a similar way to charitable payments. Also, in *Needler Financial Services Ltd v Taber* [2002] 3 All ER 501 a windfall payment received by the claimant co-incidentally was not deducted from his award. In *Gaca v Pirelli* [2004] EWCA Civ 373 the claimant had received a large sum under a group policy paid for by his employer who was also the defendant. The Court of Appeal held that the sum received by the claimant should be deducted from his final award. *Ex gratia* payments by a tortfeaser should not normally fall within the so-called 'benevolence exception' (see *McCamley v Cammell Laird Shipbuilders Ltd* [1990] 1 All ER 854). For these and other reasons, victims of mass accidents are frequently in a stronger position to obtain compensation than individual accident victims, not least because the task of collecting and evaluating evidence is often undertaken by a public inquiry. They are also able to take advantage of group litigation procedures (Civil Procedure Rules 1998, Practice Direction 19 2000).

- **Occupational disability pensions**
  In the case of *Parry v Cleaver* [1970] 3 WLR 542, it was held that a policeman who received an occupational disability pension should not have that deducted from the lost future earnings award. Both he and his employer had contributed to the pension during the term of his employment and Lord Reid thought that there was no real difference between this and any other form of insurance. However, the policeman had taken up a less demanding clerical job elsewhere and it was held that wages from this alternative employment should be set off against loss of future earnings for police work which he was no longer able to do. In *Smoker v London Fire and Civil Defence Authority* [1991] 2 All ER 449, the House of Lords confirmed *Parry v Cleaver* and held that the rule applied whether or not the pension was contributory.

- **Occupational sick pay**
  Sick pay will be deducted from the award of damages if it is paid as part of the claimant's contract of employment. Such pay is regarded as a partial substitute for earnings and therefore not like a pension which would be payable after the employment ceased (*Hussain v New Taplow Paper Mills Ltd* [1988] AC 514). However, if payments of sick pay by the employer are purely gratuitous, they will not be deducted as they are akin to charitable payments unless the employer is also the defendant in the case.

- **Redundancy payments**
  Sometimes, the claimant will be made redundant because, as a result of the injuries sustained, he or she will be more likely to be selected for redundancy in a proper scheme which prioritises all long term sick employees for redundancy. Any redundancy payment would then be deducted from damages (*Colledge v Bass, Mitchells and Butlers Ltd* [1988] 1 All ER 536). However, if the employee would have been made redundant anyway under the scheme which the employer operated regardless of the injury, there will be no deduction of redundancy payments.

- **Social Security benefits**
  The Social Security Act 1989 which has been amended by the Social Security (Recovery of Benefits) Act 1997 (see 20.3, above) changed the previous position for claiming back benefits paid out by social security. It applies only to recovering benefits from personal injury awards. If, for example, the damages are awarded purely for economic loss, there is no deduction (*Rand v East Dorset HA* [2001] PIQR P1). As explained above there is now a system for recovering social security benefits from compensators (usually insurers) using the Compensation Recovery Unit (CRU). The relevant period prescribed is five years from the date of the accident, injury or first claim for the disease, although a payment in final discharge of the claim before the end of the five years also ends the relevant period. After the relevant period the provisions for recouping the payments do not apply. The relevant benefits are set out in the legislation, and Sched 2 of the Act specifies the heads of damages against which certain benefits are recovered. The value of certain specified benefits received by the claimant in the relevant period is deducted from damages before they are paid. The sum is paid directly to the Secretary of State. Under the 1997 Act, no deductions may be made from awards of general damages and only specified benefits may be deducted from sums awarded for loss of earnings, cost of care and loss of mobility. Even if the amount of recoverable benefits is greater than the amount that can be deducted from the damages, the defendant or his insurer must pay the full amount of these benefits to the Secretary of State (see 20.3, above).

The result of the changes made by the 1997 Act is that judges now specify the precise amount of each award that is attributable to earnings lost. The Act specifies that certain compensation payments are exempted – for example, awards under the Criminal Injuries Compensation provision.

There have been many criticisms of the law in this area, not least because in some cases claimants may receive double compensation with the result that the compensation payable does not reflect actual losses of the claimant. The law has also been criticised for creating difficulties from a practical point of view for companies, employers and other compensators who are required to reimburse the Department of Social Security when making compensation payments. In *Wisely v John Fulton (Plumbers) Ltd (No 2)* [2000] 1 WLR 820, the House of Lords held that a claimant in a personal injuries case was entitled to recover interest on all his damages for past loss of earnings where he had received social security benefits which would be repayable to the Secretary of State for Social Security by the tortfeasor.

20.6.6 Deductions from the multiplier

Deductions may also be made by adjusting the multiplier downwards to allow for certain future contingencies. In an attempt to assess the appropriate sum which should be awarded for loss of future earnings, the courts gaze into a imaginary crystal ball, and try to make the award in the light of what might have been the claimant's future.

Points are subtracted to take account of possible early retirement through illness, based on family history or the claimant's own medical history. A previous back problem revealed in the claimant's medical notes (which are now available to courts in their

entirety) might reduce an award. The possibility of the claimant's having given up work for several years to deal with child rearing has also been regarded as a relevant factor.

For example, in the case of *Moriarty v McCarthy* [1978] 1 WLR 155, a young woman was seriously injured in a car accident. She was disfigured by scars, and suffered back pain and a certain loss of bladder control. Points were deducted from the multiplier to allow for the years when the court considered that she would have given up work to get married and bring up her family. The assumption of the court in that case was that all women marry, and that all married women do have children and that they do give up work in order to look after them for some time. It is doubtful, however, whether this assumption accords with reality and it is unfair to penalise young women in this way. The unfairness was compounded in *Moriarty v McCarthy* by the fact that the courts awarded exactly the same sum as was deducted by the alteration of the multiplier, as compensation for loss of marriage prospects through disfigurement and loss of sexual function. This humiliating procedure for claimants could be avoided by simply making the full award for loss of earnings in the same way as an award would be made to a young man in similar circumstances.

Some courts now adopt a more realistic and up to date approach to this problem, as in the 1985 case of *Hughes v McKeown* [1985] 3 All ER 284 in which Leonard J decided that there should be no deduction from the multiplier in the case of a woman who might at some future date give up work to look after her children. The reasoning was that she would be working in her home contributing to the general household and her husband would be taking advantage of the work she was doing in child rearing and household chores. In these cases, loss of marriage prospects should be compensated in terms of the loss of companionship and emotional support she might have received from a husband rather than by reference to any financial support a woman might have from being married. However, although the Court of Appeal appears to have endorsed this approach in *Housecraft v Burnett* [1986] 1 All ER 332, in that case it was considered that a small discount should be made from the multiplier if an award is made for loss of marriage prospect, and this is more in line with the older cases. There are Human Rights issues involved in some of these decisions which need to be taken into account in modern law, and it is unlikely that the more extreme approach in *Moriarty v McCarthy* would withstand the scrutiny of the courts today.

In *Herring v Ministry of Defence* [2003] EWCA Civ 528 the judge concluded that there was a very strong probability (75%) that the claimant would, but for his injuries, have become a police officer. However, he applied a 25% discount when assessing the multiplier, to account for contingencies such as the incompatibility of a police career with family life. The Court of Appeal disagreed with this approach partly because it was too speculative, and in any event the trial judge had found that the claimant could well have found some other career.

20.6.7 Other future losses

There are many ways in which future financial losses could be incurred. It is important for the claimant to take account of all of these when calculating damages.

The courts will not make an award if the proposed project is to be contrary to public policy, or is unrealistic and unlikely ever to be achieved. In *Briody v St Helen's and*

Knowsley HA [2002] 2 WLR 394, [2001] EWCA Civ 1010, the claimant, who had been left infertile as a result of clinical negligence, claimed compensation to cover the cost of funding surrogacy treatment, in addition to claiming under more usual heads of damages. The claim for surrogacy costs raised a novel issue, as it had never been claimed as a head of damages in the past, though the courts are not precluded from recognising new heads of damages if necessary. The claimant submitted that the defendants had deprived her of her child-bearing capacity, and, so far as possible, compensatory damages should put the victim in the position she would have been in had it not been for the negligence. The defendants, she argued, should pay for her attempts to have a surrogate child. The surrogacy costs would have included treatment in California, and the judge took into account evidence from a range of sources, including evidence of infertility experts. She considered the current guidelines of the Human Fertilisation and Embryology Authority, and the most recent view of the British Medical Association and a series of Family Division cases, and referred to the 1985 Act.

The judge took the view that it was in order to consider whether the damages sought would be likely to be successfully applied to achieve the desired objective, and concluded that, on the facts, there were very poor prospects of success for a surrogacy arrangement. Indeed, the chances of success were so low that it would be unreasonable to require the defendants to fund the treatment. It was not the business of the law of tort to provide a legal remedy which is doomed to almost inevitable failure and is outside the law. As a matter of public policy, the claimant was attempting to obtain damages to acquire a baby by a method that did not comply with the present law. Although a court could retrospectively approve an adoption in the interests of a surrogate child, it was an entirely different matter to award damages to enable an unenforceable and unlawful contract for surrogacy to be entered into. The claimant did succeed in obtaining some compensation to cover the psychological distress she had suffered as a result of her infertility.

- **Future care**
  The claimant is entitled to an award of damages to cover the cost of future care. In some cases, notably those involving serious brain damage or paralysis, when the claimant needs constant attention, this sum will form the highest component of the award, and it is these cases which are most likely to involve structured settlements. Competent and experienced solicitors acting for claimants are able to produce detailed lists of claimants' future needs in terms of care, and 'care specialists' are able to assist in the compilation of 'checklists' for future care. Teams of experts are often enlisted to assess the nursing requirements, technological aids, speech therapy, occupational therapy, and so on which will be required by the claimant in the future. This will be a question of fact for the court to consider in each case, and architects, nurses, physiotherapists, neurosurgeons, gardeners, house decorators and other experts may need to be consulted before a really comprehensive list of requirements can be completed.

- **Future medical fees and nursing care**
  It will again be a question of fact for the court to decide as to whether the claimant requires specialist care and what form that should take in the future. Prospective private medical fees will form part of the award and the court will not treat it as unreasonable that the claimant did not make use of NHS facilities (s 2(4) of the Law

Reform (Personal Injuries) Act 1948; *Harris v Brights Asphalt Contractors*). However, by s 5 of the Administration of Justice Act 1982, any saving to the claimant through being kept in an NHS hospital at public expense must be off-set against income lost through the injury. Nursing fees for the future can be claimed, and the cost of paying a reasonable sum to a husband, wife or other person who gives up work to give full time care to the claimant can also be claimed, though this claim is that of the claimant, not of the third party in his or her own right (*Donnelly v Joyce*). The Courts now permit a private top-up of local authority care – *Sowden v Lodge* [2004] EWCA Civ 1370. Third parties are theoretically encouraged by the law to be charitable by providing their services to injured relatives and friends. In *Giambrone v JMC Holidays Ltd* [2004] EWCA Civ 158 the Court of Appeal held that claims for the cost of care provided by non-professional carers on a gratuitous basis should be allowed. In *Hunt v Severs* [1994] 2 All ER 385 a voluntary carer was also the defendant. The claimant had been seriously injured in a motorbike accident caused by his negligence, and after she was discharged from hospital she married him and he continued to care for her on a voluntary basis. The Court of Appeal had made an award totalling £77,000 to the claimant which included sums representing the value of services rendered to her by the defendant in the past and for the future. What this meant in fact was that a tortfeasor who gave services voluntarily to the claimant could have the cost of such services included in the damages awarded against him (and paid by his insurance company). He was thus providing services to the claimant and also paying for them. The House of Lords reversed the decision of the Court of Appeal, deciding that, if a voluntary carer is also the defendant, there is no basis for an award of damages to cover the care so provided. It was accepted, however, that as a general principle a claimant is entitled to recover the reasonable value of services rendered by a relative or friend who provides nursing or domestic care of a kind required by the claimant's injuries. The only issue in this case was what the position is in law if the carer is also the defendant.

The Law Commission has recommended reform of the rule.

In *A v B Hospitals NHS TRUST* [2006] EWHC 1178 (QB) allowance was made in the course of the calculations for care to the date of the trial by a team of seven carers because of the special needs of the claimant who was a victim of clinical negligence. The future care required by the claimant should be assessed by reference to the phases of his future life: phase 1 to age 8; phase 2 to age 10.5; phase 3 to age 14; phase 4 to age 19; and phase 5 from age 19. The claimant's voluntary and involuntary movements, and his size and weight made it essential for two carers to undertake the task for most of his life.

- **Future financial management**
  The claimant was able to claim a sum for future management of his financial affairs, and for negotiating with the Court of Protection in *Hodgson v Trapp* [1988] 3 WLR 1281. However in *Page v Plymouth Hospitals NHS Trust* [2004] EWHC 1154, the judge ruled that the cost of investment advice and fund management charges were not recoverable. The claim was an indirect attack on the discount rate of 2.5% fixed by the Lord Chancellor.

- **Cost of bringing up children**
  There was a series of cases in which the courts had awarded damages to cover the cost of bringing up children born after unsuccessful sterilisation operations. The courts recognised the problems and attempted to grapple with the difficulties since claims of this kind were first made in the UK in the early 1980s, but not until November 1999 has the issue been considered by the House of Lords. In the Scottish case of *McFarlane v Tayside Health Board* [1999] 3 WLR 1301, the difficult issues involved in these cases were carefully analysed, and the House of Lords concluded that parents of a healthy child born after a failed sterilisation were not entitled to damages in respect of the cost of caring for and bringing up the child. This case concerned a married couple, the claimants, who had been assured by doctors employed by the Health Board that the husband was no longer fertile after undergoing a vasectomy operation. Some time later the wife became pregnant and gave birth to a healthy daughter in May 1992. Mr and Mrs McFarlane claimed general damages of £10,000 for the pain and distress suffered by Mrs McFarlane during the pregnancy and birth, and also a sum of £100,000 to cover the cost already incurred and likely to be incurred in the future in bringing up the child. Both parents stated that they loved and cared for the child and had accepted her as part of their family, even though, for economic reasons, they had not wanted another child. In the course of its deliberations, the House of Lords reviewed the earlier cases dealing with the question of damages for failed sterilisation in the UK and in other jurisdictions. It was recognised by all but Lord Millet that the claim by the mother for the pain and inconvenience of childbearing should be compensated. Although different approaches were taken by all five judges to the question of compensation for the cost of rearing the child, they were unanimous in their view that these expenses should not be recoverable. Lord Slynn treated the claim as one which fell into the broad category of economic loss. It should be handled with caution, in the light of the reluctance of the courts to create liability for pure economic loss in the absence of a closer link between the act and the damage than were foreseeable. His Lordship concluded that it would not be fair, just and reasonable to impose a duty on the doctor or his employer in the circumstances of this case (*Caparo Industries plc v Dickman* [1990] 2 WLR 358).

  Lord Steyn did not consider the question of duty of care in depth. He concentrated on the question of distributive justice, taking the view that law and morality are inextricably woven and, although there might be some objections to the fact that the House of Lords acts, on occasion, as a court of morals, the court must apply positive justice. He approached the matter from the perspective of the 'notional commuter on the Underground' and concluded that such a person would not be in favour of awarding compensation to the parents equivalent to the cost of bringing up the child to his or her 18th birthday. Continuing in this pragmatic vein, he said:

  > The realisation that compensation for financial loss in respect of the upbringing of a child would necessarily have to discriminate between rich and poor would surely appear unseemly. It would also worry them that parents may be put in a position of arguing in court that the unwanted child, which they accepted and care for, is more trouble than it is worth.

His Lordship was anxious not to perpetuate the practice of masking the true reasons for the decision with formalistic propositions by denying a remedy on the grounds that there was no foreseeable loss or no causative link between the act of negligence and the damage. He said:

> Judges ought to strive to give the real reasons for their decision. It is my firm conviction that where judges have denied a remedy for the cost of bringing up an unwanted child, the real reasons have been grounds of distributive justice . . . Judges' sense of the moral answer to a question, or the justice of the case, has been one of the great shaping forces of the common law.

Lord Hope tried to strike a balance between the intangible benefits which parents receive in terms of love and affection and, in later life, support from their children, against the cost of rearing them. He took the view that it would not be fair, just or reasonable to leave these intangible benefits out of the account. As it is impossible to calculate the cost of those benefits in money terms and set them off accurately against the cost of bringing up the child, he argued that:

> . . . the logical conclusion, as a matter of law, was that the costs to the parents of meeting their obligations to the child during her childhood were not recoverable as damages.

Lord Clyde considered the matter from the starting point that any damages awarded should put the injured party in the same position as he or she would have been in if he or she had not sustained the wrong. In this instance, without surrendering the child, the parents could not possibly be put into the same position as they would have been in had the negligent act never been committed. To relieve the parents of their financial obligations or caring for the child did not seem reasonable in his view, because it would be going beyond what should constitute a reasonable restitution.

Lord Millett emphasised that the admissibility of any head of damages is a matter of law, and if the law took the approach that an event was beneficial, claimants could not make it a matter for compensation, merely by saying that they had not wanted that event to happen. In his view:

> Claimants are not normally allowed, by a process of subjective devaluation, to make a detriment out of a benefit . . . The law must take the birth of a normal healthy baby to be a blessing, not a detriment.

The final ruling by the House of Lords coincides with that in the earliest case on this point to be decided by a court in the UK (see *Udale v Bloomsbury HA* (1999) unreported). The judge in that case made the poetical observation that, although this world be a vale of tears, the birth of a child is 'a blessing and an occasion for rejoicing'. However, two years later, the case of *Emeh v Kensington and Chelsea HA* [1985] QB 1012 established that claims for the cost of bringing up a child can succeed. Many couples who have been able to establish negligence in failed sterilisation cases have since received the benefit of large settlements or court awards.

The definitive ruling in the *McFarlane* case is to be welcomed, because the law in this area is now certain, at least if the child is born healthy. In recent years, however, many of these claims have failed at the causation stage. It has been very

difficult to prove that the parents had not been warned of the possibility of natural reversal of the sterilisation surgery. Even if they have *not* been warned, it has been argued successfully by defendants that the failure to warn would have made no difference.

It is right that the woman who has to carry the child, suffer the discomfort of pregnancy with its attendant difficulties such as morning sickness and undergo the pain of labour and delivery should receive an award of compensation. Only Lord Millett, who regarded pregnancy and birth as natural processes and part of the price paid for parenthood, did not approve that aspect of the claim in this case. The sum awarded to Mrs McFarlane of £10,000 is substantially higher than that suggested by the Judicial Studies Board guidelines of £3,000 to £4,000, and it is unknown whether Mrs McFarlane had a particularly difficult pregnancy and delivery.

In *Rand v East Dorset HA* [2001] PIQR P1, it was held that, where a disabled child was born as a result of negligent advice provided about the condition of the foetus, the parents could receive an award to compensate them for bringing up a child that was disabled. They could not, however, recover the full cost of bringing up the child. Damages were assessed by calculating the difference between the cost of bringing up a normal child and a child that is disabled.

Mr and Mrs Rand had a claim based upon the extended principle in *Hedley Byrne & Co v Heller & Partners* [1964] AC 465 for the financial consequences flowing from the admitted negligence of the defendant, but this was limited to the consequences flowing from the child's disability. The claim for the cost of maintenance and the cost of care for the child was a claim for pure economic loss, as was the claim for loss of profits of the residential care home that Mr and Mrs Rand ran. Following the judgment in *McFarlane*, Mr and Mrs Rand could only recover damages in respect of such economic loss as was proved to have arisen from the child's disability, and not from the fact of her birth. The claim for economic loss did not terminate, as a matter of law, upon the child's reaching her 18th birthday.

The law in this area is still not finally settled as new fact situations can give rise to different issues for the courts to decide. There are variations on the theme arising in situations which were not covered by the *McFarlane* case.

In *Rees v Darlington Memorial Hospital NHS Trust* [2003] UKHL 52, a landmark decision, the House of Lords ruled that a disabled mother who gave birth to a healthy child following a negligent sterilisation could not recover the extra costs of child care occasioned by her disability. A conventional award of £15,000 would be made to mark her injury and loss of the benefit that she was entitled to expect.

The claimant was disabled, suffering from retinitis pigmentosa, a condition which meant that she was severely visually handicapped. She had wanted to be sterilised because she felt that her very weak eyesight would prevent her from caring properly for children, and she was anxious about the effect of labour and delivery on her own health. The issue in this case was whether the claimant could recover the extra costs of childcare brought about as a result of her disability. The NHS Trust challenged the decision on the basis that it was logically inconsistent with *McFarlane v Tayside Health Board* [1999] 3 WLR 1301. The claimant argued that the whole cost of bringing up her child was recoverable, and invited the House to reconsider its decision in the *McFarlane* case.

It was held in a majority ruling that the appeal would be allowed. Lord Bingham's opinion was that it would be wholly contrary to the practice of the House of Lords to disturb its own unanimous decision in *McFarlane*. Nevertheless, it should be recognised that the parent of a child born after a negligently-performed vasectomy or sterilisation was the victim of a legal wrong. Accordingly there should be a conventional award of £15,000 to mark the injury that had been suffered and loss of freedom to limit family size. That award should be added to the award of damages made for pregnancy and birth. This conventional award was not intended to be compensatory but should afford recognition of the wrong done. Lord Nicholls explained that the view of their Lordships in *McFarlane* was that fairness and reasonableness did not require that damages payable by a negligent doctor should be extended to cover the cost of bringing up a healthy child. Fairness and reasonableness demanded merely that there should be such a conventional award as was proposed here. Lord Millett added that the conventional sum would be awarded to the parents by way of general damages, not for the birth of the child, but to cover the denial of an important aspect of their personal autonomy, namely the right to limit the size of their family. The loss of the opportunity to live their lives in the way they had planned was a proper subject for compensation. Lord Scott emphasised that the *McFarlane* decision was not reached by applying normal principles of damages but by constructing an exception to those principles based upon the uniqueness of every human being. The claimant's visual disability did not take the case outside *McFarlane*. However justice would not be satisfied if the claimant were to recover nothing for the frustration of a failed sterilisation. It was open to the court to put a monetary value on the expected benefit of which she was deprived by the doctor's negligence.

In a strong dissenting speech Lord Steyn made the point that special consideration should be given to the serious disability of a mother who had wanted to avoid having a child by undergoing sterilisation. The injustice of denying her the limited remedy of an award of damages to cover the extra costs caused by her disability outweighed those considerations. The notion of a conventional award was contrary to principle. Lord Hope, also dissenting, thought that the fact that the child's parent was seriously disabled provided a ground for distinguishing *McFarlane*, and it would be fair, just and reasonable to hold that such extra costs as could be attributed to the disability were within the scope of the duty of care owed by the Trust concerned. Lord Hutton, who also dissented, was of the opinion that *McFarlane* did not bar the mother recovering in the instant case. In the event the majority view that there would be an award to C for £15,000 as a conventional sum, prevailed and the appeal was allowed.

In *AD v East Kent Community NHS Trust* [2002] EWCA Civ 1872, the claimant, A, suffered from intellectual impairment and emotional instability caused by an encephalopathic illness when she was five years old. While in the care of the defendant NHS Trust she was transferred to a mixed psychiatric ward and became pregnant by an unknown man who was also in the defendant's care. A gave birth to a healthy daughter in 1998 and her mother, Mrs A, agreed to bring up the child. The appeal arose as a result of the decision of Cooke J on the preliminary issue as to whether the claimant is entitled to claim in respect of the child's upbringing,

maintenance and education. He had considered himself bound by *McFarlane v Tayside Health Board*. The claimant contended that the birth of her child was not a benefit but a burden, and the cost of bringing up her baby was an additional burden to the child's grandmother arising from A's inability to care for the child herself.

The Court of Appeal held that the claim was not a claim by the child, nor by the grandmother, and in any event even if the claim had been brought by the grandmother a person providing voluntary services to a relative has no cause of action in her own right (*Hunt v Severs*). It was necessary to focus on this case as a claim by a mother for the cost of rearing a healthy child. Ironically, as was pointed out in the judgment:

> No one doubts that the tortious defendant would be liable to pay damages to an injured child if his mother were to suffer loss of earnings in order to be at home to care for him. Nevertheless, losses sustained on the same basis (loss of earnings to be at home to care for a healthy child) were not recoverable by the mother who had been the victim of negligence by a hospital authority.

The cost of bringing up the child in this case was not an additional cost for the mother – it was the same cost being borne by another person, the baby's grandmother, Mrs A. The court could not accept that the child would never be a benefit to her mother, despite A's mental infirmity. As the claim could not be advanced by Mrs A, the Court of Appeal decided that it would be invidious to make an attempt to place a monetary value on the benefit that she may derive from bringing up her granddaughter. Accordingly, the appeal was dismissed and permission to appeal to the House of Lords was refused, presumably because an appeal in the related case of *Rees v Darlington Memorial Hospital* was due to be heard by the House of Lords.

- **Compensation for handicap on the labour market**
  The court will consider whether the claimant has suffered a handicap on the labour market and make an award accordingly (see *Smith v Manchester Corpn* (1974) 17 KIR 1), but the sum awarded will be speculative, as it is seldom possible to arrive at an accurate figure on the basis of what a person's earning capacity might have been had the accident never happened. In *Doyle v Wallace* [1998] PIQR P146, the Court of Appeal held that damages were recoverable for loss of earnings from a job for which the claimant might have become qualified, had it not been for her accident. Here, the relationship between causation and quantum becomes unclear (see Chapter 8) and the correct approach to arriving at a figure is for the court to evaluate the chance and apply a percentage amount as a means of quantification. In this case, the judge had taken the view that the claimant had a 50/50 chance of obtaining a teaching qualification and finding a job. This rather difficult area of law was clarified in *Allied Maples Group Ltd v Simmons and Simmons* [1995] 1 WLR 1602 and *Stovold v Barlows* [1996] 1 PNLR 91, in which the distinction between what matters fell within the concept of 'loss of a chance' and what was required to be proved on a balance of probabilities was explained. The claimant in *Anderson v Davis* [1993] PIQR 87 was estimated to have had a two-thirds chance of obtaining promotion to the post of

principal lecturer, and the final award was calculated on the basis of two-thirds of his lost earnings.

Occasionally some unusual cases are reported in which awards of a highly specialised nature are made. For example in *Appleton v El Safty* [2007] EWHC 631 (QB) the claimant had been a professional footballer playing in mid-field for a premiership team. In November 2001, when he was aged almost 26, during a training session, the claimant suffered a partial tear of a ligament of his right knee. The claimant was given negligent medical advice, and further treatment was negligently carried out by the surgeon. As a result, he needed more surgery and was forced to give up professional football. Had the claimant been treated properly at an early stage he would have been able to return to professional football by April 2002. The defendants admitted negligence but the claimant sought damages of almost £7,000,000 for the loss of his career and high earning potential. It was held that the overwhelming likelihood was that the claimant would have stayed with his club under a contract lasting from January 2003 until June 2005, with the possibility of a year's extension and it was found that any other premiership club would have been wary of taking him on after that time even if he had been properly treated. The judge found that the claimant's chances of playing for another two years at championship level were 75%, and his chances of being in division one were 25%, and decided that at the end of the 2006/7 season on the basis of the medical evidence, the claimant would have had to retire from professional football.

The losses in terms of loyalty payments, salary, bonuses, fringe benefits and media and sponsorship opportunities were assessed on the above basis, and the judge decided that the chances were that the claimant would have become a manager after his retirement from football some time after 2006/7 were very remote. A lump sum of £60,000 was awarded for lost future earnings, and additional awards were made of £45,000 for pain, suffering and loss of amenity; £25,000 for loss of congenial employment; £2,085 for expenses and miscellaneous items and nursing care; £10,000 for loss on account of acceleration of knee replacement surgery; a £10,000 *Smith v Manchester* award; and a sum agreed by the parties of £50,000 for pension losses. Clearly the final award was nowhere close to the sum originally claimed.

20.7 NON-PECUNIARY LOSSES

Losses which are intangible are extremely difficult to quantify, and over the years the courts have developed the practice of classifying general damages under various 'heads of damage'. The list of heads of damage is not exhaustive, and the court may add to it from time to time. In *Gregg v Scott* [2005] UKHL 21 the House of Lords rejected the suggestion that there should be a new head of damage for 'loss of a chance' in clinical negligence claims. The main heads of damages are considered below. Lawyers frequently refer to figures published regularly by the Judicial Studies Board based on recent cases to give them a broad idea of the financial brackets for general damages. More detailed information is obtainable from Kemp and Kemp (1982), an encyclopaedia of damages cases.

The Court of Appeal has taken the opportunity to comment upon the status of the Judicial Studies Board guidelines in *Reed v Sunderland HA* (1998) *The Times*, 16 October. Sir Christopher Staughton stated that, although the very title 'guidelines' might suggest that the guidance issued by the Judicial Studies Board might have some legal authority, in fact, they did not. He explained that the law relating to quantum lay in statutes and decided cases, and the Judicial Studies Board did not have legislative power. Damages awarded to the claimant for negligent diagnosis of a medical condition were reduced from £365,493 to £246,407.40 by a unanimous decision of the Court of Appeal.

20.7.1 Pain and suffering

Pain and suffering are subjective, and are impossible to measure in terms of money. However, an award will be made to cover nervous shock, psychiatric symptoms and physical pain and suffering.

It is believed that people who are unconscious do not suffer any pain and therefore no award will be made under this head in cases where the claimant is in a coma, as in *Wise v Kaye* [1962] 1 QB 638, in which the claimant was unconscious from the moment of the accident. In such cases, however, there is a very high award for loss of amenity.

In the 'failed' vasectomy cases, there is an award to the mother for the discomfort of pregnancy and the pain and anxiety of childbirth, though against this it is necessary to set the pain that would have been experienced had her pregnancy been terminated! (*Allen v Bloomsbury HA* [1993] 1 All ER 651.)

Since the Administration of Justice Act 1982, there is no separate head of damages for loss of expectation of life. Instead, that is now absorbed into the general head of 'pain and suffering' caused by the knowledge that one's life has been shortened by the accident.

20.7.2 Loss of amenity

The claimant is entitled to damages for the inability to enjoy life in various ways, in particular, impairment of the senses. This will include, for example, inability to run or to walk, or to play football, to play the piano, to play with one's children, inability to enjoy sexual functions or marriage. Claimants who are in a persistent vegetative state or in a coma will receive a very high award for loss of amenity. In *Wise v Kaye* (see 20.7.1, above), the claimant was unconscious and had been so for more than three years at the time of the trial; she did not know what she had lost and was not, apparently, suffering any pain. The Court of Appeal awarded her £15,000 for loss of amenity, which at that time was an exceptionally large sum.

In *West and Son Ltd v Shepherd* [1964] AC 326, the claimant was a woman aged 41 years when she suffered a severe head injury. Although she could not speak, there was evidence from her eye movements that she understood her predicament. She received a high award for loss of amenity. The object of awarding her damages was to try to place her in the position she would have been in if she had never been injured. It is impossible in cases such as this to know how much, if anything, a person is suffering. Awarding a large sum for loss of amenity avoids such speculation.

A number of serious fears have been expressed about the making of high awards for loss of amenity in cases such as this. Relatives of patients with a condition known as

persistent vegetative state (PVS) have much to gain if the claimant is kept alive until the trial or settlement, as high awards for loss of amenity and future care will be made. If patients in this state are allowed to die very soon after the accident, the only available claim would be under the Fatal Accidents Act 1976 to dependent relatives for loss of a breadwinner. Once the trial is over, if the life support machine is switched off and the accident victim dies, the relatives stand to gain under the will or intestacy of the deceased far more than would have been available to them under the Fatal Accidents Act 1976, particularly if the deceased was young and no claim would have been available at all for loss of dependency. While there is no suggestion of any impropriety in any known case, the danger remains, and the situation is now further complicated by the decision in *Bland v Airedale NHS Trust* [1993] AC 789, in which the House of Lords sanctioned the withdrawal of artificial feeding from a young PVS patient. Although this matter was not specifically considered by the Law Commission in its report on structured settlements, this is yet another important reason why their use should be encouraged.

20.7.3 Levels of general damages

Recent Court of Appeal decisions will have some impact on the size of future awards of general damages. In a series of appeals, *Heil v Rankin; Rees v Mabco (102) Ltd; Schofield v Saunders and Taylor Ltd; Ramsay v Rivers; Kent v Griffiths; Warren v Northern General Hospital NHS Trust; Annable v Southern Derbyshire HA; Connolly v Tasker* [2001] QB 272, the Court of Appeal gave full consideration to the question of whether it would be appropriate to change the level of awards for general damages. Guidelines were established on the level of damages for pain, suffering and loss of amenity in personal injury and clinical negligence claims worth over £10,000. The awards would be tapered, the rate of increase growing with the size of the award, up to a maximum increase of one-third on awards at the highest level. The modest increase was required to bring some awards up to the appropriate standard, which was a sum which was fair, reasonable and just.

In these eight appeals, which turned solely on quantum, the five member Court of Appeal issued a single judgment made in the light of the Law Commission's Report 257 (*Damages for Personal Injury: Non-Pecuniary Loss*, 1999, London: HMSO). This report contained a recommendation that the level of damages for non-pecuniary loss for personal injuries should be increased. The Law Commission had recommended that, in respect of injuries for which the then current award for non-pecuniary loss for the injury alone would be more than £3,000, damages for non-pecuniary loss should be increased by a factor of at least 1.5, but not more than a factor of 2. It had also recommended a tapering of increased awards in the range £2,001 to £3,000 of less than a factor of 1.5. The Law Commission had recommended that legislation be avoided if possible, and had expressed the view that the Court of Appeal and House of Lords should lay down guidelines to deal with this matter in a series of cases.

The Court of Appeal took the view that it was well equipped to make decisions on the matters discussed in the Law Commission report. There was no need to depart from basic principles used in the assessment of damages in reaching its conclusion, but it acknowledged that any process of attempting to convert pain, suffering and loss of amenity into financial damages was artificial and difficult. In the view of the court,

changing the current levels of damages, if they are no longer reflecting what should be the correct level of awards, was part of the courts' duty. This was a duty that was not to be shirked.

On the issue of damages for pain, suffering and loss of amenity, it was held that consideration of the evidence had led to conclusions which would not radically alter the present approach to the assessment of damages. The Court of Appeal thought that it would be inappropriate to increase the levels of awards to the substantial extent recommended by the Commission. However, a modest increase was necessary to bring some awards up to the standard, on which both sides were agreed, to a sum which was fair, reasonable and just. It was in the case of the most catastrophic injuries that the awards were most in need of adjustment. The scale of adjustment required reduced as the level of existing awards decreased. At the highest level, there was a need for awards to be increased by in the region of one-third. At the other end of the scale, there was no need for an increase in awards which were at present below £10,000. Between those awards at the highest level, which required an adjustment upwards of one-third, and those awards where no adjustment was required, the extent of the adjustment should taper. The means of tapering downwards was illustrated by the decisions in the individual appeals.

20.7.4 Damages for the injury itself

Some injuries are virtually impossible to assess in money terms and figures are almost plucked from the air. For example, in *Thurman v Wiltshire HA* (1997) 36 BMLR 63, an award of £50,000 was made to a woman who had lost a foetus and became permanently infertile as a result of medical negligence. Injuries are itemised and particular sums are awarded for these on the basis of precedents. These cases may be consulted in *Current Law* or Kemp and Kemp (1982), and awards increase with the passing years taking inflation into account. For example, a broken arm will be worth a certain amount, loss of an eye a certain figure, a scar would be worth a certain sum and so on.

20.7.5 Damages for bereavement

Until s 3 of the Administration of Justice Act 1982, there was no award of damages for bereavement. However, under that Act, which substituted a new s 1A to the Fatal Accidents Act 1976, it is possible for parents who lose an unmarried child under the age of 18, and any person who loses a spouse, to claim damages for bereavement. The sum currently available is £7,500, or £10,000 for deaths occurring after 31 March 2002, and this, if the parents of a deceased child are separated, is divided equally between them.

The claim does not survive for the benefit of a deceased relative's estate.

Atiyah and Cane (1999) regard this type of compensation as 'solace' and not as deserving of an award, as it is impossible to assess, and is yet another factor which puts those who can prove fault and who are therefore entitled to tort damages in a much more advantageous position than the victims of mere misfortune.

What appears to perpetrate further injustice is the fact that the statute discriminates between different types of claimant. A wife, for example, who may be heartily glad to

be rid of a drunken husband would be entitled to the same amount of money as a wife who was devastated by the loss of her husband, but a cohabitee would not be entitled to an award of bereavement damages at all. No one can measure the grief which such people feel, and it is almost insulting to place a financial sum on it.

In *Doleman v Deakin* (1990) *The Independent*, 30 January, an unmarried youth, aged 17 years, was severely injured by a negligent driver as he walked across a pedestrian crossing. He died 25 days after his 18th birthday, though tragically, for all practical purposes, he might as well have died immediately, as he never regained consciousness after the accident. The Court of Appeal held that the parents' claim for bereavement was unsuccessful because the cause of action accrues at the date of death and not at the date of the accident.

20.7.6 Interference with consortium

The head of damages known as 'loss of consortium' under which a husband could previously claim for the loss of his wife's services and society, was abolished by the Administration of Justice Act 1982. However, in *Hodgson v Trapp* [1988] 3 WLR 1281, the husband of a severely injured woman succeeded in obtaining an award of £20,000 for impairment of the relationship which he had previously enjoyed with his wife. She had been a very active woman, a freelance artist and teacher, and partner in her husband's business, as well as a good mother to their children. Through the defendant's negligence, she had suffered brain damage in an accident at the age of 33 years. After the accident, she was unable to walk, to bath or dress herself, or to go to the lavatory unaided. Her speech was slow and childlike and her sight was poor. She was no longer good company for her husband, and was constantly frustrated by her condition.

20.8 DAMAGES PAYABLE ON DEATH

Death may affect a cause of action which already exists, or it may create a new cause of action for the dependent relatives or other dependants of the deceased. One feature of the law in this area, which is sometimes considered to be unfair to the dependents of deceased claimants, is that damages payable on death may be reduced or even denied if the deceased had been guilty of contributory negligence or had consented to run the risk of death.

20.8.1 Survival of existing causes of action

Although at common law the position was that the cause of action died if the claimant or defendant died, since 1846, there has been incremental statutory reform of the common law rules, which has kept pace with the changes in society which followed the introduction of fast-moving vehicles.

The only tort action which still dies with the claimant or defendant is defamation. When Robert Maxwell died, it was said that over 100 defamation claims died with him.

In 1846, the Fatal Accidents Act gave the dependent spouse and children of an accident victim separate actions in their own right to sue his killer for lost dependency.

As there would be no damages forthcoming to the dependants if the perpetrator of the accident also died, it was necessary to make provision for the right of action to continue against the estate of a deceased tortfeasor. By the Law Reform (Miscellaneous Provisions) Act 1934, the insurer of the tortfeasor remains liable to the dependants of the accident victim.

By the same Act, the estate of a deceased accident victim is entitled to carry on an existing claim after his death.

Section 1(4) provides that where damage has been suffered as a result of the act or omission of the deceased which would have given rise to an action had he lived (for example, where a driver causes an accident in which he is killed but others survive), it is deemed that the cause of action existed before his death.

Any damages recoverable are calculated without reference to other benefits which the estate may receive on the death of the claimant (s 1(2)(c)). Such benefits might include the proceeds of an insurance policy. Similarly, losses to the estate must not enter into the equation. Funeral expenses of a reasonable amount may also be recovered by the estate.

The basis of the calculations under the Law Reform (Miscellaneous Provisions) Act 1934 is the same as if the claimant were still alive (except of course the claim for funeral expenses). Special damages and general damages are recoverable, including damages for pain and suffering and loss of amenity (see above).

In *Hicks v Chief Constable of South Yorkshire Police* [1992] 2 All ER 65, the House of Lords considered whether damages would be payable under the Act for pain and suffering in the last few minutes before death, a claim which is recognised in the US where it is termed 'pre-death trauma'. The Appeal was brought by the administrators of the estates of two sisters who were killed in the Hillsborough football stadium disaster. The defendant had admitted liability and the only issue was as to whether the terror, pain and suffering which the girls experienced immediately before they died could be the subject of an award. Medical evidence was that the girls had died of traumatic asphyxia and that, after a short period of pain and suffering, they would have lost consciousness and death would have followed in a matter of minutes. Fear of impending death is taken into account in assessing claims for pain and suffering, and is treated as suffering which occurs with the knowledge that one's life has been shortened by the accident (s 1(1)(b) of the Administration of Justice Act 1982).

The House of Lords upheld the decision of the Court of Appeal which had been based on the finding of fact that there was no established psychiatric injury because death followed the accident so quickly, so the claim failed. In the words of Lord Parker:

> The last few moments of mental agony and pain were in reality part of the death itself, for which no action lies under the 1934 Act.

In that case, the most to which the parents would have been entitled was a reasonable sum for funeral expenses and a bereavement award of £7,500 for the death of the one sister who was under the age of 18 years. Of course, as Lord Bridge acknowledged, there could be no money compensation which would be adequate for the deaths in the case of two young girls 'at the very threshold of life'.

Under the Law Reform (Miscellaneous Provisions) Act 1934, there can be no award of loss of future earnings for the 'lost years' (s 4(3) of the Administration of Justice Act 1982), as this would have meant double recovery for relatives who might also have a claim for loss of dependency under the Fatal Accidents Act 1976.

However, under the Law Reform (Miscellaneous Provisions) Act 1934, there will still be a claim for loss of amenity during the interval of time between the accident and the death providing, as was held in *Hicks* (see above), this is long enough. As Lord Parker explained in the *Hicks* case:

> There is, of course, no doubt at all that where a person is by negligence caused injuries which result in pain, suffering or loss of amenity he has a cause of action in respect thereof. If he dies later, that cause of action survives for the benefit of his estate.

Exemplary damages do not survive for the benefit of the deceased's estate (s 4(2)(a) of the Fatal Accidents Act 1976).

20.8.2 Death as a cause of action: loss of dependency

Dependants of a deceased person have a claim in their own right against the tortfeasor providing the deceased could have maintained a claim against him (s 1 of the Fatal Accidents Act 1976).

Only if the deceased would have had a claim will the dependants be entitled to sue. This means not only that the dependants will have no claim if the deceased would have been barred from making a claim by the Limitation Acts, or for some other reason, but also that any defences which would have applied if the deceased had himself lived to bring the claim will also affect the claims of the dependants. In some cases, it may even be the dependant who contributed to the death of the deceased, and if this is so there will be a suitable apportionment of the damages. If the deceased had been contributorily negligent, there will be a reduction from the award of damages made to the dependants (s 5 of the Administration of Justice Act 1982).

For example, in *Barrett v Minister of Defence* [1995] 3 All ER 87, the widow of an airman who died during a heavy drinking session while in the care of the defendants had a reduction made in her award because her husband was found to be 25% contributorily negligent.

Under s 4 of the Administration of Justice Act 1982, the right to claim for any years lost to the deceased does not survive the death of the claimant. Difficult and complex situations arise when an injured claimant dies as a result of his injuries. In *Reader and Others v Molesworths Bright Clegg Solicitors* [2007] EWCA Civ 169, the Court of Appeal held that it was clear from s 1 of the 1976 Act that if, at the moment he died, an injured claimant had a cause of action arising from a wrongful act which had been the cause of his injuries, and if he had died as the result of the same wrongful act, a second cause of action would arise for the benefit of his dependants at the same moment. His existing cause of action was transferred to his estate at the moment of death under the Law Reform (Miscellaneous Provisions) Act 1934. The Court ruled that the two actions were governed by different limitation periods. The judge had been correct in finding that the claim under the 1976 Act had not been extinguished, and also in his view that no duty had been owed to the claimant.

20.8.3 Who are the dependants?

The categories of people who are entitled to claim for loss of dependency have been increased over the years, the latest expansion being made by the Administration of Justice Act 1982.

Dependants who are entitled to claim under the Fatal Accidents Act 1976 now include: spouse; former spouse; cohabitees who were living with the deceased immediately before his death and have lived as husband or wife of the deceased for two continuous years before the death; parents or other ascendants; people treated by the deceased as parents; children or other descendants of the deceased; people who are children of a person to whom the deceased was married, and who were treated by the deceased as 'children of the family' immediately before his death; brothers, sisters, aunts and uncles of the deceased and their issue. Relations by marriage are treated as blood relations, and relations of the half-blood are treated as whole-blood relations. Children born outside marriage are treated as though they were born within marriage.

As far as the Criminal Injuries Compensation Scheme is concerned, it has been proposed by the Government that compensation rights be extended to homosexual partners. This has not been officially suggested yet for tort damages.

It is, of course, usually the spouse, partner and children of the deceased who claim for loss of dependency. If the victim was young, it is unusual for the parents to claim. One such claim was made by the parents of a promising young ballet dancer, aged 19, who had died in the *Marchioness* riverboat disaster. They were able to prove that the family shared everything, that the parents had invested heavily in their daughter's career and had been promised a share in her success later in life.

Although the claim is usually brought on behalf of the dependent person by the personal representatives of the deceased, if the claim is not begun within six months of the death, any dependant may bring the claim on behalf of all the dependants.

Damages under the Fatal Accidents Act 1976 are only available to those people in the categories specified in the Act if they can prove that they were, or would at some stage become dependent on the deceased person. Essentially, the claim is for loss of a bread-winner and for the income and financial support which would have been provided over the years but which has been lost because of the act of the tortfeasor. The calculation therefore resembles the calculations discussed above in the case of claimants who survive accidents and who claim damages for loss of future earnings. The multiplier/multiplicand method is utilised as previously described, and the object of the compensation is to provide the dependants with a lump sum which may be invested to yield income for the future, to cover the years during which the person would have been dependent upon the deceased.

In *Cookson v Knowles*, the House of Lords ruled that damages for loss of dependency should be divided into two parts to cover losses up to the date of the trial, and future losses, in a similar approach to that taken in the case of living claimants who are accident victims.

All that need be proved is a reasonable expectation of future dependency in cases in which the claimant has not been dependent upon the deceased before death. For example, there are some parents of older children about to finish training or education

who expect to be able to depend upon their children financially when they start to earn (*Kandalla v British European Airways Corpn* [1981] QB 158).

20.8.4 Adjusting the multiplier

The multiplier will be adjusted to take account of the dependant's future, so that, for example, the assumption is that children will cease to be dependent on their parents once they leave full time education.

20.8.5 Financial dependency

In the case of a dependent spouse, the likelihood of a divorce had the deceased lived will be taken into account. In *Martin v Owen* (1992) *The Times*, 21 May, the Court of Appeal reduced the claimant's multiplier from 15 to 11 to take account of the fact that her marriage to the deceased had only lasted for one year, and that she had later committed adultery twice.

Although the possibility of divorce may be considered, with all the distasteful prying into the marriage between the claimant and deceased spouse which that entails, the courts are not permitted to inquire as to the remarriage prospects of widows who claim under the Fatal Accidents Act 1976. This change in the law was introduced in 1971 after a vigorous campaign by the women's movement following a series of cases in which widows were subjected to embarrassing cross-examination about their personal lives.

One inevitable result of this rule is that those widows who remarry are overcompensated, and there are even instances in which widows have already remarried wealthy men before the case comes to trial (see Atiyah (1993), where the rule is described as 'one of the most irrational pieces of law reform ever passed by Parliament'). Irrational though it may seem today, the change in the law was not surprising given the zeal of the women's movement against the cattle market approach and the offensive questions put to young widows in some of the cases. Nevertheless, the law has not created a situation of true equality between the sexes, as widowers' remarriage prospects may be considered (though none of the cases reveals the distasteful approach found in the widows' cases), and the remarriage prospects of a widow may be considered in relation to claims by her children for loss of dependency.

Cohabitees tend to be awarded lower sums for loss of dependency than widows and widowers (s 3(4) of the Fatal Accidents Act 1976).

20.8.6 Non-financial dependency

Even non-financial dependency may be claimed under the Fatal Accidents Act 1976, as in the case of domestic services which will no longer be available (*Spittle v Bunney* [1988] 3 All ER 1031). The award is assessed on the basis of the diminishing cost of hiring a nanny until a child has grown up. If another relative, say the father, gives up work to care for children, a reasonable sum may be claimed on the same basis (*Hayden v Hayden* [1992] 4 All ER 681).

It has become the practice since *Spittle v Bunney* to assess the award for the loss of a mother as a carer in terms of a judge directing himself as if he were a jury, and mere mathematical calculations based on the cost of hiring a nanny are rejected on this basis, so that the award is frequently lower than it would have been if calculated mathematically, as this permits a qualitative assessment to be made (see *Stanley v Saddique* [1991] 2 WLR 459, discussed below).

In *Watson v Wilmott* [1991] 1 All ER 473, the claimant's parents were involved in a car accident. The mother was killed and the father, who had minor physical injuries, suffered a serious psychiatric condition and committed suicide. The claimant was adopted by an uncle and aunt and the defendant contended that as an adopted child of new parents who now had the legal responsibility of maintaining him he had no right to a claim under the Fatal Accidents Act 1976 for loss of dependency. It was held that the position of the child with his new parents should be compared with his position had his natural parents lived, and that the measure of damages should be the difference between the two positions if the present position was worse than the previous one. Damages were therefore assessed on the difference between his dependency on his natural father and that on his adopted father. However, as the adopted mother had substituted her care for that of the natural mother no damages were payable in respect of that.

By comparison, in *Stanley v Saddique* [1992] 2 WLR 459 CA, a child whose mother had not been married to his father was cared for by his father's new wife after the death of his mother, which had been caused by the defendant's negligence. The substitute mother provided a better quality of care than that which the child had enjoyed with his own mother. However, the Court of Appeal held that the fact that the child now enjoyed a better standard of care should be disregarded in the light of s 4 of the Fatal Accidents Act 1976 which states that any benefits which accrue to the claimant must be disregarded when the courts assess damages for loss of dependency. However, the claimant's damages for lost dependency were reduced because his natural mother would probably not have given him good quality care.

In *Hayden v Hayden* [1993] 2 FLR 16, CA, the 'judge as jury' approach was approved by the Court of Appeal, when a qualitative rather than a quantitative assessment was again made. It was considered that the father, in giving up his employment to care for the children, had provided at least as good a service as the mother, so that calculating the cost of providing services as that of a notional nanny would not have been appropriate. The full cost of a nanny would have been £48,000 here, but the award amounted only to £20,000.

This approach appears to be unfair financially and unduly hard in emotional terms on the carers, who as family members will already be grieving the loss of the relative for whom they are substituting care. It is also likely to prolong litigation by requiring evidence as to the care previously provided by the lost relative and of the substituted care, in order to allow the judge to make a qualitative assessment.

The Divisional Court was keen to comment in *R v Criminal Injuries Compensation Board ex p K (Minors)* [2000] PIQR P32 that the *Hayden* case had not established any general principles that would apply to all claims involving children's compensation.

Any benefits which will or may accrue to the claimant from the estate of the deceased will be disregarded when the court is assessing the award (s 4 of the Fatal Accidents Act

1976). This may lead to over-compensation in some cases, but the tendency over the past century has been to reduce the instances in which deductions will be made from the awards payable to dependants.

Such benefits may include substantial gains under life insurance policies or pensions payable on the death of the deceased to dependants. In *Wood v Bentall Simplex* (1992) *The Times*, 3 March, the deceased, a farmer, had been asphyxiated when he went to the assistance of a farm labourer who had become trapped in a slurry storage system. In assessing damages payable to the widow and children under the Fatal Accidents Act 1976, as amended in 1982, it was held to be irrelevant that a loss might be established from one source which could be made good from another by using a benefit from the deceased's estate.

Damages for bereavement may be claimed under s 1A of the Fatal Accidents Act 1976. The sum to be awarded may be increased by statutory instrument at the instigation of the Lord Chancellor when he sees fit to do so.

20.9 INTEREST ON DAMAGES

The rules for accumulation of interest on damages are arbitrary and impossible to make sense of by rational discussion. In any event, the rate of interest is very low and varies from one form of damages to another. Special damages (pecuniary losses to the date of trial) carry interest from the date of the accident at half the special investment account rate for money paid into court. Future losses, both pecuniary and non-pecuniary, accumulate no interest. Non-pecuniary loss in personal injury cases before the trial carries interest at 2% from the time the writ is served, and non-pecuniary loss in non-personal injury cases before the trial accumulates no interest.

20.10 NEW METHODS OF PAYING DAMAGES IN PERSONAL INJURY CASES

For many years, the lump sum method by which tort damages are usually paid has been regarded as unsatisfactory, particularly in cases in which the claimant is seriously injured and unlikely ever to be able to cope with full time employment, and in cases in which the medical prognosis is uncertain (see Pearson Commission Report, 1978). However, the rule at common law that damages are payable once only still applies.

The Law Commission Consultation Paper, *Structured Settlements, Interim and Provisional Damages* (Law Com 224, 1994, London: HMSO), suggested four reasons for the continued predominance of lump sum payments of damages:

- historical reasons based on the fact that damages were originally determined by juries;
- the importance which common law attaches to finality in litigation;
- the practical impossibility in the past of achieving a system of periodic payments;
- the relatively low awards of damages in previous years before technology permitted sophisticated methods of loss assessment.

The consultation paper recognised that lump sum awards are not without advantages, notably the certainty which allows claimants freedom to choose what they wish to do with their compensation and to devote their energies to recovery and rehabilitation, and the lack of a need to monitor patients with its attendant expense.

However, the disadvantages attached to lump sum payments were discussed at length and focus on the fact that such payments can never be an accurate reflection of what has been lost because they are based on a series of predictions and rely on the crude formulae of multiplier and multiplicand. Moreover, although the risk of the claimant's dissipating the award is unknown as there is no recent reliable research on the matter, it is still a possibility which cannot be ignored, though in recent cases the increasing occurrence of a head of damages for 'professional fees' to cover investment and handling of the award may be an indication that claimants are being encouraged by their lawyers to invest their compensation wisely.

The Damages Act 1996 confirms the power of the courts to make consent orders under which damages take the form of periodical payments.

Over the years, a variety of methods have been developed by which lump sum payments may be avoided. They are as follows: split trials and interim damages; provisional damages; and structured settlements.

Damages are available on a once and for all basis under the rule in *Henderson v Henderson* (1843) 3 Hare 100 to prevent unfairness to defendants by the bringing of several successive claims. The rule does not always apply, and in *Talbot v Berkshire CC* [1994] QB 290, the Court of Appeal gave examples of when it might be relaxed – such as when the claimant did not bring an earlier claim because of promises made by the defendant. In *Johnson v Gore Wood and Co (A Firm)* [2001] 1 All ER 481, the House of Lords indicated that the rule in *Henderson* should not be applied rigidly in all cases. Obviously the rule will not apply in any event if the defendant commits continuous torts, such as repeated trespass.

20.10.1 Split trials and interim damages

The split trials and interim damages method means that liability can be settled at an early stage and the issue of quantum settled later when the prognosis for the patient has become more certain. Although it is by no means certain that this method will make the medical prognosis any clearer, as many conditions can take years to develop and the patient may suffer 'compensation neurosis', a recognised phenomenon which delays improvement in the claimant's medical condition until after the trial, split trials are permitted by the Civil Procedure Rules 1998 (CPR).

Once liability has been established, the claimant will be able to receive a sum to cover special damages which have already been incurred to assist him or her financially until quantum is finalised. By CPR 25.1, the court can make an order for interim damages if the claimant shows 'need'. Although the Rules do not require a claimant to show need before an interim payment can be ordered, it has become the practice that this is in fact done on the basis of the submission of medical evidence, and the Law Commission in its consultation paper recommended the continuation of this requirement in the interests of defendants.

Some solicitors do favour this method, particularly in cases where it is clear that the claimant is enduring financial hardship, but, in practice, it is not a popular option because, particularly in smaller cases, the new regime for recouping Social Security payments may eat up the interim payments, and because it involves solicitors in swearing lengthy affidavits in support of special damages already incurred.

Another criticism of split trials is that they delay the hearing of cases, and a major criticism of the tort system has been its delays.

20.10.2 Provisional damages

Introduced by s 6 of the Administration of Justice Act 1982, which inserts a new s 32A into the Supreme Court Act 1981, provisional payments of damages, which can be adjusted at a later date, may be made in cases where the medical prognosis is uncertain and where there is a chance that a serious disease or serious deterioration in the claimant's physical or mental condition will occur at a later date.

The claimant must specify what the 'feared event' is likely to be in considerable detail. An example might be the possibility of epilepsy developing some years after a head injury.

The judge must specify the period within which the claimant must apply for a further award, but the claimant can apply for an extension of that period within the specified time. Indeed, there is no limit to the number of applications for an extension and this means that the period of time involved could well be indefinite.

The case law is still developing on the question as to whether there is a 'chance' of 'serious deterioration' in the claimant's condition and as to the meaning of these terms. However, provisional damages are seldom used, and the development of the law is likely to be slow.

In *Willson v Ministry of Defence* [1991] 1 All ER 638, the claimant, who had an ankle injury, was concerned about the possibility of arthritis developing at some future date and requested an order for provisional damages. However, despite the fact this would appear at first sight to have been a suitable case for provisional damages, he was refused an order on the grounds that arthritis is simply a progression of the particular disease and this is not the same as a 'chance event'.

The Damages Act 1996 makes provision for the situation where death supervenes after damages have been awarded during the lifetime of an accident victim on the basis that if the disease or injury deteriorates in the future, he might be entitled to a further award of compensation. In such cases, where the claimant dies, the lifetime award to the victim will not prevent dependants from claiming under the Fatal Accidents Act 1976, though their award would not include damages in respect of losses already covered by the lifetime award.

20.10.3 Structured settlements

Structured settlements are not the result of legislation but of practical moves by lawyers and insurers in consultation with HMRC, to circumvent the lump sum payment and improve the lot of claimants.

Basically, structured settlements involve the substitution of pensions for lump sum payments, and because of tax concessions by HMRC, the result is lower payments by insurers and higher incomes for claimants. The recipient of the damages receives his money free of tax under this scheme, whereas the claimant who receives a lump sum award must pay tax on any income once it is invested. After initially working out the sum which would have been received in conventional lump sum form, part is paid to the claimant immediately to cover special damage incurred to the date of the settlement, and the rest is utilised by the insurer to purchase an annuity for the benefit of the claimant. The amounts payable may be structured over a period of time to take care of various contingencies. However, structured settlements must be agreed by the parties and will only be used in cases involving substantial sums of money, as they involve heavy administrative burdens. They are particularly appropriate in cases which involve serious personal injury and where the claimant's life expectancy is uncertain. They are also useful where a vulnerable claimant needs to be protected from the influence of others or is unable to manage investment of a lump sum award. Claimants who pay tax at higher rates or have substantial capital will also benefit.

Apart from the tax advantages, a major benefit is that the income can be protected from inflation.

Further advantages of structured settlements identified by the Law Commission are that they encourage early settlement, so saving time and costs and they provide certainty for claimants at an early stage, combined with flexibility of operation.

However, there are some disadvantages in structured settlements which the Law Commission identified. These include the fact that once decided upon, a structured settlement cannot be changed: '. . . the pressure to get it right at an early stage is extreme.' There is still a pressing need to make predictions and there is a risk that monies provided will be insufficient to meet the claimant's needs. Moreover, some individuals may be persuaded into a structured settlement which they do not want.

Even investigating the likely costs of setting up a structured settlement can prove to be an expensive exercise, and, in *Conneely (A Minor) v Redbridge and Waltham Forest NHS Trust* (1999) Lawtel, 11 January, it was held that, in approving a structured settlement in a medical negligence case, it is possible for the judge to order that the costs of such an investigation be limited to a reasonable set figure. Here, the defendant sought an order to limit the costs which the claimant could incur, to be borne by the defendant (under standard NHS practice) in investigating whether or not a structured settlement should be arranged. The defendant's argument was that it was normal practice to cap the allowable expenditure for the investigation at £5,000. However, it was argued for the claimant that there should be no cap on allowable expenditure, as the claimant had moved to Eire.

The settlement was approved, but subject to the defendants' undertaking to pay the claimant's costs of investigating a structured settlement being limited to the sum of £5,000. There was to be a reconsideration of this limit, up to a maximum of £7,000 if the sum of £5,000 was reasonably shown by the claimant to have been insufficient.

Structured settlements were first developed in the US and Canada in the 1980s, and have now increased in popularity in the UK since a concession by the Inland Revenue made them possible. The first structured settlement which was judicially approved in

England was in the case of *Kelly v Dawes* (1990) *The Times*, 27 September, and they are considered so important that they were the subject of a major consultation by the Law Commission. The Damages Act 1996 aims to provide statutory support for structured settlements.

The Damages (Government and Health Service Bodies) Order 2005 which came into force on 1 April 2005 specifies that no court may make an order for future pecuniary losses in personal injury cases to take the form of periodical payments unless the continuity of payments is reasonably secure. This is likely to be the case where the defendant is a Government or Health Service body. Alterations in the method of payment at a future date are also permitted without the need for further approval by the Court. As structured settlements are in reality a particular form of periodical payments, they need no longer be treated differently from other forms of periodical payments, which have been sanctioned by s 2 of the Damages Act 1996, which gave courts the power to order payment of damages in personal injury cases by means of periodical payments as long as the parties consented. Periodical payments can now be varied by the courts under the Damages (Variation of Periodical Payments) Order 2005, to enable payments to be calculated in the light of the claimant's needs rather than wishes.

20.11 PROPERTY DAMAGE

The award of damages relating to property is calculated in a similar way to that relating to personal injuries. However, property damage is easier to quantify than personal injuries.

The heads of damage, the first three of which are set out in *Liesbosch Dredger v SS Edison* [1933] AC 449, are:

- the market value of the property. The damages are based on the loss of the property and its value at the time of loss, rather than the cost of replacing it. However, the cost of the loss may sometimes be the same as the cost of replacement;
- cost of transporting replacement property to the place in question, if relevant;
- loss of profit which is reasonably foreseeable;
- loss of use until the time the property is replaced;
- reduction in value if the property is damaged rather than destroyed. This usually amounts to the cost of repairs calculated at the time of damage or when damage ought reasonably to have been discovered.

20.12 ECONOMIC LOSS

The assessment of damages for economic loss which is unconnected with personal injuries is a complex process, but it does not pose the same difficulties as the assessment of intangible and unpredictable losses in personal injuries cases. However, the basic principle is that the claimant must be restored to the position he would have been in if the tort had never been committed.

Swingcastle Ltd v Alastair Gibson [1991] 2 All ER 353 illustrates some of the difficulties. The House of Lords held that, in a case involving a negligent house survey which had resulted in a loan being made by the claimant's finance company to the mortgagors, where the loan would not have been made at all had the survey not been negligent, the measure of damages should be the difference between the amount lent and the amount which would have been lent if the survey had been competently carried out. In this case the sum lent was £10,000 and the sum which would have been lent was £0. If interest was to be payable on the sum which had been lost, it was up to the claimants to adduce evidence as to what use they would have put the money to by way of investment, loans, and so on, during the time it was out of their hands. This is in keeping with the principle that tort damages are intended to put the claimant in the position he or she would have been in had the wrong never been committed.

20.13 SOME RECENT SUMS AWARDED IN PERSONAL INJURY CLAIMS

It is instructive to observe some of the awards made in recent cases to illustrate the principles discussed above.

20.13.1 Clinical negligence

Some very high awards of damages have been made by the courts in clinical negligence cases In Wales, there are sums of the order of £4 million and £5 million on record, which, unlike many of the awards recently recorded in England, were outright lump sum payments, and did not contain an element of grossed-up structured settlement. The Scottish NHS has paid almost £40 million in compensation to claimants in the course of the past five years, according to official figures obtained by the SNP. Compensation payments peaked in 2004–05 at £8.3 million, slipping to £7.8 million in 2005–06.

Figures produced by the CNST and published in *Hansard* for the 10 highest awards in England as at 31 December 2006 are as follows:

Cause of complaint	*Damages paid (£)*
Failure/delay in responding to an abnormal foetal heart rate	5,555,000
Delay in diagnosis of foetal distress	5,620,290
Informed consent not correctly obtained	5,624,976
Failure/delay in diagnosis	5,749,111
Failure to respond birth complications	5,793,782
Failure/delay in responding to an abnormal foetal heart rate	5,800,000
Failure/delay in diagnosis	6,248,845
Failure to monitor second stage labour	6,635,000
Failure to perform tests	8,300,000
Fail to diagnose pre-eclampsia	12,400,000

Other awards during the first four months of 2006 include the payment to a 19 year old man of a lump sum of £1,900,000 plus periodic payments for brain injuries he suffered during the neonatal period in October 1986 leaving him with severe and uncontrollable epilepsy, and profound learning disabilities; £2,350,638 to a 26 year old man for the brain injuries sustained as a result of a delay in repairing a congenital heart defect following his birth in 1979; £2,000,000 to a 5 year old girl for brain damage sustained during her birth in May 2000, resulting in quadriplegic cerebral palsy, microcephaly, visual impairment and epilepsy with a much reduced life expectancy; £1,100,000 lump sum plus periodical payments to a 13 year old boy for the brain injuries sustained during his birth in June 1992; £4,000,000 to an eight year old girl who suffered brain damage during her birth; £3,375,000 to a 19 year old man for brain damage sustained during a heart operation in February 1997; £4,200,000 to a 14 year old boy for brain injuries sustained during his birth in June 1991.

20.13.2 General claims for damages for personal injuries

In a claim for damages by a man in his twenties following a fall at work which resulted in a serious head injury which left him in a coma for 53 days, a previously devout Christian, who had previously been a faithful husband, obtained a high award to compensate him for a change in behaviour. After the accident the claimant had two affairs, regularly watched pornographic videos and websites, rang sex lines, and behaved in a sexually disinhibited way when women were present. He was awarded special damages for past and future losses, and for pain, suffering and loss of amenity. The couple sold their house and moved to a bungalow in order to facilitate the claimant's care, and on returning home he was looked after by his wife and support workers. He suffered additional disability, which included fatigue, problems with sight, memory and cognitive processes, disinhibited behaviour, stubbornness, irritability and aggression, all of which made him difficult to live with, so the decision on quantum included consideration of whether the couple's marriage was likely to survive. The judge found, on the basis of statistical evidence, that where one partner suffered frontal lobe injury of the type that suffered by the claimant, the relationship was likely to break down within eight years The future care needs of the claimant were assessed on the basis that the marriage would only last for one more year, and the award covered compensation for past losses, including loss of earnings, past family care, from which the conventional deduction of 25% was made for care was provided by family members, past professional care; past case management; aids, equipment and activities therapy and accommodation. As he had lost his marriage and the prospect of having a family, an award of general damages for pain, suffering and loss of amenity was made for £150,000.

The final award was:

- £1.9 million: nearly two thirds of the award for future care on the basis that his wife will no longer be there to look after him;
- £300,000: part of the payout for loss of earnings;
- £150,000: award for his pain, suffering and lack of amenity.

In another unusual case, the Court of Appeal held that as a matter of principle general damages can be awarded for the frustration, loss of self-confidence and loss of

self-esteem resulting from the failure of a school and local authority to identify and ameliorate the effects of dyslexia, and a claim for general damages and for damages by way of lost earning capacity based on such a failure could not be struck out as having no real prospect of success – *Skipper v Calderdale Metropolitan Borough Council and Another* [2006] EWCA Civ 239.

In *Miah v Thorne Barton Estates* (Unreported) a painter accepted a £5 million settlement after a serious fall. The High Court approved the settlement after Thorne Barton Estates and another defendant admitted liability for the accident. The claimant is dependant for mobility on a wheelchair, and has suffered a personality change as a result of his brain injury. He requires specialist care for the rest of his life. If he meets his normal life expectancy the damages will total £5 milliom. The settlement comprises a £2.4 million lump sum, and an index-linked annual payment of £105,000 for as long as the claimant lives.

20.14 INJUNCTIONS

In some cases, the claimant requires a remedy which will do more than simply prove financial compensation. There may also be circumstances in which there is a need to prevent repetition of the wrongful acts.

The appropriate remedy in such cases is the equitable remedy of an injunction. For example, in libel cases, the claimant often seeks an injunction to prevent publication of defamatory material. In trespass and nuisance cases, the claimant will require an injunction to prevent the defendant persisting in the wrongful conduct, such as the swinging of a crane over property. Injunctions may be mandatory or prohibitory. A mandatory injunction is an order of the court instructing the defendant to undo some wrongful act, for example, to dismantle a building which obstructs a right to light, as in *Kelsen v Imperial Tobacco Co Ltd* [1957] 2 QB 334. A prohibitory injunction is an order of the court instructing the defendant not to do a wrongful act, such as the commission of a trespass. If an injunction is required as a matter of urgency, for example, to prevent an imminent television broadcast which could contain defamatory statements, the claimant may apply to the court for an interim (or interlocutory) injunction as a temporary measure until the full hearing can be arranged, after which a perpetual (permanent) injunction may be obtained if the case is proved. Guidelines for the granting of interim injunctions were laid down by the House of Lords in *American Cyanamid Co v Ethicon* [1975] AC 396. One important consideration is the balance of convenience between the parties; but the judge must first be satisfied that there is a serious question to be tried. Injunctions are equitable remedies and are therefore discretionary in nature, which means that in certain cases, even though the claimant succeeds in proving the case, the court may refuse the order and grant damages in lieu of an injunction. Special problems arise when injunctions are sought to restrain nuisances. Despite the discretionary nature of injunctions, it appears that some of the underlying principles are rigid and courts are reluctant to take into account the merits of the defendant's conduct. In *Kennaway v Thompson* [1981] QB 88, the Court of Appeal granted an injunction to prevent a nuisance caused to the claimant by power boat racing, despite agreements that the activity had certain social merits and the defendants would have preferred to pay damages in lieu (cf *Miller v Jackson*

[1977] 3 WLR 20). In *Shelfer v City of London Electric Lighting Co* [1895] 1 Ch 287, the judge granted an injunction to prevent vibrations even though the consequence was that a large area of London was deprived of electricity. It was in this case that the criteria for awarding an injunction were set out, and these are referred to in cases in nuisance claims in modern law. For example, in *Jacklin v Chief Constable of West Yorkshire* [2007] EWCA Civ 181, the Court of Appeal approved the decision of the judge to grant a mandatory injunction which required the police authority to remove a container that was obstructing a stretch of land over which a landowner had a right of way. Damages in lieu of an injunction would not have been appropriate. Although the police authority had been able to satisfy the first three criteria in the rule in *Shelfer v City of London Electric Lighting Co* [1895] 1 Ch 287 it had been unable to satisfy the fourth, since it had not shown that granting such an injunction would be oppressive.

There are various reasons for refusal of equitable remedies which it is beyond the scope of this work to examine in detail. The main reasons for not awarding an injunction are delay by the claimant (laches), some impropriety on the part of the claimant, and impracticality, such as circumstances which require constant supervision of the order.

The courts also have power to award an injunction in addition to damages in an appropriate case.

20.15 OTHER REMEDIES IN TORT

There are certain remedies which are peculiar to particular torts. These are dealt with in the course of discussion of those specific torts.

20.16 JOINT AND SEVERAL TORTFEASORS

In many cases there are more than one defendant. If more than one tortfeasor causes different damage to claimant, each defendant will only be liable for the damage he inflicts (*Performance Cars v Abrahams* [1962] 1 QB 33). If several defendants cause the same damage, liability may be joint or several. There is usually some common, purpose or design in cases of this kind (*Monsanto plc v Tilly* [2000] Env LR 313; *Generale Bank Nederland NV v Export Credits Guarantee Department* [2000] 1 All ER 929). If liability is joint, each tortfeasor will be liable for the full amount of the damage, and a claim may be brought against all or any one of them.

FURTHER READING

Cane (ed), *Atiyah's Accidents, Compensation and the Law*, 7th edn, Cambridge University Press, 2006, Chapters 16 and 17

Harris, Campbell, Halson, *Remedies in Contract and Tort*, 2nd edn, Cambridge University Press, 2002

For regular monthly up-dates on this area of law, see *Personal Injury Compensation*, published monthly by Informa UK Ltd.

CHAPTER 21

DEFENCES IN TORT

There are a number of defences which apply specifically to particular torts. These are discussed in detail in the sections which are concerned with those torts, for example, the tort of nuisance and the rule in *Rylands v Fletcher*. There are other defences, however, which apply throughout the whole of the law of tort and this chapter deals with these general defences.

21.1 CONTRIBUTORY NEGLIGENCE

The defence of contributory negligence operates not as a complete defence but it allows the courts to apportion the damages, so reducing the damages payable to claimants if it can be proved that they contributed in some way to the damage suffered by failing to take sufficient care for their own safety. This defence does not only apply to the tort of negligence.

The defence is governed by statute, the Law Reform (Contributory Negligence) Act 1945, and is relatively new in the history of the tort law, having been adapted from a maritime law practice.

21.1.1 Development of the law

Originally, if a claimant was to blame in some way for the harm which he or she suffered, there would be a complete defence available and no damages would be payable (*Butterfield v Forrester* (1908) 11 East 60). However, it became clear that this rule was too harsh, and new principles developed by which the courts were able to circumvent the rule.

By using the rules of causation, a claimant could succeed in a claim despite his or her own act, if placed in a dilemma by the defendant. In *Jones v Boyce* (1816) 1 Stark 492, the claimant was a passenger in a coach which went out of control through the defendant's negligence. Fearing that he would be seriously injured if he stayed in the coach until it crashed, he decided to jump out, and in so doing he broke a leg. It was held that he was not contributorily negligent because he had acted reasonably in making the decision to jump out. The chain of causation was not broken by the claimant's own act.

However, since the introduction of the new law on contributory negligence with the Law Reform (Contributory Negligence) Act 1945, the courts are willing, in some circumstances, to find that the claimant was partly to blame for the damage suffered, and to apportion the loss.

There is no longer any need to manipulate the rules on causation in order to provide the claimant with compensation.

21.1.2 The last opportunity rule

Even before 1945, by inventing a new principle called the 'last opportunity rule', the courts made it possible for claimants who would otherwise have received no compensation to receive an award. The rule operated in such a way as to make the person who had the last opportunity of avoiding an accident bear the entire loss. In *Davies v Mann* (1842) 10 M & W 546, the owner of a donkey had left the animal tethered in the street in full view, but just as it was getting dark the defendant ran into the animal with his wagon. As the person who had the last opportunity of avoiding the accident, the defendant was liable to the claimant.

With the passage of time, it became difficult to establish who exactly had the last opportunity of avoiding accidents, particularly with the advent of fast-moving vehicles. The injustice of the all or nothing approach to contributory acts appeared even more glaring in a system which has as its underlying basis the fundamental principle that the injured person should be compensated, rather than that the person causing the injury should be punished. Accordingly, the principle of apportionment which had been introduced into English maritime law in 1911 under the Brussels Convention, was enacted in tort in the Law Reform (Contributory Negligence) Act 1945.

21.1.3 Law Reform (Contributory Negligence) Act 1945

Under s 1(1) of the Act:

> Where any person suffers damage partly as a result of his own fault, and partly as a result of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage . . .

The full amount of compensation which would have been payable, had it not been for the claimant's contributory negligence, is first calculated. The court will try to establish the percentage of the damage for which the claimant was responsible, and the award will be reduced accordingly. In order to raise a defence of contributory negligence, it must always be mentioned in the statement of case (*Fookes v Slaytor* [1978] 1 WLR 1293).

The apportionment for contributory negligence will operate not only to the disadvantage of the living claimant, but also, if the deceased was contributorily negligent, to the disadvantage of the relatives of a deceased accident victim who make claims under the Fatal Accident Acts for loss of a breadwinner.

21.1.4 The standard of care in contributory negligence

There is no need for the defendant to establish that the claimant owed a duty of care. It need only be established that the claimant failed to take proper care for his or her own safety in all the circumstances. This is bound to involve a more subjective approach than that taken by the courts when dealing with the tort of negligence. The defendant must prove, first, that the claimant did not take ordinary care for himself and, secondly, that this was a contributory cause of the damage suffered. For example, in *Brennan v Airtours plc* (1999) *The Times*, 1 February, the claimant was found to be 50% to blame for injuries

which he incurred while fooling around after drinking heavily at a party organised by the defendant. He had ignored the defendant's warnings. In *Eyres v Atkinsons Kitchens & Bedrooms Ltd* [2007] EWCA Civ 365 the Court of Appeal held that a driver who had fallen asleep at the wheel because he had been forced to drive for very long hours by a manager who was accompanying him, was 33% contributorily negligent for an accident in which he was injured when the vehicle crashed. In *Ellis v William Cook Leeds Ltd* 1/11/2007 the Court of Appeal found that work practices used by employees in a factory were inherently dangerous, and reduced the damages payable to an injured workman by 50% to account for his contributory negligence.

A warning by an employer that is ignored by an employee so that an accident occurs can result in a finding of contributory negligence. In *Wells v Mutchmeats Ltd* 28/2/2006 it had been part of the appellant's job to check that footbaths of disinfectant were full, and Court of Appeal held that the judge had been correct to make a finding of 40% contributory negligence when a tray had slipped because the appellant stood in it.

As the court is free to decide what is 'just and equitable' in each case, this may also be why there is a more subjective approach to the conduct of the claimant in contributory negligence than in negligence itself. This is particularly noticeable in the case of children (see *Gough v Thorne* [1966] 1 WLR 1387).

Accident figures suggest that the worst injuries are suffered by elderly people and children. In *Ellis v Bristol City Council* [2007] EWCA Civ 685 the Court of Appeal held that an elderly resident in a care home had been 33% to blame when she slipped in a pool of urine on the floor of the home.

It appears that in traffic children find it difficult to judge the speed and distance of approaching vehicles, and that age is an important factor in the ability to take care of oneself. The use of the subjective approach means that children and elderly people are not unduly penalised.

Through a strange twist of logic, the seat-belt cases demonstrate that the courts are trying to impose standards of care upon claimants. Despite the more subjective approach which the courts are usually willing to adopt in contributory negligence cases, there seems to be a more objective attitude to the problem in cases in which the claimant has taken a chance with his or her safety by not wearing a seat-belt.

21.1.5 Causation in contributory negligence

It is always necessary to establish that the claimant's conduct contributed to the damage which he or she suffered before a reduction will be made for contributory negligence. Some considerable uncertainty can arise as a result of causation which may be addressed at the quantum stage. For example, in one case, an employer accepted liability for negligently exposing a former employee to asbestos, but the widow was forced to accept a 20% reduction in the damages payable to the estate to reflect the contributory negligence of her former husband in failing to give up smoking after he had developed lung cancer, *Badger v MoD* [2005] EWHC 2941 (QB).

For example, in *Woods v Davidson* (1930) NI 161 NL, the claimant, who was drunk, was run over by the defendant. Since he would have been run over by the defendant even if he was sober, there was no contributory negligence.

The case of *Corr v IBC Vehicles Ltd* [2008] UKHL 13 demonstrates yet again the problems that can arise in relation to causation when contributory negligence is a potential factor. The claimant's husband had committed suicide as a result of psychiatric injury which he had suffered because of an accident at work. The issue before the House of Lords was whether the damages claimed by the respondent under the 1976 Act which could be attributed to the suicide were too remote, but the House of Lords also considered (*obiter*) whether it would be appropriate to reduce the damages payable to the widow. The defendants argued that that since committing suicide was a voluntary and unreasonable act, it broke the chain of causation, and amounted to contributory negligence.

It was considered inappropriate for House of Lords to decide the issue of contributory negligence, as the courts below had not done so, though in the view of some of their Lordships, a deduction for contributory negligence might, in certain cases, be appropriate when suicide was committed in a state of depression caused by accident (*Reeves v Commissioner of Police of the Metropolis* [2000] 1 AC 360 HL). Lord Mance considered that suicide as a result of a tortious act should not necessarily result in 100% liability on the part of the defendant and Lord Neuberger agreed with Lord Scott and Lord Mance, that in principle a defendant could succeed in obtaining a reduction in the damages payable when a person commits suicide, to take account of contributory negligence. There is clearly a large portion of policy involved in the views expressed, albeit obiter, in this case, and in logic it is difficult to justify a reduction for contributory negligence when a person has been caused such appalling psychiatric harm by the wrongful act of the defendant that he is driven to take his own life.

Problems of causation can also arise in cases where there is more than one defendant. In *Fitzgerald and Lane v Patel* [1989] AC 328, the claimant stepped into the road without looking and was hit by the defendant who was driving negligently. As a result of the impact, the claimant was pushed out into the road and was struck by the second defendant's car. The judge at first instance held that the claimant should receive two-thirds of the total award because all three parties were equally to blame for the damage. However, the House of Lords decided that once liability has been established the court must assess whether the claimant has contributed to the injury which he or she suffered, and if this is the case, what proportion of the damage could be attributed to the claimant's own carelessness. Apportionment of liability between the claimant and defendant must be kept separate from the apportionment of responsibility for the accident itself as between co-defendants. The claimant should be no better off because he has been injured by two people. In the event, the claimant received only 50% of the possible damages.

Sometimes, arguments have been advanced that not wearing a seat-belt can on some occasions save a driver or passenger from serious injury. People even claim that they make a conscious decision not to wear a seat-belt for that very reason. However, research into numerous accidents over many years suggests that in most instances, the wearing of seat-belts saves people from serious injury. This was the message which Lord Denning was attempting to communicate to the public when the Court of Appeal decided *Froom v Butcher* [1976] QB 286. In fact, that case made little difference to public awareness of the need to use seat-belts, although one or two of the tabloid newspapers carried accounts of the decision. In 1972, only 20% to 25% of people wore seat-belts, despite a nationwide intensive advertising campaign featuring Jimmy Saville advising us to 'clunk, click every

trip'. The greatest impact on the wearing of seat-belts has been made by the introduction of a criminal statute in 1979, which required all front seat passengers to wear seat-belts in cars in which they were fitted.

This has now been extended to all passengers, and new cars are routinely fitted with seat-belts. The penalty for not wearing a seat-belt is a fine, and a heavier fine for parents who do not ensure that their children wear seat-belts. The result is that now at least 90% of car-users wear seat-belts. This demonstrates that the criminal law is a far more effective deterrent than the law of tort.

The seat-belt cases involve consideration of causation in relation to the damage suffered by the claimant. In the seat-belt cases, the claimant's failure to wear a seat-belt does not usually cause the accident itself but may contribute to his injuries.

In *Froom v Butcher*, the claimant was driving carefully, within the speed limit, on the correct side of the road. The defendant was travelling too fast on the wrong side of the road, and his negligence resulted in a serious collision with the claimant's vehicle. The claimant was not wearing a seat-belt at the time, and the injuries which he suffered were serious. He would not have suffered such serious injury had he been wearing a seat-belt. Lord Denning made a clear distinction between the cause of the accident, the defendant's negligent driving, and the cause of the injuries, the claimant's carelessness for his own safety in not wearing a seat-belt. He identified three situations in which causation would be relevant to the award of damages available:

- if the wearing of a seat-belt would have made no difference to the injuries suffered, there will be no reduction for contributory negligence;
- if wearing a seat-belt would have reduced the injuries suffered, there will be a 15% reduction;
- if wearing a seat-belt would have prevented the injuries altogether, there will be a 25% reduction in the award.

However, the Court of Appeal would allow some exceptions for people who could not be blamed for failing to wear a seat-belt, such as very fat people or pregnant women.

In *Biesheuvel v Birrell* (1998) unreported, it was held that the same principles apply to the wearing of rear seat-belts. In *Condon v Condon* [1978] RTR 483, in which the claimant claimed to suffer from a seat-belt phobia, there was no reduction from the final award of damages.

21.1.6 Drunk drivers

The courts tend to deal with passengers who accept lifts from drunk drivers by finding them contributorily negligent in appropriate cases. In *Owens v Brimmel* [1977] 2 WLR 94, the claimant and defendant went on a pub-crawl together, and the defendant volunteered to drive. They each consumed about nine pints of beer, and on the journey home at the end of the heavy evening's drinking, the car left the road and collided with a lamp post. The car was a write-off, but the claimant was thrown partly clear of the wreckage, probably saving his life. However, he did suffer extensive injuries, including brain damage, loss of an eye, fractured facial bones and a fractured bone in the leg. The defendant failed to establish exactly how the injuries occurred, or indeed that wearing

a seat-belt would have reduced the extent and degree of injury, so in relation to not wearing a seat-belt the defence of contributory negligence failed. The question of accepting lifts with drunk drivers had not previously arisen in English law since *Dann v Hamilton* [1939] 1 KB 509 (see 21.2.1, below). The judge considered the commonwealth cases on the subject. It was decided that in accepting a lift with someone who was drunk, the claimant was contributorily negligent, even if he was himself too drunk at the time to know how drunk the driver was. This was because the two had set out together on a pub-crawl, and the claimant must have been aware of the possible consequences. There was a 20% reduction from the award. Watkins J said:

> Thus, it appears to me that there is widespread and weighty authority for the proposition that a passenger may be guilty of contributory negligence if he rides with the driver of a car whom he knows has consumed alcohol in such a quantity as is likely to impair to a dangerous degree that driver's capacity to drive properly and safely. So may a passenger be guilty of contributory negligence if he, knowing that he is going to be driven in a car by his companion later, accompanies him on a bout of drinking which has the effect of robbing the passenger of clear thought and perception and diminishes the driver's capacity to drive properly and carefully.

Cases on this topic suggest that the courts are becoming less lenient towards those who are given lifts by people who are drunk, but the burden of proof is still on the defence to prove that the claimant knew that the driver was unfit to drive:

- ***Limbrick v French and Farley* [1993] PIQR P121**
  The defence of contributory negligence failed, because although the claimant knew that the defendant was drunk, it was not possible to prove that she knew he was unfit to drive.
- ***Stinton v Stinton* [1993] PIQR P135**
  The claimant and defendant set out together on a pub-crawl. At the time of the accident, the claimant was so drunk that he was unconscious, and argued that he was not a direct participant, but this was not accepted by the judge who decided that short of actual participation this was a case of the maximum possible blameworthiness. The damages were reduced by one-third.
- ***Donelan v Donelan* [1993] PIQR P205**
  Both claimant and defendant had been drinking very heavily when the claimant asked the defendant to drive his car. He knew that she was an inexperienced driver and had never handled a large powerful car. The judge decided that the claimant was the dominant party in the venture and reduced his damages by 75%.
- ***O'Connell v Jackson* [1972] 1 QB 270**
  The claimant's damages were reduced because he did not wear a crash helmet when riding a motorbike, as a result of which his injuries were far worse than they would have been had he worn a helmet.

21.1.7 Who benefits from the rule?

The defence of contributory negligence allows the defendant to escape having to pay the full award which would otherwise have been available to the claimant. In the line of cases involving the negligent over-valuation of property, which has emerged as a result

of the fluctuations on the property market, the House of Lords has ruled that, where the basic loss exceeds the amount of the over-valuation, the deduction for contributory negligence (if any) must be made before the calculation is made (that is, the calculation established in *South Australia Asset Management Corpn v York Montague Ltd* [1997] AC 191, [1996] 3 All ER 365, where it was decided that, if the basic loss suffered by the claimant exceeds the extent of the over-valuation, that figure is the limit of the allowable loss).

This rule was laid down in *Platform Home Loans v Oyston Shipways Ltd* [1999] 2 WLR 518, in which Oyston Shipways had been found negligent in their overvaluation by £500,000 of a property which the claimants had accepted as security for a loan. Their basic loss was calculated as £611,748, but they were found to have been 20% contributorily negligent.

Contributory negligence can never completely exonerate a defendant from liability, and must be distinguished from the defence of '*volenti non fit injuria*', which does operate as a complete defence, and will be dealt with later. If *volenti* applies, the claimant can be said to have been willing to run the risk of being injured, and is therefore unable to complain about the defendant's conduct at a later date. This is illustrated by the case of *Morris v Murray* [1990] 2 WLR 195 (see 21.2.1, below).

21.2 *VOLENTI NON FIT INJURIA* (CONSENT)

The defence of consent or *volenti non fit injuria*, which is frequently referred to as *volenti*, is used in circumstances when the claimant has consented to take the risk involved, and is therefore not permitted to complain of the consequent damage. This defence is discussed in more detail where it is relevant to the analysis of the various torts – especially in relation to negligence and Occupiers' Liability.

The difficulty of distinguishing between *volenti* and contributory negligence and the preference of the judges for the latter has already been explained. Judges, unwilling to deny claimants a remedy altogether, frequently opt for a finding of contributory negligence as a compromise.

However, there are some circumstances in which the defence of *volenti* does succeed. People who agree to medical treatment, after being informed of material risks, to being searched by police officers, to allowing others to walk across their land, are all consenting to various torts being committed, and will not be able to complain later.

For there to be operative consent on the part of the claimant, there must be proper understanding of the risks involved. In *Stermer v Lawson* (1977) 79 DLR (3d) 366, a Canadian case, the claimant was permitted by the defendant to use his motorbike, but was not given proper instruction on how to use it. He was held not to have been *volens* when he was injured because he could not handle the machine properly. See also *Ratcliffe v McConnell* [1999] 1WLR 670.

So far as negligence is concerned, merely because a person knows that a risk exists does not necessarily mean that he has agreed to accept the consequences of that risk. Moreover, consent under protest does not operate to deny the claimant a remedy. In *Smith v Baker & Sons* [1891] AC 325, the claimant was working in a quarry, and from time to time a crane swung large loads of rock over his head without warning. Unhappy

about this, the claimant complained several times to his employer, but this made little difference, and he had no choice but to continue working in this situation if he wanted to keep his job. Eventually, a rock fell and injured him and the House of Lords held that he was not *volens*.

21.2.1 Dangerous jobs

In very few cases will an employee be held to be *volens*, so great is the employer's duty concerning care and safety of employees. One unusual case is *Gledhill v Liverpool Abattoir Co Ltd* [1957] 1 WLR 1028, in which the claimant, who worked in a slaughter house, was injured when a pig, which had been slaughtered and hung up by its legs, fell on top of him. This was a danger of which employees at the slaughter house were all aware, and it was held that the claimant was *volens*.

Since the Law Reform (Contributory Negligence) Act 1945, findings of contributory negligence are more common than *volenti* in most employment cases.

Moreover, the employer's duty of care in relation to the health and safety of employees cannot be excluded by a term of the employment contract (*Johnstone v Bloomsbury AHA* [1991] 2 All ER 293).

It might seem obvious that anyone who is foolish enough to accept a lift with a drunken driver is agreeing to run the risk of being injured and that the defence of *volenti* should operate to the full advantage of the defendant. In the case of *Dann v Hamilton* [1939] 1 KB 509, this matter was considered, and the judge decided that it should not so operate unless it was a clear and glaring example of a passenger consenting to run a very great risk. In this case, the defendant had driven the claimant and her mother to London to see the lights. They all visited several pubs, and it was clear that the defendant was drunk. One of the passengers got out of the car, but the claimant decided to accept the risks involved and stayed put. Soon afterwards, the claimant was injured, but the judge decided that she had not been contributorily negligent (note, however, that this was before the passing of the Law Reform (Contributory Negligence) Act 1945).

Since s 149 of the Road Traffic Act 1988, defendants are prevented from relying on the defence of *volenti* in circumstances when insurance is compulsory (as it is in the case of car owners' liability for injury to their passengers). It cannot therefore now arise that *volenti* could be pleaded as a defence in a road accident case, though it may be relevant in the case of other vehicles, such as aircraft (*Morris v Murray*).

In *Pitts v Hunt* [1990] 3 All ER 344, in which the claimant and defendant were engaged on a joint illegal enterprise, and in which the claimant was aiding and abetting the criminal behaviour of the defendant, there was scope for another defence to operate, that of *ex turpi causa*, which allowed the defendant to escape liability altogether (see para 21.5).

The defence of *volenti* is now seldom relied upon, partly because of the Road Traffic Act provisions, and partly because contributory negligence is likely to be favoured by the courts who may be anxious to find a source of compensation for the claimant, but have the option to inflict a small 'punishment' for carelessness. If the defendant is insured, this is often a better option than that of denying the claimant a remedy altogether, except in the most extreme cases.

In fact contributory negligence operates for the benefit of insurers who pay the damages in car accident cases and work accident cases, and indirectly it benefits all premium payers by keeping down the cost of insurance. A finding of contributory negligence shifts the loss away from the insurer and can work to the grave disadvantage of the claimant, or the relatives of a deceased claimant. The Pearson Commission considered the effect of abolishing the defence altogether. In Scandinavia, the abolition of the contributory negligence defence has increased the cost of motor insurance premiums by at least 7.5%.

21.2.2 Dangerous sports

Participants in dangerous sports are taken to have agreed to submit to acts of trespass which occur within the rules of the particular sport, but not acts of violence which occur outside those rules. Nor would a claimant be held to have consented to negligence on the part of a referee (*Vowles v Evans and Another* [2003] EWCA Civ 318).

A claim for negligence was successful in the case of *Smoldon v Whitworth and Nolan* [1997] PIQR 133 when a young rugby player who had broken his neck when a scrum collapsed contended that the referee was in breach of his duty of care to the players in not controlling the game adequately. The judge made it clear that, although the claimant had accepted a degree of risk by playing rugby, he deserved protection from the referee.

Those attending sporting events as spectators may be consenting to run the risk of injuries caused by negligence. In *Woolridge v Sumner* [1963] 2 QB 43, Lord Diplock took the view that spectators take a risk of injury being caused to them by participants, though in that case the claimant, a photographer, was held to have consented when he entered the track during heavy hunter trials, hardly the usual behaviour of a spectator. If the event is run on business lines, liability for death or personal injuries caused by negligence or breach of the occupier's duty to visitors cannot be excluded (Unfair Contract Terms Act 1977).

In the Compensation Act 2006 the Government identified and implemented what it considered to be an essential modification of the law that would enable people to participate in activities which organisers might otherwise consider too risky. However, the general picture is complex and in *Poppleton v Trustees of Portsmouth Youth Activities Committee* [2007] EWHC 1567 (QBD), it was held that an activity centre was liable to a climber who suffered an injury on its equipment because it had failed to comply with the Management of Health and Safety at Work Regulations 1999. The organisers had not warned the climber about the possibility of falling off a wall onto safety matting. The defence of *volenti non fit injuria* was rejected by the court, but the claimant was found 75% contributorily negligent. The judge found that he had been 'foolhardy' in attempting a dangerous manoeuvre which had caused his injuries. The Court of Appeal disagreed, [2008] EWCA Civ 646, and found the defendants not liable for the injuries.

21.2.3 Drunk drivers

The defence of *volenti* cannot apply in cases in which the claimant has accepted a lift in a car with a drunk driver, because of the operation of s 149 of the Road Traffic Act 1988.

However, the defence did operate to deny the claimant a remedy when he went on a joyride with the defendant in a stolen aircraft in *Morris v Murray* [1990] 3 All ER 801. Both men were involved together in a heavy drinking session, and the finding of *volenti* was based on the fact that the claimant must have known that his companion, who was killed when the plane crashed, was in no fit state to pilot it.

21.2.4 Rescuers

A rescuer will seldom be found to have consented to run the risk of injury, provided that the rescue was necessary to save life, limb or property. The tendency of the courts in previous years to lean in favour of rescuers in the cases involving nervous shock has already been described and this is yet another example of the special attitude which judges have towards rescuers.

The rationale for the lenient attitude of the courts is that a person who creates a situation of danger must foresee that a rescuer is likely to come to the assistance of the victims. It is also foreseeable that the rescuer may suffer physical injury or psychiatric harm (*Chadwick v British Rlys Board* [1967] 1 WLR 912). However, the matter is more likely to be a question of policy, in that although there is no positive duty to effect a rescue, the person who puts at risk his own safety to save another should be afforded a remedy if harmed. The loss should, morally, and perhaps also, from a practical perspective, if the defendant is insured, lie with the person who creates a danger.

This principle applies even if the rescuer is a professional member of the rescue services. In *Salmon v Seafarers Restaurants Ltd* [1983] 3 All ER 729, the claimant was a fireman who was injured attempting to extinguish a fire in a fish and chip shop. The fire had been caused by the negligence of the owner in failing to turn off the heat under large vats of fat used for frying the fish and chips. In *Ogwo v Taylor* [1987] 2 WLR 988 and *Hale v London Underground* (1992) 11 BMLR 81, the successful claimants were also firemen.

It is important that the rescue is necessary or the claimant may be *volens*. In *Haynes v Harwood* (1935), the claimant was a policeman who was injured when he stopped a horse from bolting down a street where some children were at play. He was not *volens* but, in *Cutler v United Dairies* [1933] 2 KB 297, the claimant entered a field to try to calm frisky horses, and he did not succeed in a claim for compensation. He was *volens* because he had intervened in a situation which was non-urgent in that there was no risk to people or property.

The courts now limit the scope of claims by rescuers suffering psychiatric injury alone by means of restricting the ambit of the duty of care (see Chapter 4).

21.3 CONSENT IN THE MEDICAL CONTEXT

In recent years, the issue of consent has become increasingly important in the context of medical treatment, and many of the cases turn upon the question of whether the patient consented to run the risk of suffering side-effects associated with certain treatments.

There are two separate lines of cases: those which turn on consent to trespass to the person and those which turn on negligence.

21.3.1 Trespass to the person

The patient who consents to medical treatment is in fact consenting to the torts of assault, battery and possibly false imprisonment. Any touching or treating or giving of an anaesthetic without such consent is unlawful and actionable. To treat a person against his or her will is regarded as a serious threat to personal liberty, and will only be approved in the most extreme circumstances, subject to numerous checks and safeguards. Compulsory medical treatment under the Mental Health Act 1983 falls into this category.

A considerable body of case law has been developed on the subject. For example, in *Potts v North West RHA* (1983) unreported, the claimant was injected with 'depoprovera', a long lasting and slow acting contraceptive drug, without her prior consent at the same time as she was given a rubella vaccination, shortly after the birth of a baby. She was awarded £3,000 damages for assault and battery because she had never been given the opportunity to accept or refuse the treatment. The judge said: 'To deprive her of the right to choose is to deprive her of the basic human right to do with her body as she wishes'.

The basic rule is that competent patients have the right to refuse medical treatment however irrational that decision may appear to others. In *B v A NHS Trust* [2002] EWCA 429, it was held that a woman who was being kept alive on a respirator had the right to refuse that treatment even though its withdrawal would result in her certain death. The treatment she had been given against her will amounted to trespass.

A spate of cases concerning the treatment of Jehovah's Witnesses and others who, because of religious convictions, refuse blood transfusions, indicate that the courts are becoming increasingly drawn into the picture by doctors and social workers who are concerned for the welfare of patients, and who, because they are trained to save lives, find it difficult not to treat them even in the face of refusals. The approval of the courts after long hours of deliberation is an important protection for the doctors concerned.

In the case of babies and people under the age of 16 years, the courts frequently take the view that treatment should be given even if (unusually) the parents refuse consent (*Re J (A Minor) (Wardship: Medical Treatment*) [1990] 3 All ER 930), unless the proposed treatment would inflict greater suffering and prolong a life of agony (*Re W* [1981] 3 All ER 401, CA). The courts have inherent wardship jurisdiction, and jurisdiction under s 100 of the Children Act 1989, to decide what is in the best interests of the child concerned in the event of disputes between parents and doctors about how a seriously ill child should be managed – see *Re J and Re Wyatt* [2004] EWHC 2247, [2005] EWCA Civ 1181 and *Re Winston-Jones (A Child) (Medical Treatment: Parent's Consent)* [2004] All ER (D) 313. The courts appear to have moved away from the 'intolerability' test when deciding cases concerning non-treatment and withdrawal of treatment from incompetent patients – first used in *Re B (A Minor) (Wardship: Medical Treatment)* [1981] 1 WLR 1421. In *Re J (A Minor) (Wardship: Medical Treatment)* [1991] Fam 33 the test was stated by Taylor LJ as follows:

> I consider the correct approach is for the court to judge the quality of life the child would have to endure if given the treatment and decide whether in all the circumstances such a life would be so afflicted as to be intolerable to that child. I say 'to that child' because the test should not be whether the life would be intolerable to the decider. The test must be whether the child in question, if capable of exercising sound judgment, would consider the life tolerable.

In *Re Wyatt* the Court of Appeal commented the better test was that of 'best interests', based on a balance sheet approach. This is not the place to discuss at length the line of medical law cases concerning the management of treatment of seriously ill young children, but it is useful to consider a recent decision to illustrate the dilemmas faced by the courts when they are asked to intervene. In *NHS Trust v B* [2006] EWHC 507 a judge refused to authorise doctors to withdraw life support from a baby, even though the parents thought that it would be kinder to the child to do so. The baby, known as MB for the purposes of the proceedings, had a severe form of spinal muscular atrophy and could only breathe with the aid of a ventilator. Medical experts said his death was inevitable, although there were different views as to when that would occur. MB's parents refused consent to switching off the ventilator, except as a test to discover if he could breathe independently, and they wanted MB to have a tracheotomy so that he could be ventilated outside the hospital. The doctors treating MB wanted to withdraw the endotracheal tube and allow MB to have a pain-free, dignified death, as the medical evidence unanimously supported this. The judge refused the parents' request for an order for further invasive treatment, but also refused a request by the doctors to withdraw ventilation. He carried out a balancing exercise, as recommended by the Court of Appeal in *Re Wyatt*, and concluded that any suffering he might have to endure through the invasive treatments keeping him alive was balanced by these benefits.

The cases on enforced Caesarean sections raise some important ethical issues and pose difficult dilemmas for doctors and judges. In this line of cases, doctors have sought declarations from the High Court as to the legality of treatment against the will of women who refuse to have Caesarean sections. In most of the cases the treatment is urgently required and judges are called upon in emergency situations, sometimes during the night, to sanction treatment which would otherwise amount to a battery. After a series of cases in which the courts have found the means of circumventing the basic rule that an adult patient who is of sound mind has the absolute right to refuse treatment even if the refusal appears irrational, the Court of Appeal laid down guidelines to be applied in such situations in *Re MB* (1997) *The Times*, 18 April. It was emphasised that, even if the mother and baby are both in danger of dying if the surgery is not carried out, the wishes of the mother should be respected as long as she is capable in law of giving or refusing consent to treatment. Butler Sloss LJ said:

> The law is, in our judgment, clear that a competent woman who has the capacity to decide may, for religious reasons, other reasons or for no reasons at all, choose not to have medical intervention, even though the consequence may be the death or serious handicap of the child she bears or her own death.

There is to be a presumption that a woman is competent and the test for establishing incompetence which the Court of Appeal laid down is whether there is some impairment or mental dysfunctioning rendering a woman unable to make treatment decisions.

In none of the cases so far brought before the English courts has a woman been found to be competent to refuse a Caesarean section. It remains to be seen whether the guidelines will make any difference in the future.

In the case of people over 16 with a mental disability, the consent of the court to any form of surgery is not absolutely required, but it is advisable to apply to the High Court for approval (*F v West Berkshire HA* [1989] 2 All ER 545). See *Re S (Sterilisation: Patient's*

Best Interests) (2000) unreported for clarification by the Court of Appeal of what is meant by 'best interests' (and see Chapter 13).

In the case of consent to treatment by people under 16, the doctors are guided by the directions of the House of Lords in *Gillick v West Norfolk and Wisbech HA* [1985] 3 All ER 402, a case concerning consent by a young woman under 16 to contraceptive treatment. People over that age can consent to medical treatment in their own right (s 8(1) of the Family Law Reform Act 1969), but those under the age of 16 will only be able to give valid consent to treatment if they have sufficient maturity and understanding to realise what is involved. It is up to the doctor to assess this.

Numerous problems arise in relation to refusal of treatment by young people. For example, in *Re M (A Minor) (Medical Treatment)* (2000) 52 BMLR 124, a 15 year old patient identified only as M, who had been perfectly fit and well until about three months previously, had developed heart failure and had only one week, or thereabouts, to live. Her parents had already consented for her to undergo a heart transplant operation, but, on learning that her only chance of survival was the operation to which they had agreed, M refused her consent. The High Court judge who was to hear the case, Johnson J, insisted that M should speak to a solicitor to explain her views. M said that she would prefer to die than to have the operation and take medication for the rest of her life, saying that the idea of being different from other people and living with someone else's heart made her feel very depressed. The Official Solicitor, on learning of her views, believed that M was too overwhelmed at the discovery of her fatal illness and the seriousness of her situation to make an informed decision. He recommended that the surgery should take place, and the judge accepted this recommendation on the basis that the surgeons should act in accordance with their clinical judgment. He sanctioned the surgery.

The present state of UK law on consent to treatment and refusal of treatment by minors is illogical. Although a person under the age of 16 can consent to medical treatment, as long as the criteria established in the *Gillick* case are satisfied, he or she is unable to refuse to undergo treatment for which parental consent has been given, as the parents have the right to overrule the refusal of a *Gillick* competent child *(Re R (A Minor) (Wardship) (Medical Treatment)* [1991] 4 All ER 177). In cases in which sensitive issues are raised and the parents and child are in dispute, such as M's case, a declaration is usually sought from the Family Division, despite clear authority that the parents can overrule the consent of the child. The Official Solicitor is involved as a matter of course in complex cases, and the court has power to overrule parental consent to any treatment which it considers is not in the best interests of the child. In *Re M*, the judge explained the jurisdiction of the court to deal with this matter, referring to the case of *Re W (A Minor) (Medical Treatment: Court's Discretion)* [1992] 3 WLR 758, and in particular to the words of Lord Donaldson MR, who said:

> There is ample authority for the proposition that the inherent powers of the court under its *parens patriae* jurisdiction are theoretically limitless, and that they certainly extend beyond the powers of a natural parent. There can, therefore, be no doubt that it has the power to override the refusal of a minor, whether over the age of 16 or under that age but *Gillick* competent ... Nevertheless, such a refusal is a very important consideration in making clinical judgments and for parents in deciding whether themselves to give consent. Its importance increases with the age and maturity of the minor.

In M's case, the court took the view, with some caution, that it would be appropriate for the treatment to be given against M's wishes.

The general principle, which was established by the Court of Appeal in *Re W* and *Re R* (above), has been the subject of considerable criticism. It is inconsistent with the views expressed by the House of Lords in the leading case on consent and minors, *Gillick v West Norfolk and Wisbech AHA*. As Balcombe LJ pointed out in *Re W*, 'in logic there is no difference between an ability to consent to treatment and an ability to refuse treatment'.

The Mental Capacity Act 2005 has modified the law on consent to medical treatment, and also on refusal of treatment. It sets up a detailed framework for decision making on behalf of adults aged 16 or more who lack the capacity to make decisions about their treatment. A Code of Practice for the Act gives further information and guidance. The Mental Capacity Act places the pre-existing common law provisions on a statutory footing, but adds some further features such as the ability to nominate substitute decision-makers by means of a Lasting Power of Attorney (LPA), the creation of a new Court of Protection with further powers, and the inclusion of provisions for involving incapacitated adults in certain forms of research.

There are various ways of determining whether a person has the capacity required for medical decision-making and the details of the law are beyond the scope of this book. However, it should be noted that capacity is task-specific and that an individual may move in and out of capacity for various purposes and at various times.

Under the Act, a person is regarded as being incapable of making a decision if, at the relevant time when the decision needs to be made, he or she fails:

- to understand the information relevant to the decision;
- to retain the information relevant to the decision;
- to use or weigh the information; or
- to communicate the decision in any way.

Where an individual fails one or more parts of the test, they do not have the relevant capacity.

There are basic principles which must govern all decisions under the Act which have their origins in the common law and are designed to comply with the relevant sections of the Human Rights Act. For example:

- There is a presumption of capacity.
- Decision-making should be maximised.
- People should be supported to make their own decisions.
- People should be free to make unwise decisions.
- The best interests of the individual are a vital consideration.
- The least restrictive alternative should be taken at all times.

If there are disputes as to capacity, the Court of Protection can be asked for a judgment.

The best interests test is very similar to the common law test. Relevant factors may include:

- The past and present wishes and feelings of the individual, including any relevant written statement made when she or he had capacity – this would include general statements of wishes or 'living wills'.
- His or her beliefs or values where they would have an impact on the decision. An important part of any best interests decision will normally involve a discussion with those close to the person in question.

The powers under the LPA are restricted to advance decisions to refuse treatment. Although broader advance statements – 'living wills' – stating treatment preferences may be relevant to the broader 'best interests' assessment, these are not legally binding.

Advance refusals of treatment are binding only if:

- The individual concerned was 18 or more when the statement was made, and had the necessary mental capacity.
- It specifies the specific treatment being refused and the particular circumstances when the refusal is to apply.
- The person making the directive has not withdrawn the decision when he or she had the capacity to do so.
- The person making the directive has not appointed, since the directive was made, an attorney to make the decision.
- The person making the directive has not done anything that is inconsistent with the directive remaining a fixed decision.

Advance decisions may be oral or in writing, but it is vital to note that an advance refusal can only apply to life-sustaining treatment if it is in writing, signed and witnessed, and contains a statement that it is to apply even where life is at risk.

Detailed discussion of the Act and of the important legal and ethical issues in these cases is beyond the scope of this book.

21.3.2 Negligence

Patients consenting to treatment do not consent to negligent treatment, merely to the torts of assault and battery. The question of a negligence claim arises, however, when a patient claims that he or she would not have consented to the particular treatment if information about possible risks and side-effects had been given. The distinction between the two types of case is illustrated by the following case. In *Wells v Surrey AHA* (1978) *The Times*, 20 July, the claimant was in extreme pain after a long and difficult labour. She was seen by a consultant who recommended a Caesarean section, and for the first time mentioned the possibility of a sterilisation. She signed a consent form agreeing to both a Caesarean section and a sterilisation. She already had two children, but she was a devout Roman Catholic and she later claimed that under normal conditions, had she not been in such a state of pain and exhaustion, she would never have agreed to the sterilisation, because it was against her religious convictions. She sued for trespass to the person on the grounds that the consent which she had given was not true consent. She also claimed damages for negligence because she had not been properly counselled before the operation. The judge found, on the facts that she had given her consent, so the

claim for trespass failed, but that there had been negligence on the part of the doctor in not providing her with proper advice about the operation to sterilise her, which was not always reversible.

21.3.3 Informed consent

In English law, patients are not entitled to the fullest possible information about the treatment they receive. There is no doctrine of 'informed consent' in English law. Instead, it is up to the doctor to decide how much information to give, and the test to be applied in deciding whether a doctor has acted reasonably in the amount of information given is that in *Bolam v Friern HMC* [1957] 2 All ER 118. *Bolitho v City and Hackney HA* [1992] PIQR P334, (1997) 39 BMLR 1, HL has now been extended to cases of this kind (see *Pearce v United Bristol Healthcare NHS Trust* [1999] 1 PIQR 53, and *Chester v Afshar* [2004] UKHL 41, discussed in detail in Chapter 13).

The effect has been to introduce a more patient-centred approach. The developing case law suggests that judges are more willing now to consider the patient's perspective, and what the reasonable patient would regard as necessary information about the risks and side-effects of proposed treatment. The Department of Health, in its *New Reference Guide to Consent* (2008, London: DoH, amended in the light of the Mental Capacity Act 2005), has issued detailed information to doctors to enable them to decide how much information to provide to their patients. This information now needs updating in the light of the decision in *Chester v Afshar*.

21.4 EXCLUSION CLAUSES AND CONSENT

Certain statutes, such as the Occupiers' Liability Acts 1957 and 1984 provide that the defence of *volenti* may apply in appropriate circumstances. However, the scope of this defence has been greatly limited by the Unfair Contract Terms Act 1977 which outlaws clauses excluding or limiting liability for negligence or breach of an occupier's duty of care resulting in death or personal injuries, and those excluding or limiting liability for other types of harm unless it is reasonable in all the circumstances to do so. These provisions apply only in a business context, however, and it is still possible to exclude or limit liability in other situations. Note also the Unfair Terms in Consumer Contract Regulations 1999 (93/13/EEC).

The legislation which prevents the use of exclusion clauses is the result of changing attitudes of the courts and later of Parliament towards the issue of consent. It became clear during the course of the 20th century that on many occasions when people appear to consent they do not in fact do so freely. This picture first emerged in relation to contractual situations in which it was acknowledged that consumers and employees have little or no control over the terms of the agreements into which they enter. The courts developed the role by convoluted means, frequently twisting and turning in order to circumvent unfair contractual provisions. This approach spilled over into the law of tort and is part of a wider movement towards greater emphasis on affording protection to the weaker party in many situations.

21.5 *EX TURPI CAUSA NON ORITUR ACTIO* (ILLEGALITY)

If the claim of the claimant is tainted in some way by illegal acts on his or her part, the defence of illegality based on the ancient principle of *ex turpi causa non oritur actio* may apply. Underlying this defence are notions of 'public policy' and, in more recent cases, illegality is sometimes treated as a reason for denying the existence of a duty of care rather than as a defence, so this area of law is rather vague and unpredictable. There is no definite test to determine whether the defence applies. Several tests have been suggested for illegality, including one of 'offence to the public conscience', though this was discredited as too dependent on emotional factors in *Pitts v Hunt* [1990] 3 All ER 344.

Causation is an important factor as the defence is only likely to succeed if the illegal act or acts are related to the damage which is complained of. It is, therefore, important to establish first whether there is a link between the illegal act and the tort.

Even if there is a relationship between an illegal act and the tort in question the defence of illegality may not operate, as it would be regarded as unfair to deny a remedy to a claimant merely because he or she was guilty of some minor criminal offence. Many a successful claimant who has been injured in a car accident was speeding at the time of a collision (though of course damages may be reduced for contributory negligence in such circumstances, so satisfying the requirements of 'justice'). However, it is possible to find extreme circumstances in which the defence has been successful, for example, *Pitts v Hunt*, in which the claimant, a passenger on a motorbike, had encouraged the driver to ride dangerously. In *Ashton v Turner* [1981] QB 137, the defence denied a claim to a person injured in a car accident who was escaping after committing a crime. Nevertheless, there are some cases in which there is no definite link between a criminal act and the claim in tort.

A case in which the defence of illegality was rejected demonstrates the uncertain nature of this defence in circumstances even when a claimant has been convicted of connected criminal offences. In *Revill v Newbury* [1996] 1 All ER 291, the Court of Appeal confirmed an award of damages to the claimant despite the fact that he sustained the injuries of which he complained in the course of breaking into the defendant's property. The defendant raised the obvious defence of illegality, to the claims for assault, breach of the Occupiers' Liability Act 1984 and negligence which were brought against him. The leading cases were reviewed and this case was distinguished from *Pitts v Hunt* in which the parties were engaged together in a criminal enterprise and the defence applied. Here, the claimant was acting alone in his criminal endeavours, so the defence was considered less appropriate. This did not, according to the Court of Appeal, mean that the defence can never apply in this type of case, because the underlying principle was that the public interest demanded that a wrongdoer should not be allowed to profit from his wrongs, but, in this particular case, it would, if applied, have meant that the claimant, although a criminal and a trespasser would be left without any remedy for his injuries. It was one matter to prevent a person from reaping the profits of illegal activity and quite another to render that person an outlaw. As Lord Justice Evans explained, relying on the Law Commission report, *Report on Liability for Damage or Injury to Trespassers* (Law Com 75, 1976, London: HMSO), the law recognised that trespassers do have some limited rights. There was of course a large element of contributory negligence on the part of the claimant in *Revill v Newbury*.

The popular press were fiercely critical of the decision in this case, and in the name of the 'public conscience' fought hard for the right of landowners and property owners to defend their property with vigour. Although the position in the law of contract was distinguished in this case from that in tort, similar public policy issues influence the outcome of cases in both branches of the law. In this instance, the relevant factors included the need to find a balance in the protection of property against criminal acts.

In practice, the defence of illegality is seldom encountered. The absence of a consistent approach to the problem by the courts and the fact that it probably has virtually no deterrent effect on criminal behaviour have led to many criticisms, and the issue is referred to most frequently in the press in relation to trespassers who are injured in the course of illegally entering property, with intent to steal (see Chapter 10). However, the defence was raised (successfully) in *Clunis v Camden and Islington HA* [1998] 3 All ER 180 (see Chapter 6).

In that case, the Court of Appeal held that the defence could apply where, on grounds of public policy, the claimant should be prevented from relying on his or her own criminal act as a means of bringing a claim in negligence, unless it could be proved that the defendant's mental responsibility was so impaired that he or she was incapable of understanding the nature and quality of his or her act, or that what he or she was doing was wrong.

In a claim for damages for trespass to the person, it was held that the defence of *ex turpi causa* could succeed if the defendant's acts were linked inextricably with the unlawful conduct of the claimant. In *Cross v Kirby* (2000) *The Times*, 5 April, the claimant and his partner, Mrs Davies, were trying to sabotage a hunt on the defendant's land. She bit the defendant when he was escorting her off his land. Seeing this, the claimant intervened and attacked the defendant. At the same time, Mrs Davies fetched an iron bar and the claimant took a baseball bat, threatened to kill the defendant and jabbed him in the chest with it. As the defendant tried to walk away, the claimant followed, striking him again. The defendant, after a struggle, took the bat away from the claimant and hit him on the head, fracturing his skull. The defences of self-defence and *ex turpi causa* were raised. The trial judge found that the force used by the defendant had been disproportionate to that used against him. However, the Court of Appeal disagreed and ruled that the defence could be sustained in the circumstances of the case, as the defendant had himself been under attack from the same weapon.

The cases on *ex turpi causa* were reviewed by the Court of Appeal, starting with *Holman v Johnson* (1775) 1 Cowp R 341, in which the defence was thought to have originated. There, Lord Mansfield had stated that the question was whether the claimant was precluded from recovering because of his illegal conduct. In the present case, the Court of Appeal held that the claimant's injury had indeed arisen from his own criminal conduct, and, because of *ex turpi causa*, the claim should not succeed.

In *Ellis v Department of Transport* (2000) WL 1544742, the claimant was severely injured when he fell from a tree which he had climbed to protest against the building of a bypass. The judge held that there had been no breach of duty, but commented that the defendants could not have been liable in any event, because the defence of *ex turpi causa* would have applied.

More recently, in *Vellino v Chief Constable of Greater Manchester Police* [2002] 1 WLR 218 it was decided that a criminal who was seriously injured when trying to escape from

police officers was not entitled to damages. The Law Commission in its Consultation Paper 'The Illegality Defence in Tort' (No 160 2001) was critical of the confused state of the present law. Its final report is expected in 2005.

A further opportunity to clarify the law was missed more recently. In *Gray v Thames Trains and Network Rail* [2007] EWHC 1558 (QB) the claimant suffered severe post-traumatic stress disorder as a result of the tragic Ladbroke Grove train crash in which many people died. He was later convicted of manslaughter on the grounds of diminished responsibility. Until he committed the offence, the claimant had been in regular employment, but he had suffered sickness problems and had been forced to take absences as a result of depression. The proceedings included a claim for loss of earnings from the date of the crime of manslaughter to the date of trial, and for loss of future earnings. The judge ruled that he was not entitled to damages for earnings he had lost between the date of the offence and the date of trial, nor for future loss of earnings. The decision was reached on grounds of public policy, on the basis of the doctrine of *ex turpi causa*.

It is difficult to feel comfortable about this decision as the unfortunate victim of the accident, whose life was clearly ruined by post traumatic stress disorder, has been further penalised by being denied compensation for suffering loss of earnings which he would not have sustained had it not been for the initial accident. The killing of an innocent person was also a terrible tragedy, and it appears that the only winner in this dreadful situation, through the operation of the doctrine of *ex turpi causa*, was the insurer. Some of the related cases are distinguishable from this and it is difficult to find a common approach. Although it is very clear that when the claimant was a perpetrator of an incident, and was committing an offence in the process, with no earlier accident affecting his mental state, the doctrine does operate fairly – *Pitts v Hunt* [1991] 1 QB 24, but the law and policy become confused by cases such as *Revill v Newbery* [1996] QB 567, in which the claimant was injured by the deliberate act of the defendant when stealing from the defendant's allotment. As has been seen, the Court of Appeal, while reducing the damages on the basis of contributory negligence in that case, refused to accept that *ex turpi causa* was a defence. Yet in *Clunis v Camden and Islington Health Authority* [1998] QB 978, in which the claimant committed manslaughter when he was suffering from a serious mental illness (through no fault of his own), he was denied compensation on the grounds of *ex turpi causa*.

Gray v Thames Trains is closer on its facts to *Meah v McCreamer* [1985] 1 All ER, and *Worrall v British Railways Board* [1999] CLY 1413. In both of those cases the claimant had suffered a personality change as a result of accidents caused by the negligence of others, and as a result, committed crimes. In the first of those cases, decided when Woolf LJ was in the High Court, the claimant succeeded in obtaining damages to compensate him for his time in prison. In the second, a more recent decision of the Court of Appeal, relied upon by the defence in *Gray v Thames Trains*, the claimant failed to obtain damages in respect of lost income. It is important that this area of law be clarified.

21.6 INEVITABLE ACCIDENT

The defendant may escape liability by establishing that the cause of the claimant's injury was an accident rather than any wilful or negligent act on his part.

An inevitable accident is one which no human foresight could have prevented, an accident which could not have been prevented by the exercise of reasonable care on the part of the defendant.

In claims for negligence, the consideration that an event is a pure accident will be part of the general consideration as to whether reasonable care had been taken by the defendant. In a road accident, for example, the driver who is taking all possible care in a sudden snow-storm, but whose vehicle goes into an uncontrollable skid, would be excused negligence because the claimant would not be able to establish that there had been a want of reasonable care on his part in all the circumstances.

Inevitable accident, on the other hand, is a defence in which the burden of proof is on the defendant to show that what happened was an unforeseeable accident.

In *Stanley v Powell* [1891] 1 QB 86, a case of trespass to the person, the defendant successfully pleaded inevitable accident when he accidentally shot the claimant. A pellet from his gun, when he was shooting pheasants, ricocheted off a tree at an unusual angle, and injured the claimant. In *Evans v National Coal Board* (1951) unreported, it was stated that the defence could also be applied successfully in trespass to goods.

However, it has now been established that in trespass to the person there must be proof of intention or negligence on the part of the defendant, and it is therefore arguable that any question of inevitable accident would not be treated as a separate defence but merely as part of the issue of whether the defendant has achieved the requisite standard of care in all the circumstances.

Inevitable accident is therefore a very limited defence, as it cannot apply as such in negligence, nor does it apply in torts of strict liability when the defendant is liable regardless of whether the event was an accident (though there may be a closely related defence of 'act of God' or 'act of a stranger').

21.7 MISTAKE

There is no specific defence of mistake in the law of tort. If a person uses goods belonging to another person in the mistaken belief that they are his own, or trespasses on the land of another person, mistakenly believing that he is still within his own boundaries, there will be no defence to a claim for trespass (see *Basely v Clarkson* (1681) 3 LEV 37).

If liability depends on the defendant's motive, the fact that the defendant was mistaken may be a relevant consideration in deciding the issue of 'honest belief'. Thus, in the tort of deceit, the burden of proving lack of honest belief is on the claimant. If he cannot do so because the defendant was genuinely mistaken, the claim will fail.

In negligent misstatement, a mistake will not necessarily excuse the defendant as the question to be considered is what a reasonable man would have believed in all the circumstances.

21.8 NECESSITY

The defence of necessity may excuse the defendant if he or she made a choice between two undesirable courses of action and was forced to take the measures which he or she

eventually decided upon to prevent even greater damage. In effect, the court is being asked to agree or to disagree with the defendant's decision on the basis of the facts which were available to the defendant at the time.

In the case of claims for trespass to the person, this can be a crucial issue in determining liability, particularly if the claimant is refusing life saving medical treatment, and recent cases demonstrate that courts are becoming much more concerned about the claimant's freedom to make choices, even if the decision is to refuse treatment. This represents a change of approach from that taken in the case of force feeding suffragettes (*Leigh v Gladstone* (1909) 26 TLR 139), and the entire area of law is shot through with issues of policy, depending on the political, moral and philosophical issues of the day. Inevitably, in the case of very young children, the courts are anxious to provide the best possible hope of life even if the child or minor is refusing treatment on religious grounds (*Re J* (A Minor)).

In *F v West Berkshire HA*, it was held that, if medical treatment is given in an emergency, it will be a defence to plead necessity in the best interests of the patient.

If the defence is to apply, it must be proved that the defendant acted as a reasonable man would have done (the *Bolam* test applying in medical cases) to avert the greater evil (*Cope v Sharpe* [1912] 1 KB 496).

It is unusual for the defence of necessity to be pleaded successfully. It does not apply to negligence.

21.9 SELF-DEFENCE AND DEFENCE OF PROPERTY

The use of reasonable force in an attempt to protect persons or land may operate as a defence to the torts of assault, battery and false imprisonment. What force is reasonable depends on all the circumstances of each case. For example, it might be reasonable to lock an armed intruder in a room while waiting for the police to arrive, but unreasonable to shoot and kill him. The defence of self-defence is frequently pleaded alongside that of *ex turpi causa* (see 21.5, above).

21.10 LIMITATION OF ACTIONS

Although, in equity, the claimant who delays for too long before bringing a claim may, in the exercise of the court's discretion, be denied a remedy under the equitable doctrine of laches, at common law, there was no limit to the time in which a claimant was able to bring a claim. The only limitation periods have been created by statute, the most recent of which is the Limitation Act 1980, a consolidating Act.

It would be unfair to defendants if claimants could bring legal action against them at an indefinite future time, and the imposition of time limits helps to sting claimants into action, an important consideration given the difficulty which many witnesses have of recalling events several years after they occurred.

One important distinction between contract and tort is that, put simply, in contract, time begins to run from the moment of breach, whereas, in tort, time begins to run from the moment of the damage.

21.10.1 Limitation period in tort

By s 2 of the Limitation Act 1980, an action in tort must be brought within six years from the date on which the action accrued.

In the case of torts which are actionable without proof of damage, the limitation period starts to run from the date of the defendant's wrongful act, though the court has a discretion to allow claims outside that period in exceptional circumstances.

21.10.2 Limitation period in defamation

In the case of defamation, there is a one year limitation period, but the court has a discretion to extend this in some circumstances.

21.10.3 Limitation period in personal injuries cases

In claims for personal injuries, the limitation period is three years from the date on which the cause of action accrued, or the date of knowledge, whichever is the later, although the court does have a wide discretion to allow action outside the limitation period in these cases. Guidelines for the exercise of this discretion are to be found in s 33 of the Limitation Act 1980.

In the case of death, the personal representatives or dependants of a deceased person, where death occurs within the three years from the accrual of the cause of action, have a fresh limitation period which runs from the date of death or from the date of knowledge of the death, under s 11(5) of the Limitation Act 1980.

It is not always immediately apparent whether the damage involves personal injuries. For example, in *Pattison v Hobbs* (1985) *The Times*, 11 November, CA, the claimant had a baby following a vasectomy which had been negligently performed on her partner. The claim was not for the pain of childbirth but was limited to the cost of bringing up the child and to the mother's lost income. This was held by the Court of Appeal to fall within the six year limitation period rather then the narrower three year limitation period which applies in personal injuries cases. However, in *Walkin v South Manchester HA* [1995] 1 WLR 1543, [1995] 4 All ER 132, it was held that, if the claim is for an unsuccessful female sterilisation, the limitation period is three years.

It has been held that damage caused as a result of failure to diagnose dyslexia amounts to personal injury for the purposes of limitations (*Robinson v St Helens MBC* [2002] EWCA Civ 1099).

21.10.4 Latent damage

If the claim arises out of latent damage (that is, damage which has been lying 'dormant' perhaps for many years), the date on which the cause of action accrues is governed by the Latent Damage Act 1986. Under this Act, there is a six year limitation period from the date on which the cause of action accrued, or a period of three years from the 'starting date', whichever is the later. The starting date is the same as the 'date of knowledge'. There is a further bar on claims under the 'longstop' provisions which prevent claims being brought more than 15 years after the date of the negligent act. There are many

instances in which damage can be latent, especially in relation to faults in buildings which occur through negligent construction (for example, *Pirelli General Cable Works v Oscar Faber & Partners* [1983] 2 AC 1).

21.10.5 Consumer Protection Act 1987

Under the Consumer Protection Act 1987, the limitation period is three years from the date on which the damage was suffered, or from the date on which the necessary knowledge was acquired, if later. The longest period within which action can be brought is 10 years from the date on which the defendant supplied the product to another person (that is, put the product into the market place).

If there has been fraud or concealment by the defendant, under s 32(1) of the Limitation Act 1980, the limitation period does not begin to run until the claimant has, or with reasonable diligence ought to have discovered the fraud or concealment.

21.10.6 Persons under a disability

Claimants under a disability, that is minors and people of unsound mind, have a right to bring a claim when that disability ceases. Time starts to run from the date on which the disability ceases or the person who would have brought a claim dies, whichever is the earlier. In the case of people under the age of 18, time starts to run when they reach full age. This has important implications for medical records which need to be kept safely for many years in case a person decides to bring a claim after reaching the age of 18 in respect of an injury which was caused years earlier.

21.11 ACCRUAL OF THE CAUSE OF ACTION

The legal clock begins to tick, and the counting begins, from the time when the cause of action is said to 'accrue'. This is the usual date when 'time starts to run', the earliest time when a claim could be brought (*Reeves v Butcher* [1891] 2 QB 509). For example, in the case of personal injuries, time starts to run, that is, the three years is counted, from the date on which the cause of action accrues or from the date of knowledge, whichever is the later. The date of knowledge, by s 14(1) of the Limitation Act 1980, is the date on which:

- the claimant first had knowledge of the fact that the injury was significant;
- the claimant first had knowledge that it was attributable in whole or in part to the act or omission which is alleged to constitute negligence, nuisance or breach of duty;
- the identity of the defendant was known;
- if it is alleged that the breach of duty was that of a person other than the defendant, the identity of that person was known as well as additional facts which support the bringing of the claim against the defendant (for example, as in cases of vicarious liability).

An injury is significant for the purposes of the Limitation Act 1980 if the claimant would reasonably have considered it sufficiently serious to justify his or her instituting

proceedings for damages against a defendant who did not dispute liability and was able to satisfy a judgment.

'Knowledge' includes knowledge which the claimant might reasonably have been expected to acquire from facts observable or ascertainable to him or her or from facts ascertainable to him or her only with the help of advice from experts, medical or otherwise (s 14(3)).

In *Broadly v Guy Clapham and Co* [1994] 4 All ER 439, it was held that the claimant had 'constructive knowledge' that a surgical operation had caused her some form of injury, which meant time began to run as soon as she had this knowledge. The Court of Appeal considered that she did not need to have knowledge which was detailed enough to draft particulars for time to start running. In *Dobbie v Medway HA* [1994] 1 WLR 1234, actual rather than constructive knowledge was involved. Here, the claimant had a breast removed unnecessarily when she underwent surgery to have a lump removed. The surgeon had assumed that the tumour was malignant, and immediately after the operation led her to believe that the removal of her breast was usual and correct and that she should count herself fortunate. Some time later, she discovered that the lump in her breast should have been removed for microscopic examination before the breast was removed. The Court of Appeal upheld the first instance decision that the claimant had the necessary knowledge under s 14(1) for time to start running within three years of the operation and that it would not be equitable to allow her claim to proceed out of time. Sir Thomas Bingham explained:

> She knew of this injury within hours, days or months of the operation and she at all times reasonably considered it to be significant . . . She knew from the beginning that this personal injury was . . . the clear result of an act or omission of the health authority. What she did not appreciate until later was that the health authority's act or omission was arguably negligent or blameworthy.

In clinical negligence cases, the date of knowledge is based on a subjective test, depending on the knowledge which the claimant possessed rather than on an objective test based on a reasonable layperson's knowledge without confirmation of expert advice. In *Sprague v North Essex District HA* (1997) unreported, the claimant was claiming damages for medical negligence arising from the misdiagnosis of a psychiatric condition which resulted in her being detained for much longer than was necessary. The writ was issued 12 years after the claimant had been released from hospital but it was argued on the claimant's behalf that she did not have 'knowledge' for the purposes of the Limitation Act 1980 until less than three years before the writ was issued because she did not have expert medical confirmation of what she suspected. However, as it was clear that she had strongly suspected a causal connection between the damage which she had suffered and the misdiagnosis when she first sought legal advice in 1986, her claim was held to be statute-barred. The Court of Appeal did, however, point out that a person who has some idea (though not a clear idea) that his or her condition is capable of being attributed to a certain negligent act or omission but realises that the suspicion needs to be confirmed by a medical expert does not have sufficient knowledge under s 14(1) of the Limitation Act 1980 (*Nash v Eli Lilly* [1993] 1 WLR 782, [1993] 4 All ER 383).

In *Gravgaard v Aldridge & Brownlee* [2004] EWCA Civ 1529 the Court of Appeal emphasised that in considering whether the knowledge of the claimant was to be

imputed, the Court should have regard for the position of the actual claimant and a hypothetical claimant.

21.11.1 Claims outside the limitation period

The power of the court to allow a claim outside the limitation period for personal injuries is an important one. This can happen, provided the court takes all the circumstances into account and has particular regard to:

- the length of time and reasons for any delay on the part of the claimant;
- the effect of this delay upon the evidence;
- the conduct of the defendant after the cause of action arose, including his or her response to the claimant's reasonable request for information;
- the duration of any disability of the claimant arising after the accrual of the cause of action;
- the extent to which the claimant acted promptly and reasonably once he or she knew that he or she might have a claim;
- the steps, if any, taken by the claimant to obtain medical, legal or other expert advice and the nature of any such advice as he or she may have been given;
- whether there was likely to be any prejudice suffered by either party by the delay – *Burgin v Sheffield County Council* [2005] EWCA Civ 253. Again, in *McGhie v British Telecommunications plc* [2005] EWCA Civ 42 the Court of Appeal explained that the correct test for the exercise of the discretion was the balance of prejudice test.

21.11.2 New developments

In recent years there has been considerable litigation concerning this aspect of the Limitation Act 1980. In *Horton v Sadler& Another* [2006] UKHL 27 the House of Lords held that that the real question for the court to decide under s 33 of the Limitation Act 1980 should always turn on whether it was equitable or inequitable as between the parties to override the limitation period. Artificial distinctions made in a line of previous cases lacked coherence and could not be justified on principle. For example, distinctions had been drawn between claimants who issued proceedings within the primary limitation period, which had later failed for a procedural reason, and cases where no proceedings had been issued. The House of Lords explained that the courts have a wide general discretion which should not be limited to unusual cases. The House of Lords, in reaching its decision, departed from its own previous decision in *Walkley v Precision Forgings Ltd* [1979] 1 WLR 606, which it considered had deprived claimants unfairly of a right which Parliament had intended them to have.

In *Richardson v Watson* [2006] EWCA Civ 1662 the Court of Appeal concluded that there was no objection in principle to the claimant's discontinuing proceedings and re-commencing with a fresh action to allow timely notice to be given to the Motor Insurers' Bureau, which had refused to grant her an extension of time for the commencement of her claim under the Limitation Act 1980 s 33. The claimant's husband had been killed an accident caused by an uninsured driver. The trial judge had held that her second claim was an abuse of process, as he had no power to grant

an extension of time under s 33 of the Limitation Act 1980, because of the decision in *Walkley v Precision Forgings Ltd* [1979] 1 WLR 606. After he made that decision, Walkley had been overruled by the House of Lords in *Horton v Sadler* [2006] UKHL 27, [2006] 2 WLR 1346.

In *McCoubrey v Minister of Defence* [2007] EWCA Civ 17, the Court of Appeal restated the correct approach to s 14(2) of the Limitation Act 1980 where a claimant is seeking to bring a personal injury claim outside the three-year period limitation period in s 11(4)(a), indicating that it is important to consider the reaction of a reasonable person to the injury, as opposed to its possible consequences.

21.11.3 Child abuse and other cases of deliberate injury

In *Stubbings v Webb* [1992] QB 197, the House of Lords upheld the Court of Appeal decision and ruled that if the claim is for deliberately inflicted harm, in this case alleged indecent assault and rape of the claimant when she was a child, the limitation period is fixed at six years from the time the cause of action accrues, and there was no possibility of exercising a discretion, as s 2 of the Limitation Act 1980 applies. The discretion to extend the time limit only applied in cases of *accidentally* inflicted personal injuries. This case was strongly criticised because it means that many people who were sexually abused as children, and who only become aware of the psychiatric harm caused by that abuse many years after they reach full age, have no redress. The decision also meant that claimants in medical cases who claimed that they had not consented to treatment and wished to sue for assault may have been seriously disadvantaged. The same is true of claimants suing police officers for assault, battery and false imprisonment.

There was pressure to reform the law in this area, as claimants can receive very high awards of damages for child abuse (two women who had been abused as children by the notorious Frank Beck in a children's home and who brought their claim *within* the limitation period received £145,000 and £80,000 respectively), and it was considered both illogical and unfair that they should be denied a remedy because of this anomaly in the limitation rules.

In *Various Claimants v Bryn Alyn Community Homes* [2003] EWCA Civ 85, the Court of Appeal issued guidelines on the application of ss 14 and 33 of the Limitation Act 1980 to claims arising out of physical and sexual abuse in children's homes. These were applied in *C v Middlesbrough Council* [2004] EWCA Civ 1746 in which a claim for trespass to the person through alleged sex abuse was rejected as being outside the limitation period.

The House of Lords finally resolved the difficulties surrounding the limitation period in child abuse cases in *A v Hoare; C v Middlesbrough Council; X v Wandsworth LBC; H v Suffolk County Council; Young v Catholic Care* [2008] UKHL 6, departing from its own decision in *Stubbings v Webb* [1993] AC 498, and approving instead the ruling in *Letang v Cooper* [1965] 1 QB 232. Their conclusion involved construing the Limitation Act 1980 s 14(2) in such a way as to transfer to s 33 of the same Act the need to take into account the inhibiting effect of sexual abuse on the willingness of victims to bring proceedings. The House of Lords also issued guidance on how the court might exercise its discretion under s 33.

In *A v Hoare* there were six appellants. The defendant was convicted in 1989 of attempting to rape the first appellant, and sentenced to life imprisonment, but in 2004, he won £7 million on the national lottery, and the claimant initiated a claim for damages. However, the claim was struck out by the lower courts, as the action was barred under s 2 of the 1980 Act. In *H v Suffolk County Council* the appellant claimed that he had been sexually abused by a member of staff at a boarding school between 1989 and 1990. He commenced proceedings in 2002, and on the basis of *Stubbings v Webb* it was statute barred by s 2 by the lower courts. A claim for negligence against the council failed.

In *C v Middlesbrough Council* the appellant alleged that he had been sexually abused between 1982 and 1988 at a school managed by the council. The trial judge and the Court of Appeal, in accordance with *Stubbings v Webb*, held that the action was barred by s 2, and dismissed allegations of negligence against the council.

In *X and Y v Wandsworth London Borough Council* the both appellants alleged that between 1984 and 1987 they were sexually abused by the same teacher at a school managed by the council. They too were denied a remedy by the lower courts because of the decision in *Stubbings v Webb*.

The appeal in *Young v Catholic Care (Diocese of Leeds) and the Home Office* concerned allegations of sexual abuse by employees of the defendants between October 1974 and July 1976. In the hope of circumventing *Stubbings v Webb*, the claims alleged 'systemic negligence' in the management of the school and detention centre respectively. The Court of Appeal rejected both claims.

The House of Lords held that *Stubbings v Webb* had been wrongly decided, and considered, in the words of the 1966 Practice Statement that it was 'right' to depart from it and re-establish the rule in *Letang v Cooper* [1965] 1 QB 232 (CA). In the view of the House of Lords, *Stubbings v Webb* had placed too much weight upon the Report of the Committee on the Limitation of Actions 1949 (Cmd 7740) and on *Hansard*. Although the decision in *Stubbings v Webb* had not created too many problems until 2002, several cases arose in that year which suggested that the rule it had established was too rigid and as a result was unjust – see *Lister v Hesley Hall Ltd* [2001] UKHL 22, [2002] 1 AC 215 and *S v W (Child Abuse: Damages)* (1995) 1 FLR 862 CA (Civ Div).

Reference was made by the House of Lords to the observation by Lord Reid in *Jones v Secretary of State for Social Services* [1972] AC 944 (HL) that unsatisfactory decisions made by the highest court were bound to cause uncertainty, since the lower courts attempted to distinguish them on inappropriate grounds. That had been the case in relation to *Stubbings v Webb*, as victims of sexual abuse who asked the court to exercise discretion under s 33 of the Limitation Act 1980, had been forced into alleging that abuse they had suffered had been caused by some other breach of duty, such as the duty of care in negligence.

The House of Lords established that the correct approach was to ask first what the *claimant* knew about his injury, and then to add any 'objective' knowledge which could be imputed to the claimant under s 14(3), and ask whether a reasonable person in possession of that knowledge would have considered the injury sufficiently serious to justify bringing proceedings. Once it was discovered what the claimant knew, or should be treated as having known, that person dropped out of the equation, and no

consideration should be given to the claimant's intelligence. The House of Lords pointed out that standards were, by their very nature, impersonal and did not vary according to the person to whom they were applied.

Under s 14, time started to run from when the claimant had knowledge of certain facts, not from the time when he should have been expected to take certain steps. Section s 14(2) simply defined one of those facts by reference to a standard of seriousness. The effect of the injuries sustained by a claimant on what he could reasonably have been expected to do was not relevant.

This case is very important, as the decision represents a unanimous change of heart by the House of Lords, and is one of the few cases decided since the Practice Statement was released in 1966, in which the House of Lords has directly departed from a previous decision of its own. It provides an interesting account of the development of the law in limitations from a historical perspective and contains vital reasoning relating to social and other policy matters.

Another important point raised before the House of Lords, which has implications for other areas of law, was the meaning of 'significant' injury in s 14(2). Section 14(1) provides that the 'date of knowledge' is the date upon which the claimant first had knowledge of various facts, including 'that the injury . . . was significant'.

Section 14(2) states:

> For the purposes of this section an injury is significant if the person whose date of knowledge is in question would reasonably have considered it sufficiently serious to justify his instituting proceedings for damages against a defendant who did not dispute liability and was able to satisfy a judgment.

Particular difficulties had arisen over the years because the test was treated partly as a subjective test – 'would this plaintiff have considered the injury sufficiently serious?' and partly an objective test – 'would he have been reasonable if he did not regard it as sufficiently serious?'

As Lord Hoffmann pointed out, this approach is very confusing, as it meant that judges had to grapple with the concept of the 'reasonable unintelligent person'. Lord Carswell agreed that the matter had been unnecessarily confused by importing the concept that the test of whether the claimant had the necessary knowledge for the purposes of s 14 is partly objective and partly subjective. He commented:

> In my opinion it should be clearly understood that section 14(1) is subjective, in that it refers to the knowledge actually possessed by the claimant, whereas section 14(2) is objective, the relevant test being, as Lord Hoffmann describes it at paras 39 and 42, an 'entirely impersonal' standard. Section 14(3) then relates solely to constructive or imputed knowledge. It may fix the claimant with knowledge of facts which he might reasonably have been expected to acquire in the manner specified by the subsection. Once that knowledge is imputed to him, it becomes part of the corpus of his personal knowledge, the extent of which has to be assessed under subsection (1).

All the members of the House of Lords agreed, for roughly the same reasons, that the time had come to depart from the decision in *Stubbings v Webb*, and while some the cases before them were decided there and then, others were sent back for consideration on their facts. This is a welcome ruling.

FURTHER READING

The Illegality Defence in Tort, Law Commission, 2001
Mason and Laurie, *Mason and McCall Smith's Law and Medical Ethics*, 7th edn, Oxford University Press, 2006, Chapter 10

For regular monthly up-dates on this area of law, see *Personal Injury Compensation*, published monthly by Informa UK Ltd.

CHAPTER 22

CRITICISMS OF TORT – REFORMS

Before reading this chapter, re-read the example drawn from a commonplace road traffic accident at the end of Chapter 1. That situation identifies some of the aspects of the law of tort which have attracted criticism. Some difficulties arise as a result of the rules of tort law, while others can be attributed to the operation of the legal system and are more general in nature. There follows a very brief outline of some of the criticisms of tort and its operation in the legal system.

22.1 SOME CRITICISMS OF TORT

22.1.1 Fault

The fault principle, which is a legacy of earlier centuries, still dominates the law of tort. There have been numerous criticisms of the fact that in order to succeed in obtaining compensation it is usually necessary for the claimant to establish fault on the part of the defendant. Perhaps the only real justification for this is the imposition of some kind of punishment on the defendant and the possible general deterrent effect that the fault system generates. Yet, if the defendant is not personally required to pay the damages, and if people generally are aware of this, these arguments lose much of their value.

The fault principle is unfair on claimants because it is not always possible to obtain the necessary evidence against the defendant, particularly in medical negligence cases, and those involving employers' liability. Victims of mass accidents, after which public inquiries are held to amass the evidence, are at a distinct advantage over the victims of isolated accidents who may not have the means, financial or otherwise, of establishing the truth and acting upon it. Development in the funding of claims have made justice more accessible for some, but have led to cries of derision by those in Government who would have us believe that we are living in a compensation culture.

Tort is unfair on defendants because the law does not distinguish between different degrees of culpability, and in some instances judges are prepared to find that there has been negligence even when it cannot be said that the defendant was in any way to blame, as in *Nettleship v Weston* [1971] 2 QB 691.

Tort is unfair on society as a whole because the fault principle distinguishes between different types of injury and illness, compensating in tort only those who are able to establish blame in the legal sense, and leaving uncompensated the victims of pure accidents and chance illnesses or genetic disease. Even the limited attempt to introduce strict liability in relation to defective products has proved less than satisfactory in redressing the balance between individual claimants and large producers and retailers of goods and services.

As there is no truly objective approach to the problem of establishing fault, the system is open to arbitrary and inconsistent decisions. Yet despite recommendations for reforming the tort system to exclude a heavy emphasis on fault, there have been few radical

changes in that direction, and the fault system would appear to be even more deeply embedded in our law with the advent of a complex system of conditional fees, and the rejection of recommendations for no-fault compensation for road accidents and medical accidents by the Pearson Commission in 1978 and the Bristol Royal Infirmary Inquiry report in 2001 respectively. Even the NHS Redress Bill was watered down by the time it had become an Act in 2006, and no longer included a no-fault scheme to compensate brain damaged infants. It could be that lessons have been learned from the problems encountered in other jurisdictions, such as New Zealand, which have introduced no-fault compensation schemes that have resulted in a very conservative approach being adopted in the UK.

22.1.2 Uncertainty

There is too much uncertainty in the law of tort because of the operation of judicial policy. This aspect of tort has been discussed in detail in Chapter 3, and the specific areas of the law which give rise to difficulty because of policy considerations have been highlighted as they have arisen throughout the book. Although it is possible for the law of tort to be adapted by judges to meet changing social needs and circumstances, this can also mean that it is difficult for lawyers to predict the outcome of individual cases in order to advise their clients. This leads to undue emphasis being placed upon certain areas of law which in practice seldom concern the average lawyer. The Human Rights framework introduced at the start of the 21st century may have compounded the problems of uncertainty in our law of tort.

22.1.3 Failure to meet its objectives

The rules of tort do not enable it to achieve its objectives, many of which are unclear and contradictory. Although the main aim of tort is compensation, in many instances tort is an inefficient compensator. It is frequently difficult to prove fault in those torts which require it, and causation also presents difficulties in practice. Some accident victims whom many would consider to be morally entitled to compensation are unable to obtain any. Many people who suffer injuries at the hands of others receive no compensation at all and those who are compensated are often under-compensated because of the rules by which damages are calculated and because of lump sum payments.

The notion of tort as a deterrent is espoused by some of the writers, but most recognise that the law of tort has little deterrent effect. The main deterrent value of tort lies in its ability to grant injunctions to restrain wrongful acts. However, as negligence is the tort which is most frequently relied upon in practice, the role of the injunction is relatively small in comparison with the number of negligence claims for which, of course, injunctions are inappropriate remedies. Tort is of little deterrent value when compared with criminal law and, even when it does act as a deterrent as in the medical negligence cases, this can be counter-productive. In that instance, tort has led to the practice of defensive medicine. This means that some medical procedures are carried out with the purpose of enabling doctors to avoid litigation rather than in the interests of patients.

The rules of tort and the legal system itself do not always enable the claimant to achieve revenge or vindication by allowing the claimant his or her ‘day in court’. As the

outcome of so many cases is uncertain, the vast majority of claims are settled out of court or dropped at a fairly early stage. In libel cases, people are afforded the opportunity to have a public airing of their grievances but as there is no public funding for these proceedings only the very rich can take advantage of this.

22.1.4 Inefficiency

Almost every stage in tort litigation involves some form of lottery. In personal injury cases, this is a very serious matter because people who are sick and suffering are forced to take crucial decisions at a time when they are probably least able to do so. The social security system provides a far more efficient and humane means of support.

22.2 CRITICISMS OF THE LEGAL SYSTEM

The Woolf Report, *Access to Justice* (1996, London: HMSO), summed up the problems in the civil justice system as arising from delay, expense and complexity.

- Delays: cases take a very long time to achieve settlement or to come before the courts. Delays are especially frustrating for claimants, particularly those who have suffered personal injuries. Sometimes, there are very good reasons for the delays. For example, compensation cannot be properly assessed without waiting for expert medical reports on prognosis. Nevertheless, there are many people who have criticised the legal system for permitting long delays, often to the benefit of the defendant who can gain by delaying for as long as possible. Most defendants are insurance companies and they have legal departments or employ lawyers who are accustomed to defending legal claims and who are unconcerned on a personal level about the outcomes of cases. For most claimants in tort actions, there is considerable personal strain and fear of litigation which is frequently exacerbated by delays. The Civil Procedure Rules 1998 were introduced to overcome some of the delays (see below).
- Administrative costs: the administration of the tort system is very expensive. The Pearson Commission pointed out in 1978 that the costs of administering the social security system are only a fraction of the costs of administering the tort system despite the fact that far more is paid out in total by social security which deals with many more individual cases.
- The adversarial system: tort cases are decided on an adversarial basis, with lawyers regarding cases as battles to be fought and won. This makes the legal process stressful and distressing for claimants, especially those who eventually reach the trial stage.

Despite all these criticisms, there appears to be a higher level of claims consciousness among people in general today than ever before. Tony Blair pointed out in a speech delivered in May 2005:

> Something is seriously awry when teachers feel unable to take children on school trips, for fear of being sued; when the Financial Services Authority that was established to provide clear guidelines and rules for the financial services sector and to protect the consumer

> against the fraudulent, is seen as hugely inhibiting of efficient business by perfectly respectable companies that have never defrauded anyone; when pensions protection inflates dramatically the cost of selling pensions to middle-income people; where health and safety rules across a range of areas is taken to extremes. Europe has done itself more damage through what is perceived as unnecessary interference than all the pamphlets by Eurosceptics could ever do.

A compensation culture can be defined as one in which it is acceptable for all victims of personal injuries to seek compensatory damages through litigation, even if the injury is trivial. Such an approach is seen as encouraging frivolous lawsuits which can be lucrative because they might well be settled out-of-court if the costs are likely to be greater than the compensation. This is turn is considered likely to raise the cost of insurance premiums and deter any form of risk in day to day activities previously enjoyed by groups and organisations. There is a general view that those involved in seeking potential claimants (dubbed 'claims farmers') are encouraging these practices.

The Better Regulation Council has stated that the compensation culture is a myth; and this view has been accepted by the Government which has introduced measures in the Compensation Act 2006 to regulate claims management companies. However, arguments continue as to whether or not we are in the grip of a compensation culture, enhanced by a media which revels in eye-catching reports of unusual claims. Accurate data is difficult to find, and there is a wide range of organisations with differing and conflicting agenda anxious to promote their own interests.

22.3 REFORM OF TORT

Although there have been many suggestions for reforming the law of tort, and some improvements have been made over the years by the introduction of strict liability for defective products under the Consumer Protection Act 1987 and for vaccine damage under the Vaccine Damage Payments Act 1979, these statutes do have their drawbacks, as has been seen. Procedures to speed up litigation and to arrange for ways of paying damages at an earlier stage than was possible previously have also been introduced. However, there has been no major reform of the law of tort, and many of the recent changes are seen as tinkering around the edges of tort, rather than delving deep and bringing about vital new developments. The most radical suggestion was that of the Pearson Commission in 1978 for a no-fault system for compensating the victims of road accidents. Although this had several flaws, it did provide the opportunity to introduce the means of compensating more people. Other suggestions have been for a no-fault system for medical mishaps, and, separately, for an arbitration system to deal with medical negligence claims. Neither have come to fruition.

Three major fairly recent developments have had a significant impact on the law of tort. These are the introduction of the procedural rules in 1999, the withdrawal of legal aid for most civil claims and the enactment of the Human Rights Act 1998.

22.3.1 Civil Procedure Rules 1998

As of 26 April 1999, new procedural rules apply in the conduct of civil cases, and simpler more accessible legal terminology is being used. The changes introduced by the Civil

Procedure Rules are radical, and will by now be familiar to lawyers handling clinical negligence and general personal injury cases. There is no space here to deal with all the changes in depth, but there follows a broad overview which will give some insight into the system and into the philosophy which underpins the structure.

The reforms are the result of recommendations made by Lord Woolf, who had identified numerous problems in the old system which led to high costs, delays, inequalities in access to justice, uncertainties, poor organisation and many injustices. The overriding objective of the new system is to produce just outcomes of civil cases, and the primary purpose of the new procedures is, therefore, to ensure that, so far as possible, justice is done. Rule 1.1(1) states:

> These Rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly.

By r 1.3, 'the parties are required to help the court to further the overriding objective'.

The Rules are to be interpreted purposively rather than literally, in order to achieve the overriding objective, and, although they are only procedural rules rather than rules of substantive law, the new system will inevitably have some impact on the advice which lawyers give about how cases should be handled.

Under the Rules, the judges, rather than the parties, control the progress of cases and, in so doing, judges must follow and ensure that the parties also follow, so far as is practicable, the following five basic principles:

(a) ensure that the parties are on an equal footing;

(b) save expense;

(c) deal with cases in ways which are proportionate to the amount of money involved, the importance of the case, the complexity of the issues and the financial positions of the parties (the principle of proportionality);

(d) ensure that matters are dealt with fairly and expeditiously;

(e) allot to each case an appropriate share of the resources of the court, while taking into account the need to allot resources to other cases.

In order to ensure that contested cases are dealt with quickly and efficiently, there are three separate 'tracks' or types of proceedings. The small claims track is intended for cases worth under £5,000, except personal injuries claims, where the limit is £1,000. The fast track is intended for cases between £5,000 and £15,000 (or between £1,000 and £15,000 in personal injuries claims). The multi-track is for more complex cases and includes all claims which are not normally within the small claims or fast tracks, and other cases which would have been in the fast track but for the fact that the trial will probably last for longer than one day.

Once the case has been allocated to a particular track, the court, guided by the Rules and their overriding objectives, will take control over the steps which need to be followed in order to deal with matters efficiently. However, an important aspect of the reforms is the use of pre-action protocols, which are also intended to regulate the relationship between the parties. The two most relevant in personal injury cases are the Protocol for the Resolution of Clinical Negligence Disputes and the Protocol for Personal Injuries Claims. These documents will demand greater openness between the parties,

early disclosure of documents, and even meetings between the parties and their experts to identify and narrow down the issues which are in dispute.

These Protocols contain details of what should be contained in the letter of claim and response, as well as time limits for achieving the various steps, and recommends that alternatives to litigation, such as mediation and the NHS complaints system (in clinical negligence cases) be explored by the parties.

Take the Protocol for the Resolution of Clinical Negligence Disputes as an example. This governs the conduct of claims involving clinical negligence (note that the word 'clinical' is preferred to 'medical') and was drafted by the Clinical Disputes Forum, which is a multidisciplinary body which has existed since 1997. The Protocol encourages openness when it is apparent that there has been a mishap of some kind in the treatment of a patient. It provides general guidance on how this new culture of co-operation may be achieved and recommends a timed sequence of measures for all those involved in a clinical negligence case to follow. Its aims are to resolve disputes in ways which are appropriate to both parties, reduce delays and costs, and reduce the need for litigation.

Mediation is encouraged, and was further supported by the case of *Halsey v Milton Keynes General NHS Trust* [2004] EWCA Civ 576. Under this ruling the burden is on the unsuccessful party to litigation to demonstrate why there should be a departure from the general rule on costs, in the form of an order depriving the successful party of some or all of his costs, if he had refused to agree to alternative dispute resolution.

Patients and their advisors are directed to express any concerns as soon as possible, to consider the full range of options available to them, and to inform the healthcare provider as soon as they are satisfied that the matter has been concluded.

It is hoped that the Civil Procedure Rules, which have been embraced wholeheartedly by the judiciary, but which some lawyers have been reluctant to accept, will mean that claimants are treated on an equal basis with defendants. The heavy penalties imposed on lawyers who delay or inadvertently fail to meet deadlines will make civil practice very challenging. Strict rules about disclosure of documents and punitive interest (up to 10% above base rate) for defendants who refuse offers which are matched if the case goes to trial mean that, in many cases, settlements can be arrived at much earlier than previously and court hearings are last resort. As the matters in issue between the parties need to be identified early in the process, and as fewer expert witnesses are be used, the entire process should theoretically be less expensive and much faster.

22.3.2 Funding of claims

In order for access to justice to be available to all, the problems involved in funding claims must be addressed. Legal aid has been withdrawn in personal injuries claims (Access to Justice Act 1999) and replaced by the conditional fee system, under which the client only pays the solicitor if the claim is successful, when a success fee will be charged. Conditional fees usually apply only to the client's own solicitor's fees, and sometimes apply to counsel's fees, but costs are still payable for the opponent's costs, experts' reports, court fees and all disbursements. People wishing to bring claims need to insure against the cost of losing and having to pay the costs of the opposing party. As the cost of premiums for clinical negligence claims is still very high, it has been agreed by the Lord

Chancellor that public funding will remain for the time being for these cases, but this is only a temporary reprieve. Only solicitors who are officially recognised clinical negligence specialists will be able to take on public funding cases of this kind.

The conditional fee arrangement system has a number of potential disadvantages. It has had the effect of deterring lawyers from taking on cases in which success is rather uncertain, especially those in which it will be necessary for them to invest large amounts of time, and poorer clients are reluctant to bring claims. However, research has revealed that the system has resulted – allowing for the average time-lag between incident and claim – in a rise in the number of claims, at least as far as clinical negligence is concerned, though this is just one of a number of complex factors that have contributed to the rising level of claims since the 1980s.

There is a continuing problem with costs, despite the procedural reforms and the CPR. Costs frequently exceed the value of the claim, especially in the case of small claims, and it is difficult to ensure that this does not happen, when solicitors, barristers and expert witnesses, who are in business to make profits, charge realistic fees.

22.4 CHANGES IN SUBSTANTIVE LAW

There have been some attempts to introduce substantive changes in the law of tort in recent years. Among the most prominent of these are the provisions of the Compensation Act 2006, but there are also numerous cases in which senior members of the judiciary have adapted and developed the course of substantive law.

22.4.1 Reform of tort law through the Human Rights Act 1998

The Human Rights Act 1998 is widely regarded as one of the most important and far-reaching pieces of legislation introduced in the UK for many years, and is likely to be a positive legacy for which the Blair Government will be remembered. The impact of the Act has been discussed at various points in this book. There is little doubt that the implementation, on a formal basis, of the human rights framework has resulted in significant changes to several areas of the law of tort.

22.4.2 Section 1 of the Compensation Act 2006

This section, which is discussed in Chapter 7, expressly invites judges to take into account the deterrent effect of potential liability on activities which might be regarded as desirable. The Act was introduced as a result of concerns that the law may demand too high a standard of care of those who are responsible for others in the course of potentially dangerous activities. The Act is concerned with the court's assessment of what must be done to satisfy the standard of reasonable care in the particular circumstances of each case.

Section 1 of the Act provides:

> A court considering a claim in negligence or breach of statutory duty may, in determining whether the defendant should have taken particular steps to meet a standard of care

(whether by taking precautions against a risk or otherwise), have regard to whether a requirement to take those steps might:

(a) prevent a desirable activity from being undertaken at all, to a particular extent or in a particular way, or

(b) discourage persons from undertaking functions in connection with a desirable activity.

Despite the good intentions of the Government, it is difficult to find any evidence to date that this section has changed the standard of care, though this situation may change in time. Even before the Act, the courts were making it clear that they could apply this principle effectively – see *Tomlinson v Congleton Borough Council* [2003] UKLH 47.

22.4.3 Judicial interventions and the role of policy

It is possible to find numerous examples of judicial interventions in the pages of this book, which have changed the course of tort law and have resulted in important developments. To take just one or two examples – the House of Lords has been very active in relation to ensuring access to justice for claimants who, as victims of child abuse, were reluctant to bring claims against their oppressors until they felt psychologically able to do so. There have also been useful adaptations of the law in relation to consent to medical treatment; to the scope of the duty of care in negligence; and to the standard of care required of experts. Many of the decisions in these areas are underpinned by changes in judicial policy in the light of social, scientific, economic and political developments.

22.5 THE VALUE OF TORT

The intrinsic value of tort lies in its infinite adaptability. Tort is still a developing subject in modern law, and the reforms outlined very briefly above indicate that. It continues to adapt to changing social, economic and political conditions in the 21st century. The latest series of reforms, although they might be seen as mere tinkering with the law and procedures, should enhance this process.

Although it is customary to criticise tort, and the catalogue of instances outlined above gives the impression that there is much to criticise, the law of tort does have considerable value and it has survived for many centuries to protect interests of many kinds from unlawful infringements. Property rights and personal freedoms are among the many interests protected by the law of tort and more general duties in the law of negligence protect people from a wide variety of wrongs.

Over the centuries, tort has proved to be infinitely flexible and even the ancient rules are capable of being adapted to meet modern problems. The tort of negligence, which has emerged relatively recently as a tort in its own right, has been developed through case law to cover many important situations in life. By far the greatest number of tort actions arises out of road traffic accidents – a situation which would have been unimaginable in the Middle Ages.

Tort encourages careful conduct and, in modern times, formal risk management. This prevents injury to individuals and their property and reduces the spread of disease and

the manufacture of dangerous products. Although this is also the function of other areas of law, in particular regulatory law, tort still plays a part because civil claims in tort can arise from breaches of statutory duty.

Tort also has a symbolic moral value, in that it places emphasis on fault and encourages wrongdoers to compensate their victims. It has a moral, ideological dimension which is of value to people seeking vindication. Even if that aspect is eclipsed by the use of insurance and methods of loss distribution which move the emphasis away from the wrongdoer, the focus in legal actions is nevertheless on the wrongful act and loss distribution is a consequential factor.

Historically, it has been the very essence of the nature of tort that it adapts and develops slowly and carefully in line with current thinking. For that reason, we can expect few radical development in the modern law of tort.

FURTHER READING

Cane (ed), *Atiyah's Accidents, Compensation and the Law*, 7th edn, Cambridge University Press, 2006

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