Chapter 2
Negligence: elements of the tort

This chapter discusses:

- How negligence is committed
- The tests for a duty of care
- Breach of a duty
- Damages.
Negligence is the most important tort in modern law. It concerns breach of a legal duty to take care, with the result that damage is caused to the claimant. Just a few examples of the type of case which might be brought in negligence are people injured in a car accident who sue the driver, businesses which lose money because an accountant fails to advise them properly, or patients who sue doctors when medical treatment goes wrong.

Torts other than negligence are normally identified by the particular interest of the claimant that they protect. For example, nuisance protects against interference with the claimant’s use and enjoyment of land, while defamation protects against damage to reputation. By contrast, negligence protects against three different types of harm:

- personal injury;
- damage to property;
- economic loss.

In practice, the rules of the tort may differ according to which type of harm has been suffered, but all of them are protected by negligence.

The tort of negligence has three main elements:

- the defendant must owe the claimant a duty of care;
- the defendant must breach that duty of care;
- that failure must cause damage to the claimant.

Negligence is essentially concerned with compensating people who have suffered damage as a result of the carelessness of others, but the law does not provide a remedy for everyone who suffers in this way. One of the main ways in which access to compensation is restricted is through the doctrine of the duty of care. Essentially, this is a legal concept which dictates the circumstances in which one party will be liable to another in negligence: if the law says you do not have a duty of care towards the person (or organisation) you have caused damage to, you will not be liable to that party in negligence, no matter how serious the damage.

It is interesting to note that in the vast majority of ordinary tort cases which pass through the court system, it will usually be clear that the defendant does owe the claimant a duty of care, and what the courts will be looking at is whether the claimant can prove that the defendant breached that duty – for example, in most of the road accident cases that courts hear every year, it is already established that road users owe a duty to other road users, and the issues for the court will generally revolve around what the defendant actually did and what damage was caused. Yet flick through the pages of this or any other law book, and you soon see that duty of care occupies an amount of space which seems disproportionate to its importance in real-life tort cases. This is because when it comes to the kinds of cases which reach the higher courts and therefore the pages of law books, duty of care arises frequently, and that in turn is because of its power to affect the whole shape of negligence law. Every time a potential new duty of care is accepted (or ruled out), that has implications for the numbers of tort cases being brought in the future, the types of situations it can play a part in, and therefore the role which the tort system plays in society.

As a result, the law in this field has caused the courts considerable problems as they have often found themselves torn between doing justice in an individual case, and preventing a vast increase
in the number of future cases. We can analyse the development of the law on duties of care in three main stages: the original neighbour principle as established in Donoghue v Stevenson (1932); a two-stage test set down in Anns v Merton London Borough (1978), which greatly widened the potential for liability in negligence; and a retreat from this widening following the case of Murphy v Brentwood District Council (1990). Although much of the following section describes historical development, it is worth taking time to get to know the background, as this will help you make sense of the reasoning in many later cases.

Development of the duty of care

The neighbour principle

Key Case Donoghue v Stevenson (1932)

The branch of law that we now know as negligence has its origins in one case: Donoghue v Stevenson (1932). The facts of Donoghue v Stevenson began when Mrs Donoghue and a friend went into a café for a drink. Mrs Donoghue asked for a ginger beer, which her friend bought. It was supplied, as was customary at the time, in an opaque bottle. Mrs Donoghue poured out and drank some of the ginger beer, and then poured out the rest. At that point, the remains of a decomposing snail fell out of the bottle. Mrs Donoghue became ill, and sued the manufacturer.

Up until this time, the usual remedy for damage caused by a defective product would be an action in contract, but this was unavailable to Mrs Donoghue, because the contract for the sale of the drink was between her friend and the café. Mrs Donoghue sued the manufacturer, and the House of Lords agreed that manufacturers owed a duty of care to the end consumer of their products.

For the benefit of future cases, their Lordships attempted to lay down general criteria for when a duty of care would exist. Lord Atkin stated that the principle was that ‘You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour.’ This is sometimes known as the neighbour principle. By ‘neighbour’, Lord Atkin did not mean the person who lives next door, but ‘persons who are so closely and directly affected by my act that I ought to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question’. The test of foreseeability is objective; the court asks not what the defendant actually foresaw, but what a reasonable person could have been expected to foresee.

The claimant does not have to be individually identifiable for the defendant to be expected to foresee the risk of harming them. In many cases, it will be sufficient if the claimant falls within a category of people to whom a risk of harm was foreseeable – for example, the end user of a product, as in Donoghue v Stevenson. The ginger beer manufacturers did not have to know that Mrs Donoghue would drink their product, only that someone would.

Legal Principle

There is a duty in tort to take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour.
A two-stage test

The issue of reasonable foresight was never the only criterion for deciding whether a duty of care is owed. As time went on, and a variety of factual situations in which a duty of care arose were established, the courts began to seek precedents in which a similar factual situation had given rise to the existence of a duty of care. For example, it was soon well established that motorists owe a duty of care to other road users and employers owe a duty to their employees, but where a factual situation seemed completely new, a duty of care would only be deemed to arise if there were policy reasons for doing so. ‘Policy reasons’ simply mean that the judges take into account not just the legal framework, but also whether they believe society would benefit from the existence of a duty. This approach began to be criticised, and the apparent need to find such reasons was said to be holding back development of the law.

This view was addressed in Anns v Merton London Borough (1978), where Lord Wilberforce proposed a significant extension of the situations where a duty of care would exist, arguing that it was no longer necessary to find a precedent with similar facts. Instead, he suggested that whether a duty of care arose in a particular factual situation was a matter of general principle.

In order to decide whether this principle was satisfied in a particular case, he said, the courts should use a two-stage test. First, did the parties satisfy the neighbour test – in other words, was the claimant someone to whom the defendant could reasonably be expected to foresee a risk of harm? If the answer was yes, a prima facie duty of care arose. The second stage would involve asking whether there were any policy considerations that meant it would not be desirable to allow a duty of care in this situation. If there were no policy considerations that argued against establishing a duty of care, then a duty could be imposed.

This two-stage test changed the way in which the neighbour test was applied. Previously, the courts had used it to justify new areas of liability, where there were policy reasons for creating them. After Anns v Merton London Borough, the neighbour test would apply unless there were policy reasons for excluding it. This led to an expansion of the situations in which a duty of care could arise, and therefore in the scope of negligence. This expansion reached its peak in Junior Books v Veitchi (1983), where the House of Lords seemed to go one step further. The House appeared to suggest that what were previously good policy reasons for limiting liability should now not prevent an extension where the neighbour principle justified recovery. They therefore allowed recovery for purely economic loss (see p. 25) when previously this had not been permitted.

As the first stage was relatively easy to pass, it seemed likely that the bounds of liability would be extended beyond what was considered to be reasonable, particularly given the judiciary’s notorious reluctance to discuss issues of policy – a discussion that was necessary if the second stage was to offer any serious hurdle. As a result, the growth in liability for negligence set all sorts of alarm bells ringing. Eventually, the problems of insuring against the new types of liability, and the way in which tort seemed to be encroaching on areas traditionally governed by contractual liability, led to a rapid judicial retreat and, in a series of cases, the judiciary began restricting new duties of care.

The judicial retreat

In 1990, the case of Murphy v Brentwood District Council came before a seven-member House of Lords. The House invoked the 1966 Practice Statement (which allows them to depart from their own previous decisions) to overrule Anns. They quoted the High Court of Australia in Sutherland Shire Council v Heyman (1985), a case in which the High Court of Australia had itself decided not to follow Anns:
It is preferable, in my view, that the law should develop novel categories of negligence incrementally and by analogy with established categories, rather than by a massive extension of a *prima facie* duty of care, restrained only by indefinable ‘considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed’.

The broad general principle with its two-part test envisaged in *Anns* was thereby swept aside, leaving the courts to impose duties of care only when they could find precedent in comparable factual situations.

Rejection of the *Anns* test did not mean that the categories of negligence were closed, but the creation of new duties of care was intended to involve a much more gradual process, building step by step by analogy with previous cases involving similar factual situations. Issues of policy would still arise, as such consideration of policy is an inescapable result of the importance of the judge’s position.

### The law today

Over the years, case law has established that there are a number of factual situations in which a duty of care is known to be owed. For example, drivers owe a duty to take care not to injure pedestrians, and employers owe a duty of care to take reasonable steps to protect their employees from injury. However, there are still situations in which it is not clear whether there is a duty of care, and, following the moves towards a tighter test after *Anns* was overruled, the House of Lords set down a new test in *Caparo Industries plc v Dickman* (1990).

The case is explained in more detail below, but, essentially, it requires the courts, when faced with the question of whether a duty of care should be imposed, to ask:

- Was the damage caused reasonably foreseeable?
- Was there a relationship of proximity between claimant and defendant?
- Is it just and reasonable to impose a duty?

The *Caparo* test is now accepted as the basic test to be applied when a court is presented with a new factual situation in which it needs to decide whether a duty of care exists. However, the courts have developed more detailed, and more restrictive, rules which apply in certain types of case:

- where the damage caused is psychiatric, rather than physical, injury;
- where the damage caused is purely economic loss;
- where the damage was caused by a failure to act (known as liability for omissions);
- where the damage was caused by a third party, rather than the defendant;
- whether the defendant falls within a range of groups who have become subject to special rules on policy grounds.

We will look first at the basic *Caparo* test, and then afterwards at the special types of case.

### Procedural issues

Before we move on to look at the rules surrounding where and when a duty of care will be found, there is one important procedural point which will help you make sense of some of the cases...
Duties of care: the Caparo test

Discussed in this chapter. Where a case raises an issue of law, as opposed to purely issues of fact, the defendant can make what is called a striking out application, which effectively argues that even if the facts of what the claimant says happened are true, this does not give them a legal claim against the defendant. Cases where it is not clear whether there is a duty of care are often the subject of striking out applications, where essentially the defendant is saying that even if they had caused the harm alleged to the claimant, there was no duty of care between them and so there can be no successful claim for negligence.

Where a striking out application is made, the court conducts a preliminary examination of the case, in which it assumes that the facts alleged by the claimant are true, and from there, decides whether they give rise to an arguable case in law – so in a case involving duty of care, they would be deciding whether, on the facts before them, the defendant may owe a duty of care to the claimant. If not, the case can be dismissed without a full trial. If the court finds that there is an arguable case, the striking out application will be dismissed, and the case can then proceed to a full trial (unless settled out of court). The claimant will still have to prove that the facts are true, and that the complete case is made out, so a case which is not struck out can still be lost at trial. For an example of this, see Swinney v Chief Constable of the Northumbria Police (p. 60). Recent cases brought before the European Court of Human Rights have raised important questions about the use of striking out applications (see p. 62).

Duties of care: the Caparo test

As explained above, the basic test for a duty of care is now the one set down in Caparo v Dickman (1990). This will usually be applied to duty of care questions in cases involving physical injury and/or damage to property, and those which do not fall into any of the special categories listed above. In some cases, it is also applied alongside the special rules in those categories, and some experts suggest that those special rules are in fact simply a more detailed application of the principles in the Caparo test.

The test requires the courts to ask three questions:

- Was the damage reasonably foreseeable?
- Was there a relationship of proximity between defendant and claimant?
- Is it just, fair and reasonable to impose a duty in this situation?

As we shall see from the cases in this section, in many situations one or more of these elements may overlap, and so the test is not always applied as a clear, three-step process.

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Legal Principle

The basic test for a duty of care is whether the damage was reasonably foreseeable, whether there was a relationship of proximity between claimant and defendant, and whether it is just and reasonable to impose a duty.
Reasonable foreseeability

This element of the test has its foundations in the original ‘neighbour principle’ developed in Donoghue v Stevenson (see p. 18). Essentially, the courts have to ask whether a reasonable person in the defendant’s position would have foreseen the risk of damage. A case which shows how this part of the test works is Langley v Dray (1998), where the claimant was a policeman who was injured in a car crash when he was chasing the defendant, who was driving a stolen car. The Court of Appeal held that the defendant knew, or ought to have known, that he was being pursued by the claimant, and therefore in increasing his speed he knew or should have known that the claimant would also drive faster and so risk injury. The defendant had a duty not to create such risks and he was in breach of that duty.

In order for a duty to exist, it must be reasonably foreseeable that damage or injury would be caused to the particular defendant in the case, or to a class of people to which he or she belongs, rather than just to people in general. In other words, the duty is owed to a person or category of persons, and not to the human race in general. A good example of this principle can be seen in Palsgraf v Long Island Railroad (1928). The case arose from an incident when a man was boarding a train, and a member of the railway staff negligently pushed him, which caused him to drop a package he was carrying. The box contained fireworks, which exploded, and the blast knocked over some scales, several feet away. They fell on the claimant and she was injured. She sued, but the court held that it could not reasonably be foreseen that pushing the passenger would injure someone standing several feet away. It was reasonably foreseeable that the passenger himself might be injured, but that did not in itself create a duty to other people.

That does not, however, mean that the defendant has to be able to identify a particular individual who might foreseeably be affected by their actions; it is enough that the claimant is part of a category of people who might foreseeably be affected. This was the case in Haley v London Electricity Board (1965). The defendants dug a trench in the street in order to do repairs. Their workmen laid a shovel across the hole to draw pedestrians’ attention to it, but the claimant was blind, and fell into the hole, seriously injuring himself. It was agreed in court that the precautions taken would have been sufficient to protect a sighted person from injury, so the question was whether it was reasonably foreseeable that a blind person might walk by and be at risk of falling in. The Court of Appeal said that it was: the number of blind people who lived in London meant that the defendants owed a duty to this category of people.

The duty must also relate to a particular kind of harm which the defendant could reasonably foresee arising from their actions, rather than to the possibility of causing any kind of harm whatsoever. As Lord Oliver explained in Caparo v Dickman, ‘It is not a duty to take care in the abstract, but a duty to avoid causing to the particular plaintiff [the old word for claimant] damage of the particular kind which he has in fact sustained.’ The Court of Appeal was faced with an interesting question on this issue in Bhamra v Dubb (2010). The case arose from a very sad story in which the claimant’s husband, who had a severe egg allergy, collapsed and died after unknowingly eating a dish containing eggs, which was served at a wedding. The wedding was a Sikh one, and the Sikh religion bans its followers from eating certain foods, including eggs. The defendant, who was the caterer, knew this, but it appeared that at some point the food at the wedding had run out, and he had sourced extra from another supplier. The dish supplied would not usually have contained eggs in any case, but, for some reason which was never quite established, they had been used on this occasion.

It was clear that the defendant owed Mr Bhamra and all the other guests a duty not to serve them food that would generally be considered harmful, such as mouldy or ‘off’ food. The Court
said it was also clear that the caterer owed Mr Bhamra and the other guests a duty not to offend their religious sensibilities by serving eggs (you might well ask where this particular duty comes from, since offence to religious sensibility is not a form of damage recognised in a negligence claim, but the court glossed over this point). But did the defendant owe Mr Bhamra a duty not to cause him physical harm by serving him eggs? The Court of Appeal held that there were four factors that meant he did owe such a duty. First, he was under a duty not to serve food containing eggs, because of the nature of the event. Secondly, he would have known that some people are allergic to eggs, and would suffer serious injury if they ate food containing them. Thirdly, he knew that anyone attending the wedding would expect the food to be free of eggs and so would believe they could safely eat any dish served, even if they had an egg allergy. Finally, Mr Bhamra had every reason to rely on the caterers not serving food containing eggs, and would not have seen any reason to ask whether any dish contained egg. Taken together, ‘this very unusual combination of circumstances’ meant that there was a duty of care not to cause Mr Bhamra physical harm by serving him eggs.

Proximity

In normal language, proximity means closeness, in terms of physical position, but in law it has a wider meaning which essentially concerns the relationship, if any, between the defendant and the claimant. In *Muirhead v Industrial Tank Specialities* (1985), Goff LJ pointed out that this does not mean that the defendant and claimant have to know each other, but that the situations they were both in meant that the defendant could reasonably be expected to foresee that his or her actions could cause damage to the claimant.

In this sense, proximity can be seen as simply another way of expressing the foreseeability test, as the case of *Caparo v Dickman* itself shows. The claimants, Caparo, were a company who had made a takeover bid for another firm, Fidelity, in which they already owned a large number of shares. When they were deciding whether to make the bid, they had used figures prepared by Dickman for Fidelity’s annual audit, which showed that Fidelity was making a healthy profit. However, when the takeover was complete, Caparo discovered that Fidelity was in fact almost worthless. They sued Dickman, and the House of Lords had to decide whether Dickman owed them a duty of care. They pointed out that the preparation of an annual audit was required under the Companies Act 1985, for the purpose of helping existing shareholders to exercise control over a company. An audit was not intended to be a source of information or guidance for prospective new investors, and therefore could not be intended to help existing shareholders, like Caparo, to decide whether to buy more shares. The audit was effectively a statement that was ‘put into more or less general circulation and may foreseeably be relied on by strangers to the maker of the statement, for any one of a variety of purposes which the maker of the statement has no reason to contemplate’. As a result, the House of Lords held that there was no relationship of proximity between Caparo and Dickman, and no duty of care.

Proximity may also be expressed in terms of a relationship between the defendant, and the activity which caused harm to the claimant, defined by Lord Brennan in *Sutradhar v Natural Environment Research Council* (2004) as ‘proximity in the sense of a measure of control over and responsibility for the potentially dangerous situation’. An example of this kind of proximity can be seen in *Watson v British Boxing Board of Control* (2000), where the claimant was the famous professional boxer Michael Watson, who suffered severe brain damage after being injured during a match. He sued the Board, on the basis that they were in charge of safety arrangements at professional boxing matches, and evidence showed that if they had made immediate medical
attention available at the ringside, his injuries would have been less severe. The Court of Appeal held that there was sufficient proximity between Mr Watson and the Board to give rise to a duty of care, because they were the only body in the UK which could license professional boxing matches, and therefore had complete control of and responsibility for a situation which could clearly result in harm to Mr Watson if the Board did not exercise reasonable care.

In *Sutradhar v Natural Environment Research Council*, the claimant was a resident of Bangladesh, who had been made ill by drinking water contaminated with arsenic. The water came from wells near his home, and his reason for suing the defendants was that, some years earlier, they had carried out a survey of the local water system, and had neither tested for, nor revealed the presence of arsenic. The claimant argued that the defendants should have tested for arsenic, or made public the fact that they had not done so, so as not to lull local people into a false sense of security. The House of Lords, however, held that the defendants had no duty of care to users of the water system, because there was insufficient proximity. Mr Sutradhar himself had never seen the defendants’ report, and so his claim had to be based on the idea that they owed a duty to the whole population of Bangladesh. The House of Lords said this could not be the case: the defendants had no connection with the project that had provided the wells, and no one had asked them to test whether the water was safe to drink. They had no duty to the people or the government of Bangladesh to test the water for anything, and were simply doing general research into the performance of the type of wells that happened to be used in that area. The fact that someone had expert knowledge of a subject did not impose on them a duty to use that knowledge to help anyone in the world who might require such help. Proximity required a degree of control of the source of Mr Sutradhar’s injury, namely the drinking water supply of Bangladesh, and the defendants had no such control.

**Justice and reasonableness**

In practice, the requirement that it must be just and reasonable to impose a duty often overlaps with the previous two – in *Watson* and *Sutradhar*, for example, the arguments made under the heading of proximity could equally well be seen as arguments relating to justice and reasonableness. It was obviously more just and reasonable to expect the Boxing Board to supervise a match properly, since that was their job, than it was to expect the researchers in *Sutradhar* to take responsibility for a task that was not their job, and which they had never claimed to have done.

Where justice and reasonableness are specifically referred to, it is usually because a case meets the requirements of foreseeability and proximity, but the courts believe there is a sound public policy reason for denying the claim. An example is *McFarlane v Tayside Health Board* (1999). The claimant had become pregnant after her partner’s vasectomy failed, and claimed for the costs of bringing up the child. The courts denied her claim, on the basis that it was not just and reasonable to award compensation for the birth of a healthy child – something most people, they said, would consider a blessing.

In *Commissioners of Customs and Excise v Barclays Bank plc* (2006), the government’s Customs and Excise department was owed large sums in unpaid VAT by two companies, who had accounts with the defendant bank. Customs and Excise had gone to court and obtained what are called ‘freezing’ injunctions, which restricted the two companies’ access to the money they had in the bank. The bank was notified of the orders, and should have prevented the companies from withdrawing money, but, apparently because of negligence, they failed to do so, which meant that the two companies were able to take out over £2 million, and Customs and Excise were unable to recover all the money owed. They sued the bank, claiming that it owed them a duty of care. The House of Lords held that it was foreseeable that Customs and Excise could lose money if the bank
Duties of care: pure economic loss

was negligent in handling the freezing injunction, and that this suggested there was also a degree of proximity. However, the decisive issue was whether it was just and reasonable to impose a duty. The House stated that where a court order was breached, the court had power to deal with that breach; this would usually be enough to ensure that banks complied with such orders, and there was nothing to suggest that the order created any extra cause of action. In addition, it was unjust and unreasonable that the bank should become exposed to a liability which could amount to very much more than the £2 million that was at stake in this case, when it had no way of resisting the court order, and got no reward for complying with it.

In Mitchell v Glasgow City Council (2009), the claimants were the wife and daughter of a man who had been killed by their neighbour. The neighbour rented a house from the defendant council, and had a history of abusing the claimants’ family, including making threats to kill them. In an attempt to solve the problem, the council called the defendant to a meeting, and told them that if his behaviour did not improve, they would consider evicting him. Within an hour, he had gone back home and attacked his neighbour, inflicting injuries which proved fatal. The claimants argued that the council were aware that he had made death threats, and had a duty of care to warn them about the meeting, because they had reason to suspect he might attack anyone he suspected of complaining about him to the council. The House of Lords said that it was not fair, just and reasonable to impose such a duty, because that would mean that a similar duty must apply to all other landlords, and to social workers, in similar situations. Imposing a duty to warn, and liability if warnings were not issued, would deter landlords from taking steps to deal with anti-social behaviour by tenants, which would not be desirable. In this case the council had done their best to deal with the problem, and it was better that they took those steps than did nothing at all. The situation might have been different if the council had, by their words or behaviour, undertaken responsibility for the claimants’ safety, but, as they had not, no duty should be imposed.

In West Bromwich Albion Football Club v Medhat El-Safty (2006), the case concerned a knee injury to a West Brom player, Michael Appleton. The club arranged for him to see the defendant, an orthopaedic consultant, who advised surgery. The operation was unsuccessful, and Mr Appleton could no longer play; it was established that the advice was negligent, as other treatment should have been tried first. As well as being a personal disaster, losing a player meant that the club lost money, and they sought to sue the defendant for their losses. The defendant clearly had a duty towards the player, as his patient, to take reasonable care to give competent medical advice, but the club could only claim if he also had a duty to take reasonable care not to damage their financial interest in the player. The Court of Appeal said that it was not just and reasonable to impose such a duty because there was nothing to suggest that the defendant should have realised he would be taking on that responsibility, and to take on this additional duty could have conflicted with his duty towards the player who was his patient, if, for example, aggressive treatment could have enabled him to play on, but led to problems later in life. The defendant was therefore not liable to the club.

Many losses resulting from tort could be described as economic; if the claimant’s house is burnt down because of the defendant’s negligence, the loss is economic in the sense that the claimant no longer has an asset they used to have. Similarly, a claimant who suffers serious injury which makes them unable to work suffers a financial loss. The law of tort has always been willing to compensate for these losses with damages.
However, economic loss also has a more precise meaning in tort. The term is usually used to cover losses which are ‘purely’ economic, meaning those where a claimant has suffered financial damage that does not directly result from personal injury or damage to property – for example, where a product bought turns out to be defective, but does not actually cause injury or damage to other property. In cases of pure economic loss, the law of tort has been reluctant to allow a claim.

A case which illustrates the difference between the types of loss is *Spartan Steel v Martin* (1972). Here the defendants had negligently cut an electric cable, causing a power cut that lasted for 14 hours. Without electricity to heat the claimants’ furnace, the metal in the furnace solidified, and the claimants were forced to shut their factory temporarily. They claimed damages under three heads:

- damage to the metal that was in the furnace at the time of the power cut (physical damage to property);
- loss of the profit that would have been made on the sale of that metal (economic loss arising from damage to property); and
- loss of profit on metal which would have been processed during the time the factory was closed due to the power cut (pure economic loss).

A majority of the Court of Appeal held that the first two claims were recoverable but the third was not. The defendants owed the claimants a duty not to damage their property, and therefore to pay for any loss directly arising from such damage, as well as for the damage itself, but they did not owe them any duty with regard to loss of profit.

**Economic loss and policy**

There are two main reasons for the traditional reluctance to compensate pure economic loss. The first is that, traditionally, contract was the means by which economic loss was compensated, and the courts were reluctant to disturb this. Contract was seen as offering certainty; defendants could only be liable for losses caused by their own failure to fulfil a freely undertaken agreement, and this clearly had benefits in the commercial world.

The second reason, linked to the first, is the much-quoted ‘floodgates’ argument. This reasons that while, as a general rule, an act or omission can only cause personal injury or property damage to a limited number of people, the possible economic loss from the same act may be vast and in practice incalculable. In *Spartan Steel*, for example, had the defendants been liable to compensate for profit lost as a result of the power cut, the number and amount of claims might in theory have been astronomical. Although this does not provide much of a moral reason why such losses should not be compensated, an accepted part of law’s role in a market economy like ours is to provide industry and commerce with a framework within which they can plan their activities, and preventing unlimited claims for economic loss obviously assists in this.

**Development of the law**

The issue of economic loss in negligence has been the subject of much legal activity over the past 40 years or so, and the law has swung backwards and forwards over the issue. The result is that claims for pure economic loss are now allowed in certain situations, but the law surrounding them is complex, fragmented and still has an unsettled air. However, it is more easily understood if we first look at the traditional position on economic loss, and the developments that have taken place in the past four decades.
Origins of the claim for economic loss

The initial position on pure economic loss in negligence was laid down in the case of *Candler v Crane, Christmas & Co* (1951). Here a firm of accountants had done some work for a client, knowing that the figures produced would also be considered by a third party. As a result of relying on the figures, the third party suffered financial loss, but the Court of Appeal held that the accountants owed no duty of care regarding economic loss to the third party; their responsibility was only to the client with whom they had a contractual relationship.

This remained the situation until 1963, when the extremely important case of *Hedley Byrne v Heller* provided that there were some situations in which negligence could provide a remedy for pure economic loss caused by things the defendant had said, or information they had provided; essentially, there needed to be a ‘special relationship’ between the parties, which would arise where the defendants supplied advice or information, knowing that the claimants would rely on it for a particular purpose. This is sometimes known as ‘negligent misstatement’. (The case is discussed more fully below.)

Following this came the case of *Anns v Merton London Borough* (1978) which, as we discussed on p. 19, was part of the judicial expansion of negligence liability during the 1970s. The case concerned economic loss arising from the claimant’s house being badly built; defective foundations had caused cracking in the walls. This might at first sight appear to be a case of damage to property, but the courts have traditionally been insistent that a defect is not the same thing as damage: where a product is defective in its manufacture, claims may be made for any personal injury caused as a result of the defect, or any damage to other property, but not for the defect itself, which is considered economic, since the loss arises from the reduced value of the object. In *Anns*, however, the House of Lords decided that the cracks in the walls could be viewed as damage to property rather than economic loss, and therefore compensated.

This was followed by the case which is generally viewed as forming the peak of the expansion in negligence liability, *Junior Books v Veitch* (1983). The claimants in the case had had a factory built for them under a contract with a building firm. The factory needed a special type of floor in order to support the kind of machinery the claimants wanted to use, and the claimants requested that the builders use a particular flooring firm to provide this, which they did. After the floor was laid, it was found to be defective. If the factory owners had themselves contracted with the flooring company, they could have sued them in contract for the price of replacing the floor, but their only contract was with the builders; the builders had contracted with the flooring company. It was possible to make out a case that the builders had been negligent, but a potential stumbling block was that the factory owners’ loss was purely economic: the defect in the floor posed no threat to safety, nor any risk of damage to the fabric of the building, and so the only loss was the cost of replacing it. However, a majority of the House of Lords held that there was nevertheless a duty of care between the builders and the factory owners with regard to the defect in the floor.

The situation after this was that claimants could recover for economic loss caused by statements under *Hedley Byrne*, and, following *Anns* and then *Junior Books*, it was also possible to recover for economic loss caused by negligent acts. However, as we saw on p. 19, the general expansion of negligence liability was much criticised and it was at this point that the courts began to draw back, with the eventual overruling of *Anns* in *Murphy v Brentwood District Council* (see p. 20). Like *Anns, Murphy* concerned a defective building, and, as well as laying down general principles for the way in which the law on negligence should develop, the House of Lords put a stop to the possibility that defects in products could be seen as damage to property; it reaffirmed that they were to be regarded as economic loss and that they could not be compensated in negligence.
Junior Books was not overruled in Murphy, but in a series of later cases on defective products the courts declined to follow it and eventually it was considered that Junior Books was to be regarded as unique to its facts, and in particular the idea that, by specifying that the flooring company should be used, the claimants created a relationship of proximity between themselves and the defendants, even though there was no contract.

From there on, both the courts and academic commentators began to develop an approach to economic loss which distinguished between such loss when caused by negligent acts, and when caused by negligent statements or advice. Aside from the apparent anomaly of Junior Books, it appeared that economic loss arising from acts was not recoverable in negligence, whereas such loss arising from statements and advice was, if it could be fitted into the requirements of Hedley Byrne. This led to the rather bizarre situation in which surveyors or architects who negligently advise on the construction of a building that turns out to be defective are liable in negligence for economic loss caused as a result, but builders who are negligent in constructing such buildings are not.

The current position

During the 1990s, a new mood of cautious expansion was visible in a number of cases. These extended Hedley Byrne beyond liability for negligent statements or advice, and established that it can, in some circumstances, also cover negligent provision of services. This was specifically stated in Henderson v Merrett Syndicates Ltd (1995), and confirmed in Williams and Reid v Natural Life Health Foods Ltd and Mistlin (1998) (both cases are discussed below). The result now appears to be that when the Hedley Byrne principles are fulfilled, pure economic loss is recoverable both where it is caused by either negligent advice or information, or by negligent provision of services. There is also a category of cases where compensation has been given for economic loss caused by negligent provision of services, even though the requirements of Hedley Byrne were not entirely fulfilled – these are discussed on p. 34.

Economic loss is still not, however, recoverable where it is caused by defective products, where Murphy still applies. Nor is it recoverable when caused by negligent acts other than the provision of services.

We will now look in more detail at Hedley Byrne and its effects.

The Hedley Byrne principles

The claimants in Hedley Byrne v Heller (1964) were an advertising agency, who had been asked by a firm called Easipower Ltd to buy substantial amounts of advertising space on their behalf. To make sure their clients were creditworthy, Hedley Byrne asked their own bank, the National Provincial, to check on them. National Provincial twice contacted Heller, who were Easipower’s bankers and were backing them financially, to enquire about Easipower’s creditworthiness. Heller gave favourable references on both occasions, but each time included a disclaimer stating that the information was being supplied ‘without responsibility on the part of this Bank or its officials’.

The second enquiry asked whether Easipower was ‘trustworthy, in the way of business, to the extent of £100,000 per annum’, and Heller answered that Easipower was a respectively
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The ‘special relationship’

This was described by Lord Reid in *Hedley Byrne* as arising where ‘it is plain that the party seeking information or advice was trusting the other to exercise such a degree of care as the circumstances required, where it was reasonable for him to do that, and where the other gave the information or advice when he knew or ought to have known that the enquirer was relying on him’.

Lord Reid made it plain that the ‘special relationship’ requirement meant that *Hedley Byrne* only covers situations where advice is given in a business context:

Quite careful people often express definite opinions on social or informal occasions, even when they see that others are likely to be influenced by them; and they often do that without taking the care which they would take if asked for their opinion professionally, or in a business connection . . . there can be no duty of care on such occasions.

Advice given off the cuff in a social setting will therefore not, as a rule, give rise to a duty of care. For example, both doctors and lawyers frequently complain that as soon as they disclose their profession at parties, fellow guests want to discuss backaches or boundary disputes; they can at least take comfort that, tedious though those conversations may be, they will not result in a

...
negligence suit if the advice given is careless. Curiously, there is, however, one case in which a duty of care under Hedley was found in a purely friendly setting. In Chaudry v Prabhakar (1988), the defendant had advised the claimant, a friend, to buy a particular second-hand car, without noticing that it had been in an accident. It was in fact unroadworthy, and the claimant successfully sued for negligence. The case has, however, been heavily criticised, and is unlikely ever to be followed; it certainly appears wrong in the light of Lord Reid’s statement.

An example of the special relationship can be seen in Esso Petroleum Co Ltd v Mardon (1976). Here the claimant had leased a petrol station on the strength of Esso’s advice that he could expect to sell at least 200,000 gallons a year. In fact he only managed to sell 78,000 gallons in 15 months. The Court of Appeal held that, in making the prediction, the petrol company had undertaken a responsibility to Mr Mardon, and he had relied on their skill in the petrol market; his claim was allowed.

The person giving the advice need not be a professional adviser. In Lennon v Commissioner of the Metropolis (2004), the claimant was an officer in the Metropolitan Police, who was changing jobs to go and work in the police force in Northern Ireland. He had been entitled to a housing allowance, and wanted to make sure this continued, so he asked an executive in the personnel department whether it would affect his housing allowance if he took time off between finishing one job and starting the other. She advised him that it would not. In fact, the time off counted as a break in service, which resulted in his losing entitlement to the housing allowance for ever. He sued the Metropolitan Police, who were vicariously liable (see Chapter 16) for the personnel officer’s acts. The Court of Appeal upheld his claim, stating that even though the personnel officer was not a professional adviser, she had a managerial job in the police service, and had, or had access to, special complex knowledge about the effects of transfers on police allowances of the kind in question. She had led the claimant to believe he could rely on her advice, rather than telling him the question was outside her sphere of experience and suggesting that he took advice from elsewhere.

Voluntary assumption of responsibility

As Lord Reid pointed out in Hedley Byrne, a person asked for advice in a business context has three choices: they can opt to give no advice; choose to give advice, but warn that it should not be relied on; or give the advice without giving any such warning. In general, someone who chooses the third option will be considered to have voluntarily assumed responsibility for that advice.

An example of where the courts will find such an assumption of responsibility can be seen in Dean v Allin & Watts (2001), where the Court of Appeal held that the defendant, a solicitor who had acted for some clients who were borrowing money, had also assumed responsibility for the other party to the transaction – Mr Dean, the person lending the money. Mr Dean was a mechanic, and not widely experienced in business finance. He was approached by two borrowers seeking funding for their property company, and agreed to lend them £20,000, with a particular property being put up as security for the loan. The borrowers suggested that their solicitors draw up the necessary documentation, and met all the legal costs. Mr Dean made it clear that he would not be involving his own solicitor, and it was never suggested by the borrowers’ solicitor that he should take independent legal advice.

The solicitor advised that the security could be dealt with by way of a deposit of the deeds to the property; this was in fact incorrect, and deposit of the deeds did not give Mr Dean any rights over the property. Eventually, the borrowers defaulted on the loan, and the mistake was discovered. Mr Dean now had neither his money, nor the property. He sued the solicitor, and the Court of Appeal held that, in knowing that Mr Dean was not taking independent advice, the
solicitor knew that he was being relied on to ensure that there was effective security for the loan, and therefore in continuing to act, without recommending that Mr Dean take independent advice, he was assuming a responsibility to him. The court stressed the fact that the defendant knew Mr Dean was inexperienced in business matters, and also pointed out that there was no conflict of interest between his interests and those of the defendant’s clients, who also wanted to put in place effective security for the loan. Had the solicitor advised Mr Dean to consult a solicitor of his own, the result would, the court said, have been different.

In Calvert v William Hill Credit Ltd (2008), the case concerned the question of how far a bookmaker could be liable for economic losses caused to a problem gambler. The claimant was a greyhound trainer who had initially made a lot of money from gambling, but whose gambling habits eventually became compulsive, leading to losses of over £2 million. Realising that he had a problem, he had asked the bookmaker, William Hill, to close his telephone betting account and not to allow him to open another one (an arrangement known as ‘self-exclusion’). The bookmaker had in place procedures to do this, which were part of a social responsibility policy that was designed to protect problem gamblers, but in Mr Calvert’s case the system failed and he was able to go on gambling with William Hill, as well as with other bookmakers.

He argued that there were two possible grounds on which it could be argued that William Hill owed him a duty of care. The first was that, by putting in place a social responsibility policy that was designed to protect problem gamblers, they had voluntarily assumed a responsibility towards such gamblers. The court rejected this idea, on the grounds that it was not reasonable to expect the bookmaker to identify all problem gamblers; that gamblers who signed up to the self-exclusion arrangement also agreed to a disclaimer absolving William Hill of legal responsibility for their economic losses; and that it was unfair to allow a situation in which problem gamblers could take their winnings if they were successful, but expect the bookmakers to compensate them if they were not.

The second argument was that, by agreeing to include Mr Calvert in the self-exclusion arrangement, the bookmaker assumed responsibility for carrying out that arrangement properly. The court found that he had identified himself to William Hill as a problem gambler, had asked for their help in excluding him from betting for six months, and had been told that he would get that help. That being the case, the court found that William Hill did have a duty of care to carry out the self-exclusion arrangement, and they had breached this duty. However, Mr Calvert’s claim failed because the House of Lords found that William Hill’s negligence did not ultimately cause his losses: even before he knew that the self-exclusion policy was not in place, he was still betting heavily through other bookmakers, and, given the extent of his gambling problem, the losses he sustained would have happened anyway.

**Claimants not known to the defendant**

More complex problems arise when the claimant is not known to the defendant, but claims to be, as Lord Bridge put it, ‘a member of an identifiable class’. In Goodwill v British Pregnancy Advisory Service (1996), an attempt was made to use Hedley Byrne in a new factual context. The claimant, Ms Goodwill, had become pregnant by her boyfriend. Three years before their relationship began, he had undergone a vasectomy performed by the defendants. They had advised him after the operation that it had been successful and he would not need to use contraception. The relationship began, he had undergone a vasectomy performed by the defendants. They had advised him after the operation that it had been successful and he would not need to use contraception in the future. He told Ms Goodwill this when they began their relationship, and she stopped using any contraception. In fact the vasectomy had reversed itself, and she became pregnant. She sued the defendants for negligence, claiming the cost of bringing up her daughter.
The Court of Appeal held that in order to claim successfully for pure economic loss arising from reliance on advice provided by the defendants, a claimant had to show that the defendants knew (either because they were told or because it was an obvious thing to assume) that the advice they supplied was likely to be acted on by the claimant (either as a specific individual or one of an ascertainable group), without independent enquiry, for a particular purpose which the defendants knew about at the time they gave the advice, and that the claimant had acted on the advice to his or her disadvantage.

In the case before them, the Court of Appeal held that at the time when the advice was given, the claimant was not known to the defendants, and was simply one of a potentially large class of women who might at some stage have a sexual relationship with the patient before them. They could not be expected to foresee that, years later, their advice to their patient might be communicated to and relied on by her for the purpose of deciding whether to use contraception; therefore the relationship between the defendants and Ms Goodwill was not sufficiently proximate to give rise to a duty of care. The court pointed out, however, that the situation might be different where a man and his partner were advised at the same time, or possibly even where their relationship was known to those giving the advice.

In common-sense terms, the distinction is a difficult one. Clearly, as Ms Goodwill pointed out, in this day and age it was not unlikely that a man of her boyfriend’s age would have a sexual relationship with future partners, and, while the class of possible future partners might be large, the number who would end up pregnant was not, given that once pregnancy had occurred, it would be known that the vasectomy had reversed itself. Furthermore, the purpose to which such partners would put the advice was exactly the same as the purpose for which the patient would use it: as a statement that if they had sexual relations, no pregnancy would result. What we see in cases like this one is the courts struggling to balance the need to compensate loss where justice demands it and yet avoid opening those much-mentioned floodgates and opening defendants to unreasonable liability. The theme is continued in the ‘wills cases’ discussed on p. 34.

The effect of disclaimers

Where a defendant has issued some kind of disclaimer (as in Hedley Byrne itself), this would appear to suggest that they are not accepting responsibility for their advice. However, the courts have stated that merely issuing a disclaimer will not always prevent liability under Hedley Byrne. Cases in this area are very fact-dependant, but the general approach seems to be that a disclaimer is more likely to prevent liability in cases where the claimant could reasonably be expected to understand what it meant, such as where the claimant is a business, or someone experienced in the kind of transaction taking place. This was the case in both Omega Trust Co Ltd v Wright Son & Pepper (1997), where the case involved a valuation of commercial property, and McCullagh v Lane Fox & Partners Ltd (1996), which concerned information given by an estate agent to a purchaser at the upper end of the housing market; and, in both cases, the courts found that the disclaimer issued by the defendant could be taken to mean there was no assumption of responsibility under Hedley Byrne.

However, in Smith v Eric S Bush (1990), the case involved advice given by surveyors to the buyers of an ordinary family home and, in this case, the House of Lords found that the existence of a disclaimer did not mean there was no assumption of responsibility towards the buyers. The claimants’ home had been negligently surveyed by the defendants, and was worth much less than they had paid for it. The survey had been commissioned by the building society from which the
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Claimants had sought a mortgage, as part of its standard practice of ensuring that the property was worth at least the money that was being lent. However, such surveys were routinely relied upon by purchasers as well, and in fact purchasers actually paid the building society to have the survey done, although the surveyors’ contract was always with the building society. The House of Lords held that in such situations surveyors assumed a duty of care to house purchasers; even though the surveys were not done for the purpose of advising home buyers, surveyors would be well aware that buyers were likely to rely on their valuation, and the surveyors only had the work in the first place because buyers were willing to pay their fees. An important factor was that this did not impose particularly wide liability: the extent of the surveyors’ liability was limited to compensating the buyer of the house for up to the value of the house.

Reliance by the claimant

Reliance under Hedley Byrne requires that the claimant depended on the defendant using the particular skill or experience required for the task which the defendant had undertaken; it is not merely general reliance on the defendant exercising care.

The claimant must prove not only that they relied on the defendant, but that it was reasonable to do so, and the courts have held that this will not be the case where the claimant relies on information or advice for one purpose, when it was given for a different purpose. In Caparo Industries plc v Dickman (1990) (see p. 23 for full facts) Caparo relied on an auditor’s report prepared by Dickman when deciding whether to invest in Fidelity. The House of Lords held that as auditors’ reports were not prepared for the purpose of giving such guidance, Dickman were not liable.

Lord Bridge held that there was no special relationship between Caparo, as potential investors, and the auditors. He drew a distinction between situations where ‘the defendant giving advice or information was fully aware of the nature of the transaction which the claimant had in contemplation’ and those in which ‘a statement is put into more or less general circulation and may foreseeably be relied upon by strangers to the maker of the statement, for any one of a variety of purposes which the maker of the statement has no specific reason to contemplate’.

This approach was followed in Reeman v Department of Transport (1997). Mr Reeman was the owner of a fishing boat that required an annual certificate of seaworthiness from the Department of Transport (DoT), without which it could not be used at sea. The boat was covered by such a certificate when Mr Reeman bought it, but it was later discovered that the surveyor who inspected it for the DoT had been negligent; the certificate should not have been issued and would not be renewed, making the boat practically worthless.

Mr Reeman sued for his economic loss, but the Court of Appeal held that, following Caparo, the provision of information for a particular purpose could not be taken as an assumption of responsibility for its use for a different purpose. The purpose of issuing the certificate was to promote safety, not to establish a boat’s commercial value, even though the boat effectively had no commercial value without it. In addition, the class of person likely to rely on the statement had to be capable of ascertainment at the time the statement was made, and not merely capable of description; when the certificate was issued, there was no reason to identify Mr Reeman as someone who was likely to rely on it.

However, the courts are willing to look very closely at the circumstances in which advice was given, and there are cases where they have held that the fact that advice was given for one purpose does not mean it is unreasonable for the recipient to rely on it for another purpose at the same time. In Law Society v KPMG Peat Marwick (2000) the defendants were accountants to a firm of solicitors, and were asked by them to prepare the annual accounts which were required by
the Law Society. The accountants failed to uncover the fact that a senior partner in the firm was defrauding hundreds of clients. When the frauds eventually came to light, over 300 clients claimed compensation from a fund set up for this purpose by the Law Society, and the Law Society sued the accountants, claiming that the accounts had been prepared negligently. The accountants argued that their duty was only owed to the solicitors’ firm; the Law Society held that the accountants owed a duty to them, by virtue of the Law Society’s reliance on the information given in the accounts. The Court of Appeal analysed the situation using the three-step \textit{Caparo} test. They held that if accountants’ reports failed to highlight improprieties in the way a firm dealt with clients’ money, it was clearly foreseeable that loss to the fund would result. There was sufficient proximity between the reporting accountant and the Law Society, and it was fair and reasonable to impose a duty. On this last point, the court made use of similar reasoning to that in \textit{Smith v Eric S Bush} (see p. 32), pointing out that the imposition of a duty did not expose the accountants to unrestricted liability; the amount of compensation that could be claimed was restricted to the amount of clients’ money that had been lost in the frauds, and the time within which it could be claimed was also limited, given that reports were delivered annually, so negligence in any one year could be uncovered by a non-negligent report the following year.

**Recovery without reliance – the ‘wills’ cases**

The 1980s and 1990s brought a crop of cases which have allowed compensation for economic loss caused by negligent advice or services, yet which do not sit quite comfortably within the principles of \textit{Hedley Byrne}. In \textit{Ross v Caunters} (1980), a solicitor had been negligent in preparing a client’s will, with the result that it was in breach of probate law and the intended beneficiary was unable to receive her inheritance. She successfully sued the solicitor for the value of her loss. Although the loss was purely economic, and caused by an act rather than a statement, the case was not considered especially significant at the time, since it took place in the period after \textit{Anns v Merton London Borough} (1978), when the wider approach to the issue of a duty of care was in place, and before \textit{Murphy v Brentwood District Council} (1990) tightened up the requirements again. However, the significance comes from the fact that it was followed in the post-\textit{Murphy} case of \textit{White v Jones} (1995). Here, two daughters had had a quarrel with their father, and he cut them out of his will. The family was later reconciled, and the father instructed his solicitors to renew the £9,000 legacies to his daughters. A month later, he discovered that the solicitors had not yet done this, and reminded them of his instructions. Some time later, the father died, and it was found that the will had still not been changed, so the daughters could not receive their expected inheritance. They sued the solicitors, and the House of Lords allowed the claim, even though the loss was purely economic and the result of negligent work rather than a negligent misstatement. \textit{White v Jones} proved somewhat difficult to explain on \textit{Hedley Byrne} principles. Wills are prepared in order to put into practice the wishes of the person making the will (the testator), and, as Lord Goff stated in \textit{White v Jones}, in many cases, beneficiaries will not even be aware that they stand to gain, so it is hard to see how they can be said to rely on the solicitor’s skill as required under \textit{Hedley Byrne}. Clearly the solicitors in both cases had assumed the responsibility for preparing the wills correctly for the testators, but could they also be said to have accepted a responsibility towards the beneficiaries? The House of Lords admitted that it was difficult to see how this could be argued, but, even so, they were prepared to allow a remedy.

What appears to have swayed them was the practical justice of the claimant’s case: the solicitor had been negligent, yet the only party who would normally have a valid claim (the testator and his estate) had suffered no loss, and the party who had suffered loss had no claim. As Lord Goff
pointed out, the result was ‘a lacuna [loophole] in the law which needs to be filled’. The exact ratio of the case is difficult to discover, as the three judges were divided on how the assumption of responsibility problem was to be got over. Lords Browne-Wilkinson and Nolan argued that, in taking on the job of preparing the will, the solicitor had voluntarily accepted responsibility for doing it properly, and it was for the law to decide the scope of that responsibility and in particular whether it included a duty to the claimants. Both held that it did. Lord Goff held that the solicitor had in fact assumed responsibility only to the testator, but that the law could and should deem that responsibility to extend to the intended beneficiaries.

However, even if the decision in White v Jones did no more than use practical justice to fill a loophole in the law, the case of Carr-Glynn v Frearsons (1998) extended it beyond this approach. Here a woman had made a will leaving the claimant her share in a property. The defendants, the solicitors who had drawn up the will, had advised her that there was a problem with the ownership of the property which could result in her share automatically passing to the other part-owners on her death, so that any bequest of it would be ineffective. They told her what to do to avoid the problem, but she died before taking the advice. The claimant therefore received nothing under the will, and the estate also suffered a loss since the share in the property passed to the co-owners. The case was different from Ross v Caunters and White v Jones, where the estate had suffered no loss and the party who had suffered loss had no claim; here, allowing a duty of care to the disappointed beneficiaries might give rise to two claims for the same loss, one from the intended beneficiaries and one from the estate. However, the Court of Appeal held that although the estate had a claim, any damages it recovered by bringing that claim would not go to the claimant, who was therefore still left without a remedy unless the principle of White v Jones was extended to cover her. The court stated such an extension was reasonable; there was a duty of care, and it required that the solicitor should have taken action herself to ensure that the will would take effect as expected.

**How far do the ‘wills’ cases go?**

In the years since White v Jones, there has been great debate about how far the principles laid down in that case will go. Could they apply to agreements other than wills? The case of Gorham v British Telecommunications plc (2000) would seem to suggest that they can. The case involved a pension plan taken out by a Mr Gorham, on the advice of an insurance company. They told him he would be better off opting out of his employer’s pension scheme and taking out his own pension instead; this was untrue. One of the advantages of the employer’s scheme was the insurance benefits that would be paid to Mr Gorham’s family if he died while working for the company. These were lost when he switched pensions, so when he died, still an employee of the firm, his widow sued. The Court of Appeal found that the position of intended beneficiaries of an insurance policy was comparable to that of the intended beneficiaries to a will, and that the adviser had therefore undertaken a responsibility to the family, as well as to Mr Gorham himself.

**Negligent misstatement and contract**

Because contract was traditionally seen as the method for resolving disputes involving pure economic loss, it was originally thought that where two parties had made a contract, a negligence action could not be used to fill in any gaps in that contract. However, in Henderson v Merrett Syndicates Ltd (1995), it was established that the existence of a contract between the parties did not prevent a Hedley Byrne special relationship arising. The case arose when the Lloyd’s insurance
organisation made considerable losses on many of its policies. The losses had to be borne by people who had invested in Lloyd’s by underwriting the policies. Known as Lloyd’s Names, these people were grouped into syndicates and invested on the understanding that they were assuming unlimited liability; if big losses were made, the Names could lose everything they had. They were willing to take on this liability because becoming a Name was seen as a sure way of making money for those who were wealthy enough to be able to invest, and in previous years it had proved to be exactly that.

However, in the early 1990s, a series of natural and man-made disasters led to unusually big claims, and the Names were called upon to pay; many were ruined financially as a result. They alleged that the agents who organised the syndicates had been negligent; many of the Names had entered into contracts with these managers, but, by the time the actions were brought, the three-year limitation period for a breach of contract action had expired. Could they then take advantage of the longer (six-year) limitation period for tort actions? The House of Lords held that they could; the syndicate managers had assumed responsibility for the Names’ economic welfare, and the existence of a contract could only prevent liability in tort if such liability would contradict the terms of the contract. Lord Goff explained:

liability can, and in my opinion should, be founded squarely on the principle established in Hedley Byrne itself, from which it follows that an assumption of responsibility coupled with the concomitant reliance may give rise to a tortious duty of care irrespective of whether there is a contractual relationship between the parties, and in consequence, unless his contract precludes him from doing so, the plaintiff, who has available to him concurrent remedies in contract and tort, may choose that remedy which appears to him most advantageous.

Negligent misstatements often take place in a pre-contractual situation, where one party is trying to persuade the other to enter a contract. Hedley Byrne can apply in such situations, but in practice it has been made less important in this area by the Misrepresentation Act 1967, which imposes its own liability for false statements made during contractual negotiations.

Another case which, it has been suggested, reveals an expansion of liability for economic loss is Spring v Guardian Assurance (1994). The claimant, Mr Spring, had been employed by the defendant, but was sacked. When seeking a new job, he needed a reference, but the one supplied by the defendant said that Mr Spring was incompetent and dishonest. Not surprisingly, he failed to get the new job. He sued the defendant for negligence, claiming the economic loss caused by not getting the job. The trial judge found that Mr Spring was not dishonest, and that, while the defendant had genuinely believed that what he had written was true, he had been negligent in the way he reached that conclusion. The House of Lords agreed that a duty of care existed, and the defendant had breached it.

Two key factors make Spring different from the usual Hedley Byrne case. First, the information which caused the loss was not given to the person who relied on it, as it was in Hedley, but was about him. Secondly, it is hard to see how there can be a truly voluntary assumption of responsibility where someone is asked to give an employment reference, because this is one situation where the three options outlined by Lord Reid in Hedley do not apply. Someone who refuses to give a reference is, effectively, giving a bad one, because the prospective new employer will assume there must be something to hide; equally, saying that the reference should not be relied on is likely to set alarm bells ringing. An ex-employer asked for a reference is therefore forced to assume responsibility, whichever option he or she chooses. A third issue is that claims involving damage to reputation would usually be considered to fall within the tort of defamation, which has its own rules; it was argued in the case that allowing a claim in negligence would subvert these rules. What
swwayed the House of Lords to allow the claim, however, seems to be very much, as in the wills cases, the practical justice of the situation.

Problems with the law on economic loss

Too many restrictions – or too few?

The case of Spartan Steel v Martin (1972) illustrates that the distinction between pure economic loss and other kinds of loss can be a very fine one – and one that in common-sense terms is difficult to justify. The defendants’ negligence caused all three of the types of loss that resulted from the power cut, and all three types of loss were easily foreseeable, so why should they have been liable to compensate two sorts of loss but not the third? To the non-legal eye, distinguishing between them seems completely illogical – as indeed it must to a claimant who is left with a loss caused by someone else, and has no redress unless they have a contract. In many cases this can be seen as allowing a defendant to get away with seriously careless behaviour, regardless of the loss caused to others.

On the other hand, it can be argued that rather than not allowing sufficient redress for pure economic loss, the tort system in fact allows too much. In most cases of pure economic loss, what we are really talking about is not loss, but failure to make a gain. This is obvious in the wills cases, for example, but also applies to cases such as Smith v Eric S Bush (1990), where it can be argued that in buying the house the claimants were simply entering into a market transaction, and these always run the risk of creating loss as well as the possibility of making a gain. They did not have money taken from them, they simply bought a house which was worth less than they thought.

Traditionally, the role of tort law is to compensate those who have actually suffered loss; it can be argued that those who wish to protect their expectation of gain should do so through contract, and those who have given nothing in return for a service should not be compensated when that service lets them down financially. One answer to the latter view is that in most of the cases where claimants have not given anything in return for provision of advice or services, the defendants nevertheless gain a commercial benefit from the situation. This is most clear in Smith v Eric Bush, where the surveyors only had the work in the first place because house buyers were willing to pay for it, albeit indirectly, but it can also be found in less obvious situations. In Hedley Byrne, Lord Goff pointed out that in establishing whether the necessary special relationship existed in a particular case:

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i t\text{ may often be a material factor to consider whether the adviser is acting purely out of good nature or whether he is getting his reward in some indirect form. The service that a bank performs in giving a reference is not done simply out of a desire to assist commerce. It would discourage the customers of the bank if their deals fell through because the bank had refused to testify to their credit when it was good.}
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Overlap with contract law

The issue of the relationship between contract and tort causes particular problems, and in particular, the assertion in Henderson that a claimant who has a contractual remedy as well as a possible action in negligence should be able to choose between them. As well as rendering the limitation period for contractual actions essentially meaningless in these situations, it allows the claimant to pick and choose in other ways. For example, in contract a loss will only be compensated if there was a very high degree of probability that it would result from the defendant’s breach of contract;
is it necessarily right that a claimant who cannot satisfy that requirement should get another bite of the cherry in tort, where liability can be allowed for even extremely unlikely losses if they were reasonably foreseeable?

Lack of clarity

Perhaps the most significant practical problem in this area is that in their anxiety to avoid opening the floodgates to massive liability, yet allow redress where justice seems to demand it, the courts have resorted to over-complex and not entirely logical arguments. The wills cases are an obvious example of this, and the result is uncertainty about their scope, and the possibility of further fragmentation in the way the law treats economic loss.

The same dilemma lies behind the curious situation that, as we said earlier, architects or surveyors who give negligent advice that leads to a defective building can be sued for the resulting economic loss, yet builders who construct defective buildings cannot. In practice, however, this particular situation has been addressed by introduction of legislation: the Defective Premises Act 1972 states that builders and others who take on work ‘for or in connection with the provision of a dwelling-house’ may be held liable to the owners of those dwellings if they fail to carry out the work properly, and the house becomes unfit for habitation. This contrasts with other Commonwealth jurisdictions, where the common law has allowed recovery in tort for defective buildings, most recently confirmed in New Zealand in Invercargill City Council v Hamlin (1996).

Duties of care: psychiatric injury or ‘nervous shock’

It is well established that physical injury can give rise to a claim in tort, but what about psychiatric damage? The concept of a duty has been used to limit compensation claims for psychiatric damage (often called nervous shock), in the same way as it has been used to limit claims for economic loss. In the past, where there was no physical harm the courts were slow to accept claims for mental, rather than physical, injury caused by negligence. Such claims are now recognised but are subject to a number of restrictions.

What is ‘nervous shock’?

Psychiatric injury has traditionally been known by the courts as ‘nervous shock’, a label which adds to the confusion surrounding this area of the law by being completely misleading. The term implies that claimants can seek damages because they are shocked at the result of a defendant’s negligence, or perhaps upset, frightened, worried or grief-stricken. This is not the case. In order to claim for so-called ‘nervous shock’, a claimant must prove that they have suffered from a genuine illness or injury. In some cases, the injury or illness may actually be a physical one, brought on by a mental shock: cases include a woman who had a miscarriage as a result of witnessing the aftermath of a terrible road accident (Bourhill v Young (1943), though the woman’s claim failed on other grounds), and a man who was involved in an accident but not physically injured in it, who later suffered a recurrence and worsening of the disease myalgic encephalomyelitis (ME), also known as chronic fatigue syndrome, as a result of the shock (Page v Smith (1995)).

If the shock has not caused a physical injury or illness, the claimant must prove that it has caused what Lord Bridge in Mcloughlin v O’Brien (1983) (see below) described as ‘a positive psychiatric
illness’. Examples include clinical depression, personality changes, and post-traumatic stress disorder, an illness in which a shocking event causes symptoms including difficulty sleeping, tension, horrifying flashbacks and severe depression. It is important to be clear that this category does not include people who are simply upset by a shock, regardless of how badly; they must have a recognised psychiatric illness, and medical evidence will be needed to prove this. Consequently, we will use the term psychiatric injury from now on, though ‘nervous shock’ is referred to in many judgments.

Claimants who can prove such injury can only claim in negligence if they can establish that they are owed a duty of care by the defendant, with regard to psychiatric injury (and of course that the defendant’s negligence actually caused the injury). This will depend on their relationship to the event which caused the shock, and case law has developed different sets of rules, covering different categories of claimant. The number of categories has varied at different stages of the law’s development, but since the most recent House of Lords case, White and others v Chief Constable of South Yorkshire (1998), there are now three:

- those who are physically injured in the event which the defendant has caused, as well as psychiatrically injured as a result of it. These are called primary victims;
- those who are put in danger of physical harm, but actually suffer only psychiatric injury. These are also called primary victims;
- those who are not put in danger of physical injury to themselves, but suffer psychiatric injury as a result of witnessing such injury to others; these are called secondary victims. A duty of care to secondary victims will arise only if they can satisfy very restrictive requirements.

**Primary victims**

An accident victim who suffers physical injury due to the negligence of another can recover damages not just for the physical injuries but also for any psychiatric injury as well. The ordinary rules of negligence apply to such cases. The category of primary victims also includes those who are put at risk of physical injury to themselves, but who actually suffer psychiatric injury as a result of the dangerous event. White and others (1998) confirms that if a person negligently exposes another to a risk of injury, they will be liable for any psychological injury that this may cause the other person, even if the threatened physical injury does not in fact happen.

This was originally established by the leading case of Dulieu v White & Sons (1901). The claimant was serving in a pub when one of the defendant’s employees negligently drove his van and horses into the premises. The claimant feared for her safety, and although she was not actually struck she was badly frightened and suffered a miscarriage as a result. The defendant was found liable even though there was no physical impact, as he could have foreseen that the claimant would have suffered such shock.

The leading modern case on primary victims who are exposed to the risk of injury, but not actually physically hurt, is Page v Smith (1995). The claimant was involved in an accident which could have caused physical injury, but fortunately he escaped unhurt. Some years earlier, he had suffered from a serious illness called myalgic encephalomyelitis. He had had this illness for several years but, before the accident happened, it had gone into remission. After the accident, his old symptoms began to recur, and he claimed that this had been caused by the shock of being involved in the accident.

The House of Lords held that where it was reasonably foreseeable that a defendant’s behaviour would expose the claimant to a risk of physical injury, there was a duty of care with regard to any
injury that the claimant suffered, including psychiatric injury. It was not necessary that psychiatric injury itself was foreseeable.

This approach was followed in Simmons v British Steel plc (2004). The claimant had been physically injured in a workplace accident, and as a result of his shock and anger at what had happened to him, he developed a severe skin condition. This led to him having to take a lot of time off work and, as a result of that, he developed a depressive illness. The House of Lords held that the employers were liable for the skin condition and the depressive illness, as well as the original injury. They had exposed him to a foreseeable risk of physical injury, and they were therefore liable for all the injuries that resulted from that risk. It did not matter that the actual type of the injuries was not foreseeable, nor that a victim who was more psychologically robust might not have been affected in this way (this refers to the rule that a defendant must take their victim as they find them – see p. 115).

Although a claimant can claim for psychiatric injury caused by fears for their own safety even though no physical injury actually occurred, there must be some basis for the fears. In McFarlane v Wilkinson (1997), the Court of Appeal held that the fear must be reasonable, given the nature of the risk and the claimant’s situation. The case arose out of the terrible events on the Piper Alpha oil rig, when the rig caught fire and many people died as a result of the explosion. The claimant had been in a support boat about 50 yards from the rig and witnessed the disaster. His claim for the psychiatric injury suffered as a result was rejected by the Court of Appeal, on the ground that the boat he was on was clearly never in any danger, and so his fear for his safety was unreasonable. (For reasons which will be obvious when we look at the witness cases below, merely seeing the disaster would not have been sufficient ground for this claimant’s claim.)

What is unclear is whether a claimant can be considered as a primary victim if they were not actually in physical danger, but had reasonable grounds for thinking that they might be. The two leading judgments in White differ slightly in this area: Lord Steyn says the claimant must have ‘objectively exposed himself to danger or reasonably believed that he was doing so’ (our italics); on the other hand Lord Hoffmann refers only to primary victims being ‘within the range of foreseeable physical injury’. Of course, in the majority of cases the reasonable belief that the claimant was in danger will arise from the fact that they actually were; but, in the throes of an emergency situation, it is not difficult to imagine making out a case for believing oneself to be in some danger when in fact there is no physical risk at all, and it is a pity that their Lordships did not make themselves clearer on this crucial point.

In CJD Group B Claimants v The Medical Research Council (1998), it was suggested that there might be a group which could not be considered primary victims in the usual sense, but who nevertheless should be treated in the same way. The claimants in the case had all had growth problems as children, and they had been treated with injections of growth hormone which, it was later discovered, may have been contaminated with the virus which causes Creutzfeldt-Jakob Disease (CJD), a fatal brain condition (this is the brain condition recognised as the human form of BSE or mad cow disease, but the events in this case have no link with the controversy over BSE-infected beef). It was established that those who had received the contaminated injections were at risk of developing CJD, but it was not possible to discover which batches had been contaminated, nor to test the recipients to discover whether a particular individual was harbouring the virus. As a result, the claimants were having to live with the fear of knowing that they might develop the disease, and some of them suffered psychiatric injury as a result of this.

It was established that the defendants had been negligent in allowing the injections to continue after the risk of contamination was suspected, and the claimants claimed that they were owed a duty as primary victims with regard to psychiatric injury, as the injections they were negligently
given made them more than mere bystanders, and could be compared to the car accident in which the claimant in Page v Smith was involved. Morland J disagreed with this analysis, holding that they were not primary victims in the normal sense, because the psychiatric injury was not actually triggered by the physical act of the injections, but by the knowledge, which came later, that they might be at risk of developing CJD. Even so, he allowed their claim, on the basis that there was a relationship of proximity between the parties, that the psychiatric injuries were reasonably foreseeable, and there was no public policy reason to exclude them from compensation.

However, this approach was not followed in the key case of Rothwell v Chemical and Insulating Co Ltd (2007). The claimants in the case were a group of workers who had been negligently exposed to asbestos while working for the defendants. If asbestos gets into the lungs, it can cause one of a range of fatal diseases. At the time the case was brought, none of the defendants had any of these diseases, but they did have what are known as pleural plaques. These are a form of scarring on the lungs, which show that asbestos has been inhaled. The plaques do not cause any symptoms, or make it more likely that the person will get one of the asbestos-related illnesses, but, because they are evidence that asbestos has entered the person’s lungs, having them is a sign that that person may be at risk of asbestos-related illness. This naturally caused great anxiety among the claimants, but, as we have seen, this is not enough to make a claim for psychiatric injury. However, one of the claimants had gone on to develop clinical depression, which is a recognised psychiatric illness, as a result of the worry, and so the House of Lords had to consider whether the defendants owed him a duty of care with regard to psychiatric illness. They held that there was no duty of care in this case, stating that the question should be decided on the usual principles applicable to psychiatric illness caused at work (see p. 145). On this basis, the defendants could not reasonably have been expected to foresee that the claimant would suffer a psychiatric illness as a result of exposure to asbestos, so there was no duty of care and his claim failed.

**Secondary victims**

**Key Case** White and others (1998)

White and others (1998) establishes that sufferers of psychiatric injury who are not either physically injured or in danger of being physically injured are to be considered secondary victims. Among the important cases which have fallen within this group are claims made by:

- people who have suffered psychiatric injury as a result of witnessing the death or injury of friends, relatives or work colleagues;
- those whose psychiatric injury has been caused by them unwittingly bringing about death or injury to others, where the ultimate cause was someone else’s negligence;
- those who have suffered psychiatric injury as a result of acting as rescuers, both those who have voluntarily given assistance to others in danger, and those who have done so as a result of their jobs, such as police officers.

**Legal Principle**

A claimant who suffers psychiatric injury but is not physically injured or at risk of physical injury is a secondary claimant who must pass the tests set down in Alcock. This category includes rescuers and employees of the defendant.
Until White, each of these groups had been subject to different treatment, but White establishes that they are all to be subject to the same rules, namely those developed in two key cases, McLoughlin v O’Brien (1982) and Alcock v Chief Constable of Yorkshire (1992). These cases established that secondary victims could only claim for psychiatric injury in very limited circumstances, and White confirms these limitations.

In McLoughlin v O’Brien, the claimant’s husband and children were involved in a serious car accident, caused by the defendant’s negligence. One of her daughters was killed and her husband and two other children badly injured. The claimant was not with her family when the accident happened, but was told about it immediately afterwards, and rushed to the hospital. There she saw the surviving members of her family covered in dirt and oil, and her badly injured son screaming in fear and pain. She suffered psychiatric injury as a result, including clinical depression and personality changes.

The House of Lords allowed her claim, even though up until then only witnesses who were actually present at the scene of a shocking incident had been allowed to recover for psychiatric injury. The decision itself was rather confused, in that Lord Bridge suggested that the sole criterion was still reasonable foresight, and the claimant could recover because her psychiatric injury was reasonably foreseeable, but Lords Wilberforce and Edmund-Davies favoured a different approach. They suggested that while psychiatric injury did have to be reasonably foreseeable, this in itself was not enough to create a duty of care towards secondary victims. Unlike other types of claimant, secondary victims would have to satisfy a series of other requirements, concerning their relationship to the primary victims of the shocking incident and their position with regard to that incident. This second approach is the one which has since found favour with the courts, and it was explained in detail in Alcock v Chief Constable of South Yorkshire (1992).

**Key Case**

Alcock v Chief Constable of Yorkshire (1992) arose from the Hillsborough football stadium disaster in 1989. The events which gave rise to the case (and to White and others v Chief Constable of South Yorkshire (1998)) took place during the 1989 FA Cup Semi-Final match between Liverpool and Nottingham Forest. All tickets for the match had been sold, and it was being shown on live television. However, play had to be stopped after six minutes because so many spectators had been allowed onto the terraces that some were being crushed against the high fences that divided the terraces from the pitch. A total of 95 people died in the tragedy that followed, and another 400 needed hospital treatment for their injuries.

The South Yorkshire police were responsible for policing the ground, and it was widely thought that the incident was caused by a negligent decision on their part, which allowed too many people into the ground. Claims for physical injury and death were settled by the police, as were others for psychiatric injury which clearly fell within the accepted categories of those who could make a claim for this type of damage. This left two further groups who claimed psychiatric injury as a result of the tragedy: relatives and friends of those injured or killed, whose claims were examined in Alcock; and police officers on duty for the events of that day, who were represented in White (the fate of their claim is discussed later).

**Alcock** was a test case in that the specific claimants were chosen because between them they represented a range of relationships to the dead and injured, and positions in relation to the incident at the ground, which were held by around 150 other people who claimed to
have suffered psychiatric injury as a result of the tragedy. They included parents, grandparents, brothers, brothers-in-law, fiancées and friends of the dead and injured, who had either been at the stadium when the disaster occurred and witnessed it at first hand, seen it live on the television, gone to the stadium to look for someone they knew, been told the news by a third party, or had to identify someone in the temporary mortuary at the ground.

The claimants argued that the test for whether they were owed a duty of care was simply whether their psychiatric injuries were reasonably foreseeable, as Lord Bridge had suggested in *McLoughlin*. The House of Lords took a different view, pointing out that while it was clear that deaths and injuries in traumatic accidents commonly caused suffering that went well beyond the immediate victims, it was generally the policy of the common law not to compensate third parties. They held that although some exceptions could be made, they should be subject to much stricter requirements than those which applied to primary victims.

The starting point, they said, was that a secondary victim must prove that psychiatric injury to secondary victims was a reasonably foreseeable consequence of the defendant’s negligence. *White* confirms earlier cases in stating that this will only be established where a bystander of reasonable fortitude would be likely to suffer psychiatric injury; if the claimant only suffers psychiatric injury because they are unusually susceptible to shock, reasonable foreseeability is not proved. However, it was pointed out that this rule should not be confused with the ‘eggshell skull’ situation seen, for example, in *Page v Smith*, where as a result of psychiatric injury the damage is more serious than might be expected. So long as a bystander of normal fortitude would be likely to suffer psychiatric injury, it does not matter that that psychiatric injury is made more serious by some characteristic personal to the claimant; but if the psychiatric injury would not have occurred at all to someone without the claimant’s particular susceptibility, there is no claim.

Once reasonable foreseeability is established, there are three further tests which the courts must consider:

- the nature and cause of the psychiatric injury;
- the class of person into which the claimant falls, in terms of their relationship to the primary victim(s);
- the claimant’s proximity to the shocking incident, in terms of both time and place.

The strength of restrictions which these tests place on claims can be seen in the fact that every single claimant in *Alcock* failed on at least one of them. Below we look at each in turn.

### Legal Principle

Claimants who suffer psychiatric injury as a result of witnessing a shocking incident, but are not physically injured or at risk of physical injury, are owed a duty of care only if their psychiatric injury is caused by a sudden shock; they have a sufficiently close emotional tie to the primary victims; and they were sufficiently close in space and time to the shocking incident.

### The nature and cause of the psychiatric injury

Like primary victims, secondary victims must prove that their psychiatric damage amounts to a recognised psychiatric illness. They are also subject to an additional requirement, that the psychiatric damage must have been caused by the claimant suffering a sudden and unexpected shock.
caused by a ‘horrifying event’. This excludes, for example, cases in which people suffer psychiatric illness as a result of the grief of bereavement, or the stress and demands of having to look after a disabled relative injured by the negligence of another. In *Sion v Hampstead Health Authority* (1994), the claimant had developed a stress-related psychiatric illness as a result of watching his son slowly die in intensive care as a result of negligent medical treatment. It was held that as the father’s psychiatric illness had not been caused by a sudden shock, he could not recover damages for it.

A contrasting case is *North Glamorgan NHS Trust v Walters* (2002). Here the claimant was the mother of a baby boy who died after receiving negligent treatment for which the defendants were responsible. The little boy, Elliott, was ill in hospital. Unknown to his mother at the time, the hospital had misdiagnosed his illness. She woke up to find him choking and coughing blood, and was told by the doctors that he was having a fit, but that he was very unlikely to have suffered any serious damage. Later that day, he was transferred to another hospital, where she was told – correctly – that he had in fact suffered severe brain damage and was in a coma; she was asked to consider switching off his life support machine. She and her husband agreed to this on the following day.

The events caused her to suffer a psychiatric illness, but the hospital argued that they were not liable for this as it was not caused by a sudden shock, but by a sequence of events that took place over 36 hours. The Court of Appeal disagreed: it said that the ‘horrifying event’ referred to in *Alcock* could be made up of a series of events, in this case, witnessing the fit, hearing the news that her son was brain-damaged after being told that he was not, and then watching him die. Each had their own immediate impact, and could be distinguished from cases where psychiatric injury was caused by a gradual realisation that a child was dying.

The courts have held that shock can be the result not just of injury or death to a loved one but also of damage to property. In *Attia v British Gas* (1988), British Gas were installing central heating into the claimant’s house. She had spent many years decorating and improving her home and she was very attached to it. When she returned home in the afternoon she found her house on fire. It took the fire brigade four hours to get the blaze under control, by which time her house was seriously damaged. The fire was caused by the negligence of the defendants’ employees. British Gas accepted their liability for the damage to the house but the claimant also sought damages for the nervous shock she had suffered as a result. The Court of Appeal accepted that she could make a claim for nervous shock resulting from the incident.

In many cases, causation will be difficult to prove, since, in addition to the required shock, claimants will have experienced the grief of bereavement, which could equally well have caused their psychiatric injury. In *Vernon v Bosley (No 1)* (1996), it was made clear that so long as a sudden shock is at least partly responsible for the claimant’s psychiatric injury, the fact that grief has also played a part in causing it will not prevent a claim. In that case, the claimant had witnessed his children drowning in a car that was negligently driven by their nanny. The Court of Appeal accepted that his psychiatric illness might have been partly caused by his grief at losing his children, but, since the shock of witnessing the accident had also played a part, it was not necessary to make minute enquiries into how much of his illness was attributable to each cause, if indeed it was even possible to find out.

**The class of person**

If a secondary victim can prove that, as a result of the defendant’s negligence, they have suffered a recognisable psychiatric injury because of a sudden shock, the next hurdle they face is to prove
that they fall within a class of people which the law allows to claim compensation for such injuries. The key cases have focused on four possible classes of people:

- relatives and friends of those killed or injured as a result of the defendant’s negligence;
- rescuers at the scene of accidents;
- employees of the party causing the accident;
- ‘unwitting agents’ – people who cause death or injury to others, not through their own fault but as a result of someone else’s negligence.

**Relatives and friends**

*Alcock* makes it clear that relatives are the people most likely to succeed in an action for psychiatric damage as a secondary victim. But there is no set list of relationships; whether or not a claim succeeds will depend on the facts of each particular case. In *McLoughlin v O’Brian* Lord Wilberforce said:

As regards the class of persons, the possible range is between the closest of family ties – of parent and child, or husband and wife – and the ordinary bystander. Existing law recognizes the claims of the first; it denies that of the second, either on the basis that such persons must be assumed to be possessed of fortitude sufficient to enable them to endure the calamities of modern life, or that defendants cannot be expected to compensate the world at large . . . other cases involving less close relationships must be very carefully scrutinized. I cannot say that they should never be admitted. The closer the tie (not merely in relationship, but in care) the greater the claim for consideration. The claim, in any case, has to be judged in the light of the other factors, such as proximity to the scene in time and place, and the nature of the accident.

On the same subject, Lord Keith said in *Alcock*:

As regards the class of persons to whom a duty may be owed . . . I think it sufficient that reasonable foreseeability should be the guide. I would not seek to limit the class by reference to particular relationships such as husband and wife or parent and child.

He said that friends and engaged couples could potentially be included, for, ‘[i]t is common knowledge that such ties exist, and reasonably foreseeable that those bound by them may in certain circumstances be at real risk of psychiatric illness if the loved one is injured or put in peril.’

Despite these liberal-sounding statements, on the actual facts of the case, brothers, brothers-in-law, grandparents, uncles and friends were all found not to have a sufficiently close relationship with the deceased or injured person to succeed in their action. This is partly because the House of Lords emphasised that a claimant would not only have to prove that the type of relationship was one that would generally be assumed to be close, such as brother and sister, but also that the relationship was as a matter of fact close: there also needed to be a close relationship in terms of love and affection. This point had merely been made in passing by Lord Wilberforce in *McLoughlin v O’Brian* when he said that ties had to be close ‘not merely in relationship, but in care’.

The result in *Alcock* was that a claimant who was present at the stadium at the time of the disaster at which his brother was killed failed in his action because he had not supplied evidence to prove that he was as a matter of fact close to his brother. Lord Keith said that the closeness of the tie could be presumed in ‘appropriate cases’, giving as examples the relationship between parent and child and that between an engaged couple. But if the relationship of a brother is not an appropriate case it is difficult to imagine many other examples.
Chapter 2 Negligence: elements of the tort

**Rescuers**

Until *White*, it had been assumed that rescuers, meaning people who suffered psychiatric injury as a result of helping the primary victims of a shocking incident, were a special case, on the ground of public policy – the theory being that such selfless behaviour should be encouraged and supported, and therefore not subjected to rules stricter than those of ordinary personal injury. This was generally viewed as the position taken in the classic rescuer case of *Chadwick v British Railways Board* (1967), where the claimant spent 12 hours helping victims of a terrible train disaster which occurred near his home, and in which over 90 people were killed. He successfully claimed for psychiatric injury which occurred as a result of the experience.

*White*, as stated earlier, arose from the Hillsborough disaster, and here the claimants were police officers who had been on duty at the ground on the day of the tragedy. Like *Alcock*, *White* was originally a test case in that the four claimants had performed different roles which between them represented the experiences of a number of other officers. Three of them had actually been at the scene of the crushing incident: PC Bevis had spent time attempting to resuscitate fans, who were in fact already dead, close to the fences; Inspector White had passed dead and injured fans from the fenced-in areas; as had PC Bairstow, who had also helped in giving a victim heart massage. The fourth officer, PC Glave, had moved bodies into a temporary morgue set up at the opposite end of the ground from the incident, and obtained first aid for some of the injured.

The claimants claimed on two alternative grounds: first, that the police force owed them a duty of care as employees, and this covered the psychiatric injuries they had suffered (this claim is discussed at p. 47); or, secondly, that they were owed a duty of care as rescuers. They argued that either of these situations meant they were not secondary victims at all, and therefore not subject to the *Alcock* restrictions. The House of Lords rejected both arguments. It stated that only those who were in danger of physical injury (or, according to Lord Steyn, reasonably believed themselves to be so) could be viewed as primary victims; everyone else was a secondary victim. Rescuers were not to be considered as a special category of secondary victim either, but had to be subject to the normal rules on secondary victims, as stated in *Alcock*. This meant that none of the officers could have a claim on the basis of being rescuers, since they had no pre-existing close relationships with the primary victims.

In looking at the question of whether the officers could recover as rescuers, the House of Lords could easily have limited itself to considering whether professional rescuers should be treated in the same way as those who volunteer their help. It would have been easy to keep the special treatment of voluntary rescuers, yet deny the officers’ claim on the grounds that the public policy reasons did not apply to them, since there should be no need to encourage them to act in ways that were already required by their jobs. However, the House chose to go further than this and consider the whole area of rescuers who suffer psychiatric shock. It stated that even voluntary rescuers were not, and should not be, a special category. Where acting as rescuer put a claimant in danger of physical injury, they could claim as a primary victim, but, where no risk of physical injury was caused to the rescuer, they would be a secondary victim, and therefore subject to all the restrictions in *Alcock*.

Two main reasons were given by Lord Hoffmann for the ruling. First, that allowing rescuers to be a special case would sooner or later lead to difficult distinctions: once rescuers includes those who help without putting themselves in any physical danger, the line between rescuers and bystanders may become difficult to draw. How much help would someone have to give to be considered a rescuer? Lord Hoffmann’s second reason was that allowing the claims of professional rescuers would appear unjust, given that the police officers’ conditions of service provided for
them to be compensated in other ways for the psychiatric injury they had suffered, while, on the other hand, the bereaved relatives in Alcock had been given nothing. While it is difficult to argue with the justice of this point, Lord Hoffmann’s reasoning does not explain why volunteer rescuers should be treated in the same way as professional ones. Interestingly, Lord Hoffmann claimed that this was not a change in the law, stating that existing rescuer cases were merely examples of the standard rules on recovery for psychiatric shock, because the claimants in those cases were all at risk of physical injury to themselves and therefore primary victims. In the leading case of Chadwick, at least, this is debatable: while a theoretical risk of a wrecked train carriage collapsing on the claimant was mentioned in that case, it is by no stretch of the imagination a keystone of the judgment.

This reasoning makes the impact of the judgment less clear than it seems at first sight. If Mr Chadwick can be considered a primary victim on the facts of his case, it may be that what the decision actually does is to allow the courts to take a wide view of whether voluntary rescuers were subject to physical danger, and use that reasoning to allow or deny a claim, rather than explicitly mentioning public policy.

**Employees**

The second argument made by the police officers in White was that they were owed a duty of care as employees of the party whose negligence caused the shocking event. It is well established that employers owe a duty of care towards employees, which obliges them to take reasonable care to ensure that employees are safe at work, and, although police officers are not actually employed by their Chief Constable, the court accepted that, for the purposes of their argument, the relationship was sufficiently similar to the employer–employee relationship. The claimants in White argued that this meant they could not be considered secondary victims, and were not subject to the Alcock restrictions. This argument was rejected by the House of Lords.

The House stated that the employers’ duty to employees was not a separate tort with its own rules, but an aspect of the law of negligence, and therefore subject to the normal rules of negligence. This meant that where a type of injury was subject to special restrictions on when a duty of care would exist, these rules applied where the injury was caused by an employer to an employee, just as they would normally. So, for example, just as there was no general duty not to cause economic loss to others, there was no duty for an employer not to cause economic loss to employees, by, for example, reducing opportunities to earn bonuses. In the same way, there was no special duty of care regarding psychiatric damage caused by employers to employees, just the normal rules, and these meant that there was no duty of care towards the claimants in White.

An attempt to widen employers’ liability for psychiatric injury caused by a shocking event was firmly rejected by the House of Lords in French and others v Chief Constable of Sussex Police (2005). The claimants were all police officers who had been involved in events leading up to a raid on a suspect’s premises. The raid went wrong, and the suspect was fatally shot by one of the defendants’ colleagues. None of the defendants were present at the time, but, after the shooting, four of the five faced criminal charges concerning their part in the raid. They were acquitted, but then internal disciplinary procedures were brought against them. These too were either dropped or dismissed, but the whole process lasted around five years, and the men alleged that, as a result of the stress it put them under, they had all suffered psychiatric injury. Their case was that the police force had failed to provide adequate training, and this failure had led to the shooting, and the subsequent consequences for the defendants. They held that the psychiatric injuries they had all suffered were a foreseeable consequence of the failure to provide proper training.
Chapter 2  Negligence: elements of the tort

The House of Lords rejected this argument. The claimants were clearly not primary victims, and, since they had not witnessed the shooting, they were not even secondary victims, and had no sustainable claim in law. In addition, if the foreseeability argument were to succeed, it would mean that the Chief Constable should have foreseen that if the police force failed to offer adequate training, an event such as the shooting would occur, and criminal and/or disciplinary proceedings would be brought against the officers involved, and the stress of that process would cause psychiatric injury. The House of Lords held that this chain of events was not a foreseeable result of the original failure to provide training.

Employees are therefore only able to claim for psychiatric injury caused by a shocking event where they can satisfy the rules on claims by secondary victims, or where they can be considered primary victims. An example of the latter type of case is **Cullin v London Fire and Civil Defence Authority** (1999), where the claimant was a firefighter who suffered psychiatric injury after an incident in which two colleagues became trapped inside a burning building. The claimant was among those who went into the building to attempt a rescue which proved impossible; he later witnessed their bodies being carried out. The fire authority applied to have his action struck out on the ground that the situation was similar to those of the police officers in **White**, in that the claimant was a professional rescuer and the risk of psychiatric injury he had been exposed to was a normal part of his job. The court disagreed, and said that this approach was too narrow. Relying on remarks made *obiter* by Lord Goff in **White**, they said that a professional rescuer who could establish that they were exposed to danger and the risk of physical injury, or reasonably believed that they were, even if only in the aftermath of the event, could qualify as a primary victim. In this case it was at least arguable that the firefighter had been a primary victim and so the action could not be struck out.

There is also a category of cases in which employees sue for psychiatric injury caused not by accidents but by stress at work. These are considered in Chapter 4.

**Unwitting agents**

There remains one category of claimant whose position is left unclear in **White**, namely those who witness a shocking accident caused by someone else’s negligence and, while they are in no physical danger themselves, might be considered more than mere bystanders because some action of theirs physically brings about death or injury to another. The best-known example is **Dooley v Cammell Laird** (1951). Here the claimant was operating a crane at the docks where he worked, when, through no fault of his, it dropped a load into the hold of the ship being unloaded. He successfully claimed for psychiatric injury caused through fearing for the safety of a colleague working below. Until **White**, the case, along with a couple of similar decisions, was viewed as establishing the right of an employee to recover for psychiatric injury caused by witnessing or fearing injury to colleagues as a result of their employers’ negligence. In **White**, Lord Hoffmann maintains that there is no such right, and that the cases, all of which were first instance judgments, were decided on their facts, and before the **Alcock** control mechanisms were in place. However, he concedes that there may be grounds for treating unwitting agent cases as exceptional, and exempting them from the **Alcock** restrictions, though the point is *obiter* since, as Lord Hoffmann points out, the facts of **White** do not raise the issue.

The issue was examined in **Hunter v British Coal** (1998). Here the claimant was a driver in a coal mine, who accidentally struck a water hydrant while manoeuvring his vehicle. He went to try to find a hose to channel the water away safely, leaving behind a colleague, C. When the claimant was about 30 metres away, he heard the hydrant explode and rushed to find the valve to turn it
Duties of care: psychiatric injury or ‘nervous shock’

off, which took about 10 minutes. During that time he heard a message over the tannoy that a man had been injured, and on his way back to the accident scene another colleague told him that it looked as though C was dead. This proved to be the case, and the claimant’s belief that he was responsible for his colleague’s death caused him to suffer clinical depression.

When it became clear that in fact the accident had occurred because of his employer’s failure to put certain safety features in place, he sued. The Court of Appeal held that, in order to be owed a duty of care of psychiatric injury, the claimant would have to have been at the scene of the accident when it happened, or seen its immediate aftermath; his depression had been caused by hearing about it and that was not sufficient. The case therefore seems to suggest that unwitting agents may have a claim if they satisfy the requirements of proximity in space and time.

Other bystanders

The cases make it clear that bystanders who have no relationship with the primary victims of an accident are very unlikely ever to be able to sue successfully for psychiatric injury experienced as a result. This approach approves the traditional position in cases such as Bourhill v Young (1943), where it was held that a woman who suffered psychiatric injury as a result of seeing the aftermath of a horrific motorcycle accident involving a stranger could not recover damages; the court held that an ordinary bystander could be expected to withstand the shock of such a sight, which meant that it was not reasonably foreseeable that the claimant would in fact suffer psychiatric damage as a result.

However, in Alcock the point was made that there might be very rare occasions when an incident was so horrific that psychiatric damage to even uninvolved bystanders was foreseeable, and there a duty of care would arise. The House of Lords gave the rather lurid and imaginative example of a petrol tanker crashing into a school playground full of children and bursting into flames.

Proximity

The third test which secondary victims must pass in order to have a claim concerns proximity, which in this case means how close they were to the shocking event, in terms of both time and place. In Alcock some claimants had seen the disaster from other stands inside the stadium; one of the claimants was watching the match on a television nearby and when he saw the disaster commence went to find his son (who had been killed); others saw the tragedy on the television at home or heard about it on the radio. Alcock established that to succeed in a claim for nervous shock, the witness must have been sufficiently proximate to the accident, which normally means that they must have been present at the scene of the accident or its immediate aftermath; hearing it on the radio or seeing it on the television will not usually be enough.

The House of Lords was not prepared to specify exactly what was the immediate aftermath, but the interpretation they give to the issue is narrower than that advocated in some of the obiter dicta in McLoughlin v O’Brien. Lord Keith appears to approve of the dicta in the Australian case of Jaensch v Coffey (1984), which stated that the aftermath continues for as long as the victim remains in the state caused by the accident, until they receive immediate post-accident treatment. McLoughlin was considered to be a borderline case by Lord Ackner and it was stated that identifying the body of a loved one at a temporary mortuary eight hours after the accident did not fall within seeing the immediate aftermath of the tragedy.

The House made it clear that merely being informed of the incident by a third party was not sufficiently proximate. This was confirmed in the very sad case of Tan v East London and City Health Authority (1999). The claimant was telephoned by a member of hospital staff and told
that his baby had already died in its mother’s womb, and would be stillborn. He went to the hospital for the birth, which took place around three hours later. He sued the hospital for psychiatric injury, but the court rejected his claim. It held that the shocking event that caused the psychiatric damage was the death of the baby before birth, rather than seeing it being born dead. The claimant had not witnessed the death itself, but been told about it over the phone, and therefore was not sufficiently proximate to the event.

In Alcock, the House also had to deal with the question of whether watching an incident on television could be sufficiently proximate to impose liability to secondary victims for nervous shock, as the Hillsborough disaster had been broadcast live on television to millions of people. The pictures did not pick out individuals, as broadcasting guidelines prevented the portrayal of death or suffering by recognisable individuals. On the facts, the House of Lords did not find that watching the television broadcasts was sufficiently proximate, though it did not rule out the possibility that sometimes television viewers could be sufficiently proximate. The House of Lords drew a distinction between recorded broadcasts and live ones. The former were never sufficiently proximate to give rise to a duty of care. With the latter they said that a claim was unlikely to arise because of the broadcasting guidelines which meant that normally even live broadcasts of disasters could not be equated with actually having been present at the scene of the tragedy. Lord Jauncey stated:

I do not consider that a claimant who watches a normal television programme which displays events as they happen satisfies the test of proximity. In the first place a defendant could normally anticipate that in accordance with current television broadcasting guidelines shocking pictures of persons suffering and dying would not be transmitted. In the second place, a television programme such as that transmitted from Hillsborough involves cameras at different viewpoints showing scenes all of which no one individual would see, edited pictures and a commentary superimposed.

If pictures in breach of broadcasting guidelines were shown, their transmission would normally break the chain of causation as a novus actus interveniens (see p. 110). This would mean that the instigator of the incident would not be liable because they could not have foreseen that such pictures would be shown.

Occasionally the chain of causation would not be broken and liability on the original instigator could be imposed. The example the judges gave was of a publicity-seeking organisation arranging an event where a party of children were taken in a hot-air balloon, the event being shown live on television so that their parents could watch. If the basket suddenly burst into flames, the suddenness of the tragedy might mean that it was impossible for the broadcasters to shield the viewers from scenes of distress and this would be reasonably foreseeable to those whose negligence caused the accident.

### Psychiatric injury not caused by accidents

Though most of the cases on psychiatric injury involve accidents, there are of course other ways in which negligence can cause such injury. The most significant area for litigation is psychiatric injury caused by prolonged exposure to stress at work, and the courts have treated this in a different way to psychiatric injury caused by accidents and sudden events, notably by not requiring that the illness be triggered by a sudden shock. This area is discussed more fully in the chapter on employers’ liability (see p. 145).

In W v Essex County Council (2000), the House of Lords was prepared to allow that there might be a claim for negligence causing psychiatric shock after the defendant council negligently
placed a foster child who had a history of abusing other children into a family with four young children. He then abused those children, and both they and their parents suffered psychiatric injury as a result. Clearly there was no sudden shock, nor, certainly in the parents’ case, any physical injury which would make them primary victims, nor did they directly witness the abuse. This would seem to set the case apart from other decisions on psychiatric injury, and the House of Lords did comment that the parents might well have difficulties making their claim, but they were not willing to strike out the case. However, it is important to note that the case took place shortly after *Osman v UK*, which put into question the use of striking out applications (see p. 62), and this may explain the courts’ reluctance to dismiss the action. Whether it would have succeeded must now remain a mystery, as the case was settled out of court in January 2002, with the council paying £190,000 in compensation.

### Statutory provision

In addition to the common law remedy for nervous shock, emotional distress can occasionally be compensated under statute. For example, there is a statutory award for bereavement contained in the Fatal Accidents Act 1976. There is no need to prove proximity to the incident that caused the death nor for evidence of a medically recognised mental illness. However, it has its own limitations as it is only awarded to a very small class of people, is for a fixed sum of money and is only available on death, not serious injury.

![Diagram](attachment:Figure_2.1.png)

*Figure 2.1 Liability for psychiatric injury*
Problems with the law on psychiatric damage

The position of rescuers

As explained earlier, rescuers were traditionally thought to be a special case with regard to psychiatric shock, and a rescuer who suffered psychiatric shock as a result would not be subject to the same restrictions as a mere bystander. White of course changes this, and this aspect of the decision was comprehensively criticised in the dissenting judgments of Lords Goff and Griffiths in that case. Lord Hoffmann’s claim that rescuers had never been a special case, and that the main authority, Chadwick, fitted in with his analysis because there was a danger of the train collapsing, is disputed by Lord Goff. He points out that the trial judge in Chadwick treated the potential danger as irrelevant, and was right to do so, because it was clearly not the threat of danger to himself that caused Mr Chadwick’s psychiatric injury, but the horror of spending hours surrounded by the terrible sights and sounds that were the aftermath of the accident.

Lord Goff also pointed out that making rescuers’ claims dependent on whether they were at risk of physical injury could create unjust distinctions. He gave the example of two men going to help in the aftermath of a train crash, where the situation happened to be that helping victims in the front half of the train involved some threat of physical danger, and working in the back half did not. Each of the two men might perform the same service, suffer the same trauma and end up living with the same degree of psychiatric injury, yet if they happened to be helping at opposite ends of the train one would be able to claim compensation for his psychiatric injury and the other would not, a distinction which his Lordship said was ‘surely unacceptable’.

The ‘closeness of relationship’ rules

As you will remember, it was established in Alcock v Chief Constable of South Yorkshire (1992) that one of the requirements for recovery by a secondary victim was that they should have a relationship with a primary victim that was ‘close in care’, meaning that it is not sufficient to establish, for example, that the primary and secondary victims were brothers; it must also be proved that the relationship between them was close in terms of the way they felt about each other.

The requirement must make the trial more traumatic for the claimant, yet quite how it contributes to the law is difficult to see. Clearly it would be ridiculous for a claimant who was the brother of a primary victim to claim damages if in fact they disliked each other intensely and rarely had any kind of contact – but in such cases, is it likely that the claimant would be able to prove that he had suffered a psychiatric illness as a result of his brother’s death or injury? This requirement alone provides a limiting mechanism that makes the test of factual closeness unnecessary.

In addition, it is hard to see why this should affect the defendant’s duty, which is still initially based on foreseeability; how can a defendant be said to foresee whether or not the person they injure will have a close relationship with their relatives, and therefore to owe a duty only if they do?

The proximity requirements

As you will recall, the decision in Alcock regarding proximity was that in order to claim for psychiatric injury, a secondary victim would have to have been present at the incident which endangered, injured or killed their loved one, or to have witnessed its ‘immediate aftermath’.

In McLoughlin, the deciding factor seemed to be that the injured were in much the same state as when the accident happened, covered in oil and dirt, and so the implication seems to be that
this made the sight of them more devastating, and therefore more likely to mentally injure Mrs McLoughlin. While it is clear that these factors could make a sight more distressing and shocking, it is difficult to make out why exactly the courts believe this should be the dividing line between experiences which can and cannot cause psychiatric injury. Sight is not the only way in which human beings perceive suffering: hearing about the circumstances of an accident, particularly when the outcome is not known, can surely be equally devastating. Similarly, the House of Lords in Alcock were emphatic that those seeing the incident on television could not be caused psychiatric injury by the experience, yet the claimants who saw the TV coverage would have known, right at the time when the incident was happening before their eyes, that their loved ones were there. Even if they could not identify them by sight, it is hard to see that this was less distressing than coming upon the aftermath of an accident, and if it was equally distressing, there seems no reason why it should be less likely to cause psychiatric injury.

Nor is the courts’ emphasis on the time between the accident and the perception of it easy to justify. Among the Alcock claimants, for example, was one man who had gone to the ground and searched all night for the brother he knew had been at the match. It is difficult to see why those long hours of searching and worrying should be less likely to cause psychiatric injury than sight of a loved one immediately after an accident.

**The ‘sudden shock’ requirement**

As with the proximity requirements, it is difficult to find a rational basis for the line drawn between psychiatric injury caused by a sudden shock and the same injury caused by, for example, the stress of caring for a seriously injured relative, or the grief of being bereaved. So long as the psychiatric shock is a foreseeable result of the defendant’s negligence, why should the precise aspect of the claimant’s situation which triggered it off make any difference?

Take the case of Sion v Hampstead Health Authority (1994), for example (see p. 44). Had the son died suddenly of a fatal heart attack caused by his poor medical treatment, and his father been there to witness it, the father might very well have been able to secure compensation for any psychiatric illness he suffered as a result. Why should the fact that he watched his son die slowly, with all the stress and grief that must cause, change his situation? The defendant’s treatment of his son is no less negligent; his own psychiatric injury is no less real, and nor is it less foreseeable. Furthermore, if sudden shock is a logical requirement, how are we to explain the decisions allowing claims for psychiatric injury after prolonged stress at work? Why is this stress considered more harmful than the stress of caring for a relative injured by someone else’s negligence? Clearly the law has to draw a line somewhere, but the justification for making a sudden shock the defining factor is hard to see.

**Reform**

The Law Commission has been looking at this area of the law for some time, and in 1995 began consulting with interested parties. The results of their consultations were published in 1998. The Commission argues that the current rules on compensation for secondary victims are too restrictive. They agree that the requirement for a close tie between primary and secondary victim is justified and should remain, but believe this alone would be sufficient; they recommend that the requirements of proximity (both in time and space, and in method of perception) should be abolished. They also suggest that the requirement for psychiatric injury to be caused by sudden shock should be abandoned.
Chapter 2  Negligence: elements of the tort

Duties of care: omissions

As a general rule, the duties imposed by the law of negligence are duties not to cause injury or damage to others; they are not duties actively to help others. And if there is no duty, there is no liability. If, for example, you see someone drowning, you generally have no legal duty to save them, no matter how easy it might be to do so (unless there are special reasons why the law would impose such a duty on you in particular, such as under an employment contract as a lifeguard). This means tort law generally holds people liable for acts (the things they do), not omissions (the things they fail to do).

However, there are some situations in which the courts have recognised a positive duty to act, arising from the circumstances in which the parties find themselves. Although the categories are loose and at times overlap, the following are the main factors which have been taken into consideration.

Control exercised by the defendants

Where the defendants have a high degree of control over the claimant, they may have a positive duty to look after them which goes beyond simply taking reasonable steps to ensure that the defendants themselves do not cause injury. A key case in this area is Reeves v Commissioner of Police for the Metropolis (1999). The case was brought by the widow of a man who had committed suicide while in police custody. Although previous case law had accepted that the police had a duty of care to prevent suicide attempts by prisoners who were mentally ill, Mr Reeves was found to have been completely sane, and the police therefore argued that while clearly they had a duty of care not to cause his death, they could not be held responsible for the fact that he chose to kill himself, and had no duty to prevent him from doing so. However, the Court of Appeal held that their duty of care to protect a prisoner’s health did extend to taking reasonable care to prevent him or her from attempting suicide; they accepted that to impose a positive duty like this was unusual, but explained that it was justified by the very high degree of control which the police would have over a prisoner, and the well-known high risk of suicide among suspects held in this way.

The 2001 prize for the cheekiest legal action must surely go to the claimant in another case in this area, Vellino v Chief Constable of Greater Manchester (2001). Mr Vellino was a career criminal, with an extensive record, and was well known to the local police. On several occasions the police had gone to his flat to arrest him, and he had tried to escape by jumping from the second floor windows to the ground floor below. On the occasion that gave rise to the case, the police arrived and Mr Vellino jumped, as usual, but this time he seriously injured himself, ending up with brain damage and paralysis, which made him totally dependent on others for his needs. He sued the police, arguing that they were under a duty to prevent him from escaping, and their failure to do so had caused his injuries. It was, his counsel argued, foreseeable that he would try to escape, and foreseeable injury could result.

The Court of Appeal rejected the argument entirely, pointing out that it would mean that arresting officers had a duty to hold a suspect in the lightest possible grip, just in case he or she wrenched a shoulder in struggling to break free. Equally, it would mean prisons could be sued if prisoners hurt themselves jumping off high boundary walls, since it was foreseeable that prisoners might try to escape and that jumping off high walls tends to cause injury.

In any case, the court said, Mr Vellino was not actually under the control of the police when he jumped. He was trying to escape police custody, which was a crime, and therefore the defence of illegality (see p. 125) applied.
Assumption of responsibility

Although in English law people generally have no duty to actively help each other, such a duty will be implied where the courts find that one of the parties has assumed responsibility for the other in some way. A common reason for finding such an assumption is where a contract implying such responsibility exists, or where such responsibility clearly arises from the defendant’s job.

In *Costello v Chief Constable of Northumbria Police* (1999), the claimant was a police constable who was attacked by a prisoner in a police station cell. A police inspector was nearby, but despite her screams he failed to come to her aid. The claimant sued the Chief Constable, alleging that he had a duty of care towards her in that situation (the Chief Constable was sued as being vicariously liable – see Chapter 16). The Court of Appeal agreed; as a police officer, the inspector had assumed a responsibility to help fellow officers in circumstances like these, and where a member of the police force’s failure to act would result in a fellow officer being exposed to unnecessary risk of injury, there was a positive duty to act.

A defendant may also be deemed to have assumed responsibility for another person by virtue of his or her actions towards that person. In *Barrett v Ministry of Defence* (1995), the Ministry of Defence (MOD) was sued by the widow of a naval pilot, who had died by choking on his own vomit after becoming so drunk that he passed out. He had been found unconscious and an officer had organised for him to be taken up to his own room, but nobody had been told to watch over him and make sure he did not choke. The court heard that extreme drunkenness was common on the remote Norwegian base where the death happened, and the officer in charge admitted that he had not fulfilled his responsibility, imposed by Royal Navy regulations, of discouraging drunkenness at the base. At trial, the judge found the defendant was negligent in tolerating the excessive drinking, but reduced the damages by one-quarter because the dead man had been contributorily negligent in getting so drunk. The MOD appealed.

The Court of Appeal disagreed with the first instance court’s finding that the officer could be liable for failing to prevent drunkenness, and held that it was fair, just and reasonable to expect an adult to take responsibility for their own consumption of alcohol and the consequences of it. However, the court stated that once the officer had ordered the unconscious man to be taken up to the room, he had from that point assumed responsibility for his welfare, and had been negligent in not summoning medical help or watching over him. Bearing in mind that the defendant would never have had to assume this responsibility had it not been for the dead man’s own actions, they decided that there was contributory negligence, and damages were reduced accordingly.

Creation of a risk

Where a defendant actually creates a dangerous situation – even if this risk is created through no fault of the defendant – the courts may impose a positive duty to deal with the danger. This issue was explored in *Capital and Counties plc v Hampshire County Council* (1997). The case, which is discussed more fully on p. 63, concerned the question of whether fire brigades had a duty of care towards people whose property was on fire. The court concluded that in general they did not, but said that where a fire brigade had actually done something which either created a danger or made the existing danger worse, they then had a positive duty to take reasonable steps to deal with that danger. In the case itself, this meant that a fire brigade whose employee had ordered the claimant’s sprinkler system to be turned off, and thereby enabled the fire to spread more rapidly than it would otherwise have done, was liable in negligence.
Duties of care: liability for the acts of third parties

In general, tort law is designed to impose liability on those who have caused damage, and so it does not usually impose liability on one person or body for damage done by another. This is the case even if the defendant could have foreseen that their own acts might make it possible or likely that someone else might cause damage as a result of them. In *P Perl (Exporters) v Camden London Borough Council* (1984) the defendant council owned two adjoining buildings, numbers 142 and 144. The first was rented by the claimant, and the second was empty. There was no lock in the door of number 144, making it possible for thieves to enter, and, by knocking a hole in the wall, some thieves got through to number 142 and burgled it. The Court of Appeal held that the council was not liable for negligence: they might have foreseen the risk of harm in leaving the property without a lock, but that was not sufficient to make them responsible for the acts of the burglars.

There are, however, five circumstances where a duty of care regarding the acts of third parties may arise. The first and perhaps most common is where the law imposes vicarious liability, which is discussed in Chapter 16. The other four are:

- where there is a relationship of proximity between the claimant and the defendant;
- where there is a relationship of proximity between the defendant and a third party who causes damage to the claimant;
- where the defendant has negligently created a source of danger; and
- where the defendant knew or had reason to know that a third party was creating a risk to others on the defendant’s property.

As you will see from the discussion of cases below, there are links between liability of the acts of third parties and liability for omissions, discussed in the previous section, since many cases will essentially concern an omission to prevent damage being done by a third party.

**The defendant–claimant relationship of proximity**

The term ‘relationship of proximity’ is essentially legal shorthand for the existence of circumstances relating to the particular defendant and the particular claimant, which may provide reasons why a duty of care should exist between them. This is a horribly slippery concept, but becomes clearer if we look at some examples.

The relationship can often arise from the existence of a contract between the parties. In *Stansbie v Troman* (1948), the defendant was a decorator, working on the claimant’s premises. The claimant, leaving him alone in the house when she went out, specifically requested that he should be sure to lock the house before he left. He failed to do this, with the result that she was burgled. Unlike in *Perl*, the existence of a contractual relationship between them was enough in this case to establish a relationship of proximity and so impose a duty of care to take reasonable steps to prevent a burglary.

The relationship may also arise from things the parties have said and done. This was the case in *Swinney v Chief Constable of Northumbria Police* (1996) (discussed on p. 60) where the police were held to have a duty of care to a particular claimant because she had supplied them with information regarding a criminal and stressed that it should be kept confidential, and it was clear that, if they did not do so, there was a serious risk that the criminal who the information concerned
would try to take revenge on the claimant. This case can be contrasted with Hill v Chief Constable of West Yorkshire (1988). In that case, the mother of one of the women killed by Peter Sutcliffe, better known as the Yorkshire Ripper, sued the police, arguing that they had been negligent in failing to catch him earlier and so prevent her daughter’s murder. It was held in this case that there was no relationship of proximity between the police and the claimant’s daughter, since there was no reason for them to believe she was in special danger from Sutcliffe; she was simply in the same general danger as any member of the female public in the area where the murders were being committed (in both these cases, issues of public policy were also important; these are discussed on p. 59).

The defendant-third-party relationship of proximity

The main way in which a relationship of proximity can arise between the defendant and a third party who has injured the claimant is where the defendant had a right or responsibility to control the third party. However, this will rarely be enough in itself to create a duty of care: in addition, the claimant will need to be someone who was at a particular risk of damage if the defendants were negligent in controlling the third party, over and above the general risk such negligence might pose to the public at large.

This can be seen in the case of Home Office v Dorset Yacht Co (1970). Here prison officers (employed by the Home Office) were in charge of a youth custody centre, called a Borstal, situated on an island. Due to their negligence, some boys escaped from the Borstal and took boats belonging to the claimants to try to get away from the island, damaging the boats in the process. The House of Lords found that the Home Office was liable for the acts of the boys because the boys were under the officers’ control (or at least they were supposed to be!). However, that did not mean that the Home Office owed a duty to anyone who might suffer damage caused by the boys, only those at particular risk; the yacht owners were held to come into this category because it was clearly foreseeable that if the boys escaped, they would try to get off the island by stealing boats.

Creating a risk of danger

A defendant who negligently creates or allows the creation of a risk of danger may be liable if a third party’s actions cause that danger to injure the claimant. An example arose in Haynes v Harwood (1935), where a horse was left unattended in a busy street and bolted when some children threw stones at it. The defendant was held to owe a duty of care to a police officer who, seeing the danger, ran after the horse and caught it, injuring himself in the process.

In such cases it is not sufficient that the defendant creates a situation which might make it possible for a third party to injure someone else: there must be the creation of a special risk. This can be seen in Topp v London Country Bus (South West) (1993), where a bus was left unattended outside a pub by the defendant’s employee, with the keys left in the ignition. When the pub closed, somebody got into the bus and drove it away. There was evidence that the bus was being driven erratically and without headlights, and ultimately it hit and killed the claimant. The Court of Appeal held that the defendant’s leaving the bus as he did was not sufficient to amount to creating the kind of risk which would create a duty of care as in Haynes. It was no more a source of danger than any other vehicle parked on the road (unlike the horse, which might well have bolted even without the intervention of the children).
Chapter 2  Negligence: elements of the tort

**Risks created on the defendant’s property**

Where a defendant knows, or has the means of knowing, that a third party has created a risk to others on the defendant’s property, the defendant has a duty to take reasonable steps to prevent danger to others. In most such cases, the danger will be to people on adjacent land. Such a situation was the subject of *Smith v Littlewoods Organisation* (1987). Here, Littlewoods were the owners of a disused cinema. While it stood empty, vandals set the building on fire, and the fire spread, causing damage to neighbouring buildings. The House of Lords held that an occupier of land could owe a duty to prevent risks caused on it by third parties, although on the facts of the case Littlewoods had not been negligent, since they had not known about the vandals and the precautions they had taken to keep trespassers out were reasonable.

![Diagram](image.png)

**Figure 2.2** Liability for third parties

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**Topical issues**

**Compensation and community events**

The so-called ‘compensation culture’ is never far from the headlines and, in 2009, a Court of Appeal case brought the issue into the news once again. In *Glaister and others v Appleby-in-Westmorland Town Council* (2009), the claimants were members of a family who had visited Appleby Fair, a week-long gathering of gypsies and travellers, mainly for the purpose of selling horses. The fair has been held for centuries, and become something of a tourist attraction. The council did not own the land where the fair was held, but did allow travellers attending the fair to stay on land it owned, and promoted the fair as an attraction to visitors.

The Glaisters were watching horses race along the public highway when a runaway horse came towards them. Mr Glaister tried to catch it, and was kicked, causing him serious head injuries. His wife and daughter suffered psychiatric injury from witnessing the incident. It was not possible to determine whose the horse was, or how it had broken free, so the Glaisters sought to sue the local council, claiming that they had a duty of care towards visitors to the fair, because they promoted it, and stood to gain from the extra visitors it attracted. They argued that the council had breached this duty by not putting in place insurance cover so that if anyone was injured, they would be compensated. The Court of Appeal rejected this argument, confirming that there is no general duty to
Duties of care: special groups

A number of occupational and other groups have become subject to particular rules concerning negligence claims. This is generally because there are thought to be policy reasons why these groups should have immunity from certain types of action, and/or policy reasons why a duty of care should not be imposed on them in particular types of situation.

The issue of immunities has recently been questioned by the European Court of Human Rights, as being in possible breach of Art. 6 of the European Convention on Human Rights, concerning the right to a fair trial. This question is discussed on p. 71.

The police

Negligence cases involving the police generally fall into one of two categories: those involving operational matters, which basically means the way the police actually carry out their work; and those involving policy issues, such as the allocation of resources, or the priority given to different types of work.

Where a case involves purely operational matters, police officers are liable in just the same way as anyone else (in practice, the case will be brought against the relevant Chief Constable, under the principle of vicarious liability, explained in Chapter 16, and if the claim is successful, damages are paid out of a special fund). However, where a case involves policy issues, slightly more complicated rules apply. Before we look at these rules, the case of Rigby v Chief Constable of Northamptonshire (1985) is a useful guide to the distinction between operational matters and policy issues. Here a building owner sued the police for fire damage to his property, caused when the police used CS gas, which is inflammable, to oust a gunman who had taken refuge there. The court held that the police could not be held liable for equipping themselves with the gas, even though a non-flammable alternative was available, because that was a policy decision; however, they could be liable for negligence in failing to bring firefighting equipment to the scene, since this was an operational matter.

The basic position on police liability in cases involving policy decisions was laid down in Hill v Chief Constable of Yorkshire (1988). This was the case referred to on p. 57, where the mother of one of a serial killer’s victims sought to sue the police for failing to prevent her daughter’s murder. As well as pointing to the lack of proximity between the police and the young lady who was killed, the House of Lords indicated that there were good policy reasons for not imposing a duty of care on the police in such cases: the fear of being sued might cause the police to compromise the way they work, in order to avoid liability; the decisions they made were likely to be

prevent injury or damage caused by a third party just because the defendant could have prevented that damage, and no duty to ensure that third parties had insurance.

The claim was criticised as being an example of the compensation culture, which it is claimed is making it more and more difficult to organise public events like the fair, because the organisations running them are so afraid of being sued, and insurance premiums are becoming impossibly high. The Court of Appeal addressed this issue in its judgment, saying that imposing liability on the organisers of events like the fair for the acts of others would act as a deterrent to those who freely gave their time and energy to organise events that benefited the community.
partly policy-based; and the business of defending claims would be a waste of money and manpower, distracting the police from the job of dealing with crime.

For these reasons, it was held in Alexandrou v Oxford (1993) that the police could not be held liable to a member of the public who was burgled after they had dismissed a message that his burglar alarm had been activated as a false alarm, and so failed to go to the scene and investigate. They owed him no duty of care even to turn up and check.

The position in Hill was confirmed by the House of Lords in Brooks v Commissioner of Police for the Metropolis (2005). The claimant in the case was Duwayne Brooks, a friend of Stephen Lawrence, who was murdered in a racist attack. Duwayne was with Stephen at the time, and was himself attacked by the gang who killed Stephen. The police investigation into the murder was grossly mishandled, and eventually became the subject of an official inquiry. Its report concluded that one of the problems was that when the police found Mr Brooks at the scene, agitated and, in their words, aggressive, they assumed that there had been some kind of fight, rather than that he and Stephen had been attacked and that he was understandably disturbed by what he had seen, and by the delay in an ambulance arriving. This mistake, the report said, was a result of racist stereotyping and, because of it, the police failed to treat him as a victim and did not, at first, take his evidence seriously.

Mr Brooks suffered post-traumatic stress disorder after the incident, and, although it was accepted that this was initially caused by witnessing the murder, he claimed that his treatment by the police had made it worse, and sued them for negligence. The basis of his case was that the police owed him a duty of care to:

- take reasonable steps to work out whether he was a victim and, if he was, to treat him appropriately;
- take reasonable steps to give him the appropriate support and protection for a witness to a serious violent crime;
- give reasonable weight to his account of what happened, and act accordingly.

The House of Lords was unanimous in finding that the police owed no such duty to someone in Mr Brooks’s position. In doing so, they relied almost completely on the policy arguments put forward in Hill, pointing out that the primary duty of the police was to suppress and investigate crime, and that police time and resources would be diverted from that duty if they had to take the steps outlined above every time they dealt with someone who was a potential victim or witness. The House accepted that it was desirable for the police to treat victims and witnesses with respect, but held that imposing this as a duty that could give rise to liability for damages was going too far.

However, by the time Brooks was decided, the cases of Osman v UK (1998) and Z v UK (2002) had come before the European Court of Human Rights, both of which challenged the immunities given to public bodies (and are discussed at p. 62). Against this background, the House of Lords said that it was no longer appropriate to think in terms of a blanket immunity for the police and, even where cases involved policy issues, they should be assessed on the basis of whether there was a duty of care. Although they said it would still be rare to find a duty of care in cases involving the investigation of crime, the House agreed that there might be ‘exceptional cases’, or, as Lord Keith put it, ‘cases of outrageous negligence by the police’ which could fall outside the general principle in Hill.

In fact, there had already been a small number of cases in which the circumstances were such that the Hill principle was not applied. In Swinney v Chief Constable of Northumbria Police (No 2) (1999), the claimant was a pub landlady who had given the police information concerning the identity of a hit-and-run driver who had killed a police officer. The person she identified was known to the police as a violent and ruthless criminal. The claimant made it very clear to the police that, understandably, she was giving them the information confidentially and did not want to be
identified as its source, and they agreed to this. Nevertheless, the police recorded her as the informant in a document containing the details she had supplied. This document was left in an unattended police car, from where it was stolen, and eventually reached the hands of the hit-and-run driver. The result was a campaign of terrifying threats of violence against the claimant. She was so badly affected by this that she suffered psychiatric illness and was forced to give up running her pub.

When the claimant tried to sue the police for negligence concerning the information she supplied, the police argued that there was no relationship of proximity between them and the people who had made the threats that would justify making the police liable for the actions of this third party; and that there were policy reasons, similar to those described in Hill, why they should not be held to have a duty of care towards the claimant. The Court of Appeal disagreed.

On the proximity question, the Court of Appeal held that the case could be distinguished from Hill, where the claimant’s daughter had not been at any special risk from the murderer, but was simply one of many women in the area who were his potential victims. In Swinney, it was clear that if the information was allowed to fall into the wrong hands, the claimant was in particular danger, and, in recognising and agreeing to the need for confidentiality, the police had undertaken a responsibility towards this particular person. The court stated that informers were not to be considered merely as members of the public with regard to their relationship with the police; where someone gave information like this to the police, it created a special relationship, which gave rise to sufficient proximity to establish a duty of care.

As far as the policy issues were concerned, the Court of Appeal held such arguments were indeed relevant, but that in this case, the policy arguments favoured the claimant’s case. They pointed out that the imposition of a duty of care to keep confidential information secure would encourage informants to come forward, and so help rather than hinder the fight against crime.

On the facts, it was held that the actions of the police had not in fact breached their duty of care towards the claimant, so she lost her case.

Similarly, in Waters v Commissioner of Police for the Metropolis (2000), the House of Lords held that the immunity did not apply to a negligence action brought by a police officer who claimed that she had been raped by another officer, and, as a result of making a complaint about him, had been ostracised and bullied by other officers, which had resulted in her suffering psychiatric injury. She claimed that the police had failed to deal properly with her complaint, and had caused or allowed the other officers to victimise her. The House of Lords stated that the issue of whether the immunity should apply had to be considered in the light of all the relevant considerations in each case. It was true that, as in Hill, the negligence action would take officers and other resources away from the primary job of dealing with crime, but this had to be balanced against other issues of public interest, namely the fact that if the claimant’s allegations were true, there was a serious problem with the police, which should be brought to public attention so that steps could be taken to deal with it.

However, both Swinney and Waters involved claimants who were in a special position regarding their relationship to the police, one as an informant and the other as an employee, and it was not clear quite what else would amount to the kind of ‘exceptional case’ referred to in Brooks. The case of Smith v Chief Constable of Sussex (2008) now suggests that, as far as ordinary members of the public are concerned, cases will have to be very exceptional indeed before the police can be held liable for failing to protect an individual.

The claimant, Mr Smith, had told the police about a succession of death threats he had had from his former partner, Gareth Jeffrey, but the police took no action, and even refused to look at the threatening e-mails and texts. Eventually, Mr Jeffrey attacked Mr Smith with a hammer, so violently that he was arrested for attempted murder. Mr Smith survived, and sued the police for
negligence. Despite the fact that the police had had clear information that Mr Smith was under threat from a particular individual (as opposed to the situation in Hill, where there was no way of knowing who the killer’s next victim would be), the House of Lords held that the police were not liable. Although they admitted that it was a difficult balance to strike, they accepted the arguments in Hill and Brooks that creating a specific duty to an individual would be against the public interest, because it would skew the way in which police resources were used. They also pointed out that there would be many cases, especially in the area of relationship breakdown, where one person claimed to be under threat from another, and imposing a duty to protect the accuser could mean taking unjustified action against the person accused, who might well be innocent. As in Brooks, the House did not rule out the idea that there might be situations where the police would have a duty to protect a specific individual, but said this was not such a case.

### Police liability and the Human Rights Act

Attempts have been made to sidestep the Hill issue, by basing a claim on the Human Rights Act, rather than negligence. In Osman v UK (1998), the case was brought by the wife of a man who was murdered by someone who had an obsession with their son. The police had for a long time been aware of both the obsession and of the eventual killer’s threatening behaviour; he had, for example, attacked a friend of the Osmans’ son, and threatened to ‘do a Hungerford’, referring to a gunman who went on a shooting spree in the Berkshire town of Hungerford in 1987, killing 14 people. However, although the police interviewed him twice, they took no other steps and eventually the man stole a gun, attacked the Osmans’ son and shot and killed Mr Osman. Mrs Osman sought to sue the police for negligence in failing to protect them despite the clear evidence that they were at risk. When the case was struck out on the grounds of the Hill immunity, she went to the European Court of Human Rights and sued the UK government, claiming that the Hill immunity was in breach of the Art. 6.1 right to a fair trial, and that the failure to protect her husband and son was a breach of the right to life under Art. 2. The ECHR agreed with the Art. 6.1 claim (though in a later case it pulled back slightly from this position: see p. 71), but said that the right to life under Art. 2 was not breached. However, it did say that there were circumstances in which national authorities could have an obligation to take preventative action to protect an individual whose life was at risk from the criminal activities of another. This obligation would arise, they said, where the authorities knew or ought to have known of a real and immediate risk to the life of an indentified individual, from the criminal activities of someone else, and they failed to take measures which were within the scope of their powers, and might reasonably have been expected to protect the person concerned.

In Van Colle v Chief Constable of Hertfordshire (2008), a case was brought in the British courts, claiming a breach of Art. 2. The claimants were the parents of a man who was shot dead just before he was due to give evidence in a criminal trial. Their son, Giles Van Colle, had been called as a witness in the trial of a man called Daniel Brougham, on charges of dishonesty. During the run-up to the trial, there was a series of threats and incidents of interference with witnesses, and evidence was provided that the police officer in charge of the case was aware, or should have been aware of this. Nevertheless, no protection was provided for Giles, and days before the trial he was shot by Daniel Brougham, who was convicted of his murder. The claimants argued that the state authorities had put Giles at risk by requiring him to give evidence, and that there were reasonable precautions that the police could and should have taken, which would have made it more likely than not that his death could have been avoided. They said that this meant the police had breached his right to life under Art. 2 of the Human Rights Act.
Mr and Mrs Van Colle won their case at first instance and in the Court of Appeal, but the House of Lords reversed the Court of Appeal decision. They said that the key question, based on the **Osman** decision, was whether the officer in charge of the case, making a reasonable and informed judgement in the circumstances known to him at the time, should have realised that there was a real and immediate risk to Giles’ life. If he should have realised this, there would have been a breach of Art. 2 because appropriate steps to protect Giles were not taken. However, on the facts, the House held that there had been no breach.

**Other emergency services**

A number of recent cases have looked at the liability for negligence of the other emergency services – fire brigades, ambulance services and coastguards – with varying results.

The position of the fire services was examined in three cases, heard together by the Court of Appeal: **Capital & Counties plc v Hampshire County Council; John Munroe (Acrylics) Ltd v London Fire and Civil Defence Authority; Church of Jesus Christ of Latter-Day Saints (Great Britain) v West Yorkshire Fire and Civil Defence Authority** (1997). The cases were heard together because they raised similar issues of law, but their facts were each slightly different. Each claimant had suffered a fire which severely damaged their property, and each alleged that the damage was the result of the relevant fire brigade’s negligence. In **Capital & Counties**, the negligence was said to be that fire officers had turned off the building’s sprinkler system when they arrived, allowing the fire to get out of control; in **John Munroe**, the claimant’s building was set alight by smouldering debris from a fire in a nearby building; the negligence was alleged to be that, after examining the adjacent building and deciding the fire there was out, the fire officers had neglected to check the claimant’s building, where they would have found the debris; in **Church of Jesus Christ**, the fire brigade had been unable to fight a fire because the water supply from nearby hydrants was inadequate, and the negligence was alleged to arise from the brigade’s failure to inspect these hydrants regularly, which they had a statutory duty to do.

The first issue the Court of Appeal looked at was whether the fire services owed a duty of care to members of the public who had called them out to fires, to turn up to those fires, or at least
to take reasonable care to do so. Purely on the authority of Alexandrou v Oxford (1993) (see p. 60), they held that there was no such duty; if the police were not liable for failing to turn up in response to an emergency call, there was no reason to make the fire services subject to a different rule. This may sound odd, but remember that the Court of Appeal was not considering whether the fire services have a moral or social duty to attend fires when called, nor even a duty under their employment contracts; what they were considering was whether they owed a duty of care to the victims of fires that would enable those victims to sue if the duty was breached. The court found it quite easy to conclude that no such duty existed.

Bearing this in mind, the court went on to consider whether, assuming they had turned up and begun to deal with the fire, the fire services owed a duty of care regarding the way in which a fire was fought; if they did so negligently, were they liable to those who suffered damage as a result? In the first case, Capital & Counties, it was argued that turning the sprinkler system off was a positive act which made the fire spread further than it otherwise would have done, and so actually caused harm to the claimant’s property over and above that which the fire would otherwise have caused. The Court of Appeal agreed that there was a duty of care not to cause or increase harm in this way.

In the other two cases, it was argued that by turning up at the fires, the fire services had assumed responsibility for fighting the fires and the claimants had relied on this assumption, thus creating the necessary relationship of proximity between them and imposing a duty of care. The Court of Appeal disagreed, for three reasons. First, that the fire service’s primary duty was to the public at large, and imposing a duty to individual property owners might conflict with this. Secondly, it was difficult to see precisely who such a duty would actually be owed to. If it were only the owner of the building on fire, this would leave the owners of adjacent buildings unprotected, and suggest that the burning building should be saved at the expense of those around it, but if the owners of adjacent buildings were also owed a duty, then a duty might as well be owed to everyone in the vicinity, since they would all be potentially at risk (remember again that the point under consideration is not whose property should actually be protected by the fire services, but who should be entitled to sue if they fail to protect it). Thirdly, it would be irrational to impose a duty of care regarding the way in which a fire was fought, when it had been established that there was no duty to turn up and fight it at all. It would mean that fire brigades would be better off in terms of legal protection from negligence suits if they simply refused ever to attend fires! For these reasons, the Court of Appeal held that apart from situations where the fire services’ actions positively increased the damage done to the claimant, there was not a sufficient relationship of proximity between fire services and members of the public who suffered fires to give rise to a duty of care.

The Court of Appeal then considered public policy, and pointed out that in order for public policy reasons to prevent a duty of care arising, it was necessary to establish that such a duty would clash with ‘some wider object of the law or interest of the particular parties’. In cases like that of Capital & Counties, where the fire services had increased the harm done, they concluded that there was no policy argument to prevent the imposition of a duty of care. In the other two cases, they had already established that no duty existed because there was no relationship of proximity, but they nevertheless considered what the public policy position would have been if a relationship of proximity had been found. The main public policy arguments against such liability were the usual floodgates issue, plus the fact that damages would ultimately have to be paid by the taxpayer, thus diverting taxes from more socially useful purposes. The court rejected these arguments on the grounds that they were equally applicable to other public services, such as the National Health Service, and these bodies were not immune from negligence actions.

This reasoning leaves aside a rather stronger public policy argument, namely the existence and widespread use of a simpler method of compensation for fire damage: insurance. Most owners of
property are likely to have such insurance, and, in practice, claims brought against fire brigades are likely to stem not from the owners of property themselves, but from their insurers, who bring such cases because they hope to avoid paying out the benefits they have been paid to provide, and instead to shunt the financial responsibility onto the taxpayer.

However, when the courts looked at the position of the ambulance services, they took a different view. The issue was examined in Kent v Griffiths and others (2000), which concerned the London Ambulance Service’s failure to respond promptly to a call from the claimant’s doctor. The claimant was a pregnant woman who had asthma. Having been called in to see her during a bad attack, her GP rang for an ambulance, and was told one was on its way; however, it took 38 minutes to arrive, despite two further calls from the GP. As a result of the delay, she temporarily stopped breathing, which caused her to lose her baby, and to suffer long-term memory problems and personality changes.

The ambulance service argued that, on the authority of Capital & Counties, they owed the claimant no duty of care, but the Court of Appeal disagreed. It said that the nature of the service provided by the ambulance service was not comparable with that provided by fire brigades or police, but was more like that provided by National Health Service hospitals, which are accepted as having duties of care towards individual patients. Whereas the fire brigades and the police tended to provide services to the public at large, the ambulance service, once called to the assistance of an individual, was providing a service to that individual, and that individual would be the only person who could be caused damage by their failure to provide the service properly. Therefore, the Court of Appeal held, the ambulance service did owe a duty of care to the claimant.

The Court of Appeal did, however, stress that the distinction between operational and policy matters (see p. 59) would still apply, as it did in other cases involving emergency services. This meant that where there was a question of ambulances being delayed because of lack of resources, or because of demand elsewhere which the Ambulance Service had decided to give priority to, the duty of care question might be decided differently. In this case those issues did not arise; the resources had been available, and what was alleged was a careless failure to use them.

The armed forces

In Mulcahy v Ministry of Defence (1996), the Court of Appeal considered whether a member of the armed forces, injured by the negligent behaviour of a colleague during battle conditions, could sue for that injury. The reason why this – presumably fairly common – situation had never come before the courts before was that until 1987 the situation was covered by a statutory immunity, but this was removed in the Crown Proceedings (Armed Forces) Act 1987. The Act provides that the immunity can be restored by the Secretary of State for Defence in respect of any particular ‘warlike operations’ outside the UK, but no such order was made regarding the Gulf War, in which the claimant met his injury when a fellow soldier negligently discharged a gun beside him, damaging his hearing.

The Court of Appeal held that there was no duty of care between fellow soldiers engaged in battle conditions. Following the Caparo approach (see p. 21 above), the court found that there was foreseeability and proximity, but that it was not just and reasonable to impose a duty in the circumstances, because military operations would be adversely affected if every soldier had to be conscious even in the heat of battle that their actions could result in being sued by a comrade. However, the case of Bici v Ministry of Defence (2004) makes it clear that this ‘combat immunity’ will only apply where the situation is such that soldiers are actually under threat of attack. The claimants in this case were two Kosovan Albanians who were shot by British soldiers during peace-keeping operations in Kosovo. The High Court held that the soldiers were negligent in shooting the men when they were not being threatened by them, and they had no reasonable grounds to
think that they were. The Ministry of Defence argued that the soldiers were covered by ‘combat immunity’, but the court said this was an incident of street disorder, not a combat situation. The armed forces can be sued by their members for damage occurring completely outside battle conditions: Barrett v Ministry of Defence (see p. 55) is an example of this.

Local authorities and public bodies

Local authorities and other public bodies pose special problems regarding negligence actions, for two main reasons. The first is that even where foreseeability and proximity can be established, there will very often be reasons why imposing a duty of care may not be just and reasonable: in particular, the problem of damages ultimately being paid by taxpayers, and the danger of employees being distracted from their main task, and possibly changing their working practices, in order to avoid being sued. In these respects the dilemma is similar to that regarding public services such as the police and fire brigades. But there is a further problem with many cases involving public bodies, and, in particular, democratically elected ones. This is the question of ‘justiciability’, which simply means suitability for examination by a court.

The justiciability issue arises because, in many cases, the actions and decisions of public bodies can only be properly examined by reference to factors which the court process is not equipped to assess. Public bodies are frequently given powers to act, but allowed a discretion as to how, when and even whether they exercise those powers. The exercise of such discretion may depend on many different factors: the availability of resources and the other demands on those resources; the weight given to competing aims and objectives; the preference given to different methods of solving a problem or meeting a need.

As an example, take the facts of Stovin v Wise (1996). Here the claimant had been injured when the motorbike he was riding was hit by a car driven by the defendant. The defendant claimed that the accident was partly due to the negligence of the local authority, which he therefore joined to the action. The basis for his claim was that he had been unable to see the claimant because an overhanging bank of earth was obstructing his view; the authority had a statutory power to order the removal of such obstructions and had failed to do so. We will discuss the decision in the case further on in this section, but for our purposes here it illustrates very well the problem of justiciability. The council did know about the obstruction (in fact the council had asked the landowner to remove the obstruction, but had not followed up when this was not done), and it knew that previous accidents had happened in the same spot. But there were even worse accident black spots in other areas of the county; there were calls other than accident black spots on the authority’s road maintenance budget; and this budget was limited. On what basis should a court decide whether the authority should have spent its money and manpower on removing this particular obstruction?

Restrictions on liability

Up until recently, these problems were generally taken by the courts to mean that it was desirable to protect local authorities and other public bodies from actions for negligence, for the reasons explained. The benchmark case establishing this approach was X v Bedfordshire County Council (1995), in which the House of Lords grouped together five separate cases which all raised the issue of local authority liability in negligence; in each case the local authorities had applied to have the actions struck out, arguing that there was no cause of action. Two of the cases were brought by claimants who alleged that their local authorities had acted negligently regarding their powers to
prevent child abuse; the other three cases concerned local authorities’ powers with regard to providing education for children with special needs.

The House of Lords held that it was not just and reasonable to impose a duty with regard to protection from child abuse, on the grounds that this was an area where a degree of discretion had to be exercised and there might well be different views as to the wisdom of any decision taken. Imposing a duty of care would mean local authority employees making such decisions with one eye on whether they might be sued, and would also divert public money and manpower away from child protection. In addition, private citizens had other means of challenging decisions made in this area, including statutory appeals procedures and the right to petition the local authority ombudsman.

In the education cases, however, the House of Lords found that it was arguable that a duty of care might arise, because here there was not the same danger of defensive practices, and because advice was being given directly to and relied upon by parents.

A similarly restrictive approach was taken in *Stovin v Wise*, the road accident case referred to above. The claimant argued that the existence of a statutory power to remove the obstruction was sufficient to create a relationship of proximity between the council and users of the road, which would not otherwise exist. The House of Lords compared the position regarding a statutory power to that regarding a statutory duty (see Chapter 7), and said the situation was similar. Therefore, in order to discover whether a statutory power was intended to give rise to an individual right to sue in negligence, it was necessary to look at the statute itself, and decide whether in making it Parliament intended to create a private right to compensation. On this point, the very fact that Parliament had granted a power to act, rather than a duty to do so, suggested it did not intend to create such a right.

This did not mean that a statutory power could never give rise to a right to compensation if the power was not exercised, but in order to do so, two fairly strict requirements would have to be satisfied. First, the non-exercise of the power must have been irrational in the circumstances. This term (sometimes known as ‘Wednesbury unreasonableness’ after the case in which it was first described) is borrowed from public law, and essentially applies when a public body or official makes a decision that is so unreasonable that no reasonable public body or official could have made it.

Secondly, there must be ‘exceptional grounds’ for imposing an obligation to pay compensation. This will only be the case if, as Lord Hoffmann explained, there is ‘general reliance’ on the power being exercised, to the extent that ‘the general pattern of social and economic behaviour’ is affected by this reliance (an example of this might be the setting of insurance premiums). Lord Hoffmann stressed that the doctrine was concerned with the general expectations of the community at large, not those of the defendant; defendants would not have to prove that they had relied on the exercise of the power, but, equally, the fact that they did so rely would be irrelevant unless shared by the general public. Lord Hoffmann also pointed out that general reliance could only exist where the benefit provided, if and when the statutory power was exercised, was of ‘uniform and routine’ nature, so that it is clear exactly what the defendant was expected to do.

**The current approach**

These cases seemed to establish that the courts intended strictly to limit the liability of public bodies for negligence. But in *W v Essex County Council* (2000), a shift of approach began to appear. The claimants were foster parents for the council. They had children of their own and, before accepting their first foster-child, they had told the council that they could not foster any child who was a known or suspected child abuser; the council had agreed to this condition. The council then placed a 15-year-old boy with them, who the council knew had indecently assaulted his sister; they
did not tell the foster parents this. During his stay, he sexually abused the claimants’ children. They sued the council for negligence on their children’s behalf.

The Court of Appeal was asked to decide whether the case could go ahead, or should be struck out. It pointed out that there were good policy reasons why a duty of care should not be imposed on the council: the task of dealing with children at risk was a difficult and delicate one, and a duty of care might lead councils to protect themselves from liability, at the expense of their duties towards children needing fostering. However, it stated that in this case it was arguable that the policy reasons should not apply, since the children who had been abused were not actually subject to the council’s powers under statute, but were living at home with their parents, and, in addition, the council had given express assurances which it had broken. For these reasons the Court of Appeal refused to strike out the case, and the House of Lords upheld their decision. In the event, as we stated earlier, the case was finally settled out of court.

After the decision in W, there was a decisive move away from the restrictive approach of X v Bedfordshire. In Barrett v Enfield London Borough Council (1999), it was argued that the local authority owed a duty to a child who it had placed in care. The claimant was taken into care by the local authority when he was 10 months old. He remained there until he was 17, and had had a thoroughly unpleasant and difficult childhood. He alleged that the authority had a duty to place him for adoption, locate suitable foster homes and oversee his re-introduction to his birth mother; the fact that none of this had been done, he claimed, had led to him suffering psychiatric damage. The case was initially struck out on the grounds that, following X v Bedfordshire, there were sound policy reasons why it was not fair, just and reasonable to impose a duty of care. The striking out decision was eventually appealed to the House of Lords, who held that the action should not be struck out because without a proper examination of the facts it was not possible to determine whether the decisions taken with regard to the claimant’s upbringing were policy ones, which would not be justiciable and so could not give rise to a duty of care, or operational ones, which could.

In four cases which ultimately ended up being considered together by the House of Lords, the courts looked again at the issue of the duties owed by local educational authorities to children using their educational services, which you will remember was one of the issues raised in X itself. The first case was Phelps v Hillingdon London Borough (1998), in which the claimant – now grown up – had had problems with learning as a child and was referred to an educational psychologist employed by the local authority, who said her difficulties were the result of emotional and behavioural problems. In fact it was later discovered that the claimant was dyslexic. She claimed that the psychologist’s failure to diagnose this had prevented her getting the educational help she needed, help which would have improved her employment prospects.

The second of the four cases, Jarvis v Hampshire County Council (1999) also concerned a claimant with dyslexia, though in this case it had been diagnosed correctly; the alleged negligence concerned the education authority’s failure to give appropriate advice on the right kind of school for him.

In the third case, G (a child) v Bromley London Borough Council (1999), the claimant had a progressive muscle disease which meant he needed special equipment in order to be able to communicate; this was not provided and he alleged that his education had suffered as a result, causing psychological damage.

The fourth case concerned a claimant, Anderton, who was seeking access to her educational records in order to prove that she had been damaged by inadequate education. Phelps was the only case of the four which had been tried; in the other three, the House of Lords was only required to decide whether there was a potentially arguable case. It refused to dismiss any of the four claims, holding that a local education authority has a duty of care to provide an education appro-
appropriate to a child’s needs, and where this does not happen, as a result of the negligent actions of a teacher or educational psychologist, the council may be liable.

The House of Lords stressed that, although there was a duty of care, liability for negligence would not be imposed merely because a child had done badly at school – a teacher or educational psychologist would have to fall below the standards expected of a reasonable body of similarly professional people for negligence to be found. They argued that this requirement would ensure that the decision did not result in a flood of claims.

In *D v East Berkshire Community NHS Trust* (2003); *MAK v Dewsbury Healthcare Trust*; *RK v Oldham NHS Trust* (2003), the Court of Appeal heard three cases dealing with local authority liability for preventing child abuse. The first, *Berkshire*, was brought by a mother who had been wrongly suspected of harming her daughter. In the second, *Dewsbury*, a father and his daughter sued the local council for taking the daughter into care on the – incorrect – suspicion that she was being abused by her father. The claimants in the third case, *Oldham*, were a mother and father whose daughter was taken into care for a year after they were wrongly accused of abuse.

The councils sought to rely on *X v Bedfordshire*, which had stated that it was not fair, just or reasonable to impose a duty of care on councils with regard to the decision on whether to take a child into care, because fear of being sued would adversely affect the way councils did their job in this area. This particular point had not been disturbed by subsequent cases. The Court of Appeal said that the situation had, however, been changed since the passing of the Human Rights Act 1998, which created the right to freedom from inhuman and degrading treatment (Art. 3) and to respect for family life (Art. 8). This means that a council who wrongly takes a child into care (or wrongly fails to do so) can be sued under the Human Rights Act. As a result, it no longer made sense to say that councils should be immune from being sued in tort for negligence so as to avoid the adverse effects of fear of being sued, since they could be sued under human rights law instead.

As a result, it was now fair, just and reasonable to impose on councils a duty to use a reasonable degree of care and skill in making the decision on whether to remove a child from its parents. However, this duty was owed only to the child, not the parents. The Court of Appeal said that, in this kind of case, the interests of the parent and the child might well be different, and to allow a duty to both would create a conflict of interest. The claimants then appealed to the House of Lords, on the issue of whether a duty should be owed to parents (*D v East Berkshire* (2005)). They argued that there was no conflict of interest, because it was in the interests of both parents and children that the authorities acted with due care and skill when deciding whether children should be taken into care. The House of Lords rejected this argument. They said that at the point where there was suspicion of abuse, it was in the interests of the child that any suspicions, even if they were slight, were reported and investigated. Those steps would not necessarily be in the interests of the parent. Therefore there was a conflict which made it undesirable that child protection authorities should owe a duty of care to the parents in such cases, as well as to the children.

In *Lawrence v Pembrokeshire County Council* (2007), an attempt was made to use the Human Rights Act 1998 to defeat the decision in *D v East Berkshire*. The claimant argued that, in putting her children on the at-risk register, her local council had breached her right to respect for family life, under Art. 8 of the Act. The Court of Appeal rejected this approach. They explained that the reason for the decision in *D v East Berkshire* was to make sure that councils could protect children who appeared to be at risk from their parents. Providing, in Art. 8, a right to respect for family life did not weaken or undermine the need for such protection, and so the court held that *D v East Berkshire* was compatible with Art. 8.

The key cases on local authority liability mostly look at the issue of child protection and education, but in *X v Hounslow London Borough Council* (2009), the Court of Appeal addressed a
new and slightly different issue: what duty of care, if any, did a local authority owe to vulnerable adults? The case arose from the tragic story of a couple who both had learning difficulties, and were living with their two young children in a council flat owned by the defendant local authority. Because of their learning disabilities, they had a variety of problems in coping with everyday life, and so were visited by social workers and other council support agencies. Because of their difficulties, they found it hard to tell when other people were a danger to them, and the social workers were aware of this. During 2000, they were – or thought they were – befriended by a group of youths. These boys began taking advantage of the couple, storing stolen goods in their flat, taking drugs and having under-age sex there, and generally causing problems. One of the social workers realised the boys were a serious problem, and tried to get the police involved but they refused to act because the couple themselves were too frightened to make a complaint. She also tried to get the family rehoused but, due to a shortage of council housing in the borough, this did not happen. The situation culminated in a horrific weekend, when the boys imprisoned the family in the flat and repeatedly abused them physically and sexually, subjecting even the children to humiliating assaults.

The family suffered severe psychological as well as physical injuries as a result of the ordeal, and sued the council (they were represented by the Official Solicitor, who acts for people who cannot properly manage their own affairs). The basis of their claim was that the council had a duty of care to protect them because the council could foresee that, in their situation, the youths were likely to cause them harm. The couple won their case at first instance and were awarded £100,000 in damages, but lost them when the council successfully appealed. The Court of Appeal said that a local authority did not owe a duty to vulnerable adults from criminal acts by third parties, unless the circumstances showed that the council had assumed a responsibility to them. On the facts, the council itself had not assumed any special responsibility to them; it had merely been doing what it was obliged under statute to do, by housing them and giving them access to support services. The only person who might be said to have assumed a responsibility to them was the social worker who had tried to get the police involved and get the family rehoused, but, if she had a duty, she had not breached it, since she had done what was reasonable.

Reasons for the change

Why was there such a change in approach in the years since X v Bedfordshire? While there may have been a genuine change of view on the part of the courts as to the proper legal liabilities of public bodies, a more likely explanation is the effect of the decision of the European Court of Human Rights in Osman v UK (see p. 62), where it took a very dim view of the use of blanket immunities from suit. The ECHR pulled back from this position in the subsequent case of Z v UK (2001), but there remains some doubt over how the law in this area will be developed. This issue is discussed below.

Other types of case

It is worth noting that the issue of immunity from suit for public bodies and local authorities only arises in cases where a local authority or public body is claimed to be negligent with regard to something they have done or failed to do in their specific role as a public body – usually this will concern a statutory power or duty. If a local authority or public body is alleged to be negligent because they have done something which would amount to negligence if it was done by a private individual or organisation, the normal rules apply and the fact that the defendant is a public body is not an issue.
An example of this is Beasley v Buckinghamshire County Council (1997). Here the claimant was a paid foster-parent to a handicapped teenager. The child was heavy and so badly handicapped that she needed a lot of help and, as a result of the work, the claimant was injured. She claimed that the council had been negligent in failing to give her the necessary equipment and training to protect herself from injury. The council sought to have the case struck out, relying on X v Bedfordshire to argue that on public policy grounds no duty of care should exist; they argued that their decision to use the claimant’s services had been one of policy, and within the discretion allowed them by statute. The court disagreed: the alleged negligence arose not from the decision to use the claimant’s services, but from the way the council acted once it had taken that decision, namely the refusal to provide proper training and equipment. The case was not comparable with X, but was more like a case involving an employer’s duty of care to provide a safe working environment. The court therefore refused to strike the case out.

The future for special-group immunities

As we have mentioned previously, the question of special-group immunities has been called into question during the past few years by the European Court of Human Rights. The court has considered whether such immunities could be a violation of Art. 6 of the European Convention on Human Rights, concerning the right to a fair trial, and in Osman v UK (1998) they concluded that this could be the case, causing some uproar in the British legal world. Three years later, in Z v UK (2001), they appeared to draw back from this position, though some questions remain, which is why we need to look at these two cases in detail.

As we saw on p. 62, Osman concerned a family who had suffered a tragedy at the hands of a criminal, and sought to sue the police for negligence in failing to prevent it. The police successfully made an application to strike out their claim, on the ground that Hill established that the police could not be sued for negligence concerning the investigation and suppression of crime. The Osmans then brought a case against the British government before the European Court of Human Rights (ECHR). They made a number of different allegations but, as far as our discussion here is concerned, the important one was that the striking out of their case was in breach of Art. 6.1 of the European Convention on Human Rights, which provides a right to a fair trial. The argument was that the decision in Hill gave the police a blanket immunity from negligence suits in cases which involved the investigation and suppression of crime, and that this meant that the English courts would not even look at the merits of such a case. As a result, people in the position of the Osmans would be denied a fair trial of their claim.

The British government argued that the rule established in Hill did not confer a blanket immunity; it did not mean that an action against the police on the issue of their work against crime was always doomed to fail. However, the ECHR found that the way in which the rule had been used did confer a blanket immunity. The courts had not looked at the merits of the Osmans’ claim, nor the facts on which it was based; their case was simply rejected by the Court of Appeal because it was found to fall squarely within the scope of the exclusionary rule formulated by the House of Lords in the Hill case. The Court of Appeal had assumed that this provided the police with a watertight defence.

The ECHR pointed out that the aim of the Hill rule – to promote the effectiveness of the police service and so prevent crime – might well be legitimate within the terms of the Convention, but its scope and the way it had been used in this case were problematic. In particular, in dealing with the case on the basis of a striking out application, the Court of Appeal had denied itself the chance to consider whether there were competing public interest issues which would outweigh the public interest argument for the Hill rule. The ECHR suggested that clearly there were other public inter-
est issues: the applicants’ case had involved the alleged failure to protect the life of a child; they alleged that that failure was the result of a catalogue of acts and omissions which amounted to grave negligence as opposed to minor acts of incompetence; and the harm sustained was of the most serious nature. The ECHR held that these were considerations which should have been examined on their merits and not automatically excluded by the application of a rule which amounted to the grant of an immunity to the police.

The government argued that the Osmans had available to them alternative routes for securing compensation, such as a civil action against the killer or the psychiatrist who had examined him during the period before the killing and concluded that he was not mentally ill. However, the ECHR argued that these remedies would not have met the Osmans’ aim in bringing the action against the police, which was to secure answers to the question of why the police failed to take action soon enough to protect the victims. While the Osmans might or might not have succeeded in proving that the police were negligent, they were at least entitled to have the police account for their actions and omissions in a court hearing which would examine the facts and merits of the case.

For these reasons, the court concluded unanimously that the application of the Hill rule in the Osmans’ case was a restriction on the applicants’ right of access to a court and therefore a violation of Art. 6.1 of the Convention.

The implications of Osman

Osman seemed to have extremely important implications, both for procedure and for the substantive law of tort. In terms of procedure, it seemed to suggest that the use of striking out applications to decide whether a duty of care exists in a particular case would only be permissible in the clearest cases, where all the issues could be weighed in the pre-trial examination. Some commentators believed it might even be suggesting that such use of striking out actions was not ever to be permissible. It was also clear from the arguments made that the decision did not only apply to cases against the police: the statement that public policy arguments in favour of immunity must be balanced against public policy arguments against it would equally well apply to actions against any of the special groups mentioned above. As a result, as we noted earlier, after Osman the English courts began to show considerable reluctance to allow striking out applications in cases concerning immunity for special groups. In Barrett and Phelps they made specific reference to Osman in explaining this, though not without criticism of it.

As far as substantive tort law was concerned, the implications were perhaps even more important. As we have seen, the approach of English tort law to the duty of care issue is to lay down general rules regarding policy questions (such as the distinction between operational and policy matters in cases concerning how the police do their job) and to use these rules to decide whether a particular individual’s case gives rise to a duty of care. The result of this approach is that if the rules say there is no duty of care in a particular situation, then nothing about the individual’s case can affect that. The Osman decision takes a different view, suggesting that it is important to balance the policy considerations behind general rules against the circumstances of each case – so that, for example, the seriousness of the harm done and the degree of carelessness shown by the defendant might outweigh the policy considerations behind the immunity, as the court found to be the case in Osman. Clearly this had the potential to wreak profound changes in the development of duties of care.

A retreat from Osman?

There was something of a sigh of relief in the English legal world when the ECHR appeared to backtrack from Osman in Z v UK, though it is by no means clear that the situation has stabilised,
Duties of care: special groups

let alone reverted back to pre-\textit{Osman} days. The case involved four children who had suffered horrendous neglect at the hands of their parents. Neighbours, the police and teachers had all expressed concern about them to social services, over a period of years, but the social services department refused to take them into care. They eventually did so five years after first being made aware of the problem, and only then at the mother’s own request. Three of the four children suffered psychiatric illness as a result of what had happened to them, and the social services department was sued on their behalf by the Official Solicitor. The claim was struck out by the House of Lords on the basis that, following \textit{X v Bedfordshire}, the social services had no duty of care towards the children.

The Official Solicitor took the case to the ECHR, alleging that the striking out was a violation of Art. 6 of the Convention. The ECHR (more or less) admitted that their view in \textit{Osman} had been based on a misunderstanding of English tort law, something which English lawyers, judges and academics had been pointing out since the decision was published.

Article 6 is concerned with procedural blocks to exercising the right to a fair trial, such as, for example, where a government might arbitrarily remove the courts’ jurisdiction to deal with certain types of claim. The so-called immunity in negligence of public authorities, however, was not a procedural block, but a part of the substantive law of negligence in this country. Our law of tort says that if it is not just and reasonable to impose a duty of care, then no such duty should be imposed. By saying that it was not just and reasonable to impose a duty of care on local authorities in child abuse cases, the court was not saying that local authorities had a blanket immunity from liability, but that there was no liability in law for them to be immune from.

The ECHR found that in \textit{Z v UK}, the striking out hearing had been an adversarial examination of the issues in the case. Although this hearing did not test whether the facts alleged were true, it did examine whether, if they were true, the claimant would have had an arguable case in law. Since the answer was no, a hearing to examine whether the facts were true would simply be a waste of time and resources. In the striking out hearing, the House of Lords had carefully balanced competing policy questions, and, as a result, this was a sufficient trial for the purposes of Art. 6.

It would save both us and you a lot of time and trouble if we could assume that \textit{Z v UK} simply shows that \textit{Osman} was wrong and can now be ignored. Unfortunately, the situation is not quite so simple. While the ECHR in \textit{Z} admitted to a misunderstanding, it did not say that \textit{Osman} should be regarded as wrong. In fact, the decision of the court was not unanimous (it was made by a majority of 12 to 5), and it was clear that some of the dissenters still felt that the \textit{Osman} approach was correct. As a result, the position of special-group immunities in negligence is still not clear.

One view is that \textit{Z v UK} means that denying a duty of care on the basis that it is not fair, just and reasonable to impose one on the defendant is part of substantive English tort law, and not a procedural block, and therefore Art. 6 has no application in this area. This was the approach taken by the Court of Appeal in \textit{D v East Berkshire Community NHS Trust} (2003), the case concerning local authority liability for investigating child abuse, discussed on p. 69. Relying on \textit{Osman}, the claimants argued that striking out their claims on the grounds that no duty was owed to them was a violation of Art. 6. The Court of Appeal disagreed, stating that establishing the existence of a duty of care was a precondition of being allowed to sue someone in negligence. A claimant who is prevented from suing a defendant because they cannot establish that there is a duty of care is not prevented by an immunity, but by the fact that, in law, it is not possible for the defendant to be liable to them. Therefore, Art. 6 could not apply.

The House of Lords seemed to approve this view in \textit{Matthews v Ministry of Defence} (2003). The case did not actually concern duties of care, but a similar issue of Crown immunity, which provides that, where it applies, the Crown cannot be sued for acts that other parties would be
liable for. Matthews tried to argue that this immunity was in breach of Art. 6, but the House of Lords said that, as it was a part of substantive law, Art. 6 could not apply.

However, it is not at all clear from \( Z \text{ vs } \text{UK} \) that this is the position the ECHR will take in future cases. The ECHR made it clear in that case that even where there was a legal rule which meant that a defendant could not be liable in domestic law, they would look at that rule in order to decide whether it in fact operated as the kind of procedural block covered by Art. 6 and, if so, they would assess whether its existence was a disproportionate interference with the claimant's right to a fair trial. They in fact did this in \( Z \text{ vs } \text{UK} \), giving two reasons why the immunity did not act as a blanket immunity: first, that it applied only to one specific area of a local authority’s functions, rather than protecting them from any type of claim; and, secondly, that the House of Lords had carefully weighed up both sides of the policy issue, in deciding whether or not it was fair, just and reasonable to exclude a duty of care.

The fact that the ECHR looked at the \( Z \) case in this way suggests that the Osman approach may not be dead after all. First, if it was important that the immunity only applied to a specific part of the council’s work, does that mean that an immunity which covered all the functions of a particular type of public authority would be viewed as a procedural block in breach of Art. 6? Secondly, if the fact that the House of Lords balanced up the competing public interest issues helped justify the immunity, does that mean that every court in every case has to perform the same weighing-up exercise? If it does, that means that in practice many of the rules on where a duty of care will exist are virtually useless as a means of sketching out the limits of tort liability, or of creating predictability and equal treatment.

Whatever happens in future cases, Osman has already had a profound impact on one aspect of negligence law. During the period between Osman and \( Z \text{ vs } \text{UK} \), the courts were noticeably reluctant to use the striking out procedure in cases involving public authorities, and as a result the cases brought in that period have increased the liability of public authorities quite substantially (see p. 72). \( Z \text{ vs } \text{UK} \) does nothing to change that.

**Breach of a duty of care**

At the very beginning of this chapter, we explained that negligence has three elements: a duty of care; breach of that duty; and damage caused by the breach. Now that we have looked at the various tests for establishing whether a duty exists between the claimant and the defendant, we can move on to consider what, assuming a duty has been found in any particular circumstances, will constitute a breach of that duty.

Breach of a duty of care essentially means that the defendant has fallen below the standard of behaviour expected in someone undertaking the activity concerned, so, for example, driving carelessly is a breach of the duty owed to other road users, while bad medical treatment may be a breach of the duty owed by doctors to patients. In each case, the standard of care is an objective one: the defendant’s conduct is tested against the standard of care which could be expected from a reasonable person. This means that it is irrelevant that the defendant’s conduct seemed fine to them; it must meet a general standard of reasonableness.

As the test is objective, the particular defendant’s own characteristics are usually ignored. A striking example of this is that the standard of care required of a driver is that of a reasonable driver, with no account taken of whether the driver has been driving for 20 years or 20 minutes, or even is a learner driver. In Nettleship \( v \) Weston (1971) the claimant was a driving instructor,
The standard of reasonableness

Figure 2.3 Is there a claim in negligence?

and the defendant his pupil. On her third lesson, she drove into a lamp post and the claimant was injured. The court held that she was required to come up to the standard of the average competent driver, and anything less amounted to negligence: ‘The learner driver may be doing his best, but his incompetent best is not good enough. He must drive in as good a manner as a driver of skill, experience and care.’ However, there are a limited number of situations in which special characteristics of the defendant will be taken into account (see below).

The standard of reasonableness

It is important to realise that the standard of care in negligence never amounts to an absolute duty to prevent harm to others. Instead, it sets a standard of reasonableness: if a duty of care exists between two parties, the duty is to do whatever a reasonable person would do to prevent harm occurring, not to do absolutely anything and everything possible to prevent harm.

An example of this principle in operation is Simmonds v Isle of Wight Council (2003). The claimant here was a five-year-old boy, who was injured while playing, unsupervised, on swings during a school sports day. The boy had had a picnic lunch with his mother near to where the sports day was taking place, and afterwards his mother sent him back to rejoin the supervised activities. Unknown to her, the little boy instead headed for some nearby swings. While playing there alone, he fell off and broke his arm. The court rejected the mother’s claim that the school had a duty of care to prevent accidents happening on the swings. The sports day had been well supervised, and the school had in place measures to prevent children playing on the swings; it
was not possible to make a playing field completely free of hazards, only to take reasonable pre-
cautions, and the school had done that. The same principle can be seen in Holt v Edge (2006). The
defendant was a doctor, and the claimant a patient whose illness he misdiagnosed. The claimant
had a bleed in her brain, but the defendant did not realise this because the symptoms she described
were not typical of the condition. It went on to cause her to have a stroke. Her claim failed because
the symptoms she talked about were unusual for that condition, and so the doctor did not fall
below the expected standard in failing to diagnose it.

In deciding what behaviour would be expected of the reasonable person in the circumstances
of a case, the courts consider a number of factors, balancing them against each other. These
include:

- special characteristics of the defendant;
- special characteristics of the claimant;
- the size of the risk;
- how far it was practical to protect against the risk;
- common practice in the relevant field;
- any benefits to society that might be gained from taking the risk.

None of the factors is conclusive by itself; they interact with each other. For example, if a type of
damage is not very serious nor very likely to occur, the precautions required may be quite slight,
but the requirements would be stricter if the damage, though not serious, was very likely to occur.
Equally, a risk of very serious damage will require relatively careful precautions even if it is not very
likely to occur.

**Special characteristics of the defendant**

**Children**

Where the defendant is a child, the standard of care is that of an ordinarily careful and reasonable
child of the same age. In Mullin v Richards (1998), the defendant and claimant were 15-year-old
schoolgirls. They were fencing with plastic rulers during a lesson, when one of the rulers snapped
and a piece of plastic flew into the claimant’s eye, causing her to lose all useful sight in it. The Court
of Appeal held that the correct test was whether an ordinarily careful and reasonable 15-year-old
would have foreseen that the game carried a risk of injury. On the facts, the practice was common
and was not banned in the school, and the girls had never been warned that it could be dangerous,
so the injury was not foreseeable.

In Orchard v Lee (2009), the Court of Appeal stressed that where the claimant was a child,
their behaviour would have to be ‘careless to a very high degree’ before they should be considered
liable for negligence. The claimant in the case was a playground supervisor at a school, who was
injured when a 13-year-old pupil ran into her, while playing tag with a friend. The Court of Appeal
confirmed that the test in Mullin was the correct approach, but said it was not the whole story.
Courts did need to ask what a reasonable and prudent child of the defendant’s age would have
foreseen, but only as part of the wider question of whether the child had fallen below the standard
of behaviour that could reasonably be expected from a child of that age. Only if there was a high
degree of carelessness should a child be liable. In this case, that did not apply where a child of 13
was playing a game within a play area, was not breaking any rules or acting to any significant
degree outside the rules of the game.
Illness

A difficult issue is what standard should be applied when a defendant’s conduct is affected by some kind of infirmity beyond their control. In *Roberts v Ramsbottom* (1980), the defendant had suffered a stroke while driving and, as a result, lost control of the car and hit the claimant. The court held that he should nevertheless be judged according to the standards of a reasonably competent driver. This may seem extremely unjust, but remember that motorists are required by law to be covered by insurance; the question in the case was not whether the driver himself would have to compensate the claimant, but whether his insurance company could avoid doing so by establishing that he had not been negligent. This is also one explanation for the apparently impossible standard imposed in *Nettleship* (p. 74).

Even so, in a more recent case, *Mansfield v Weetabix Ltd* (1997), the Court of Appeal took a different approach. Here the driver of a lorry was suffering from a disease which on the day in question caused a hypoglycaemic state (a condition in which the blood sugar falls so low that the brain’s efficiency becomes temporarily impaired). This affected his driving, with the result that he crashed into the defendant’s shop. The driver did not know that his ability to drive was impaired, and there was evidence that he would not have continued to drive if he had known. The Court of Appeal said that the standard by which he should be measured was that of a reasonably competent driver who was unaware that he suffered from a condition which impaired his ability to drive; on this basis he was found not to be negligent.

Professionals and special skills

Account will also be taken of the fact that a particular defendant has a professional skill, where the case involves the exercise of that skill. In such a case, the law will expect the defendant to show the degree of competence usually to be expected of an ordinary skilled member of that profession, when doing their duties properly. A defendant who falls short of that level of competence, with the result that damage is done, is likely to be held negligent. It would be ridiculous to demand of a surgeon, for example, no more than the skill of the untrained person in the street when carrying out an operation.

In *Vowles v Evans* (2003), a rugby player was injured as a result of a decision made by the referee. The Court of Appeal said that the degree of care a referee was legally expected to exercise would depend on his grade, and that of the match he was refereeing; less skill would be expected of an amateur stepping in to help out, than of a professional referee. This means that the same accident might amount to a breach of duty if the referee was a trained professional, but not if he was an amateur. The referee in the case was a professional and was found liable. Similarly, in *Horton v Evans* (2006), a pharmacist was held liable for the side-effects suffered by a customer whose GP had mistakenly prescribed drugs eight times stronger than her usual dose, on the grounds that a reasonably careful and competent pharmacist would have noticed the increased dosage and queried it with the claimant and/or the GP (the GP was also sued and settled out of court).

Differences of opinion

In assessing the standard of care to be expected in areas where the defendant is exercising special skill or knowledge, the courts have accepted that within a profession or trade there may be differences of opinion as to the best techniques and procedures in any situation.
This issue was addressed in **Bolam v Friern Barnet Hospital Management Committee** (1957), a case brought by a patient who had had electric shock treatment for psychiatric problems and had suffered broken bones as a result of the relaxant drugs given before the treatment. These drugs were not always given to patients undergoing electric shock treatment; some doctors felt they should not be given because of the risk of fractures; others, including the defendant, believed their use was desirable. How was the court then to decide whether, in using them, the defendant had fallen below the standard of a reasonable doctor?

Their answer was a formula which has been taken as allowing the medical profession (and to a certain extent other professions, as the test has been adopted in other types of case too) to fix their own standards. According to 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.*

Providing this was the case, the fact that other doctors might disagree could not make the conduct negligent. The practical effect of this decision (which was only given in a High Court case, but was adopted in several later House of Lords cases) was that so long as a doctor could find a medical expert prepared to state that the actions complained of were in keeping with a responsible body of medical opinion, it would be impossible to find him or her negligent.

**Key Case**

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

The House of Lords has, however, now modified this much-criticised decision in **Bolitho v City & Hackney Health Authority** (1997). This case involved a two-year-old boy, who was admitted to hospital suffering breathing difficulties. He was not seen by a doctor. Shortly after his second attack of breathing problems, his breathing failed completely, he suffered a heart attack and died. His mother sued the health authority on his behalf, arguing that he should have been seen by a doctor, who should have intubated him (inserted a tube into his throat to help him breathe), and that it was the failure to do this which caused his death. The doctor on duty at the time maintained that even if she had seen the boy she would not have intubated him, which meant that the court had to decide whether she would have been negligent in not doing so. The doctor was able to produce an expert witness to say that intubation would not have been the correct treatment, and the claimant was able to produce one who said it would.

In this situation, the **Bolam** principle had always been taken as suggesting that the doctor was therefore not negligent – other medical opinion might disagree with what she did, but...
she could produce evidence that it was a practice accepted by a responsible body of medical opinion. Lord Browne-Wilkinson, delivering the leading judgment with which the others agreed, thought differently. While agreeing that the Bolam test was still the correct one to apply, he said that the court was not obliged to hold that a doctor was not liable for negligence simply because some medical experts had testified that the doctor’s actions were in line with accepted practice. The court had to satisfy itself that the medical experts’ opinion was reasonable, in that they had weighed up the risks and benefits, and had a logical basis for their conclusion. He then went on, however, to water down this statement by suggesting that in most cases the fact that medical experts held a particular view would in itself demonstrate its reasonableness, and that it would only be in very rare cases that a court would reject such a view as unreasonable. The case before the House of Lords, he concluded, was not one of those rare situations, and so the claimant’s claim was rejected.

Legal Principle
Although the Bolam test still applies, a court is not obliged to find a doctor not liable for negligence purely because other medical experts have testified that his or her actions were correct.

However, there are some signs that Bolitho is being used more forcefully, to hold medical opinion to a proper standard of reasonableness. In Marriott v West Midlands Regional Health Authority (1999), the claimant had suffered a head injury after a fall at home; he spent the night in hospital but was discharged the next day after tests. After continuing to feel ill for a week, he called his GP, who could find nothing wrong but told Mrs Marriott to call him again if her husband’s condition got any worse. Four days later, Mr Marriott became partially paralysed, and this was later discovered to be a result of the original injury. He claimed that the GP had been negligent in not referring him back to the hospital, given that the GP did not have the resources to test for the condition which he was eventually found to have. At trial, Mr Marriott’s expert witness claimed that, given the symptoms Mr Marriott had shown, the GP should have sent him back to the hospital for more tests; however, the GP brought expert evidence to suggest that, although this would have been a reasonable course of action, keeping a patient at home for review was equally reasonable in the circumstances.

The old Bolam approach would have required the judge to find for the GP, given that he could prove that a reasonable body of medical opinion supported his actions, but, following Bolitho, the trial judge looked at the reasonableness of this opinion, given the risk to Mr Marriott, and concluded that, in the circumstances, deciding to review his case at home, without asking for further tests, was not a reasonable use of a GP’s discretion. He therefore found the GP negligent. The Court of Appeal upheld his approach: a trial judge was entitled to carry out his own assessment of the risk in the circumstances, and was not bound to follow the opinion of a body of experts.

The use of the Bolam test has been extended to cover not just other professionals, but also defendants who do not have the skills of a particular profession, but have made a decision or taken an action which professionals in the relevant area might disagree about. In Adams and another v Rhymney Valley District Council (2000), the claimants were a family whose children died when fire broke out in the house they rented from the defendant council. The house had double-glazed
windows which could only be opened with a key, and the claimants had been unable to smash the glass quickly enough to save the children. They argued that the council had been negligent in providing this type of window, and the issue arose of whether it was correct to decide this by applying the Bolam test, given that the council were not window designers. The court held that it was. They pointed out that, in deciding on the window design, the council had to balance the risk of fire against the risk of children falling out of a more easily opened window, and professional opinions varied on how this balance should be struck. If a reasonable body of experts in the field would consider that the council’s window design struck this balance in an acceptable way, and the court accepted this view as reasonable, there was no negligence, even though other experts might disagree, and even though the council had neither consulted experts, nor gone through the same processes when choosing the design as an expert would have done.

**Standards of skill**

It was also established in Bolam (and Bolitho does not affect this point) that where a defendant is exercising a particular skill, he or she is expected to do so to the standard of a reasonable person at the same level within that field. No account is taken of the defendant’s actual experience, so that a junior doctor is not expected to have the same level of skill as a consultant, but is expected to be as competent as an average junior doctor, whether he or she has been one for a year or a week. This principle was upheld in Djemal v Bexley Heath Health Authority (1995) where the standard required was held to be that of a reasonably senior houseman acting as a casualty officer (which was the defendant’s position at the time), regardless of how long the defendant had actually been doing that job at that level.

The standard of care imposed is only that of a reasonably skilled member of the profession; the defendant is not required to be a genius, or possess skills way beyond those normally to be expected. In Wells v Cooper (1958) the defendant, a carpenter, fixed a door handle on to a door. Later the handle came away in the claimant’s hand, causing him injury. It was held that the carpenter had done the work as well as any ordinary carpenter would, and therefore had exercised such care as was required of him; he was not liable for the claimant’s injury.

In Balamoan v Holden & Co (1999) the defendant was a solicitor who ran a small town practice, in which he was the only qualified lawyer. The claimant consulted him over a claim for nuisance. During the following two years, he had two 30-minute interviews with non-qualified members of the solicitor’s staff, but no contact with the defendant himself. At the end of that time, he was advised that his claim was worth no more than £3,000, and when he refused to accept that advice, his legal aid certificate was discharged and he stopped using the firm. He went on to conduct the nuisance case himself, and won a settlement of £25,000. He then sued the solicitor, arguing that, but for the solicitor’s negligence in, for example, failing to gather all the available evidence at the time, he could have won £1 million in damages. The Court of Appeal held that the solicitor was only to be judged by the standard to be expected of a solicitor in a small country town (rather than, for example, a specialist firm which might have expert knowledge of big claims). However, if such a solicitor delegated the conduct of claims to unqualified staff who could not come up to that standard, the solicitor could be held negligent.

**A duty to explain?**

In Chester v Afshar (2004), the House of Lords seemed to be suggesting that professionals had a duty not only to take reasonable steps to make sure their advice was right, but also to explain the
thinking behind that advice. The claimant had been operated on by the defendant surgeon to treat a back problem. When recommending the surgery, the surgeon had made no mention of any risk of things going wrong. After the operation, the claimant suffered severe nerve damage, which caused paralysis in one leg. She later discovered that this was a known, if unusual, risk of the surgery. She sued the doctor.

The House of Lords found that the doctor had not been negligent in the way he carried out the operation; the paralysis was something that could happen even when the surgery was carried out properly, as it had been here. But they stated that the surgeon had been negligent in not warning the claimant of the risk, however slight it might be. The patient had a right to choose what was or was not done to her, and she could only exercise this right if given full information. Providing such information was therefore part of the doctor's duty of care.

It was not clear from the judgment in Chester whether the duty to warn applied only in medical negligence cases, or in all cases involving professionals, but subsequent cases have suggested that it is, at the very least, much less likely that a duty to warn would be owed in non-medical situations. In Moy v Pettman Smith (2005), the defendant was a barrister, who was sued by a client. The claim arose out of another case in which the claimant, Mr Moy, was suing a health authority for medical negligence over an operation that went wrong, and the defendant was his barrister. Part of the evidence in the case was to be a report from an orthopaedic surgeon, but Mr Moy's solicitors failed to get it in time. The barrister's application to have the trial adjourned so that the report could be obtained had initially been refused, but she planned to apply again. At the door of the court, the health authority made a settlement offer of £150,000, but the defendant advised the claimant not to accept it, and said she was hopeful that there would be no problem getting time to present the medical report. In fact, she thought there was around a 50:50 chance of that application being accepted by the court, but reasoned that if the report could not be used, and the result was that Mr Moy won less than he should have, he could sue the solicitors. However, she did not explain any of this to Mr Moy.

On her advice, Mr Moy refused the offer, but, once the hearing got under way, it soon became obvious that the application to produce the extra evidence was not going to succeed, which would weaken the claimant's case. The barrister therefore advised Mr Moy to settle, but by this point the health authority had reduced their offer to £120,000. Mr Moy then sued the barrister, and the question arose as to whether she was negligent in failing to explain fully her thinking about the likelihood of the court accepting the application to submit the medical report. The House of Lords held that she was not. The advice she had given was within the range of advice that could be given by a reasonably competent barrister, and, as long as a barrister gave clear and understandable advice about their recommended course of action, it was not necessary to spell out all the reasoning behind that advice. Similarly, in White v Paul Davidson & Taylor (2004), the Court of Appeal considered whether the Chester duty to explain applied to a claim against a solicitor, and, in Beary v Pall Mall Investments (2005), to a claim against a financial adviser. In both cases, the answer was no.

Changes in knowledge

In areas such as medicine and technology, the state of knowledge about a particular subject may change rapidly, so that procedures and techniques which are approved as safe and effective may very quickly become outdated, and even be discovered to be dangerous.
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In Maguire v Harland and Wolff plc (2005), the claimant was a woman who had contracted the fatal disease mesothelioma, as a result of being exposed to asbestos fibres brought home on her husband’s clothes. The husband worked for the defendant shipbuilding firm, and it was accepted that the firm had been in breach of their duty of care to him, in exposing him to asbestos. Could they also be expected to foresee injury to members of his family from exposure to his work clothes? Today, it is well known that such exposure can result in injury, but the court found that at the time when Mr Maguire was working at the shipyard there had been no information from specialists in workplace safety, or from the medical profession, to suggest that it was necessary or even sensible to protect family members from exposure. Therefore the defendants were not liable to Mrs Maguire.

However, once a risk is suspected, the position may change. In N v UK Medical Research Council (1996), the Queen’s Bench Division looked at this issue. In 1959, the Medical Research Council (MRC) started a medical trial of human growth hormone, which involved giving the hormone to children with growth problems. The children were each given the hormone by one of four different methods. In 1976, the MRC were warned that the hormone could cause Creutzfeldt–Jakob Disease (CJD, which most readers will know is the human form of BSE, the fatal brain disease generally known as mad cow disease – although this litigation has no connection with the controversy over BSE-infected beef). A year later, the MRC were told that two of the four methods of giving the hormone carried a particular risk of transmitting CJD. Ultimately, several of the children who received the hormone died from CJD, and their parents alleged that the MRC had been negligent in not investigating the risk when it was first suggested in 1976, and in not suspending the programme until it was proved safe.

The court held that the failure to look into the risk was negligent, and, if the MRC had looked into it then, failure to suspend the trial programme would also have been negligent.

Special characteristics of the claimant

The standard of care requires that a reasonable person would have due regard to the fact that a claimant has some characteristic or incapacity which increases the risk of harm.
In a number of recent cases the courts have looked at the issue of claimants who are drunk, and whether this amounts to a characteristic which in some way increases a defendant’s duty towards them. In *Barrett v Ministry of Defence*, the case of the drunken naval pilot discussed on p. 55, the Court of Appeal took the view that there is no duty to stop someone else from getting drunk, but, once the claimant was drunk, it accepted that the defendant had assumed some responsibility for protecting him from the consequences of his intoxication, by virtue of the relationship between them and the fact that the defendant had ordered the claimant to be taken to lie down.

However, without such a relationship, it seems there is no general duty to give extra protection to a drunken claimant. In *Griffiths v Brown* (1998), the claimant had got drunk and asked a taxi driver to take him to a particular cashpoint machine. The driver dropped him off on the opposite side of the road from the machine, and he was injured while crossing. He argued that the driver, knowing he was drunk, had a duty not to expose him to the danger of crossing a road. The court rejected this argument: the duty of a taxi driver was to carry a passenger safely during the journey, and then stop at a place where they can get out of the car safely; that duty should not be increased by the fact that the claimant was drunk. However, the court accepted that the duty might be extended if, for example, a passenger who intended to spend the evening drinking arranged for a taxi driver to collect them and see them home safely; this clearly accords with the *Barrett* approach that there may be a duty to protect a claimant from the effects of drunkenness where the defendant has actually done something which amounts to assuming responsibility for such protection.

### Size of the risk

This includes both the chances of damage occurring, and the potential seriousness of that damage. In *Bolton v Stone* (1951), the claimant was standing outside her house in a quiet street when she was hit by a cricket ball from a nearby ground. It was clear that the cricketers could have foreseen that a ball would be hit out of the ground, and this had happened before, but only six times in the previous 30 years.
Chapter 2 Negligence: elements of the tort

Taking into consideration the presence of a 17-foot fence, the distance from the pitch to the edge of the ground, and the fact that the ground sloped upwards in the direction in which the ball was struck, the House of Lords considered that the chances of injury to someone standing where the claimant was were so slight that the cricket club was not negligent in allowing cricket to be played without having taken any other precautions against such an event. The only way to ensure that such an injury could not occur would be to erect an extremely high fence, or possibly even a dome over the whole ground, and the trouble and expense of such precautions were completely out of proportion to the degree of risk.

A case in which the potential seriousness of an injury was decisive is Paris v Stepney Borough Council (above).

Practicality of protection

The magnitude of the risk must be balanced against the cost and trouble to the defendant of taking the measures necessary to eliminate it. The more serious the risk (in terms of both the chances of it happening and the degree of potential harm), the more the defendant is expected to do to protect against it. Conversely, as Bolton v Stone shows, defendants are not expected to take extreme precautions against very slight risks. This was also the case in Latimer v AEC Ltd (1952). Flooding had occurred in a factory owned by the defendants following an unusually heavy spell of rain. This had left patches of the floor very slippery. The defendants had covered some of the wet areas with sawdust, but had not had enough to cover all of them. The claimant, a factory employee, was injured after slipping on an uncovered area, and sued, alleging that the defendants had not taken sufficient precautions; in view of the danger, they should have closed the factory. The House of Lords agreed that the only way to eradicate the danger was to close the factory, but held that given the level of risk, particularly bearing in mind that the slippery patches were clearly visible, such an onerous precaution would be out of proportion. The defendants were held not liable.

Where the defendant is reacting to an emergency, they are then judged according to what a reasonable person could be expected to do in such a position and with the time available to decide on an action, and this will clearly allow for a lesser standard of conduct than that expected where the situation allows time for careful thought.

Common practice

In deciding whether the precautions taken by the defendant (if any) are reasonable, the courts may look at the general practice in the relevant field. In Wilson v Governors of Sacred Heart Roman Catholic Primary School, Carlton (1997), the claimant, a nine-year-old boy, was hit in the eye with a coat by a fellow pupil as he crossed the playground to go home at the end of the day. The trial judge had looked at the fact that attendants were provided to supervise the children during the lunch break, and inferred from this that such supervision should also have been provided at the end of the school day. The Court of Appeal, however, noted that most primary schools did not supervise children at this time; they also pointed out that the incident could just as easily have happened outside the school gates anyway. Consequently the school had not fallen below the standard of care required.

In Thompson v Smith Shipyrepairs (North Shields) Ltd (1984), it was made clear that companies whose industrial practices showed serious disregard for workers’ health and safety would not evade liability simply by showing that their approach was common practice in the relevant
industry. The case involved a claimant who suffered deafness as a result of working in the defendants’ shipyard, and the defendants argued that the conditions in which he worked were common across the industry and therefore did not fall below the required standard of care. Mustill J disagreed, stating that they could not evade liability simply by proving that all the other employers were just as bad. He pointed out that their whole industry seemed to be characterised by indifference to the problem, and held that there were some circumstances in which an employer had a duty to take the initiative to look at the risks and seek out precautions which could be taken to protect workers. He pointed out, however, that this approach must still be balanced against the practicalities; employers were not expected to have standards way above the rest of their industry, although they were expected to keep their knowledge and practices in the field of safety up to date.

Another area where common practice is taken into account is in accidents which take place during sports. In *Caldwell v Maguire and Fitzgerald* (2001), the claimant, Caldwell, was a professional jockey, as were the two defendants. All three were in a race with a fourth jockey, Byrne. At the point where the incident which gave rise to the case happened, Maguire, Fitzgerald and Byrne were neck and neck, with Caldwell close behind. As they approached a bend, Maguire and Fitzgerald pulled ahead in such a way as to leave no room for Byrne. Seeing its path ahead closed off, Byrne’s horse veered across Caldwell’s path, causing him to fall. The defendants were found to have committed the offence of careless riding under the rules of the Jockey Club, which regulates racing practice; this was the least serious of five possible offences concerning interfering with other riders.

Caldwell sued Maguire and Fitzgerald for causing his injuries, but the Court of Appeal found their conduct did not amount to negligence. They confirmed that a player of sports owes a duty to all the other players, and approved the test of negligence in sports used in the earlier case of *Condon v Basi* (1985), which stated that the duty on a player of sports is to exercise such care as is appropriate in the circumstances. The court went on to explain that this would depend on the game or sport being played, the degree of risk associated with it, its conventions and customs, and the standard of skill and judgement reasonably to be expected of players. As a result, the standard of care would be such that a momentary lapse of judgement or skill would be unlikely to result in liability and, in practice, it might be difficult to prove a breach unless the player’s conduct amounted to a reckless disregard for others’ safety. Therefore, in this case, the defendants were not negligent, as, within the circumstances of the horseracing world, careless riding was accepted as part of the sport, even if not approved of.

Players of sport also have a duty to spectators, but the court stated that as, in the normal course of events, spectators would be at little or no risk from players, a player would have to have behaved with a considerable degree of negligence before he or she could be said to have failed to exercise such care as was reasonable in the circumstances.

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**Potential benefits of the risk**

Some risks have potential benefits for society, and it has long been the practice of the courts to weigh such benefits against the possible damage if the risk is taken. This principle was applied in *Watt v Hertfordshire County Council* (1954). The claimant was a firefighter. He was among others called to the scene of an accident where a woman was trapped under a car; a heavy jack was needed to rescue her. The vehicle in which the fire officers travelled to the scene was not designed to carry the jack, and the claimant was injured when it slipped. He sued his employers, but the court held that the risk taken in transporting the jack was outweighed by the need to get
there quickly in order to save the woman’s life. However, the court stated that if the same accident had occurred in a commercial situation, where the risk was taken in order to get a job done for profit, the claimant would have been able to recover.

The Compensation Act 2006 now confirms this position. Section 1 of the Act states that when considering whether a defendant should have taken particular steps to meet a standard of care, a court:

- may . . . have regard to whether a requirement to take such 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.

As the case of Watt shows, s. 1 of the Act does not actually change the law, since the courts already considered the issue of public benefit where they felt it was necessary to do so, and s. 1 does not oblige them to take it into account, but merely confirms that they may.

The Act was passed in July 2006, so it is too early to see its impact, but critics have warned that it could lead to increased litigation. It has been suggested that it may end up being used to create two different standards of care, according to whether or not an activity is deemed ‘desirable’ or not. In his article ‘What compensation?’ (see Reading list), John Leighton Williams QC cites the example of a firefighter trying to claim compensation for being injured at work. Would the fact that fighting fires is likely to be considered a desirable activity mean that he or she would have to prove a higher degree of negligence than workers in other fields would have to? Firefighting might well be something society wants to encourage, but is preventing those injured as a result of such work from claiming compensation really the best way to do so?

Leighton Williams also makes the point that differentiating between desirable activities and others may lead individuals to believe they can take unacceptable risks, on the assumption that if anything goes wrong, they will not be held to account because they are leading Scouts on a climbing holiday, or taking a group of pupils skiing, and those activities would be considered desirable.

In Cole v Davis-Gilbert (2007), the Court of Appeal specifically mentioned the danger of setting standards of care so high that they discourage socially useful activities. The case arose after Ms Cole was walking across a village green, and stepped into a hole, breaking her leg. The hole had been used to hold a maypole for a village fête, and was dug by the local British Legion, who organised the fête. After the pole had been removed, they had filled in the hole, but, by the time of Ms Cole’s accident, it had been left open again. It was not known how this happened, but the court assumed it was probably done by children playing on the green. The court held that the British Legion was not in breach of its duty to people walking on the green, because its members had taken reasonable steps to fill in the hole; equally, the landowners, who were also sued, were reasonable in assuming the hole had been filled in and were not liable either. The court commented that it was important not to set a higher standard of care than what was reasonable, because an unreasonable standard would eventually mean that events like village fêtes could not take place at all.
The negligence must cause damage; if no damage is caused, there is no claim in negligence, no matter how careless the defendant’s conduct. In the vast majority of cases this is not an issue: there

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**Table 2.1** The standard of reasonableness

<table>
<thead>
<tr>
<th>Factors in favour of the defendant</th>
<th>Factors in favour of the claimant</th>
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<tbody>
<tr>
<td>The damage was not very likely to happen</td>
<td>The damage was very likely to happen</td>
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<tr>
<td>The damage was not very likely to be serious</td>
<td>The damage was very likely to be serious</td>
</tr>
<tr>
<td>It would have been difficult and/or expensive to take precautions against the risk</td>
<td>Taking precautions against the risk would have been simple and inexpensive</td>
</tr>
<tr>
<td>The precautions taken were in line with common practice, or it was not common practice to take precautions against this risk</td>
<td>It was common practice to take precautions against this risk, or better precautions than the defendant took</td>
</tr>
<tr>
<td>The risky activity had social benefits</td>
<td>There were no social benefits associated with the risky activity</td>
</tr>
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**Topical issue**

**Behind the headlines**

Negligence cases often reach the news and, once you know a little about tort law, you will discover that they are often misrepresented. This certainly happened with much of the coverage of *Harris v Perry* (2008), a case in which a young boy was injured while playing in a bouncy castle that had been hired for a friend’s birthday party. When, at first instance, the claimants won their case, it was widely reported in the press that the parents who had hired the castle would have to pay damages of over £1 million, and that the case was an example of the ‘compensation culture’, in which people seek to blame someone and get compensation for even the most minor injury. The facts of the case did not, however, fit this picture. First, the Perrys, like most householders, had home insurance, and it was their insurers who would have to pay the damages (in practice, it is extremely unlikely that an ordinary person without such insurance would be sued for negligence). In taking premiums from the Perrys, the insurance company was accepting the risk that they might, one day, have to pay out on the policy, which they would have assessed as a risk worth taking, in the knowledge that they might equally well have been able to take the premiums for years and years and never have to pay a penny on the policy. Secondly, the boy injured in the castle suffered severe brain damage, and will need 24-hour care for the rest of his life. His parents were not seeking to get rich at the expense of someone else, but to be able to pay for that care. Interestingly, when the case was appealed, and the defendants won, very few newspapers bothered to report the decision prominently. At the time of writing, the Harrises were planning to appeal to the House of Lords.
will be obvious personal injury, damage to property or economic loss. However, there are cases where the claimant perceives that the defendant’s negligence has caused damage, yet the law does not recognise the results of that negligence as damage. The cases discussed in this section give an insight into how the law decides what is damage and what is not.

The issue of damage to property was the subject of Hunter v Canary Wharf Ltd and London Docklands Development Corporation (1997). The case arose from the construction of a tower block at Canary Wharf in East London. An action concerning the effects of the construction work was brought by local residents, and one of the issues that arose from the case was whether excessive dust could be sufficient to constitute damage to property for the purposes of negligence. The Court of Appeal concluded that the mere deposit of dust was not in itself sufficient because dust was an inevitable incident of urban life. In order to bring an action for negligence, there had to be damage in the sense of a physical change in property, which rendered the property less useful or less valuable. Examples given by the court included excessive dust being trodden into the fabric of a carpet by householders in such a way as to lessen the value of the fabric, or excessive dust causing damage to electrical equipment.

A very different issue was examined in R v Croydon Health Authority (1997) and McFarlane v Tayside Health Board (1999); could the birth of a child be considered damage? In R v Croydon Health Authority, an employee of the defendant had routinely examined the claimant, a woman of childbearing age, and found that she was suffering from a life-threatening heart condition, which could be made worse by pregnancy. The claimant was not told this, and went on to become pregnant and have a child. Although she did want a child, the claimant claimed she would not have become pregnant if she had known of the danger to herself in doing so. In addition to claiming for the fact that her heart condition was made worse by the pregnancy, she claimed for the expenses of pregnancy and the cost of bringing up the child, and was successful at first instance. The defendant appealed against the award of damages for the costs of pregnancy and bringing up the child. The Court of Appeal supported its view: where a mother wanted a healthy child and a healthy child was what she got, there was no loss. The court emphasised that a key factor in this case was that the claimant had wanted a child; the decision might be different, it was suggested, when a child was not wanted.

However, when this issue was addressed in McFarlane v Tayside Health Board, the House of Lords found it impossible to view as damage the birth of a healthy child, even to parents who had expressly decided that they did not want more children (the case is a Scottish one, but has been treated as representing English law too). The claimants were a couple who had four children, and decided that they did not want any more, so Mr McFarlane had a vasectomy. After he was wrongly advised that the operation had been successful, Mrs McFarlane became pregnant again, and gave birth to a healthy daughter. The couple sought to sue the health authority, with Mrs McFarlane claiming damages for the pain and discomfort of pregnancy and birth, and both claimants claiming for the costs of bringing up the child.

The House of Lords allowed the claim for pain and discomfort, pointing out that tort law regularly compensated for pain arising from personal injury, and there was no reason to treat pregnancy as involving a less serious form of pain. But they refused to allow the claim for the costs of bringing up the child, although there was some difference of opinion as to why. Lords Slynn and Hope simply argued that this was pure economic loss and it was not fair, just and reasonable to impose a duty on the health board to prevent such loss. Lords Steyn and Millett based their decision more on policy grounds, stating that the birth of a normal, healthy baby was universally regarded as a blessing, not a detriment, and therefore could not be viewed as damage. Lord Millett pointed out that although there were disadvantages involved in parenthood (cost being one), they
were inextricably linked with the advantages, and so parents could not justifiably seek to transfer the disadvantages to others while themselves having the benefit of the advantages.

Both cases focused on the fact that the baby was healthy, and in McFarlane the House of Lords specifically declined to consider what the position is when a baby is born handicapped, who would not have been born at all if it were not for a defendant’s negligence. The implication seemed to be that they might be prepared to allow that the birth of a child with disabilities could be considered damage in a way that having a healthy child did not, which said little for their approach to disabled people. (Note that what we are talking about here are cases where a disabled baby would not have been born at all, but for the defendant’s negligence; this is not the same as cases where a baby would have been born healthy, but the defendant’s negligence has caused its disability. There is no question that the latter type of case is accepted as damage, in the form of personal injury to the child.)

Not long afterwards, the question of whether the situation would be different if an unwanted child born as a result of negligence did turn out to be disabled arose before the Court of Appeal in Parkinson v St James and Seacroft University Hospital (2001). The claimant, Mrs Parkinson, and her husband had four children, and had decided they neither wanted nor could afford any more, so Mrs Parkinson was sterilised. Because of the hospital’s admitted negligence, the operation did not work, and Mrs Parkinson became pregnant again. The child was born with severe disabilities, and Mrs Parkinson claimed for the costs of bringing him up. At first instance the court refused to allow her to claim the basic costs of his maintenance (the amount it would have cost to bring him up if he had not been disabled), following McFarlane. However, the judge said she could claim the extra costs which arose from her son’s disability. The hospital appealed.

The Court of Appeal allowed Mrs Parkinson’s claim for these extra costs (though not the basic costs), and, in her judgment, Hale LJ addressed the issue of whether the birth of a disabled child could be considered damage, if that of a healthy one could not. In doing so, she looked again at the reasoning in McFarlane. She argued that one of the most important rights protected by the law of tort was that of bodily integrity – the right to choose what happens to one’s own body, and not to be subjected to bodily injury by others. The processes of pregnancy and childbirth, if unwanted, were a serious violation of this right, denying a woman the chance to decide what happened to her own body, and causing discomfort and pain. In addition, she pointed out that childbearing impacts on a woman’s personal autonomy, saying that ‘One’s life is no longer just one’s own, but also someone else’s’. Mothers-to-be are expected to alter what they eat, drink and do to safeguard the baby, while after the birth there is a legal responsibility to look after the child, which includes a financial burden. As a result, she said, it was clear that where an unwanted pregnancy happened as a result of negligence, its consequences were capable of giving rise to damages. However, she went on, it was also necessary to take into account the fact that children bring benefits to their parents, and, since it was impossible to calculate these, the fairest assumption was that they were sufficient to cancel out the costs. This was what the House of Lords had assumed in McFarlane.

Applying this reasoning to the birth of a disabled child, she said that allowing a claim for the extra costs associated with disability made sense. It was acknowledging that a disabled child brought as much benefit to his or her family as any other child, but that, as he or she would cost more to bring up, the costs were not cancelled out. Therefore, the extra expense should be recoverable.

The same issue took a slightly different shape in Rees v Darlington Memorial Hospital NHS Trust (2002). Here the claimant was a disabled woman, who was almost blind as a result of a hereditary condition. Because of her disability, she did not want to have children, and so chose to be sterilised. The operation was performed negligently, and the claimant had a son, who was not disabled. She was a single parent, and claimed, not for the basic costs of bringing up her son, but for the extra costs of doing so that were caused by her disability.
Chapter 2  Negligence: elements of the tort

The Court of Appeal had said that Ms Rees was entitled to compensation for these extra costs, but the House of Lords rejected the claim. As in McFarlane, they allowed the claimant compensation for the pain and stress of pregnancy and birth, but they refused to give compensation for any of the costs of bringing up a child. By a majority, they confirmed the reasoning in McFarlane, that a child should not be seen in terms of an economic liability, and that the benefits of having a child could not be quantified. They said that the idea of giving someone compensation for the birth of a healthy child would offend most people, especially as that money would come from the hard-pressed resources of the NHS.

However, they said that it was clear that where a defendant’s negligence had brought about a pregnancy and birth which the mother did not want and had asked them to prevent, a legal wrong had been done that went beyond the pain and suffering of birth and pregnancy. As examples of the harm this could cause, Lord Bingham cited the situation of a single mother who might already be struggling to make ends meet and would now not only have another child to feed, but also face a longer period before she could work longer hours and earn more money; or the situation of a woman who had been longing to start or resume a much-wanted career, and was now prevented from doing so. The House of Lords held that there should be a financial recognition of this loss, and awarded Ms Rees £15,000 in addition to the compensation for pain and suffering.

The House also took the opportunity to consider whether Parkinson had been correctly decided, and said that it was; where a child born as the result of a defendant’s negligence was disabled, the parents could claim for the extra costs associated with his or her disability.

The House of Lords recently shed some more light on how they assess the presence of damage in Rothwell v Chemical & Insulating Co (2007). This is the case discussed on p. 41, where the claimants had been exposed to asbestos, which caused pleural plaques, a form of scarring on the lungs. Pleural plaques themselves cause no symptoms, nor do they make it more likely that a person will suffer an asbestos-related illness, but, because they show that asbestos has entered the lungs, they do indicate that a person is at risk of asbestos-related illness. As a result, they caused severe anxiety in the claimants. The House of Lords considered whether the plaques could be considered to be damage, and concluded that they could not. It was clear that the plaques were a physical change in the claimants’ bodies; the court was shown photos of the scarring on the men’s lungs. But, the House of Lords said, physical change in itself did not mean damage. For there to be damage, the change had to be something which made the claimants worse off in some way, whether physically or economically or both. The plaques themselves had no effect on the claimants’ health, and so they could not be considered to be damage.

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Is sperm property?

Advances in medical knowledge can result in novel questions coming before the courts, and this was the case in Yearworth and others v North Bristol NHS Trust (2009). The claimants in the case were all men who had undergone chemotherapy treatment for cancer. This kind of treatment can leave men sterile, and so it has become common for hospitals to offer patients the chance to have a sperm sample frozen under medical conditions, so that they still have at least a chance of having children if they later want to. The storage and use of such samples is regulated by the Human Fertilisation and Embryology Act 1990, which lays down rules about who can store the samples and how they can be used.
The claimants’ sperm samples had been stored by one of the defendant’s hospitals but, owing to negligence, they had been allowed to thaw, making them useless. The claimants sued the NHS Trust for negligence.

The Trust admitted that it had a duty of care to take reasonable care of the samples, and that it had breached this duty. However, it denied liability because, it argued, the loss of the samples was not damage of a kind that was recognised in the law of negligence. There were two possible ways in which the destruction of sperm could be classified as damage: either its destruction was a personal injury to the men who provided it, or, alternatively, the sperm could be considered to be the men’s property. In making the argument that the damage was personal injury, the claimants’ lawyer said that the sperm had been inside the men’s bodies, and, if it had been damaged there, that would clearly have counted as a personal injury. Why, he argued, should the situation be any different because the sperm had been ejaculated? He went on to argue that the sperm was different from body parts which were intended to be discarded, such as nail clippings or amputated limbs, because it was always intended to be kept, the purpose of keeping it was exactly the same as the purpose it had while still in the men’s bodies, namely to fertilise an egg and create a baby, and it was still biologically active and therefore had a ‘living nexus’ or connection with the men.

The Court of Appeal dismissed these arguments, stating that ‘it would be a fiction to hold that damage to a substance generated by a person’s body, inflicted after its removal for storage purposes, constituted a bodily or “personal injury” to him’. They provided little reasoned explanation for this conclusion, beyond saying that to accept destruction of the sperm as personal injury would ‘generate paradoxes, and yield ramifications, productive of substantial uncertainty, expensive debate and nice distinctions in an area of law which should be simple, and the principles clear’.

The Court of Appeal therefore considered the alternative argument, that the sperm was the men’s property. The Trust’s lawyers had argued that the sperm could not be considered property, because the Human Fertilisation and Embryology Act 1990 had so restricted the rights that would normally go with ownership that it was no longer possible to say the men owned the samples. For example, the Act includes provisions that only organisations licensed under the Act can store the samples and use them to bring about a pregnancy, so it would not have been possible for the men to ask for the samples back and have them stored somewhere else, or to store them themselves. The Court of Appeal disagreed. They said that the men’s bodies had produced the sperm, and the reason for giving the sperm samples was that it could later be used for their benefit. They agreed that the Act restricted the men’s use of the samples, but pointed out that many statutes imposed restrictions on the use of property, without suggesting that this means the owner does not own it – for example, planning laws restrict a landowner’s choice of how to use their land, but that does not mean that the land is not property or not owned. They further pointed out that, as well as placing restrictions on what they could do with the sperm, the Act also gave the men rights over it, such as that the men could at any time withdraw their consent to having the sperm stored, and no one else would have any right that could override that. They also pointed out that the men’s recognised rights over the sperm, namely to decide its future use, exactly coincided with the result of the Trust’s breach of duty, which was to prevent its future use. They therefore agreed that the sperm samples could be regarded as property, and so there could be liability in negligence for their destruction.
How far does the law of negligence impose a duty not to cause economic loss?

This essay question offers plenty of opportunity to use the information in the sections on economic loss. You should begin by talking about the nature of economic loss, and distinguishing between economic loss caused by physical injury or damage to property, and pure economic loss, perhaps using the case of *Spartan Steel v Martin* to illustrate the difference.

You can then go on to explain that as far as economic loss caused by personal injury or property damage is concerned, the existence of a duty of care is not problematic; if negligence causing these types of damage is proved, then the defendant will also be liable to compensate the claimant for resulting economic loss, within the rules of causation and remoteness. Then you can get into the real point of the essay: the issue of pure economic loss.

It would be useful to begin your discussion with a brief summary of the historical development of the law in this area, as discussed in this chapter, but do not get too bogged down: a simple recital of what happened first and what happened next and what happened after that will not earn you too many marks. Outline the development, but, in doing so, make it clear that you know not just what happened, but why, by discussing the reasons why the courts pulled back after *Junior Books v Veitchi*.

The biggest part of your essay should be a discussion of what the law on pure economic loss is now. Talk about those situations in which a duty of care will exist, looking in detail at the *Hedley Byrne* principles, as extended by *Henderson v Merrett Syndicates* and the ‘wills cases’. You should also discuss the situations where a duty of care with regard to pure economic loss will not exist, namely defective products (see Chapter 6) and negligent acts other than provision of services.

The question asks how far there is a duty not to cause economic loss, but to win yourself some more marks, finish your essay with a discussion of how far there should be such a duty. The material on problems with the law on economic loss will be useful here.

The law of negligence is intended to encourage people and organisations to take care not to cause injury or loss to others. How well do the rules about the standard of care in negligence fulfil this intention?

The first thing to notice here is that you are specifically asked to talk about the rules concerning the standard of care, so even though there is a lot of material on duty of care and the operation of negligence law in practice that is relevant to the issue of whether the law encourages care for the safety of others, in this essay you must stick to discussing the rules on the standard of care.

A good way to start would be to outline the basis of these rules: the standard of reasonableness; the objective approach; and the factors which the courts will weigh against each other to assess reasonableness. You can then go on to discuss each of these areas in more detail, stating how they operate to discourage dangerous behaviour, and highlighting any ways in which they fail to do this. As regards the objective standard,
you could point to the fact that it can be vague, and in some cases unachievable. The case of *Nettleship v Weston* is relevant here, and in discussing it you should talk about the implications of insurance in negligence cases: the standard of driving imposed in *Nettleship* may not discourage unsafe driving, since a learner driver is unlikely to be able to reach that standard however hard they try, but what it does do is ensure that the financial risk is borne by the party who is insured and therefore able to pay. Similar comments apply to the rules on defendants whose conduct is affected by an infirmity over which they have no control, as in *Roberts v Ramsbottom*. You could contrast this with *Mansfield v Weetabix*, where the standard imposed seems more in keeping with the aim of promoting care, and yet its practical effect was to leave the injured claimant uncompensated, even though the defendant was insured.

In discussing the rules on special characteristics of the defendant, you should talk about the special rules for professionals, and in particular doctors. Discuss the criticisms made of *Bolam v Friern Barnet Hospital Management Committee*, and the idea that doctors are in effect allowed to set their own standard of care; how far can such rules effectively discourage medical negligence? Consider whether *Bolitho v City & Hackney Hospital Authority* has made a difference.

You should also point out that the rules on practicality of protection mean that defendants are not required to eliminate risk, only to take reasonable precautions. The cases of *Latimer v AEC* and *Bolton v Stone* are relevant here.

To extend the coverage of your essay, you could discuss the fact that in some cases the law’s emphasis on promoting care in individuals ignores the wider picture and can result in injustice to claimants. On the issue of risks unknown at the time when the defendant acted, you can point out that there is no liability for damage caused as a result of such risks, and this can be justified by the argument that defendants cannot be expected to take care to avoid risks which are not known by anyone to exist. You can then go on to explain that this approach can be unfair to the claimant, whose injury will often result in some advance in knowledge that benefits others (as in *Roe v Minister of Health*) yet remains uncompensated because of the law’s focus on individual fault.

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**Summary of Chapter 2**

Negligence has three main elements:

- a duty of care;
- breach of the duty;
- damage caused by the breach.

**Duty of care**

Duty of care is a legal concept which dictates whether one party can be liable to another in negligence. The test for a duty of care has varied over the years, but the current main test comes from *Caparo v Dickman* (1990):
Is the damage reasonably foreseeable?
Was there a relationship of proximity between claimant and defendant?
Is it just and reasonable to impose a duty of care?

The test has been modified for cases which involve:
- economic loss;
- psychiatric injury;
- omissions;
- acts of third parties;
- special groups.

**Duties of care: economic loss**
Cases involving pure economic loss use a duty of care test developed in *Hedley Byrne v Heller* (1963), which requires:
- a ‘special relationship’ between the parties;
- a voluntary assumption of responsibility by the defendant;
- reliance on that advice;
- that it was reasonable to rely on the advice.

Recent cases have allowed liability without reliance, in limited situations.

Problems with the law on economic loss:
- too few/too many restrictions;
- overlap with contract law;
- lack of clarity.

**Duties of care: psychiatric injury**
The initial duty of care test for psychiatric injury cases contains two elements:
- Is there a recognised psychiatric injury?
- Was the claimant:
  - physically injured as well as psychiatrically (a primary victim)?
  - in danger of physical injury (also a primary victim)?
  - a witness to the incident in some way while not themselves in physical danger (called a secondary victim)?

The first two types of claimant can claim under the normal rules of negligence. For secondary victims, three further tests apply:
- Do they have a recognised psychiatric illness, caused by a sudden shock?
- Are they within a class of people that the law allows to claim compensation for psychiatric injury as a secondary victim?
- What was their proximity to the shocking event?

Problems with the law on psychiatric injury:
- the position of rescuers;
- the ‘closeness of relationship’ rules;
Summar of Chapter 2

- the proximity requirements;
- the ‘sudden shock’ requirement.

Duties of care: omissions
Negligence generally imposes liability for things people do, not things they fail to do, but there are some situations where a defendant may be liable for an omission to act:
- where the defendant has a high degree of control over the claimant;
- where the defendant has assumed responsibility for the claimant in some way;
- where the defendant creates a dangerous situation, and fails to deal with it.

Duties of care: acts of third parties
Negligence usually imposes liability only on the person who causes damage, but there are five situations where someone may be liable for damage done by another:
- vicarious liability;
- where there is a relationship of proximity between claimant and defendant;
- where there is a relationship of proximity between the defendant and the party causing damage;
- where the defendant negligently creates a source of danger;
- where the defendant knew/had reason to know a third party was creating a risk on their property.

Duties of care: special groups
A number of special groups have become subject to special rules on when they will owe a duty of care in negligence, although the Caparo test is still the basis of liability. They are:
- the police;
- other emergency services;
- the armed forces;
- local authorities and public bodies.

The European Court of Human Rights cases of Osman v UK (1998) and Z v UK (2001) have suggested that there may have to be some restrictions on the way the courts treat special groups.

Breach of a duty of care
A defendant will be in breach of their duty of care if their behaviour falls below the standard of behaviour reasonably to be expected in someone doing what they are doing.

The test is objective, and is known as the standard of reasonableness; it requires the defendant to take reasonable precautions, not to eliminate every possible risk.

In deciding on the standard to be expected, the courts weigh up a number of factors:
- special characteristics of the defendant;
- special characteristics of the claimant;
- the size of the risk;
- how far it was practical to prevent the risk;
- common practice in the relevant field;
- any potential benefits to society from the activity that caused the risk.
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Damage
The defendant will only be liable if the negligence causes damage. The usual types of damage are:

- personal injury;
- damage to property;
- economic loss.

In a series of cases, the courts have decided that the birth of a baby, even if unwanted, is not damage.

Reading list

Text resources

Morgan, J (2005) ‘Slowing the expansion of public authority liability’ 121 Law Quarterly Review 43
Woolf, Lord (2001) ‘Are the courts unnecessarily deferential to the medical profession?’ 9(1) Medical Law Reports 1–16

Reading on the Internet

The Law Commission’s 1998 report on liability for psychiatric injury can be read at: http://www.lawcom.gov.uk/lc_reports.htm
The European Court of Human Rights judgment in Z v UK (2001) can be read at: http://www.echr.coe.int/ECHR/
The House of Lords judgment in Sutradhar v Natural Environmental Research Council (2006) can be read at: http://www.echr.coe.int/ECHR/
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The House of Lords judgment in **White v Chief Constable of South Yorkshire** (1998) can be read at:
http://www.parliament.the-stationery-office.co.uk/pa/ld199899/ldjudgmt/jd981203/white01.htm

The House of Lords judgment in **Alcock v Chief Constable of South Yorkshire** (1992) can be read at:
http://www.bailii.org/uk/cases/UKHL/1991/5.html

The House of Lords decision in **Chief Constable of Hertfordshire v Van Colle** (2008) and **Smith v Chief Constable of Sussex** can be read at:
http://www.parliament.the-stationery-office.co.uk/pa/ld200708/ldjudgmt/jd080730/vanco-1.htm

The Court of Appeal judgment in **D v East Berkshire NHS Trust** (2003) can be read at:
http://www.parliament.the-stationery-office.co.uk/pa/ld200405/ldjudgmt/jd050421/east-2.htm

Visit [www.mylawchamber.co.uk/elliottquinntort](http://www.mylawchamber.co.uk/elliottquinntort) to access study support resources including interactive multiple choice questions, practice exam questions with guidance, weblinks, glossary, glossary flashcards, and legal updates, all linked to the Pearson eText version of Tort Law which you can search, highlight and personalise with your own notes and bookmarks.

Use Case Navigator to read in full the key cases referenced in this chapter:
- **Caparo Industries plc v Dickman and others** (1990)
- **Chester v Afshar** (2004)
- **Commissioners of Customs and Excise v Barclays Bank plc** (2006)
- **D v East Berkshire Community Health NHS Trust and others** (2005)
- **Henderson v Merrett Syndicates Ltd** (1994)
- **Hunter v Canary Wharf Ltd and London Docklands Development Corporation** (1997)
- **MAK v Dewsbury Healthcare Trust; RK v Oldham NHS Trust** (2003)
- **Phelps v Hillingdon London Borough** (1998)
- **Stovin v Wise (Norfolk County Council, third party)** (1996)
- **Sutradhar v Natural Environment Research Council** (2006)
- **White and others v Chief Constable of the South Yorkshire Police and others** (1999)