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TUTORIAL QUESTIONS
PART 1: INTRODUCTION TO TORT

1 DICTIONARY DEFINITION

1.1 tort n. Law a breach of duty (other than under a contract) leading to liability for damages. [Middle English via Old French from medieval Latin tortum ‘wrong’, neut. past part. of Latin torquere tort – ‘twist’] Oxford English Dictionary

2 TYPES OF TORT

2.1 The law of tort is concerned with obligations arising under civil law, other than by contractual agreement or the law of trusts. Unlike contractual obligations, most tortious obligations are negative – i.e. things you must NOT do unless you wish to be sued for a remedy.

2.2 Although the law of tort covers a great many unsociable activities, there remain many indiscretions which are not recognised as torts. Thus whilst people who shout into mobile phones on the train, rustle sweet wrappers at the theatre or try to beat toddlers at Snakes and Ladders are certainly annoying, such bad manners do not make them ‘tortfeasors’. Such things are said to be "damnum absque injuria": injuries which does not give rise to legal rights.

2.3 D v. East Berkshire Community Health NHS Trust [2005] 2 AC 373 (HL)

"The world is full of harm for which the law furnishes no remedy. For instance, a trader owes no duty of care to avoid injuring his rivals by destroying their long-established businesses. If he does so and, as a result, one of his competitors descends into a clinical depression and his family are reduced to penury, in the eyes of the law they suffer no wrong and the law will provide no redress – because competition is regarded as operating to the overall good of the economy and society. A young man whose fiancée deserts him for his best friend may become clinically depressed as a result, but in the circumstances the fiancée owes him no duty of care to avoid causing this suffering. So he too will have no right to damages for his illness. The same goes for a middle-aged woman whose husband runs off with a younger woman. Experience suggests that such intimate matters are best left to the individuals themselves. However badly one of them may have treated the other, the law does not get involved in awarding damages.” per Lord Rodger at para 10

2.4 On the other hand, wise people should not engage in the following activities...

NEGLIGENCE: By far the most common tort, the ambit of legal negligence is strictly controlled by the courts. Mere careless behaviour will not do. There must be a breach of a recognized duty of care which has caused foreseeable loss or damage, and even all that might not be enough to ensure a successful claim. Most of this manual is involved in discussing the intricacies of this complex tort.

OCCUPIERS’ LIABILITY: Occupiers of premises owe a special duty in addition to normal ‘negligence’ to consider the safety of those who enter those premises. Originally entirely a common law matter, predating even the modern tort of negligence, Occupiers’ Liability is now governed by two statutes, imaginatively titled the Occupiers’ Liability Act 1957 and the Occupiers’ Liability Act 1984.

PRIVATE NUISANCE: It is a tort unreasonably to interfere with people’s enjoyment of their land. Smoke, noise, vibrations – even perambulating prostitutes – may be targeted here, but only a person with an interest in the land may bring the action.

RYLANDS v. FLETCHER: A rather clumsy name for a largely defunct tort, this is akin to private nuisance. It involves bringing something onto your land which is not naturally there and which may cause injury to your neighbour if it escapes. If it does escape and causes injury – oh dear! Originally applied to a leaking reservoir, it has been known to cover fumes, electricity and even chairs from a fairground ride!
TRESPASS: A direct, unlawful and intentional interference with someone’s property or person. Trespass to land is the most common form of this, but the tort extends to touching people without their consent (battery); threatening immediate battery (assault); preventing people from exercising their freedom of movement (false imprisonment); and generally interfering with their stuff. Unlike negligence, trespass is actionable without proof of any consequent injury – i.e. actionable per se.

DEFAMATION: A tort for the very rich who want to be even richer (but may end up destitute and/or in prison) this involves the publication of an untrue statement which lowers the victim’s reputation in the estimation of right-thinking members of society and causes the victim serious harm. Shout it in the street and it is slander; write it on the wall and it is libel.

PASSING OFF: This is a commercial tort by which one business concern misrepresents itself as being part of, or associated with, another business, and thereby benefits unfairly from the goodwill established by that other business.

3 THE FUNCTION OF THE LAW OF TORT

3.1 There has been much academic and political debate about the function of the tort system.

3.2 As an individual deterrent it arguably has little effect as most torts involve accidents, and people will generally try to avoid accidents whether or not a lawsuit might result. That said, a reputation for committing torts, especially negligence, will not help the members of a professional practice, who might therefore take elaborate steps to avoid it. Also, publishers will try to avoid publishing libel for fear of the excessive damages that could result.

3.3 The immediate interest of the claimants in a tort action is usually to get the activity stopped and/or to claim damages. Where nuisance or trespass is concerned an injunction can be effective, but it is not automatically awarded as the courts consider the wider public interest in preventing an activity, and the tort system may in that respect entirely fail the claimant.

3.4 As far as compensation is concerned, it is clear that many cases are in fact covered by insurance, and insurance companies will fight to avoid paying out on claims to the extent that many claimants are coaxed into accepting inadequate damages or even to give up the claim entirely to avoid the trauma and time of an uncertain hearing.

3.5 It has been suggested that the tort system should be replaced either in whole or in part by a no-fault liability system, as is practised in New Zealand, especially since the social security system is better placed to care for persons who are severely disabled by accidents.

3.6 A partial no-fault system and an enhanced social security system was one of several schemes considered in 1978 by the Royal Commission on Civil Liability and Compensation for Personal Injury (known as the Pearson Commission). However, it all went horribly wrong. The report was widely criticised and when the Conservative government took over shortly afterwards, committed to reducing rather than enhancing the social security system, the whole thing vanished away like the dew in the morn.
4 TYPES OF TORTIOUS DAMAGES

4.1 The usual remedy sought in a tort action is damages, though an injunction may also be required to stop the unlawful behaviour.

4.2 Compensatory damages in tort are designed to put the claimant in the position he would have been in had the tort not been committed (unlike in contract, where they are designed to put him in the position he would have been in had the contract been performed.) Where the damages include compensation for personal injuries, the calculation can be very complex, including actual financial loss, anticipated financial loss and compensation for pain, suffering and loss of amenity.

Livingstone v. Rawyards Coal Co. (1880) 5 App. Cas. 25

“Where any injury is to be compensated by damages, in settling the sum of money to be given for reparation of damages you should as nearly as possible get at that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation. That must be qualified by a great many things which may arise – such, for instance, as by the consideration whether the damage has been maliciously done, or whether it has been done with full knowledge that the person doing it was doing wrong.” per Lord Blackburn at p.39

4.3 Contemptuous damages are extremely uncommon, but are most likely to be awarded in defamation cases. They are awarded when although the claimant has technically won the case, the court considers that the action is contemptible and the case should not have brought. The award is normally for the lowest coin of the realm, and the claimant is unlikely to be awarded costs.

4.4 Nominal damages are awarded where the claimant has technically won, but has not actually suffered any calculable injury: “Damnum sine injuria”. This may be the case where the tort is one, such as trespass, which is actionable per se. The amount awarded is usually about £20.

4.5 Aggravated damages are awarded when the defendant’s behaviour has led the claimant to suffer more than would be normally expected in such a case. For example, defamation may not only have injured the claimant’s good reputation, but also have caused him to lose his job.

4.6 Exemplary/Punitive damages are awarded to punish the defendant for particularly bad behaviour, such as a newspaper editor deliberately publishing a libel, thinking that the profits will probably outweigh any possible damages. They are tantamount to a fine, and so may be seen to impinge upon criminal law. They are thus rare and carefully controlled.

4.7 Conventional awards are made where a claimant has suffered an injury as a result of a breach of duty, but policy demands that a full compensatory award should not be made. Instead a standard, set amount is awarded which is substantially more than nominal damages would be, but not as much as compensatory damages. An example can be seen in Rees v. Darlington Memorial Hospital NHS Trust [2004] 1 AC 309 (HL) which set a somewhat random figure of £15,000 as appropriate for a wrongful birth.
PART 2: THE ELEMENTS OF NEGLIGENCE

5 THE THREE STAGES

5.1 A common definition of negligence is to say that ‘the defendant is liable for all damage caused by his breach of duty to take reasonable care, provided that the damage is not too remote.’

Lochgelly Iron & Coal Co. v. M’Mullan [1934] AC 1 (HL)

“In strict legal analysis, negligence means more than heedless or careless conduct, whether in omission or commission: it properly connotes the complex concept of duty, breach, and damage suffered by the person to whom the duty was owing.” per Lord Wright at p.25

5.2 The famous dictum in Donoghue v. Stevenson breaks the tort into three elements, all of which must be proved by a claimant (unless they already clearly apply).

1. DUTY OF CARE

Not all people who suffer an injury can recover damages against the person who caused it. They must first be in a recognized category of people owed a ‘duty of care’ by the defendant. Lord Atkin calls such people ‘neighbours’, meaning – inter alia – people the defendant ought reasonably to have foreseen might be injured by his actions. However, even ‘neighbours’ may not always be owed a duty of care. The limits of ‘duty’ (and thus of the tort of negligence) are very much driven by considerations of policy. In practice, negligence cases are rarely litigated on a point of whether a duty of care was owed: most negligence cases involve direct personal injury or property damage, and it is well established that there is a duty of care not to cause foreseeable injury or property damage. However, there are still issues relating to pure psychiatric illness and pure economic loss, where the duty of the defendant may be extremely limited, even if he or she is technically at fault.

2. BREACH OF DUTY

Even if the claimant was owed a ‘duty of care’ when he was injured, he can only recover damages if the defendant was in ‘breach’ of that duty. This usually means that the claimant must show that the defendant acted unreasonably in causing the accident, because it is often considered reasonable to take a risk - even with someone else’s safety - if it serves a greater good. Thus, we permit people to drive cars, even though the harm they can is incalculable. The standard of reasonable behaviour is traditionally judged by the ordinary standards of the ‘man on the Clapham omnibus’.

3. FACTUAL CAUSATION & LEGAL REMOTENESS

Even if the claimant can prove that the defendant owed him a duty and breached that duty, he can only recover damages if he can also prove that he has suffered injuries (personal, property or financial) which were both factually caused by the breach of duty, and which were not too ‘remote’ from it as a matter of law (i.e. which were reasonably foreseeable.)

5.3 It is unusual to find a case where all three issues were being contested, but one famous case where all three elements of negligence were at issue is Watson v. British Boxing Board of Control (2001) QB 1134 (CA).

Watson v. British Boxing Board of Control (2001) QB 1134 (CA)

Michael Watson was fighting Chris Eubank for the WBO Super-Middleweight title in a boxing match being held in accordance with the rules of the BBBC. He was knocked unconscious. Due to confusion at the ring it was seven minutes before he was examined by a doctor and he was unable to do much to help, as there was no resuscitation equipment available. It was then 28 minutes before he was taken to North Middlesex hospital from where he then had to be transferred to St. Bartholomew’s Hospital where there was a neurosurgical department. He suffered serious brain damage as a result of a sub-dural haematoma.

The BBBC argued (i) that it did not owe Watson a duty of care; (ii) that if it did, it was not in breach of the duty; (iii) that if it was in breach of the duty, it did not cause the injury by its negligence.
HELD: (i) The BBBC does owe a duty of care to professional boxers who compete according to its regulations. The Board is the sole body controlling professional boxing and it undertakes responsibility for the medical supervision of boxing contests. It is reasonably foreseeable that an omission to provide proper medical supervision could result in an injury, and as a matter of policy there is a sufficient relationship of proximity between the Board and professional boxers for the Board to be held responsible for the safety of the boxers, especially given that the boxers have no control over the activities of the Board. It is thus fair, just and reasonable to expect the Board to provide reasonable facilities for their safety.

(ii) The BBBC was in breach of its duty as it did not do all it reasonably could have to put in place an adequate system for dealing with the injury suffered by Watson, such as having resuscitation equipment available at the ringside and an ambulance ready to go directly to a neurosurgical unit.

(iii) The BBBC had caused the injury, since it was proven on the balance of probabilities that had resuscitation been available at the ringside and had Watson been taken directly to a neurosurgical unit, it was likely that he would have had a significantly improved prognosis. It was also reasonably foreseeable that the lack of such equipment could have led to the injuries in question.

5.4 A recent case where all three elements were in issue was:

**Darnley v. Croydon Health Services NHS Trust [2019] AC 831 (SC)**

On 17 May 2010, the claimant, Michael Darnley, was the victim of an assault. He received a violent blow to the head. A friend drove him to the A&E department of Mayday Hospital, operated by the defendant trust. A receptionist took down the claimant’s details. The complaint was a head injury. The claimant told the receptionist he was in considerable pain. The receptionist told the claimant to wait in the waiting area and added it would be up to 4 to 5 hours before he was seen.

The information which the receptionist gave to the claimant was incorrect. In fact the system was that a triage nurse would examine the claimant within 30 minutes of arrival. That nurse would decide how soon he needed to see a doctor. The volume of work that night meant that many patients had to wait 4 to 5 hours before treatment, but it by no means followed that a patient with a serious head injury would have to wait that long.

After 19 minutes the claimant, who was in pain, decided to go home and take paracetamol. The claimant and his friend got up and left, without notifying the reception staff. A short time later, a triage nurse came to look for the claimant, but by then he had gone. Unfortunately, after the claimant arrived at his mother’s house, his condition deteriorated and he was taken by ambulance back to Mayday Hospital. A CT scan revealed an extradural haematoma. The claimant was transferred for neurosurgery. By then, it was too late to prevent permanent injury. The claimant sustained left sided hemiplegia and long-term disabilities. He claimed that the defendant, via its A&E receptionists, was in breach of its duty of care to him.

Applying the principles of *Caparo v. Dickman*, the Court of Appeal held that it would not be fair, just and reasonable to impose such duty of care on hospital receptionists to patients.

*However, the Supreme Court overturned this decision and found in favour of the claimant.*

**Duty of care** – The case fell within an established category of duty of care for NHS Trusts. Those running A&E departments owed a duty to take reasonable care not to cause physical injury to those who presented themselves complaining of illness or injury, and that duty existed before the patient was treated. Once the appellant had presented at A&E seeking medical attention, had provided the information required by the receptionist and had been "booked in", he entered into a patient/health care provider relationship with the trust and was in a distinct and recognisable situation in which the law imposed a duty of care. The scope of that duty clearly extended to a duty to take reasonable care not to provide misleading information which might foreseeably cause physical injury applied

**Negligent breach of duty** – While it was impossible for A&E receptionists to give each patient accurate information as to precisely when they would be seen by a clinician, it was not unreasonable to require them to take reasonable care not to provide misleading information as to the likely availability of medical assistance. The standard required was that of an averagely competent and well-informed person performing the function of a receptionist at a department providing emergency medical care. In the instant case, the receptionists knew that the standard procedure was to triage head injury patients.
Their usual practice was to tell such patients that they would be seen by a triage nurse as soon as possible, or within 30 minutes. It was not clear why the appellant had not been told that, and it was not unreasonable to require that patients in his position should be given that information, either orally, in a leaflet, or by a prominent notice. The appellant was given incomplete information and was misled as to the availability of medical assistance. Given the trial judge's finding that it was reasonably foreseeable that a person who believed they were facing a four or five hour wait to see a doctor might decide to leave, the provision of such misleading information by a receptionist was negligent.

**Causation** – The appellant had not broken the chain of causation. Three findings made by the trial judge were critical in that regard. First was the finding above. Second was the finding that had the appellant been told that he would be triaged within 30 minutes, he would not have left, his collapse would have occurred within the hospital, he would have undergone surgery sooner than he did, and he would have made an almost complete recovery. Third was the finding that the appellant's decision to leave had been based at least in part on the information given to him by the receptionist.

5.5 Although breaking down the tort of negligence into these three elements is convenient, they overlap with each other to the extent that one judge thought they should be abolished entirely…


"The more I think about these cases, the more difficult I find it to put each into its proper pigeon hole. Sometimes, I say "there was no duty". In others I say: "the damage was too remote." So much so that I think the time has come to discard those tests which have proved so elusive."

per Lord Denning M.R. at p.37

5.6 Furthermore, it is said that Lord Atkin's dictum does not really distinguish between a duty of care and the breach itself, which both seem to rely on a test of reasonable foreseeability. Later attempts have been made to formulate a more comprehensive test, but these have been rife with controversy, particularly in regard to the extent to which POLICY has been allowed to influence the categories of the duty of care.
PART 3: THE DUTY OF CARE IN NEGLIGENCE

6 THE GENESIS OF NEGLIGENCE: Heaven v. Pender

6.1 It has long been recognised that an injury caused by CONTRACTUAL negligence could found a claim for damages. A duty of care was also recognized in certain specific relationships, such as doctor/patient, occupier/invitee etc.

6.2 It was considered, however, that to permit claims in negligence where there was no existing legal relationship between the parties would open the floodgates to an unmanageable number of claims and create an undesirably litigious society.

Winterbottom v. Wright (1842) 10 Meeson and Welsby 109 152 E.R. 402

The defendant, Wright, supplied a mail coach to the Postmaster General under a contract of hire that required him to keep the coach in a fit, proper and secure state. Nathaniel Atkinson was under contract to deliver mail in the said coach, supplying horses and coachmen for the purpose. Winterbottom was a mail-coachman hired by Atkinson to drive the coach.

Due to the negligence of Wright in not maintaining the coach properly, the coach collapsed whilst Winterbottom was driving it. He was thrown from his seat and made lame for life.

As Winterbottom had no contract with Wright, it was held that he had no cause of action either in tort or arising out of contract.

"The only safe rule is to confine the right to recover to those who enter into the contract; if we go one step beyond that, there is no reason why we should not go fifty." per Alderson B. at p.405

"This is one of those unfortunate cases in which there certainly has been damnum, but it is damnum absque injuria; it is, no doubt, a hardship upon the plaintiff to be without a remedy, but by that consideration we ought not to be influenced. Hard cases, it has been frequently observed, are apt to introduce bad law." per Rolfe B. at p.405

6.3 It was clear that if an independent tort of negligence were to be permitted, it would have to be subject to clear – and severe – limitations.

6.4 In his dissenting judgment in Heaven v. Pender, Brett M.R. attempted to identify an independent tort of negligence, subject to the limitation that the duty of care would only be owed in situations where the defendant objectively ought reasonably to have foreseen that his action would cause injury to the claimant. However his analysis was not accepted until Lord Atkin's classic obiter dictum in Donoghue v. Stevenson in 1932.

6.5 Heaven v. Pender (1883) 11 QBD 503 (CA)

A dock owner erected a staging outside a ship in his dock under a contract with the shipowner. The plaintiff was a workman in the employ of a ship painter who had contracted with the shipowner to paint the outside of the ship, and in order to do the painting he stood on the staging, which collapsed and injured him. It was held that he was entitled to damages as the dock owner had a contractual interest in the work in which he was engaged, and so had a duty to ensure that the staging was safe. Brett M.R. also held that, even without the contractual interest, the dock owner would have owed him a duty. Cotton and Bowen L.J.J. did not concur with him on this point.

"If a person contracts with another to use ordinary care or skill towards him or his property the obligation need not be considered in the light of a duty; it is an obligation of contract. It is undoubted, however, that there may be the obligation of such a duty from one person to another although there is no contract between them with regard to such duty... When two drivers or two ships are approaching each other, such a relation arises between them when they are approaching each other in such a manner that, unless they use ordinary care and skill to avoid it, there will be danger of an injurious collision between them. This relation is established in such circumstances between them, not only if it be proved that they actually know and think of this danger, but whether such proof be made or not. It is established, as it seems to me, because anyone of ordinary sense who did think would at once recognise that if he did not use ordinary care and skill under such circumstances there would be such danger.
“And everyone ought by the universally recognised rules of right and wrong, to think so much with regard to the safety of others who may be jeopardised by his conduct; and if, being in such circumstances, he does not think, and in consequence neglects, or if he neglects to use ordinary care and skill, and injury ensues, the law, which takes cognisance of and enforces the rules of right and wrong, will force him to give an indemnity for the injury.” per Brett M.R. at p.507

7 THE NEIGHBOUR PRINCIPLE: *Donoghue v. Stevenson*

7.1 The *obiter dictum* in *Donoghue v. Stevenson* established negligence as an independent tort, but its scope was deliberately restricted (as a matter of policy) by permitting claims only by victims who were *reasonably foreseeable* by the tortfeasor. It was feared that otherwise there would be an unmanageable number of claims and that commercial enterprise would become uninsurable.

*Donoghue v. Stevenson* [1932] AC 562 (HL Scotland)

May M’Alister went with a friend into a Paisley café run by Francis Minchella. The friend bought her a bottle of ginger-beer, which was opaque and sealed. Having consumed half the contents of the bottle, Miss M’Alister discovered the rotten remains of a snail in the bottle. She suffered shock and severe gastro-enteritis as a result, and sued the manufacturer of the ginger beer – David Stevenson – in negligence. The case went to the House of Lords on the issue of whether the manufacturer of a defective product owed a duty of care to the ultimate consumer of it.

The House of Lords held that such a duty did exist and thus established negligence as an independent tort which did not rely on either the existence of a contract or the physical proximity of the parties.

7.2 The *ratio* of *Donoghue v. Stevenson*

“When a manufacturer puts upon a market an article intended for human consumption in a form which precludes the possibility of an examination of the article by the retailer or the consumer, he is liable to the consumer for not taking reasonable care to see that the article is not injurious to health.” per Lord Buckmaster at p.534

7.3 Although this decision importantly established that manufacturers owe a duty of care not to cause physical damage to ultimate consumers, the real significance of the case was the *obiter dictum* of Lord Atkin.

7.4 The *obiter* in *Donoghue v. Stevenson*

In response to concerns that this extension of the law could stifle trade, Lord Atkin delivered his famous ‘neighbour’ speech, explaining the limits of the doctrine of negligence. Negligence can only be proved against a person who owes a ‘duty of care’ not to injure the victim, and such a duty is not owed to everybody. i.e. There are some injuries caused by a defendant for which compensation will not be available. It is not a question of moral right, but one of pragmatic law.

“*In English law there must be, and is, some general conception of relations giving rise to a duty of care, of which the particular cases found in the books are but instances. The liability for negligence, whether you style it such or treat it as in other systems as a species of ‘culpa’ is no doubt based upon a general public sentiment of moral wrongdoing for which the offender must pay. But acts or omissions which any moral code would censure cannot in a practical world be treated so as to give a right to every person injured by them to demand relief. In this way rules of law arise which limit the range of complainants and the extent of their remedy. The rule that you are to love your neighbour becomes in law: You must not injure your neighbour, and the lawyer’s question, Who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who then, in law, is my neighbour? The answer seems to be persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called into question.”* per Lord Atkin at p.580
From this speech we can extract the three requirements for establishing negligence:

i) The Duty of Care must be owed;

ii) The Duty of Care must be breached;

iii) The Breach must cause a foreseeable injury

Although this is a Scottish case, the House of Lords confirmed that “the principles of the law of Scotland on such a question as the present are identical with those of English Law.”

per Lord Atkin p.579

Lord Atkin’s speech raises several issues relating to the Duty of Care.

1. What is a ‘duty of care’?: The duty not to do acts or omissions which you can reasonably foresee would be likely to injure your neighbour.

2. To whom is the duty owed?: The duty is owed only to your ‘neighbour’—a person who is so closely and directly affected by your act that you ought reasonably to have them in your contemplation as likely to be so affected when doing the act in question.

These two criteria for establishing a Duty of Care were not universally accepted by either academics or the judiciary. For one thing, it is not entirely clear what the difference is between them. The second of them—from the test of ‘proximity’—was designed to restrict the potential number of claimants, but the way it is stated by Lord Atkin, it seems to depend simply on reasonable foreseeability, which is also the basis of the first test.

Furthermore, if ‘reasonable foreseeability’ were to be the sole criteria for whether a duty of care exists, critics claimed that this would still allow too many claimants, as it took no account of the requirements of public policy.

Thus the test (or tests) needed to be qualified to be workable. It has been largely by expanding and contracting the scope of the ‘duty of care’ that the courts continue, as a matter of policy, to establish the limits of the tort of negligence.

“The significance of the neighbour principle has been over-emphasised by both its supporters and its opponents. It was not intended to be, and cannot properly be treated as being, a general formula which will explain all conceivable cases of negligence. Even at a fairly high level of abstraction it needs considerable qualifications and reservations before it can be accepted. It is indeed a sign of the poverty of thought about the law of torts in this country that the proposition should have been called upon to bear a weight so manifestly greater than it could support.”

R.F.V. Heuston: ‘Donoghue v. Stevenson in Retrospect’ 1957 MLR 1

For example, in Hedley Byrne & Co. v. Heller & Partners [1964] AC 465 (HL) the House of Lords extended the duty of care to persons making negligent misstatements, but added to the requirement of ‘reasonable foreseeability’ the further requirement that there should be a pre-existing ‘special relationship’ between the parties, based on a ‘voluntary assumption’ of responsibility by one party, and ‘reasonable reliance’ by the other. (See Negligent Misstatement)

In Alcock v. Chief Constable of South Yorkshire Police [1992] 1 AC 310 (HL) the House of Lords, whilst confirming that there could be claims for pure nervous shock by those who had seen horrific accidents, made the arbitrary requirement that for a claimant to be owed a duty of care, those they saw injured should usually be their spouses, parents or children. They also required that the claimant should usually have been at the scene of the accident themselves. Again, this was openly designed to limit the possible claimants as a matter of policy. (See Nervous Shock)
8 CONFIRMING THE TEST IN DONOGHUE V. STEVENSON

Home Office v. Dorset Yacht

8.1 Despite academic opposition, the status of the ‘neighbour’ principle as a general rule was confirmed by Lord Reid in Home Office v. Dorset Yacht Co. Ltd. [1970]

Home Office v. Dorset Yacht Co. Ltd. [1970] AC 1004 (HL)

Seven Borstal boys, who were working on Brownsea Island, escaped to Poole Harbour whilst their supervising officers were asleep. They boarded, cast adrift and damaged the plaintiff’s yacht which was moored offshore. The Court of Appeal upheld the judgment of Thesiger J. that the Home Office owed a duty of care to the plaintiffs with respect to the discipline of the boys they detained. The Home Office appealed on the grounds that there was virtually no authority for imposing a duty such as was suggested by the plaintiffs; that no person could be liable for a wrong done by another who was of full age and capacity and was not his servant or agent; and that public policy required that the officers should be immune from any such liability. Applying the dictum in Donoghue v. Stevenson, the House of Lords dismissed the appeal, holding that a duty of care did arise in this situation.

"Donoghue v. Stevenson may be regarded as a milestone, and the well-known passage in Lord Atkin’s speech should I think be regarded as a statement of principle. It is not to be treated as if it were a statutory definition. It will require qualification in new circumstances. But I think that the time has come when we can and should say that it ought to apply unless there is some justification or valid explanation for its exclusion.” per Lord Reid at p.1027

8.2 Thus Lord Reid in effect created a two-stage test for a new duty of care to arise.

i) Is the ‘neighbour’ principle of ‘reasonable foreseeability’ satisfied?; and

ii) If it is, is there any policy reason to deny a duty of care in the particular case?

8.3 The first of these is really a combination of the two tests in Donoghue v. Stevenson and thus further obliterates the distinction – if any – between them.

8.4 The second relates to issues of public policy, the factor arguably missing from the original test.

8.5 On the question of public policy, Lord Reid noted that in New York the State was not held liable for the conduct of careless prison wardens, as this would foster reluctance in prison officers to assign eligible men to minimum security work, lest they give rise to costly claims against the State. He continued:

“It may be that public servants of the State of New York are so apprehensive, easily dissuaded from doing their duty and intent on preserving public funds from costly claims that they could be influenced in this way. But my experience leads me to believe that Her Majesty’s servants are made of sterner stuff.” per Lord Reid at p.1033

9 EXTENDING THE DUTY OF CARE: Denning and Co.

9.1 It was established by the time of Home Office v. Dorset Yacht that there was a general duty of care not to cause foreseeable PERSONAL or PROPERTY damage to others, and no-one would sensibly think of trying to argue a standard personal injury or property damage case on the basis of whether a duty of care existed.

9.2 However, there are areas where the courts have been reluctant to extend the doctrine of negligence for fear that either there might be a proliferation of claims (such as with PURE ECONOMIC LOSS and NERVOUS SHOCK) or that the public good would not be served by allowing the claim (such as in cases against the emergency services.)

9.3 Examining some of the leading cases in these areas illustrates the criteria the courts have developed to decide whether to allow negligence claims in new areas. The criteria have altered over time. In particular, there was a move in the 1970’s (kick-started by Lord Denning) to extend the limits of negligence by expanding the duty of care whenever public policy (i.e. reasonableness) demanded it.
Imminent Dangers: *Dutton v. Bognor Regis U.D.C.*

9.4 Courts do not generally allow claims in negligence for pure economic loss. This includes situations where someone buys a faulty product or premises and needs to spend money to repair or replace it. It would only be if the fault caused an injury that a claim would be valid, and even then only for the injury itself and not for the product. (In fact, even then the claim may be barred! This is discussed later.)

9.5 To avoid this inconvenient restriction when he wanted to find for the plaintiff, Lord Denning extended the ‘duty of care’ to include a duty not to put others in danger of *future* harm or property damage from faulty goods or premises.


Mrs. Dutton bought a house with faulty foundations, built on a rubbish tip. The builder paid her £625 towards her repair costs of £2,240 and she sued the local authority for the rest on the grounds that it had negligently failed to exercise its statutory power to prevent the house from being built in breach of the Building Regulations. Although the building was dangerous, the danger had not manifested itself so there was no actually injury. Nevertheless, the Court of Appeal allowed Mrs. Dutton’s claim.

“The damage done here was not solely economic loss. It was physical damage to the house. If counsel’s submission were right, it would mean that, if the inspector negligently passes the house as properly built and it collapses and injures a person, the council are liable: but, if the owner discovers the defect in time to repair it – and he does repair it – the council are not liable. That is an impossible distinction. They are liable in either case. I would say the same about the manufacturer of an article. If he makes it negligently, with a latent defect (so that it breaks to pieces and injures someone), he is undoubtedly liable. Suppose that the defect is discovered and in time to prevent the injury. Surely he is liable for the cost of repair.” per Lord Denning M.R. at p.396

Lord Denning justified this decision squarely as a matter of policy:

“This case is entirely novel. Never before has a claim been made against a council or its surveyor for negligence in passing a house. The case itself can be brought within the words of Lord Atkin in Donoghue v. Stevenson: but it is a question whether we should apply them here. In Dorset Yacht Co. Ltd. v. Home Office, Lord Reid said that the words of Lord Atkin expressed a principle which ought to apply in general “unless there is some justification or valid explanation for its exclusion.” So did Lord Pearson. But Lord Diplock spoke differently. He said it was a guide but not a principle of universal application.

“It seems to me that it is a question of policy which we, as judges, have to decide. The time has come when, in cases of new import, we should decide them according to the reason of the thing.”

per Lord Denning M.R. at p.396

The Two-Stage Test: *Anns v. Merton London Borough Council*

9.7 Despite Lord Denning having invented this new duty out of thin air, the House of Lords accepted his decision but placed it on a more principled footing.


The leasehold occupiers of a block of flats sued the council for negligence when the walls of the flat began to crack due to being built on inadequate foundations. The council had discretion as to whether to inspect the foundations of such buildings, but claimed that they were not liable if it did not do so, or did so badly, as they were not obliged to do so at all. The House of Lords held that the council was liable. Whilst the council had no absolute duty to inspect, it had a common law duty to exercise its discretion to inspect property and on proper grounds. A decision not to inspect could therefore be challenged if made without such consideration. If the council did decide to exercise its powers, it then came under a duty of care to carry out a proper careful inspection.
Lord Wilberforce proposed a new two-stage test to decide whether a duty of care exists in a novel situation:

“In order to establish that a duty of care arises in a particular situation, it is not necessary to bring the facts of that situation within those of previous situations in which a duty of care has been held to exist. Rather the question has to be approached in two stages.

“First one has to ask whether, as between the alleged wrongdoer and the person who has suffered damage, there is a sufficient relationship of proximity or neighbourhood such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter, in which case a prima facie duty of care arises.

“Secondly, if the first question is answered affirmatively, it is necessary to consider whether there are any considerations which ought to negate, or to reduce or limit the scope of the duty or the class of person to whom it is owed or the damages to which a breach of it may give rise.”

per Lord Wilberforce at p.751

9.8 Both parts of this test have been criticised, even though in essence they amount to much the same thing that Lord Reid said in Home Office v. Dorset Yacht.

PART ONE: Lord Wilberforce says the duty of care is prima facie owed to people who are the foreseeable victims of carelessness.

The first problem with this is that it presumes a duty of care exists simply on the basis of foreseeability of harm. This would make the scope far too wide, particularly as it places the burden on the defendant to show that a duty of care does NOT exist whenever the claimant has suffered a foreseeable risk

The second problem is that he appears to be using Lord Atkin’s definition of what constitutes a duty of care to define the people to whom it is owed, thus obscuring even further the separate definition of proximity/neighbourhood and so eroding this control mechanism. (Given the vagaries of this subject in any case, one might consider this criticism to be semantic nonsense!)

PART TWO: This was even more controversial, as it seemed to require the defendant to justify his actions in terms of public policy and to give the courts leave to emphasise and discuss openly the public, social, economic or other policy reasons for their decisions, reasons which had generally been only implicit (although Lord Denning was already being quite explicit about it!)

“The Law Lords had moved so far as to hold that public policy primarily required the imposition of liability unless there was some other and secondary policy demanding a total or partial immunity from suit.” Salmond & Heuston, Law of Tort p.200

10 THE POLICY ELEMENTS: McLoughlin v. O’Brian

10.1 In McLoughlin v. O’Brian [1983] 1 AC 410 (HL) (one of the leading cases on Nervous Shock) Lord Wilberforce at p.421 listed the supposed policy reasons for placing a limitation on the extent of admissible claims (in the context of nervous shock) though without condoning them.

i) Floodgates. Extension of liability may lead to a proliferation of claims, including fraudulent claims. He thought, however, that such fraud could be contained by the courts.

The courts have frequently cited Cardozo CJ in Ultramares Corp. v. Touche (1931) 255 NY 170, who warned against “liability in an indeterminate amount for an indeterminate time to an indeterminate class.”

i. Extension of liability could be unfair to the defendants by imposing damages out of proportion to the negligent conduct.

ii. Extension would increase evidentiary difficulties and tend to lengthen litigation.

iii. Extension of liability should only be made by the legislature after careful research.
Lord Scarman was in support of policy being an issue for Parliament.

“The policy issue as to where to draw the line is not justiciable.” per Lord Scarman at p.431.

However, Lord Edmund-Davies championed the idea that the courts should take account of public policy.

“It is immaterial that the question be one of ethics rather than law.” per Lord Edmund-Davies at p.428


The ‘high-water’ mark of this liberal attitude was reached in Junior Books v. Veitchi Co. Ltd. [1983] when the House of Lords openly permitted an economic loss claim to succeed in negligence simply because they thought the claimant was unfortunate not to be able to bring the action in contract (due to privity problems). This controversial case stretched the scope of duty of care to its limit, allowing a claim for defective property, even though there was no danger to health or safety.

Junior Books Ltd. v. Veitchi Co. Ltd. [1983] 1 AC 520 (HL Scotland)

The defenders (Veitchi), who are specialist flooring contractors, laid a defective floor in a factory. They had not been directly employed by the factory owners, but were nominated subcontractors. The factory owners claimed the estimated cost of relaying the floor and various items of economic loss, such as moving the machinery and loss of profits. As the defenders were subcontractors, they could not be sued by the factory owners in contract. The only hope for the pursuers was to sue them in tort. It was not alleged that the state of the floor had given rise to or was likely to give rise to any danger of injury to people or property in the factory.

A majority of the House of Lords permitted the claim, though Lord Brandon dissented, fearing that tort was about to usurp the function of contract law. The House of Lords emphasised the unusually close relationship of the parties:

“The appellants, though not in direct contractual relationship with the respondents, were as nominated sub-contractors in almost as close a commercial relationship with the respondents as it is possible to envisage short of privity of contract.” per Lord Roskill at p.544

12 THE RETREAT FROM ANNS v. MERTON: Lord Keith and Co.

Academic and judicial opinion was much opposed to the decision in Anns v. Merton and to the unintended liberal attitude to where it had lead. Various new restricting criteria were suggested and applied by the courts, and following a series of cases in which Anns v. Merton was distinguished, it was finally overruled by the House of Lords in Murphy v. Brentwood District Council [1991] 1 AC 398. The ‘new’ criteria were then amalgamated into the now prevalent test in Caparo v. Dickman [1990] 2 AC 605.

The leader of the movement away from the liberal view was Lord Keith of Kinkel, who was not the most popular judge in the world. He once famously sent a man to prison for committing an offence, even though the act (raping one’s wife) was not a crime at the time the offence was committed. He died in 2002, and one obituary simply read: “Thank goodness he’s dead!”

12.3 The ‘just and reasonable’ test

In Governors of the Peabody Donation Fund v. Sir Lindsay Parkinson & Co. Ltd. [1985] AC 210 (HL), Lord Keith suggested that a duty will only arise if it is ‘just and reasonable’ that it should do so. This may just have been another way of describing a ‘public policy’ requirement, but significantly he had returned the burden to the claimant to establish the scope of the defendant’s duty rather than having the burden on the defendant to disprove it. Having this burden would clearly reduce the claimant’s likelihood of success.
Governors of the Peabody Donation Fund v. Sir Lindsay Parkinson & Co. Ltd. [1985] AC 210 (HL)

“A relationship of proximity in Lord Atkin’s sense must exist before any duty of care can arise, but the scope of the duty must depend on all the circumstances of the case... In determining whether or not a duty to take care of particular scope was incumbent upon a defendant it is material to take into account considerations of whether it is just and reasonable that it should be so.”

per Lord Keith at p.240

The ‘incremental’ approach

12.4 A significant new restriction on novel cases was a requirement that new cases should have some obvious basis in precedent, rather than simply being considered in isolation on the basis of ‘the reason of the thing’. Thus, the courts will not recognize a new type of duty of care unless there is an analogy with an existing one. This idea originated in the Australian case of Sutherland (Council of the Shire of) v. Heyman (1985), but was quickly adopted by the House of Lords.

Sutherland (Council of the Shire of) v. Heyman (1985) 60 ALR (HC of Australia)

“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.”

per Brennan J. at p.43

Brennan J’s obiter dictum was approved by Lord Bridge in Caparo v. Dickman 1990 and by Lord Keith in Murphy v. Brentwood 1991


A fishing vessel sank near Fishguard when hit by a freak wave. The lone survivor sued the coastguard service for failing to respond to a mayday call. HELD: There was no duty of care.

“It seems to me that the incremental approach yields a definite and negative answer to the question whether the coastguard owes a duty of care to mariners in respect of watching, search and rescue functions. There is no way to arrive at a duty of care by analogy with the position of other emergency services or by analogy with the position of public bodies exercising statutory functions. In fact, the relevant precedents to which I have referred appear to give a negative answer whether or not the incremental approach is adopted.” per Gareth Edwards J.

13 REINTERPRETING ANNS v. MERTON

13.1 A series of cases in the 1980’s re-interpreted, restricted and eventually overruled the decision in Anns v. Merton.

13.2 Leigh and Sillavan Ltd. v. Aliakmon Shipping Co. Ltd. [1985] AC 785 (HL)

The case concerned the rights of the buyers of a cargo, which was damaged due to bad stowage, to sue the owners of the ship where it was stowed, even though at the time they were neither legal owners of the goods in question, nor had any possessory title to them. Finding against there being any cause of action in tort, the House of Lords made the following observation about the scope of the Anns test:–

“There are two preliminary observations which I think that it is necessary to make with regard to the passage in Lord Wilberforce’s speech on which counsel relies. The first observation which I would make is that that passage does not provide, and cannot in my view have been intended by Lord Wilberforce to provide, a universally applicable test of the existence and scope of the duty of care in negligence...
“The second observation which I would make is that Lord Wilberforce was dealing, as is clear from what he said, with the approach to the questions of the existence and scope of a duty of care in a novel type of factual situation which was not analogous to any factual situation in which the existence of such duty had already been held to exist. He was not, as I understand the passage, suggesting that the same approach should be adopted to the existence of a duty of care in a factual situation in which the existence of such a duty had repeatedly been held not to exist.” per Lord Brandon at p.815

13.3 Smith v. Littlewoods Organisation Ltd. [1987] 1 AC 241 (HL Scotland)

The defenders bought a cinema with the intention of replacing it with a supermarket. They left the building unattended, and vandals broke in and set fire to it, damaging a nearby church belonging to the pursuers. HELD: Whether the occupier of a building owed a duty of care to adjoining occupiers in respect of acts of trespassers depended on all the circumstances of the case. As the defenders had no reason to suppose that vandals would set fire to their cinema, they owed no duty to the pursuers to anticipate the possibility. On the general issue of duty of care, Lord Goff stated:

“It is very tempting to try to solve all problems of negligence by reference to an all-embracing criterion of foreseeability, thereby effectively reducing all decisions in this field to questions of fact. But this uncomfortable solution is, alas, not open to us. The law has to accommodate all the untidy complexity of life; and there are circumstances where considerations of practical justice impel us to reject a general imposition of liability for foreseeable damage. An example of this phenomenon is to be found in cases of pure economic loss, where the so-called ‘floodgates’ argument...compels us to recognise that to impose a general liability based on a simple criterion of foreseeability would impose an intolerable burden upon defendants.” per Lord Goff at p.280

13.4 Yuen Kun-Yeu v. AG of Hong Kong [1988] AC 175 (PC – Hong Kong)

Investors had lost money when a deposit-taking company, registered by the Commissioner of Deposit-Taking Companies, went into liquidation. They alleged that the Commissioner owed them a duty of care to ensure that the company’s affairs were not being conducted fraudulently or speculatively. The Privy Council upheld the decision of the Court of Appeal of Hong Kong that there was no reasonable cause of action as there was no close and direct relationship between the parties.

In fact, it would have been unfair to impose such a duty as the Commissioner had neither the power nor the resources to control or investigate all the companies under his statutory jurisdiction.

Lord Keith made the following observation:

“Theyir Lordships venture to think that the two stage test formulated by Lord Wilberforce for determining the existence of a duty of care in negligence has been elevated to a degree of importance greater than it merits, and greater perhaps than its author intended. Further, the expression of the first stage of the test carries with it a risk of misinterpretation. As Gibbs C.J. pointed out in Council of the Shire of Sutherland v. Heyman, there are two possible views of what Lord Wilberforce meant.

“The first view, favoured in a number of cases mentioned by Gibbs C.J., is that he meant to test the sufficiency of proximity simply by the reasonable contemplation of likely harm. The second view, favoured by Gibbs C.J. himself, is that Lord Wilberforce meant the expression ‘proximity or neighbourhood’ to be a composite one, importing the whole concept of necessary relationship between plaintiff and defendant described by Lord Atkin in Donoghue v. Stevenson. In their Lordships’ opinion the second view is the correct one.

“The second stage of Lord Wilberforce’s test in Anns is one which will rarely have to be applied. It can arise only in a limited category of cases where, notwithstanding that a case of negligence is made out on the proximity basis, public policy requires that there should be no liability... In view of the direction in which the law has been developing, their Lordships consider that for the future it should be recognised that the two-stage test in Anns is not to be regarded as in all circumstances a suitable guide to the existence of a duty of care.” per Lord Keith at p.191
**ISOLATING PROXIMITY: Hill v. Chief Constable of West Yorkshire**

“When I use a word,” Humpty Dumpty said in rather a scornful tone, “it means just what I choose it to mean – neither more nor less.”

per Lewis Carroll, Through the Looking Glass

14.1 The Donoghue v. Stevenson, Home Office v. Dorset Yacht and Anns v. Merton tests all seemed to have equated ‘proximity’ with ‘foreseeability’ (though that was probably not the intention of any of the judges). However, the courts began to emphasise that even if a loss were reasonably foreseeable, this did not mean that there was necessarily the requisite ‘proximity’ to found a duty of care.

14.2 In fact, the term ‘proximity’ seemed to take on a whole new life to mean whatever the courts wanted it to mean to reach their desired policy limitation. In that respect, the idea of ‘proximity’ had more to do with whether a cause of action was ‘just and reasonableness’ than with its literal meaning.

14.3 Hill v. Chief Constable of West Yorkshire [1989] AC 53 (HL)

The plaintiff’s twenty-year-old daughter had been murdered by Peter Sutcliffe, after several similar killings by him. The plaintiff claimed the police had been negligent in not apprehending Sutcliffe in time to prevent the murder. The House of Lords held that there was no general duty of care owed by the police to identify or apprehend an unknown criminal. Lord Keith repeated his opinions of the Anns v. Merton test, and concluded that there was not sufficient proximity between the victim and the police to establish a duty of care.

“Foreseeability of likely harm is not in itself a sufficient test of liability in negligence. Some further ingredient is invariably needed to establish the requisite proximity of relationship between plaintiff and defendant, and all the circumstances of the case must be carefully considered and analysed in order to ascertain whether such an ingredient is present.” per Lord Keith at p.60

He added that even had there been sufficient proximity, the duty of care would have been excluded as a matter of policy (under the second stage of Lord Wilberforce’s test).

“In Yuen Kun-Yeu v. A-G of Hong Kong [1988] I expressed the view that the category of cases where the second stage of Lord Wilberforce’s two stage test in Anns v. Merton might fall to be applied was a limited one... Application of that second stage is, however, capable of constituting a separate and independent ground for holding that the existence of liability in negligence should not be entertained. Potential existence of such liability may in many instances be in the general public interest, as tending towards the observance of a higher standard of care in the carrying on of various types of activity. I do not, however, consider that this can be said of police activities. The general sense of public duty which motivates police forces is unlikely to be appreciably reinforced by the imposition of such liability.” per Lord Keith at p.63

14.4 Stovin v. Wise (Norfolk County Council, third party) [1996] AC 923 (HL)

“Proximity is a slippery word. Proximity is not legal shorthand for a concept with its own, objectively identifiable characteristics. Proximity is convenient shorthand for a relationship between two parties which makes it fair and reasonable that one should owe the other a duty of care.”

per Lord Nicholls at p.932
15 THE ‘TRIPARTITE TEST’: Caparo v. Dickman

Statement of the Test

15.1 The Anns v. Merton test having been thus eroded, in Caparo Industries plc v. Dickman (1990) the House of Lords appeared to propose a new test to decide whether a duty of care should be imposed in novel situations.

Caparo Industries plc v. Dickman [1990] 2 AC 605 (HL)

The defendants were auditors of Fidelity plc. The audited accounts showed a pre-tax profit of £1.3 million and the plaintiffs bought all the available shares. In fact, Fidelity had made a loss of £400,000. The auditors were sued for negligence, but the House of Lords held that they were not liable. Other than in exceptional circumstances, auditors engaged by a company owe no duty of care to third parties, including individual shareholders in the company, who rely on the accounts. Such a "virtually unlimited and unrestricted duty of care... extending to anyone who may use those accounts for any purpose such as investing in...or lending to the company, seems...untenable."

The House of Lords explained what was needed for a duty of care to be imposed in a novel situation: "In addition to the foreseeability of damage, necessary ingredients in any situation giving rise to a duty of care are that there should exist between the party owing the duty and the party to whom it is owed a relationship characterised by the law as one of 'proximity' or 'neighbourhood' and that the situation should be one in which the court considers it fair, just and reasonable that the law should impose a duty of a given scope upon the one party for the benefit of the other."

per Lord Bridge at p.617

15.2 Thus there appeared to be a tripartite test for establishing new duties of care:

1. Was it reasonably foreseeable that negligence by the defendant would harm the claimant?; and

2. Was there was a sufficiently close (or 'proximate') relationship between claimant and defendant to justify the imposition of a duty of care?; and

3. Would it be fair, just and reasonable in all the circumstances to impose a duty of care?

15.3 This approach was approved by the House in Murphy v. Brentwood District Council (1991) in which the decision in Anns v. Merton was over-ruled. Lord Bridge also expressly approved of the 'incremental approach' advocated in Sutherland v. Heyman (1985)

15.4 Murphy v. Brentwood District Council [1991] 1 AC 398 (HL)

The plaintiff bought a new house which had just been built by a construction company, using a concrete raft to secure the foundations. The local authority had approved the plans for the foundations under the building regulations. The foundations were defective and the value of the house was reduced by £35,000. The plaintiff claimed that there was an imminent danger to health, but the House of Lords said that there was no liability in tort for what was merely a defect in quality which had not actually caused physical injury.

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

per Lord Mackay, L.C. at p.457

"In my opinion it is clear the Anns did not proceed upon the basis of established principle, but introduced a new species of liability governed by a principle indeterminate in character but having the potentiality of covering a wide range of situations... There can be no doubt that Anns has for long been widely regarded as an unsatisfactory decision..."
“My Lords, I would hold that Anns was wrongly decided as regards the scope of any private law duty of care resting upon local authorities in relation to their function of taking steps to secure compliance with building byelaws or regulations and should be departed from. It follows that Dutton v. Bognor Regis Urban District Council [1972] 1 QB 373 should be overruled, as should all cases subsequent to Anns which were decided in reliance on it.” per Lord Keith at p.471

The Overstated Significance of the Tripartite Test

15.5 The tripartite test in Caparo v. Dickman is frequently cited when Duty of Care is discussed, but despite the reverence in which the test is sometimes held, even the judges in Caparo v. Dickman itself did not intend to create anything more than a general guideline to liability.

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

“It is implicit in the passages referred to that the concepts of proximity and fairness embodied in these additional ingredients are not susceptible of any such precise definition as would be necessary to give them utility as practical tests, but amount in effect to little more than convenient labels to attach to the features of different specific situations which, on a detailed examination of all the circumstances, the law recognises pragmatically as giving rise to a duty of care of a given scope. Whilst recognising, of course, the importance of the underlying general principles common to the whole field of negligence, I think the law has now moved in the direction of attaching greater significance to the more traditional categorisation of distinct and recognisable situations as guides to the existence, the scope and the limits of the varied duties of care which the law imposes.”

per Lord Bridge at p. 618

15.6 In Stovin v. Wise, Lord Nicholls observed that the test did not really represent a great change in the law from Anns v. Merton. It was more a matter of emphasis.

**Stovin v. Wise (Norfolk County Council, third party) [1996] AC 923 (HL)**

The plaintiff was injured when his motor cycle collided with the defendant’s car as it emerged from a blind junction. The reason the junction was blind was that there was an earth bank at the corner which the local highway authority knew to be dangerous. In holding that the highway authority were not liable for not removing the bank, the House of Lords considered the current state of the law relating to duty of care.

“In Anns Lord Wilberforce propounded a two-stage test for the existence of a duty. This test is now generally regarded with less favour than the familiar tripartite formulation subsequently espoused in Caparo: (1) foreseeability of loss; (2) proximity; and (3) fairness, justice and reasonableness. The difference is perhaps one of presentation and emphasis than substance. Clearly, foreseeability of loss is by itself insufficient foundation for a duty to take positive action. Close attention to the language of Lord Wilberforce with its reference to a sufficient relationship of proximity or neighbourhood, shows that he regarded proximity as an integral requirement. The Caparo tripartite test elevates proximity to the dignity of a separate heading. This formulation tends to suggest that proximity is a separate ingredient, distinct from fairness and reasonableness, and capable of being identified by some other criteria. This is not so. **Proximity is a slippery word.** Proximity is not legal shorthand for a concept with its own, objectively identifiable characteristics. Proximity is convenient shorthand for a relationship between two parties which makes it fair and reasonable that one should owe the other a duty of care. This is only another way of saying that when assessing the requirements of fairness and reasonableness regard must be had to the relationship of the parties...

“Despite this, the pithy tripartite formulation has advantages. The relationship between the parties is an important ingredient in the overall assessment. The tripartite test is useful in focusing attention specifically on this feature and also in clearly separating this feature from foreseeability of damage.”

per Lord Nicholls at p.931
In the case of *Customs and Excise Commissioners v. Barclays Bank plc* [2007] the House of Lords appeared to suggest that the whole thing is just a matter of common sense, to be considered on a case-by-case basis – a bit like Lord Denning had done 35 years earlier.

**Customs and Excise Commissioners v. Barclays Bank plc** [2007] 1 AC 181

The C&EC, seeking to recover outstanding VAT from two companies, obtained freezing injunctions in respect of the assets in their bank account. Contrary to the injunction, the Bank permitted the directors to withdraw money from the account, which was thus lost to the C&EC.

The House of Lords held that the Bank owed no duty of care to the C&EC for this act of negligence. *(This case will be considered in detail later on in the course.)* After reviewing the leading cases and principles relating to Duty of Care, Lord Bingham came to this conclusion: “It seems to me that the outcomes (or majority outcomes) of the leading cases cited above are in every or almost every instance sensible and just, irrespective of the test applied to achieve that outcome. This is not to disparage the value of and need for a test of liability in tortious negligence, which any law of tort must propound if it is not to become a morass of single instances. But it does in my opinion concentrate attention on the detailed circumstances of the particular case and the particular relationship between the parties in the context of their legal and factual situation as a whole.”

per Lord Bingham at para 8

It is notable that the Court of Appeal in this case had unanimously found for the claimants, and the House of Lords unanimously found for the defendants. It is thus anyone's guess how any particular case will turn out!

In *N v. Poole Borough Council* [2019] 2 WLR 1478, Lord Reed was even more emphatic in his rejection of the tripartite test.

**N v. Poole Borough Council** [2019] 2 WLR 1478

"Clarification of the general approach to establishing a duty of care in novel situations was provided by *Caparo Industries plc v Dickman* [1990] 2 AC 605, but the decision was widely misunderstood as establishing a general tripartite test which amounted to little more than an elaboration of the Anns approach, basing a prima facie duty on the foreseeability of harm and “proximity”, and establishing a requirement that the imposition of a duty of care should also be fair, just and reasonable: a requirement that in practice led to evaluations of public policy which the courts were not well equipped to conduct in a convincing fashion.”

per Lord Reed at para 30

In *Robinson v. Chief Constable of West Yorkshire Police* [2018] AC 736, the Supreme Court, led by Lord Reed, re-examined *Caparo v Dickman* in light of the reluctance of the courts to find the police liable for negligence, even when they had directly caused a physical injury to the claimant. *Caparo v Dickman* had been repeatedly cited in such cases to reinforce the idea that no duty can arise because of policy arguments based on the third limb of the test, and following the decision in *Hill v. Chief Constable of West Yorkshire* [1989] AC 53 (HL).

The Supreme Court clarified two key issues:

i. The decision in *Hill v. Chief Constable of West Yorkshire* was not that the police should never be liable for negligence in the way that they carry out their duties. The policy issues only arise in cases where their negligence has been by way of an omission which (for example) gave the opportunity to a third party villain to injure the claimant.

If the negligent actions of the police can be regarded as a commission leading to an injury (such as running someone over), they will – and have always been – liable, just as any public servant would be. What might distinguish the case from one involving 'civilians' is not the duty of care, but the breach: what might be reasonable for a police officer in pursuit of a terrorist might not be so for a lecturer in a hurry to get to work on time.
ii. It is not necessary to consider the *Caparo v. Dickman* criteria in cases where a relevant duty of care has already been established (or held not to exist). They are only relevant – if at all – to novel cases. The policy issues inherent in the ‘fair, just and reasonable’ test should not be re-examined in every case. In the interests of certainty, established precedent should be followed, and the real issue in novel cases is to ensure that any expansion of the tort would be incremental to existing categories.

15.11 **Robinson v. Chief Constable of West Yorkshire** [2018] AC 736

In July 2008, DS Willan spotted a man called Williams dealing in “Class A” drugs. He contacted a senior officer about what he should do. It was agreed he should make an arrest as quickly as possible, and preferably whilst Williams was still in possession of the drugs. He called for back-up and considered possible locations for the arrest. He concluded it had to be on the street. The intention was to have two officers approach Williams from the front (Willan and Dhurmea) and two (Roebuck and Green) from the rear in a “pincer movement” in case he should try to escape. Williams was to be seized, pushed against an adjacent wall, restrained and arrested.

Unfortunately, on being apprehended, Williams struggled so violently, his momentum took the group up the street towards an elderly lady, Mrs. Robinson, who was walking down the street. They knocked into her and they all fell to the ground with the Mrs. Robinson underneath.

She brought proceedings for personal injury damages against the Chief Constable of West Yorkshire, alleging negligence by the police. The trial judge found that there had been a foreseeable risk of injury to Robinson, and that the arrest called for more careful planning. The officer who planned the arrest was under a duty to consider the risk to passing members of the public, and had acted negligently. However, there was an immunity of suit for police officers engaged in the apprehension of criminals, and therefore the claim was dismissed.

Robinson appealed. She argued that the judge was wrong in law to apply the three-stage test in *Caparo v. Dickman*, claiming that where the case involved direct physical harm, public policy considerations did not arise and there was no need for the court to ask itself whether it was fair, just and reasonable to impose a duty. Further, that he was wrong in law to apply a blanket immunity and to find that it required “outrageous negligence” to defeat the principle in *Hill v. CC West Yorkshire*.

The appeal was dismissed by the Court of Appeal which held that the *Caparo v. Dickman* test applied to all claims in the modern law of negligence, whatever the nature of the harm, so the court should always consider the issues of foreseeability, proximity and whether it was just and reasonable for the action to proceed. Further, that he was wrong in law to apply a blanket immunity and to find that it required “outrageous negligence” to defeat the principle in *Hill v. CC West Yorkshire*.

However, the Supreme Court found for Mrs. Robinson. The police did owe her a duty of care not to cause her a direct injury by their negligent actions; and they were in breach of that duty by taking an unreasonable risk with public safety.

Lord Reed made some seminal comments about the *Caparo v. Dickman* test in general, and the liability of the police in particular.

**On the Caparo v. Dickman test**

“21 The proposition that there is a Caparo test which applies to all claims in the modern law of negligence, and that in consequence the court will only impose a duty of care where it considers it fair, just and reasonable to do so on the particular facts, is mistaken. As Lord Toulson JSC pointed out in his landmark judgment in *Michael v Chief Constable of South Wales Police (Refuge intervening)* [2015] AC 1732, para 106, that understanding of the case mistakes the whole point of the Caparo case, which was to repudiate the idea that there is a single test which can be applied in all cases in order to determine whether a duty of care exists, and instead to adopt an approach based, in the manner characteristic of the common law, on precedent, and on the development of the law incrementally and by analogy with established authorities…"
“26 Where the existence or non-existence of a duty of care has been established, a consideration of justice and reasonableness forms part of the basis on which the law has arrived at the relevant principles. It is therefore unnecessary and inappropriate to reconsider whether the existence of the duty is fair, just and reasonable (subject to the possibility that this court may be invited to depart from an established line of authority). Nor, a fortiori, can justice and reasonableness constitute a basis for discarding established principles and deciding each case according to what the court may regard as its broader merits. Such an approach would be a recipe for inconsistency and uncertainty…

“27 It is normally only in a novel type of case, where established principles do not provide an answer, that the courts need to go beyond those principles in order to decide whether a duty of care should be recognised. Following the Caparo case, the characteristic approach of the common law in such situations is to develop incrementally and by analogy with established authority. The drawing of an analogy depends on identifying the legally significant features of the situations with which the earlier authorities were concerned. The courts also have to exercise judgement when deciding whether a duty of care should be recognised in a novel type of case. It is the exercise of judgement in those circumstances that involves consideration of what is “fair, just and reasonable”. As Lord Millett observed in McFarlane v Tayside Health Board [2000] 2 AC 59, 108, the court is concerned to maintain the coherence of the law and the avoidance of inappropriate distinctions if injustice is to be avoided in other cases. But it is also “engaged in a search for justice, and this demands that the dispute be resolved in a way which is fair and reasonable and accords with ordinary notions of what is fit and proper”.

“55 Hill's case is not, therefore, authority for the proposition that the police enjoy a general immunity from suit in respect of anything done by them in the course of investigating or preventing crime. On the contrary, the liability of the police for negligence or other tortious conduct resulting in personal injury, where liability would arise under ordinary principles of the law of tort, was expressly confirmed. Lord Keith spoke of an “immunity”, meaning the absence of a duty of care, only in relation to the protection of the public from harm through the performance by the police of their function of investigating crime…

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

On the negligence of the police

72 The role of the police in the accident in which Mrs. Robinson was injured is not comparable to that of the defendant in the examples commonly given of pure omissions: for example, someone who watches and does nothing as a blind man approaches the edge of a cliff, or a child drowns in a shallow pool. Nor, to cite more realistic examples, is it comparable to that of the police authority in Hill's case, which failed to arrest a murderer before a potential future victim was killed, or the police authority in Michael's case, which failed to respond to an emergency call in time to save the caller from an attack. In such cases the defendant played no active part in the critical events. Nor is this a case in which the chief constable is sought to be made liable for the conduct of a third party. Lord Reid's observation in the Dorset Yacht case [1970] AC 1004, 1027 is apposite: “the ground of liability is not responsibility for the acts of the escaping trainees; it is liability for damage caused by the carelessness of these officers in the knowledge that their carelessness would probably result in the trainees causing damage of this kind.”

73 In the present case, the ground of action is liability for damage caused by carelessness on the part of the police officers in circumstances in which it was reasonably foreseeable that their carelessness would result in Mrs. Robinson's being injured. Her complaint is not that the police officers failed to protect her against the risk of being injured, but that their actions resulted in her being injured. In short, this case is concerned with a positive act, not an omission.

(4) Did the police officers owe a duty of care to Mrs. Robinson?

74 It was not only reasonably foreseeable, but actually foreseen by the officers, that Williams was likely to resist arrest by attempting to escape. That is why Willan summoned assistance in the first place, before attempting to arrest Williams, and why it was decided that DS Roebuck and DC Green should be positioned on the opposite side of Williams from Willan and Dhurmea, so as to block his escape route. The place where the officers decided to arrest Williams was a moderately busy shopping street in a town centre. Pedestrians were passing in close vicinity to Williams. In those
circumstances, it was reasonably foreseeable that if the arrest was attempted at a time when pedestrians—especially physically vulnerable pedestrians, such as a frail and elderly woman—were close to Williams, they might be knocked into and injured in the course of his attempting to escape. That reasonably foreseeable risk of injury was sufficient to impose on the officers a duty of care towards the pedestrians in the immediate vicinity when the arrest was attempted, including Mrs. Robinson.” per Lord Reed

**Caparo v. Dickman Applied**

15.12 Despite the doubt thrown onto the usefulness of the so-called tripartite test – even by the judges in the case itself – *Caparo v. Dickman* has been the basis of numerous decisions. Here are some eclectic examples.

15.13 **West Bromwich Albion Football Club v. El-Safy [2007] PIQR P7**

In January 2000, Michael Appleton was signed up for three and a half years to WBA. In November 2001 he suffered a knee injury in practice and was treated by Medhat El-Safy, a consultant orthopaedic surgeon. He negligently recommended reconstructive surgery – which left the player unable to play for fifteen months – rather than more conservative treatment which would have enabled Appleton to resume his career in just four months. He was clearly liable to Appleton, but the question arose whether he also owed a duty or care to WBA – Appleton’s employer – for depriving them of this valuable asset. The court held that he did not.

Specifically applying the tripartite test, the court held that a doctor’s duty is to do the best for the health of his or her patient, and it would not be just, fair and reasonable also to impose a general duty of care on doctors towards the employers of the patient, especially as these two duties might conflict.

15.14 **Calvert v. William Hill Credit Ltd. [2009] Ch 330 (CA)**

Graham Calvert was a compulsive gambler, especially keen on betting on greyhound races, as he was a greyhound trainer. He had a telephone betting account with William Hill. On May 2nd 2006, he placed bets with them worth a total of £336,600. Although he came out £139,200 ahead, he had a ‘moment of clarity and horror’ on realising how much he had stood to lose. He asked William Hill to close his account and never to let it be reopened.

Despite this, as soon as he asked them to do so later that month, they did reopen the account and he continued to gamble. In June he made a self-exclusion agreement with William Hill, under the provisions of the Gambling Act 2005, by which they agreed not to accept any bets from him for a six-month period. However this was not implemented and by the end of the year he had lost £2,052,972.18. He claimed the sum from William Hill on the basis of their negligence in permitting him to continue his habit.

The trial judge, with whom the Court of Appeal concurred, held *inter alia* that in applying the tripartite test, there was no duty of care.

“Recognition of a common law duty to protect a problem gambler from self-inflicted gambling losses would involve a journey to the outermost reaches of the tort of negligence in the realm of the truly exceptional.” para 13

15.15 **Bhamra v. Dubb (t/a Lucky Caterers) [2010] EWCA Civ 13**

Dubb was engaged to cater for a Sikh wedding. Sikhs may not eat eggs, and Dubb knew therefore that the food must be egg-free. He bought some ras malai from another firm, not realising it contained egg. Unfortunately one of the guests – Mr. Bhamra – was allergic to eggs and died from an anaphylactic reaction. He had not enquired as to the content of the food as he had not expected eggs to be used in any case.

The issue was whether Dubb had a duty of care to warn the guests that there may be egg in the food. The Court of Appeal held that in a normal (i.e. non-Sikh) gathering, there would be no duty to warn guests about such matters, even though the risk of egg-allergies was well know, as they could be expected to guard themselves against their known allergies. However in the special circumstances of this case there was Caparo proximity. Dubb should have realised that the guests would not expect there to be any egg products served, so he *did* owe a duty either to take care not to serve any such products or to warn the guests against the possibility of their being served.
15.16 *Everett v. Comojo (UK) Ltd. (t/a Metropolitan) [2012] 1 WLR 150*

Comojo owns and manages a nightclub inside the Metropolitan Hotel in London. In November 2002, one of the waitresses, Tania Kotze, was tapped on the bottom by one of the guests, but she did not want to make a fuss about it. However, the incident was witnessed by a regular guest called Sami Balubaid, who took great affront on her behalf and told her that those responsible would apologise to her before the end of the evening. Tania Kotze reported this to her line manager, Ezelle Alblas.

Meanwhile, Balubaid called for his ‘driver’ Cecil Croasdaile to join him at the club. Croasdaile is a man of enormous physique, and Kotze feared he had been brought in to extract the apology Balubaid had promised her. She reported this to the bar manager, Mr Rosenblatt, in his office. Whilst she was there, Croasdaile attacked two guests – Robert Everett and Carl Harrison – who Balubaid had told him were the culprits. He punched and knifed them.

Croasdaile was sent to prison and Balubaid disappeared without trace, so the injured parties sued Comojo, claiming that the nightclub company owed a duty of care to its customers to ensure that they were safe from foreseeable dangers caused by their other guests. They claimed that Kotze was negligent in not alerting the door supervisors to her fears, rather than the bar manager, as they were employed and trained to deal with such incidents and might have been able to prevent the stabbings.

The Court of Appeal considered *Home Office v. Dorset Yacht*, where the House of Lords had held that the Home Office owed a duty of care to people whose property was damaged by the prisoners in their care, but noted that this was only because the risk was highly foreseeable in the circumstances. The Court then applied the tripartite test in *Caparo v. Dickman* to the current situation, and held that there was a duty of care owed by the nightclub company to its guests in relation to the foreseeable violence of its customers.

However, despite there being a duty of care, the court concluded that it had not been breached, as Kotze had acted reasonably in informing the people she did of the incidents. She had no reason to suppose that a fight was about to break out, and it was not therefore negligent not to inform the bouncers.

Lady Justice Smith analysed the duty of care in the following way:

*Para 30* “The judge in the present case did not go through the process of applying the threefold test. I shall undertake that process, always bearing in mind that the three elements of the test are not completely separate considerations; they overlap to some extent.

**Proximity of the relationship**

*Para 31* “I consider that the relationship between the management of a night club and its guests is of sufficient proximity to justify the existence of a duty of care. The management is in control of the premises. It can regulate who enters, who is refused entry and who is to be removed after entry. The guest comes to the night club to relax and enjoy himself and for that prospect relies on the competence and prudence of its management. He expects and is entitled to expect that there will be no violence and that he will not be unsafe.

“Further, the management of the night club is in business and wants the guest to come to spend his money; there is an economic relationship between the two. In my judgment, those factors demonstrate sufficient proximity.

**Foreseeability of injury**

*Para 32* “It is a well-known fact that the consumption of alcohol can lead to the loss of control and violence, both verbal and physical. Lord Faulks acknowledged as much. In the present case, Comojo’s own risk assessment recognises the existence of those risks. It must be foreseeable to any licensed hotelier that there is some risk that one guest might assault another. The risk may be low in respectable members-only establishments and much higher in a night club open to the public. The assessment of the degree of risk, which will dictate what precautions have to be taken, will vary. There cannot be any rule of thumb to apply to all night clubs. But it does not seem to me that, given its own risk assessment, Comojo could seriously argue that the risk of such assault was so low that it could safely be ignored.
**Fair, just and reasonable**

**Para 33** “In my view, it is fair, just and reasonable to impose a duty of care on the management of a night club in respect of injuries caused by a third party, provided that the scope of the duty is appropriately set. The factors already mentioned are relevant — control, the economic relationship and the (highly variable but existing) foreseeability of violence...

**Para 34** “Accordingly, I would conclude that there is a duty on the management of a night club in respect of the actions of third parties on the premises but I stress that the standard of care imposed or the scope of the duty must also be fair, just and reasonable.”

15.17 **Mitchell v. Glasgow City Council [2009] 1 AC 874**

The House of Lords applied *Caparo v. Dickman* and held that a local authority does not owe a duty of care to warn one of its tenants that the neighbouring tenant has just been given an eviction notice, and might take it out on the neighbours, who they considered to be responsible. They did not consider that this would be ‘fair, just and reasonable.’

15.18 **Jones v. Scottish Opera [2015] SLT 401 Court of Session (Outer House)**

Martin Jones, a self-employed theatrical production manager, injured his wrist when he fell a metre from the back of a trailer owned by Scottish Opera whilst unloading the set of *Jack and the Beanstalk* at the Alhambra Theatre in Dunfermline. Neither Jones nor the pantomime had anything to do with Scottish Opera — they had just rented out their trailer for use by another company. He would not have fallen had there been a ramp at the back of the trailer, and claimed *inter alia* that Scottish Opera owed him a duty of care to provide such a ramp.

“The pursuer's case on record is a common law case. Counsel submitted that the necessary relationship of proximity existed between the defenders and the pursuer to establish a duty of care, that the loss was foreseeable and that it was just and reasonable that a duty should exist: *Caparo Industries plc v. Dickman*. The defenders, he submitted knew that their own employee would not be, at least primarily, responsible for unloading the trailer. They took responsibility for the provision of a ramp. It served a dual purpose; to facilitate unloading and to reduce or remove any risk to the health and safety of those accessing and egressing the trailer. That ought to have triggered the question, “who will be affected by my failure to provide the ramp?” The answer was those accessing and egressing the trailer. The injury was foreseeable and a loss of footing at the height of the trailer was likely to result in a fall and injury.” per Lord Boyd of Duncansby at para 17.

Scottish Opera denied that they owed him any such duty as he was not their employee and...

“In this case the factual control or supervision was the theatre company who employed the pursuer. There was no control by the defenders or the driver. The pursuer was not practically involved in the activities of the defenders. Their activity was to deliver the trailer. The role of the pursuer and others in his crew was to unload the trailer. Neither the defenders generally, or more particularly the driver, had any role in the unloading of the trailer. The workplace was the workplace of the Alhambra Theatre Co, not the defenders. While it might be argued that temporarily, the trailer and ramp became part of the workplace that ignored the evidence that the unloading was to be carried out by Alhambra Theatre Co Ltd and the defenders had no role in the unloading of the trailer. They ceded control to the theatre.” per Lord Boyd of Duncansby at para 2

Applying *Caparo v. Dickman*, the Court of Session held that such a duty was owed, independently of any employment relationship.

15.19 **Wall v. British Canoe Union (2015) County Court (Birmingham)**

Stephen Wall was a keen, experienced and competent canoeist who died in an accident on the River Teme in Bunington. At the time of his death, he was following a route described in a guide book as ‘a pleasant grade 2/3 paddle’, when in fact it contained a dangerous weir, which dragged Stephen Wall beneath the water to his death.

His widow claimed against the publishers of the guidebook, which was entitled “English White Water – the BCU Guidebook – claiming that they owed a duty of care to its readers to provide accurate information to keep them reasonably safe.
The court applied *Caparo v. Dickman* and held that no such duty of care could exist. There was no relationship of proximity between the parties; and it would not be fair, just and reasonable to impose such a potentially wide-ranging duty onto the authors or publishers of a guide towards anyone who might one day read it. Furthermore, applying the incremental approach, there were no analogous authorities on which the claimant could rely.

Para 147 “I find that there was no “relationship of proximity” between Mr Wall and the Defendant. Mr Wall was not engaged in a paddle arranged by the Defendant or under the control, supervision or instruction of the Defendant. Mr Wall, an experienced and skilled canoeist, had merely read the Guide which the Defendant had published almost 10 years before the tragic accident.

Para 148 “Further, the allegation by the Claimant that the Defendant had assumed responsibility in respect of Mr Wall’s safety whilst relying on the Guide and/or in respect of the accuracy thereof is misconceived and not founded on the established law. I do not find that the Defendant owed a duty of care to Mr Wall in respect of the Guide and the contents thereof. In short, the Defendant had not assumed responsibility for Mr Wall’s safety as alleged or at all.

Para 149 “I find that there was no “relationship of proximity” between the Defendant and Mr Wall so as to establish a duty of care between the publisher – on the one hand, and the reader on the other. In short, it would not be fair, just or reasonable in the circumstances of this case to find that such a duty of care could be imposed.

Para 150 “If the duty of care as argued for by the Claimant were found to exist it would mean that every publisher of every guidebook in the world on whatever topic or subject matter would assume an unlimited legal responsibility for the action and omissions of anyone who read their guidebook at any time after the publication. That responsibility would be unlimited – not only in terms of the indeterminate class of those who may read the same but also in terms of time. The inevitable consequence would be as noted in the case of Walter, albeit a case decided in the United States of America, that no author would wish to be exposed to liability for writing on a topic which might result in physical injury and certainty not on those activities and sports which involve any element of uncertainty or risk.

Para 151 “The Defendant argues that the fact that no such action has ever been brought let alone been successful is of significance. That is, however, merely another way of asserting that there is no authority, even by analogy, upon which the Claimant can point in support of the duty of care for which she contends.” per HHJ Lopez

15.20 *Rathband v. Chief Constable of Northumbria* [2016] EWHC 181 (QB)

PC Rathband had been shot in the head and blinded by M. M had already shot and seriously injured his ex-partner, and had killed her new partner in the mistaken belief that he was a police officer. M had rung 999 to explain his actions, and made threats against police officers in general, saying that he was “coming to get you”. The superintendent in charge of the operation decided not to issue an immediate warning to all police officers. She decided to wait for cell-site analysis and for the 999 call to be considered further before issuing any warning. There was a period of about seven-and-a-half minutes between the superintendent being told of M's threat and R being shot.

The police denied that a duty of care existed or that it had been negligent not to issue a warning, and did not accept that doing so would have prevented the shooting of R. R began the instant proceedings, which were continued by his brother and sister following his suicide.

Held: Claim dismissed.

In deciding whether the police owed R a relevant duty of care, the court applied the three stage test in *Caparo v. Dickman*.

The requirement of foreseeability was satisfied. M had made credible express threats against police officers. The possibility that he might carry them out was not merely foreseeable, but foreseen.

The second requirement, proximity, was also satisfied.
The real issue was the third element – whether the imposition of a duty was fair, just and reasonable. That was closely connected to the principle of public policy that the police were generally under no duty of care in respect of activities inextricably bound up with the investigation and prevention of crime. In particular, no private law duty was owed to protect individuals against harm caused by criminals.

A chief constable owed officers within his force a non-delegable duty to take reasonable care for their safety by ensuring both the provision and operation of a safe system of work. That was a different starting point to cases brought by members of the public. The duty as a quasi-employer could, however, be excluded as a matter of public policy, or because it would not be fair, just and reasonable for such a duty to exist: Hill followed. That was more likely in cases involving operational decisions taken under pressure. That was a particularly important consideration where there was a risk that imposition of a duty would give rise to "defensive policing", or in circumstances which involved the performance of the "core functions" of the police. In such cases, the important public policy was likely to outweigh the public interest in the performance of the chief constable's duty as a quasi-employer.

15.21 **Sumner v. Colborne (Denbighshire County Council) [2019] QB 230 (CA)**

Sumner was cycling along the A494 when he was in a collision with a Rover motor car driven by the defendant. He sued not only the driver, but also the council, claiming that the accident was in part caused by an excess of vegetation at the junction where he was hit, which severely obstructed visibility. He claimed that the council owed a duty of care to keep such vegetation cut back.

As there was no precedent for imposing such a duty of care, the court applied the Caparo v. Dickman test and held that it would not be good policy to impose such a duty of care on local councils.

The factors militating against the existence of a duty of care in a case such as the present were very powerful. The imposition of a duty of care on owners of land to ensure that vegetation in their fields and gardens did not affect sightlines on neighbouring highways (at least where they had themselves planted that vegetation or had allowed its growth by positive acts such as the erection of fencing) would be profound and, whilst the present case concerned vegetation, the principle would extend to the erection of buildings, fences and other structures that might affect visibility on the highway. Planning controls and the powers of highway authorities provided a range of public law powers for dealing with those matters in appropriate cases and the court should be slow to supplement them by way of an onerous duty of care in private law. Further, the road network was imperfect and drivers had to take it as they found it.

If a duty of care were found to exist in the present case, it would be liable to encourage a marked growth in claims by drivers’ insurers for contributions from owners of land adjacent to the highway in cases where visibility was an issue (and such owners would not necessarily have public liability insurance) and a marked growth in the business of providing expert advice to landowners on the implications of vegetation and structures on their land for visibility on the adjoining road network. Those were potentially serious and costly consequences for very little practical gain. For those reasons, the council had been under no relevant duty of care. It would not be just, fair and reasonable to find a duty of care in those circumstances.

"31 When it comes to weighing up the reasons for and against imposing liability in a case such as this, the factors militating against the existence of a duty of care are in my view very powerful.

"32 First, as Mr Warnock QC submitted on behalf of the Council, the imposition of a duty of care on owners of land to ensure that vegetation in their fields and gardens did not affect sightlines on neighbouring highways (at least where they had themselves planted that vegetation or had allowed its growth by positive acts such as the erection of fencing) would be profound. Farmers would need to consider visibility on the highway when deciding where to plant crops, hedges and trees, and when to harvest, prune or fell them. Similar issues would arise in relation, for example, to the planting of shrubs, hedges or trees in urban and suburban gardens. And whilst the present case concerns vegetation, the principle would extend to the erection of buildings, fences and other structures that might affect visibility on the highway. Planning controls and the powers of highway authorities provide a range of public law powers for dealing with these matters in appropriate cases. The court should be slow to supplement them by way of an onerous duty of care in private law.
“33 One feature of the duty contended for would limit its practical impact, but in a way that underlines its unsatisfactory nature. The duty would apply only to a landowner whose positive act had created the situation giving rise to the visibility problem. If the land were then sold, a later owner would not be liable, since that owner would not have done the positive act and, as is acknowledged, would not be liable in negligence for a failure to maintain the vegetation or otherwise to remove the source of the visibility problem. Whether a claim could still be brought against the original landowner is something best left on one side.

“34 A further important consideration is that… the road network is imperfect and drivers must take it as they find it.” per Sir Stephen Richards

15.22 **James-Bowen v. Commissioner of Police of the Metropolis** [2018] 1 WLR 4021 (SC)

Various police officers took part in the arrest and detention of a terrorist subject, who complained that he was unlawfully assaulted by them. After the commissioner had admitted liability and settled the claim, the police officers were charged with and acquitted of causing actual bodily harm to the suspect.

The police officers sued the commissioner for not supporting their case. They asserted, *inter alia*, that the commissioner owed them a duty of care as their employer or quasi-employer to take reasonable care to safeguard their welfare, including their economic and professional welfare, and reputational interests in the conduct of the defence to BA's claim and when considering and effecting any settlement of it.

It was held, applying *Caparo v. Dickman*, that to impose such a duty on an employer – especially one who holds public office – would create an untenable conflict of interests, which not therefore be fair, just and reasonable.

“31 In cases where an employer is alleged to be vicariously liable for the tortious conduct of his employee, the possibility of contribution proceedings between employer and employee highlights this potential conflict of interests…

“32 These stark differences between the interests of employer and employee strongly suggest that it would not be fair, just or reasonable to impose on an employer a duty of care to defend legal proceedings so as to protect the economic or reputational interests of his employee. Nor do I consider it realistic to suggest, as do the respondents in the present case, that this potential for conflict can be overcome by the recognition of a duty of care up to the time at which an actual conflict of interests arises, at which point “timeous notification” by the commissioner could result in the duty of care ceasing to apply. Where an employer defends a claim against him founded on his vicarious liability for his employees, the potential for conflict is too great to permit such a compromise. Moreover, it would often be totally impracticable. A civil claim and its defence, as they proceed, often develop in unexpected ways. There could be no justification for imposing on an employer the burden of keeping under review at each stage of the proceedings the question whether an actual conflict has arisen. Furthermore, steps taken by the employee as a result of such “timeous notification” of the emergence of an actual conflict may well be disruptive of the litigation.

“33 In the present case, moreover, the commissioner is not merely in a position analogous to that of an employer. She also holds public office and has responsibility for the Metropolitan Police Service. This adds a further dimension to this appeal because in the conduct of the proceedings against her she must be free to act as she considers appropriate in accordance with her public duty. This duty is, to my mind, totally inconsistent with her owing a duty of care to protect the reputational interests of her employees when defending litigation based on vicarious liability for their alleged misconduct. As we have seen, in *Calveley v Chief Constable of the Merseyside Police* [1989] 1 AC 1228 the House concluded that it would be contrary to public policy to prejudice the discharge by the police of their public duty to investigate alleged misconduct by officers by imposing a conflicting duty of care to protect the reputational interests of those officers.” per Lord Lloyd-Jones JSC
PART 4: THE DRIVE OF PUBLIC POLICY IN DUTY OF CARE

16 THE DRIVE OF POLICY: Practical Solutions

16.1 Whatever formulation is used to determine whether a new duty of care exists, it is clear that in practice the issue of whether to allow a claim is decided as a matter of policy. This relates in particular to two matters:

i) The kind of harm done;
ii) The status of the defendant.

16.2 **McFarlane v. Tayside Health Board** [2000] 2 AC 59 (HL)

“It may be objected that the House must act like a court of law and not like a court of morals. That would only be partly right. The court must apply positive law. But judges’ sense of the moral answer to a question, or the justice of the case, has been one of the great shaping forces of the common law. What may count in a situation of difficulty and uncertainty is not the subjective view of the judge but what he reasonably believes that the ordinary citizen would regard as right.”

per Lord Steyn at para 82

16.3 **Heil v. Rankin** [2001] QB 272 (CA)

“The compensation must remain fair, reasonable and just: fair compensation for the injured person. The level must also not result in injustice to the defendant, and it must not be out of accord with what society as a whole would perceive as being reasonable.” per Lord Woolf MR at p.294

16.4 **Rees v. Darlington Memorial Hospital NHS Trust** [2004] 1 AC 309 (HL)

“Judges of course do not have, and do not claim to have, any special insight into what contemporary society regards as fair and reasonable, although their legal expertise enables them to promote a desirable degree of consistency from one case or type of case to the next, and to avoid other pitfalls. But, however controversial and difficult the subject matter, judges are required to decide the cases brought before the courts. Where necessary, therefore, they must form a view on what are the requirements of fairness and reasonableness in a novel type of case.” per Lord Nicholls at para.14

The Kind of Harm

16.5 The criteria of ‘proximity’ or of what is ‘just and reasonable’ vary according to the kind of harm suffered. In cases of actual physical injury or damage it is generally unnecessary nowadays even to consider the issue of duty of care: the contentious issues, if any, will concern breach and injury.

16.6 However, in cases of non-physical loss, the courts have imposed other conditions (some may say arbitrarily) to the requirement of duty of care – beyond mere foreseeability – specifically to limit the numbers of potential claimants. This is the subject of ‘Nervous Shock’ and ‘Economic Loss’ which will be studied later in the course.

The Status of the Defendant

16.7 Some defendants are treated rather better than others and permitted to get away with a great deal more! This has been justified on the grounds of public interest, but such privilege is being gradually eroded.

16.8 Examples of these developments may be seen in many areas including cases involving The Emergency Services, Local Authorities and Children, Wrongful Births and Barristers’ Immunity.
17 ACTS AND OMISSIONS

17.1 It is important to draw a distinction between positive acts which cause an injury; and omissions to act, which permit an injury to be caused.

17.2 The general rule is that negligence liability does not extend to omissions (subject to certain exceptions) as there is no duty in English law to rescue people or to provide them with a gratuitous benefit.

17.3 This issue was considered in some detail by Lord Reed in Robinson v. Chief Constable of West Yorkshire [2018] AC 736, where he examined the difference between situations where members of the public services have committed an act which directly causes an injury to a member of the public; and those situations where they have omitted to act, indirectly enabling a third party to cause the injury.

17.4 Robinson v. Chief Constable of West Yorkshire [2018] AC 736

“The distinction between careless acts causing personal injury, for which the law generally imposes liability, and careless omissions to prevent acts (by other agencies) causing personal injury, for which the common law generally imposes no liability, is not a mere alternative to policy-based reasoning, but is inherent in the nature of the tort of negligence. For the same reason, although the distinction, like any other distinction, can be difficult to draw in borderline cases, it is of fundamental importance.

“It is also consistent with that characteristic that the exceptions to the general non-imposition of liability for omissions include situations where there has been a voluntary assumption of responsibility to prevent harm (situations which have sometimes been described as being close or akin to contract), situations where a person has assumed a status which carries with it a responsibility to prevent harm, such as being a parent or standing in loco parentis, and situations where the omission arises in the context of the defendant’s having acted so as to create or increase a risk of harm.

“The argument that most cases can be equally analysed in terms of either an act or an omission, sometimes illustrated by asking whether a road accident is caused by the negligent driver’s act of driving or by his omission to apply the brakes or to keep a good lookout, does not reflect the true nature and purpose of the distinction, as explained above.

“The argument was answered by Lord Hoffmann in Stovin v. Wise (p 945):

“One must have regard to the purpose of the distinction as it is used in the law of negligence, which is to distinguish between regulating the way in which an activity may be conducted and imposing a duty to act upon a person who is not carrying on any relevant activity. To hold the defendant liable for an act, rather than an omission, it is therefore necessary to be able to say, according to common sense principles of causation, that the damage was caused by something which the defendant did. If I am driving at 50 miles an hour and fail to apply the brakes, the motorist with whom I collide can plausibly say that the damage was caused by my driving into him at 50 miles an hour.” per Lord Reed at para 69
In *N v. Poole Borough Council* [2019] WLR 1478, Lord Reed further expounded what he meant by 'commission' or 'act' as opposed to 'omission' or 'failure to act'.

**N v. Poole Borough Council** [2019] WLR 1478

"Like private individuals, public bodies did not generally owe a duty of care to confer benefits on individuals, for example by protecting them from harm... In this context I am intentionally drawing a distinction between causing harm (making things worse) and failing to confer a benefit (not making things better), rather than the more traditional distinction between acts and omissions, partly because the former language better conveys the rationale of the distinction drawn in the authorities, and partly because the distinction between acts and omissions seems to be found difficult to apply. As in the case of private individuals, however, a duty to protect from harm, or to confer some other benefit, might arise in particular circumstances, as for example where the public body had created the source of danger or had assumed responsibility to protect the claimant from harm."

per Lord Reed at para 8

The fine line between an act and an omission was recently discussed in the High Court.

**Chief Constable of Essex v. Transport Arendonk BvBa** (January 23 2020) [2020] 1 WLUK 192

Transport Arendonk had had a cargo of sportswear being shipped from Belgium to Sheffield in a curtain-sided lorry driven by its employee (L). The lorry was involved in an accident during the evening. L continued for a quarter of a mile after the accident, then stopped in an unlit lay-by surrounded by farmland. The police came to the lorry and, after L tested positive for alcohol in a breath test, arrested him and took him to the police station.

During the night, while L was kept at the station, the lorry was broken into and cargo stolen. Transport Arendonk sued the police for the value of the stolen cargo. Its case was that L had told the police he was not allowed to leave the lorry, that the police took his keys, and that they would not let him call Transport Arendonk and did not call anyone on his behalf.

Transport Arendonk contended that the police's actions had amounted to an assumption of responsibility for the security of the lorry and its cargo, and that they knew, because they had been conducting an investigation into a spate of thefts from vehicles in the area, that it was at risk being left there overnight, but did not check on it or make regular patrols of the lay-by. The police submitted that they had no duty of care towards the respondent to prevent the commission of crimes by third parties; that the sole cause of the lorry being left was L leaving the scene of the accident and being over the alcohol limit; and that it was not arguable that they had assumed responsibility for the lorry or its cargo. They submitted that the police were liable in negligence, having taken positive action to leave the lorry unsecured in a remote area known for thefts and refusing to let L call the respondent.

The police’s claim that there was no case to answer because this was an ‘omission’ case was rejected. The ambiguity of whether it was an act or omission case, or in the words of Lord Reed in *Poole*, whether the police had been “making things worse” or “not making things better”, could be resolved at trial. It could be difficult on the facts to tell if a case was about an act or omission; the respondent’s claim had that difficulty, as it shared features of both. It could not be said for sure whether there was a duty of care. It needed a full trial of the evidence.

### 18 THE EMERGENCY SERVICES: Duty of Care and Omissions

18.1 There is generally no duty to rescue a person in danger, apart from the duty of parental responsibility and the contractual duty of those employed by the rescue services.

18.2 Similarly, *Skinner v. SS for Transport* [1995] (above) and a series of similar cases illustrate that the emergency services have no general duty to respond to a call, nor to be helpful when they arrive, provided that they do not actually make matters worse.

18.3 The general rule is thus that the police (and other emergency services and public authorities) do not owe a duty of care to members of the public to make sure that they are rescued or kept safe from danger, as such an imposition would not be in the public interest.
18.4 **Calveley v. Chief Constable of the Merseyside Police** [1989] AC 1228

“All other considerations apart, it would plainly be contrary to public policy in my opinion to prejudice the fearless and efficient discharge by police officers of their vitally important public duty of investigating crime by requiring them to act under the shadow of a potential action for damages for negligence by the suspect.” per Lord Bridge at p.1238

18.5 The policy reasons were neatly spelt out in the case of **M v. Commissioner of Police for the Metropolis** [2007] EWCA Civ 1361

**M v. Commissioner of Police for the Metropolis** [2007] EWCA Civ 1361

It was held that the police owed no duty of care to a child for failing to prosecute her abusive without even consulting her or her siblings about it, even though all the children were clearly victims of the abuse and suffered further because their father remained at large

“Summarising: the policy reasons are:

a) The supposed liability would not create a higher standard of care;

b) Police investigations might be carried out defensively;

c) Potentially elaborate investigations of fact, policy, discretion and allocation of resources would be involved with the consequent significant diversion of police manpower and attention from their most important function, that of the suppression of crime;

d) Closed investigations would require to be re-opened.” per Jacob L.J.at para 10

18.6 The very limited scope of the duty of care owed by the police in the light of public policy considerations was extensively reviewed by Males J. in the High Court in **Rathband v. Chief Constable of Northumbria**.

18.7 **Rathband v. Chief Constable of Northumbria** [2016] EWHC 181 (QB) see para 15.20 above.

**Excerpts from the judgment of Males J.**

**Para 93** “The principle that the police are generally under no private law duty of care in respect of activities inextricably bound up with the investigation and prevention of crime has been firmly established since **Hill v Chief Constable of West Yorkshire** [1989] 1 AC 53 (a claim on behalf of a victim of the “Yorkshire Ripper”) and has been repeatedly reaffirmed at the highest level: see **Brooks v Commissioner of Police of the Metropolis** [2005] UKHL 24, [2005] 1 WLR 1495 (negligence in the investigation of the murder of Stephen Lawrence); **Van Colle v Chief Constable of the Hertfordshire Police**, **Smith v Chief Constable of Sussex Police** [2008] UKHL 50, [2009] 1 AC 225 (negligent failure to protect against prolonged threats of extreme violence by an ex-partner) and **Michael v Chief Constable of South Wales Police** [2015] UKSC 2, [2015] AC 1732 (negligent failure to respond to an emergency call after a threat to kill by an ex-partner).

**Para 94** “The principle and its rationale were clearly stated by Lord Steyn in **Brooks** at [30]: “The prime function of the police is the preservation of the Queen's peace. The police must concentrate on preventing the commission of crime; protecting life and property; and apprehending criminals and preserving evidence … A retreat from the principle in **Hill** would have detrimental effects for law enforcement. Whilst focusing on investigating crime, and the arrest of suspects, police officers would in practice be required to ensure that in every contact with a potential witness or a potential victim time and resources were deployed to avoid the risk of causing harm or offence. Such legal duties would tend to inhibit a robust approach in assessing a person as a possible suspect, witness or victim. By placing general duties of care on the police to victims and witnesses the police’s ability to perform their public functions in the interests of the community, fearlessly and with despatch, would be impeded. It would, as was recognised in **Hill**, be bound to lead to an unduly defensive approach in combating crime.”

**Para 95** “The principle is one of general application, in the interests of the community as a whole, which does not depend on the facts of individual cases and which may therefore produce harsh results in such individual cases, as Lord Hope of Craighead explained in **Van Colle** at [75]: “... the principle had been enunciated in the interests of the whole community.”
Replacing it with a legal principle which focuses on the facts of each case would amount, in Lord Steyn’s words [in Brooks], to a retreat from the core principle. We must be careful not to allow ourselves to be persuaded by the shortcomings of the police in individual cases to undermine that principle. That was the very thing that he was warning against, because of the risks that this would give rise to. As Ward L.J. said in Swinney v Chief Constable of Northumbria Police Force [1997] QB 464, 487, the greater public good outweighs any individual hardship. A principle of public policy that applies generally may be seen to operate harshly in some cases, when they are judged by ordinary delictual principles. Those are indeed the cases where, as Lord Steyn put it, the interests of the wider community must prevail over those of the individual.

Para 97 “Some aspects of the justification for this principle given in Hill itself have fallen by the wayside in the intervening years, but the principle remains. Its surviving rationale is based upon two points, essentially those stated by Lord Steyn in Brooks, as explained by Lord Phillips CJ in Van Colle at [88]: “The first is the danger that the existence of a duty of care would alter, detrimentally, the manner in which the police performed their duties in as much as they would act defensively out of apprehension of the risk of legal proceedings. The second is that time and resources would have to be devoted to meeting claims brought against the police which could better be devoted to their primary duties.”

Para 98 “However, as the principle is one of public policy, it may sometimes have to yield to other important principles of public policy. An example from the cases is the need to protect informers (Swinney v. Chief Constable of Northumbria Police Force [1997] QB 464). Moreover, while the principle means that it will generally not be fair just and reasonable to impose a private law duty of care, it will not prevent such a duty arising in some other way, for example where there is an assumption of responsibility by the police (Lord Brown in Van Colle at [119] to [122]).

Summary of legal principles

Para 107 “In the light of this review of the cases I would for present purposes summarise the position in this way:

(1) The starting point is that a Chief Constable owes to officers within his force a non-delegable duty to take reasonable care for their safety by ensuring both the provision and operation of a safe system of work. That is a different starting point from that which applies in cases by members of the public, where the general rule in the absence of any assumption of responsibility is the exclusion of a duty to protect against harm caused by criminals pursuant to the Hill principle.

(2) The duty as a quasi-employer may, however, be excluded as a matter of public policy (or because it would not be fair, just and reasonable for such a duty to exist) by reference to the Hill principle.

(3) The duty will be excluded, or at least is more likely to be excluded, in cases involving operational decisions concerning the investigation or prevention of crime which are taken under pressure, whether of time or due to other circumstances. That will be a particularly important consideration in circumstances where there is a risk that imposition of a duty would give rise to “defensive policing”. These are the kind of circumstances which have been described as falling within “the core principle of Hill” (e.g. Robinson at [26]) or which involve the performance of the “core functions” of the police (Robinson at [46] and [50]).

In such cases the important public policy represented by the Hill principle is likely to outweigh the public interest in the performance of the Chief Constable’s duty as a quasi employer.

(4) What matters, therefore, is the nature of the decision that falls to be made. Save perhaps in wholly exceptional circumstances which it is unnecessary to consider in the present case, that will be so regardless of whether the circumstances alleged to amount to a breach of any duty are particularly egregious.

Para 108 “Many policing decisions involving the performance of the “core functions” of the police will affect the safety of members of the public as well as of police officers. It would be anomalous if, in such cases, a private law duty of care was owed to police officers as a result of their quasi employment relationship with the Chief Constable when it is clear from the Hill line of cases that no such duty is owed to members of the public. Application of the principles summarised above will mean that, even if the starting points in the two cases are different, this anomalous result does not arise.
Application of the principles

Para 109 “The decision which Superintendent Farrell had to make in the present case involved a reaction to an unexpected and unforeseeable 999 call in the course of a complex and challenging police manhunt for a highly dangerous criminal wanted for murder. The decision was not merely whether to issue a warning. Rather, she had to decide whether to issue an immediate warning to a large number of police officers (about 700 in all) currently on duty throughout the Northumbrian police area, without waiting for a proper understanding of what had been said in the call and without waiting for cell site analysis to see whether the area at risk could be narrowed down. She knew that what she had been told was based on a brief but necessarily second or third hand report of a threat to shoot police officers, passed on by an officer, Inspector Dwyer, who had not himself listened to the call. While the information available to her was unlikely to be simply wrong, it was obviously incomplete.

Superintendent Farrell had to decide, therefore, whether to issue an immediate warning, knowing that she was not making use of all the information available to her and that other information available in the recording of the call at least might put what she had been told in a different light, or to wait for a relatively short time when other information would be available which might enable a more focussed and effective warning to be given.

Para 110 “Superintendent Farrell did not have time to analyse in any detail the pros and cons of issuing an immediate warning or to think through the implications of such a course. There was no guidance in any manual on which she could draw. She had, therefore, to rely on her instincts and experience as a TFC. She would have been aware, however, that the issue of such a warning would have at least some implications for the performance of the police's duties to protect members of the public during what was, on the evidence, the busiest time of the week. It would at least involve some distraction of police officers on duty in the busy city centres of Newcastle and Gateshead from performance of their normal duties.

It might, as explained below, cause real difficulties in police communications and thus the ability of the police to respond promptly to unrelated emergencies. Therefore, in addition to the matters which were already centre stage in the operation to find Moat, including the safety of the individuals against whom he was known to have made threats and the threat which he posed to the public in general, the threats which he had now made against police officers had to be weighed against whatever impact on police operations, and therefore public safety, the issue of a warning might have had.

Para 111 “Further, it would have been artificial to consider in the abstract whether a warning should be given without some consideration of what that warning should say. There was an obvious trade-off between police officers' safety and the impact on normal police operations. The more directive the terms of any warning (for example, an instruction to stay mobile or return to base), the greater the impact on officers' ability to perform other duties, either by maintaining a visible police presence around the night clubs and bars in the city centre or by responding to emergency calls. The less directive the warning (for example, merely to be vigilant), the less impact it would have on the performance of normal duties, but the less effective it might prove to be.

Para 112 “I do not accept, therefore, the submission of Mr Geoffrey Tattersall QC for the claimants that the issue of an immediate warning was a “no brainer”. On the contrary, the decision whether to issue an immediate warning and, if so, in what terms, was one which required careful albeit rapid thought and a weighing of the possible courses of action and their likely consequences.

Para 113 “Focussing on the nature of the decision which Superintendent Farrell had to make, as distinct for the moment from whether the decision which she made was right or wrong, the decision fell clearly, in my judgment, within the scope of the core Hill principle. It was an operational decision which had to be taken under considerable pressure of time. It involved the weighing of a number of factors, including public safety as well as the safety of police officers. It was directly concerned with the investigation and prevention of crime. To impose a duty of care owed to police officers in these circumstances would plainly give rise to a risk of defensive policing and would inhibit rapid decision making.

Para 114 “For these reasons, I conclude that the public interest in the performance of the Chief Constable's duty as a quasi-employer is outweighed by the public policy represented by the Hill principle and that it would not be fair, just and reasonable for a duty of care to be owed in the circumstances of this case.
This is not – at this stage of the analysis – to say that Superintendent Farrell made the right decision, although the considerations to which I have referred will also be relevant to that question.

Rather, it means that even if the decision which she made was negligent, the law makes a policy decision that there shall be no private law claim for negligence in order to ensure that the police’s ability to perform their public functions in the interests of the community, fearlessly and with despatch, is not impeded. Undoubtedly that policy decision may bear harshly on PC Rathband, just as it did on the claimants in the Hill line of cases, but that is a consequence which the law is prepared to accept in the overall public interest.

Para 115 “This does not mean that the police owed no duty at all or that a victim of police misconduct has no remedy. It is common ground that (as in Van Colle ) there may in appropriate circumstances be a claim under the Human Rights Act for infringement of Article 2 of the European Convention on Human Rights (violation of a positive obligation to protect the right to life) but the requirements for such a claim are demanding (see Osman v United Kingdom (2009) 29 EHRR 245 ). So too are the requirements for a private law claim under domestic law for misconduct in public office. It is not suggested that either of these claims is possible in the present case. The only claim advanced here is in the tort of negligence, for which a private law duty of care is an essential element of the cause of action, but in my judgment there is on the facts of this case no such duty.

Para 116 “This conclusion means that this claim must be dismissed. It would not, however, be right to leave the matter there. The issue whether Superintendent Farrell was negligent was the subject of extensive evidence, taking up the greater part of the trial, and was fully argued. Fairness to both parties requires a conclusion to be reached.”

18.8 A series of cases illustrate the application of this principle as it relates to the emergency services.

18.9 Brooks v Commissioner of Police of the Metropolis [2005] 1 WLR 1495 (HL)

The claimant and his friend L, who were black, were set upon by white youths in a racist attack, and L was killed. The claimant was dealt with by the police in a way that was subsequently the subject of severe criticism in the report of an inquiry appointed to inquire into the matters arising from L’s death. He brought an action against the defendants, the commissioner of police, 15 named police officers and the Crown Prosecution Service, claiming inter alia damages for negligence. The judge struck out his action against five officers and the Commissioner.

On appeal, the Court of Appeal allowed his appeal in relation to his claim in negligence against the commissioner in respect of three duties of care that he alleged had been owed to him by the police, namely to take reasonable steps to assess whether he was a victim of crime and, if so, then to accord him reasonably appropriate protection, support, assistance and treatment, to take reasonable steps to afford him the protection, assistance and support commonly afforded to a key eye-witness to a serious crime of violence and to afford reasonable weight to the account that he had given of events and to act on it accordingly.

On appeal by the Commissioner, the House of Lords overturned the Court of Appeal on the grounds of public policy: “A retreat from the principle in Hill's case would have detrimental effects for law enforcement. Whilst focusing on investigating crime, and the arrest of suspects, police officers would in practice be required to ensure that in every contact with a potential witness or a potential victim time and resources were deployed to avoid the risk of causing harm or offence. Such legal duties would tend to inhibit a robust approach in assessing a person as a possible suspect, witness or victim. By placing general duties of care on the police to victims and witnesses the police’s ability to perform their public functions in the interests of the community, fearlessly and with despatch, would be impeded. It would, as was recognised in Hill's case, be bound to lead to an unduly defensive approach in combating crime.” per Lord Steyn at para 30

18.10 Alexandrou v. Oxford [1993] 4 All ER 328 (CA)

The plaintiff’s shop was burgled and an emergency call was sent to the police via a direct line from the plaintiff’s premises. Two police officers attended the scene but failed to notice that the back door had been forced open. The burglars returned later and emptied the shop through the door. The plaintiff sued the police for the value of the stolen goods.

HELD: The police do not owe a duty of care to the general public either to attend emergency calls or to act properly when they do.
OLL Ltd v Secretary of State for Transport [1997] 3 All ER 897

A party of eight children and a teacher went on a canoeing trip. When they got into trouble, the coastguard effected a botched search and rescue operation, involving inter alia the misdirection both of a lifeboat and of a Royal Navy helicopter. The canoe instructors claimed that the coastguard had been negligent. HELD: There was no obvious distinction between the fire brigade responding to a fire where lives were at risk and the coastguard responding to an emergency at sea and, on that basis, the coastguard were under no enforceable private law duty to respond to an emergency call, nor, if they did respond, would they be liable if their response was negligent, unless their negligence amounted to a positive act which directly caused greater injury than would have occurred if they had not intervened at all.

Elguozouli-Daf v Metropolitan Police Commissioner McBrearty v Ministry of Defence [1995] QB 335 (CA)

Two cases were heard together. The plaintiffs in both were arrested, charged and remanded in custody for serious offences (rape and planting the Hyde Park bomb), but after periods of detention of 22 and 85 days respectively, the CPS discontinued proceedings against them for lack of evidence. The plaintiffs claimed that the CPS had been negligent in not acting with reasonable diligence to conclude sooner that their evidence was insufficient to support a case. HELD: No duty of care was owed by the CPS. The Court of Appeal applied the tripartite Caparo test, though combining the ‘proximity’ and ‘just and reasonable’ elements.

Having accepted that it was reasonably foreseeable that negligence on the part of the CPS would lead to the plaintiffs’ loss of liberty (thus satisfying the first part of the test), Steyn L.J. continued:

“The matter turns on a combination of the element of proximity and the question of whether it is fair, just and reasonable that the law should impose a duty of care. It does not seem to me that these considerations can sensibly be considered separately in this case: inevitably they shade into each other.

“Recognising that individualised justice to private individuals, or trading companies, who are aggrieved by careless decisions of CPS lawyers militates in favour of the recognition of a duty of care, I conclude that there are compelling considerations, rooted in the welfare of the whole community, which outweigh the dictates of individualised justice. I would rule that there is no duty of care owed by the CPS to those it prosecutes.” per Steyn L.J.

Leach v Chief Constable of Gloucestershire Constabulary [1999] 1 WLR 1421 (CA)

The police wished to interview W about a number of murders and since they suspected that he was mentally disturbed they asked Leach, a volunteer worker on a young homeless project, to act during the interviews as ‘an appropriate adult’ in accordance with PACE 1984. The details of the murder were harrowing and Leach was often left alone with W in a cell. W eventually committed suicide in custody. As a result of this experience, Leach suffered post-traumatic stress disorder, psychological injury and a stroke and sued the police for damages. Her claim failed.

It was held that there were strong policy reasons why the law should not impose on the police a duty towards a person acting as an appropriate adult to take care to protect him or her from mental or psychological harm as this would inhibit the interview with the suspect.

B v Reading BC [2009] EWHC 998

A father was falsely accused of molesting his three-year-old daughter, which meant that he was unable to have any contact with her for five years, until the truth was discovered. The social worker and police officer investigating the abuse had acquired their ‘evidence’ by bombarding the child with grossly leading and personal questions, and when she did not say anything useful, falsely claimed she had said that ‘daddy put his willy near my privates.’ The father sued the police and council, claiming that the principle in Hill could be set aside when the police officer’s conduct had been morally bankrupt.

It was held that although the police and social worker had made a bad misjudgment, they were acting in bona fide exercise of their authority, and there was no reason to bring this case outside the policy in.
18.15 **Desmond v. Chief Constable of Nottinghamshire** [2011] EWCA Civ 3

Vincent Desmond was arrested for sexually assaulting a woman in Nottingham, which he denied. DC Kingsbury initiated a crime file and Desmond was released on bail. It then turned out that this had been a case of mistaken identity, and Kingsbury closed the file, noting on it: “It is apparent Desmond is not responsible for the crime.”

In 2005, Desmond applied for an Enhanced Criminal Record Certificate in connection with his application for a teaching position. To his horror, the record had details of the attempted rape, even though he was never even charged with it. The information had been supplied to the Criminal Records Bureau by the defendant.

Desmond fought for over a year to have this rectified, which it eventually was, despite the obstructive attitude of the Nottinghamshire Police, and he then sued the police for their negligence, which had caused him a great deal of distress, as well as potentially losing him the opportunity to work as a teacher.

Following **Hill**, it was held that there was no duty of care owed by the police to individuals in this respect. Although there might be exceptional cases (see below) where the police had assumed responsibility to a particular individual, this was not such a case. In particular, the Court of Appeal noted that the statutory duty on the police to give information to the CRB in relation to ECRCs was designed to protect children, not potential paedophiles.

“Not only is there no proper basis for concluding that the chief officer is to be taken to have assumed responsibility to Mr Desmond in the performance of a responsibility imposed by statute, but the structure and purpose of the statute strongly suggests that there should be no duty of care. If there were, there would be a plain conflict between the chief officer’s putative duty to Mr Desmond and the statutory purpose of protecting vulnerable young people.” per the President of the QBD at para 49

18.16 **Michael v. CC of South Wales** [2015] AC 1732 (SC)

M had made a 999 call from her home in South Wales in the early hours of the morning. The call was picked up by Gwent Police. M told the operator that her ex-partner had assaulted her and that, although he had left, he had threatened to return imminently and kill her. The operator relayed the details of the call to South Wales police, but did not mention the threat to kill. South Wales police downgraded the priority of the call, deeming an immediate response unnecessary.

M made a second 999 call about 15 minutes after the first. In it, she could be heard screaming. Police officers arrived at her home within eight minutes of the second call to find that she had been killed by her ex-partner.

Her executrix brought claims against Gwent and South Wales police in common law negligence and in respect of ECHR art.2.

HELD: The police do not owe a common law duty of care in negligence to a specific member of the public even where they were aware, or ought reasonably to have been aware, of a threat to her life or physical safety. Nor do they owe such a duty where a member of the public has given them apparently credible evidence that an identifiable third party presented a specific and imminent threat to her life or physical safety.

There was, however, a case to answer on the article 2 point,

“It does not follow from the setting up of a protective system from public resources that if it fails to achieve its purpose, through organisational defects or fault on the part of an individual, the public at large should bear the additional burden of compensating a victim for harm caused by the actions of a third party for whose behaviour the state is not responsible. To impose such a burden would be contrary to the ordinary principles of the common law.

“The refusal of the courts to impose a private law duty on the police to exercise reasonable care to safeguard victims or potential victims of crime, except in cases where there has been a representation and reliance, does not involve giving special treatment to the police. It is consistent with the way in which the common law has been applied to other authorities vested with powers or duties as a matter of public law for the protection of the public…
"The question is therefore not whether the police should have a special immunity, but whether an exception should be made to the ordinary application of common law principles which would cover the facts of the present case.

"Ms Monaghan has advanced essentially two arguments in support of the intereners’ liability principle. The first is that the nature and scale of the problem of domestic violence is such that the courts ought to introduce such a principle to provide protection for victims and a spur to the police to respond to the problem more effectively. The second is that the common law should be extended in harmony with the obligations of the police under articles 2 and 3 of the Convention.

"I recognise fully that the statistics about the incidence of domestic violence and the facts of individual cases such as the present are shocking. I recognise also that the court has been presented with fresh material on the subject. However, I am not persuaded that they should cause the court to create a new category of duty of care for several reasons.

"If the foundation of a duty of care is the public law duty of the police for the preservation of the Queen's peace, it is hard to see why the duty should be confined to potential victims of a particular kind of breach of the peace. Would a duty of care be owed to a person who reported a credible threat to burn down his house? Would it be owed to a company which reported a credible threat by animal rights extremists to its premises? If not, why not?

"It is also hard to see why it should be limited to particular potential victims. If the police fail through lack of care to catch a criminal before he shoots and injures his intended victim and also a bystander (or if he misses his intended target and hits someone else), is it right that one should be entitled to compensation but not the other, when the duty of the police is a general duty for the preservation of the Queen's peace? Similarly if the intelligence service fails to respond appropriately to intelligence that a terrorist group is intending to bring down an airliner, is it right that the service should be liable to the dependants of the victims on the plane but not the victims on the ground? Such a distinction would be understandable if the duty is founded on a representation to, and reliance by, a particular individual but that is not the basis of the interveners’ liability principle.

"These questions underline the fact that the duty of the police for the preservation of the peace is owed to members of the public at large, and does not involve the kind of close or special relationship ("proximity" or "neighbourhood") necessary for the imposition of a private law duty of care.”

per Lord Toulson at paras 114–120

19 THE EMERGENCY SERVICES: Duty of Care and Commissions

19.1 Despite the apparent protection from litigation afforded to them, there may still be cases where the emergency services will be held liable for negligence. Although they do not seem to owe a general duty of care in tort to do their jobs properly (or at all), they do owe a duty not actively to make matters worse.

19.2 Brooks v Commissioner of Police of the Metropolis [2005] 1 WLR 1495 (HL)

"Like Lord Bingham and Lord Steyn, in reaching this conclusion I am not to be taken as endorsing the full width of all the observations in Hill v Chief Constable of West Yorkshire. There may be exceptional cases where the circumstances compel the conclusion that the absence of a remedy sounding in damages would be an affront to the principles which underlie the common law. Then the decision in Hill’s case should not stand in the way of granting an appropriate remedy."

per Lord Nicholls at para 6


Three cases were heard together on the issue of whether the fire-brigade had a duty to take care in responding to an emergency. In the first, the fire-officer ordered a sprinkler system to be turned off, as a result of which the plaintiff's building burnt down. In the second, the fire brigade left the scene of a fire without properly extinguishing it. It flared up later and caused further damage. In the third, the fire brigade were unable to fight a fire because their water hydrants were not working.
It was held that a fire brigade did not enter into a sufficiently proximate relationship with the owner or occupier of premises so as to come under a duty of care merely by attending at the fire ground and fighting the fire: “In my judgment, the fire brigade are not under a common law duty to answer the call for help, and are not under a duty to take care to do so. If therefore, they fail to turn up, or fail to turn up on time, because they have carelessly misunderstood the message, got lost on the way or run into a tree, they are not liable.” per Stuart-Smith L.J. at p.1030

However, where the fire-brigade by their own actions have increased the risk of damage, they could be liable for that damage. Thus, there was a valid claim in the first case, but not the other two.


Mary Swinney gave information to the police about the identity of a person implicated in the unlawful killing of a police officer, specifying that her identity must be kept confidential as she knew that the criminal was violent and feared he would seek revenge. The police left a document naming her as the informant in an unattended police vehicle, which was broken into. The document then got into the hands of the criminal, who threatened the informant and her husband with violence and arson, causing them psychiatric damage. The Chief Constable contended that the police owed no duty of care to the plaintiffs or alternatively that public policy precluded the prosecution of the plaintiffs’ claim, since the police were immune from prosecution for claims arising out of their activities in the investigation or suppression of crime.

HELD: It was arguable that there was a special relationship between the police and an informant who passed on information in confidence implicating a person known to be violent which distinguished her from the general public as being particularly at risk and gave rise to a duty of care on the police to keep the information secure. Whilst public policy considerations would normally protect the police from being sued, stronger policy suggested that the public should be encouraged to give information without fear that their identity would be made known to the person implicated.

19.5 In 2008, the Crown Prosecution Service and Met Police paid a family more than £600,000 in damages and costs after a child witness was identified to a gang. The 16-year-old boy had been promised anonymity to give evidence about a violent gang attack, but details were inadvertently passed to gang members. The family of three was moved for its protection. The payout is thought to be one of the largest of its kind. Prosecutors said the service’s actions “fell below our accepted standard”.

The family was threatened after details of the boy’s identity were disclosed, and had to be relocated as part of a witness protection scheme, although they were not given new identities. In a statement, the boy, his mother and her partner told BBC News they had been left with “no option” but to leave their homes, careers, families and friends “without even being able to say goodbye”. They said other children in the family also had to leave. “The children were uprooted from their schools and whisked away without an opportunity to explain: The trauma and upset this caused is beyond words.”

The family's solicitor, Fiona Murphy, told BBC Radio 4's Today programme: "The boy witnessed a violent gang attack and he agreed to provide a statement to the police on the express promise that his identity would not be revealed to the suspects. Through a series of individual and systemic failings, his name and address were revealed to the criminal gang and the family began to experience a campaign of harassment and intimidation, and when they brought their concerns to the attention of the Metropolitan Police it was denied that their identity had been revealed." She said the police had finally advised the family they had to go into witness protection.

'Lost trust'

The family blamed the mistake on the Crown Prosecution Service and the Metropolitan Police and launched legal action against them for psychiatric damage, lost earnings and disruption to their lives. The CPS and the Met eventually paid damages of more than £550,000, with the CPS paying almost two-thirds, £350,000. The Met also had to pay £50,000 legal costs between them as well as apologise to the family. The family said that, for the young witness, "no sum of compensation would have given him back his youth... He will never recover from this experience, he has lost trust in the police and if he were to witness a similar crime tomorrow – he would simply look away."
19.6 **Costello v. Chief Constable of Northumbria Police** (1999) 1 All ER 550 (CA)

WPC Julie Costello was instructed to take a young woman into custody. Inspector Stuart Bell accompanied Costello in order to protect her. Costello was attacked by the prisoner, but Bell did nothing to assist. Costello claimed that Bell had a common law duty of care (as well as his contractual duty) to assist her in the circumstances. Whilst acknowledging the importance of the general principle laid down in *Hill v. CC West Yorkshire*, the Court of Appeal held that such a duty of care did exist.

“For public policy reasons, the police are under no general duty of care to members of the public for their activities in the investigation and suppression of crime (Hill's case). But this is not an absolute blanket immunity and circumstances may exceptionally arise when the police assume a responsibility, giving rise to a duty of care to a particular member of the public (Hill's case and Swinney's case). The public policy considerations which prevailed in Hill's case may not always be the only relevant public policy considerations (Swinney's case)...

If a police officer tries to protect a fellow officer from attack but fails to prevent injury to the fellow officer, there should in my view generally be no liability in tort. The relationship between the two police officers is arguably closer than the relationship between the police officer and the member of the public, but the public policy considerations are essentially the same and are compelling. One such consideration is that in the circumstances liability should not turn on, and the court should not have to inquire into, shades of personal judgment and courage in the heat of the potentially dangerous moment.

“But in this case, Inspector Bell acknowledged his police duty to help the plaintiff. Yet he did not, on the extraordinary facts found by the judge, even try to do so. In my judgment, his acknowledged breach of police duty should also incrementally be seen as a breach of a legal duty of care.”

per May L.J. at 563/564

19.7 **Kent v. Griffiths** [2001] QB 36 (CA)

Tracey Kent was pregnant and asthmatic, and as she was having trouble breathing her G.P. (Yvonne Griffiths) phoned for an ambulance, which she was told was on the way. The ambulance should have taken no more than 14 minutes to arrive, but due to the carelessness of the ambulance service took 38 minutes. As a result of this delay, Mrs. Kent suffered respiratory arrest which led to memory impairment and a miscarriage. The defendant relied on the previous authorities to show that no duty of care was owed by the emergency services to those who call upon them and asked the Court of Appeal to strike out the claim as disclosing no reasonable cause of action.

However, the Court of Appeal distinguished the earlier cases in that here the ambulance service had actually accepted the call and assured the plaintiff they were on the way. This caused the plaintiff to abandon the search for other possible means of transportation to the hospital.

The Court suggested therefore, that the application of the *Caparo v. Dickman* tripartite test might find sufficient proximity between the parties incrementally to increase the duty of the emergency services in such cases, and might also find that it was just and reasonable to impose such a duty.

Thus, there was potentially a cause of action, and the matter could proceed to trial.

At the trial the claimant was awarded £326,377 [£379,660] in damages against the London Ambulance Service. The LAS appealed on the basis that the case was indistinguishable from *Alexandrou v. Oxford* [1993] and *Capital and Counties v. Hampshire CC* [1997].

Lord Woolf drew a distinction between the police and fire services, whose duty was to protect the public at large, and the ambulance service in this case whose duty was to protect a particular member of the public, the claimant, who was the only person for whom the ambulance was called and was the only person who could have been adversely affected by the actions of the ambulance crew. There was no question of an ambulance not being available or of a conflict of priorities. There was thus no policy reason why the ambulance service should not have been liable, and the appeal by LAS was dismissed.
“The fact that it was a person who foreseeably would suffer further injuries by a delay in providing an ambulance, when there was no reason why it should not be provided, is important in establishing the necessary proximity and thus duty of care in this case. In other words, as there were no circumstances which made it unfair or unreasonable or unjust that liability should exist, there is no reason why there should not be liability if the arrival of the ambulance was delayed for no good reason. The acceptance of the call in this case established the duty of care. On the findings of the judge it was delay which caused the further injuries. If wrong information had not been given about the arrival of the ambulance, other means of transport could have been used.”

per Lord Woolf M.R. at para 49

19.8 **Commissioner of Police for the Metropolis v. Reilly [2008] EWHC 2217 (QB)**

Caroline Reilly was being constantly harassed by Peter Webb, a man with a criminal record and a drug habit. She made frequent complaints to the police, who largely ignored her, frequently telling her they would come to see but not doing do so. Nothing was done by the police to prevent Webb’s continued campaign, causing Reilly distress, anxiety and possible injury. She sued the police for their negligence and the Commissioner sought to have the action struck out as being contrary to the policy in *Hill*. However, the court held (without deciding the case itself) that in these circumstances, Reilly did have an arguable case to show sufficient proximity to justify an award.

“Note the use of the word “proximity”, because in the case of *Hill* the claimant could not be said to meet the text of proximity which of course forms an important part of the ratio in the well-known case of *Caparo*. The claimant in *Hill* was the personal representative of a murder victim of the Yorkshire Ripper who had been a member of the general public. She was not a complainant to the police. She was not somebody who had placed herself in the hands of the police. She was not a witness. She was an ordinary member of the public who, because of the delay in detection and arrest, had the misfortune to be murdered. So proximity was an important factor, but it was recognised, both in *Hill* and *Brooks*, as I have been at pains to point out, that there were exceptions to what might be called a general immunity...

“A difference emerges from the *Hill* principle. Miss Reilly had not only created a degree of proximity by making a complaint to the police by asserting that criminal acts had been committed for which an arrest could be made and by asserting that the harassment and the criminal acts threatened to continue, but also by naming the person whom she wished to have arrested.”

per MacDuff J. at paras 9 and 11

19.9 **Robinson v. Chief Constable of West Yorkshire [2018] AC 736**

The paradigm case of the duty of care owed by the police in relation to their positive acts is now *Robinson v. Chief Constable of West Yorkshire*, which has been discussed in great detail above.

20 **PUBLIC POLICY AND THE ARMED FORCES**

20.1 Since the case of *Shaw Savill v. Commonwealth* (1940) 66 CLR 344, the courts have recognised that the decisions of the government (Ministry of Defence) as to the deployment of troops and the conduct of defence in times of war are not matters over which the courts have jurisdiction. This is known as ‘combat immunity’.

20.2 However, there is sometimes a fine line between the conduct of a war and the preparations for it.

**Smith v. Ministry of Defence [2014] AC 52 (SC)**

Two cases were heard together in a striking out action concerning the liability of the MoD for providing troops in Iraq with substandard equipment and training.

In the first set of claims, in March 2003, four soldiers (Corporal Stephen Allbutt, Trooper David Clarke, LC Daniel Twiddy and Trooper Andrew Julien) were in a Challenger tank in Basra, placed at a dam in full down position, so as not to be visible. They were mistaken as being enemies in a bunker by members of another UK regiment using thermal imaging sights, and were attacked with high explosive shells fired from another Challenger tank.
Allbutt and Clarke were killed and the others seriously injured. The claimants blamed the accident on a failure by the MoD to ensure that the claimants’ tank and the tanks that fired on it were fitted with the technology and equipment to prevent the accident, as well as a lack of proper recognition training for the soldiers pre-deployment.

In the second case, in May 2007, Private Phillip Hewett was killed when he was deployed in a Snatch Land Rover to patrol Al Amarah, a town known to be subject to bombing attacks. He was killed when the vehicle was the subject of an enemy’s improvised explosive device. Snatch Land Rovers are only lightly armoured, and were not therefore suitable for patrolling the area in question.

The relatives and survivors claimed that the injuries were caused by the lack of proper equipment and/or training, and sued the Ministry of Defence on several grounds, *inter alia*:

i) Breach of article 2;
ii) Common law negligence.

On the first ground, the MoD sought to have the case struck out on the basis that Article 2 protection does not extend to incidents occurring outside the territory of the treaty State. The majority of the Supreme Court held that the test for the applicability of the Convention was not solely concerned with territory, but rather with jurisdiction, and that extraterritorial jurisdiction could exist whenever a state, through its agents, exercised authority and control over an individual (as was clearly the case with the armed forces.) That was not to say that there had actually been a breach of article 2 in the circumstances, but the action could not be struck out simply on the basis of article 2 being inapplicable.

On the second ground, the MoD claimed that either the matter was covered by ‘combat immunity’ and was therefore not justiciable; or, even if it were justiciable, it was not fair, just and reasonable to impose such a duty of care on the MoD. Lord Hope opined that the doctrine of combat immunity should be narrowly confined to decisions made in the height of warfare, which was not the case in the Challenger claimants’ case, and was a matter to be decided on the full evidence in the Snatch Land Rover case. On that basis, neither claim should be struck out.

“The same point can be made about the time when the failures are alleged to have taken place in the Challenger claimants’ case. At the stage when men are being fitting of equipment to tanks or other fighting vehicles, there is time to think things through, to plan and to exercise judgment. These activities are sufficiently far removed from the pressures and risks of active operations against the enemy for it to not to be unreasonable to expect a duty of care to be exercised, so long as the standard of care that is imposed has regard to the nature of these activities and to their circumstances.

“For this reason I would hold that the Challenger claims are not within the scope of the doctrine, that they should not be struck out on this ground and that the MOD should not be permitted, in the case of these claims, to maintain this argument.” per Lord Hope at para 95

As to whether it was fair, just and reasonable to impose the duty of care, Lord Hope said that the case needed to be decided on its merits after a full hearing of the evidence. The circumstances of a theatre of war may vary greatly and such cases cannot be grouped under a single umbrella, let alone be analogized with the police cases. So the cases would not be struck out for that reason either.

However, Lord Hope did note both that the courts must beware of imposing unrealistic private duties of care on military commanders; and must also guard against finding them to be in breach of such duties in the extraordinary circumstances of a war.

“The sad fact is that, while members of the armed forces on active service can be given some measure of protection against death and injury, the nature of the job they do means that this can never be complete. They deserve our respect because they are willing to face these risks in the national interest, and the law will always attach importance to the protection of life and physical safety. But it is of paramount importance that the work that the armed services do in the national interest should not be impeded by having to prepare for or conduct active operations against the enemy under the threat of litigation if things should go wrong. The court must be especially careful, in their case, to have regard to the public interest, to the unpredictable nature of armed conflict and to the inevitable risks that it gives rise to when it is striking the balance as to what is fair, just and reasonable.” per Lord Hope at para 100
21 PUBLIC POLICY AND LOCAL AUTHORITIES

21.1 Local authorities make a popular target for litigation, even when the damage suffered by the claimant is hardly due to their misfeasance, since local authorities generally have the funds to pay damages.

21.2 In direct physical injury cases (such as someone falling down an open manhole) local authorities will generally settle the claim, and will have funds set aside to do this. In more complex and indirect claims, the courts will often favour the local authority on the basis that any damages would effectively be paid by the tax-payer, and there are better things on which to spend public money than in paying off disgruntled individuals.

21.3 Jain v. Trent Strategic Health Authority [2008] QB 246 (CA)

Trent SHA inspected a nursing home – Ash Lea Court – run by Jain, and found several defects, such as a torn carpet, which were considered a risk to the elderly residents. Trent made an urgent application to the magistrates’ court under The Registered Homes Act 1984 s.30, to have the home closed down, which it was. Jain appealed to the Registered Homes Tribunal, which found that there were no grounds to support the closure, but by that time it was too late for Jain to resuscitate the business.

Jain successfully sued TSA for negligence. T appealed on the grounds, inter alia, that the trial judge was wrong to have held that it was fair, just and reasonable for T to owe J a duty of care with respect to making an application under the 1984 Act.

The Court of Appeal agreed with Trent. The trial judge had decided that there must be a duty of care because of the severity of the breach, but that was entirely the wrong approach. The issue was whether, public policy, inter alia, should impose such a duty of care on the local authority in any event. Here, the statutory scheme was designed to protect the residents from abuse, not to protect the owners from financial loss. Furthermore, if such cases were permitted, the local authority would find itself using public resources to defend itself against actions from every residential-home owner it applied to close down, as the home owners had such a key interest in staying open.

21.4 Cases against local authorities involving undetected or badly handled cases of child abuse have recently been overhauled in light of the Human Rights Act 1998, and are discussed later on.

21.5 Other cases involving the physical and educational welfare of children illustrate the general difficulties faced by the courts in balancing duty of care and policy.

22 THE EDUCATIONAL NEEDS OF CHILDREN

22.1 Phelps v. London Borough of Hillingdon [2001] 2 AC 619 (HL)

Pamela Phelps suffered dyslexia and as a result had severe learning difficulties at school. She was sent to an educational psychologist when she was 11, but the psychologist failed to notice the dyslexia. The claimant left school at 16 with no qualifications. Shortly after leaving school, her parents sent her to be tested again and the dyslexia was diagnosed. The parents sued the local authority for which the psychologist worked for the inappropriate education received by the child.

The House of Lords held that a prima facie duty of care is owed when an educational psychologist is called in to give advice about a specific child which it is clear will be relied upon by the parents and teachers.

“It is long and well-established, now elementary, that persons exercising a particular skill or profession may owe a duty of care in the performance to people who it can be foreseen will be injured if due care and skill are not exercised, and if injury or damage can be shown to have been caused by the lack of care. Such duty does not depend on the existence of any contractual relationship between the person causing and the person suffering the damage. A doctor, an accountant and an engineer are plainly such a person. So in my view is an educational psychologist or psychiatrist and a teacher including needs. So may an education officer performing the functions of a local education authority in regard to children with special educational needs. There is no more justification for a blanket immunity in their cases than there was in Capital & Counties plc v. Hampshire County Council [1997].” per Lord Slynn
22.2 *Phelps v. London Borough of Hillingdon* was followed by the Court of Appeal in the similar case of *Devon County Council v. Clarke* [2005] EWCA Civ 266.

22.3 However, owing a duty of care is not, of course, the same thing as actually being negligent. (This is discussed in detail under the section on Breach of Duty below.)

**Carty v. Croydon LBC [2005] 1 WLR 2312**

Leon Carty had a number of physical and development problems from birth. Amongst other problems, he suffered from “glue ear” which affected his hearing, and at the age of two he was still unable to speak. He was originally sent to Crossfield nursery school, but due to his aggressive behaviour and learning difficulties he was placed at the age of four in St. Lukes' Day Nursery, a unit used to investigate the special educational needs of children with a variety of difficulties. Following assessment, he was sent to a mainstream primary school, but was later moved to a school for children with moderate learning difficulties. When that school could no longer cope with him, he was moved to a school for children with emotional and behavioural problems and then to a boarding school for children with dyslexia. He was then sent to a mainstream comprehensive school, but having been excluded for violent behaviour at the age of fourteen, he never returned to school and had to have tuition at home until he was sixteen.

At the age of twenty-five, he sued the council for breaching its duty of care to ensure identification of and provision for his learning difficulties.

Applying the *dictum* of Lord Slynn in *Phelps v. London Borough of Hillingdon*, Gibbs J. held that the council (as educational authority) did owe a duty of care to the claimant. However, he also held that in the complex circumstances of the case the council had done all it reasonably could to meet the claimant’s special needs and had not been negligent towards him.

23 **THE PHYSICAL SAFETY OF CHILDREN**

**Bullying**

23.1 *Bradford-Smart v. West Sussex County Council* [2002] EWCA Civ 7

Leah Bradford-Smart suffered years of severe bullying both in and out of school leading her to suffer depression and Post Traumatic Stress Disorder by the time she was fifteen. She sued the Council (who were responsible for the school) claiming that they had a duty to make sure she was not bullied. There were several earlier cases in which such claims had succeeded, but in those the bullying had taken place almost entirely on school premises.

Most of Leah’s bullying had taken place on the estate where she lived and during her bus journeys to and from school, albeit by children from the same school. The teachers who were aware of the bullying did what they could to prevent it happening on school premises. Thus, the question for the court was whether there was any duty on the school staff in respect of bullying which took place outside the school gates. The answer was “no” because such a duty would not pass the third test in *Caparo v. Dickman*.

“I make no secret of the fact that I find this a most anxious case. Advancing the boundaries of negligence requires the most careful consideration of whether it is fair, just and reasonable to impose a duty granted that there is foreseeability of damage and proximity. There was proximity and I have no difficulty with foreseeability: that sustained persecution by third parties can go beyond misery to psychiatric illness. The boundaries of negligence have been moved forward in *Gower v. London Borough of Bromley* [1999] and *Phelps v. Hillingdon LBC* [2000]. In both cases the extent of the duty and the nature of the particular breach could in my view be ascertained with greater precision than is possible in the present case. Is a school to be concerned with bullying only at the bus stop immediately outside the school gate, on the bus itself or arising from anti-social behaviour between families on a housing estate? A school’s powers are limited to what might best be described as inquiry and counselling which may in certain circumstances exacerbate rather than ameliorate the situation. I have come to the conclusion that granted a school knows that a pupil is being bullied at home or on the way to and from school, it would not be practical, let alone just, fair and reasonable, to impose upon it a greater duty than to take reasonable steps to prevent the bullying actually happening inside the school.” per Garland J. in the High Court (approved by the Court of Appeal)
23.2 **Winfindale v. Rotherham Borough Council (2011) Unreported**

Jed Winfindale, 13, was hit over the head several times with a wooden drawing board by a classroom bully. His arm and shoulder were injured as he tried to protect himself, and he had to be taken to hospital. Afterwards, he suffered nightmares and flashbacks.

The attack happened at Maltby Comprehensive School near Rotherham, South Yorkshire. The attacker became disruptive and verbally abusive to Jed and the teacher, and when the teacher left the class to find a colleague trained to tackle such pupils, the child struck. Rotherham council admitted liability for breach of statutory duty and negligence and agreed to pay an undisclosed four figure payout.

Jed was one of the first schoolchildren to receive a payout for such an incident.

**Sports Related Incidents**


Daryl Kearn-Price was a pupil, aged 14, at Tunbridge Wells Boys Grammar School. Following a series of ball-related accidents in the school playground, the use of full-size leather footballs was banned in the playground. However, nothing was done to enforce this ban, and at 8.40 am on 7 July 1998, Daryl was struck in the eye by a banned football and lost all useful vision in his left eye. The school day actually began at 8.45, though pupils were encouraged to arrive earlier to be ready on time.

The school argued that it owed no duty to take care for the safety of its pupils while they were on school premises before school hours as it was unreasonable to expect the staff to supervise the pupils in the pre-school period. In 1970 the Court of Appeal had disallowed a similar claim from an 8 year old student who was injured by running into a brick wall five minutes before school started (Ward v. Hertfordshire County Council [1970] 1 WLR 356), but Dyson L.J. did not consider that this established that there was never such a duty in any circumstances. There clearly is a duty to pupils at school before it starts: the question is the precise scope of it. The Court of Appeal held that in the circumstances of Daryl’s case, there was a duty of care which had been breached.

“*The law expects of schools no more than that they show such care towards their pupils as is reasonable in all the circumstances. It is important to emphasise that the claimant in the present case was not playing football; he was merely a bystander in a crowded playground where a number of games were being played, and he was behaving entirely reasonably in being where he was and doing what he was doing. The school appreciated that full size leather footballs were dangerous and that the ban on their use was being flouted daily. The attempts to enforce the ban during school breaks were desultory, and during the pre-school period, non-existent. This was a well-behaved school. If the pupils had understood that the school was serious about enforcing the ban, they would have complied with it.*” per Dyson L.J. at para 37

23.4 The duty of the school to ensure the safety of its students is not always delegable: that is, even if they reasonably put the safety of the child in the hands of a third party, they may still be liable for any injuries caused by the lack of care of that third party.

23.5 **Woodland v. Swimming Teachers’ Association [2013] 3 WLR 1227 (SC)**

Annie Woodland, aged 10, was a pupil at a school run by Essex County Council. She was sent with her class to Gloucester Park swimming pool in Basildon for a swimming lesson. The lesson was supervised by a swimming teacher and a lifeguard who were both employees of Direct Swimming Services, an independent contractor hired by the council to organise and supervise school swimming lessons.

Annie suffered an accident during the lesson which caused her severe brain injuries. Her parents claimed compensation from, *inter alia*, Essex County Council, claiming that their duty to keep the pupils safe was non-delegable, so that they were liable for any injuries suffered to the children during school hours, even if caused by the negligence of carefully chosen expert independent contractors.
The court did not agree. Langstaff J. held that the school (and therefore the local authority) could not be liable for the injuries as they had taken reasonable care to entrust the safety of the claimant into the hands of experts. This was confirmed by the Court of Appeal, but overturned by the Supreme Court.

The Supreme Court held that this was an example of a non-delegable duty of care. Even though the local authority was not at fault in the conventional sense, it was still responsible for the safety of the child and so was liable for her injuries.

**In what circumstances will a non-delegable duty arise?**

“22 The main problem about this area of the law is to prevent the exception from eating up the rule. Non-delegable duties of care are inconsistent with the fault-based principles on which the law of negligence is based, and are therefore exceptional. The difference between an ordinary duty of care and a non-delegable duty must therefore be more than a question of degree. In particular, the question cannot depend simply on the degree of risk involved in the relevant activity. The ordinary principles of tortious liability are perfectly capable of answering the question what duty is an appropriate response to a given level of risk.

“23 In my view, the time has come to recognise that Lord Greene MR in Gold’s case [1942] 2 KB 293 and Denning L.J. in Cassidy’s case [1951] 2 KB 343 were correct in identifying the underlying principle, and while I would not necessarily subscribe to every dictum in the Australian cases, in my opinion they are broadly correct in their analysis of the factors that have given rise to non-delegable duties of care. If the highway and hazard cases are put to one side, the remaining cases are characterised by the following defining features: (1) The claimant is a patient or a child, or for some other reason is especially vulnerable or dependent on the protection of the defendant against the risk of injury. Other examples are likely to be prisoners and residents in care homes. (2) There is an antecedent relationship between the claimant and the defendant, independent of the negligent act or omission itself, (i) which places the claimant in the actual custody, charge or care of the defendant, and (ii) from which it is possible to impute to the defendant the assumption of a positive duty to protect the claimant from harm, and not just a duty to refrain from conduct which will foreseeably damage the claimant. It is characteristic of such relationships that they involve an element of control over the claimant, which varies in intensity from one situation to another, but is clearly very substantial in the case of schoolchildren. (3) The claimant has no control over how the defendant chooses to perform those obligations, i.e. whether personally or through employees or through third parties. (4) The defendant has delegated to a third party some function which is an integral part of the positive duty which he has assumed towards the claimant; and the third party is exercising, for the purpose of the function thus delegated to him, the defendant’s custody or care of the claimant and the element of control that goes with it. (5) The third party has been negligent not in some collateral respect but in the performance of the very function assumed by the defendant and delegated by the defendant to him.” per Lord Sumption

### 24 A DUTY TO ADOPTIVE PARENTS?

#### 24.1

The Court of Appeal has considered whether a local authority might also owe a duty of care to adoptive parents to ensure that they are given full information about the children they want them to care for.

#### 24.2 **A. v. Essex County Council** [2004] 1 WLR 1881 (CA)

The defendant adoption agency wanted to place two siblings, a boy and a girl, with the claimants, a married couple. The couple had specifically stated that they were not prepared to consider adopting a child “with either a physical or a mental disability, or with special educational needs outside mainstream school.” In fact, there was a medical report about the boy, which included the following assessment: “His concentration is very poor. Because of his behaviour he requires constant adult supervision; he will test his carers to the absolute limit, including running away. He needs constant strong discipline with lots of love and firm boundaries… His behaviour can be very difficult with frequent tantrums. He has been seen by a child psychiatrist who recommended ongoing child guidance therapy.”
The adoption agency planned to show this report to the couple, but did not do so, and after a placement, the couple agreed to adopt both children. The boy proved to be violent and destructive. The adoptive mother, who was pregnant, was twice hospitalised for her safety, and when the baby was born, the boy became progressively worse, causing injury to both parents and throwing an electric iron at his baby sister. The parents were unable to cope and he was temporarily accommodated by the local authority.

The parents continued with the adoption as they had grown emotionally attached to the children, despite the fact that they suffered physical damage to their home, each had suffered psychiatric injury and frequent physical assaults and the mother had required hospital admission for depression. However, they sued the council for not telling them the full history of the children, which, if they had known, they would never have adopted them.

The Court of Appeal identified two separate issues.

First, did the adoption agency owe a common law duty of care to prospective adopters in relation to the content of the reports it shows them? It was held that it did not as it would not be fair, just and reasonable to impose upon professionals involved in compiling reports a duty of care towards the prospective adopters (though there might be such a duty towards the children.) This was partly because the agency was acting under statutory authority with which it was not for the court to interfere.

“It is clear that adoption agencies are entitled to have policies, or standard practices, about what information will be disclosed to the prospective adopters before children are placed with them… That policy decision is classically an area of discretion which can only be challenged if it falls outside the realms of reasonableness. It is not for the court to tell adoption agencies how they should decide such questions any more than it would be for this court to tell a professional body what its rules should be. Parliament has entrusted this task to the adoption agency… for good reason.”

per Hale L.J. at paras 47 & 48

The second issue was whether the adoption agency, having decided to give certain information to the prospective adopters, had a duty of care actually to communicate it. The answer to this was yes, and for that reason the defendants were liable to the parents.

“We see no difficulty in a duty of care to communicate to the prospective adopters that information which the agency has decided that they should have. If an agency has decided that the prospective adopters should have the child’s medical report… and its staff fail to take reasonable steps to ensure that that information is in fact communicated. In circumstances where it is foreseeable that actionable harm will be caused if it is not, then there should be liability.” per Hale L.J. at para 50

25 PUBLIC POLICY AND WRONGFUL BIRTH

25.1 A series of cases have discussed whether there is a duty of care on surgeons who negligently perform sterilisation operations such that they should pay towards the upkeep of the children who are subsequently born. The answer has varied depending on the circumstances, but the general view is that, subject to the payment of a standard lump sum, they should not be so liable. However, a recent case currently the subject of an appeal to the Supreme Court – Khan v. Meadows – has reopened the debate.

A Healthy Child to Healthy Parents

25.2 McFarlane v. Tayside Health Board [2000] 2 AC 59 (HL)

The House of Lords held that no damages could be given for the birth of a healthy child to healthy parents following a negligently performed vasectomy operation, beyond those to compensate the mother for the pain and suffering of enduring the actual pregnancy and birth. The policy considerations included:

i) An unwillingness to regard a child as nothing but a financial liability. This would be particularly impolitic as it might require the parents to argue in court that the unwanted child which they accepted and cared for was more trouble than it was worth!

ii) A recognition that the rewards of parenthood – even if involuntary – could not be quantified.
A Disabled Child to Healthy Parents

25.3 Parkinson v. St. James and Seacroft University Hospital NHS Trust [2002] QB 266

Distinguishing McFarlane, the Court of Appeal held that healthy parents could claim the extra costs of bringing up a disabled child, although this must be questioned in the light of the obiter dictum in Rees v. Darlington Memorial Hospital NHS Trust [2004].

“Whatever the commuter on the Underground might think of the claim for Catherine McFarlane, it might reasonably be thought that he or she would not consider it unfair, unjust or disproportionate that the person who had undertaken to prevent conception, pregnancy and birth and negligently failed to do so were held responsible for the extra costs of caring for and bringing up a disabled child.” per Hale L.J. at para 95


Later the year (2001), Hale L.J. followed her own decision to hold that a GP who had acted negligently in failing to ascertain that the claimant was pregnant at the time of her sterilisation was liable for the special costs arising from the upbringing of the claimant’s seriously disabled child, who had contracted salmonella meningitis four weeks after her birth.

25.5 Khan v. Meadows [2019] 4 WLR 26 (CA)

A doctor who was negligent in failing to determine that Omodele Meadows was a carrier for haemophilia was initially held to be liable for losses incurred by her in raising a child to whom she had later given birth and who suffered from both haemophilia and autism. Although the autism was unrelated to the haemophilia, Yip J. held that both conditions were a natural consequence of a pregnancy that would not have continued but for the negligence. Thus, according to the High Court judge, the scope of the doctor's duty extended to preventing the child's birth and all its consequences.

Whilst acknowledging the conflicting obiter dicta in Rees v. Darlington Memorial Hospital NHS Trust [2004], Yip J. felt obliged to follow the Court of Appeal decisions in Parkinson and Groom.

“Some of the speeches in Rees cast doubt on the Court of Appeal's reasoning in Parkinson and Groom. A number of their Lordships doubted whether damages for raising a disabled child were recoverable. Nevertheless, Parkinson and Groom remain binding on me and Mr Davy did not seek to argue that the principle that damages could be recovered for the additional costs of a disabled child should be revisited in light of Rees.” per Yip J. at para 29

However, when the case went to the Court of Appeal, the decision was overturned on the basis that the judge had misapplied the scope of duty test, as established in South Australia Asset Management Corp. v. York Montague Ltd. [1997] AC 191.

Applying the scope of duty test, the court was required to address three questions, namely:

(i) what was the purpose of the procedure, information or advice which was alleged to have been negligent;

(ii) what was the appropriate apportionment of risk taking account of the nature of the advice, procedure or information; and
(iii) what losses would in any event have occurred had the defendant's advice or information been correct or the procedure been performed.

In this case, the scope of the defendant's duty was to advise and investigate in relation to haemophilia in order to provide the claimant with an opportunity to avoid the risk of a child being born with haemophilia, not to protect the claimant from all the risks associated with becoming pregnant and continuing with the pregnancy and to prevent the birth of the child.

Furthermore, the development of autism being a coincidental injury and not one within the scope of the defendant's duty, there was no adequate link between the scope of the defendant's duty and the damage sustained, as required by the scope of duty test, and therefore the defendant was not liable for the loss.

It was unnecessary for the court to address separately the issue of whether its decision was fair, just and reasonable, the established principles in the scope of duty test encompassing the concepts and the court's subjective view being neither necessary nor desirable.

The case will now be heard by the Supreme Court, so there might at last be some definitive answers to some long controversial questions.

**A Healthy Child to a Disabled Parent**

25.6 **Rees v. Darlington Memorial Hospital NHS Trust [2004] 1 AC 309 (HL)**

The respondent, Karina Rees, suffered from retinitis pigmentosa which rendered her severely visually handicapped. She adamantly did not want to have children, fearing all aspects of the pregnancy, labour, delivery and upbringing. She thus elected to have a sterilisation operation, but this was negligently performed so that she became pregnant and gave birth to a son, who had a small risk of inheriting her disability. The father disowned them both.

She claimed damages from the Health Authority for financial assistance in bringing up the child. The case of a disabled parent bringing up a healthy child had not previously been heard.

The Court of Appeal held that the mother’s disability was a relevant distinction between this case and *McFarlane v. Tayside Health Board*. Whilst that case held that the benefits of having a child, albeit unexpectedly, normally outweigh the burdens, this cannot be stated so categorically in the case of a disabled parent who might risk losing his or her child into local authority care if there was no financial assistance to help bring it up.

“There is a crucial difference between (able bodied parents) and a seriously disabled parent. These able-bodied parents are both of them able to look after and bring up their child. No doubt they would both benefit from a nanny or other help in doing so. But they do not need it in order to be able to discharge the basic parental responsibility of looking after the child properly and safely, performing those myriad essential but mundane tasks such as feeding, bathing, clothing, training, supervising, playing with, reading to and taking to school which every child needs. They do not need it in order to avoid the risk that the child may have to be taken away to be looked after by the local social services authority or others, to the detriment of the child as well as the parent. That is the distinction between an able-bodied parent and a disabled parent who needs help if she is to be able to discharge the most ordinary tasks involved in the parental responsibility which has been placed upon her as a result of the defendant’s negligence.” per Hale L.J., para 22

However, the House of Lords (by a majority of 4:3) reversed this decision, finding no relevant distinction between this case and *McFarlane v. Tayside Health Board* [2000], and refuting the submission that the decision in that case was wrong.

However, the House of Lords felt that a new ‘conventional’ award of £15,000 should be made, not as compensation but to mark the fact that a wrong had been done and an injury had been suffered.

“I have heard nothing in the submissions advanced on the present appeal to persuade me that [the decision by the House in McFarlane] was wrong and ought to be revisited. On the contrary, that the negligent doctor or, in most cases, the National Health Service, should pay all the costs of bringing up the child seems to me a disproportionate response to the doctor’s wrong. It would accord ill with the values society attaches to human life and to parenthood.
The birth of a child should not be treated as comparable to a parent suffering a personal injury, with the cost of rearing the child being treated as special damages akin to the financially adverse consequences flowing from the onset of a chronic medical condition.

“But this is not to say it is fair and reasonable there should be no award at all except in respect of stress and trauma and costs associated with the pregnancy and the birth itself. An award of some amount should be made to recognise that in respect of the birth of the child the parent has suffered a legal wrong, a legal wrong having a far-reaching effect on the lives of the parent and any family she may already have. The amount of such an award will inevitably have an arbitrary character. I do not dissent from the sum of £15,000 suggested by my noble and learned friend Lord Bingham of Cornhill in this regard. To this limited extent I agree that your Lordships’ House should add a gloss to the decision in McFarlane’s case.

“Once it is decided that damages do not include the cost of bringing up a healthy child, anomalies... become inescapable if an exception is made where either the child or the mother is disabled. The personal circumstances where this problem arises will vary so widely that what is fair and reasonable in one set of family circumstances, including the financial means of the family, may not seem so in another. But awards of damages of this nature cannot sensibly be made by courts on a discretionary or means-tested basis. The preferable approach is an award of a lump sum of modest amount in all circumstances.” per Lord Nicholls at paras 16, 17 and 18

Lord Nicholls suggests here that special damages are not available when EITHER the mother OR the child is disabled. This obiter dictum clearly conflicts with the Court of Appeal’s decisions in Parkinson v. St.James and Seacroft University Hospital NHS Trust (2001) and Groom v. Selby (2001).

25.7 There is an interesting variation of this principle in AD v. East Kent Community NHS Trust [2003] 3 All ER 1167 (CA).

**AD v. East Kent Community NHS Trust [2003] 3 All ER 1167 (CA)**

The claimant was detained as a patient under the Mental Health Act 1983 in the care of the defendant NHS Trust. Whilst on a mixed psychiatric ward, she had sexual intercourse with an unidentified patient and became pregnant. A healthy daughter was born, but as the mother was incapable of caring for her, the child’s grandmother took on the task. The mother then claimed against the NHS Trust the cost of rearing the child. (The damages, if awarded would be held in trust for the benefit of the grandmother.)

HELD: Even if the birth of the child had resulted from negligence by the NHS Trust, damages were not recoverable to compensate for the cost of rearing a healthy child. The costs that were being borne by someone other than the mother were simply those that would have been borne by the mother herself had she been fit enough to care for the child, and as such were not recoverable as part of the mother’s claim.

25.8 A perplexing case on this issue is Farraj v. King’s Healthcare NHS Trust.

**Farraj v. King’s Healthcare NHS Trust [2010] 1 WLR 2139**

Mr. and Mrs. Farraj, who are Jordanian, are both carriers of a gene which can cause the blood disorder beta thalassaemia major to be passed to their children, causing disability and reducing life expectancy.

Whilst she was pregnant, Mrs. Farraj was tested to see if her unborn child had the disorder, with the intention of terminating the pregnancy if it did. The hospital sent the foetal sample to Cytogenic DNA Services for testing, where the test was carried out negligently and it was reported to the Farraj’s that the child would be fine, which it was not.

The High Court held that the laboratory owed a duty of care to the parents to take reasonable care in providing its services to the hospital, and so were liable for the wrongful birth. The issue of the general policy against such findings was not discussed in any of the courts, the matter only going to the Court of Appeal on the issue of whether the hospital should be made jointly liable with the laboratory (the answer being: no).
BARRISTERS’ IMMUNITY

26.1 The ultimate professional immunity was afforded to barristers, who could not be sued for their negligence in conducting a case in court, however disastrous their incompetence might be for their client. This ancient rule (of more than 200 years) was upheld by the House of Lords in Rondel v. Worsely [1969] 1 AC 191.

26.2 A host of policy reasons was given for maintaining this immunity. On July 20th 2000, the House of Lords swept aside all these reasons, and declared that the immunity was abolished!


Three cases were heard together to discuss the single issue of the liability of barristers and advocate-solicitors. All the cases involved clearly negligent advice given by solicitors to their clients, and in each case the solicitors were hiding behind their supposed immunity.

The House of Lords held that the immunity no longer existed, and so the defences failed.

Lord Hoffmann considered the previous policy reasons for the immunity, and explained why they were no longer relevant.

1. Divided loyalty: As barristers owe a primary duty to the court, they might not always act in their client’s best interest, and it was said that they should not be held liable for doing their duty, or they would be inhibited.

Many professions have divided loyalties, but that is no reason for them to be immune from negligence. So too barristers. Lord Hoffmann did not consider that barristers were generally so dishonest that they would deliberately mislead a court to avoid being sued, and in any case there are laws to prevent vexatious litigants from claiming that a barrister fulfilling his duty to the court was being ‘negligent’. (e.g. wasted cost orders)

2. Cab rank principle: According to professional ethics, a barrister may not refuse to act for a client, even if he disapproves of the case. A barrister would be less inclined to uphold this principle if it was likely that his client would turn against him when he lost.

Lord Hoffman simply dismissed this argument as nonsense, and repeated his point about vexatious litigants.

3. The witness analogy: Witnesses cannot be sued in defamation for anything said in court, as this would inhibit them from speaking freely, which would be contrary to the administration of justice. It was said that a similar rule should apply to the counsel.

Lord Hoffman dismissed the analogy. A barrister owes a professional duty to the court. He must be under a stronger duty of care than a witness.

4. Collateral challenge: To prove one’s case against a barrister, one would have to show that you would have won but for his negligence, which would involve retrying the original issue, which is a particular problem if the case is a criminal one.

This was the most complex of the issues, but re-litigation was not unheard of in other areas of law, and vexatious claims could be dismissed as ‘abuse of process’. This would particularly be the case where a convicted criminal attempts to reopen his case by suing his barrister. In general, a convicted person could only sue the barrister after he has been found to have been wrongly convicted in some other way.²

5. Inappropriate relitigation: The dangers of inappropriate relitigation were minimised by the powers of the court to prevent an abuse of process under the Civil Procedure Rules 1998 Part 24.2

26.3 Despite the decision in Arthur J.S. Hall & Co v. Simons, it is clear that barristers have not entirely lost their privileged status.

² The doctrine of ‘abuse of process’ was explained by the House of Lords in Hunter v. Chief Constable of the West Midlands [1982] AC 529.

David Moy, aged 27, broke his leg whilst playing football. Due to a negligently performed operation, he was left with continuing pain and disability and reduced earning potential. Such an injury would normally give rise to about £300,000 in damages. However, his solicitors (Pettman Smith) negligently failed to obtain a vital medical report in time by the deadline required for the trial, without which evidence he was unlikely to be awarded more than £100,000.

The health authority paid £150,000 into court, but on the day of the trial Moy's barrister, Jacqueline Perry, advised him not to accept it as the vital evidence had now arrived, and she was confident that the judge would permit it to be used and Moy would get a much higher award. However, it became clear during her application to include the late evidence that the judge was not prepared to let it be admitted in evidence, and the health authority reduced its offer to £120,000, which the claimant accepted for fear of getting even less if the case went to a full hearing.

Moy successfully sued the solicitors for their negligence, and the solicitors appealed on the basis that Ms Perry had also been negligent in wrongly anticipating that the late evidence would be admitted, and that she should have to pay a contribution towards the damages.

Whilst acknowledging that the barristers’ professional immunity has been removed, the House of Lords did not hold Ms Perry to be liable, even though, in retrospect, she had taken a wrong decision and given her client bad advice. In the circumstances, she was not negligent to make an ill-considered judgment of the situation, and it would be impolitic to create an ethos of ‘defensive advocacy’ where barristers were more concerned with their own potential liability than in giving clear advice when it was needed.

"In my opinion there is considerable force in the arguments advanced on behalf of the appellant. Your Lordships have held in Arthur J S Hall & Co v Simons [2002] 1 AC 615 that the public interest does not require advocates to be held immune from suit for the consequences of their negligence. But that interest does require that the application of the principle should not stifle advocates’ independence of mind and action in the manner in which they conduct litigation and advise their clients. That also accords with common justice in a case such as the present. Latham L.J. cited an apt passage from the speech of Lord Salmon in Saif Ali v Sydney Mitchell & Co [1980] AC 198, 231: "Lawyers are often faced with finely balanced problems. Diametrically opposed views may [be] and not infrequently are taken by barristers and indeed by judges, each of whom has exercised reasonable, and sometimes far more than reasonable, care and competence. The fact that one of them turns out to be wrong certainly does not mean that he had been negligent."

"The same thought has been expressed in the Ontario High Court by Anderson J in Karpenko v Parojan, Courey, Cohen & Houston (1980) 117 DLR (3d) 383, 397-398 in a passage which mutatis mutandis is material to the present issues: "What is relevant and material to the public interest is that an industrious and competent practitioner should not be unduly inhibited in making a decision to settle a case by the apprehension that some judge, viewing the matter subsequently, with all the acuity of vision given by hindsight, and from the calm security of the Bench, may tell him that he should have done otherwise. To the decision to settle a lawyer brings all his talents and experience both recollected and existing somewhere below the level of the conscious mind, all his knowledge of the law and its processes. Not least he brings to it his hard-earned knowledge that the trial of a lawsuit is costly, time-consuming and taxing for everyone involved and attended by a host of contingencies, foreseen and unforeseen. Upon all of this he must decide whether he should take what is available by way of settlement, or press on. I can think of few areas where the difficult question of what constitutes negligence, which gives rise to liability, and what at worst constitutes an error of judgment, which does not, is harder to answer. In my view it would be only in the case of some egregious error that negligence would be found."

"As Latham L.J. acknowledged, the difficulties faced by an advocate who is advising on acceptance or rejection of a settlement are manifold and the pressures, especially if the advice has to be given at the door of the court, can be heavy. In such circumstances it would be surprising if every such piece of advice were reasoned with as much comprehensive precision as may be applied in hindsight by an appellate tribunal which has had the benefit of extensive argument and leisurely reflection. Since the decision in Arthur J S Hall & Co v Simons advocates have been liable to their clients for negligence in the same way as other professional persons. It would not be in the interests of those clients if they were compelled by the effect of over-prescriptive decisions to adopt a practice of defensive advocacy in the conduct of litigation or advising litigants about the course to be taken."
“I would endorse the view expressed by Brooke L.J. in the Court of Appeal, to which I have already referred, that it would be unfortunate if they felt that they had to hedge their opinions about with qualifications. It would be equally unfortunate if another effect of the same syndrome were to be an abdication of responsibility for decisions relating to the conduct of litigation and a reluctance to give clients the advice which they require in their own best interests. Nor do I consider that to give clients a catalogue of every factor which might affect the course of action to be adopted, on the lines of that suggested in argument by Mr Livesey for the solicitors, would be a productive discharge of advocates’ duty to give them proper advice.” per Lord Carswell at paras 59 & 60

26.5 **Jassi v. Gallagher [2006] EWCA Civ 1065**

Saran Jassi had been the tenant under a long lease of property when he served a notice on the landlord, under the Leasehold Reform Act 1967 claiming the freehold. The landlord admitted the claim, but then applied for a declaration that the admission was not binding as Jassi had misrepresented the property as his only or main residence.

Stanley Gallagher (Jassi’s barrister) advised Jassi that he had a strong case to defend the claim and the case went to court, where Jassi lost. He sued Gallagher, *inter alia*, for being negligent in suggesting he would win the case.

HELD With the benefit of hindsight, Gallagher’s advice about the prospects for the case may have been over-optimistic, but that was not the same as being negligent, and Gallagher was therefore not liable.

See also *McFaddens (A Firm) v. Platford [2009] EWHC 126 (TCC)*
PART 5: DUTY OF CARE AND HUMAN RIGHTS

27 POLICY, ARTICLE 6 AND STRIKING OUT ACTIONS

Striking Out Actions

27.1 If a case is brought which, as a matter of law, discloses no cause of action and so displays no prospect of success, even if the facts alleged were proved, it may be ‘struck out’ by the court and not considered further. This saves the litigants a great deal of time and money, and avoids vexatious litigation.

As this will end the claim without the claimant having had the opportunity fully to put his case, the courts will only grant a striking out in the clearest of cases.

27.2 An illustration of this dilemma is the case of K. v. Central and North West London Mental Health Trust.


K, a mental patient, was diagnosed as a paranoid schizophrenic. C undertook to care for him in the community, and arranged for him to stay in bed and breakfast accommodation. Whilst there, K leapt from a second storey window and suffered calamitous injuries.

He sued C on the basis, inter alia, that they were negligently in breach of their duty to provide after-care services. The Master struck out the claim on the basis that there was no such cause of action.

On appeal, the court permitted the case to proceed to trial. Although C’s role in this case was technically administrative, it was at least arguable that they were directly responsible for ongoing aspects of K’s care. There was thus at least some prospect that the claim in negligence might succeed, even if fraught with difficulties.

27.3 If the reason for striking out is that there is a blanket policy against such cases succeeding without the actual case being heard, it might be objected that this is contrary to Article 6 of the European Convention on Human Rights (now enshrined by the Human Rights Act 1998) which gives the right to a fair trial.

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

28 THE OSMAN CASE

28.1 Although the European Court held in Osman v. UK [1998] that adopting a blanket policy was contrary to Article 6, it has since acknowledged that the decision was based on a misunderstanding of English tort law! However, its legacy might be felt in the future, as courts have clearly become less willing to strike out claims on the basis of blanket policies.

28.2 Osman v. United Kingdom [1998] 29 European Court of Human Rights 245

Ahmet Osman (aged 14) was a pupil of Paul Paget-Lewis at Homerton House School in Hackney. Paget-Lewis formed an obsessive attachment to Ahmet, giving him money, taking photographs, following him home and eventually changing his own name by deed poll to Ahmet Osman. Ahmet’s father Ali asked for Ahmet to be transferred to another school, but in the meantime sexual graffiti about Ahmet appeared round the neighbourhood and Ahmet’s school files were stolen.

Paget-Lewis was questioned, but denied any involvement. The headmaster reported Paget-Lewis to the police, and eventually suspended him from teaching duties.

Paget-Lewis them began a campaign of violence against the Osmans, including smashing the windows of their house and car. After each incident the police interviewed Paget-Lewis, but failed to arrest him.
Several months later, Paget-Lewis shot and killed Ali Osman and injured Ahmet. He then shot and injured the deputy headmaster and killed his son. He was convicted of manslaughter on the ground of diminished responsibility.

The Osmans sued the police for negligence, but the action was struck out by the Court of Appeal on the grounds that according to the House of Lords in Hill v. Chief Constable of West Yorkshire, no action could lie against the police for their negligence in the investigation and suppression of crime. (Osman v. Ferguson [1993] 4 All ER 344.)

The Osmans applied to the European Court of Human Rights on the basis that there had been a failure to protect Ali and Ahmet Osman and to protect the family from harassment, contrary to articles 2 and 8 of the Convention, and that they had been denied access to a court or to any other effective remedy in respect of that failure, contrary to articles 6.1 and 13. The Court held, inter alia:

i) Re Article 2 (Everyone’s right to life shall be protected by law): Although in some cases the Article may impose a positive obligation on the authorities to take preventative measures to protect an individual from a known criminal, this obligation had to be interpreted in a way which did not impose an impossible burden on the authorities. The police had acted properly in presuming Paget-Lewis innocent until there was sufficient evidence to arrest him, and on analysis there was no such clear evidence until the killings.

ii) Re Article 6.1 (In the determination of his civil rights... everyone is entitled to a hearing by an independent and impartial tribunal established by law): The Court of Appeal had prevented the case from going fully to trial on the basis that it fell within the prohibition in the Hill case. Whilst recognising that there could be legitimate policy reasons for disallowing cases against the police, the Court held that this had to be decided on a case by case basis. There were many different considerations in this case than those in Hill and these should have been examined on their merits, not automatically excluded by a blanket immunity rule.

Accordingly, the Osmans were awarded £10,000 each to compensate them for their loss of opportunity to have their case considered on the merits by a court.

The case caused some problems in later striking out actions, where the court realised that, whatever the apparent merits of striking out, the claimants would probably just bring an action under the Osman principle, and so may well win undeserved damages.

29 THE CHILD ABUSE CASES

29.1 The general approach to be taken in cases where the local authority has been sued for not properly attending to the welfare of children in its care was laid down in X (Minors) v. Bedfordshire C.C. in 1995.

However, this case was distinguished by the House of Lords soon after it was decided³, and it has recently been overruled by the Supreme Court in so far as it ruled out on grounds of public policy the possibility that a duty of care might be owed by local authorities or their staff towards children with whom they came into contact in the performance of their statutory functions.⁴

29.2 X (Minors) v. Bedfordshire C.C. [1995] 2 AC 644 (HL)

The House of Lords considered five cases relating to the physical and educational welfare of children.

In two of the cases, the local authority was accused of negligently causing harm to children by either not taking them into care when they were at risk or by taking them into care when they were not at risk.

In the other three cases, the authority was accused either of causing children harm by not diagnosing them as special needs, or by wrongly diagnosing them as special needs.

On the matter of child abuse, the court thought that it was not politic to impose a duty of care on the local authority as it would not be ‘just and reasonable’ to do so.

The reasons included:

- Local authority employees would be over-cautious in exercising their duties for fear of being sued;
- Public money would be diverted away from child protection;
- Under the statutory system, several agencies are responsible for child welfare, and it would be unfair to impose liability only on the local authority;
- Private citizens have other, more appropriate, means of challenging local authority decisions.

On the matter of education, it was arguable that a duty of care might arise, but that the statutory appeals procedure was more appropriate than negligence litigation.

“If it comes to the attention of a headmaster that a pupil is under-performing, he does owe a duty to take such steps as a reasonable teacher would consider appropriate to try to deal with such under-performance.” per Lord Browne-Wilkinson at p.766

However X v. Bedfordshire C.C. [1995] was distinguished by the House of Lords a few years later in Barrett v. Enfield London Borough Council in light of the Human Rights Act 1998 and the decision in Osman. (Barrett was decided in 1999, though it did not make it to the AC Reports until 2001)


The plaintiff was placed in care at the age of 10 months and stayed there until he was 17 years old. He claimed that he was so negligently treated by the local authority that by the time he was 18 he was suffering from a psychiatric illness leading to his having an alcohol problem and a propensity to self-harm. The defendant applied to have the action struck out on the basis that it disclosed no cause of action.

The House of Lords held that the plaintiff was entitled to have his claim heard. As a matter of policy, this case was not like the Bedfordshire case where a local authority did not properly investigate alleged abuse by parents, but was one in which the child was already in local authority care where there were trained staff to advise on decisions which would directly affect him. Negligent decisions of this kind might be justiciable and should be investigated.

Although the case could thus be distinguished on its facts from the Bedfordshire cases, Lord Brown-Wilkinson, whilst criticising the Osman decision, seemed to make it a principal reason for allowing the case to proceed to trial.

“The court (in Osman) said that the police has been granted ‘blanket immunity’ which was disproportionate and therefore an unjustifiable restriction on the Osmans’ right of access to the court. The Osmans were entitled to have there case against the police determined in deserving cases.

“The problems in applying this reasoning to the English law of negligence are many and various. For example, the correct answer to the following points is not immediately apparent.

“1. Although the word ‘immunity’ is sometimes incorrectly used, a holding that it is not fair, just and reasonable to hold liable a particular class of defendants whether generally or in relation to a particular type of activity is not to give immunity from a liability to which the rest of the world is subject. It is a prerequisite to there being any liability in negligence at all that as a matter of policy it is fair, just and reasonable in those circumstances to impose liability in negligence.

“2. In a wide range of cases public policy has led to the decision that the imposition of liability would not be fair and reasonable in the circumstances, e.g. some activities of financial regulators, building inspectors, ship surveyors, social workers dealing with sex abuse cases. In all these cases and many others the view has been taken that the proper performance of the defendant’s primary functions for the benefit of society as a whole will be inhibited if they are required to look over their shoulder to avoid liability in negligence.
“In English law the decision as to whether it is fair, just and reasonable to impose a liability in negligence on a particular class of would-be defendants depends on weighing in the balance the total detriment to the public interest in all cases from holding such class liable in negligence as against the total loss to all would-be plaintiffs if they are not to have a cause of action in respect of the loss they have individually suffered.

“3. In English law, questions of public policy and the question whether it is fair and reasonable to impose liability in negligence are decided as questions of law. Once the decision is taken that, say, company auditors though liable to shareholders for negligent auditing are not liable to those proposing to invest in the company, that decision will apply to all future cases of the same kind. The decision does not depend on weighing the balance between the extent of the damage to the plaintiff and the damage to the public in each particular case.

“In view of the decision in the Osman case it is now difficult to foretell what would be the result in the present case if we were to uphold the striking out order. It seems to me that it is at least probable that the matter would then be taken to Strasbourg.

“The court, applying its decision in the Osman case, if it considers it to be correct, would say that we had deprived the plaintiff of his right to have the balance struck between the hardship suffered by him and the damage to be done to the public interest in the present case if an order were to be made against the defendant council. In the present very unsatisfactory state of affairs... in such cases as these it is difficult to say that it is a clear and obvious case calling for striking out.”

per Lord Browne-Wilkinson at p.85

29.4 In Kent v. Griffiths [2001], Lord Woolf discussed the importance and scope of Osman v. United Kingdom [1998].

Kent v. Griffiths [2001] QB 36 (CA)

“The Osman decision... does draw attention to the fact that in this area of the law there is a danger that statements made in judgments will be applied more widely and more rigidly than was in fact intended. The statements are intended to assist in the difficult task of determining whether a duty of care exists. They are tools not rules...

“In so far as the Osman case underlined the dangers of a blanket approach so much the better. However, it would be wrong for the Osman decision to be taken as a signal that, even when the legal position is clear and an investigation of the facts would provide no assistance, the Courts should be reluctant to dismiss cases with no real prospect of success.”

per Lord Woolf M.R. at paras 37 and 38

29.5 All these cases must now be read in the context of Z. v. United Kingdom (2002) 34 EHRR 3; and N v. Poole Borough Council [2019] 2 WLR 1478.

Z. v. United Kingdom (2002) 34 EHRR 3

This case arose out of the facts of one of the cases involved in X. v. Bedfordshire C.C. [1995].

Having seen the result in Osman, one set of claimants decided to bring a similar claim – that the striking out action decided against them was contrary to Art.6. However, the European Court reconsidered its decision in Osman and concluded that it was not necessarily a breach of Art.6 for a court to strike out an action in these circumstances.

The case involved four siblings all aged under ten years old who suffered terrible abuse at the hands of their mother, involving being locked for long periods in filthy, unlit bedrooms, which they had to use as a toilet; being treated as slaves; and being given so little food to eat that they had to scavenge in dustbins for apple cores. Despite several meetings and visits being held by professionals over a period of four and a half years to consider their case, it was repeatedly decided that no social worker would be allocated to the family and that the children would not be placed on the Child Protection Register. In March 1992, the mother asked for the two boys to be placed for adoption, threatening to batter them if they were not taken away.

At last the local authority sought care orders for the children, and in 1993 they were seen by a child psychiatrist who reported that three of them were suffering from serious depressive illnesses and that this was the worst case of neglect and emotional abuse she had ever seen. She opined that the social services had “leaned over backwards to avoid putting these children on the Child Protection Register.”

The Official Solicitor, acting as the children’s next friend, commenced negligence proceedings against the local authority, but the application was struck out as revealing no cause of action first in the High Court and again by the Court of Appeal and the House of Lords. Lord Wilberforce explained that as there was no precedent for such a duty of care in negligence, the Caparo v. Dickman tests must be applied.

Although the first two criteria could be met, he held that it was not just and reasonable to impose a common law duty of care in the circumstances, despite the general policy of the law that wrongs must be remedied. [See X. v. Bedfordshire C.C. [1995] above.]

The claimants applied to the European Court on the basis that they had been denied a fair trial, contrary to Art. 6. Despite their decision in Osman, the court held that there had not been a violation of Art. 6. It was perfectly legitimate for a domestic court, having reviewed a case, to hold that even if the facts alleged were proved there would be no basis for a claim as a matter of law, and thus avoid the expense and time of hearing the actual case.

The House of Lords were not granting the local authority an immunity from suit; they were simply saying that in such a case as this, there was no cause of action against them.

Art. 6 does not guarantee any particular content for civil rights and obligations in national law (though there may be protection under other Articles) and it is not brought into play simply because an applicant wishes to bring an action for a category of harm that is not recognised as a tort.

“It is contended by the applicants in this case that the decision of the House of Lords, finding that the local authority owed no duty of care, deprived them of access to court as it was effectively an exclusionary rule, or an immunity from liability, which prevented their claims being decided on the facts.

“The Court observes, firstly, that the applicants were not prevented in any practical manner from bringing their claims before the domestic courts. Indeed, the case was litigated with vigour up to the House of Lords, the applicants being provided with legal aid for that purpose. Nor is it the case that any procedural rules or limitation periods were invoked. The domestic courts were concerned with the application brought by the defendants to have the case struck out as disclosing no reasonable cause of action. This involved the pre-trial determination of whether, assuming the facts of the applicants’ case as pleaded were true, there was a sustainable claim in law. The arguments before the courts were therefore concentrated on the legal issues, primarily whether a duty of care in negligence was owed to the applicants by the local authority.

“Moreover, the Court is not persuaded that the House of Lords’ decision that as a matter of law there was no duty of care in the applicants’ case may be characterised as either an exclusionary rule or an immunity which deprived them of access to court. As Lord Browne-Wilkinson explained in his leading speech, the House of Lords was concerned with the issue whether a novel category of negligence, that is a category of case in which a duty of care had not previously been held to exist, should be developed by the courts in their law-making role under the common law. The House of Lords, after weighing in the balance the competing considerations of public policy, decided not to extend liability in negligence into a new area. In so doing, it circumscribed the range of liability under tort law.

“That decision did end the case, without the factual matters being determined on the evidence. However, if as a matter of law, there was no basis for the claim, the hearing of evidence would have been an expensive and time-consuming process which would not have provided the applicants with any remedy at its conclusion. There is no reason to consider the striking out procedure which rules on the existence of sustainable causes of action as per se offending the principle of access to court. In such a procedure, the plaintiff is generally able to submit to the court the arguments supporting his or her claims on the law and the court will rule on those issues at the conclusion of the adversarial procedure.
“Nor is the Court persuaded by the suggestion that, irrespective of the position in domestic law, the decision disclosed an immunity in fact or practical effect due to its allegedly sweeping or blanket nature. That decision concerned only one aspect of the exercise of local authorities’ powers and duties and cannot be regarded as an arbitrary removal of the courts’ jurisdiction to determine a whole range of civil claims.” paras 94 – 99

The court conceded that it had misunderstood the concept of duty of care in negligence when deciding Osman. The application of the ‘just and reasonable’ test was not used to exclude claimants from litigation or to create immunities for certain persons from the law. Rather, it defines what the law is, and if, having done that, the court can see that the law cannot help the particular litigant, it is not a violation of Art.6 to discontinue the proceedings. Rather, it saves them time and expense.

“The Court considers that its reasoning in the Osman judgment was based on an understanding of the law of negligence which has to be reviewed in the light of the clarifications subsequently made by the domestic courts and notably the House of Lords.” para 100

n.b. The applicants were awarded £79,000 each as they had suffered inhuman and degrading treatment, contrary to Art. 3, and had been denied an effective remedy, contrary to Art. 13.

29.6 Z v. United Kingdom was considered and followed by the House of Lords in D v. East Berkshire Community Health NHS Trust [2005] 2 AC 373.

D v. East Berkshire Community Health NHS Trust and Others [2005] 2 AC 373

In each of three appeals heard together, parents brought actions in negligence against healthcare professionals, and in one case a social services department, claiming damages for alleged psychiatric harm caused by false allegations that the parents had abused their children.

i. In the first case, a boy suffered from allergic reactions and asthma attacks, so that he had to sleep in his mother’s room. When his mother took him to hospital, aged 6, to see if it would be possible to monitor his breathing from his own room, she was wrongly diagnosed as suffering from Munchausen’s syndrome by proxy and accused of inventing her son’s condition. This incorrect diagnosis was maintained for three years, during which time the boy was put on the ‘at risk’ register for six months, until it was confirmed that he did, indeed, suffer from allergies and asthma. As a result of all of this, the mother suffered acute anxiety and depression.

ii. In the second case, a nine-year-old girl was suffering from Schamberg’s disease, which produces discoloured patches on the skin. Following an accident on her bicycle, her mother took the child to see a doctor, who concluded that the marks on the child’s legs were caused by sexual abuse and had her admitted to hospital. Her Father went to visit her in hospital and was publicly banned from doing so. He and his son were also forbidden by social services from staying at home when the child was released from hospital. After ten days, the correct diagnosis was made and it was accepted that there was no question of abuse.

iii. In the third, a two-month-old girl was taken to hospital by her parents because she was clearly in great pain. It turned out that she had a spiral fracture of the femur. This was caused by brittle bone disease, but because the medical staff failed to take an accurate history from the parents, this was not considered at the time. Instead, the consultant paediatrician concluded that the child was suffering from an inflicted injury, and the parents were separated from their child for the next eight months, until a proper diagnosis was made. As a result of this, the parents suffered from a psychiatric illness.

In each case it was determined as a preliminary issue that no duty of care was owed to any of the claimants by any of the defendants, on the ground that it was not fair, just and reasonable to impose such a duty. Each claim was accordingly dismissed without actually being tried.

The claimants appealed on grounds including that the preliminary hearings infringed their right to a fair hearing under Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms as scheduled to the Human Rights Act 1998: that in the light of recent authority and the 1998 Act it was fair, just and reasonable to impose a duty of care on the defendants; that there was sufficient proximity between the various claimants and defendants for such a duty to exist and that witness immunity did not preclude any liability on the part of the social workers.
In the Court of Appeal, Lord Phillips made the following observation:

“In so far as the position of a child is concerned, we have reached the firm conclusion that the decision in X (Minors) v Bedfordshire County Council [1995] 2 AC 633 cannot survive the Human Rights Act. Where child abuse is suspected the interests of the child are paramount: see section 1 of the Children Act 1989. Given the obligation of the local authority to respect a child’s Convention rights, the recognition of a duty of care to the child on the part of those involved should not have a significantly adverse effect on the manner in which they perform their duties. In the context of suspected child abuse, breach of a duty of care in negligence will frequently also amount to a violation of article 3 or article 8. The difference, of course, is that those asserting that wrongful acts or omissions occurred before October 2000 will have no claim under the Human Rights Act 1998.

“This cannot, however, constitute a valid reason of policy for preserving a limitation of the common law duty of care which is not otherwise justified. On the contrary, the absence of an alternative remedy for children who were victims of abuse before October 2000 militates in favour of the recognition of a common law duty of care once the public policy reasons against this have lost their force.” para 83

“It follows that it will no longer be legitimate to rule that, as a matter of law, no common law duty of care is owed to a child in relation to the investigation of suspected child abuse and the initiation and pursuit of care proceedings.” para 84

That, however, was not the issue here. The Court of Appeal held that whatever the duty owed to the abused children, health professionals responsible for investigating suspected child abuse did not owe the persons suspected of having committed the abuse a duty of care beyond that to carry out the investigation in good faith. Carelessness was not enough to give rise to an action in damages.

There was a balance to be made between the public interest need to protect children from abuse and the private interests of the suspected individual. This was the same balance as in any criminal investigation. The duty of care owed to the children in these cases was not the same as that owed to their parents since the parents were not in sufficient proximity to give rise to a duty of care. There were cogent reasons of public policy for holding that no common law duty of care should be owed to the parents and that it was accordingly not fair, just and reasonable to impose such a duty.

The House of Lords upheld this decision.

“The essence of the claims is that health professionals responsible for protecting a suspected child victim owe a person suspected of having committed a crime against the child a duty to investigate their suspicions, a duty sounding in damages if they act in good faith but carelessly.” per Lord Nicholls at para 76

“Stated in this broad form, this is a surprising proposition. In this area of the law, concerned with the reporting and investigation of suspected crime, the balancing point between the public interest and the interest of a suspected individual has long been the presence or absence of good faith. Good faith is required but not more. A report, made to the appropriate authorities, that a person has or may have committed a crime attracts qualified privilege. A false statement ("malicious falsehood") attracts a remedy if made maliciously. Misfeasance in public office calls for an element of bad faith or recklessness. Malice is an essential ingredient of causes of action for the misuse of criminal or civil proceedings…” per Lord Nicholls at para 77

“This background accords ill with the submission that those responsible for the protection of a child against criminal conduct owe suspected perpetrators the duty suggested. The existence of such a duty would fundamentally alter the balance in this area of the law. It would mean that if a parent suspected that a babysitter or a teacher at a nursery or school might have been responsible for abusing her child, and the parent took the child to a general practitioner or consultant, the doctor would owe a duty of care to the suspect. The law of negligence has of course developed much in recent years, reflecting the higher standards increasingly expected in many areas of life. But there seems no warrant for such a fundamental shift in the long established balance in this area of the law.” per Lord Nicholls at para 78

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6 [2001] QB 558
"In considering whether it would be fair, just and reasonable to impose such a duty, a court has to have regard, however, to all the circumstances and, in particular, to the doctors' admitted duty to the children. The duty to the children is simply to exercise reasonable care and skill in diagnosing and treating any condition from which they may be suffering. In carrying out that duty the doctors have regard only to the interests of the children. Suppose, however, that they were also under a duty to the parents not to cause them psychiatric harm by concluding that they might have abused their child. Then, in deciding how to proceed, the doctors would always have to take account of the risk that they might harm the parents in this way. There would be not one but two sets of interests to be considered. Acting on, or persisting in, a suspicion of abuse might well be reasonable when only the child's interests were engaged, but unreasonable if the interests of the parents had also to be taken into account. Of its very nature, therefore, this kind of duty of care to the parents would cut across the duty of care to the children."

per Lord Rodgers at para 108

29.7 

*D v. East Berkshire Community Health NHS Trust and Others* [2005] has been applied in several cases with similar facts, including: *L v. Pembrokeshire CC* [2007] PIQR 1 and *L v. Reading BC* [2006] EWHC 2449

29.8 

The *obiter dictum* concerning the duty owed to abused children was applied in *Pierce v. Doncaster MBC* [2009].

**Pierce v. Doncaster MBC** [2009] Fam. Law 202 (CA)

Jake Pierce was born into a disreputable family and was placed into foster care shortly after he was born. However, within a year he was returned to his parents despite there being no proper assessment or investigation to justify this course of action. Even when he was hospitalised at four months old due to malnutrition, he was not removed from his parents. Over the next fourteen years they physically and mentally abused him, with burning, starvation and bullying. At the age of fourteen, he left home to live on the streets as a rent boy, where he was further physically and sexually abused.

As a result of this abuse, at the age of 31, he was HIV positive and suffering from borderline personality disorder.

He sued the local authority for negligence. They contended that they owed no duty of care as a matter of law, following *X v. Bedfordshire*.

However, in the hearing at first instance ([2007] EWHC 2968), Eady J., citing the *obiter dictum* in *D v. East Berkshire*, held that *X* was no longer good law, and that in the circumstances there was a duty of care owed by the defendant to the claimant.

"Was there a duty owed by the Defendant?"

22 “It is necessary to consider the scope of the duty of care which is now to be taken as owed by local authorities to children within the relevant area, and also whether there is anything about the circumstances in the present case to justify concluding that the imposition of such a duty would not be fair, just and reasonable. This needs to be addressed separately for each of the relevant periods pleaded.

23 “It is clearly important that this Claimant came to the attention of the Defendant’s social services department at a very early stage in his life. Their concerns for his welfare led to his being fostered for some 15 months between August 1976 and November 1977. That decision can hardly be criticised. The social worker had come to the conclusion that his hands and face were quite grubby and that he had the “characteristic frozen awareness of a neglected baby”. Moreover, he had actually lost body weight since his previous weighing. He lost 200g during a period when it was reasonable to suppose that he would gain about 600g. This significant development is characterised by the Claimant’s expert, Mr Patrick Ayre, as “representing a total deficit of some 800g or about 15% of his body weight”.

24 “The Claimant was initially placed in hospital and little or no interest appears to have been taken in him by either parent. His mother visited him only infrequently during the period while he was in foster care, and his father not at all.
“It is also fundamentally important that the area social services officer ("ASSO"), Ms Pat Shore, noted following the Claimant's eventual return to his parents' care in November 1977 that, in her opinion, his mother would require support for many years to come until her family was grown up. She added "I think that as a department we must be prepared to give this in order to prevent the remaining three children being received into care". It would thus be appropriate to look carefully at the records to see whether this advice was implemented or, if it was not, exactly what reasoning led to a different conclusion.

“Against this background, it seems to me to be obvious that the Defendant owed a duty of care from mid-1976, at least, and that there is no countervailing reason why the imposition of such a duty would be other than fair, just and reasonable.” per Eady J.

The Court of Appeal upheld the decision of Eady J., except that they found that the case had been brought outside the statutory limitation period. The case was therefore remitted back to the High Court for a hearing on the court’s discretionary extension of time.

D v. East Berkshire was applied in a somewhat tangential way in Ahmad v. Brent LBC.


Almas Ahmad had murdered his 19 year old daughter, and was sentenced to life imprisonment in 1992. He was released on licence in 2001, a term of the licence being that he should have no direct contact with his other daughter (then aged 13) without prior written authority from Social Services. In particular it was feared that he might abduct his daughter to force her into an arranged marriage, and that if she defied him, he might well murder her, as he did his other daughter.

Despite this, from 2004 onwards he was a frequent overnight visitor at the family home, and when this was discovered he was recalled to prison for breach of his licence, on the recommendation of Brent Social Services, which was responsible for the safety of his daughter, and of the Probation Service. He claimed that he was not in breach of his licence as he did have written authority to stay with his family (including his daughter), and that the recall was inter alia due to the negligence of Brent Social Services and the Probation Service for not realising this.

The court held that even if there had been such written authority (which, in fact, there was not), Brent Social Services was under no duty of care to Ahmad to check this. Its only duty was to the at-risk child, not to the parents.

“The primary duty of the First Defendant was to protect Alia from the claimant and to ensure that she did not suffer the same fate as her elder sister.” per Supperstone J. at para 14

N. v. Poole Borough Council [2019] 2 WLR 1478

The most recent consideration of this series of child abuse cases by the Supreme Court, is N. v. Poole Borough Council, which must now be taken to be the leading authority on the matter.

N. v. Poole Borough Council [2019] 2 WLR 1478 (SC)

In 2006, the local authority had housed woe children and their mother next door to a family known for anti-social behaviour. One of the children was disabled. For several years the children and their mother suffered abuse and harassment at the hands of their neighbours who verbally abused them, attacked their home and car, physically assaulted the mother and one of the children, and made threats of violence. Various measures taken by the local authority to halt it were unsuccessful. One of the children became suicidal and ran away from home.

The children were assessed as children in need under the Children Act 1989. The local authority undertook an investigation relating to one of the children and he was made subject to a child protection plan. The children and their mother were eventually rehoused by the local authority in 2011. They claimed that the abuse had caused them physical and psychological harm and that the local authority owed them a duty of care at common law when exercising its functions under the Act.

The claim was struck out by the Court of Appeal as disclosing no reasonable cause of action, and the claimants appealed to the Supreme Court.
The Supreme Court dismissed the appeal on its facts, as the particulars of claim did not provide a basis for concluding that the defendant had assumed a responsibility to protect the claimants from harm, since neither the defendant's functions under the Children Act 1989 nor the alleged behaviour of the defendant entailed such an assumption of responsibility.

However, Lord Reed reviewed all the authorities, and laid down some general principles about whether a public authority could owe a duty of care in some circumstances. This followed on from his discussion of the police authorities in Robinson v. Chief Constable of West Yorkshire Police [2018] AC 736

**Whether a public authority owed a duty of care – general principles**

- Public authorities might owe a duty of care in circumstances where the principles applicable to private individuals would impose such a duty, unless a duty would be inconsistent with, and was therefore excluded by, the legislation from which their powers or duties were derived.

- Public authorities did not owe a duty of care at common law merely because they had statutory powers or duties, even if, by exercising their statutory functions, they could prevent a person from suffering harm.

- Public authorities could come under a common law duty to protect from harm in circumstances where the principles applicable to private individuals or bodies would impose such a duty, for example where the authority had created the source of danger or had assumed a responsibility to protect the claimant from harm, unless the imposition of such a duty would be inconsistent with the relevant legislation,

> “In the light of the cases which I have discussed, the decision in X (Minors) v Bedfordshire County Council [1995] 2 AC 633 can no longer be regarded as good law in so far as it ruled out on grounds of public policy the possibility that a duty of care might be owed by local authorities or their staff towards children with whom they came into contact in the performance of their functions under the 1989 Act, or in so far as liability for inflicting harm on a child was considered, in the Newham case, to depend upon an assumption of responsibility. Whether a local authority or its employees owe a duty of care to a child in particular circumstances depends on the application in that setting of the general principles most recently clarified in the case of Robinson [2018] AC 736. Following that approach, it is helpful to consider in the first place whether the case is one in which the defendant is alleged to have harmed the claimant, or one in which the defendant is alleged to have failed to provide a benefit to the claimant, for example by protecting him from harm. The present case falls into the latter category.” per Lord Reed at para 74

**30 ARTICLES 2 AND 3: Police Liability**

30.1 The virtual bar on bringing negligence claims against the police for their omissions, has led lawyers to look for other routes for compensation for their injured clients. As the police are officers of state, the ECHR 1950 – now enshrined in the Human Rights Act 1998 – which protects citizens against human rights abuse by the state has become the new theatre for litigation, with mixed results.

30.2 Article 2 offers protection to the right to life. If, therefore, the state (via police negligence) act in such a way as to endanger human life, the argument is that this is a violation of Article 2. However, the success of this argument depends upon the extent to which negligent inactivity can be held to be in breach of the positive duty to protect life.

> Article 2: Everyone’s right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

30.3 Article 3 offers protection from torture and inhuman treatment, which may be useful for the claimant whose life has not been endangered, but has nevertheless suffered physical abuse (such as rape) following the negligent inactivity of the police in failing to apprehend the abuser. However, the same problematic issues of interpretation of the ECHR duty will arise.

> Article 3: No one shall be subjected to torture or to inhuman or degrading treatment or punishment.
30.4 **Van Colle v. Chief Constable of Hertfordshire [2007] 1 WLR 1821 (CA)**

Giles Van Colle, aged 25, was a witness for the prosecution in the trial of Daniel Brougham for the theft of £4,000 worth of spectacles and related items, many of them stolen from Giles himself. (He was an optician, not a glasses fetishist!). Brougham pleaded not guilty, and was committed to trial at Luton Crown Court.

In the meantime, Brougham set about nailing the witnesses. Although he attempted to buy some of them off, he adopted a different tactic with Giles. First he set fire to his car. Next he phoned him to warn him thus: “Drop the charges. We know where you live and where your parents live and where your business is. You'll be in trouble if you don't!” This so shocked Giles, that he phoned 999 to report it as a death threat.

Despite all this, DC Ridely, who was in charge of the case, did nothing to offer Giles any protection, even though there is an official witness protection plan to meet such eventualities. Indeed, he did not even do the most obvious thing, which was to arrest Brougham to question him about the threats.

A few days before the trial was due to begin, Giles was murdered by Brougham.

The court concluded that DC Ridely had been in clear dereliction of his professional duties not to react properly to the witness intimidation. Indeed, he was found guilty of this by the police disciplinary hearing. It was also held that but for this breach of duty, Giles would probably not have been murdered. The police contended, however, that this did not amount to a breach of Article 2.

The trial judge and the Court of Appeal thought otherwise, only disagreeing about the amount of damages which were payable to his estate and relatives.

“In short we do not disagree with the judge's conclusion, which was consistent with that of the disciplinary panel, that the police should have taken action to protect Giles. They should have known that there was a real risk to his life and that the risk was and would remain immediate until the date of Brougham's trial. In these circumstances they should have done all that could reasonably have been expected of them to minimise or avoid the risk. Unfortunately, as the judge held and as DC Ridley himself accepted, the police did nothing to that end. For these reasons, we conclude that, with regard to the questions posed, at para 7, above, the judge was correct to hold that the police were under a duty to take preventive measures in relation to Giles and that they were in breach of that duty and therefore acted incompatibly with Giles's right to life under article 2 of the Convention.”

per Sir Anthony Clarke M.R. at para 94

“We should add that, in reaching those conclusions, we have not embarked on the kind of comparative analysis of the position under article 2 with that at common law which the judge did, at paras 89–93. For the reasons given earlier, we have assumed that, as the common law stands at present, the police would be held to owe no duty to the claimants to exercise care and skill in this regard. The question for decision in this appeal does not depend upon the position at common law. It depends upon the position under article 2 of the Convention.”

per Sir Anthony Clarke M.R. at para 95

Hence, the Court of Appeal specifically stated that the case would probably have failed if brought for common law negligence, following the general policy that the police owe no duty of care to the general public.

30.5 **Van Colle v. Chief Constable** was considered in the context of common law a few months later in **Smith v. Chief Constable of Sussex Police [2008]**. Although the Court of Appeal had recently stated that the Article 2 liability of the police did not impact on common law negligence, they seemed to have changed their minds.

30.6 **Smith v. Chief Constable of Sussex Police [2008] EWCA Civ 39**

Stephen Smith repeatedly told the police that his former lover, Gareth Jeffrey was threatening to kill him, but the police took no positive action, refusing even to look at the offensive text messages and emails he had been sent. Eventually, Smith was attacked with a claw-hammer and seriously injured by Jeffrey, in such a way that, had he been killed, it would have been a clear case of murder.

Smith sued the police for negligence as he had left it too late to bring an Art. 2 action. The police claimed the action should be struck out as they owed no duty of care to the claimant.
The court held that there was an arguable duty of care here as there was such a close proximity between the claimant and the police. In reaching this decision, the court specifically highlighted the analogy between Art. 2 rights (as discussed in Van Colle) and the common law duty of care.

According to Sedley L.J.:

“Van Colle has this much present relevance, that the trial judge's finding of a particular nexus in the victim's status as a prosecution witness, which was upheld by this court, bears as much on common law liability as on liability under the Human Rights Act.” para 23

“If there is a Convention value in play here, it is the right to life enshrined in Art. 2, with the derivative obligation upon states, developed in the Court's jurisprudence, to take reasonable steps to protect human life. This coheres well enough with the common law, which recognises that it is not reasonable to expect the police to answer in damages to every individual whose life or health might have been spared or saved by more competent police work, but that where, for example, someone's life or safety has been so firmly placed in the hands of the police as to make it incumbent on them to take at least elementary steps to protect it, unexcused neglect to do so can sound in damages if harm of the material kind results.” para 27

“Adopting this approach to the facts set out at the start of this judgment, I consider that Mr Smith's claim is not doomed to failure and should not have been struck out. If the facts upon which it is founded are established, the claimant was both a key witness to a serious offence of making threats to kill and the potential victim. The police ought to have been alerted by the evidence he offered them, and Jeffreys ought to have been arrested promptly. Instead he was left at large and permitted to carry out the attack which he had been threatening to carry out.” para 28

“Whether under Art. 2 or at common law, it cannot be a valid ground of distinction that an informer is entitled to protection while a witness is not, nor that a witness to a crime which has been charged is entitled to a measure of protection not available to a witness to a crime which should have been charged but through neglect has not been.” para 29

30.7 However... Both Van Colle and Smith were sent up to the House of Lords, who considered them together, and allowed both appeals, thus overturning the decisions in the Court of Appeal, and finding for the police.


In Van Colle’s case, it was held that in order to establish a violation of the positive obligation under article 2 of the Convention it had to be shown that a public authority had, or ought to have, known at the time of the existence of a real and immediate risk to the life of an identified individual from the criminal acts of a third party and that it failed to take measures within the scope of its powers which, judged reasonably, might have been expected to avoid that risk; that the test remained constant and was to be applied whatever the particular circumstances of the case, and no lower test applied where the risk to an individual's life arose from the state's decision to call him as a witness; and that the deceased's status as a witness, although a relevant factor, was not significant, given the minor character of the offences with which the accused was charged.

Since neither the murderer’s criminal record nor his approaches to witnesses indicated that he was given to violence and since some incidents had not been reported and the reported incidents had not involved explicit death threats, it could not reasonably have been anticipated from the information available to the police officer at that time that there was a real and immediate risk to the deceased's life. Accordingly, the obligation under article 2 had not been violated.

In Smith's case, it was held that it was a core principle of public policy that, in the absence of special circumstances, the police owed no common law duty of care to protect individuals from harm caused by criminals since such a duty would encourage defensive policing and divert manpower and resources from their primary function of suppressing crime and apprehending criminals in the interest of the community as a whole; that the public interest was best served by maintaining the full width of the core principle and an exception which imposed a duty of care in circumstances such as arose in the claimant's case, where the police were discharging their general public duty of law enforcement, could not be accommodated within it; and that, accordingly, the judge had been correct to strike out the claimant's action.
In **Mouncher v. Chief Constable of South Wales** [2016] EWHC 1367 (QB) the court had grave reservations as to whether a remand on unconditional bail, even for a very significant time, could be sufficiently serious to infringe art.8, but did not decide the point.

A recent case gives more hope to litigants trying to rely on the ECHR. **Commissioner of Police of the Metropolis v. DSD** [2019] AC 186 (SC)

Between 2002–2008 John Worboys, drugged and raped 105 women in the back of his black cab. He was convicted in 2009.

Two of his victims brought an action against the police, alleging that the incompetent investigation of Worboy’s crimes – which had indirectly led to them being raped – amounted to a breach of Article 3 by the police (prohibition on torture, inhuman or degrading treatment).

In a conjoined appeal, a man appealed against a decision dismissing his claim for breach of art.3 against the Chief Constable of the Greater Manchester police. The man had been assaulted in a bar and part of his ear had been bitten off. He had given inconsistent accounts about the identity of his assailant. The judge found that there had been a series of shortcomings by the investigating officer, but dismissed the man’s claim for breach of art.3.

The Court of Appeal held that there had been a breach of Article 3 as far as the women were concerned, but not in the man’s case. Where a credible allegation of a grave or serious crime – which involved inhuman treatment – is made, the police have a duty to investigate it in an efficient and reasonable manner.

The Supreme Court upheld the decision in the Court of Appeal. The state was obliged under ECHR art.3 to conduct an effective investigation into crimes involving serious violence to persons, whether that had been carried out by state agents or individual criminals. For the right to be practical and effective, an individual who had suffered ill-treatment had a right to claim compensation against the state where there had been a failure to conduct a sufficient investigation. To succeed in a claim, a claimant had to establish that there were serious defects in the police investigation into the particular case; there was no need to establish that there were serious failings of a systemic nature.

However, the Supreme Court made it clear that the police’s exemption at common law was not to be extended to claims advanced under the Human Rights Act 1998. The bases of liability were different. No assumption should be made that the policy reasons underlying the common-law exemption applied to liability for breach of ECHR rights.

The Supreme Court also emphasised that their decision was to be strictly confined and should not be taken to have opened the floodgates for general claims against the police.

“The prospect of every complaint of burglary, car theft or fraud becoming the subject of an action under the Human Rights Act has been raised. I do not believe that this is a serious possibility... The recognition that really serious operational failures by police in the investigation of offences can give rise to a breach of article 3 cannot realistically be said to herald an avalanche of claims for every retrospectively detected error in police investigations of minor crime.” per Lord Kerr at para 53
PART 6: BREACH OF THE DUTY OF CARE

31 GENERAL PRINCIPLES

31.1 It is not enough that the defendant owes the claimant a duty of care. He must also have breached it. This means that, on an objective standard, he has not done what a ‘reasonable man’ would have done in the situation.

31.2 It is all a question of risk assessment, and involves considering not only what the defendant should have done, but also what precautions the claimant should reasonably have taken. The defendant is only required to guard against reasonably foreseeable accidents, not fantastic possibilities.

In this he is judged by the objective standards of the ‘reasonable man/woman’

31.3 **Blyth v. Birmingham Waterworks Co.** [1856] 11 Ex. 781

“Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do.” per Baron Alderson

32 WHO IS THE REASONABLE MAN?

32.1 **Hall v. Brooklands Auto Racing Club** [1933] 1 KB 205 (CA)

“The person concerned is sometimes described as the ‘man on the street’, or the ‘man on the Clapham Omnibus’, or as I recently read from an American author ‘the man who takes the magazines at home and in the evening pushes the lawnmower in his shirt sleeves.’” per Greer L.J. at p.224

32.2 **Glasgow Corporation v. Muir** [1943] AC 448 (CA)

The defendants allowed a church picnic party to use their tea-rooms on a wet day. During the course of the day, a tea-urn, which was being carried through a passage, was dropped and the water scalded some children. It was held that the defendants were not liable, as there was no reason why they would anticipate this event happening as a result of their granting permission for a picnic.

“The standard of foresight of the reasonable man is, in one sense, an impersonal test. It eliminates the personal equation and is independent of the idiosyncrasies of the particular person whose conduct is in question. Some persons are, by nature, unduly timorous and imagine every path beset with lions. Others, of more robust temperament, fail to foresee or nonchalantly disregard even the most obvious dangers. The reasonable man is presumed to be free both from over-apprehension and from over-confidence, but there is a sense in which the standard of care of the reasonable man involves in its application a subjective element. It is still left to the judge to decide what, in the circumstances of the particular case, the reasonable man would have had in contemplation and what accordingly the party sought to be made liable ought to have foreseen. Here there is room for diversity of view, as indeed is well illustrated in the present case. What to one judge may seem far-fetched may seem to another both natural and probable.” per Lord Macmillan at p.457

32.3 **Chester v. Afshar** [2005] 1 AC 134 (HL)

“On its own, common sense, and without more guidance, is no more reliable as a guide to the right answer in this case than an appeal to the views of the traveller on the London Underground. As I survey my fellow passengers on my twice weekly journeys to and from Heathrow Airport on the Piccadilly Line – such a variety in age, race, nationality and languages – I find it increasingly hard to persuade myself that any one view on anything other than the most basic issues can be said to be typical of all of them.” per Lord Hope at para 83

32.4 Eldridge, Modern Tort.

“The reasonable man is a fiction. He is the personification of the court and jury’s social judgment.”
32.5 C.K. Allen, Law in the Making

“Nobody is deceived by the fiction that the judge is stating not what he himself thinks, but what an average reasonable man might think.”

33 WHAT IS A REASONABLE STANDARD OF CARE?

33.1 The objective standard of what is ‘reasonable’ will vary depending on the circumstances in which the defendant finds himself. Various factors have been considered by the courts in deciding how much care it was reasonable for the defendant to take (or not to take) in the particular circumstances of the cases.

34 THE MAGNITUDE OF THE RISK

34.1 The greater the risk of an act or omission causing an injury, the less reasonable it will be to do it. Conversely, if an activity carries very little risk of causing an injury, it may be reasonable to take the risk of pursuing it, particularly if it has some social value.

34.2 Bolton v. Stone [1951] AC 850 (HL)

The plaintiff was hit by a cricket ball whilst standing on a side-road near to a cricket ground. The ground was enclosed by a seven-foot fence, the top of which was seventeen feet above the level of the pitch. Although balls had been hit over the fence on rare occasions in the past, the hit in question was altogether exceptional. HELD: Although the possibility of the ball being hit onto the highway might reasonably have been foreseen, this was not sufficient to establish negligence, since the risk of injury to anyone in such a place was so remote that a reasonable person would not have anticipated it.

“The standard of care in the law of negligence is the standard of an ordinarily careful man, but in my opinion an ordinarily careful man does not take precautions against every foreseeable risk. He can, of course, foresee the possibility of many risks, but life would be almost impossible if he were to attempt to take precautions against every risk which he can foresee. He takes precautions against risks which are reasonably likely to happen. Many foreseeable risks are extremely unlikely to happen and cannot be guarded against except by almost complete isolation. The ordinarily prudent owner of a dog does not keep his dog always on a lead on a country highway for fear it may cause injury to a passing motor cyclist, nor does the ordinarily prudent pedestrian avoid the use of the highway for fear of skidding motor cars.” per Lord Oaksey at p.863

34.3 Haley v. London Electricity Board [1965] AC 778 (HL)

The respondent Electricity Board dug a sixty-foot trench lengthwise along Charlton Church Lane in south London. To guard the trench, the workmen had put a punner-hammer across the pavement with its long handle resting on some railings about two feet high. (A punner-hammer is a broomstick with a weight on it, used to beat down the earth.) There was a similar arrangement made up of a pick and a shovel at the other end, and various warning signs.

John Haley, aged 64, was a blind telephonist, who often walked down this lane on his way to the bus-stop. (He had been blinded 25 years earlier by having a hard ball batted into his face.) His white stick missed the punner-handle and his leg caught it about 4.5 inches above his ankle. He was catapulted into the hole and became almost totally deaf. The Electricity Board argued that a blind person who chooses to walk on the highway alone takes upon himself the risk of colliding with any obstruction.

In the Court of Appeal, Lord Denning was curiously unsympathetic towards Mr. Haley.

“In order to fulfil this duty, the defendants must, I think, have regard to all the many sorts and conditions of people who use the pavement. They must realise that it is used by men and women hurrying to work, by boys and girls running to school, and by old people pottering on their morning walk. All these are commonplace users of the way, and proper provision must be had for their safety. But the defendants do not have to cater for the man who walks with his head in the air and does not look where he is going. He is such an exceptional person that they need not provide for him. If he runs into a fence or guard, it cannot be helped. It is not their fault.
“Likewise, I am afraid I must say, the defendants do not have to provide for the blind, at any rate in places where they have no particular reason to expect blind persons to be. It would be too great a tax on the ordinary business of life if special precautions had to be taken to protect the blind.”

per Lord Denning MR at [1964] 2 QB 121, p.128

The House of Lords did not agree with Lord Denning and held that the Electricity Board was liable. Blind people are not so uncommon that it is reasonable to ignore their needs.

“It is their duty to take reasonable care not to act in a way likely to endanger other persons who may reasonably be expected to walk along the pavement. That duty is owed to blind persons if the operators foresee or ought to have foreseen that blind persons may walk along the pavement and is in no way different from the duty owed to persons with sight, though the carrying out of the duty may involve extra precautions in the case of blind pedestrians. I think that everyone living in Greater London must have seen blind persons walking slowly along on the pavement and waving a white stick in front of them, so as to touch any obstruction which may be in their way, and I think that the respondents’ workmen ought to have foreseen that a blind person might well come along the pavement in question.” per Lord Morton at p.794


Christopher Gates, aged 25, was hypnotised by Paul McKenna during a stage show, and claimed damages when he later became schizophrenic. He lost. Apart from the fact that he had failed to establish any causal link between the hypnosis and the schizophrenia, he had also failed to establish that there was any foreseeable risk that hypnosis of this type could cause any lasting physical effects.

“The defendant provided what was intended to be a form of family entertainment, in which the plaintiff willingly participated. I do not believe that he can be fairly criticised for his conduct of the show, or that anyone could reasonably have been expected to foresee the disastrous consequences which it is alleged to have had for the plaintiff.” per Toulson J.

34.5 Thompson v. Home Office [2001] EWCA Civ 331 (CA)

Delroy Thompson was serving a custodial sentence at Swinfen Hall Young Offender Institution. Another inmate attacked him with a razor blade supplied by the YOI officers. He claimed £15,000 in damages.

He was awarded £7,650 by the trial judge and the defendants appealed on the basis that they had been reasonable in following Home Office guidelines which stated: “Convicted prisoners may be allowed to retain razor blades or disposable razors at the Governor’s discretion. When a Governor has reason to believe that a prisoner may harm himself or others, razor blades or disposable razors should be issued on a daily basis.”

The Court of Appeal held that the defendants were not negligent in adopting these guidelines. There had only been one confirmed razor blade attack at the institution in the 23 months prior to the incident and there was no obvious reason for the Governor not to adopt the basic policy, particularly as trusting the inmates with razor blades contributed to their rehabilitation by giving them a sense of responsibility (and a lethal weapon!)

34.6 Orange v. Chief Constable of West Yorkshire Police [2002] QB 347

Paul Orange, aged 25, was arrested for being drunk and disorderly at 5.40 a.m. as he staggered home with his friend, swearing at a passing police van. He was placed in a police cell and was allowed to keep all of his clothing. He was monitored by visits every 30 minutes and by a closed circuit television. He was observed walking around the cell at 9.30, in no apparent distress. Shortly afterwards, when a police officer went to release him from his cell, he discovered that Orange had hanged himself to death with his belt. His widow sued the police for negligence.

HELD: The police were not liable. Although the police owe a duty of care to people in custody to take reasonable care for their health and safety, where there is no reason to suppose that someone is a suicide risk, they are not obliged to treat them with the same care and attention they would lavish on someone who is.
“There is no doubt that a custodian owes a duty of care to those taken into custody. As we have said, the duty is to take reasonable care for that person’s health and safety. In determining the extent of that duty, it is clearly relevant to take into account the fact that there is an increased risk of suicide amongst such prisoners. But that does not mean that suicide is a foreseeable risk in relation to every prisoner. As Lord Hope said in Reeve’s case [2000], suicide can be both unforeseen and unforeseeable. Nor do we consider that it would be fair, just and reasonable to impose upon either the police or the prison authorities a general obligation to treat every prisoner as if he or she were a suicide risk. The consequence would be an unacceptable level of control and precaution, not only as an obligation placed upon the authorities, but also as an imposition on the individual prisoner.”

per Latham L.J. at para 41

34.7 Charles v. Cardiff CC [2002] EWCA Civ 1735

Yvonne Charles was employed as a residential social worker at Crosslands Residential Unit which provided accommodation for up to six children aged between 10 to 16 who had behavioural problems. The older residents were free to come and go as they pleased and to have visitors with an informal curfew of about 9 pm. One evening at 9.30 pm Miss Charles heard a bang at the door of the home. She opened it to two young males thinking they were residents. They were not residents and were drunk, threatening and aggressive. When Miss Charles refused them entrance, one grabbed her arm and repeatedly banged the door closed on her wrist, causing her injury. She sued the Council for their failure to equip the door with a chain, an elementary precaution which would have prevented this incident. She lost.

The court held that the risk of such an incident occurring was very small, especially as she could have asked for the identity of the callers through the door which had frosted glass panels, or by looking through the clear glass of the lounge window. She had been answering the door for ten years without the use of a chain. Furthermore, the staff had been special training in dealing with aggressive youths and did not need precautions of this sort to keep them at bay.

34.8 R. v. Ministry of Defence [2007] EWCA Civ 1472

R, a serving member of the RAF in Cranwell, was resident in an all-women accommodation block which had an external lock and combination locks for each corridor. R and her women friends went for a drunken night out at Flicks Nightclub, where one of the friends, Fiona Graham, picked up a man, Derek Johnston, whom she brought back with her.

Fiona and Derek helped the drunken R to bed, and Fiona then took Derek to the ‘party room’. They did not lock R’s door as it could only be locked from the outside by locking R in.

When Fiona went to bed, she showed Derek to the door, but did not see him out, despite guidelines that stated that all men should be seen off the premises after they had served their manly purpose to the women. Derek went back to R’s room and raped her.

R claimed that the MOD was in breach of its duty of care towards her by not providing doors with swipe card access rather than combination locks that could be left on latch.

The court held that the MOD was not in breach. There was no evidence that a swipe card system would have been any more effective in protecting R than the combination locks. The real problem was that Fiona had not escorted her man off the premises, as she was required to do, and as common sense would dictate. It was not unreasonable to give this responsibility to the women themselves and to expect them to carry it out.

34.9 Whippey v. Jones [2009] EWCA Civ 452

Andrew Jones was out on a run when he was knocked down and injured by an unleashed Great Dane called Hector, owned by an RSPCA inspector, Christopher Whippey. It was established that the owner only unleashed the dog when he was reasonably sure that there was no-one else around.

HELD: Although there was clearly a duty of care on dog owners to make sure they did not injure members of the public, it was not unreasonable to let a dog off its leash when it was unlikely to do any harm.
“The question of whether a person has acted negligently is not answered simply by analysing what he did or did not do in the circumstances that prevailed at the time in question and then testing it against an objective standard of “reasonable behaviour”. Before holding that a person's standard of care has fallen below the objective standard expected and so finding that he acted negligently, the court must be satisfied that a reasonable person in the position of the defendant (i.e., the person who caused the incident) would contemplate that injury is likely to follow from his acts or omissions. Nor is the remote possibility of injury enough; there must be a sufficient probability of injury to lead a reasonable person (in the position of the defendant) to anticipate it.” per Aikens L.J. at para 16

35 THE SERIOUSNESS OF THE POTENTIAL HARM

35.1 The greater the harm that is likely to be inflicted by the act or omission, the less reasonable it will be to engage in it.

*Paris v. Stepney Borough Council* [1951] AC 367

The plaintiff, as his employers knew, had only one good eye. He was not provided with goggles for his work and was blinded when a splinter entered his one good eye. HELD: It would not have been negligent to fail to provide goggles for a two-eyed man, but it was negligent not to provide them for a one-eyed man since the consequences of injury would be so much more serious.

“The test is what precautions would the ordinary reasonable and prudent man take. The relevant considerations include all those facts which could affect the conduct of a reasonable and prudent man and his decision on the precautions to be taken. Would a reasonable and prudent man be influenced, not only by the greater or less probability of an accident occurring, but also by the gravity of the consequences if an accident does occur? In *Mackintosh v. Mackintosh* (1864) Lord Neaves, considering a case of alleged negligence in muir-burning, said: “It must be observed that in all cases the amount of care which a prudent man will take must vary infinitely according to circumstances. No prudent man in carrying a lighted candle through a powder magazine would fail to take more care than if he was going through a damp cellar. The amount of care will be proportionate to the degree of risk run and to the magnitude of the mischief that may be occasioned.”

per Lord Normand at p.380

36 THE COST OF ELIMINATING THE RISK

36.1 Although the court will be slow to recognise mere financial cost as a reason not to take care, it may be a deciding element in some cases.


The floor of the defendants' factory was left slippery after a flood by a combination of rainwater and an oily cooling mixture which normally ran in a channel along the floor. They used their available supplies of sawdust to try to soak up the oily water on the floor and sent out for more sawdust. In the meantime, the factory continued to work and the plaintiff was injured when he slipped and fell whilst trying to load a heavy barrel onto a trolley. HELD: The defendants had not been negligent. They had done all they reasonably could to prevent accidents, having regard to the degree of risk, short of closing the factory.

“The only question was: has it been proved that the floor was so slippery that, remedial steps not being possible, a reasonably prudent employer would have closed down the factory rather than allow his employees to run the risks involved in continuing work?

“The absence of any evidence that anyone on the factory during the afternoon or night shift, other than the plaintiff, slipped or experienced any difficulty or that any complaint was made by or on behalf of the workers all points to the conclusion that the danger was in fact not such as to impose upon a reasonable employer the obligation placed upon the respondents by the trial judge.”

per Lord Tucker p.659
37 COMMON PRACTICE

37.1 Common trade practice – including Codes of Practice – is a useful indicator of what might constitute ‘reasonable’ behavior but will not be decisive either way. If the defendant has failed to adopt a safety measure that is both common practice and obviously sensible, it may incumbent upon him or her to explain this omission.


The defendant was a professional mountain guide who was employed by the plaintiff to accompany him on a climb in the French Alps. The guide used only one ice-screw to secure the plaintiff to the ice-face of the Tour Ronde, even though it was the ‘universal practice’ to use two ice-screws unless there was an overriding reason for departing from this. As the defendant could not justifiy the use of only one screw, he was held liable for the death of the plaintiff who had fallen off the ice face when his one screw came loose.

37.3 *Rhodes-Hampton v. Worthing and Southland Hospital NHS Trust* [2007] EWCA Civ 1202

Jennifer Louise Rhodes-Hampton was employed as a midwife at Worthing Hospital. In August 2000, she was sent to the delivery suite to attend to an obese patient. The patient needed an emergency caesarian section, which caused her great distress. After the successful operation, she was wheeled into an adjacent recovery room, where she was left with just the midwife and Dr Haraharan, an anaesthetist. What followed was graphically explained in the judgment of Lady Justice Smith:

“Dr Haraharan asked the appellant to put the patient on to a cardiac monitor but the appellant, who had not been trained as a recovery nurse, told him that she did not know how to do so. He expressed some dissatisfaction at that. The appellant began her obstetric duties, attending to the patient's wound and other matters. After a short while, the patient ejected the Guedel airway which had remained in place until then. The patient still had a catheter in place and a drip inserted into each hand. Soon afterwards, the patient lay down, expressing some post-anaesthetic confusion. She began to groan and tried to sit up, shouting 'I need to pee, I need to pee, help me'. She then sat up fully and swung her legs over the edge of the bed, on the side where the appellant was standing. The appellant stood in front of her in order to prevent her from falling from the bed. The patient punched the appellant twice, once in the breast and once in the abdomen. Although these injuries were painful, they did not result in lasting damage and the appellant did not sue in respect of them. The appellant tried to calm the patient, explaining that she had a catheter in place and did not need to pass urine. The patient became somewhat calmer and lay down.

“Meanwhile, Dr Haraharan had remained at the head of the bed and had not moved to assist the appellant. When the patient lay down, he began to speak to her in a reassuring way. The appellant resumed her obstetric duties. She also went to check on the condition of the baby. She then returned to the patient's bedside. During all this time, Mrs. L remained fidgety and slightly agitated and was calling out. About 4 to 5 minutes after the earlier incident, Mrs. L began to 'thrash about' again. She became increasingly agitated and was shouting that she wanted 'a pee' and needed help. She then rolled over onto her right side and swung her left leg across, kicking the appellant in the abdomen. The appellant took a step back but she was worried that the patient might roll off the bed. She was also concerned about the patient's catheter and that she had a drip inserted into each hand. So the appellant moved back towards the patient to prevent her from falling. The patient then grabbed the appellant's wrist and rolled back over, pulling the appellant with her. The appellant's hips struck the side of the bed and she felt a pain in her back and down her right leg. She had suffered the injury for which she was later to claim damages.”

The midwife sued the hospital for negligence, *inter alia*, for not having a sufficient number of properly trained staff in the recovery room; and for not having fitted cot sides on the bed. (The guidelines of the Association of Anaesthetists require at least two staff trained in recovery to be present; and it is common practice to have cot sides on beds in recovery rooms.)

The trial judge held that there was no breach of duty by the Hospital Trust. Although it was good practice to have two recovery staff and cot sides, this was for the benefit of the patient, not for the safety of the staff. However, the Court of Appeal overturned this decision. Disregarding common practice in this case was clearly unreasonable and thus a breach of duty towards both the patient and the staff.
“If it is foreseeable that a patient might suffer from post-anaesthetic confusion, which might endanger her own safety, it is also foreseeable that any member of staff present will seek to prevent harm to the patient and might, in so doing, endanger him or herself. In such an episode, it is also foreseeable that, unless the patient is restrained, a member of staff might be assaulted. If such a foreseeable risk exists, the reasonable employer should have a system of work which will reduce the risk to employees to a reasonable level. So it seems to me that the requirement of good practice that there should be at least two recovery staff present is probably not designed solely for the benefit of the patient. It is probably also designed to ensure that, if an episode occurs which might endanger staff as well as the patient, there are sufficient staff present to handle the situation appropriately.”

per Smith L.J. at para 32

“I turn to consider the question of cot sides. Both experts agreed that it was not wrong or bad practice not to keep the cot sides in situ at all times provided that they were immediately available and could be fitted without delay. I confess that it seems to me rather pointless to keep the cot sides off the bed. It would seem sensible to have the cot sides in place all the time, particularly if the bed is to be used as a trolley, as apparently this one was. That was the practice in the main operating suites in this hospital and no evidence was given to justify a different practice or policy in the obstetric operating suite. Indeed, it is difficult to think of any justification.”

per Smith L.J. at paras 32 and 33

37.4 Bollito v. Arriva London [2008] EWHC 48

Vincenzo Bollito and his friends missed his bus, and ran after it to try to catch it up. Bollito caught it at the traffic lights and knocked on the door, which the driver opened. Bollito showed his pass and then stood in the doorway, urging his friends to hurry up. The driver closed the door on him and moved off. He continued driving whilst Bollito tried to free himself, which he eventually did by falling into the road and smashing his head on the ground.

Rule 33 of the driver’s rulebook made it clear that in no circumstances should a bus with passenger doors be moved in service with any door open, and that drivers should be vigilant to ensure that passengers boarded and alighted safely.

It was held that ignoring this rule/common practice was clear evidence of the driver’s negligence.

37.5 RXDX v. Northampton BC [2015] EWHC 1677

In 2002, a six-year-old boy suffered irreversible brain damage when he nearly drowned in a swimming pool, despite the presence of three lifeguards nearby who failed to notice that the boy was in trouble. His mother sued the local council, who ran the pool, alleging that they were vicariously liable for the lifeguards on duty who – she claimed – had failed to use professional skill and care so as to ensure the boy’s safety.

In 1999, in response to heightened concern about the numbers of drowning incidents in public swimming pools, the Health and Safety Commission had published a safety guidance entitled “Managing Health and Safety in Swimming Pools”, which included advice about how swimming pools should be divided into manageable zones which lifeguards could scan every 10 seconds, with a maximum of 20 seconds response time.

However, the council decided not to take this advice, but to use instead its own substantial publication entitled “Pool Safety Operating Procedures and Emergency Action Plan”, which the court deemed to be incomprehensible.

In holding that the lifeguards were in breach of their duty of care towards the child, the court noted the significance of them not following the HSC guidelines.

“While this document is guidance only and not a statutory code, the experts on both sides accepted that it defined good practice for public pools, and while my task is to decide whether the claimant has proved a failure by the defendant’s relevant lifeguarding staff to exercise reasonable skill and care in relation to the safety of pool users including the claimant any material breach of these obligations would constitute negligence at common law.” per Sir Colin Mackay at para 27

However, common practice is not conclusive of what a particular defendant ought to have done. Thus, even if some employers provide protection for their employees from a particular risk, it may not be a general requirement to provide such protection (subject of course to any statutory safety requirements.)
37.7 Brown v. Rolls Royce Ltd. [1960] 1 WLR 210 (HL)

A factory employee who worked as a machine oiler had his hands in constant contact with oil, from which he eventually contracted dermatitis. His employers did not provide barrier cream as it was not recommended by their medical officer. Rozalex 1 was commonly supplied by employers to men doing similar work, but there was no evidence that it would have prevented the dermatitis.

HELD: The employers had not failed in their duty to the employee, since their conduct satisfied the test of "the conduct and judgment of a reasonable and prudent man." The Lords stated that although common practice may provide useful evidence of reasonable behaviour, non-compliance is not conclusive of negligence.

"The keystone in (the appellant’s) argument seemed to be the finding of a common practice to supply barrier cream... But I can draw no such inference from this finding. A common practice in like circumstances not followed by an employer may no doubt be a weighty circumstance to be considered by judge or jury in deciding whether failure to comply with this practice, taken along with all the other material circumstances in this case, yields an inference of negligence on the part of the employers." per Lord Keith at p.214

37.8 That said, an employer cannot ignore a safety issue simply on the basis that other employers are just as bad in not providing suitable protection for their workers. Note that the leading cases on this predate the Health and Safety at Work Act 1974 and similar legislation and regulations which now largely govern this area of law where employees are concerned.

37.9 Cavanagh v. Ulster Weaving Co. Ltd. [1960] AC 145 (HL Northern Ireland)

A labourer, wearing wet and slippery rubber boots, fell from a crawling ladder which had no handrail whilst carrying a bucket of cement. He fell onto a glass roof, and had to have his arm amputated. The jury found his employers liable for negligence, but the Court of Appeal said that they were not liable as there was no evidence that the employers were omitting to provide safety facilities which were either obviously needed or were commonly provided by other such employers.

The House of Lords reversed this decision. Despite the common trade practice, the jury was entitled to find the defendants liable for negligence since the evidence as to trade practice alone could not be treated as conclusive in favour of the defendants.

38 THE SOCIAL VALUE OF THE DEFENDANT’S CONDUCT: Emergency Vehicles

38.1 Whether the social value of the defendant's conduct justifies him in causing a danger to the claimant will depend on the circumstances of the case. This issue is at the centre of most cases about breach, where the question is essentially whether the public's desire to engage in a potentially dangerous activity (such as driving a car or playing a contact sport) overweights the public interest in forbidding the activity lest it should result in the foreseeable injury. If the answer to that question is 'no', then the activity would never be reasonable and would always result in a breach. If the activity is considered to be of social worth per se, the issue then hinges on the other factors, such as the likelihood of harm, the precautions taken and the potential for serious injury, as discussed above.

38.2 A number of cases have concerned the rights of drivers of emergency vehicles to go through red lights etcetera. Although the early cases suggest that any collision thus caused is entirely the fault of the driver of the emergency vehicle, more recent cases have supported a view that drivers who do not give way to emergency vehicles may at least be contributorily negligent if there is a crash.

38.3 Ward v. London County Council [1938] 2 KB 341

A fire-engine, going through a red light, crashed into a car crossing the junction. It was contended that as a driver is bound by the regulations, even when the lights are in his favour, to have due regard to the safety of other users of the road, the plaintiff should have given way to the fire-engine.

HELD: The accident was caused solely by the negligence of the driver of the fire-engine.
“It is said that, because he was driving a fire-engine, he was in a certain privileged position. That is not so. He was not in a privileged position at all. It is perfectly true that, when the bell is clanged, people generally draw aside, but, if they do not draw aside, the driver of a fire engine has no business to charge into them.” per Charles J. at p.343

38.4 Joseph Eva Ltd. v. Reeves [1938] 2 KB 393 (CA)

A police car driven by Stanley Reeves collided with a van belonging to Joseph Eva at the crossroads of Lambeth Road and St. George’s Road. The police car was speeding to an emergency call, and went through a green light. The driver of the van, who had gone through a red light, was held to be liable, but appealed on the basis that even when going through a green light, a motorist had a duty to look out for vehicles crossing his path. The Court of Appeal was not impressed!

“In my opinion Reeves was entitled to assume that traffic approaching the crossing from the west would act in obedience to the statutory regulations and he was not bound to assume or provide for the case of an eastbound vehicle entering the crossing in disobedience to the red light. This does not, of course, mean that, if he had noticed the appellant’s van in time, it was not his duty to take all reasonable possible steps to avoid coming into collision with it notwithstanding that the appellants’ van was acting in breach of the regulations.”

“But he did not see it and I do not see how it can be said that he was under any obligation to assume the possibility of its presence.” per Sir Wilfred Greene M.R. at p.401

38.5 Gaynor v. Allen [1959] 2 QB 403

A pedestrian was knocked down by a police motorcyclist whilst crossing the road. The police officer was travelling at 60 m.p.h. on a 40 m.p.h. road, in pursuit of a speeding motorist. Although the police officer was not committing a criminal offence, (as emergency vehicles are permitted by statute to speed to emergencies), the court held that this did not affect his civil liability. He owed a duty to the public to drive with due care and attention and without exposing members of the public to unnecessary danger. He was in breach of that duty.

“The question, as I see it, is this: First, is it clear that the police motor-cyclist, judged by the standard of an ordinary driver of a motor-vehicle on his private occasions, is to be held guilty of negligence causing the accident? I think the answer to that clearly must be “Yes”. To drive at that speed on a restricted road, in the half-light at a time of the evening when it must be known that there may be pedestrians making their way home, is itself, in my judgment, to drive at an improper and unsafe speed.” per McNair J. at p.407

38.6 The matter is now subject to regulations such as:

Road Traffic Regulation Act 1984

s.87 Exemption of fire brigade, ambulance and police vehicles from speed limits.

(1) No statutory provision imposing a speed limit on motor vehicles shall apply to any vehicle on an occasion when it is being used for fire and rescue authority, ambulance or police purposes, if the observance of that provision would be likely to hinder the use of the vehicle for the purpose for which it is being used on that occasion.

38.7 Griffin v. Mersey Regional Ambulance Service [1998] PIQR P34 (CA)

Peter Griffin was driving his car westwards through Islington. He was in the centre of the three westbound lanes and was approaching a junction with the green light in his favour. He failed to notice an ambulance crossing southwards through a red light across the junction, despite the fact that the ambulance was already well across the road; its siren was blaring; and other traffic had halted at the green lights to let the ambulance across. The ambulance collided with Griffin, and he sued the Ambulance Service for negligence.

The trial judge recognised the high duty placed by the law upon emergency vehicles crossing junctions against red lights, but considered that Griffin was 60% contributorily negligent for not noticing the ambulance and stopping for it. Griffin appealed on the basis that either there was an absolute rule in favour of the traffic at the green light (as held in earlier cases) or that the apportionment of blame to him was too high.
The Court of Appeal considered the Traffic Signs Regulations and the Highway Code, and agreed with the trial judge on both counts.

“In my judgment, the general approach of the judge below was entirely correct. He rightly identified the duty upon the defendants’ driver crossing this junction against the red light, as a high or heavy one, but equally rightly he recognised a duty of care upon the plaintiff beyond that of merely taking reasonable steps to avoid colliding with any vehicle crossing on red which he happened to see or otherwise be aware of. Rejecting, as I do, the application here of what is suggested to be the absolute rule in favour of traffic crossing a junction on green established in Joseph Eva Ltd v. Reeves, it follows that, in my judgment, the appellant’s argument that there was no scope here for any finding of contributory negligence fails.” per Simon Brown L.J. at p.38

38.8  **Gilfillan v. Barbour** [2003] SLT 1127 (Scottish Outer House)

Alex Barbour went with his wife Helen to a concert in Glasgow. They were both in their sixties and had been married for 36 years. On the way home, Alex was driving their Fiat Punto. As they approached a junction to turn right, they heard a police siren, but could not tell where the sound was coming from. There was a car facing them waiting to turn right in the opposite direction. Rather than wait to see where the police car was, Barbour started to turn right as the other car did.

He then saw, for the first time, a police car with all lights flashing driven by P.C. George Gilfillan speeding towards them in a high performance Volvo S70. The police car – which was attending an emergency – drove into them and killed Helen.

Gilfillan suffered a psychological injury as a result of the accident and a consequential loss of earnings. He sued the poor old husband for damages! Barbour admitted negligence but claimed that Gilfillan had also been negligent. Gilfillan admitted that he would have been able to stop safely if he had not been speeding at 60 m.p.h. across the junction, but claimed that his speed was justifiable in the circumstances of attending an emergency.

The court questioned the judgment in Gaynor v. Allen, as the standard of care required of a police driver attending an emergency is not necessarily the same as that required of an ordinary driver. Whilst it is clearly not negligent for an emergency vehicle to speed *per se*, the degree of risk a police officer may take in speeding depends on what is reasonable in the circumstances.

“It might be relevant to know whether he was in pursuit of an escaping murderer or in pursuit of a motorist with defective lights... There will of course be circumstances where the risk to other road users is so high that it would not be reasonable to take that risk, however urgent the police business might be.” per Lord Reed at para 31

In this case, the call was not particularly urgent, and the police officer should have realised that if he could not see the cars ahead, they might not be able to see him. He should have slowed down to ensure there was no danger before speeding across the junction. Gilfillan was held to be 50% contributorily negligent.

38.9 In other cases, the danger caused by vehicles attending an emergency has been held to be entirely justified.

**Daborn v. Bath Tramways Motor Co. Ltd.** [1946] 2 All ER 333 (CA)

Miss Daborn was driving a left-hand drive Chevrolet ambulance through wartime Bath. The ambulance was completely enclosed at the back, so she could only see behind her in her left-hand windscreens mirror. If a vehicle was close to her, she could not see it at all. There was a large warning notice on the back of the ambulance saying “Caution – Left Hand Drive – No Signals”. Unaware that there was a bus close behind her trying to overtake, she gave a left-hand signal to turn right, turned right and crashed into the bus. She sued the owners of the bus, but it was contended that she was negligent in not taking proper care to ensure there was no vehicle behind her before turning.

HELD: The bus driver was negligent, but the ambulance driver was not. American ambulances were very common at the time and Miss Daborn had taken the correct course and given the correct hand signals for turning right.
“In determining whether a party is negligent, the standard of reasonable care is that which is reasonably to be demanded in the circumstances. A relevant circumstance to take into account may be the importance of the end to be served by behaving in this way or that. As has often been pointed out, if all the trains in this country were restricted to a speed of 5 miles an hour, there would be fewer accidents, but our national life would be intolerably slowed down. The purpose to be served, if sufficiently important, justifies the assumption of abnormal risk.

“The relevance of this applied to the present case is this: during the war which was, at the material time, in progress, it was necessary for many highly important operations to be carried out by means of motor vehicles with left-hand drives, no others being available. So far as this was the case, it was impossible for the drivers of such cars to give the warning signals which could otherwise be properly demanded of them. Meanwhile, it was essential that the ambulance service should be maintained. It seems to me, in those circumstances, it would be demanding too high and an unreasonable standard of care from the drivers of such cars to say to them: “Either you must give signals which the structure of your vehicles renders impossible or you must not drive at all.””

per Asquith L.J. at p.336

38.10 **Watt v. Hertfordshire County Council** [1954] 1 WLR 835

The plaintiff was a fireman. He was called out with his colleagues to an accident where a woman lay trapped beneath an overturned vehicle. A heavy jack was needed to lift the vehicle, but the fire-brigade did not have a suitable vehicle to convey it. The jack was therefore carried in a lorry with the plaintiff and several of his colleagues holding it. The plaintiff was injured when the jack slipped.

**HELD:** A claim in negligence failed. Although such action might normally have been negligent, the risk here was justified by the need to protect life and limb.

38.11 **Marshall v. Osmond** [1983] 1 QB 1034 (CA)

P.C. Maximilian Needham was driving an unmarked Mini in the early hours of the morning in Brockenhurst. He had been dispatched there because of a spate of car thefts in the area. At 1.10 a.m. he saw a Cortina full of youths go by, and he pursued it. The youths stopped the car on one of the open roads of the New Forest with the intention of escaping. P.C. Needham skidded to a stop and accidentally knocked over one of the youths.

**HELD:** Needham’s error of judgment in performing the manoeuvre did not amount to negligence.

However, the court emphasised that “the duty owed by a police driver to the suspect is...the same duty as that owed to anyone else, namely to exercise such care and skill as is reasonable in all the circumstances... Of course, one of the circumstances was that the plaintiff bore all the appearance of having been somebody engaged in a criminal activity for which there was a power of arrest.”

per Sir John Donaldson M.R. at p.1038

39 **OTHER SITUATIONS OF SOCIAL VALUE**

39.1 Other situations are judged as the merits of the case demand.

39.2 **British School of Motoring Ltd. v. Simms** [1971] 1 All ER 317

During the driving test from Hell, Margaret Simms drove over some give-way lines on Cleveland Road in Bournemouth when there was a car driven by Mr. Fisher coming along the main Windham Road. The examiner used the dual controls to execute an emergency stop, which left Simms’ car in the middle of the road, where Fisher crashed into it. The test car spun round and crashed into Mrs. Drew’s car, which was stopped at the opposite junction.

Mrs. Drew was also taking her test, and the car she was driving was owned by BSM. *Inter alia*, BSM sued Cyril Cooper (the driving examiner for Mrs. Simms) for failing to supervise or control Simms’ driving and for applying the brakes when it was unsafe to do so.

**HELD:** Cooper was not liable. It was his duty as an examiner not to interfere with the driving, so he could observe whether mistakes were being made, unless it was essential to avoid danger to the public. Furthermore, he was not liable for applying the brakes, albeit inappropriately, as this was a reasonable reaction in the circumstances.
“It is quite plain that when an examiner is faced with a position of emergency that arrives suddenly, he must take such steps as might appear reasonable to him in the sudden rising of the emergency. If the steps that he takes turn out to be the wrong ones, then the law does not demand that in those circumstances he should be held to be negligent. The expression so often used is ‘an act taken in the agony of the moment’. Where such an act is taken in the agony of the moment and it happens to be the wrong one, that does not mean that he becomes liable for his act. He would become liable if it was rash.” per Talbot J. at p. 320

39.3 **Bogle v. McDonald’s Restaurants Ltd. [2002] EWHC 490**

Sam Bogle, aged 15 months, was taken by his childminder to McDonald’s at Hinkley Town Centre. Sam went to drink a cup of coffee (!) that had been left on a table with its lid removed and spilled the contents onto himself, sustaining scalding injuries. He sued McDonald’s, *inter alia*, for serving coffee at a temperature high enough to cause such injuries. The court was not impressed by the claim.

“The evidence is that tea or coffee served at a temperature of 65°C will cause a deep thickness burn if it is in contact with the skin for just two seconds. Thus, if McDonald’s were going to avoid the risk of injury by a deep thickness burn they would have had to have served tea and coffee at between 55°C and 60°C. But tea ought to be brewed with boiling water if it is to give its best flavour and coffee ought to be brewed at between 85°C and 95°C. Further, people generally like to allow a hot drink to cool to the temperature they prefer. Accordingly, I have no doubt that tea and coffee served at between 55°C and 60°C would not have been acceptable to McDonald’s customers. Indeed, on the evidence, I find that the public want to be able to buy tea and coffee served hot, that is to say at a temperature of at least 65°C, even though they know that there is a risk of a scalding injury if the drink is spilled.

“Is it right that the law of negligence and occupier’s liability should be responsible for denying to the public a facility they want notwithstanding the known risk? In my opinion, the answer is plainly no. Although McDonald’s owe a duty of care to those who visit their restaurants to guard against injury, that duty is not such that they should have refrained from serving hot drinks at all.” per Field J. at paras 33 and 34

39.4 Compare this to the US case of **Liebeck v. McDonald’s Restaurants** in 1994. Stella Liebeck, a 79-year-old woman, suffered third-degree burns in her pelvic region when she accidentally spilled hot coffee in her lap after purchasing it from a ‘drive-thru’ McDonald’s. Liebeck was hospitalized for eight days while she underwent skin drafting, followed by two years of medical treatment.

Liebeck’s attorneys argued that, at 82–88°C, McDonald’s coffee was defective, claiming it was too hot and more likely to cause serious injury than coffee served at any other establishment. McDonald’s offered her $800. A jury awarded her $2.86 million. She finally got $640,000.

39.5 **Scout Association v. Barnes [2010] EWCA Civ 1476**

Mark Barnes, aged 13, was a Boy Scout with the 237th Castle Bromwich Scout Group. He was injured whilst playing a game called "Objects in the Dark" at a scout meeting.

The game was organised by the scout leader. Blocks were placed in the centre of a room whilst players ran around. Half the main lights were turned off and, at any given moment, the remainder of the lights would be turned off and the players would rush to the middle of the room and grab a block: there were not enough blocks for every player. Rounds were played until one boy was left holding a block and declared the winner.

The game was similar to another game which was played with the lights on. In the course of playing the game, Barnes collided with a bench, injuring his head and left shoulder.

The Scout Association contended that there was great social value to the game, and that the risks associated with playing the game in the dark were no different to those that existed when playing with the lights on.

HELD: The Scout Association was liable. The risks associated with playing the same game in a lighted room were increased when the lights were switched off. Whilst everyone accepted that scouting activities were valuable to society and that they often, and properly, carried some elements of risk, that did not render every scouting activity, however risky, acceptable. In the instant case, the Court of Appeal (by a majority) held that the judge rightly concluded that playing in the dark significantly increased those risks and that the only justification was the additional excitement.
Darkness added no other social or educative value. Whether the social benefit of an activity was such that the degree of risk it entailed was acceptable was a question of fact, degree and judgment which had to be decided on an individual basis.

39.6 Humphrey v. Aegis Defence Services Ltd. [2017] 1 WLR 2937 (CA)

Dwayne Humphrey, a former marine, worked for the respondents providing close protection security services in Iraq during post-war reconstruction. Each security escort team consisted of three contractors, most of whom were former servicemen, and one Iraqi interpreter. The work was dangerous due to the risk of armed attacks by insurgents, and teams were expected to maintain a good level of fitness so that they could withdraw under fire in emergency situations. The interpreters had lower fitness levels than the contractors.

The teams were required to undertake simulation exercises to test their fitness. The exercise involved wearing full kit, making simulated contact with an enemy force and withdrawing under fire in pairs while carrying a loaded stretcher. During one such exercise, the interpreter dropped his handle of the stretcher through fatigue, causing injury to Humphrey's shoulder. He sued his employers for their negligence in exposing him to the danger of being dropped by someone not fully fit to carry a stretcher in these circumstances.

The defendants tested the interpreters' fitness during induction training to ensure that it reached a minimum level. They also encouraged them, by regular tests, to maintain or improve their fitness, and had dismissed some whose fitness had not improved. However, the simulation exercise was itself designed to test physical fitness and it was implicit that some might not pass it.

The judge had found that there was a foreseeable modest risk of harm resulting from the dropping of the stretcher, leading to minor soft tissue injury. However, in those circumstances, given the scarcity of Iraqis willing to act as interpreters, the importance of their role, and of their integration into the contractors' teams, and the modest degree of risk involved, it was impossible to say that the defendants were at fault in failing to take further steps to ensure that the interpreters were fit enough to undertake the simulation exercise.

Dismissing the appeal, the Court of Appeal agreed that there had been no breach of duty. It was held that although social utility cannot be a complete answer to a claim in negligence, the importance of the activity in question, the measures required to avoid the risk of harm, and the nature of the foreseeable harm were factors which had to be taken into account when deciding whether a defendant was in breach of a duty of care.

“I am not persuaded that the judge treated social utility as a complete answer to what he would otherwise have accepted as a well-founded claim. Although he referred to the passages in Lord Hoffmann’s speech in Tomlinson v. Congleton and Asquith L.J.’s judgment in Daborn v. Bath Tramways, to which I have referred, he appears to have been treating them as no more than authority for the proposition that the importance of the activity in question and the measures required to avoid the risk of harm, as well as the nature of the foreseeable harm, are factors which must be taken into account when deciding whether the defendant is in breach of a duty of care. In my view he was right to do so.” per Moore-Bick, L.J. at para 14

40 GENERAL KNOWLEDGE AT THE TIME OF THE INCIDENT: The State of the Art Defence

40.1 A defendant is not expected to have known of the potential adverse effects of his or her actions if these were unknown to humankind at the time of the incident.

40.2 Roe v. Minister of Health [1954] 2 QB 66 (CA)

Two patients who had operations on the same day were given nupercaine as a spinal anaesthetic. The nupercaine had been contained in sealed glass ampoules, which had been stored in a solution of phenol. The phenol had contaminated the nupercaine by penetrating invisible cracks in the glass. As a result of being injected with the phenol, the patients became paralysed from the waist down. At the time of the incidents (1947) the possibility of such ‘invisible cracks’ or molecular flaws in the glass was not generally known. It only became common knowledge following a report published in 1951. HELD: There was no negligence on the facts as known at the time.
“He did not know that there could be undetectable cracks, but it was not negligent for him not to know it at that time. We must not look at the 1947 accident with 1954 spectacles... If the hospitals were to continue the practice after this warning, they could not complain if they were found guilty of negligence... Nowadays it would be negligence not to realize the danger, but it was not then.” per Denning L.J. at p.84/86

40.3 Thompson v. Smiths Shiprepairers (North Shields) Ltd. [1984] QB 405

The plaintiffs were labourers in ship-repair yards. They claimed damages against their employers for loss of hearing caused by exposure to excessive noise in the course of their work at the defendants’ yards where the plaintiffs had worked since 1944 or earlier. The defendants knew that the levels of noise could cause hearing loss, but at the time they started work there was a general apathy and a lack of any authoritative official guidance. Efficacious methods of ear protection were not available until the late 1950’s.

In 1963 the Ministry of Labour published ‘Noise and the Worker’ which explained the need for earmuffs, but these were not provided until 1973. Most of the damage to the plaintiffs’ hearing happened before 1963, but it was accelerated and worsened by the continued exposure thereafter.

HELD: The defendants were liable for the injuries caused after 1963 but not those that occurred before, since 1963 marked the dividing line between a reasonable policy of following the general practice in the industry and a failure to take reasonable precautions against the risk of deafness.

Mustill J. adopted the principles laid down by Stanwick J. in Stokes v. Guest [1968] 1 WLR 1776 at 1783: “Where there is a recognised and general practice which has been followed for a substantial period in similar circumstances without mishap, he is entitled to follow it, unless in the light of common-sense or newer knowledge it is clearly bad; but, where there is developing knowledge, he must keep reasonably abreast of it and not be too slow to apply it; and where he has in fact greater than average knowledge of the risks, he may be thereby obliged to take more than the average or standard precautions.” per Mustill J. at p.415

On April 10th 2000, a spokesman from the GCHQ spy centre confirmed that the members of staff whose hearing was damaged because of inadequate headphones were receiving compensation packages of up to £20,000 each. £500,000 had already been paid to workers at the surveillance site in Cheltenham, who were left with tinnitus and other ear problems.

40.4 Walker v. Wabco Automotive UK Ltd. (1999) (unreported) (CA)

The claimant had a job assembling compressors by means of hand held power tools. In 1990 the Health and Safety Executive issued a pamphlet entitled “Work Related Upper Limb Disorders – A Guide To Prevention” which suggested tentatively that exposure to vibration might cause Carpal Tunnel Syndrome. In 1993 the claimant developed CTS and sued her employers on the basis that, given the publication of the HSE pamphlet, they should have foreseen the risk of such injury.

HELD: Her claim failed. The tentative suggestion by the HSE that vibrations might be a factor in CTS, in the absence of any other evidence, did not place a duty on the employers to take preventative measures. On the facts, no other employee had ever suffered CTS in the twenty years of the assembly process operation.

41 THE UNSKILLED DEFENDANT

41.1. Where the defendant holds himself out as having only a limited skill in an area, he must take reasonable care to avoid causing injury, but is not expected to reach the standard of a top professional. On the other hand, if it is a job that cannot safely be done without professional expertise, it might prima facie be negligent for the amateur even to attempt it.

41.2 Thus, where one attempts a job as an amateur, which might otherwise be done by a professional, there appear to be two issues:

i) Is it a job that it is appropriate for an amateur to attempt to do at all? If not, it might be a breach of duty even to attempt it.

iii) If it is a job that an amateur might reasonably attempt, how well must it be done? The answer appears to be that the amateur need only show that he or she acted with the reasonable skill of an amateur. However, the cases on this are not consistent.
Amateur Surgery

41.3 Phillips v. William Whiteley Ltd. [1938] 1 All ER 566

Mrs. Phillips went to Whiteleys to have her ears pierced by Mr. Couzens, a jeweller. Couzens disinfected both the piercing needle and his fingers before carrying out the operation. Mrs. Phillips then went into hospital for a gall-bladder operation. (She had deliberately timed her ear piercing so she could ‘recover’ from both operations at the same time!) During this time, she developed an abscess on her neck, which she claimed was due to Couzens negligently using an infected needle during the ear piercing.

HELD: Even if the causal link could have been established between the abscess and the ear piercing (which it could not) the jeweller had not been negligent anyway. Although his needle might not have been as clean as a surgeon would have required, it was sterile enough for all practical purposes, and he did as much to clean it as one could expect from a jeweller.

“If a person wants to ensure that the operation of piercing her ears is going to be carried out with that proportion of skill and so forth that a Fellow of the Royal College of Surgeons would use, she must go to a surgeon. If she goes to a jeweller, she must expect that he will carry it out in the way that one would expect a jeweller to carry it out... I see no ground for holding that Mr. Couzens departed from the standard of care which you would expect from a man of his position and his training, being what he held himself out to be, was required to possess. Therefore, the charge of negligence fails." per Goddard J. at p.569

Amateur Do-it-Yourself

41.4 Wells v. Cooper [1958] 2 QB 265 (CA)

Albert Wells, a fishmonger, was invited in for tea by one of his customers whilst he was delivering some fish to ‘Hazelgarth’, a house in Guestling near Hastings. When leaving, he pulled the back door closed behind him. He had to pull hard as the door was stiff and it was very windy that day. The handle came off and he fell four feet off an unrailed platform, injuring himself in the process. The handle had been fitted by the house owner, Fred Cooper, an amateur carpenter of some experience, who believed it to be secure, particularly since he had fitted it five months previously and it had shown no signs of coming loose.

HELD: Cooper was not negligent as he had acted with the skill of a reasonably competent carpenter, even though he had used three-quarter inch screws when a professional carpenter would have used one inch screws. Having embarked upon the job, he had to use reasonable care (rather than simply doing his personal best), but he did not have to show the same standard of workmanship as would a contracted professional.

“It was a trifling domestic replacement well within the competence of a householder accustomed to doing small carpentering jobs about his home, and of a kind which must be done every day by hundreds of householders up and down the country.

“Accordingly, we think that the defendant did nothing unreasonable in undertaking the work himself. But it behoved him, if he was to discharge his duty of care to persons such as the plaintiff, to do the work with reasonable care and skill, and we think the degree of care and skill required of him must be measured not by reference to the degree of competence in such matters which he personally happened to possess, but by reference to the degree of care and skill which a reasonably competent carpenter might be expected to apply to the work in question. Otherwise, the extent of the protection that an invitee could claim in relation to work done by the invitor himself would vary according to the capacity of the invitor, who could free himself from liability merely by showing that he had done the best of which he was capable, however good, bad or indifferent that best might be.

“Accordingly, we think the standard of care and skill to be demanded of the defendant in order to discharge his duty of care to the plaintiff in the fixing of the new handle in the present case must be the degree of care and skill to be expected of a reasonably competent carpenter doing the work in question. This does not mean that the degree of care and skill required is to be measured by reference to the contractual obligations as to the quality of his work assumed by a professional carpenter working for reward, which would, in our view, set the standard too high. The question is simply what steps would a reasonably competent carpenter wishing to fix a handle such as this securely to a door such as this have taken with a view to achieving that object.”

per Jenkins L.J. at p.271
Learner Drivers

41.5 The theory of Wells v. Cooper is not borne out by Nettleship v. Weston [1971], where the Court of Appeal held that a learner driver was required, even *vis a vis* his instructor, to come up to the standard of a competent, qualified driver.

41.6 **Nettleship v. Weston [1971] 2 QB 691 (CA)**

Eric Nettleship, an experienced driver, was giving lessons to Lavinia Weston in her husband’s car, (having first made sure that the insurance covered learner drivers.) On their third trip out, she failed to straighten out after turning left and crashed, ever so slowly, into a lamp-post on Mansfield Road in Sheffield. Nettleship broke his knee-cap. Weston was convicted of driving without due care and attention. Nettleship sued for his injuries.

**HELD:** Weston was liable, even though Nettleship drove with her knowing her to be a learner. The duty of care owed by a learner to the passenger instructor was the same objective and impersonal standard as that owed by every driver, including the learner, to passengers and the public. The standard was not affected or reduced by reason of the instructor’s knowledge of the learner’s lack of skill and experience.

"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, who is sound in wind and limb, who makes no errors of judgment, has good eyesight and hearing, and is free from any infirmity."

per Lord Denning M.R. at p.699

"As I see it, if this doctrine of varying standards were to be accepted as part of the law on these facts, it could not logically be confined to the duty owed by learner drivers. There is no reason in logic why it should not operate in a much wider sphere. The disadvantages of the resulting unpredictability, uncertainty and, indeed, impossibility of arriving at fair and consistent decisions outweigh the advantages. The certainty of a general standard is preferable to the vagaries of a fluctuating standard."

per Megaw L.J. at p.707

41.7 This case was followed in the arguably more extreme case of Roberts v. Ramsbottom [1980] 1 All ER 7.

**Roberts v. Ramsbottom [1980] 1 All ER 7**

Arthur Ramsbottom crashed his car into that of Jack and Jean Roberts and was found to have been negligent, even though the crash was caused because Ramsbottom had suffered a stroke whilst he was driving. Ramsbottom had neither history of strokes nor any warning that he was about to suffer from one. Had he actually become unconscious, he would have had the defence of automatism, but because he continued to drive, albeit with his consciousness clouded, this defence was not available to him.

41.8 **Roberts v. Ramsbottom** was partly disapproved of by the Court of Appeal in Mansfield v. Weetabix [1998] 1 WLR 1263, although they held that it was rightly decided.

**Mansfield v. Weetabix [1998] 1 WLR 1263 (CA)**

Terence Tarleton, whilst driving a Weetabix van, crashed into an off-licence. Without knowing it, he was suffering from insulinoma that impaired his consciousness. The trial judge held, following Roberts v. Ramsbottom, that although the driver was not to blame, he was nevertheless liable, as the impairment had not resulted in a total loss of control.

The Court of Appeal held that he was not liable. They criticised the judge in Roberts v. Ramsbottom for equating the criminal defence of automatism with the civil law defence of lack of fault. However, the decision in Roberts v. Ramsbottom was confirmed because there the defendant continued driving when he realised he was unfit to do so. In this case, however, the defendant was not at fault and was not liable.

"There is no reason in principle why a driver should not escape liability where the disabling event is not sudden, but gradual, provided that the driver is unaware of it. A person with Mr. Tarleton’s very rare condition commonly does not appreciate that his ability is impaired, and he was no exception..."
“In my judgment, the standard of care that Mr. Tarleton was obliged to show in these circumstances was that which is to be expected of a reasonably competent driver unaware that he is or may be suffering from a condition that impairs his ability to drive.” per Leggatt L.J. at p.1267/126

The Court of Appeal in *Nettleship v. Weston* was heavily influenced by the presence of insurance. Salmon L.J. dissented, and agreed with the contrary decision of Sir Owen Dixon in *The Insurance Commissioner v. Joyce* (1948) 77 CLR 39.

In *Cook v. Cook* (1986) ALR 353, the High Court of Australia described the decision in *Nettleship v. Weston* as “contrary to common sense and the concept of what is reasonable in the circumstances.”

*Roberts v. Ramsbottom* and *Mansfield v. Weetabix* were applied in *C (A Child) v. Burcombe* [2003].

*C (A Child) v. Burcombe* [2003] CLY 3030

C, whose mother had been killed in a road accident, sued the estate of Burcombe, who had also been killed. B, who was seventy, had a history of heart disease. He had been declared fit to drive, but had been warned not to engage in strenuous activity. Despite this, he changed the wheel of his car in a layby, got back in, started off and promptly had a heart attack. He lost control of the car, veered onto the wrong side of the road and collided with two vehicles, killing both drivers and a passenger – C’s mother. B’s estate claimed that it was an unavoidable accident.

HELD: B had driven off aware of his illness and the possibility of becoming disabled following the effort of changing the wheel. The cause of his loss of control had been his negligent failure to heed his doctor’s advice. He was, therefore, liable.

All that said, even professional drivers are not expected to be Super Heroes.


Ahanonu walked round some safety railings and up behind a bus as it was leaving the bus-station. He was squashed against a bollard as it turned left. The trial judge held the bus-company to be liable, with a 50% reduction for contributory negligence.

The Court of Appeal overturned the finding of liability. The driver would have needed to keep his eye constantly on his rear-view mirror to have noticed Ahanonu, and that in itself would have created a hazard. Buses exiting the station did so in a queue, and if the driver had taken his eye off the bus infront of him, there could have been a serious accident. In requiring the driver to be able to look in all directions at the same time, the trial judge had not assessed the reality of the situation – or of human anatomy.

Clarification?

Later cases have thrown more shadow than light on this issue.

*Condon v. Basi* [1985] 2 All ER 453 (CA)

During a sliding tackle in a Leamington League match between Whittle Wanderers and Khalsa Football Club, Gurdaver Basi broke the right leg of James Condon. HELD: He was negligent as the tackle was made in a reckless and dangerous manner by any objective standard since Basi had lunged at Condon with his boot studs about a foot from the ground. However, the court accepted that what constitutes ‘reasonable care’ is different in a football game than during a walk in the countryside, and that a higher degree of care is required of a player in the First Division than in a local league match. This seems to depart from *Nettleship v. Weston* [1971] which was not cited.

*Ali v. Furness, Withy* [1988] 2 Lloyd’s Rep 1

A ship’s master who incorrectly diagnosed insanity in a crew member was required to act only as a prudent master armed with the ship’s medical guide.
Police and Prisons

41.15 Where the police are concerned, the first hurdle for the claimant is to establish that they owe a duty of care to him or her at all, given the strong policy based presumption against it.

41.16 **Vellino v. Chief Constable of the Greater Manchester Police** [2002] 1 WLR 218 (CA)

The claimant, Carlo Vellino, was something of a folk hero in his local community. He was frequently in trouble with the police having been convicted of a range of offences including burglary, theft and drugs possession. He was famous for evading arrest by jumping out of windows. During one attempt to arrest him, the police chased him into a bedroom, and he leaped from the window, suffering severe brain damage and tetraplegia. The police were sued for their negligence in not stopping him from attempting his usual foolhardy escape trick.

**HELD:** The police were not liable. The police do not owe a duty to take care that an arrested person does not injure himself in a foreseeable attempt to escape from lawful custody.

“To suggest that the police owe a criminal the duty to prevent the criminal from escaping, and that the criminal who hurts himself while escaping can sue the police for the breach of that duty, seems to me self-evidently absurd... I understood (Mr. Stockdale) to submit that the police are under a duty owed to the claimant to prevent him from sustaining foreseeable injury whilst foreseeably attempting to escape from custody. This, with respect, seems to me equally untenable: it would require the police to hold him in the loosest of grasps so that there was no danger of him wrenching his shoulder as he struggled to break free..."

“Similarly...there is in my judgment no right in a prisoner who hurts himself while leaping from a high boundary wall to be compensated on the basis that it is foreseeable that prisoners will try and escape and that if they leap off high walls they may well hurt themselves.”

per Schiemann L.J. at p.224

Vellino was denied leave to appeal to the House of Lords. His girlfriend said she would take the matter to the European Court, but wisely did not do so.

41.17 Even having overcome the duty of care hurdle, the courts have been less than consistent in their approach to what constitutes breach when the police are asked to perform tasks outside their normal remit.

**Knight v. Home Office** [1990] 3 All ER 237

Paul Barrington Worrell, aged 21, attacked a man in a public house and was remanded in custody to Brixton prison. He was found to be mentally ill and arrangements were made for him to be transferred to Bethlem Royal Hospital. Meanwhile, he was detained in his prison cell, and was observed every 15 minutes. Between two such inspections, he hanged himself. His personal representatives brought an action against the Home Office claiming that the standard of care provided for the deceased in the prison was inadequate.

**HELD:** The standard of care provided for a mentally ill prisoner detained in a prison hospital was not required to be as high as the standard of care provided in a psychiatric hospital outside prison, since they had different functions, and there was no negligence on the part of the prison service in not providing the constant supervision that would be available in a psychiatric hospital.

41.18 The scope of the decision in **Knight v. Home Office** has been affected by later decisions.

41.19 **Brooks v. Home Office** (1999) 2 FLR 33

The plaintiff was pregnant with twins when she was detained at Holloway prison. She required specialist attention, as one of the twins was not growing normally. However, the doctor in charge had insufficient obstetrics expertise to realise this, and the twin died when the woman was left untreated for five days before receiving the necessary attention. The defendant relied on **Knight v. Home Office** as authority to show that a woman in prison was not entitled to the same standard of care as a woman at liberty. Garland J. did not accept this interpretation, and held that a woman in prison was owed the same standard of care as a woman at liberty. However, as the death had not been caused by the negligence, the Home Office was not liable.
41.20 Reeves v. Commissioner of Police of the Metropolis [2000] 1 AC 360 (HL)

Martin Lynch was held in a police cell in the custody of the defendant’s officers, who had been alerted to the fact that he might commit suicide, although a doctor who examined him soon after his arrival at the police station stated that he showed no sign of any psychiatric disorder. The officers inadvertently left the flap of the cell door open, and Lynch tied his shirt through the spy hole on the outside of the door and hanged himself to death. Sheila Reeves, Lynch’s cohabitant and the mother of his child, sued the Commissioner for negligence in causing his death.

It was held the police were in breach of their duty to take reasonable care not to give Lynch the opportunity to kill himself, but the damages were reduced by 50% for contributory negligence. Knight v. Home Office was not mentioned.

cf Orange v. Chief Constable of West Yorkshire Police [2002] QB 347

41.21 In another case, the court held that prison staff ought at least to know basic first aid.


Bryant St. George was a prisoner at HMP Brixton, serving a four-month prison sentence for theft. He was known to be an intravenous heroin user and a heavy drinker and therefore prone to withdrawal fits. He was also epileptic.

Despite these pressing reasons against it, he was allocated to sleep in a top bunk. He suffered a fit and fell head first from the bunk onto the hard lino beneath, suffering a severe head wound. The problem was then compounded by the lack of proper first aid he was given in the prison and by the fact that an ambulance was not called for until 39 minutes after the event and then not permitted to drive through the prison gates, even though this had been specifically arranged at the time of the 999 call.

By the time the paramedics arrived, the prisoner was in “about as bad a condition as a person can be in short of being dead.” As a result of his injuries and the delay in treating them, he suffered progressive and severe hypoxic brain damage.

MacKay J. found the prison staff to be in breach of their duty of care for the lack of proper medical attention given to St. George, but reduced damages by 15% for the claimant’s contribution to his injuries by becoming a drug addict. He made the following observation:

“As to the First Aid applied, Dr Ayneson, the defendant's expert on this area of the case and Mr Gavalas for the claimant, agreed in their joint report that when the prison staff arrived on the scene, having ensured that the patient was made safe from injury from his surroundings, something that Mr Caussyram said he did do, a clear airway should be obtained as far as possible and as soon as oxygen was available, it should have been administered. The algorithm ABC which is well known applies to this, airway, breathing and circulation. Dr Ayneson said the matter of the airway was paramount and an absolute priority, even before summoning the doctor that should have been done, he said.

“This, I am satisfied, is no more than basic First Aid and is not to impose too high a standard on a prison nursing team who, I agree, should not be judged by the standards of a hospital or even a doctor. The nurses should have been protecting his airway straightaway and, in the case of an unconscious patient, they should be administering oxygen, said Dr Ayneson, "Time is of the essence", he put it. The fact is that certainly at the time the ambulance staff arrived at 1857, no attention was being paid by anyone to his airway. The patient was breathing at an elevated rate against a partially obstructed airway and his appearance was cyanosed. I have also found at no time prior to their arrival was oxygen administered. I regard this therefore as a fundamental breach of reasonable practice for a competently run prison nursing team for those who found themselves in the position that this team found itself in any emergency involving an unconscious patient. It is particularly important in the case of a patient who is in status, where Mr Gavalas and Dr Reynolds told me that the epileptic convulsions themselves give rise to a greatly increased demand for oxygen by the brain.” per MacKay J. at paras 35 and 36

The decision on liability was upheld by the Court of Appeal, but they held that there should not have been a reduction made for contributory negligence in the circumstances. Although he was responsible for being a drug addict, this was not the direct cause of his injuries. He had told prison staff about his addiction and previous seizures.
The staff knew or ought to have known that he might suffer from withdrawal seizures, yet they placed him in a top bunk. S's position was analogous to that of a patient admitted to a rehabilitation clinic for the express purpose of being weaned off his addiction to drugs. If the same thing had happened to such a patient, his damages would not be reduced for contributory negligence.

42 ATTENDANCE AT DANGEROUS EVENTS: The Sports Cases

Attendance as a Spectator

42.1 Where a spectator is injured by an obvious danger at a dangerous event, the defences of contributory negligence or volenti non fit injuria may be available to the defendant. However it may not be negligent at all to injure someone in the normal course of events if they have attended a dangerous function and the behaviour of the participants was reasonable in the circumstances. The rules of the game are a relevant, but not a determining, circumstance.

42.2 Hall v. Brooklands Auto Racing Club [1933] 1 KB 205 (CA)

Spectators at a racing track were injured when two cars collided, and one of them shot into the air over the kerb and the grass margin and hit the railing where the spectators were watching. Such an occurrence was previously unknown. It was held that the owners of the racing track were not liable. It was their duty to see that the course was as free from danger as reasonable care and skill could make it, but they were not insurers against accidents that no reasonable diligence could foresee or against dangers inherent in a sport that any reasonable spectator can foresee and of which he takes the risk.

“What is reasonable care would depend upon the perils which might be reasonably expected to occur, and the extent to which the ordinary spectator might be expected to appreciate and take the risk of such perils. Illustrations are the risk of being hit by a cricket ball at Lord’s or the Oval, where any ordinary spectator in my view expects and takes the risk of a ball being hit with considerable force amongst the spectators, and does not expect any structure which will prevent any ball from reaching the spectators. An even more common case is one which may be seen all over the country every Saturday afternoon, spectators admitted for payment to a field to witness a football or hockey match, and standing along a line near the touchline. No-one expects the persons receiving payment to erect such structures or nets that no spectator can be hit by a ball kicked or hit violently from the field of play towards the spectators. The field is safe to stand on, and the spectators take the risk of the game.” per Scrutton L.J. at p.214

42.3 Wooldridge v. Sumner [1963] 2 QB 43 (CA)

Edmund Lestocq Wooldridge, a photographer, attended the National Horse Show in London. During the course of a competition for heavyweight hunters, he was knocked down and severely injured by a horse ‘Work of Art’, owned by Hugh Sumner, and ridden by Ronald Holladay, an experienced horseman. On veering around a corner, the horse became temporarily out of control, and charged down a line of shrubs close to a bench where the plaintiff was standing with his tripod. In an attempt to save Miss Smallwood (his employer) who was sitting on the bench, Wooldridge stepped directly into the path of the horse and was knocked down. No-one else was hurt and the horse won the competition! HELD: Sumner was not liable.

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

“A person attending a game or competition takes the risk of any damage caused to him by any act of a participant done in the course of and for the purposes of the game or competition notwithstanding that such act may involve an error of judgment or a lapse of skill, unless the participant’s conduct is such as to evince a reckless disregard of the spectator’s safety.” per Diplock L.J. at p. 67 & 68
42.4 Wilks v. Cheltenham Homeguard Motor Cycle Club [1971] 1 WLR 668 (CA)

Whilst watching a motor-cycle scramble, two spectators were injured when a rider crashed through the boundary ropes. It was held that although the rider had lost control, he was not speeding or driving recklessly, and that loss of control was just one of the things that happened at motor-cycle scrambles. He was not liable.

“Let me first try to state the duty which lies upon a competitor in a race. He must, of course, use reasonable care. But that means reasonable care having regard to the fact that he is a competitor in a race in which he is expected to go ‘all out’ to win. Take a batsman at the wicket. He is expected to hit six, if he can, even if it lands among the spectators. So also in a race, a competitor is expected to go as fast as he can, so long as he is not foolhardy. In seeing if a man is negligent, you ask what a reasonable man in his place would or would not do. In a race a reasonable man would do everything he could do to win, but he would not be foolhardy. That, I think, is the standard of care to be expected of him.” per Lord Denning M.R. at p.670

Attendance as a Participant

42.5 Although in general terms participants are taken to accept the dangers of a game played within its rules, whether the defendant has played within or outside those rules will not in itself determine whether the duty of care has been breached. (This is similar to the rules about Common Practice discussed above.)

42.6 Rootes v. Shelton [1968] ARL 33 (High Court of Australia)

A water-skier was injured during a display when the driver of the boat that was towing him collided with a stationary boat. The driver was held to be liable.

On the general issue of the standard of care expected by the participants in the course of a sport, the trial judge made this useful observation:

“By engaging in a sport or pastime the participants may be held to have accepted risks which are inherent in that sport or pastime; the tribunal of fact can make its own assessment of what the accepted risks are: but this does not eliminate all duty of care of the one participant to the other. Whether or not such a duty arises, and, if it does, its extent, must necessarily depend in each case upon its own circumstances. In this connection, the rules of the sport or game may constitute one of those circumstances but, in my opinion, they are neither definitive of the existence nor of the extent of the duty; nor does their breach or non-observance necessarily constitute a breach of any duty found to exist...

“Unless the activity partakes of the nature of a war or of something else in which all is notoriously fair, the conclusion to be reached must necessarily depend, according to the concepts of the common law, upon the reasonableness, in relation to the special circumstances, of the conduct which caused the plaintiff's injury. That does not necessarily mean the compliance of that conduct with the rules, conventions or customs (if there are any) by which the correctness of the conduct for the purposes of carrying on of the activity as an organised affair is judged; for the tribunal of fact may think that in the situation in which the plaintiff's injury was caused a participant might do what the defendant did and still not be acting unreasonably, even though he infringed the 'rules of the game'. Non-compliance with such rules, conventions or customs (where they exist) is necessarily one consideration to be attended to upon the question of reasonableness; but it is only one, and it may be of much or little or even no weight in the circumstances.” per Barwick C.J. at p.34

42.7 Smolden v. Whitworth [1997] ELR 249 (CA)

Smolden, aged 17, was the captain and hooker of the Sutton Coldfield Colts, an amateur rugby football team. During a game with the Burton Colts his neck was broken when a scrum collapsed. This would have been avoided had the referee properly enforced the Laws of the Game which contained special safety provisions relating to players aged under nineteen and which required the front rows of a scrum to engage in a crouch-touch-pause-engage sequence, which they had not.

It was held that the referee was in breach of his duty of care to enforce the Laws of the Game, despite fears that such a judgment would “emasculate and enmesh in unwelcome legal toils a game which gives pleasure to millions.”
“The plaintiff had of course consented to the ordinary incidents of a game of rugby football of the kind in which he was taking part. Given, however, that the rules were framed for the protection of him and other players in the same position, he cannot possibly be said to have consented to a breach of duty on the part of the official whose duty it was to apply the rules and ensure so far as possible that they were observed. If the plaintiff were identified as a prime culprit in causing the collapse of the scrums, then this defence (and contributory negligence) might call for consideration. But that is not the case.” per Lord Bingham CJ at p.146

42.8 **Caldwell v. Maguire** [2001] EWCA Civ 1054

Peter Caldwell, a professional jockey, was seriously injured in a two-mile novice hurdle race at Hexham. He was unseated when two other jockeys (Adrian Maguire and Mick Fitzgerald) veered their horses into the path of a third, causing the third to fall off his horse into the path of Caldwell’s horse. At a Stewards’ Inquiry the two jockeys responsible for the accident were found guilty of careless riding contrary to the Jockey Club Rules. However, the Court of Appeal did not accept that this equated to common law negligence, and held that in the circumstances the jockeys were not liable in tort.

“Thoroughbred horse racing is a competitive business, which is played for high stakes. Its participants are large animals ridden by small men at high speed in close proximity. The opportunity for injury is abundant and the choices available to jockeys to avoid or reduce risk are limited. In such circumstances it is not possible to characterise momentary carelessness as negligence... The Jockey Club’s rules and its findings are of course relevant matters to be taken into account, but, as the authorities make clear, the finding that the respondents were guilty of careless riding is not determinative of negligence. As the judge said, there is a difference between response by the regulatory authority and response by the courts in the shape of a finding of legal liability.” per Tuckey L.J. at paras 27 and 28

42.9 **Caldwell v. Maguire** may be applied equally to favour the claimant as the defendant.

**Gaynor v. Blackpool FC** [2002] 7 CL 432 (Oldham County Court)

Gaynor, an aspiring professional footballer, suffered a serious leg injury during an under-19’s association football match between the youth teams of two professional football clubs. He alleged he had been kicked high on his leg by one of Blackpool FC’s players after the referee had blown his whistle for an earlier infringement and the ball had rolled out of play. The other player contended that the injury was Gaynor’s fault for lunging at the ball and kicking him on the knee. The court preferred Gaynor’s account of the events, and applied **Caldwell v. Maguire** to hold that in all the circumstances of the case this was NOT a case of momentary carelessness, but an unnecessary and highly dangerous act which had been executed in such a way as to kick Gaynor hard enough to break his leg, even though he was wearing shin pads. The defendant was liable.

42.10 The Court of Appeal has suggested that amongst the circumstances to be considered in judging the standard of care required of an amateur player is how good he purports to be and the level of the game. Presumably though, if a player or match official is so terrible he is clearly putting the other players at an unreasonable risk of injury, he should not get involved at all.

42.11 **Vowles v. Evans** [2003] 1 WLR 1607 (CA)

The ‘Laws of the Game’, as issued by the Council of the International Rugby Football Board, include the following regulation: “In the event of a front row forward being ordered off, the referee, in the interests of safety, will confer with the captain of his team to determine whether another player is suitably trained/experienced to take his position; if not the captain shall nominate one other forward to leave the playing area and the referee will permit a substitute front row forward to replace him.”

During an amateur game between Llanharan RFC 2nd XV and Tondu RFC 2nd XV, Llanharan’s loose head prop dislocated his shoulder. Not only did Llanharan have no trained front row forward on the bench to replace him, they had no-one in the second or back row of their pack who had trained or even played much on the front row.

The referee, David Evans, gave the team captain the option either to find a replacement from within the scrum or opt for non-contestable scrum mages (which would mean that even if they won the match, they would get no League points.) Christopher Jones, who was playing as a flanker, said he would “give it a go”. Evans permitted him to do so without enquiring as to his training or experience.
During a contested set scrummage, Richard Vowles was injured when the scrum collapsed, and was rendered tetraplegic.

Evans was found to be liable in negligence for abdicating his responsibilities under the Laws of the Game to the team captain, despite the protestations of the defence counsel that such a finding would make it difficult to find willing volunteers to referee amateur rugby games in the future. Evans should have known better: in the first place, he was a highly experienced player and had been on an intensive Welsh Rugby Union refereeing course. In the second place, the decision was not made during the fast action of the game, but calculatedly during a break in play.

However, the court suggested that in different circumstances, the standard of care required of an amateur might be rather less.

“The standard of care to be expected of a referee must depend upon all the circumstances of the case. One of those circumstances is the nature of the game. As Lord Bingham C.J. observed in Smolden, a referee of a fast-moving game cannot be expected to avoid errors of judgment, oversights or lapses. The threshold of liability must properly be a high one.”

per Lord Phillips M.R. at para 26

“There is scope for argument as to the extent to which the degree of skill to be expected of a referee depends upon the grade of the referee or of the match that he has agreed to referee. In the course of argument it was pointed out that sometimes in the case of amateur sport, the referee fails to turn up, or is injured in the course of the game, and a volunteer referee is called for from the spectators. In such circumstances the volunteer cannot reasonably be expected to show the skill of one who holds himself out as a referee, or perhaps even to be fully conversant with the Laws of the Game.”

per Lord Phillips M.R. at para 28

42.12 Bartlett v. English Cricket Board Association of Cricket Officials (27.8.2015) County Court, Birmingham

Thomas Bartlett – aged 22 at the time of the incident – was playing cricket as Captain of the Moseley Ashfield Cricket Club against Solihull Municipal Cricket Club in the second division of the Warwickshire Cricket League. Bartlett decided to call off the match as the pitch was wet following heavy rainfall, but the opposing captain – Bissett – insisted that the match should go ahead, subject to an inspection of the pitch by the umpires. The umpires duly inspected the pitch, and deemed that although it was wet, it was not unsafe and that the game should be played – albeit with a few hours delay.

Whilst fielding, Bartlett used a ‘sliding stop’ technique to collect the ball, but as he stood up from the crouch position, he felt excruciating pain in his left leg, which turned out to be a soft tissue injury to his knee. He was taken to hospital, and the game continued without further incident.

Bartlett claimed that his injury was due to the fault of the umpires in permitting the game to go ahead in unsafe conditions.

Whilst noting that this was a case of a carefully considered decision made by the umpires (as in Vowles v. Evans) rather than being made it the ‘heat of the moment’ of an active game, the court held that the umpires had acted with proper consideration for the safety of the players, and were not in breach of their duty of care. Furthermore, the accident was not caused by the wet grass, but probably because the ‘sliding stop’ was executed incorrectly by the claimant.

Horseplay

42.13 The principles applied to participation in organized sports may also be applied to horseplay.

Blake v. Galloway [2004] 1 WLR 2844 (CA)

Ross Blake and his friend Stephen Galloway (both aged 15) were members of a jazz quintet. The quintet was rehearsing at Battisborough House in Devon. In their lunch break, they went into the grounds and engaged in friendly horseplay, involving throwing bits of twig and bark chipping at each other. Blake threw a small bit of bark at Galloway’s body. Galloway threw it back, and accidentally hit Blake in the eye, causing a significant injury. The Court of Appeal equated horseplay to any other game that carried a risk of injury, and held that as Galloway had not been reckless he was not in breach of his duty.
“I recognise that the participants in the horseplay owed each other a duty to take reasonable care not to cause injury. What does that mean in the context of play of this kind? No authority has been cited to us dealing with negligence in relation to injury caused in the course of horseplay, as opposed to a formal sport or game. I consider that there is a sufficiently close analogy between organised and regulated sport or games and the horseplay in which these youths were engaged for the guidance given by the authorities to which I have referred to be of value in the resolution of this case. The only real difference is that there were no formal rules for the horseplay. But I do not consider that this is a significant distinction.

“The common features between horseplay of this kind and formal sport involving vigorous physical activity are that both involved consensual participation in an activity (i) which involves physical contact or at least the risk of it, (ii) in which decisions are usually expected to be made quickly and often as an instinctive response to the acts of other participants, so that (iii) the very nature of the activity makes it difficult to avoid the risk of physical harm.

“I would, therefore, apply the guidance given by Diplock L.J. in Woolridge v. Sumner [1962], although in a slightly expanded form, and hold that in a case such as the present there is a breach of the duty of care owed by participant A to participant B only where A’s conduct amounts to recklessness or a very high degree of carelessness.

“If the defendant in the present case had departed from the tacit understandings or conventions of the play and, for example, had thrown a stone at the claimant, or deliberately aimed the piece of bark at the claimant’s head, then there might have been a breach of the duty of care. But what happened here was, at the highest, ‘an error of judgment or lapse of skill’ (to quote from Diplock L.J.) and that is not sufficient to amount to a failure to take reasonable care in the circumstances of horseplay such as that in which these youths were engaged. In my view, the defendant’s conduct came nowhere near recklessness or a very high degree of carelessness.”

per Dyson L.J. at paras 15, 16 & 17

43 THE CHILD DEFENDANT

43.1 Although the test of reasonable foresight is an objective one, it may be relevant to consider that a child’s judgment will be different from that of an adult.

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

Teresa Mullin and Heidi Richards were schoolfriends aged fifteen, and were playing at sword fighting by hitting each other’s plastic rulers. This was a common game at the school and no-one had ever warned them about the inherent dangers of it. One of the rulers snapped, and a piece went into Teresa’s eye, causing considerable damage. Teresa sued Heidi and the trial judge found her liable. The Court of Appeal held that Heidi was not negligent. The trial judge should have taken into account that she was only fifteen, and that in the circumstances she had no reason to suppose that the game was dangerous.

“This was in truth nothing more than a schoolgirls’ game such as on the evidence was commonplace in this school and there was, I would hold, no justification for attributing to the participants the foresight of any significant risk of the likelihood of injury.” per Hutchinson L.J. at p.1311

44 RES IPSA LOQUITUR: The thing speaks for itself

44.1 If the claimant has been injured in such a way that the accident must logically have occurred because of the defendant’s negligence, the court may be prepared to draw an inference of negligence without specific evidence about the way in which the incident occurred. It is then for the defendant to prove that he was not in breach of his duty of care.

44.2 There are, as ever, three requirements:

i) The thing causing the damage must be under the control of the defendant;

ii) The accident must be such as could not happen in the ordinary course of things without negligence;

iii) There must be no evidence of the cause of the accident
44.3 **Scott v. London and St. Katherine Docks Co.** (1865) 3 H&C 596 (CA)

The plaintiff was passing the defendant's warehouse when six bags of sugar fell on him from a crane. There was no evidence as to why or how this happened, but in the absence of an innocent explanation from the defendant, the court was prepared to draw an inference that it was caused by their negligence.

“There must be reasonable evidence of negligence, but where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care.” per Erle C.J.

44.4 Although this can be a useful doctrine for claimants who have no real evidence of a negligent act except for their injuries, the actual phrase has received some criticism, with the suggestion that it should replaced by the expression “prima facie case.”

44.5 **Roe v. Minister of Health** [1954] 2 QB 66 (HL)

“There maxim possesses no magic qualities nor has it any added virtue, other than that of brevity, merely because it is expressed in Latin. When used on behalf of a plaintiff it is generally a short way of saying: ‘I submit that the facts and circumstances which I have proved establish a prima facie case of negligence against the defendant…’ There are certain happenings that do not normally occur in the absence of negligence, and upon proof of these a court will probably hold that there is a case to answer.” per Morris L.J. at p.87
PART 7: PROFESSIONAL NEGLIGENCE: Duty of Care

INTRODUCTION TO THE PROFESSIONAL DUTY OF CARE

45.1 Having studied the concepts of Duty of Care and Breach of Duty in the tort of negligence, it is useful to consider both of them specifically in the context of professional negligence where the usual rules may not always apply.

45.2 There is no doubt that a professional practitioner owes a general duty of care to his or her clients to do a professional job and not to cause them any foreseeable injury or loss.

45.3 However, for various policy reasons, certain professionals have been protected by the courts from litigation, especially when the costs of defending a claim would come from the public purse. Thus, as we have seen, it is often difficult to succeed in an action against such bodies as the police force, the fire-brigade and local authorities, even when they are clearly in the wrong and have caused a foreseeable injury.

45.4 The most common form of professional negligence leading to a personal injury claim is in the field of health care, as doctors and other medical practitioners are uniquely well placed to cause physical injuries in the course of their work by misdiagnosis and/or mistreatment of patients. However, because of their importance to society and the reverence in which they have historically been held, the courts have been reluctant to question the actions of doctors, even when they have caused serious injuries or even death.

45.5 Roe v. Minister of Health [1954] 2 QB 66 (CA)

“We should be doing a disservice to the community at large if we were to impose liability on hospitals and doctors for everything that happens to go wrong. Doctors would be led to think more of their own safety than of the good of their patients. Initiative would be stifled and confidence shaken.”

per Denning L.J. at p.86

45.6 However, in the current millennium, there has been a sea-change in the way that doctors have been treated by the courts. They are no longer regarded as the heroic saviours they once were, and in line with other professionals (such as barristers) they have become far more open to complaint and litigation in recent years.

45.7 Of particular significance in this regard was the Kennedy Report on the Bristol Royal Infirmary Heart Scandal of 2001.

THE BRISTOL ROYAL INFININARY HEART SCANDAL

46.1 In 1988, Stephen Bolsin began working at the Bristol Royal Infirmary as an anaesthetist. The hospital specialised in paediatric cardiology and performed thousands of procedures on infants to correct holes in the heart and ‘switch’ operations to exchange the arteries in babies born with them back to front.

46.2 Bolsin noticed that these procedures were taking up to five times longer than they should and that many of the baby patients were dying. He began to take a log and realised that the death rate was 66 percent, compared with the national average of 11 percent.

46.3 He reported his findings to the hospital’s chief executive, John Roylance, who dismissed his request for an inquiry, but informed the surgeon who performed most of the operations, James Wiseheart, of the complaint. Wiseheart’s failure rate was one in two, compared with the national average of one in seven.

46.4 Thereafter Bolsin was subjected to a hate campaign that forced him to resign from the hospital and go to work in Australia. However, Bolsin contacted the General Medical Council with his findings. The Council investigated and found Wiseheart and his fellow incompetent surgeon Janardan Dhasmana guilty of serious misconduct. They had performed these operations with inadequate expertise in order to maintain the funding the hospital received as a leading centre of paediatrics.

46.5 The Health Secretary ordered a public inquiry headed by Professor Ian Kennedy that became the longest hearing in history and resulted in the publication of a 12,000-page report on July 18th 2001.
The Findings

46.6 Of 1,827 babies and children operated on over a 12-year period, 167 died or were left with brain damage. (n.b. It should be remembered that as Bristol was the leading hospital in this field, it did get the worst cases to deal with.)

- A third of all children treated in the hospital received less than adequate care
- 35 deaths between 1991 and 1995 were avoidable
- Hospital authorities covered up the death rate, which was at least twice the national average
- Parents of prospective patients were given false information about the risks of the operations. Wisehart told parents that there was an 80% success rate, but in fact most of his patients died.

"This is an account of a hospital where there was a club culture, an imbalance of power, with too much control in the hands of individuals. Vulnerable children were not a priority, either in Bristol or throughout the NHS."

James Wisheart and John Roylance were struck off the medical register for professional misconduct and Janardan Dhasmana was prohibited from practising paediatric surgery.

The Recommendations

- Doctors must report the misconduct or incompetence of colleagues
- The Office for Monitoring Healthcare Performance will act as a watchdog for failing hospitals with the power to recommend they be closed down
- The publication of league tables to enable patients and the public to compare the performance of trusts, services and consultants
- Doctors will be forced to prove they are fit to practise by opening their records to independent assessors every five years
- Any unit providing open heart surgery on very young children must have at least two surgeons trained in paediatric surgery who must undertake between 40 and 50 such operations a year in order to gain and maintain expertise
- National standards are to be developed for all aspects of the care and treatment of children with congenital heart disease
- The Clinical Negligence system should be abolished and replaced by an alternative way of compensating patients harmed by NHS treatment, to stamp out the ‘blame culture’.
- Doctors and nurses should be encouraged to own up, rather than to cover up their mistakes
- Two all powerful regulatory bodies should be created – a Council for the Quality of Healthcare to regulate healthcare standards and institutions and a Council for the Regulation of Healthcare Professionals to regulate doctors and nurses.
- Patients should be told the full risks of surgery and their consent should be gained
- A National Director for Childrens’ Healthcare Services should be appointed to promote improvements in this area.

Trevor Jones, whose daughter Bethany died at the hands of the Bristol team, said: “This is the end of the age of ‘the doctor knows best’.”
However:

- Many of these recommendations, including the replacement of the whole Clinical Negligence system with a no-fault liability scheme, have not been implemented.

- Although the Office of the Health Professions Adjudicator (which was to replace the GMC) was established in 2007, so that doctors would not be the sole adjudicators of complaints against other doctors, it was scrapped in December 2010. However, the constitution of the GMC itself has been revised to include members of the public as well as medical practitioners.

- Before the scandal broke, Wisheart was awarded a £250,000 bonus for merit. He was legally entitled to it despite having been subsequently struck off, so there may be some way to go before true justice prevails!

46.7 That said, even with the somewhat muted reaction to the report, it is clear that an action for Clinical Negligence will no longer be barred simply due to an outdated reverence for medical practitioners.

Chester v. Afshar [2005] 1 AC 134

“In modern law, medical paternalism no longer rules.” per Lord Steyn at para 16

47 THE DUTY OF DISCLOSURE: Informed Consent

47.1 Professionals (especially medical professionals) have a duty not only to treat their clients/patients with reasonable care, but also a duty to ensure they have the opportunity to give their informed consent to any treatment which might injure them, even if the treatment itself is not carried out negligently. This means that a doctor, in recommending a course of treatment, may have a Duty of Care fully to explain the inherent risks of the procedure to the patient, even if those risks are minimal.

47.2 In Bolam v. Friern Hospital Management Committee [1957] 1 WLR 582 it was held that the doctor was not liable for failing to warn the patient of the possible dangers, as he had not thereby fallen below a standard of practice recognized as proper by a competent body of professional opinion.

47.3 However, as the idea of “doctor knows best” has waned, so the duty to inform has grown. Thus it is now clear that a doctor (and other such professionals) must generally get INFORMED CONSENT from his or her patient or client before embarking on an operation, especially if the potential (albeit unlikely) injury would be grave.

47.4 Thus, even if an operation itself is performed without any negligence, liability may lie simply for having done it at all without disclosing the risks.

Sidaway v. Board of Governors of the Bethlem Royal Hospital and the Maudsley Hospital [1985] AC 871 (HL)

The plaintiff had an operation to cure a recurrent pain in her neck which carried a small risk of damage to the spinal column. She was not told of this risk, and she was seriously disabled when her spinal column was damaged. She sued on the basis of the non-disclosure. HELD: The surgeon was not liable. The question whether an omission to warn a patient of inherent risks of proposed treatment constituted a breach of a doctor’s care towards his patient was to be determined by an application of the Bolam test.

“I think that English law must recognise a duty of the doctor to warn his patient of risk inherent in the treatment which he is proposing: and especially so, if the treatment be surgery. The critical limitation is that the duty is confined to material risk. The test of materiality is whether in the circumstances of the particular case the court is satisfied that a reasonable person in the patient’s position would be likely to attach significance to the risk. Even if the risk be material, the doctor will not be liable if upon a reasonable assessment of his patient’s condition he takes the view that a warning would be detrimental to his patient’s health.” per Lord Scarman at p.495
However, the House of Lords stated that there might be circumstances where the proposed treatment involved a substantial risk of grave consequences in which a judge could conclude that, notwithstanding any practice to the contrary accepted as proper by a responsible body of medical opinion, a patient's right to decide whether to consent to the treatment was so obvious that no prudent medical man could fail to warn of the risk unless there was an emergency or some other sound clinical reason for non-disclosure.

47.5 This was taken further in the Australian case of *Rogers v. Whittaker* [1992]

**Rogers v. Whittaker** [1992] 109 ALR 625

Mrs. Whittaker, who was virtually blind in her right eye, had an operation to restore her sight. She was not warned that this carried a risk that she would lose the sight in her left eye due to sympathetic ophthalmia. The risk was 1:14,000, but unfortunately it happened so she became almost blind. Medical opinion was equally divided about whether such a patient should be made aware of the risk. However, since she had asked for information, the court held that she should have been given it, whatever medical opinion might think. This was seen as a shift away from the ‘Doctor knows best’ attitude.

"In Australia, it has been accepted that the standard of care to be observed by a person with some special skill or competence is that of the ordinary skilled person exercising and professing that special skill. But that standard is not determined solely or even primarily by reference to the practice followed or supported by a responsible body of opinion in the relevant profession or trade."

47.6 The increasing vulnerability of medical professionals to litigation in this area has been displayed in a series of cases.

**St. George’s Healthcare National Health Service Trust v. S** The Times, May 8 1998 (CA)

A pregnant woman was diagnosed with eclampsia and advised that she needed urgent attention and an induced birth. Without this treatment the life of herself and her unborn child were in real danger. Although she understood the danger, she refused any treatment. She was certified insane under the Mental Health Act 1983 and forced to undergo a caesarean section. She sued.

It was held that the certification was improper in the circumstances, and that as she clearly was not insane, she had the right to overrule the doctor's wishes and risk her life and that of her unborn child if she wanted to do so.

"She was entitled not to be forced to submit to an invasion of her body against her will, whether her own life or that of her unborn child depended upon it. Her right was not reduced or diminished merely because her decision to exercise it might appear morally repugnant."

47.7 The leading case on informed consent is now *Chester v. Afshar* [2005]

**Chester v. Afshar** [2005] 1 AC 134 (HL)

The defendant, a neurosurgeon, advised the claimant to undergo a surgical procedure on her spine without revealing to her the small risk (1%–2%) that, even without negligence in performing the operation, the patient might develop cauda equina syndrome as a result. The claimant agreed to the operation and although it was performed skillfully, she developed the syndrome.

Even though there was evidence that the patient might have undergone the operation eventually even if she had known of the risk, the House of Lords held that the defendant had been in breach of duty not to warn the patient of the possible effects, and that there was a causal link between this omission and her injury.

The causation issue is discussed later in this manual.

"Surgery performed without the informed consent of the patient is unlawful. The court is the final arbiter of what constitutes informed consent. Usually, informed consent will presuppose a general warning by the surgeon of a significant risk of the surgery." per Lord Steyn at para 14
“A surgeon owes a legal duty to a patient to warn him or her in general terms of possible serious risks involved in the procedure. The only qualification is that there may be wholly exceptional cases where objectively in the best interests of the patient the surgeon may be excused from giving a warning. This is, however, irrelevant in the present case. In modern law, medical paternalism no longer rules and a patient has a prima facie right to be informed by a surgeon of a small, but well established, risk of serious injury as a result of surgery.” per Lord Steyn at para 16

47.8 The duty of disclosure may extend to a duty to advise the patient of alternative treatments.

**Birch v. UCL Hospital NHS Trust [2008] EWHC 2237 (QB)**

Janet Birch, a diabetic aged 55, awoke with a bad headache, blurred vision and with her left eye turned inwards. She went to hospital where a doctor recommended that she undergo an MRI scan to help in the diagnosis. As the hospital had no MRI slots available she was transferred to another hospital where they decided to perform a catheter angiography instead, a mildly invasive procedure which carried the risk of causing a stroke in someone with Birch’s condition.

The dangers were explained to her, and she signed a consent form. She suffered a stroke as a result of the procedure.

It was held, *inter alia*, that the hospital was liable for not explaining to her that the MRI (for which she had been sent there) did not carry the risks of the angiography, as she would have refused the angiography and opted to have the MRI instead if she had been properly appraised of the comparative risks.

47.9 The law in this area was considered in detail in the Supreme Court case of *Montgomery v. Lanarkshire Health Board [2015] AC 1430*.

**Montgomery v. Lanarkshire Health Board [2015] AC 1430**

Nadine Montgomery was pregnant with her son, Sam. Because she is diabetic and of a small stature, her pregnancy was regarded as high risk. When she was told that the unborn baby was unusually large, she raised concerns about vaginal delivery, but was not told that there was a 10% risk that a vaginal delivery would lead to shoulder dystocia, where the baby’s shoulders cannot pass through the pelvis.

Sam Montgomery, who was born on 1 October 1999. At 19.30 on 30 September 1999 the induction of her labour was commenced. At 17.45 on 1 October 1999 Sam’s head was delivered.

He then exhibited signs of shoulder dystocia. As a result of this, the remainder of his body was not delivered until about 17:57. As a result of the delay in delivering the rest of his body Sam sustained a period of acute hypoxia lasting for at least 12 minutes from about 19.30 on 1 October 1999.

As a result of the period of hypoxia, Sam was clinically dead at birth. Although he was resuscitated, he suffered renal damage and epileptic seizures. He has been diagnosed with cerebral palsy of a dyskinetic type affecting all four limbs. Further, due to the procedures used to overcome the shoulder dystocia he sustained a brachial plexus injury involving Erb's palsy of the upper limb.

Nadine sued on his behalf, claiming that no ordinarily competent obstetrician acting with reasonable skill and care would have:

(a) allowed a diabetic woman of short stature with macrosomic foetus in “early trial of labour” whose foetal heartbeat was grossly abnormal to continue in labour and attempt a vaginal delivery;

(b) failed to recommend delivery by caesarean section between 08.10 and 17.00 hours on 1 October at the latest.

(c) failed to take foetal blood samples between 08.10 and 17.00 hours.

However, applying the test in *Bolitho*, the Scottish Court of Session concluded that although there was a difference of medical opinion about the best procedure in such a case, it could not be established that there had been a failure of care by the consultant obstetrician in her interpretation of a foetal cardiotocograph trace and the consequent decision not to proceed to a caesarean section. Although there was competing expert medical evidence on the interpretation of the trace, it could not be said that the views of these experts could not be supported, and where they differed, no basis could be identified for wholly rejecting either view as illogical.
Nadine took the case to the Supreme Court on the basis that whatever the views of the professionals, she was entitled to have been given an informed choice of whether to opt for a caesarean section instead of a vaginal delivery. The Supreme Court upheld her claim.

“The correct position, in relation to the risks of injury involved in treatment, can now be seen to be substantially that adopted in Sidaway by Lord Scarman, and by Lord Woolf MR in Pearce [1999] PIQR P53, subject to the refinement made by the High Court of Australia in Rogers v Whitaker 175 CLR 479, which we have discussed at paras 77–73. An adult person of sound mind is entitled to decide which, if any, of the available forms of treatment to undergo, and her consent must be obtained before treatment interfering with her bodily integrity is undertaken. The doctor is therefore under a duty to take reasonable care to ensure that the patient is aware of any material risks involved in any recommended treatment, and of any reasonable alternative or variant treatments. The test of materiality is whether, in the circumstances of the particular case, a reasonable person in the patient’s position would be likely to attach significance to the risk, or the doctor is or should reasonably be aware that the particular patient would be likely to attach significance to it.

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

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

“Secondly, the doctor’s advisory role involves dialogue, the aim of which is to ensure that the patient understands the seriousness of her condition, and the anticipated benefits and risks of the proposed treatment and any reasonable alternatives, so that she is then in a position to make an informed decision. This role will only be performed effectively if the information provided is comprehensible. The doctor’s duty is not therefore fulfilled by bombarding the patient with technical information which she cannot reasonably be expected to grasp, let alone by routinely demanding her signature on a consent form.” per Lord Kerr and Lord Reed paras 87–90

47.10 The patient must not have given consent under duress or by way of a misrepresentation.

**Jones v. Royal Devon and Exeter NHS Foundation Trust** (2015) (Exeter County Court)

Kathleen Jones (aged 69) agreed to have a serious but non-urgent back operation, to be performed by a leading orthopaedic spinal surgeon, Daniel Chan. On the day of the operation, Mr. Chan was not available, but this was not explained to Mrs. Jones, who had already delayed the operation in order for it to be carried out by Mr. Chan. Mrs. Jones was seen by another surgeon – Mr. Sundaram – who she presumed to be someone who was going to assist Mr. Chan. She signed the usual consent form, without noticing the standard provision that there was no guarantee that a particular person would carry out the operation.

In fact, the operation was carried out by Mr. Sundaram himself, and went disastrously wrong, leaving Mrs. Jones with cauda equine syndrome.

Mrs. Jones claimed, *inter alia*, that the NHS Trust was liable to her for not obtaining her informed consent to the operation being performed by Mr. Sundaram.

HELD: Although she had signed the consent form, in the circumstances she had not had the consequences of so doing properly explained to her, and she could not be said to have given her informed consent to having anyone but Mr. Chan perform the operation.
The issue of non-disclosure came up in an unusual way in a case involving the organ retention of dead babies.

**In Re Organ Retention Group Litigation** (otherwise known as **A, B and Others v. Leeds Teaching Hospitals NHS Trust**) [2005] QB 506

In September 1999, whilst giving evidence at the Bristol Royal Infirmary enquiry (see below) Professor Robert Anderson revealed that for a long period of time tissue had been removed from children at post-mortems and retained by hospitals without the knowledge of the parents. This revelation led to over 2,000 claims by parents of deceased children who said that they had suffered nervous shock on hearing that their own children’s tissue had thus been retained.

Three cases were heard together to consider various preliminary issues, including whether there was a duty of care on doctors who were asking parents to consent to a post mortem on their children, to explain that some tissue would be retained and not returned for burial or cremation.

It was held that there was such a duty, and that the doctors who did not do this were therefore in breach of that duty. Neither was it enough to get permission to retain ‘tissue’ if what was actually being retained were organs. Although in medical terminology ‘tissue’ includes organs, that is not the common understanding of laymen, and getting permission to retain ‘tissue’ does not amount to gaining informed consent to retain organs.

“In my judgment, Dr Clifford owed a duty of care to Mr. and Mrs. Harris. That duty of care involved explaining to Mr. and Mrs. Harris what was involved in a post mortem and, at the least, alerting them to the fact that organs from Rosina’s body might be removed and retained following the post mortem examination. In one sense Mr. Harris was alerted to this fact.

“The post mortem consent form which he signed specifically permitted the removal of tissue for treatment of other patients and for medical education and research. The first half of this form follows precisely the form recommended at Appendix 2 to the DHSS Health Circular of August 1977 entitled: “Health Services Development: Removal of Human Tissue at Post Mortem Examination-Human Tissues Act 1961”.

“In my opinion, that form ought to have alerted Mr. Harris to the possibility that organs might be removed and retained. In fact, of course, he knew this to be so because that is why his wife sought to impose the condition that all organs removed should be returned. The difficulty in this case arose because he thought that tissue did not include organs and Dr Clifford misunderstood what Mr Harris meant by the word "whole". In cross-examination Dr Clifford agreed that some patients might understand the word "tissue" to mean something different from the meaning given to it by doctors. He accepted that, although to him, as a doctor, it included organs, to a patient it might not include organs. In my judgment, Dr Clifford should have done what he said he would do in such circumstances, that is either give a complete answer or ask some questions so as to ensure that Mr. Harris was aware that organs might be retained. I find that he did neither.

“In addition, had Dr Michaels recorded his conversation with Mrs. Harris in the medical records or spoken to Dr Clifford about that conversation, as I find that he ought to have done, it is inconceivable that Dr Clifford would not have discussed the matter more fully with Mr. Harris. In the circumstances I find that Dr Michaels and Dr Clifford were negligent.” per Gage J. at para 254

The disclosure requirement is not absolute. In appropriate cases, a doctor may still be able to show that disclosure was not necessary.

**Rimmer v. General Dental Council** [2011] EWHC 3438 (Admin)

Barry Rimmer, a dentist, habitually administered intravenous conscious sedation to his child patients to calm them down during treatment. He was disciplined by the General Dental Council *inter alia* for not advising the patients or their parents that this was not a standard procedure and for not getting their informed consent.

The court held that the Council had erred in this. Despite some opposing views, it seemed that the risks associated with the procedure are very small, and there is no known risk of serious harm. There was no evidence that other practitioners would have told the patients any more about the treatment than Rimmer did, nor that they ought to have done so. The findings of the Council were therefore quashed.
“It is implicit in that statement (from Chester v. Afshar) that the law does not impose on the medical or dental practitioner an obligation to warn a patient about the risks involved in a procedure if those risks are non-existent or not serious, or are not a risk, however small, of serious injury or harm. The evidence of Dr Robb would appear to have been that the risk of any harm was very small, and of serious harm, negligible, such that there was no requirement to inform the patient or the parent of a patient before intravenous polypharmacy sedation was attempted.” per Mitting J. at para 17

47.13 In some cases, even a risk of serious injury to the patient may not need to be disclosed.


Aplastic anaemia (AA) is a rare, potentially fatal blood disease. Some cases are acquired through such triggers as drug ingestion, but most cases are idiopathic (i.e. arise from an unknown cause.) More rarely, AA can be inherited (such as in a condition called Dyskeratosis Congenita – DK) which requires a different treatment.

Richard Meiklejohn was misdiagnosed by Judith Marsh as having acquired idiopathic AA, when he actually had DK. However, applying Bolam and Bolitho, the judge found that her diagnosis was a reasonable one to make. Marsh treated Meiklejohn with Anti Lymphocyte Globulin (ALG) which is the standard treatment for AA. The ALG itself causes serum sickness, which is treated with Prednisolone. A rare side effect of the Prednisolone is avascular necrosis. Meiklejohn was not informed about this remote possibility, and contracted the necrosis, causing him to require bilateral hip replacements. In fact, necrosis had only ever occurred with higher doses of Prednisolone, so Meiklejohn’s case was to some extent unique.

Meiklejohn claimed, inter alia, (i) that he should have been told about the rare side effect, given its devastating consequence; and (ii) that he should also have been told about other possible treatments, supposing he ever had acquired AA in the first place.

**Held:** Applying the Bolam and Bolitho tests, the judge agreed with Marsh that the likelihood of necrosis was so small that she had no duty to warn about it: Furthermore, even if Marsh had told the patient about the alternative treatments (which also carried risks of serious side effects), she would have strongly recommended ALG, and he would probably have gone with it, so the case was distinguishable from Birch v. UCL Hospital NHS Trust [2008].

“Thus I have no hesitation in concluding that it was not negligent to fail to discuss with the Claimant the remote risk of the claimant developing AVN as a result of the administration of Prednisolone…

“Moreover, even if the risk had been disclosed, the Claimant would have accepted the advice to undergo ALG treatment with Prednisolone, not least because he would have been told that there had hitherto been no case of anyone treated with the low dose regimen at St George's ever going on to develop AVN.

“Finally, even if alternative treatment options had been discussed, it is clear that Professor Marsh would have recommended ALG with Prednisolone and the Claimant would have accepted that advice. Oxymetholone is a treatment which itself carries significant risks of side effects, as Dr Cavanagh mentioned in evidence when describing a patient who had lost half their liver as a result of administration of Oxymetholone. ALG is the first line treatment for AA.”

per Robinson HHJ at paras 164–167

47.14 However, the Supreme Court has ruled that the ‘therapeutic exception’ whereby a doctor is entitled to withhold information as to a risk on the basis that the disclosure itself would be seriously detrimental to the patient’s health, is very limited and must not be abused.

**Montgomery v. Lanarkshire Health Board [2015] AC 1430**

“It is important that the therapeutic exception should not be abused. It is a limited exception to the general principle that the patient should make the decision whether to undergo a proposed course of treatment: it is not intended to subvert that principle by enabling the doctor to prevent the patient from making an informed choice where she is liable to make a choice which the doctor considers to be contrary to her best interests.” per Lord Kerr and Lord Reed para 91
47.15 **Gallardo v. Imperial College Healthcare NHS Trust [2017] EWHC 3147 (QB)**

Raul Guiu Gallardo underwent major abdominal surgery in January 2001 immediately following a CT scan which had showed a mass on his stomach. A malignant gastrointestinal stromal tumour (GIST) was removed. Complications requiring further surgery occurred. He then needed intensive care for some weeks. He moved back to the ward for 25 days before moving to a private wing.

He was discharged from hospital in April 2001. He saw his consultant privately as an out-patient a few times until the beginning of 2002. In 2006, he began suffering abdominal pain again. He referred himself to a specialist cancer hospital after several unsatisfactory diagnoses. His previous consultant was contacted, prompting an email from him to the patient in November 2010 in which he explained that the first operation was for a malignant GIST. The patient claimed that that was the first time he had been informed that the tumour was malignant and that there was a risk of recurrence, which required him to have regular check-ups and CT scans. He underwent major complex surgery in 2011. He was being regularly monitored. Further surgery was likely.

Experts agreed that the consultant should have advised that regular CT scans were necessary. Had they been done, it was likely that the tumour would have been diagnosed in 2006 and further surgery would have taken place four years earlier, when the tumour would have been smaller.

Gallardo sued the NHS Trust for not informing him in a timely manner of the outcome of his treatment, the prognosis, and the options for follow-up care and treatment.

Following *Montgomery v. Lanarkshire Health Board*, the court found for the claimant. Information should only be withheld in exceptional circumstances, and for clear and persuasive therapeutic reasons. The timing of such discussions was flexible and it could be affected by various factors, but due regard had to be given to the patient's right to be told. The discussion should occur as soon as the patient was well enough to participate fully. It should not be delayed longer than necessary without good reason, and not on therapeutic grounds unless it would be seriously detrimental to the patient's health.

47.16 There is no separate liability for wrongful invasion of autonomy in these cases. Though this might be considered within the award of general damages, it is not an independent cause of action.

**Shaw v. Kovac [2017] 1 WLR 4773 (CA)**

On 26 September 2007 Mr William Ewan, aged 86, died following an operation for a trans-aortic valve implant conducted that day. In due course, his daughter, Mrs Gabriele Shaw, acting as personal representative of his estate, brought proceedings in negligence against the surgeon who supervised the conduct of the operation.

The core of the claim in negligence advanced was that neither the deceased nor his family was given proper information as to the true nature of, and risks inherent in, the actual surgical procedure deployed; and that in consequence no properly informed consent was given by the deceased to such an operation. It was said that the defendants were negligent in failing to give the requisite information and that, had it been given, Mr Ewan would have refused the operation altogether. In the event, liability was eventually conceded by the defendants.

At the trial fixed for the assessment of damages, the judge assessed damages at £15,591. The award included an amount of £5,000 for pain, suffering and loss of amenity.

The claimant appealed, arguing that the judge should in addition have awarded a sum representing a further and distinct head of loss: that is to say, as compensation for what was described as "the unlawful invasion of the personal rights" of Mr Ewan and his "loss of personal autonomy."

It was accepted by the claimant that such an award would be novel, in the sense that a right to recover under such a head of loss had never before been acknowledged in an action framed in negligence, ostensibly in respect of personal injuries. It was said, however, that recent developments in the law and the increasing emphasis given in modern times to the right to personal autonomy of an individual both justify and required that modern courts should acknowledge such an actionable head of loss. The appropriate figure suggested in this case is £50,000.

The appeal was dismissed.
It was held that a failure to give proper advice so as to obtain informed consent to what would otherwise be an unauthorised invasion of a person's body did not give rise to a new cause of action for the wrongful invasion of that person's personal autonomy, but was properly formulated as an action in negligence or breach of duty. A new head of loss of compensatory damages for the negligent invasion of a person's personal autonomy by reason of the performance of surgical procedures without proper informed consent having been obtained, was contrary to legal authority and principle.

According to Davis L.J.:

“70. Moreover, if, in any particular case, an individual's suffering is increased by his or her knowing that his or her “personal autonomy” has been invaded through want of informed consent (not, I add, the present case, on the facts) then that can itself be reflected in the award of general damages…

“71. Further, if the claim to an additional award is well-founded it must be the case that an award would also in principle be recoverable, in the context of lack of informed consent, even if the operation performed on a patient was a complete success. Mr Berkley accepted that that was a corollary of his argument, when the point was put to him. Likewise, Mr Berkley maintained that damages would be payable (albeit, rather puzzlingly, he said that they would be "nominal damages") even if it were established that the patient still would have consented if he had been given the proper information. It is, however, impossible, in my opinion, to see the justification for such an outcome.

“72. Yet further, what would be the applicable principles for assessing these novel (compensatory) damages as now claimed? Mr Berkley insisted that the award might vary, depending on the context of each particular case. But he could identify no principled approach which the courts assessing damages might then adopt for this purpose. Indeed, it is very difficult to see why the importance and value of the right to personal autonomy and the right not to have one's body invaded without informed consent should vary from one context to another, from one individual to another. It is surely the same fundamental right for all adult people of sound mind.”
PART 8: PROFESSIONAL NEGLIGENCE: Breach of Duty

48 INTRODUCTION

48.1 The usual requirement to succeed in an action in negligence is for the claimant to prove that, on an objective standard, the defendant could not only foresee the consequences of his actions, but did not do what a ‘reasonable man’ would have done in the situation.

48.2 The hypothetical ‘reasonable man’ is most commonly characterised as ‘the man on the Clapham Omnibus’ – that is, a normal person who is neither unduly timorous nor ridiculously nonchalant about risks.

48.3 However, appealing to the standards of the man or woman in the street (or on a bus) may not be appropriate or relevant when the defendant was acting in a professional capacity, as a layperson may not have the knowledge on which to base an informed view of the defendant’s actions.

Bolam v. Friern Hospital Management Committee [1957] 1 WLR 582

“Where you get a situation which involves the use of some special skill or competence, then the test as to whether there has been negligence or not is the test of the man on the top of the Clapham omnibus, because he has not got this special skill.” per McNair J. at p.586

48.4 This is particularly problematic in the field of Clinical Negligence, where it is generally of no help to ask what diagnosis an untrained person would have made, or what treatment s/he would consider to be reasonable, as s/he probably knows nothing at all about medical science.

48.5 There have thus developed special tests for the breach of duty in cases of professional negligence.

49 THE BOLAM TEST

49.1 The principles regarding the Breach of Duty of professional practitioners centre around the so-called BOLAM TEST named after the seminal case in this area.

Bolam v. Friern Hospital Management Committee [1957] 1 WLR 582

John Hector Bolam was given electro-convulsive therapy treatment at Friern Mental Hospital by Dr. Allfrey, who, in accordance with his usual practice, gave it “unmodified”, that is using neither a relaxant drug on the patient, nor manually restraining him. During the treatment, Bolam suffered bilateral stove-in fractures of the acetabula, which would have been avoided if the treatment had not been unmodified. Expert evidence was divided as to whether it was good practice either to use relaxant drugs or manual restraint during E.C.T. treatment.

HELD: The doctor was not negligent. He had acted in accordance with a practice accepted at the time as proper by a responsible body of medical opinion. The fact that there was also a contrary line of opinion did not make his actions negligent. Furthermore, he was not liable for failing to warn the patient of the possible dangers, as he had not thereby fallen below a standard of practice recognized as proper by a competent body of professional opinion.

McNair J. laid down several principles that govern the question of professional negligence:

1. THE STANDARD OF CARE: “How do you test whether this act or failure is negligent? ... Where you get a situation which involves the use of some special skill or competence, then the test as to whether there has been negligence or not is the test of the man on the top of the Clapham omnibus, because he has not got this special skill. The test is the standard of the ordinary skilled man exercising and professing to have that special skill. A man need not possess the highest expert skill; it is well established law that it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular art”. per McNair J. at p.586

2. THE TEST OF REASONABLE CARE: “He is not guilty of negligence if he has acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular act.” per McNair J. at p.587
3. CONFLICTING PROFESSIONAL STANDARDS: “It is not essential for you to decide which of two practices is the better practice, as long as you accept that what the defendants did was in accordance with a practice accepted by responsible persons.” per McNair J. at p.587

49.2 The development of these three aspects may be considered separately, although they obviously overlap.

50 THE STANDARD OF CARE UNDER BOLAM

Specialists

50.1 A professional must show a standard of care commensurate with his or her professed skill. Thus someone who holds himself out as having a particular professional skill will be judged by the standards of other reasonably competent specialists.

**Maynard v. West Midlands Regional Health Authority [1984] 1 WLR 634 (HL)**

A consultant physician and a consultant surgeon, whilst recognising that Mrs. Blondell Maynard probably had tuberculosis, took the view that she might instead have Hodgkin’s disease, which would require immediate treatment. The treatment was known to be risky, and Maynard was injured by it. It then transpired that she did have tuberculosis after all. There was expert opinion that the physician and surgeon had been correct in taking the action they did, though the plaintiff also called an expert who said otherwise.

**HELD:** The doctors were not negligent as they had acted with the skill expected of such specialists, despite the disastrous consequences.

“**A doctor who professes to exercise a special skill must exercise the ordinary skill of his speciality.**”

per Lord Scarman at p.638

Trainees

50.2 A trainee who is held out as a specialist must display the professional competence of such a specialist. Thus it is no defence for a junior doctor who is acting as a diagnostician to plead his inexperience in making a misdiagnosis, for if he is not competent to give a proper diagnosis, he should not be attempting to do so.


Djemal claimed that a senior houseman at one of B’s hospitals was negligent in failing to make sufficient enquiries about Djemal’s case history when he was seen in the A&E department. This resulted in an incorrect diagnosis. Djemal was suffering from epiglottitis, but it was diagnosed as a viral upper respiratory tract infection and so he was sent home. Djemal subsequently suffered hypoxic brain damage, which meant he remained in a persistent vegetative state. The defendant claimed that the doctor was not negligent given that he was only a houseman, and not a casualty officer who would have had more experience of such injuries.

**Held:** Djemal’s claim succeeded:

(1) The standard of care to be applied was that of a reasonably competent senior houseman acting as a casualty officer regardless of length of experience;

(2) The doctor was negligent in that he failed to notice the spitting and pooling due to an inability to swallow saliva; and

(3) by failing to obtain a proper case history, the doctor was deprived of information which would have led a reasonably competent casualty officer to send Djemal for further examination.

50.4 However, it is reasonable for a trainee to make an inexperienced diagnosis when, recognising the limits of his knowledge, he then asks for the second opinion or confirmation of an expert. (The same would be true, for example, of a General Practitioner seeking the advice of a Consultant, or a trainee solicitor seeking the advice of a partner.)
50.5 Wilsher v. Essex Area Health Authority [1987] QB 730 (CA)

Martin Wilsher, a premature baby was placed in a special care unit at one of the defendant's hospitals. He needed extra oxygen, and in order to monitor this it was necessary to insert a catheter into an umbilical artery. Dr. Wiles, a junior doctor, mistakenly inserted the catheter into the umbilical vein. This gave a false reading, as a result of which the baby was supersaturated with oxygen. As a possible result of this, he became blind. Dr. Wiles was saved from liability because he had asked Dr. Kawa, the senior registrar, to check his work.

Dr. Kawa was held to be negligent (though this was overturned by the House of Lords on a matter of causation.)

The Court of Appeal made the following observation:

“If I understand him correctly, the Vice-Chancellor would apply a less stringent test to a newly-qualified practitioner, who has accepted an appointment in order to gain experience. The suggested test would only hold such a doctor liable ‘for acts or omissions which a careful doctor with his qualifications and experience would not have done or omitted.’ With great respect, I do not believe this is the correct test. In my view, the law requires the trainee or learner to be judged by the same standard as his more experienced colleagues. If it did not, inexperience would frequently be urged as a defence to an action for professional negligence.

“If this test appears unduly harsh in relation to the inexperienced, I should add that, in my view, the inexperienced doctor called upon to exercise a specialist skill will, as part of that skill, seek the advice and help of his superiors when he does or may need it. If he does seek such help, he will often have satisfied the test, even though he may himself have made a mistake.”

per Glidewell L.J. at p.774

51 THE BOLAM TEST AND OTHER PROFESSIONS

51.1 The Bolam test applies to all professions, not just to health workers. Thus a general practitioner, in whatever trade or profession, cannot be expected to have specialist expertise, but should know when to refer a matter to an appropriate specialist.

Prison Officers

51.2 Knight v. Home Office [1990] 3 All ER 237

Paul Barrington Worrell, aged 21, attacked a man in a public house and was remanded in custody to Brixton prison. He was found to be mentally ill and arrangements were made for him to be transferred to Bethlem Royal Hospital. Meanwhile, he was detained in his prison cell, and was observed every 15-minutes. Between two such inspections, he hanged himself. His personal representatives brought an action against the Home Office claiming that the standard of care provided for the deceased in the prison was inadequate.

HELD: The prison medical staff had exercised a sufficient standard of care for people in their position (i.e. not psychiatric nurses). Applying the Bolam test, the prison medical staffs were not negligent in failing to keep the deceased under continuous observation since their decision to observe him at 15-minute intervals was one that ordinary skilled medical staff in their position would have made.

51.3 St. George v. Home Office [2007] EWHC 2774

Bryant St. George was a prisoner at HMP Brixton, serving a four-month prison sentence for theft. He was known to be an intravenous heroin user and a heavy drinker and therefore prone to withdrawal fits. He was also epileptic.

Despite these pressing reasons against it, he was allocated to sleep in a top bunk. He suffered a fit and fell head first from the bunk onto the hard lino beneath, suffering a severe head wound. The problem was then compounded by the lack of proper first aid he was given in the prison and by the fact that an ambulance was not called for until 39 minutes after the event and then not permitted to drive through the prison gates, even though this had been specifically arranged at the time of the 999 call.
By the time the paramedics arrived, the prisoner was in “about as bad a condition as a person can be in short of being dead.” As a result of his injuries and the delay in treating them, he suffered progressive and severe hypoxic brain damage.

In finding the prison staff to be in breach of their duty of care for the lack of proper medical attention given to St. George, MacKay J. made the following observation:

“As to the First Aid applied, Dr. Ayneson, the defendant’s expert on this area of the case and Mr. Gavalas for the claimant, agreed in their joint report that when the prison staff arrived on the scene, having ensured that the patient was made safe from injury from his surroundings, something that Mr Caussyram said he did do, a clear airway should be obtained as far as possible and as soon as oxygen was available, it should have been administered. The algorithm ABC which is well known applies to this, airway, breathing and circulation. Dr. Ayneson said the matter of the airway was paramount and an absolute priority, even before summoning the doctor that should have been done, he said.

“This, I am satisfied, is no more than basic First Aid and is not to impose too high a standard on a prison nursing team who, I agree, should not be judged by the standards of a hospital or even a doctor. The nurses should have been protecting his airway straightaway and, in the case of an unconscious patient, they should be administering oxygen, said Dr. Ayneson, “Time is of the essence”, he put it. The fact is that certainly at the time the ambulance staff arrived at 18:57, no attention was being paid by anyone to his airway. The patient was breathing at an elevated rate against a partially obstructed airway and his appearance was cyanosed. I have also found at no time prior to their arrival was oxygen administered. I regard this therefore as a fundamental breach of reasonable practice for a competently run prison nursing team for those who found themselves in the position that this team found itself in any emergency involving an unconscious patient. It is particularly important in the case of a patient who is in status, where Mr. Gavalas and Dr. Reynolds told me that the epileptic convulsions themselves give rise to a greatly increased demand for oxygen by the brain.” per MacKay J. at paras 35 and 36

Adoption Agencies

51.4  **A v. Essex County Council** [2004] 1 WLR 1881 (CA)

The defendant adoption agency wanted to place two siblings, a boy and a girl, with the claimants, a married couple. The couple had specifically stated that they were not prepared to consider adopting a child “with either a physical or a mental disability, or with special educational needs outside mainstream school.”

In fact, there was a medical report about the boy, which included the following assessment: “His concentration is very poor. Because of his behaviour he requires constant adult supervision; he will test his carers to the absolute limit, including running away. He needs constant strong discipline with lots of love and firm boundaries... His behaviour can be very difficult with frequent tantrums. He has been seen by a child psychiatrist who recommended ongoing child guidance therapy.”

The adoption agency planned to show this report to the couple, but did not do so, and after a placement, the couple agreed to adopt both children. The boy proved to be violent and destructive.

It was suggested *inter alia* by the claimants in this case that the social worker, Helen Nys, had been negligent in her preparation of the reports on the children who were to be adopted. Hale L.J. applied the *Bolam* test to discount this contention.

“*The breach of that duty of care is to be judged in accordance with the principles laid down in Bolam v. Friern Hospital Management Committee*: if the professional judgment made is one which would be acceptable to a responsible body of opinion within that profession at that time, then there is no breach of duty. In this case, the judge did not ask himself that question. If he had done so, he might have considered difficult in holding that Helen Nys was in breach of her duty in compiling Form E.” per Hale L.J. at para 57

*n.b. The defendants were held to be liable in this case because, having decided that they would show the report to the claimants, they did not do so.*
Family Planning Advisors

51.5 Gold v. Haringey Health Authority [1988] QB 481 (CA)

In 1979, Phyllis Gold, not wishing to have any more than her three children, had a sterilisation operation, but later became pregnant again and had a fourth child. She claimed damages in negligence alleging, inter alia, that she had not been warned of the failure rate of female sterilisation operations and that, if she had been warned, her husband would have had a vasectomy instead. Expert evidence showed that there was a substantial body of responsible doctors who would not have given such a warning in 1979, but the trial judge held that the Bolam test only applied to advice given in a therapeutic, not a contraceptive context.

HELD: On appeal, the court held that the Bolam test did apply to contraceptive advice, and that the defendants were not therefore liable.

"The Bolam test is not confined to a defendant exercising or professing the particular skill of medicine... The Bolam test is rooted in an ancient rule of common law applicable to all artificers."

per Lloyd L.J. at p.489

Auctioneers

51.6 It appears that clients are expected to realise the limitations of provincial auction houses.

Luxmoore-May v. Messenger May Baverstock [1990] 1 WLR 1009 (CA)

The defendants were provincial auctioneers and valuers who valued two paintings for the plaintiff at £50 for the pair. Relying on this, the plaintiffs, Paul and Penelope Luxmoore-May, sold the paintings at an auction for £840. It then turned out that they were by George Stubbs and worth £88,000. The defendants claimed to have exercised as much skill as could be expected from a provincial valuer.

HELD: The valuer had not been negligent, as it could not be shown that no competent provincial valuer could have failed to recognize the paintings for what they were. (Rather a lot of double negatives there!)

However, the test will not always work in the defendant’s favour...

Solicitors


Safeways built a new supermarket close to George Balamoan’s house in Hastings. The construction caused a great deal of dust to circulate, which Balamoan claimed caused him serious breathing difficulties and ruined his valuable book collection. Although Balamoan had retired, he was a noted scholar and was planning to move back to his native Zimbabwe to take up a post as associate professor at a university in Bulawayo.

He consulted Holden & Co, a firm of rural solicitors, who lodged an application for legal aid but did not take a detailed note of the peculiar aspects of this case, which would have affected the value of the claim, nor did they arrange for Balamoan to see specialist counsel or arrange to collect crucial medical evidence. Holden assessed the claim at less than £3,000, and when Balamoan refused to accept this, he was unable to claim any more legal aid.

He pursued the case as a litigant in person, and after six years he finally accepted a settlement of £25,000 from the construction company. He contended that had the case been properly dealt with in the first place, he might have been awarded £1,000,000, and he sued the solicitors for their professional negligence.

The defendants argued that they had done all that could reasonably be expected of a rural solicitor.

Whilst recognising that the standard of care demanded of rural solicitors may be less than that required of city practitioners, the Court of Appeal held that Holden and Co. had not even reached the minimum standard required of rural solicitors.
“In the present case, the court is concerned with the standard of care reasonably to be required of a solicitor in a small country town who is instructed by a legally aided client to pursue what appears to be a comparatively small claim. It is of critical importance for the courts not to apply a too rigorous standard in these circumstances, because when pursuing such a claim a solicitor must always be anxious not to incur costs which he cannot, if successful, recover from the other side, because otherwise the Legal Aid Boards charge will reduce his client’s compensation.

“For these reasons this court will necessarily place great weight in a case like this on the judgment of a local circuit judge — and particularly one of Judge Kennedy’s vast experience — as to the standards reasonably to be required of local litigation solicitors.

“Having made all these allowances, I am nevertheless of the clear opinion that between January 1989 and May 1991 the defendants failed in the duty of care they owed to Mr. Balamoan to take such steps as were reasonable to ensure either that they took him to see counsel promptly (so that counsel could advise on what evidence should be gathered before the trail went cold) or that they gathered such evidence competently of their own initiative, and that he suffered as a consequence of this breach of duty.” per Brooke L.J.

University Lecturers


Maria Abramova, a Russian national, had enrolled on the Legal Practice Course (LPC) provided by OIPL. She had previously achieved great success at school in Russia and had achieved an upper second class law degree from Oxford University. The LPC students were required to mark their own mock examination papers in property law and private client. Abramova failed all three compulsory subjects and a number of electives. After two further attempts at the compulsory property law paper, Abramova failed the LPC on the basis of her third failure of a compulsory subject. She had received feedback from the subject tutor following her second attempt. In its routine assessment of OIPL’s course, the Law Society had criticised the self-marking practice and had recommended that a feedback process be implemented.

Abramova argued that the manner in which OIPL had delivered the course breached its duty under the Supply of Goods and Services Act 1982 s.13 in that (1) the practice of requiring students to mark their own mock examinations was negligent because it was a flawed approach not practised by other LPC providers and had been criticised by the Law Society's assessors; (2) the teaching in examination techniques was inadequate and O should have alerted S to problems with her performance by calling her in for feedback.

Held: Judgment for OILP.

The criticisms of the Law Society assessors did not show that the practice of self-marking was unreasonable. Educational establishments continually kept their methods under review through internal evaluation and OILP had not acted unreasonably in not improving its assessment process earlier. In addition, OILP’s assertion that the practice was supported by academic research was unchallenged. Accordingly, Abramova had failed to establish that the practice of self-marking was unreasonable in the Bolam sense to the extent that it was negligent. To prove such a claim, expert evidence would have been necessary.

(2) It was reasonable to expect adult graduates to take responsibility for their own studies in the face of clear guidance outlined in the course documents and reiterated by the course director at the start of the year. There was no deficiency in the availability or quality of assistance provided to S after her first and second attempts at the property law paper. She had been advised to seek feedback, which had been appropriately dealt with by the subject tutor. The success of the overwhelming majority of students at O demonstrated the quality of the teaching, which was also reflected in the overall assessments of outside observers.

(3) (Obiter) On the question of causation, even if a breach of duty had been established, there was no realistic chance that S would have passed the course. Despite her clear academic ability, S did not display the aptitude necessary to succeed on the course and the breadth of her difficulties in passing a variety of the papers suggested a fundamental problem, which a lack of success in the New York Bar examinations confirmed.
This case was considered in *Siddiqui v. University of Oxford*.

**Siddiqui v. University of Oxford** [2018] EWHC 184 (QB)

The student had read modern history at the university. He had sat his final examinations in 2000 and was awarded a second class upper degree. He claimed damages on the basis that but for alleged negligent teaching he would have been awarded a higher second upper or first class degree and that the class of his degree had had a detrimental effect on his career and earnings.

He maintained *inter alia* that the teaching in particular for a specialist subject on India had been poor due to the unavailability of several lecturers who were on sabbatical, that the university had been aware and had taken a deliberate decision not to restrict the numbers of students taking the specialist subject knowing that that would affect the quality of teaching provision, had been aware of the detrimental effect on students taking that specialist subject in the 1999/2000 academic year, and all that had all been well-documented by the university.

In a striking out application*, Kerr J. refused an application by Oxford University to strike out or to grant summary judgment of the claim, and explained what would need to be proved at the trial.

“Private law claims for breach of duty in the field of educational provision

“Claims for negligent educational provision can take various forms. They are notoriously difficult to win, but that has been held not to be a good reason for excluding the existence of duty of care. In private law claims founded on tort or contract (as distinct from public law claims, normally brought by judicial review), the relevant principles are now reasonably well settled. I do not begin to attempt a full exposition here. It is sufficient to identify three broad categories of claim, which do not necessarily occupy the entire field.

“The first category is a claim which asserts a breach of a duty owed in tort or contract arising in the exercise by the defendant's professional teaching staff of academic judgment. An example would be a decision to award a particular grade to a student sitting an examination. Such a claim is not justiciable as a matter of law, and is therefore liable to be struck out.

“The second category is that of claims which allege the use of negligent teaching methods, in the devising of courses or the means of acquainting students with the educational content of the courses that are being taught. Such claims can be actionable in principle. However, because the claimant's attack is on the competence of the defendant's performance in the exercise of skill and care in a profession, the merits of the claim must be assessed by reference to the *Bolam* test.

“As is well known, that test is derived from *Bolam v. Friern Barnet Hospital Management Committee* [1957] 1 WLR 582. In such a case, the question is “whether the defendants, in acting in the way they did, were acting in accordance with a practice of competent respected professional opinion”; that is to say, “in accordance with a practice accepted as proper by a responsible body of ... men skilled in that particular art.”

“A claimant advancing such a claim will therefore require expert evidence that the Bolam standard was not met; cf. Phelps v. Hillingdon LBC (cited above), per Lord Clyde at 672E-H. A recent example is the decision of Burnett J (as he then was) in *Abramova v. Oxford Institute of Legal Practice* [2011] EWHC 613 (QB), [2011] ELR 385, where the unsuccessful complaints included, in particular, an attack on the practice of having students mark their own mock examination papers.

“The third category of claim could be described as one founded on simple operational negligence in the making of educational provision. Again, hypothetical examples would include administrative error leading to a student sitting the wrong examination paper, containing questions about which the student had received no tuition; or where classes are cancelled due to non-availability of teaching staff; or a case where a teacher was habitually drunk or asleep during classes.

“In such a case if it is proved on the facts, a court does not need expert evidence to accept the proposition that the required standard of professional skill and care has not been met. Mr Milford, for the University, rightly accepted that in the latter example, expert evidence would not be necessary to establish a breach of the duty of skill and care.” per Kerr J. at para 41–47

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The case proceeded to a full hearing, where the court dismissed the claim.

**Was the course tuition negligently inadequate?**

No. The starting point was the manner of delivering the course before 1999: there had been no previous complaints. There was no doubt that W was a high quality teacher, and the standard of tuition before 1999 had been distinctly higher than reasonably competent. The issue was whether the standard had fallen below reasonable by reference to before, but without imposing a "counsel of perfection" on the teaching standard required. The only difference in 1999 was that W undertook all tutorial responsibilities as well as his other responsibilities. That someone had to work longer and harder to perform a familiar task did not mean it would be accomplished less adequately. There was no reason to doubt his evidence that he had taught in the same way as before. S had not liked his teaching style; that was not the yardstick for reasonableness. There was no contemporaneous evidence that others had shared his concerns. There was no consistent pattern amongst the course students of underachievement on the paper by comparison with their other results. Even if the claimant had achieved the highest grade obtained by a classmate, his degree class would not have been altered. Generally speaking, underachievement by an individual was not of itself evidence of negligent teaching. No breach of duty was established.

**Would causation of a lower mark have been established?**

No. The claimant faced an impossible task in demonstrating that alleged negligent teaching led to his mark: he had achieved a higher mark in the practice exam. He accepted that his reading of the texts was selective. His final marks were generally in line with his first year marks. He had never been predicted to receive a First. His final exam performance could have been affected by hay fever. So many factors went into an individual's performance, especially on an unfamiliar type of exam, that it was hard to see how a causal connection could be established between the tuition level and a result unless the tuition failed to meet the most basic standard.

**Would causation of a psychiatric injury have been established?**

No. The evidence did not support the claimant's contention that he had had a serious adverse reaction to his degree results. His subsequent depression was related to his failure to measure up to his own expectations. It was not until 2013 that his course result emerged as a factor in his perception of his problems.

**Did his tutor fail to alert examination authorities about relevant medical issues?**

No. After early 1999 there was no mention of psychological issues, anxiety, insomnia or depression in the claimant's medical records until late 2000, and then only generally. He was not complaining of those issues to any doctor during the exams. The doctor's note concerned only hay fever. The court preferred the tutor's evidence to the claimant's.

**Would causation of career difficulties have been established?**

No. There was no evidence that his failure to obtain a place at top US law schools arose from the quality of his degree. It was more likely caused by his admission test results. Issues regarding lateness and poor personal presentation arose in each of his employments. Nothing suggested that any preoccupation with his degree result played any part.

**Would the claim have been time-barred?**

Yes. In 2001 the claimant had possessed sufficient material to justify considering a claim. At the time of the paper he had raised the issue of inadequate coverage of the syllabus. He had been aware of S's concerns but took no steps. All that his discovery of S's complaint yielded was further evidence.
Unskilled Professionals

51.10 It is no defence to negligence that you have embarked upon a collateral trade in which you have little expertise.

The Lady Gwendolin [1965] Unreported (CA)

Guinness, a brewing company, bought a ship to carry its stout from Dublin to Liverpool and Manchester. It was no defence to an action in negligence brought against the company that the expertise of Board of Directors was in brewing, not in shipping.

“The law must apply a standard which is not relaxed to cater for the defendant's factual ignorance of all activities outside brewing. Having become shipowners, they must behave as reasonable shipowners.” per Winn L.J.

52 THE TEST OF REASONABLE CARE UNDER BOLAM

Expert Evidence

52.1 The defendant must show he exercised a standard of care commensurate with his professed skill. Thus the actions of someone who holds himself out as having a particular professional skill will be judged by the standards of other reasonably competent specialists in that field. These standards will be assessed by evidence from experts in the professed skill, as stated in the Bolam case itself.

52.2 Applying this test, even a clear error of judgment may not be negligent.


A senior hospital registrar severely injured a baby by using forceps with apparently undue force during his birth. However, the evidence was that the doctor had acted in accordance with sound medical practice, and he was found not to be negligent.

“Merely to describe something as an error of judgment tells us nothing about whether it is negligent or not. The true position is that an error of judgment may, or may not, be negligent; it depends on the nature of the error. If it is one that would not have been made by a reasonably competent professional man professing to have the standard and type of skill that the defendant holds himself out as having, and acting with ordinary care, then it is negligent. If, on the other hand, it is an error that such a man, acting with ordinary care, might have made, then it is not negligent.”

per Lord Fraser at p.263

Keeping up the Expertise

52.3 A practitioner is under a duty reasonably to maintain and update his professional knowledge and expertise.

Shakoor v. Situ (Eternal Health) [2000] 4 All ER 181

Abdul Shakoor died from acute liver failure due to having taken a herbal remedy prescribed by Kang Situ, a practitioner of traditional Chinese Herbal Medicine. Shakoor’s reaction to the remedy was unusual and Situ did not know the possibility of it although there had been some correspondence about such a possible reaction published in ‘The Lancet’, a leading orthodox medical journal.

Situ produced a witness who was an expert in Chinese Herbal Medicine to confirm that the treatment was a reasonable one for practitioners of Chinese Herbal Medicine, and claimed that he should not be judged by the standards of orthodox western general medical practitioners, as he did not hold himself out to be such a person.

The court held that where someone practices alternative medicine alongside orthodox practitioners, he has a duty to acquaint himself with the potential risks of his treatments if they have been documented in the orthodox press and cannot claim the general ignorance of alternative practitioners in the field as a defence.
However, in the circumstances, the reports about the herbs he had used were not conclusive as to their adverse side-effects and it seemed that even if Situ had read them, he would not have been negligent to have disregarded them as even orthodox practitioners might reasonably have done so. Thus, he was not liable.

n.b. *Roe v. Minister of Health* [1954] 2 QB 66 (CA)

53 CONFLICTING PROFESSIONAL STANDARDS

**General Principle**

53.1 Many of the cases concern conflicting opinions, but the general principle is that it does not matter if a responsible body of professional opinion considers a decision to be wrong, provided that an equally responsible body considers it to be correct.

53.2 *Hunter v. Hanley* (1955) SLT 213

“In the realm of diagnosis and treatment there is ample scope for genuine difference of opinion and one man is not negligent merely because his conclusion differs from that of other professional men...The true test for establishing negligence in diagnosis or treatment on the part of a doctor is whether he has been proved to be guilty of such failure as no doctor of ordinary skill would be guilty of if acting with ordinary care.” per Clyde L.P. at p.217

This was cited with approval in the cases of *Bolam v. Friern Hospital Management Committee* [1957] 1 WLR 582, *Maynard v. West Midlands Regional Health Authority* [1984] 1 WLR 634 and *Luxmoore-May v. Messenger May Baverstock* [1990] 1 WLR 1009.

53.3 *Maynard v. West Midlands Regional Health Authority* [1984] 1 WLR 634 (HL)

“It is not sufficient to show that there is a body of competent professional opinion which considers that there was a wrong decision, if there also exists a body of professional opinion, equally competent, which supports the decision as reasonable in the circumstances. It is not enough to show that subsequent events show that the operation need never have been performed, if at the time the decision to operate was taken it was reasonable in the sense that a responsible body of medical opinion would have accepted it as proper.” per Lord Scarman at p.638

54 THE BOLITHO REFINEMENT

54.1 As the burden of proof is on the claimant, the *Bolam* test seemed to imply that even if the claimant could amass a body of expert opinion in his favour, the claim would be defeated even if the defendant could produce only one expert to speak for him. However, the suggestion that the ‘expert’ opinions of doctors were unquestionable was strongly refuted in 1993.


A doctor failed to treat with penicillin a patient who was suffering from septic places on her skin though he knew them to contain organisms capable of leading to puerperal fever. A number of distinguished doctors gave evidence that they would not, in the circumstances, have treated with penicillin. The defendant was held not to have been negligent.

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

per Sachs L.J. at p.397
54.3 *Hucks v. Cole* was approved by the House of Lords in *Bolitho v. City & Hackney Health Authority* [1997] where the House of Lords emphasised that the test of professional competence was whether a “reasonable and responsible” body of professional opinion endorsed the defendant’s actions. The court was entitled to disregard “expert” evidence on the basis that in the circumstances it was illogical to consider it met these criteria. It was the right and duty of the court to reach a decision based on all the evidence.

54.4 *Bolitho v. City & Hackney Health Authority* [1998] AC 232 (HL)

A two-year-old boy was admitted to hospital suffering from respiratory difficulties. His breathing deteriorated several times, but the doctor who was called declined to attend. The child apparently recovered the first two times, but after the third, he suffered cardiac arrest, which led to severe brain damage from which he eventually died. The cardiac arrest might have been avoided had the doctor arranged for prophylactic intubation after the second respiratory compromise, but she argued that she would not have arranged for the intubation even if she had attended, and so her failure to attend was not the cause of the death. The court accepted this, and so the case collapsed on the issue of causation.

In his *obiter dictum*, Lord Browne-Wilkinson, with whom the others Lords all agreed, explained the limits of the *Bolam* test in establishing the standard of care required by professionals.

“In my view, the court is not bound to hold that a defendant doctor escapes liability for negligent treatment or diagnosis just because he leads evidence from a number of medical experts who are genuinely of the opinion that the defendant’s treatment or diagnosis accorded with sound medical practice. In the *Bolam* case itself, McNair J. stated that the defendant had to have acted in accordance with the practice accepted as proper by a “responsible body of medical men.” Later he referred to “a standard of practice recognised as proper by a competent reasonable body of opinion.”

“Again, in...Maynard’s case, Lord Scarman refers to a “respectable” body of professional opinion. The use of these adjectives – responsible, reasonable and respectable – all show that the court has to be satisfied that the exponents of the body of opinion relied upon can demonstrate that such opinion has a logical basis. In particular in cases involving, as they so often do, the weighing of risks against benefits, the judges before accepting a body of opinion as being responsible, reasonable or respectable, will need to be satisfied that, in forming their views, the experts have directed their minds to the question of comparative risks and benefits and have reached a defensible conclusion on the matter.” per Lord Browne-Wilkinson

54.5 *Sharkey v. Belfast Health and Social Care Trust* [2014] NIQB 117

“If the case is one that involves clinical judgment to which the Bolam test applies, and if the medical practitioner does produce evidence that his practice was supported by a responsible body of medical opinion, then, in the words of Sedley L.J. in *Adams v. Rhymney Valley DC* [2000] Lloyd's Rep. P.N. 777, at [41], “the judge or jury have to accept the opinion of a body of responsible practitioners, unless it is unreasonable [in the Bolitho sense]”

Accordingly in an action involving clinical judgment there is a two-step procedure to determine the question of alleged medical negligence:

(a) whether the medical practitioner acted in accordance with a practice accepted as proper for an ordinarily competent medical practitioner by a responsible body of medical opinion; and

(b) if “yes”, whether the practice survives *Bolitho* judicial scrutiny as being “responsible” or “logical”.”

per Stephens J. at para 46
54.6 The *Bolitho obiter* has been applied in several cases.


The plaintiff fell down stairs and was rendered unconscious. He was taken to hospital by ambulance but allowed to return home the next day. He continued to feel ill, but was assured by the doctors at the hospital and his own G.P. that there was nothing seriously wrong and that no further treatment was needed. A week later, he went into cardiac arrest and was discovered to have fractured his skull in the fall and to be suffering from an epidural haematoma with inter-cranial bleeding. He was left severely disabled. The plaintiff was awarded damages against both the hospital and his G.P., the trial judge declaring that the defendants’ “expert witnesses” who had supported the inaction of the defendants had no logical basis to do so. The G.P. appealed on the grounds that the judge had no business to substitute her own view of prudent medical practice for that of the experts.

It was held, following *Bolitho*, that in applying the test of a “reasonable professional body of opinion”, as laid down in *Bolam*, a judge had to be satisfied that there was a logical base supporting such opinion.

The judge was not bound to accept expert evidence that had no logical basis. In this case, where the risk of haematoma was known and where there was equipment readily available to detect the true nature of the plaintiff’s injuries, the judge was correct in substituting her own opinion for that of the experts, and so to hold that the experts’ view that the defendants had acted responsibly and reasonably was not a sensible one.


P’s cervical smear test slide, taken as part of the national cervical smear test programme, was interpreted by the primary screener to be negative. P subsequently developed invasive adenocarcinoma of the cervix and, together with two other women, brought an action in negligence against EKHA. Based upon the evidence of five experts and the standard of care required by a competent screener at that time, EKHA was held liable as the smear slides exhibited abnormalities which a reasonably competent screener could not have deemed to be normal.

In reliance on the test set out in *Bolam*, EKHA appealed, contending that, whilst the judge had been correct to consider the screener’s interpretation of the slide, expert opinion held that a reasonably competent screener at that time could not have recognised the abnormalities.

Held, dismissing the appeal and applying *Bolitho*, that EKHA was liable for the negligent interpretation of the cervical smear test slides. Whilst the *Bolam* test was appropriate where the exercise of skill and judgment employed by the screener was being questioned, it had no application where a judge had to determine what the slides actually showed, even where that determination was the subject of conflicting medical evidence.

54.8 **Kingsberry v. Greater Manchester Strategic Health Authority (2006) BMLR 73**

Lee Kingsbury was born in 1985. He suffers from severe choreo-athetoid cerebral palsy, which was caused at the time of his birth by a prolonged period of bradycardia when the cord was tightened for 25 minutes around the fetal neck.

The bradycardia – or its consequences – could have been avoided if the attendant doctors had embarked upon a ‘trial by forceps’, a procedure whereby a forceps delivery is attempted, but with an option rapidly to perform a caesarean section instead. Kingsbury claimed that the doctors had been negligent not to adopt this procedure at the time of this birth.

Although the defendants led evidence from an eminent surgeon – Mr. I.Z. MacKenzie – that the omission to act in this way was reasonable in 1985, the judge preferred the more logical view of the experts for the claimants that the procedure should have been adopted even at the time of the birth, and held accordingly.

“It is to be noted that the *Bolitho* approach to the assessment of whether a body of opinion is a responsible one by reference to whether it withstands logical analysis has become a commonplace within the assessment of whether or not a doctor’s act or omission is or is not negligent (see *Marriott v. West Midlands HA [1999] Lloyds Law Rep.Med.23 at 27–28, and *Reynolds v. North Tyneside HA [2002] Lloyds Law Rep. Med. 459 at 463–464, 475*).
“Those cases are illustrative of the circumstances where it is said by a defendant that a practice exists reflecting a body of opinion at the material time which is found to be negligent by the court on the basis that it does not withstand logical analysis because there was a failure to guard against a relevant risk.” per McKinnon J. at para 11

54.9 The Bolitho test does not always favour the claimant.

**XYZ v. Warrington and Halton NHS Foundation Trust [2016] EWHC 331 (QB)**

A patient brought a negligence claim against a hospital trust on the basis that one of its orthopaedic surgeons – Mr. Shackleford – had wrongly decided to carry out spinal surgery on her.

The patient had been sexually abused as a young teenager and had serious psychological problems for which she was seeing a psychiatrist. She had also sustained a back injury during the abuse and suffered constant pain. She was referred to the hospital’s orthopaedic department and for three years the surgeon tried to manage her condition with pain relief, physiotherapy and eventually steroid injections. He was reluctant to offer spinal surgery because of her young age. The patient’s condition did not improve and in addition she developed leg pain. The surgeon became concerned that she was developing chronic pain syndrome as there was no physical explanation for some of her symptoms. He thought that he should continue to delay surgery until her mental health improved, as her psychiatric problems could adversely affect the outcome.

The patient's psychiatrist then wrote to the surgeon advising him not to delay as the patient's back pain was a constant reminder of the abuse she had suffered and was in itself making her mental health problems worse. The surgeon operated on her four months later. Her psychiatric illness subsequently worsened to the point where she lost the feeling in her legs and became a wheelchair user.

The patient contended that the problems associated with her psychological symptoms had been overriding and the surgeon had breached his duty of care by offering surgery without discussing it further with her psychiatrist or getting a second opinion.

Held: Claim dismissed. There had been no breach of duty of care in the patient’s case. Several factors supported the action that the surgeon had taken: the patient had had persistent and unresolved pain, the injections had failed to provide her with any long-standing relief and the findings of her MRI scans had supported surgical intervention. Regarding the patient’s psychiatric condition, the surgeon had been entitled to approach the psychiatrist’s correspondence as a simple, direct and explicit encouragement for the operation to occur.

Applying the Bolam test, a reasonable body of competent medical opinion would have taken her statement as a “green light” for surgery to be undertaken. The letter had not directly dealt with the patient's psychiatric symptoms as a counter-indication to surgery, but the surgeon had been entitled to assume that the psychiatrist would have communicated any observation that surgery would have a material impact on the patient's mental wellbeing alongside the message that he ought not to wait for her mental health to improve before operating. The letter was in reality positive in respect of undertaking surgery. In addition, the letter had offered the opportunity for further discussion but that did not suggest that it was required. The surgeon had been entitled to proceed without further discussion.

As to seeking a second opinion, a reasonable body of competent medical opinion would not have considered it necessary. The decision of whether to operate had been a clinical judgement that the surgeon had been best placed to make given his detailed and extensive knowledge of the patient's case, which stretched over a number of years. He had had regard to all the relevant clinical factors affecting the decision. The treatment that he had given the patient reflected a standard accepted as proper by a responsible body of medical opinion, and it had been reasonable and defensible bearing in mind the risks and benefits that were at stake in assessing its suitability. (Case summary as per the Westlaw Abstract.)

In reaching this decision, the court specifically applied the ruling in Bolitho.

“I am satisfied that the treatment which the claimant received from Mr Shackleford reflected a standard of treatment accepted as proper by a responsible body of medical opinion and, further, that the treatment was reasonable and defensible bearing in mind the risks and benefits which were at stake in assessing its suitability.” per Dove, J. at para 64
54.10 Although the *Bolitho* test permits the court to choose between competing expert opinions on the issue of whether the act or omission of an NHS trust's employee fell below the standard reasonably to be expected, the court cannot reject a particular expert's view unless persuaded that it was untenable in logic or otherwise flawed in some manner rendering its conclusion indefensible and impermissible.

**Muller v. King's College Hospital NHS Foundation Trust [2017] QB 987**

The claimant claimed damages against the defendant NHS trust in respect of its misdiagnosis of a malignant melanoma.

The claimant had a wound on the sole of his foot. In November 2011 a biopsy was taken. A histopathologist (Dr Goderya) diagnosed a non-malignant ulcer. The wound failed to heal and in July 2012 the claimant underwent surgery in the form of a narrow local excision. A further biopsy was taken, which revealed a malignant melanoma. In August 2012 the claimant underwent a wide local excision to remove the tumour and a sentinel lymph node biopsy in order to determine whether the cancer had spread. The biopsy revealed that the cancer had spread to the lymph nodes. The November 2011 biopsy was reviewed, and signs of malignant melanoma were found. The claimant underwent lymph node dissection and an operation to repair the tissue in his foot.

Four expert witnesses prepared reports. They disagreed on whether (1) G had breached her duty to exercise reasonable skill and care; (2) the cancer had metastasised by November 2011; (3) the claimant would have undergone a sentinel lymph node biopsy in January 2012 if G had diagnosed a malignant melanoma in November 2011.

In respect of breach of duty, the trust submitted that the standard *Bolam* test applied. It relied on the opinion of one of the experts (Dr Vipul Foria) that the misdiagnosis was not negligent, but could easily have been made by a histopathologist acting with reasonable skill and care.

The claimant submitted that *Bolam* did not provide the answer, and that *Penney v East Kent HA [2000] Lloyd's Rep. Med. 41* showed that the court had to determine the objective facts about what pathological features were there to be seen in the biopsy sample, and then decide whether, in the light of the differing experts' views, the misdiagnosis was one that must have been made without the use of reasonable skill and care.

**Held:** Judgment for claimant.

The authorities applying the conventional *Bolam* approach to negligence did not sufficiently differentiate between two types of case: the first was where a patient's condition was unknown, and what was alleged to be negligent was a doctor's diagnosis of the condition. The diagnosis was either right or wrong and, if wrong, either negligently so or not. The second type of case was where the nature of the patient's condition was known, and the alleged negligence consisted of a decision to treat the condition in a particular manner. That type of case was the paradigm for application of the *Bolam* principle. The judge in *Bolam* did not have in mind a “pure diagnosis” case such as the instant case when he gave his direction to the jury. However, even in a pure diagnosis case, the exercise of preferring one expert to another had to be viewed through the prism of the exception in *Bolitho (Deceased) v City and Hackney HA [1998] A.C. 232*, namely that the expert's opinion had to have a logical basis, and the expert had to have directed his mind to the question of comparative risks and benefits and have reached a defensible conclusion.

*Penney* was authority permitting the court to choose between competing expert opinions on the issue of whether the relevant act or omission fell below the standard reasonably to be expected. However, the court could not reject F's view unless persuaded that it was untenable in logic or otherwise flawed in some manner rendering its conclusion indefensible and impermissible, *Bolitho* applied. The experts and the parties agreed that signs of melanoma were present and visible in the sample examined by G. There had been a breach of duty by G. F's contrary conclusion was underpinned by applying the wrong legal test; as such, his reasoning and conclusion were not defensible and fell within the *Bolitho* exception.
55 LIMITS OF CONTRACTUAL NEGLIGENCE

55.1 Professional negligence is often contractual negligence, and to some extent the tortious Duty of Care owed by a professional might depend on the terms of the contract.

55.2 **Midland Bank v. Hett, Stubbs and Kemp** [1979] Ch 384

“The expression "my solicitor" is as meaningless as the expression "my tailor" or "my bookmaker" in establishing any general duty apart from that arising out of a particular matter in which his services are retained. The extent of his duties depends upon the terms and limits of (his) retainer and any duty of care to be implied must be related to what he is instructed to do. Now no doubt the duties owed by a solicitor to his client are high, in the sense that he holds himself out as practising a highly skilled and exacting profession, but I think that the court must beware of imposing upon solicitors – or upon professional men in other spheres – duties which go beyond the scope of what they are requested and undertake to do. It may be that a particularly meticulous and conscientious practitioner would, in his client's general interests, take it upon himself to pursue a line of inquiry beyond the strict limits comprehended by his instructions. But that is not the test. The test is what the reasonably competent practitioner would do having regard to the standards normally adopted in his profession." per Oliver J. at p.402

55.3 However, just as contractual terms may be implied, so may the Duty of Care in negligence.

**Glyn v. McGarel-Groves** [2006] EWCA Civ 998

Jane McGarel-Groves owned a champion dressage mare called Anna. Anna was placed with a top French rider – Michael Assouline – based in Sussex, and according to usual practice, a vet was retained to attend Anna as necessary. This vet was Philip Glyn. Anna developed problems with her left hind leg, and at the request of Assouline, was attended by a specialist French vet, Erik Grandiere. Jane McGarel-Groves insisted, however, that Glyn should be present at the treatment. Anna died of laminitis as a result of negligent treatment by Grandiere, which Glyn could have prevented if he had intervened. The issue was whether Glyn had a duty of care to prevent Grandiere from giving the horse treatment which might foreseeably be disastrous.

Glyn relied on Midland Bank v. Hett, Stubbs and Kemp to argue that he had been retained only to witness the treatment, not to supervise it, and therefore he had no duty – either contractual or tortious – to intervene. The Court of Appeal did not agree.

“*In my judgment, there is a great deal of force in Mr Lawrence’s submission that Mr Glyn was instructed to attend on the 18 May 2001 as Mrs. McGarel-Groves' vet not just as a bystander. It is a necessary implication of that instruction that he was to bring to bear his expert knowledge as a vet on what was occurring. He was the vet who had been treating Anna on a regular basis in the past including on occasions for orthopaedic conditions. He was the vet whom it was obvious would be treating Anna in the future.*” per Gage L.J. at para 37
PART 9: CAUSATION IN FACT

56 INTRODUCTION

56.1 Even if the claimant can prove that a duty of care was owed to him and has been breached, he will not succeed in negligence unless he can also prove that his loss was caused by the defendant's breach. Even proving a factual causal link may not be enough if the loss is considered to be too remote from the act or omission that constituted the breach.

56.2 The issue of causation is directly connected to that of quantum of damages. Damages in tort are ostensibly awarded to put the claimant in the position he would have been in had the tort never occurred. Thus it is necessary to know what injury has been 'caused' by the negligence before this can be assessed.

57 THE SCOPE OF THE DUTY

57.1 Even if the defendant has behaved unreasonably and caused an injury, he will not be liable in negligence if the purported breach did not relate to the duty he owed. This issue will arise particularly when it is clear that the defendant did owe some duty of care to the claimant, but argues that the claimant's expectations of that duty were too high or broad.

57.2 This relates to issues of causation because the defendant will claim that, although his action may have caused the claimant's injury, the action itself was not a breach of the duty of care, so there is in fact no causal link between the breach (if any) and the injury.

57.3 The leading authority on the issue of the scope of the duty is South Australia Asset Management Corp. v. York Montague Ltd. [1997] AC 191.

South Australia Asset Management Corp. v. York Montague Ltd. [1997] AC 191

SAAMCO involved three cases in which the defendants, as valuers, were required by the plaintiffs to value properties on the security of which they were considering advancing money on mortgage. In each case the defendants considerably overvalued the property. Loans were made which would not have been done if the plaintiffs had known the true value of the properties. The borrowers defaulted, the property market fell which increased the losses suffered by the plaintiffs.

The plaintiffs sued for damages, in negligence and breach of contract. The House of Lords held that the duty of the defendants in each case, which was the same in tort as in contract, had been to provide the plaintiffs with a correct valuation of the property. Where a person was under a duty to take reasonable care to provide information on which someone else would decide on a course of action he was, if negligent, responsible not for all the consequences of the course of action decided on but only for the foreseeable consequences of the information being wrong.

“Before one can consider the principle on which one should calculate the damages to which a plaintiff is entitled as compensation for loss, it is necessary to decide for what kind of loss he is entitled to compensation. A correct description of the loss for which the valuer is liable must precede any consideration of the measure of damages. For this purpose it is better to begin at the beginning and consider the lender's cause of action.

“A duty of care such as the valuer owes does not however exist in the abstract. A plaintiff who sues for breach of a duty imposed by the law (whether in contract or tort or under statute) must do more than prove that the defendant has failed to comply. He must show that the duty was owed to him and that it was a duty in respect of the kind of loss which he has suffered.

“The real question in this case is the kind of loss in respect of which the duty was owed.

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8 For a recent application of this case see Khan v. Meadows [2019] 4 WLR 26 (CA), paragraph 25.5 above.
“The scope of the duty, in the sense of the consequences for which the valuer is responsible, is that which the law regards as best giving effect to the express obligations assumed by the valuer: neither cutting them down so that the lender obtains less than he was reasonably entitled to expect, nor extending them so as to impose on the valuer a liability greater than he could reasonably have thought he was undertaking.” per Lord Hoffmann at p.211

The rationale behind the principle was identified by Lord Hoffman as follows:

“Rules which make the wrongdoer liable for all the consequences of his wrongful conduct are exceptional and need to be justified by some special policy. Normally the law limits liability to those consequences which are attributable to that which made the act wrongful. In the case of liability in negligence for providing inaccurate information, this would mean liability for the consequences of the information being inaccurate.

“I can illustrate the difference between the ordinary principle and that adopted by the Court of Appeal by an example. A mountaineer about to undertake a difficult climb is concerned about the fitness of his knee. He goes to a doctor who negligently makes a superficial examination and pronounces the knee fit. The climber goes on the expedition, which he would not have undertaken if the doctor had told him the true state of his knee. He suffers an injury which is an entirely foreseeable consequence of mountaineering but has nothing to do with his knee.

“On the Court of Appeal’s principle, the doctor is responsible for the injury suffered by the mountaineer because it is damage which would not have occurred if he had been given correct information about his knee. He would not have gone on the expedition and would have suffered no injury. On what I have suggested is the more usual principle, the doctor is not liable. The injury has not been caused by the doctor’s bad advice because it would have occurred even if the advice had been correct.”

“I think that one can to some extent generalise the principle upon which this response depends. It is that a person under a duty to take reasonable care to provide information on which someone else will decide upon a course of action is, if negligent, not generally regarded as responsible for all the consequences of that course of action. He is responsible only for the consequences of the information being wrong. A duty of care which imposes upon the informant responsibility for losses which would have occurred even if the information which he gave had been correct is not in my view fair and reasonable as between the parties. It is therefore inappropriate either as an implied term of a contract or as a tortious duty arising from the relationship between them.

“The principle thus stated distinguishes between a duty to provide information for the purpose of enabling someone else to decide upon a course of action and a duty to advise someone as to what course of action he should take. If the duty is to advise whether or not a course of action should be taken, the adviser must take reasonable care to consider all the potential consequences of that course of action. If he is negligent, he will therefore be responsible for all the foreseeable loss which is a consequence of that course of action having been taken. If his duty is only to supply information, he must take reasonable care to ensure that the information is correct and, if he is negligent, will be responsible for all the foreseeable consequences of the information being wrong.”
58 CAUSATION IN FACT: The But-For Test

58.1 The test most generally accepted by the courts is the so-called ‘but-for’ test. If the result would not have happened ‘but for’ the act in question, then that act is the cause. If it would have happened even without that act, then the act is not the cause.

58.2 The ‘but-for’ test does not settle the question of liability, but it does serve to eliminate cases without a cause before allocating legal responsibility.

58.3 Cork v. Kirby Maclean Ltd. [1952] 2 All ER 402 (CA)

The defendants employed Albert Cork as a painter. He did not tell them that he was epileptic and had been forbidden by his doctor from working at a height beyond ground level. Whilst working on a platform some twenty feet above ground he had a fit, fell to the ground and was killed. The defendants had been in breach of their statutory duty by providing a platform that was less than 34 inches wide and had no guard-rails or toe-boards. HELD: Both the workman and the employer were equally at fault.

“Subject to the question of remoteness, causation is a question of fact. If you can say that the damage would not have happened but for a particular fault, then that fault is in fact a cause of the damage; but if you can say that the damage would have happened just the same, fault or no fault, then the fault is not a cause of the damage. It often happens that each of the parties at fault can truly say to the other: “But for your fault, it would not have happened.” In such a case both faults are in fact causes of the damage.” per Denning L.J. at p.407

58.4 However, even at this ‘simple’ stage of the causation investigation the matter may be controversial, for the courts must adopt a pragmatic approach, rather than a philosophical, ‘chaos theory’ or ‘butterfly effect’ one.

58.5 Yorkshire Dale Steamship Co. Ltd. v. Minister of War Transport [1942] AC 691 (HL)

“Causation is to be understood as the man in the street, and not as either the scientist or the metaphysician, would understand it.” per Lord Wright at p.706

58.6 Chester v. Afshar [2005] 1 AC 134 (HL)

“It is now, I think, generally accepted that the "but for" test does not provide a comprehensive or exclusive test of causation in the law of tort. Sometimes, if rarely, it yields too restrictive an answer… More often, applied simply and mechanically, it gives too expansive an answer: "But for your negligent misdelivery of my luggage, I should not have had to defer my passage to New York and embark on SS Titanic". But, in the ordinary run of cases, satisfying the "but for" test is a necessary if not a sufficient condition of establishing causation.” per Lord Bingham (dissent) at para 8

58.7 St. George v. Home Office [2007] EWHC 2774

“It also has to be shown that the injury sustained was the result of his fault. This is like all issues of causation in our law of tort and is not to be approached in the manner of the academic or logician so much as on (a) robust and pragmatic basis.” per MacKay J. at para 52

58.8 The difficulties in assessing factual causation may be seen from some of the many cases that have addressed the issue.

58.9 Stapley v. Gypsum Mines Ltd. [1953] AC 663 (HL)

John Stapley was a miner in a gypsum mine. He and Dale, a fellow workman of equal status, were directed by Mr. Church, a foreman, to bring down the roof of a stope in which they were proposing to work since it was unsafe. After trying unsuccessfully to do this, they agreed to give up and went back to work. The roof fell on Stapley and killed him. HELD: (By a majority) Stapley and Dale (for whom the defendants were responsible) were both responsible for the accident as it was their joint decision to stop working on the roof. Dale’s fault was so much mixed up with the state of things brought about by Stapley that in the ordinary plain common sense of the business, it must be regarded as having contributed to the accident.
“To determine what caused an accident from the point of view of legal liability is a most difficult task. If there is any logical or scientific theory of causation, it is quite irrelevant in this connection... The question must be determined by applying common sense to the facts of each particular case.

“One may find that, as a matter of history, several people have been at fault and that if any one of them had acted properly the accident would not have happened, but that does not mean that the accident must be regarded as having been caused by the faults of all of them. One must discriminate between those faults which must be discarded as being too remote and those which must not. Sometimes it is proper to discard all but one and to regard that one as the sole cause, but in other cases it is proper to regard two or more as having jointly caused the accident. I doubt whether any test can be applied generally.” per Lord Reid

58.10 **McWilliams v. Sir William Arrol & Co. Ltd.** [1962] 1 WLR 295 (HL Scotland)

An experienced steel erector working on the erection of a steel lattice tower fell 70 feet and was killed. His widow claimed damages from his employer because her husband had not been provided with a safety belt. The trial judge found that even if a safety belt had been provided, the deceased would not have worn it. HELD: The onus was on the pursuer to establish the causal connection between the breach and the injury. As the overwhelming evidence showed that the workman would not have worn the belt, even if provided, his employers were not liable.

58.11 **Barnett v. Chelsea and Kensington Hospital Management Committee** [1969] 1 QB 428

William Barnett and two fellow night-watchmen presented themselves at the casualty department of a hospital, complaining to the nurse on duty that they had been vomiting for three hours after drinking tea. The nurse (who thought they were drunk) telephoned the medical casualty officer and told him about the men. He replied: “Well I am vomiting myself and I have not been drinking. Tell them to go home and go to bed and call in their own doctors.”

The nurse told them this and they left. About five hours later William Barnett died from poisoning by arsenic that had been introduced into the tea by an unknown murderer. His widow sued the hospital, claiming that his death resulted from their negligence in not diagnosing or treating his condition. HELD: Although the medical casualty officer was negligent in not seeing the deceased and in not treating him, he was not liable since Barnett would probably have died of the arsenic poisoning even if it had been diagnosed and treated. The plaintiff had failed to establish on the balance of probabilities that the defendant’s negligence had caused the death.

58.12 **Robinson v. Post Office** [1974] 2 All ER 737 (CA)

Keith Robinson worked as a jointer for the Post Office. He slipped as he was descending a ladder from one of the Post Office’s tower wagons, due to the ladder being oily from a leakage of a pump. He sustained a wound on his left shin, and later visited Dr. MacEwan who gave him an anti-tetanus serum injection (ATS). The normal procedure with ATS was to give a small amount and wait half an hour to see if there was any adverse reaction before giving the whole dose, but as the doctor knew his patient had received the serum in the past, and as some time had elapsed since the wound was sustained, he only waited a minute for a reaction. Nine days later, Robinson showed signs of a reaction, and two days after that was admitted to hospital suffering from encephalitis, which caused him brain damage. He sued the Post Office and the doctor.

HEL: The doctor was not negligent in deciding to administer ATS, and although he was negligent in failing properly to administer the test dose, he was not liable, as it would have made no difference in the circumstances (since the actual reaction took more than half an hour.) The Post Office, however, were liable. It was foreseeable that if oil were negligently allowed to escape onto a ladder, a workman could slip and injure himself and require medical treatment that might go wrong. It was irrelevant that the results of the treatment were more serious than they could have foreseen, as they were bound to take the plaintiff as they found him. (See Egg-Shell Skull Rule below)

Woolworths were tenants of a retail store in which they laid floor panels. A week later, the floor tiles had to be taken up and relaid because water had got under them and affected the adhesive. Woolworths claimed that the water had come in from the adjoining store where HBM were doing some redevelopment work, as during a heavy rainstorm the adjoining shop had flooded and water had come through the internal adjoining walls which were not properly sealed. Although the court held that this failure to seal the walls was a breach of duty, HBM were not liable for the floor because even more water was pouring into Woolworths from outside and it was more likely that this was the cause of the floor tiles rising.

Garcia v. East Lancashire Hospitals NHS Trust [2006] EWHC 2062

Paula Garcia became pregnant for the first time at 27 years old. The baby had still not been born 12 days after term when she was delivered by Caesarean section. It was clear that at some stage whilst in the womb the baby had suffered a stroke which would leave her with long-term injuries including severe left hemiparesis, learning difficulties and epilepsy.

The NHS Trust admitted that – on the basis of the CTG traces which were performed at various stages before the birth – the baby should have been delivered over 26 hours before she was, and that it was in breach of its duty not to have performed the Caesarean earlier.

However, the Trust escaped liability because the claimant could not prove, on the balance of probabilities, that the injuries were caused other than by the stroke, nor that the stroke had occurred within the crucial 26-hour period, rather than earlier.

CAUSATION IN FACT: Unfortunate Coincidences

The defendant may not be liable if his breach of duty has only 'caused' the injury by placing the claimant in the wrong place at the wrong time.

Chester v. Afshar [2005] 1 AC 134 (HL)

"A factor which secures the presence of the plaintiff at the place where and at the time when he or she is injured is not causally connected with the injury, unless the risk of the accident occurring at that time was greater. 'When a traveller was delayed through a railway company's fault and a lamp exploded in the hotel where she was compelled to spend the night (the well-known case of Central of Georgia Railway Co v Price (1898)) that was simply an unfortunate coincidence. Similarly, if a taxi-driver drives too fast and the cab is hit by a falling tree, injuring the passenger, it is sheer coincidence. The driver might equally well have avoided the tree by driving too fast, and the passenger might have been injured if the driver was observing the speed limit."

per Lord Walker at para 94

However, that argument will be defeated when there is clear connection between the breach and the cause of the injury, though there may be something of a fine line between coincidence and causation.

Howell-Williams v. Richards Brothers, Lesley Wood [2008] EWCA Civ 1108

Emily Howell-Williams, aged 5, was being taken to a child-minder after school in a mini-bus operated by Richards. The bus stopped on the other side of the road from the child-minder's house, and Emily and some other children got out and she ran across the road. She was struck by a car being driven by Lesley Wood.

The driver of the bus Mr. Rose, had been negligent in various ways: he had stopped the bus on the far side of the road (when the usual practice was to pull up to the house); he had not waited for the childminder, who was at the door, to cross over to collect the children; he had not kept the children on the bus although he could see Wood's car approaching. Wood (who was travelling at 40 mph) was held to be negligent in not slowing down when approaching a stationary school bus. The defendants were held to be jointly liable, with 2/3 apportionment on the driver.
Woods appealed on the grounds that causation had not been established against her. She claimed that the situation of danger had been entirely created by Rose, and that even had she been travelling more slowly, she might still have hit Emily. The fact that she and Emily happened to be crossing the same spot at the same time was just an unfortunate coincidence, of the sort Lord Walker had said in Chester v. Afshar was legally irrelevant. HELD: This case was clearly distinguishable from the example given by Lord Walker, and she was liable as the trial judge had found.

"The contention that these matters are in some way legally irrelevant is in my view wholly without foundation. The fact that the accident would have been avoided had Mrs. Wood, in compliance with her duty of care, driven at a very much lower speed is legally relevant for the simple reason that the duty was to drive at a very much lower speed and the breach of duty lay in the failure to do so. The accident was plainly not the result of sheer coincidence of the kind referred to by Lord Walker in Chester v. Afshar, but was causally related (and directly so related) to the breach of duty and the failure to slow down when Mrs. Wood should have done that is to say when she saw or should have seen the bus." per Richards L.J. at para 31

59.3 AB v. Main [2015] EWHC 3183 (QB)

In a similar case to Howell-Williams v. Richards Brothers, Lesley Wood, a driver was held to be liable when she ran over a young boy who had been playing at the side of the road and ran into her path. Although she had not been speeding, she should have kept the child under proper observation and have either slowed down or sounded her horn in case he moved.

"I do accept that if the defendant had decided to take her foot off the accelerator, so as to reduce her speed to 25mph, to cover the brakes, to keep the boys under close observation and to move a little into the centre of the road, there would have been no need to sound the horn as well. That would have been unnecessary and a counsel of perfection. However I am satisfied that she needed to do one or the other, and that doing neither was negligent.

"I repeat that I am satisfied that to find the defendant negligent in these respects is not to impose the standard of an ideal driver, with the benefit of hindsight, upon the defendant. I entirely accept that she was driving at a reasonable speed as she approached the boys, that she was aware of them, and that she genuinely believed she was taking reasonable precautions. However I am satisfied that she made a series of errors of judgment, small in themselves, which individually and cumulatively can and should properly be categorised as amounting to negligence, in that: (a) she failed to appreciate the true extent of the risk posed by these young boys playing by the road as she approached them; (b) she failed to keep a close lookout on the boys as she came closer, thus failed to see or appreciate the claimant acting in a way which ought to have made her even more aware of the risk that he might do something foolish, including suddenly moving out into the road; (c) she failed to appreciate the real risk that even at the reasonable speed she was travelling, if the claimant did suddenly move out into the road in front of her she would have insufficient time to react, and move her foot from the accelerator to the brake and then come to a halt or to steer her car in some way so as to avoid a collision; (d) she failed to take the sensible precautions of covering her brakes so as to allow the car to reduce speed to 25mph and buy herself some more vital reaction time, whilst at the same time keeping the boys under closer observation and moving around 0.5m towards the centre of the road, or alternatively to sound her horn to ensure that the boys were aware of her presence.

"Was the defendant's negligence causative of the accident and/or the serious brain injuries sustained by the claimant?"

"I remind myself of the importance of not making precise findings which are not warranted by the evidence, of not elevating the evidence as to running speeds and times, reaction times and stopping times into rigid mathematical formulae, and of the need to be satisfied that the claimant has discharged the burden of proof in relation to the reasonable range of potential scenarios.

"I am satisfied that the defendant, by failing to take her foot of the accelerator, failed to take the opportunity to reduce her speed from 30mph or just under to what I am satisfied would have been no more than 25mph at the point the claimant ran out in front of her.

"I am satisfied that the defendant, by failing to keep the claimant under close observation as she approached closer to him, failed to see him starting to move off towards the road. As a result she missed the benefit of some vital extra reaction time in which to undertake what I am satisfied would
have been an instinctive reaction to apply her brakes in an emergency stopping manoeuvre and to swerve further to her right away from the claimant. Her failure to cover her brakes caused her to miss the benefit of some further vital saved action time at the point when she should have seen the claimant starting to move off towards the road. I am also satisfied that the defendant, by failing to move at least 0.5m to her right, caused her to miss the benefit of some further vital saved reaction and action time to act in the same way before the point at which the claimant came into the path of her car.

“Even though I cannot conclude that the effect of the above was that the collision would undoubtedly have been entirely avoided, I can be and am satisfied that the impact would have been at a speed of less than 20mph. I am therefore satisfied that the claimant would not have suffered the serious brain injury which he did in the collision if the defendant had not acted negligently.”

per Judge Stephen Davies paras 78–83

60 CAUSATION IN FACT: Proving Causation

60.1 The general civil standard of proof is “on the balance of probabilities”, which means that the claimant must show that it was more likely than not (or at least 51% certain) that the breach complained of has caused the injury.

60.2 Some cases have relaxed this rule to counter the difficulties that may face some worthy claimants in proving causation in fact.

61 CAUSATION IN FACT: Significant Increase in Risk

61.1 Where an employee suffers from an industrial illness it may be enough to show that his employer has significantly increased the risk of his contracting such an illness, even if the claimant cannot specifically show that the employer caused it.

61.2 McGhee v. National Coal Board [1972] 1 WLR 1 (HL)

Full damages were awarded to a worker who contracted dermatitis from abrasive brick dust at work. He claimed that this was the fault of his employers for not providing on-site washing facilities, thus forcing him to cycle home each day caked in brick dust. He won, despite being unable to establish any actual connection between the lack of washing facilities and his skin complaint.

All he could prove was that being caked with brick dust materially added to the risk of dermatitis, but the House of Lords equated that material increase in risk of contracting the disease with a material contribution to its occurrence.

61.3 Although this case was criticised by Lord Bridge, amongst others, as laying down no principle of law, it was adopted by the House of Lords in Fairchild v. Glenhaven Funeral Services [2002] as a precedent to permit a relaxation of the ‘but for’ rule in certain limited circumstances.

61.4 Fairchild v. Glenhaven Funeral Services [2003] 1 AC 32 (HL)

The claimant's husband, Arthur, developed fatal mesothelioma after exposure to asbestos during the course of his employment. Mesothelioma is a malignant tumour of the pleura, the membrane that lines the chest cavity. It differs from asbestosis in that it is not a cumulative disease. It is triggered off by a particular incident when a fibre of asbestos or other dust damages a mesothelial cell. As various other companies, which had also exposed him to asbestos dust, had employed the husband the widow was unable to show, on the balance of probabilities, that it had been the particular exposure during his employment with the defendants that had been the cause of his illness. The Court of Appeal therefore held that she had no claim for damages (on behalf of his estate).

The House of Lords overturned the Court of Appeal to permit the claim to succeed. They said that there are certain circumstances where justice requires a relaxation of the ‘but for’ rule to cater for claimants who are otherwise prevented from proving their case simply because of the deficiencies of medical science in pinpointing the specific rogue amongst several who was the actual cause of their illness.

It was enough, in this case, that the defendants had materially increased the risk of Fairchild contracting the disease, even though in fact they could not technically be proved to have actually caused it. That this will be a narrow doctrine is clear from the criteria laid down by Lord Hoffman.
“What are the significant features of the present case? First, we are dealing with a duty specifically intended to protect employees against being unnecessarily exposed to the risk of (among other things) a particular disease. Secondly, the duty is one intended to create a civil right to compensation for injury relevantly connected with its breach. Thirdly, it is established that the greater the exposure to asbestos, the greater the risk of contracting the disease. Fourthly, except in the case in which there has been only one significant exposure to asbestos, medical science cannot prove whose asbestos is more likely than not to have produced the cell mutation which caused the disease. Filthy, the employee has contracted the disease against which he should have been protected.” per Lord Hoffman at para 61

61.5 Where the Fairchild doctrine does apply, a relatively small exposure to asbestos might amount to a ‘material increase in risk.’

Rolls Royce Industrial Power (India) Ltd. v. Cox [2007] EWCA Civ 1189

Derek Cox, a welder, died from mesothelioma caused by exposure to asbestos. He had worked for various employers over a period of 24 years where he might have contracted the disease, but the only one still solvent or identifiable was the defendant. Even though he had worked for the defendant company for less than a year – and it was unclear how long, if at all, he had been exposed to asbestos during that period – the court awarded him £100,000 in damages.

The defendant appealed on the grounds that the trial judge had not properly determined the length of the exposure to asbestos, if any, caused to the claimant during his short employment with them.

The Court of Appeal upheld the judgment, finding that such precision of facts was not required to apply the doctrine in Fairchild.

“For the claim to succeed, the judge needed to be satisfied that the extent and duration of the exposure had constituted a material increase in the risk to the Deceased of contracting mesothelioma. No specific measurement of the duration was necessary and the Recorder was right to resist the invitation to fix one. Exposure that would fall within the de minimis formula would be insufficient. However, the type of contract work undertaken by International Combustion at power stations and the role of the Deceased in that work, coupled with his generic description of conditions in power stations at the time, undoubtedly justified the finding that this was not a de minimis case. Mr Limb frankly conceded that to work in such conditions at a particular location for a week would not be de minimis. The probability is that the Deceased worked for International Combustion in such circumstances for at least a week and, notwithstanding the reference of the Recorder to “at least four months”, his finding that “there is no reason to suppose he was working there for other than a significant period” is, in my judgment, unassailable.” per Maurice Kay L.J. at paras 21

61.6 There is a duty to warn employees of potential risks and to give them advice about minimizing them.

Rice v. Secretary of State for Business Enterprise and Regulatory Reform [2008] EWHC 3216 (QB)

Former dock workers contracted an asbestos related illness caused by exposure to transient dust whilst unloading cargoes. It was held that their employer was in breach of a duty of care not to warn them about the dangers of such dust and to advise them to wear respirators whilst exposed to it.

61.7 The Fairchild exception is not restricted to cases of mesothelioma.

61.8 International Energy Group Ltd. v. Zurich Insurance plc (Association of British Insurers intervening) [2016] AC 509

“To many people, that avowedly policy-based decision, which is applicable to any disease which has the unusual features of mesothelioma seemed, and still seems, not only humane, but obviously right.” per Lord Neuberger at para 191

61.9 Heneghan v. Manchester Dry Docks Ltd. [2016] I WLR 2036 (CA)

Leo Heneghan died from lung cancer, having been exposed to asbestos fibres and dust during his employment with six different firms. The experts agreed that, on the balance of probabilities, he would not have developed lung cancer if he had not been exposed to asbestos. It was agreed that his exposure to asbestos over the course of his working life could be quantified and that the respondents were responsible for 35.2% of the whole exposure.
It was also agreed that biological evidence could not establish which, if any, of the exposures had triggered the cell changes in his body which led to him contracting the disease.

It was held that the principle established in *Fairchild* in relation to mesothelioma should apply equally to lung cancer if the same issues arose of an employed increasing the risk to the employee without the victim being able to identify the exact point when the illness was contracted.

**Limitations on the *Fairchild* doctrine**

61.10 In *Gregg v. Scott* [2005] 2 AC 176, a case of clinical negligence, the House of Lords considered that the approach taken in *Fairchild* applied only to the most narrowly defined circumstances and did not represent a general relaxation of the principles of causation.

61.11 The doctrine has been unsuccessfully pleaded in several cases.

**Clough v. First Choice Holidays and Flights Ltd.** [2006] EWCA Civ 15

Michael Clough, aged 26, was on holiday at Las Lomas Apartments in Lanzarote. There were two adjoining circular pools in the complex – one for swimming and one for paddling – laid out in a figure of eight, with a 64” wall between them.

The appellant, whilst drunk, walked along the wall and fell into the 18” paddling pool and broke his neck. The wall was not painted with non-slip paint, which would have made it safer, but the judge concluded that Clough would probably have fallen into the paddling pool in any event, so causation was not established. The appellant of paint on the wall increased the risk of a fall, the claimant should succeed under the *Fairchild v. Glenhaven* test.

It was held that *Fairchild* did not alter the ‘trite’ law that factual causation must be proved by the ‘but for’ test. It applied only to exceptional circumstances, of which this was not one.

“The authorities to which Mr Burton drew attention establish that the “but for” test, applied in its full rigour, should no longer be treated as a single, invariable test applicable to causation issues, in whatever circumstances they may arise. The question in the present appeal is whether *Fairchild* and the series of decisions developing the law of which it represented the culmination (subject of course to subsequent developments) have any application here. In my judgment, in agreement with the judge, they do not.”

“On any view, it would be absurd to describe this unfortunate accident as exceptional. Accidents like this happen all too frequently, and even though negligence by an identified tortfeasor is established, the question still remains whether the negligence caused the claimant's injuries. A successful claim for damages for personal injuries consequent on negligence or breach of duty requires the court to be satisfied that the injuries were indeed consequent on the defendant's negligence. Even if it may have some application in different situations, the distinction sought to be drawn by Mr Burton between material contribution to damage and material contribution to the risk of damage has no application to cases where the claimant's injuries arose from a single incident.

“In this Court any modification of the principles relating to causation in the context of claims for damages for personal injury must be approached with the greatest caution. Certainly, however the law of causation may develop, save in the House of Lords, it cannot develop in a way which revives or is dependent on the approach adopted by Mustill L.J. in *Wilsher*, and subsequently twice rejected in the House of Lords. That route is closed. In reality, for the purposes of cases like this, trite law is unchanged.” per the President of the Queen’s Bench Division at para 43

61.12 Yet another limitation to the *Fairchild* exception was revealed in the Scottish case of *Hennon v. Cape Building Products Ltd.* [2006].

**Hennon v. Cape Building Products Ltd.** [2006] Rep LR 71

Cape Building Products manufactured asbestos panels, which they supplied to Hennon’s employer. Hennon was instructed by his employer to cut these panels, which thus exposed him to asbestos dust, which settled on his skin, hair and clothing.

Hennon claimed that this materially increased the risk of his wife contracting mesothelioma, which she did.
It was held the claim against Cape must fail, not only on the causation issue, but also because, on a straight application of *Donoghue v. Stevenson*, there was no duty of care owed by Cape to this unforeseeable victim.

**Apportionment of Damages under the Fairchild doctrine**

61.13 **Barker v. Corus UK Ltd.** [2006] 2 AC 752 (HL)

Three cases were heard together by the House of Lords. In each case, an employee had died of mesothelioma having been exposed to asbestos by more than one employer. In the case of Vernon Barker, he had also exposed himself to asbestos when self-employed. The trial judge (and Court of Appeal) said that each of the employers in question were jointly and severally liable, so that the employees (or, rather, their estates) could sue any one of the employers for the whole amount. (Barker’s damages were reduced by 20% for Contributory Negligence.)

Two issues were appealed to the House of Lords.

i) **If the claimant has been exposed to asbestos partly by the tort of the defendant, and partly by a non-tortious action (such as with Barker), does that prevent the claim?**

ii) **Where more than one person has exposed the claimant to the material risk of contracting the illness, are they each liable for the whole amount of damages?**

Lord Hoffman gave a detailed account of the doctrine in *Fairchild*, noting the need to keep it a limited one.

“My Lords, the opinions of all of your Lordships who heard *Fairchild* expressed concern, in varying degrees, that the new exception should not be allowed to swallow up the rule. It is only natural that, the dyke having been breached, the pressure of a sea of claimants should try to enlarge the gap.”

per Lord Hoffman at para 5

The answer to the first question was that there was nothing in the doctrine to prevent it operating when the claimant has been exposed to the material risk both tortiously and non-tortiously.

“It should not therefore matter whether the person who caused the non-tortious exposure happened also to have caused a tortious exposure. The purpose of the *Fairchild* exception is to provide a cause of action against a defendant who has materially increased the risk that the claimant will suffer damage and may have caused that damage, but cannot be proved to have done so because it is impossible to show, on a balance of probability, that some other exposure to the same risk may not have caused it instead. For this purpose, it should be irrelevant whether the other exposure was tortious or non-tortious, by natural causes or human agency or by the claimant himself. These distinctions may be relevant to whether and to whom responsibility can also be attributed, but from the point of view of satisfying the requirement of a sufficient causal link between the defendant’s conduct and the claimant’s injury, they should not matter.”

per Lord Hoffman at para 17

However, it was crucial that the various exposures to material risk should all be of the same kind: e.g. repeated exposures to asbestos dust.

“I do not think that the exception applies when the claimant suffers lung cancer which may have been caused by exposure to asbestos or some other carcinogenic matter but may also have been caused by smoking and it cannot be proved which is more likely to have been the causative agent.”

per Lord Hoffman at para 24

On the second question of apportionment, the House of Lords held that in the interests of fairness to the defendant, liability should be apportioned between the possible defendants in proportion to the amount of exposure for which they were responsible. Thus, a claimant’s solvent former employers should not have to make up the money due form the insolvent ones.

“In my opinion, the attribution of liability according to the relative degree of contribution to the chance of the disease being contracted would smooth the roughness of the justice which a rule of joint and several liability creates. The defendant was a wrongdoer, it is true, and should not be allowed to escape liability altogether, but he should not be liable for more than the damage which he caused and, since this is a case in which science can deal only in probabilities, the law should accept that position and attribute liability according to probabilities.
"The justification for the joint and several liability rule is that if you caused harm, there is no reason why your liability should be reduced because someone else also caused the same harm. But when liability is exceptionally imposed because you may have caused harm, the same considerations do not apply and fairness suggests that if more than one person may have been responsible, liability should be divided according to the probability that one or other caused the harm."

per Lord Hoffman at para 43

However...

The Compensation Act 2006

The ruling in Barker v. Corus UK Ltd. [2006] on apportionment caused grave concern to the Trade Unions, who viewed it as essentially removing the force of the Fairchild doctrine and enabling employers substantially to escape liability. After a strong petition to the government, the ruling was swiftly overturned by statute.

The Compensation Act 2006 enables victims of industrial mesothelioma (and only that disease) to claim full damages from any of the employers who exposed them to asbestos, provided that the actual culprit responsible cannot be discerned. An employer who is thus ordered to pay full damages may then seek a contribution from other culpable employers.

THE COMPENSATION ACT 2006

3 Mesothelioma: damages

(1) This section applies where—
   (a) a person (“the responsible person”) has negligently or in breach of statutory duty caused or permitted another person (“the victim”) to be exposed to asbestos,
   (b) the victim has contracted mesothelioma as a result of exposure to asbestos,
   (c) because of the nature of mesothelioma and the state of medical science, it is not possible to determine with certainty whether it was the exposure mentioned in paragraph (a) or another exposure which caused the victim to become ill, and
   (d) the responsible person is liable in tort, by virtue of the exposure mentioned in paragraph (a), in connection with damage caused to the victim by the disease (whether by reason of having materially increased a risk or for any other reason).

(2) The responsible person shall be liable—
   (a) in respect of the whole of the damage caused to the victim by the disease (irrespective of whether the victim was also exposed to asbestos—
      (i) other than by the responsible person, whether or not in circumstances in which another person has liability in tort, or
      (ii) by the responsible person in circumstances in which he has no liability in tort), and
   (b) jointly and severally with any other responsible person.

(3) Subsection (2) does not prevent—
   (a) one responsible person from claiming a contribution from another, or
   (b) a finding of contributory negligence.

(4) In determining the extent of contributions of different responsible persons in accordance with subsection (3)(a), a court shall have regard to the relative lengths of the periods of exposure for which each was responsible; but this subsection shall not apply—
   (a) if or to the extent that responsible persons agree to apportion responsibility amongst themselves on some other basis, or
   (b) if or to the extent that the court thinks that another basis for determining contributions is more appropriate in the circumstances of a particular case.

(5) In subsection (1) the reference to causing or permitting a person to be exposed to asbestos includes a reference to failing to protect a person from exposure to asbestos.

The Compensation Act 2006 only applies to mesothelioma. If the claimant has contracted another illness – even if asbestos related – damages may still be apportioned between various defendants if it is clear how much exposure each defendant caused.
Heneghan v. Manchester Dry Docks Ltd. [2016] I WLR 2036 (CA)

The claimant (who had lung cancer rather than mesothelioma) was awarded damages against each defendant only in proportion to the increase in risk for which it was responsible. As several of the earlier employers who had contributed to the risk had not been joined as defendants, the award was for £61,600 rather than full damages of £175,000.

62 CAUSATION IN FACT: Non-Disclosure of Risk

62.1 In Chester v. Afshar the House of Lords again seemed to make a decision on causation in favour of the claimant based entirely on policy, despite a failure of the conventional test.

Chester v. Afshar [2005] 1 AC 134 (HL)

Mr. Afshar, a neurosurgeon, negligently failed to tell his patient of the 1%–2% risk that a proposed operation would leave her with cauda equina syndrome. However, even if she had been properly informed of the risk, the patient admitted that there was a good chance she would have undergone the operation anyway, albeit at a later date, with the same risk. On that basis, applying conventional principles, the failure to warn the patient had not increased the risk of her being injured eventually, so factual causation was not proved on the normal test.

Despite this, the House of Lords found for the patient, since otherwise she would be left with no remedy, simply because she could not honestly say that she would never have consented to such an operation. The court refused to discriminate between patients who had made their minds up about their future conduct and those who had not.

“Questions about causation which lie beyond the simple issue as to whether the harm could have occurred in the absence of the wrongful conduct tend to be issues of legal policy in disguise. They are better answered by asking whether, all things considered, the defendant should be held liable for the harm which ensued, or, on another view, whether the harm was foreseeable as within the risk, or was within the scope of the rule violated by the defendant. I would prefer to approach the issue which has arisen here as raising an issue of legal policy which a judge must decide. It is whether, in the unusual circumstances of this case, justice requires the normal approach to causation to be modified.

“I start with the proposition that the law which imposed the duty to warn on the doctor has at its heart the right of the patient to make an informed choice as to whether, and if so when and by whom, to be operated on. Patients may have, and are entitled to have, different views about these matters. All sorts of factors may be at work here – the patient's hopes and fears and personal circumstances, the nature of the condition that has to be treated and, above all, the patient's own views about whether the risk is worth running for the benefits that may come if the operation is carried out. For some the choice may be easy – simply to agree to or to decline the operation. But for many the choice will be a difficult one, requiring time to think, to take advice and to weigh up the alternatives. The duty is owed as much to the patient who, if warned, would find the decision difficult as to the patient who would find it simple and could give a clear answer to the doctor one way or the other immediately.

“To leave the patient who would find the decision difficult without a remedy, as the normal approach to causation would indicate, would render the duty useless in the cases where it may be needed most. This would discriminate against those who cannot honestly say that they would have declined the operation once and for all if they had been warned. I would find that result unacceptable.

“The function of the law is to enable rights to be vindicated and to provide remedies when duties have been breached. Unless this is done the duty is a hollow one, stripped of all practical force and devoid of all content. It will have lost its ability to protect the patient and thus to fulfil the only purpose which brought it into existence. On policy grounds therefore I would hold that the test of causation is satisfied in this case. The injury was intimately involved with the duty to warn. The duty was owed by the doctor who performed the surgery that Miss Chester consented to. It was the product of the very risk that she should have been warned about when she gave her consent. So I would hold that it can be regarded as having been caused, in the legal sense, by the breach of that duty.”

per Lord Hope at paras 85–87
62.2 Chester v. Afshar was recently considered by the Court of Appeal, who pointed out that it allows a modification of the usual ‘but for’ test in exceptional cases, but does not entirely negate it.

**Duce v. Worcestershire Acute Hospitals NHS Trust** [2018] EWCA Civ 1307

In 2008, Gale Marie Duce underwent a total abdominal hysterectomy and bilateral salpingo-oophorectomy after suffering from heavy and painful periods. Following the surgery, she suffered neuropathic post-operative pain and claimed that the trust had negligently failed to warn her of the risk of developing chronic post-surgical pain (CPSP). However, the judge found that the trust had not been negligent and, in any event, causation had not been established, as she would have had the operation even if warned of the post-operative risks.

Duce appealed on the grounds, *inter alia*, that the court had failed to apply the test of causation set out in *Chester v. Afshar*, and in particular that the claimant in a consent case did not have to establish the ‘but for’ test was satisfied at all. It was held that this was a misinterpretation of the decision in *Chester v. Afshar* and her appeal was dismissed.

“69 I accordingly agree with the respondent that the majority decision in Chester does not negate the requirement for a claimant to demonstrate a “but for” causative effect of the breach of duty, as that requirement was interpreted by the majority, and specifically that the operation would have not have taken place when it did.

“70 It is also to be noted that in the recent case of Correia v University Hospital of North Staffordshire NHS Trust [2017] EWCA Civ 356 the court emphasised at [28] that if “the exceptional principle of causation” established by Chester is to be relied upon it is necessary to plead and prove that, if warned of the risk, the claimant would have deferred the operation.” per Hamblen L.J.

62.3 Chester v. Afshar was distinguished in a case involving negligent financial advice.

**Beary v. Pall Mall Investments** [2005] EWCA Civ 415

Beary consulted an independent financial adviser in respect of methods of dealing with his pension fund. He was advised to transfer his share of assets in his self-administered pension scheme into a broker-managed fund. The advisers negligently did not suggest the alternative possibility of buying an immediate annuity, which, in retrospect, would have been more profitable for Beary. The trial judge held that although the defendants should have told Beary about the annuity, it was not proven that he would have bought one anyway, as he would have followed their advice about the broker-managed fund instead. Thus, causation was not established.

Beary appealed on the grounds that, as in *Chester v. Afshar*, it was not necessary for him to prove that he would actually have changed his course of action if properly advised. The Court of Appeal held that it WAS necessary for him to prove this. The decision in *Chester v. Afshar* applies only to exceptional situations, and claims for negligent financial advice do not fall into that category.

*cf. Safia Deriche v. Ealing Hospital NHS Trust* [2003] EWHC 3104 in which a woman claimed that she was not given adequate warning that having chicken pox during pregnancy might cause a small risk of congenital malformation in the baby. She failed in her action because she could not prove that she would have terminated the pregnancy even if she had been given an adequate warning.
CAUSATION IN FACT: Loss of Chance

A particular difficulty arises where the claimant is complaining not of a direct injury caused by the breach, but rather of the loss of a chance, be it the chance of a better prognosis of an illness, or the chance to make a profit from a business venture.

In general, the court will apply the usual 51% rule to such cases, so that if a claimant can only display a less-than-51% chance that the breach has spoilt his future prospects, he will not recover any damages at all.

**Hotson v. East Berkshire Area Health Authority [1987] AC 750 (HL)**

Stephen Hotson, aged 13, fell out of a tree and injured his hip. He was taken to St Luke’s Hospital, Maidenhead, but his injury was not correctly diagnosed for five days. The injury caused him to develop avascular necrosis, so that by the time he was 20, he was permanently disabled.

Had he been properly treated at the hospital, there was a 25% chance that he would have recovered from the fall. On that basis, the trial judge awarded him 25% of the full damages he would otherwise have got. However, the House of Lords reversed that decision and awarded him nothing. If there was only a 25% chance that the negligent treatment would have made any difference, the claimant had not proven on the requisite 51% balance of probabilities that the defendant caused his disability at all.

By the same token, however, if the claimant had established only a 51% probability that the negligence caused his disability, he would have been entitled to full damages, with no discount taken for the other 49%.

However, the courts have not been consistent with this approach, especially in cases involving the loss of a business opportunity.

**Allied Maples Group Ltd. v. Simmons & Simmons [1995] 1 WLR 1602 (CA)**

The claimants bought a business and engaged the defendant solicitors to draft the contracts of sale. The defendants negligently omitted a clause that would have protected the claimants against certain liabilities towards the vendors.

The solicitors argued that in order to establish causation, the claimant would have to show that there was a 51% chance that had the omission been pointed out before the contracts were agreed, the sellers would have accepted an amendment to give the purchasers the desired protection.

A majority of the Court of Appeal held that where the claimant’s loss depended on the hypothetical action of a third party, the claimant need only show that there was a real, rather than purely speculative, chance that the third party would have so acted. It was not necessary to establish a 51% likelihood.

**Allied Maples was considered in Farrukh v. Irwin Mitchell [2006]**

**Farrukh v. Irwin Mitchell [2006] EWHC 1541**

Shehzad Farrukh, a Chartered Accountant, set out to obtain funds for the acquisition and future development of a new company named Innovative Web Technologies Ltd. There were many complex legal technicalities, and Farrukh took advice from the defendant solicitors. The firm gave him negligent advice regarding the legal effect of a transfer of the shares through a trust deed, and the scheme failed.

The court held that had the firm given Farrukh correct advice on how to proceed there was only a 25% probability that he would have gone ahead with the scheme anyway, as to comply with the legal requirements would have involved him in a massive financial risk. Therefore, the firm could not be held to have caused his loss.

The court also considered what the situation would have been if Farrukh had successfully shown that he probably would have gone ahead with the scheme. The question would then be whether the scheme would have succeeded.
This was an issue of ‘loss of chance’, and in accordance with Allied Maples, the test was not 51% probability, but simply whether the claimant had a “real and substantial rather than a merely negligible prospect of success.” (Justin Fenwick QC at para 130)

In fact, the court held that there was no real prospect that the scheme would have succeeded, so the most they would have awarded in damages was a nominal £2.

The application of the principles in Hotson and Allied Maples is modified in cases involving the loss of a chance to litigate.

**Dixon v. Clement Jones Solicitors [2004] EWCA Civ 1005**

Patricia Dixon (aged 60) and her friend Mr Mooney had a scheme to open a convenience store in Moggs Head, a village in Hampshire. They approached Barclays Bank for a £200,000 loan, and were told – in the nicest possible way – that the idea stank and they were bound to lose all their money if they proceeded with the scheme. Undeterred, Mrs. Dixon engaged a firm of accountants – The Dyer Partnership – to give her financial advice about the venture. Dyer negligently failed to point out that the idea stank, and Mrs. Dixon took out a mortgage with National Home Loans to finance the venture.

When the business sank without a trace – leaving Mrs. Dixon homeless – she decided to sue Dyer, and engaged Clement Jones to act for her. They negligently failed to serve the claim on time, so her case was struck out without being heard. She therefore sued the solicitors!

The solicitors claimed in their defence that even if Dixon had sued the accountants, she would probably have lost on the basis of causation: They reckoned that the court would have held that as she had ignored the advice of the bank not to proceed, she would probably also have ignored the same advice of the accountants (if they had given it). Thus, the accountants would not have been liable to her, and thus she had lost nothing by losing her chance to sue them.

The trial judge agreed that there was less than a 51% chance that if Dixon had sued the accountants she would have lost. However, he thought that she had at least a 30% chance of winning something – even if it was only through a settlement. On that basis, he awarded her 30% damages.

The solicitors appealed on the basis that a 30% chance of winning was not a “real and substantial rather than a merely negligible prospect of success”, and so they should not have to pay her any damages at all.

The Court of Appeal disagreed with the defendants. What the claimant was suing the solicitors for was the loss of her chance to sue a third party, which was 100% down to the negligence of the solicitors.

That established, unless there was absolutely no prospect of a successful outcome to the original case, the chance to sue was a thing of value, which she had lost, and for which damages were payable. The court did not have to ‘try’ the first case to decide whether the claimant would have won it. It was enough to establish that she had a fair chance.

However, the percentage likelihood of her winning the first case would be relevant to assessing her damages (thus, unlike the ruling in Hotson.) To that extent, the court does have to predict the likely outcome of the first case.
64 CAUSATION IN FACT: Professional Negligence

64.1 The *Bolam* test (which normally applies to establish a breach of duty) may also be used to establish causation.

**Bolitho v. City & Hackney Health Authority** [1998] AC 232 (HL)

A two-year-old boy was admitted to hospital suffering from respiratory difficulties. His breathing deteriorated several times, but the doctor who was called (Dr. Horn) declined to attend. The child apparently recovered the first two times, but after the third, he suffered cardiac arrest, which led to severe brain damage from which he eventually died. The cardiac arrest might have been avoided had the doctor arranged for prophylactic intubation after the second respiratory compromise, but she argued that she would not have arranged for the intubation even if she had attended, and so her failure to attend was not the cause of the death.

The House of Lords accepted her argument, but held that a hypothetical omission to act could only break the causal link if the omission itself would have been reasonable. To that extent, it was relevant to question what other experts in the field would have done: i.e. to apply the *Bolam* test.

“Dr. Horn could not escape liability by proving that she would have failed to take the course which any competent doctor would have adopted. A defendant cannot escape liability by saying that the damage would have occurred in any event because he would have committed some other breach of duty thereafter. I have no doubt that this concession was rightly made by the defendants. There were, therefore, two questions for the judge to decide on causation. (1) What would Dr. Horn have done, or authorised to be done, if she had attended Patrick? And (2) if she would not have intubated, would that have been negligent? The *Bolam* test has no relevance to the first of those questions but is central to the second.” per Lord Browne-Wilkinson at p.1157

64.2 Since the House of Lords in *Bolitho* re-examined the *Bolam* test, claimants who have been the victims of clinical negligence are more likely to succeed against doctors who claim that their negligence has not been a material cause of the injury as the courts are less willing to take doctors at their word.

**Hutchinson v. Epson and St. Helier NHS Trust** [2002] EWHC 2363

Gerald Hutchinson died on December 19th 1998 aged 51. He had been admitted to hospital on September 27th 1997 suffering from a painful, swollen left leg, headache and fever. It was noted that he drank at least 56 units of alcohol a week and was morbidly obese. He was wrongly diagnosed with cellulitis, treated with antibiotics and sent home on October 8th. His symptoms got worse, and on December 9th 1998 he was correctly diagnosed as suffering from alcoholic liver disease. He died on December 18th 1998.

The hospital admitted negligence in not correctly diagnosing the liver disease, though there was some dispute about whether the obesity or the alcohol had caused it. The court decided it was a combination of both, but the hospital claimed that in any event the misdiagnosis had not caused Gerald’s death.

Had they spotted the disease they would have advised Gerald to stop drinking and to lose weight to save his life, but they claimed that the probability was he would have done neither and so would have died anyway. Despite expert evidence to this effect, the court chose to believe the contrary from Gerald’s widow Pauline, and awarded damages.

“Would the deceased have given up drink had he been properly warned? This is not an easy question to decide. It is clear on the evidence, as I have found, that he was a considerable drinker. He was very fond of his wine in particular... Clearly, the family had nagged him to control his drinking in the past. What would he have been told?

“The evidence is that he would have been told: “If you don’t stop drinking you will be dead in 12 months or perhaps two years.” That is a stark warning. Mrs. Hutchinson gave evidence on this issue. She said: “I believe he would have given up had he been told this.” She pointed to the fact, first of all, that he had given up smoking in 1995. He had been smoking since the age of 14 and they got him to give up eventually because of the health risks. Secondly, she pointed to the fact that they have a very difficult son... “He would not have wanted me to have had to look after him alone.”
“Thirdly, she pointed to the fact that: “We had many good things in our lives. He adored and cherished the children and there is no way he would have jeopardised that.” Lastly, she pointed out: “He had me, and I would have killed him if he hadn’t done it!”

“Having listened to Mrs. Hutchinson in the witness box and seen her during this trial, it is clear to me that there is considerable force in what she says. Undoubtedly he would have had the motivation. In my judgment, she is probably right. Had he been given that stark warning when he should have been, he would, on the balance of probabilities, have stopped drinking.”

per Royce QC (at paras 28 and 29)

64.3 **Ganz v. Childs** [2011] EWHC 13

Morwenna Ganz suffered permanent brain damage by developing mycoplasma pneumonia at the age of 14. Although she had a history of serious childhood illness, her GP thought that her parents were being over-protective when they brought her in with early symptoms and did not admit her to hospital for tests. On the day she was eventually sent to hospital, she lapsed into a coma and suffered irreversible brain damage.

The claimant argued that an earlier diagnosis would have avoided the condition: the defendant doctors claimed that it would not.

Despite credible expert evidence for the defendant, the judge preferred the logic of the claimant’s version. Following *Bolitho*, he therefore found for the claimant.

“As far as I am concerned, all the experts started (and indeed remain) on an equal footing so far as essential credibility is concerned. However, I still have to determine where, having regard to all the evidence and to what, I trust, is judicial commonsense, the various strands of this evidence lead in what Professor Kirkham said, despite Mr Browne’s invitation to her to confirm that this was a straightforward case from her point of view, was a very difficult case...” per Foskett J. at para 199

“In my view, had Morwenna been admitted to hospital on the Saturday by about midday or thereabouts, steps would have been taken which would have prevented the combined hypoxia and hypocapnia. She would, of course, still have had the pneumonia, but since she did not, in my judgment, develop MPE there is no reason to suppose that she could or would have suffered irreversible brain damage from any other cause.

“On that basis the case against the First Defendant is made out, both in terms of liability and causation.” per Foskett J. at paras 321 and 322

64.4 The *Bolitho* refinement will not always work in favour of the claimant.

**Toth v. Jarman** [2006] EWCA Civ 1028

The claimant’s baby son, Wilfred, died after Dr. Jarman negligently failed to administer an intravenous glucose injection when the baby had suffered a hypoglycaemic attack. The baby’s death caused his father to suffer nervous shock, for which he sued the doctor.

The doctor contended that the baby was so ill when he was called out to it, that it would have died even if he had administered the injection, and as he had not caused the baby’s death, he could not be liable for the claimant’s subsequent psychiatric injury. Both parties produced expert witnesses as to the baby’s prognosis, giving conflicting views as to whether the injection would have saved his life. The trial judge preferred the expert evidence of the defendant, and so dismissed the case.

The claimant appealed on the basis that his expert’s evidence should have been preferred to the defendants, but his appeal was dismissed. The judge is entitled to believe whichever expert appears to him to be presenting a more rational view.

9 See also *McCoy v. East Midlands SHA* [2011] EWHC 38.
64.5 **Zarb v. Odetoyinbo [2006] EWHC 2880**

On September 24th 2001, Michelle Zarb consulted her GP, Dr. Oselegun Odetoyinbo, in relation to a recurrent back pain which had recently become crippling. Rather than making a same-day referral to an orthopaedic surgeon, O sent a referral letter to a consultant, and Z was admitted to the Royal London Hospital on September 27th. She was admitted at once for dangerous emergency surgery.

Although the expected risks of the surgery did not materialise, it unexpectedly turned out that she had was prone to the rare **Cauda Equina Syndrome**, which she developed, resulting in permanent nerve damage.

It was agreed that had the surgery been carried out a few days earlier, this would have staved off the CES, but that there was no indication before the operation that she was prone to CES at all.

Z sued O on the basis that had he referred her to the consultant at once, she would have had the operation sooner and so would not have developed CES. One issue, therefore, was whether she would have had the operation earlier if she had been referred earlier.

The expert neurosurgeon called for Z indicated that he would have recommended immediate surgery, despite the inherent risks in the operation. The expert called for O (Mr. Macfarlane) said that the risks of the surgery were so serious that, absent any symptoms of CES, they outweighed the risks of not operating. Applying the *Bolam* test, as refined by *Bolitho*, the judge preferred the evidence of the defendant’s expert, and so dismissed the claim.

“It has not been shown to my satisfaction that Mr. Macfarlane’s assessment of the risks is illogical or wrong… His views are in my judgment in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art.” per Tugendhat J. at paras 105 & 106

65 **CAUSATION IN FACT: Cumulative Causes**

65.1 ‘Cumulative causes’ describes a situation where the claimant’s injury has been caused partly by an incident preceding the negligence.

65.2 The cases on this mainly involve industrial injuries of an accumulating type, e.g. where the more the employee is exposed to a risk of injury, the worse his condition becomes. Typical examples would be repeated exposure to noise causing increasing hearing loss; or increasing exposure to asbestos causing asbestosis. Where an employee suffers such a gradual injury, the employer is only liable for it from the time when he could or should have done something to prevent it. This can lead to rather arbitrary apportionment of damages.

**Thompson v. Smiths Ship Repairers (North Shields) Ltd. [1984] QB 405**

This was a test case to determine the liability of employers towards employees who had become deaf due to exposure to excessive noise at work. The plaintiffs were labourers in ship-repair yards. They claimed damages against their employers for loss of hearing caused by exposure to excessive noise in the course of their work at the defendants’ yards where the plaintiffs had worked since 1944 or earlier. It was found that the defendants had only been negligent since 1963, by which time much of the damage had already been done. The court held that the damages must thus be apportioned between pre-1963 and post-1963, even though the calculation could not really be scientifically precise.

“*The degree of accuracy demanded should be commensurate with the degree of accuracy possible, in the light of existing knowledge, and with the degree of accuracy involved in the remainder of the exercise which leads to the computation of damages.*” per Mustill J. at p.438

65.3 Where the injury has been caused by an accumulation of exposure from more than one employer, each employer will only be liable for the proportion of the exposure for which he is responsible. This can be a complex calculation, as by the time the employee gets to the second employer, he will already have an accumulation of the toxic thing, so it is not just a case of dividing the damages between employers based on the time spent with each.

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10 See also *Wright v. Cambridge Medical Group* [2011] EWCA Civ 669.
65.4 **Holtby v. Brigham & Cowan (Hull) Ltd. [2000] 3 ALL ER 421 (CA)**

The claimant contracted asbestosis. He had worked with asbestos for 24 years, of which the last 12 years were spent in the employ of the defendant. The trial judge held that the defendant was negligent, but as the asbestosis had been caused by the cumulative effect of exposure over 24 years, half of which was spent in someone else’s employ, the damages should be reduced by 25%. The claimant appealed on the basis that the defendant was liable to pay all the damages, and then it was up to him to seek a contribution from other guilty parties.

HELD: A tortfeasor is only liable to the extent of his contribution towards any disability.

“The question should be whether at the end of the day and on consideration of all the evidence, the claimant has proved that the defendant is responsible for the whole or a quantifiable part of his disability. The question of quantification may be difficult and the court only has to do the best it can using its common sense.” per Stuart-Smith L.J. at para 20

65.5 This calculation may be very complex.

**Allen v. British Rail Engineering Ltd. [2001] ICR 942 (CA)**

Allen started to work for BREL in the 1950’s. By 1968 he was suffering from vibratory white finger as a result of working with vibrating tools. This became increasingly more severe, but in 1987 he left BREL to take another job using vibrating tools. The court held that BREL had been negligent since 1973, when enough was known about the condition to have raised a duty in them to have Allen examined by a doctor and given advice about his condition.

It was found that Allen had received 50% of the injurious vibrations before 1973, 40% between 1973 and 1987, and 10% thereafter. However, to complicate matters, it was also found that even had BREL done their duty to Allen in 1973, he would probably have continued working with vibratory tools by his own volition, but on tools which caused only 50% of the harmful vibrations.

The total injury was reckoned to be worth £11,000, and on a straight line basis, BREL were thus only liable for 20% of it. However Smith J. did not apportion damages on such a basis because she felt that “damages should reflect the onset and progress of disability as well as actual damage.”

Thus she deducted £1,500 for the period prior to 1976 (the date at which Allen might have changed his job had the injury been recognised in 1973!); she deducted £1,500 for the period after 1987; and she halved the remaining £8,000, leaving damages of £4,000.

Despite appeals and cross-appeals, the Court of Appeal upheld the decision.

65.6 Another kind of ‘cumulative injury’ is where one tortfeasor places the claimant in a situation where he becomes vulnerable to injury from another tortfeasor. For example, X might push C into the road where C gets run over by Y who is speeding. Whether X is liable for the injury caused by Y will depend upon whether Y’s action is seen as a *novus actus interveniens*. This is discussed later.

**66 CAUSATION IN FACT: Consecutive Causes**

66.1 ‘Consecutive causes’ describes the situation where, by the time of the trial, the injury caused by the defendant has been superseded by a far worse injury to the claimant for which the defendant is not responsible.

66.2 It may be that the claimant is extremely unlucky in life, and that the injury he sustained by the negligence of the defendant has become overshadowed by a worse incident which has happened since and which is no fault of the defendant. e.g. D causes an injury to C which affects the vision in C’s left eye. C sues D for the impaired vision, but before the case is heard, it is discovered that C has a tumour in his left eye and the eye has to be removed. Should D have to compensate C for his loss of vision even after the time when his eye is removed?

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11 See also Heneghan v. Manchester Dry Docks Ltd. [2016] I WLR 2036 (CA).
Whether the defendant should still be fully liable for the injury he caused in such circumstance is a matter of some controversy.


George Baker was crossing Croydon Road in Mitcham when he was struck by a car driven by Arthur Willoughby which injured his left leg. Before the trial for negligence, Baker was shot in this leg during an armed robbery at work, and had to have it amputated. The defendant argued that the plaintiff’s damages for his pain, discomfort and loss of amenities in having an injured leg should be reduced since he now (through no fault of the defendant) had no leg at all.

**HELD:** The plaintiff's disability could be regarded as having two causes and where, as here, the later injuries merely became a concurrent cause of the disabilities caused by the injury inflicted by the defendant, they could not diminish the amount of damages payable by him. Accordingly, the plaintiff was entitled to the full sum.

“A man is not compensated for the physical injury: he is compensated for the loss which he suffers as a result of that injury. His loss is not in having a stiff leg: it is in his inability to lead a full life, his inability to enjoy those amenities which depend on freedom of movement and his inability to earn as much as he used to earn or could have earned if there had been no accident. In this case the second injury did not diminish any of these. So why should it be regarded as having obliterated or superseded them?” per Lord Reid at p.492

*n.b.* Although the armed robbery was clearly no fault of the defendant, if he had not run over the plaintiff, the plaintiff would not have taken the menial job in the scrap-metal yard where the armed robbery happened. This, of course, was just an unfortunate coincidence.

It is difficult to reconcile **Baker v. Willoughby** with **Jobling v. Associated Dairies Ltd. [1982] AC 794 (HL)**

**Jobling v. Associated Dairies Ltd. [1982] AC 794 (HL)**

In 1973, Alexander Jobling suffered an accident during the course of his employment that left him with a disabling continuing back pain. He claimed *inter alia* loss of future earnings. However, before the trial he was found to be suffering from myelopathy, in no way connected with the accident, which would render him totally disabled by the end of 1976. The defendants argued that the damages should be reduced to take account of this subsequent illness.

**HELD:** In the assessment of damages the myelopathy could not be disregarded since the court must provide just and sufficient, but not excessive compensation, taking all factors into account, and in comparing the situation resulting from the accident with the situation had there been no accident, it must recognise that the supervening illness would have overtaken the plaintiff in any event.

“It is not easy to accept a solution by which a partially incapacitated man becomes worse off in terms of damages and benefit through a greater degree of incapacity. Many other ingredients, of weight in either direction, may enter into individual cases. Without any satisfaction I draw from this the conclusion that no general, logical, or universally fair rules can be stated which will cover, in a manner consistent with justice, cases of supervening events whether due to tortious, partially tortious, non-culpable or wholly accidental events. The courts can only deal with each case as best they can in a manner so as to provide just and sufficient but not excessive compensation, taking all factors into account.” per Lord Wilberforce at p.804

The House of Lords in **Jobling** criticised the decision in **Baker**, but they did not overrule it and accepted that it had been decided correctly on its facts. However, it seems likely that **Baker** will be confined to its peculiar facts, particular in the light of the comment of Lord Edmund-Davies:

“My Lords, it is a truism that cases of cumulative causation of damage can present problems of great complexity. I can formulate no convincing juristic or logical principles supportive of the decision of this House in **Baker v. Willoughby**.” per Lord Edmund Davies at p.807
The application of the two cases was considered by the Court of Appeal in Heil v. Rankin [2001]

**Heil v. Rankin [2001] PIQR 3 (CA)**

John Heil was a police constable who worked as a dog handler. During an incident in 1987, a criminal called Davies aimed a shotgun at Heil’s dog. An armed policeman shot Davies dead with a bullet that went very close to Heil and caused him a great deal of fright. (The dog was all right by the way!) He suffered from Post Traumatic Stress Disorder, which manifested itself in obsessive behaviour, including drinking and gambling, but he continued to work for the police.

Six years later, in 1993, another incident occurred in which Heil attempted to stop a drunken driver, Graham Rankin, by standing in front of him in the road. The driver did not stop and Heil got knocked down. Heil got to his feet and attempted to grab the ignition keys out of the now stopped car, but Rankin drove off at speed.

Although Heil had only suffered a minor physical injury, the fright Heil suffered triggered an florid development of his Post Traumatic Stress Disorder which became far worse and caused him to retire from the police force on the grounds of permanent ill-health in 1994.

Although Rankin admitted liability, the trial judge assessed that the 1987 incident had made Heil so prone to PTSD that it was highly likely that had the 1993 incident not triggered it off, some other similar incident would have done so. On that basis, there was only a 25% chance that he would have worked until normal retirement age even without Rankin’s negligence and so he reduced the damages for loss of future earnings accordingly.

Heil appealed on the grounds that Jobling did not give the court leave to consider imagined future torts that might later affect the claimant. Indeed, since in Baker a real subsequent tort was not taken into account, a fortitiori a fictional one could not be so considered.

The Court of Appeal described this argument as fallacious as it misinterpreted the policy being applied in those two cases. It was reasonable to consider the likely vicissitudes of the claimant’s future life in assessing damages so as not to over-compensate the claimant.

However, they held that on the evidence, the judge had discounted the claimant’s chance of working until retirement age too heavily and that there was a 50% chance that he would have done so. Thus they reduced the deduction made by the trial judge.

On the subject of Jobling and Baker, Otton L.J. made the following observations:

“The reason for the approach adopted in Baker v. Willoughby and Jobling is to avoid the operation of two legal rules that, if both fully applied together, might in a case of sequential torts deprive the plaintiff of full compensation. Those two rules are, first, the rule, in issue in the present case, that deductions should be made from claims for prospective loss of income to allow for contingencies. In a case such as Baker v. Willoughby, if that rule were to be applied with its full rigour the first tortfeasor could rely upon the principle that the court will not speculate where it knows (of a second tort), to claim that his responsibility had been terminated or curtailed by the actual occurrence of the second tort. But the second tortfeasor in turn could rely on the further rule that he is entitled to take the plaintiff as he finds him, and that his liability should accordingly be reduced because of the already injured state of the plaintiff at the time of the second tort.

“The combination of these arguments by the two tortfeasors might well result in the plaintiff not receiving from either of them, or from both of them together, full compensation for his injuries. Lord Keith in his exposition in Jobling was clear that the rule he formulated, of ignoring the occurrence of a second tort when awarding damages against a first tortfeasor, could not be justified on any identifiable juristic basis, but rather was a just and practical solution to avoid the barrier to full compensation that would arise if the normal rules were applied to their full extent.”

per Otton L.J. at paras 16 and 17
PART 10: CAUSATION IN LAW: Remoteness

67  INTRODUCTION

67.1 Under the doctrine of *Re Polemis and Furness, Withy & Co. Ltd.* [1921] 3 KB 560 (CA), a defendant was liable for all the direct consequences of his negligence, even if these consequences could not reasonably have been anticipated. Thus the defendants were liable when they negligently dropped a plank into the hold of a ship which caused a spark which ignited some petrol vapour which set alight and burned the ship, even though it could not even have been foreseen that dropping the plank would cause a spark.

67.2 This doctrine was overturned in the case of *Overseas Tankship (U.K.) Ltd. v. Morts Dock & Engineering Co. Ltd. (The Wagon Mound No. 1)* [1961] AC 388 (PC), which substituted a test of reasonable foresight. Thus, a person is only liable for the probable consequences of his actions: that is, those that a reasonable man would foresee.

**The Wagon Mound (No.1) [1961] AC 388 (PC)**

The plaintiff was repairing a ship in Sydney Harbour using welding equipment. The defendant negligently released bunkering oil into the harbour 200 yards away. It was not foreseeable at the time that oil could ignite on water. It did, and the resultant fire damaged the plaintiff's wharf. HELD: (Disapproving of *Re Polemis*) The defendants were not liable, as they could not reasonably have foreseen that the oil would catch fire.

"Enough has been said to show that the authority of Polemis has been severely shaken though lip-service has from time to time been paid for it. In their Lordships’ opinion it should no longer be regarded as good law... For it does not seem consonant with current ideas of justice or morality that for an act of negligence, however slight or venial, which results in some trivial foreseeable damage, the actor should be liable for all consequences however unforeseeable and however grave, so long as they can be said to be ‘direct.’ It is a principle of civil liability...that a man must be considered to be responsible for the probable consequences of his act. To demand more of him is too harsh a rule, to demand less is to ignore that civilised order requires the observance of a minimum standard of behaviour.” per Viscount Simonds at p.422

68  EXCESSIVE INJURIES

68.1 It is enough to satisfy the *Wagon Mound* test that the damage caused is of the *kind* foreseeable, even though it much greater than expected.

**Hughes v. Lord Advocate** [1963] AC 387 (HL – Scotland)

A manhole in an Edinburgh street was opened for the purpose of maintaining underground telephone equipment. It was covered with a tent and, in the evening, left by the workmen unguarded but surrounded be warning paraffin lamps. An eight year old boy entered the tent and knocked or lowered one of the lamps into the hole. An explosion occurred causing him to fall into the hole and to be severely burned.

HELD: The workmen were in breach of duty to safe-guard the boy from this kind of occurrence, which arising from a known source of danger, the lamp, was reasonably foreseeable, although the source of the danger acted in an unpredictable way.

"If the lamp fell and broke it was not at all unlikely that the boy would be burned and the burns might well be serious. No doubt it was not to be expected that the injuries would be as serious as those which the appellant in fact sustained. But a defender is liable, although the damage may be a good deal greater in extent than was foreseeable. He can only escape liability if the damage can be regarded as differing in kind from what was foreseeable.” per Lord Reid at p. 845
68.2 **Bradford v. Robinson Rentals Ltd. [1967] 1 WLR 337**

The defendants employed Oliver Bradford as a mobile radio and television engineer. During the winter of 1963 his employers required him, in the course of his employment and despite his protests, to undertake a round journey of 450 miles to exchange a defective van for another. They knew that temperatures were likely to be freezing and that neither van had a heater, which meant that he would have to travel with the window open to avoid condensation. Due to prolonged exposure to the cold and extreme fatigue from driving in such adverse conditions, Bradford suffered frost-bite, which is unusual in this country.

HELD: The employers were liable. Although frost-bite is unusual, it was of the type and kind of injury, such as cold, pneumonia and chilblains, that might reasonably be foreseeable from prolonged exposure to severe cold and fatigue.

68.3 **Vacwell Engineering v. B.D.H. Chemicals [1971] 1 QB 88**

The plaintiffs were supplied by the defendants with boron tribromide in glass ampoules labelled ‘Harmful Vapour’, which the plaintiffs intended to use in the manufacture of transistors. There were reports in 19th century text-books that the chemical was explosive in water, but this was not mentioned in the recent books used by the defendants and they did not carry out any independent research into the matter. In April 1966, Messrs. Neale and Stroushinski, whilst attempting to wash off the labels from the ampoules, were killed by the violent explosion that occurred when an ampoule was dropped into the sink. There was also massive property damage. The defendants argued that even if they had been negligent in not testing or labelling the chemical properly, they were not liable for the deaths and property damage caused by the explosion as it was far greater than would have been reasonably anticipated even had they done the proper research. HELD: The defendants were liable for all the damage caused.

“Taking all these circumstances into account, including that an explosion involving some damage to property caused by the explosion was reasonably foreseeable, I am unable to find that because the damage to property was much greater than could have been reasonably foreseen, it was too remote to be recoverable in law.” per Rees J. at p.107

69 **INJURIES OF AN UNFORESEEEN TYPE**

69.1 If the injury is not of the type foreseen, even though related to a foreseeable cause of injury, it will not give rise to liability.

**Tremain v. Pike [1969] 1 WLR 1556**

The defendants negligently allowed their farm to become infested with rats. Although it was foreseeable that the presence of rats might lead to diseases from rat bites or food contamination, the plaintiff, a herdsman, contracted Weil's disease (which is carried in rats’ urine), which is very rare in humans and was virtually unknown in such circumstances at the time. HELD: The defendants were not liable because the possibility of contracting Weil's disease was a remote one which could not reasonably be foreseen.

“The kind of damage suffered here was a disease contracted by contact with rats’ urine. This, in my view, was entirely different in kind from the effect of a rat bite, or food poisoning by the consumption of food or drink contaminated by rats. I do not accept that all illness or infection arising from an infestation of rats should be regarded as of the same kind.” per Payne J. at p.1561

69.2 **Doughty v. Turner Manufacturing Co. Ltd. [1964] 1 QB 518 (CA)**

The plaintiff was standing by a cauldron of molten metal when an asbestos cover fell into it. It was foreseeable that this might cause a splash, but in fact there was a chemical reaction and an explosion that caused an eruption of the molten metal. The plaintiff was injured and awarded £150 in damages by the first instance court.

HELD: (On appeal) Even if the inadvertent immersion of the asbestos cement cover into the cauldron was a negligent act, the defendants were not liable for the damage resulting from the explosion because it was not damage of the kind as could reasonably have been foreseen, being altogether different from a foreseeable splash.
The Egg-Shell Skull Rule

69.3 It may be that the injury caused to the claimant is unforeseeably severe because he is unusually susceptible to that kind of injury; or that the foreseeable injury sets off in the claimant an unexpected medical reaction. e.g.

i) D negligently cuts C. It is foreseeable that C will bleed a bit, but he unexpectedly bleeds to death because he is a haemophiliac.

ii) D negligently breaks C’s leg. Because C has an unusually weak heart, the shock of breaking his leg gives him an unforeseeable heart-attack.

69.4 In such cases, the defendant will be liable both for the foreseeable injury and for the unforeseeable side-effects. The maxim is that the tortfeasor must ‘take his victim as he finds him’, though this does not really explain the doctrine. The point is that the victim must have first suffered a foreseeable injury which has then led to an unforeseeable consequence – unforeseeable because of the victim’s unusual susceptibility to a particular type of consequential injury (his ‘thin skull’).

69.5 **Dulieu v. White** [1901] 2 KB 669

“If a man is negligently run over or otherwise negligently injured in his body, it is no answer to the sufferer’s claim for damages that he would have suffered less injury...if he had not had an unusually thin skull or an unusually weak heart.” per Kennedy J. at p. 679

69.6 **Smith v. Leech Brain & Co.Ltd.** [1962] 2 QB 405

Due to the negligence of his employers, William Smith was burned on the lower lip when a piece of molten metal hit him. The burn was a promoting agent of cancer, which developed at the site of the burn, and from which he died three years later. The cancer developed in tissues that already had a pre-malignant condition, but it might never have developed had it not been for the burn. HELD: The employers were liable for the fatal cancer.

“The tortfeasor takes the victim as he finds him... The test is not whether these employers could reasonably have foreseen that a burn would cause cancer and that he would die. The question is whether these employers could reasonably foresee the type of injury he suffered, namely the burn. What, in the particular case, is the amount of damage which he suffers as a result of that burn, depends upon the characteristics and constitution of the victim.” per Lord Parker C.J. at p.415
70 **NOVUS ACTUS INTERVENIENS: Introduction**

70.1 A consequence will be too remote if, despite satisfying the but-for test, some other intervening or later event is legally regarded as the sole cause of the damage.

70.2 Examples might include:

i. D knocks over C in his car, causing C to be lying helpless on the road. X negligently drives over C. Is D liable to C for the extra injuries caused by X?

ii. D knocks over C in his car, causing C to be lying helpless on the road. X takes advantage of the situation to steal C’s wallet. Is D liable for the theft?

iii. D knocks over C in his car, causing C to be lying helpless on the road. C tries to stand up, but is so dizzy he falls and cracks his head on the pavement. Is D liable for the crack on the head caused by C’s own action in trying to stand up?

70.3 The principles in this area are not entirely clear.

**Home Office v. Dorset Yacht Co. Ltd.** [1970] AC 1004 (HL)

"Where human action forms one of the links between the original wrongdoing of the defendant and the loss suffered by the plaintiff, the action must at least have been something very likely to happen if it is not to be regarded as novus actus interveniens breaking the chain of causation. I do not think that a mere foreseeable possibility is or should be sufficient, for then the intervening human action can more properly be regarded as a new cause than as a consequence of the original wrongdoing.”

per Lord Reid at p.1030

70.4 **Horton v. Evans** [2006] EWHC 2808

"The guiding principle is that there is no guiding principle in this area of the law:

"No precise or consistent test can be offered to define when the intervening conduct of a third party will constitute a novus actus interveniens sufficient to relieve the defendant of liability for his original wrongdoing. The question of the effect of a novus actus can only be answered on a consideration of all the circumstances and, in particular, the quality of that later act or event'.

Four issues need to be addressed. Was the intervening conduct of the third party such as to render the original wrongdoing merely a part of the history of events? Was the third party's conduct either deliberate or wholly unreasonable? Was the intervention foreseeable? Is the conduct of the third party wholly independent of the defendant, i.e. does the defendant owe the claimant any responsibility for the conduct of that intervening third party? In practice, in most cases of novus actus more than one of the above issues will have to be considered together."

per Keith J. at para 53

71 **NOVUS ACTUS INTERVENIENS: Acts of the Claimant**

71.1 Whether the claimant's act will 'break the chain' of causation depends upon whether his actions were reasonable (or at least reasonably foreseeable) in the circumstances.

**McKew v. Holland & Hannen & Cubitts (Scotland) Ltd.** [1969] 3 All ER 1621 (HL)

Abraham McKew suffered an injury at work for which his employers were liable. Due to this injury, his leg would sometimes give way beneath him. He would have recovered in a week or two, but for a second accident. Whilst descending a staircase that had no handrail, his leg gave way and he attempted to jump the 12 feet to the bottom of the stairs to avoid falling down them. On landing he suffered a severe fracture of the ankle for which he tried to blame his employers.

HELD: The employers were not liable for his second injury. In attempting to descend a steep staircase without a handrail and without adult assistance when he knew his leg might give way, he was acting unreasonably, and the chain of causation was broken.
"If a man is injured in such a way that his leg may give way at any moment he must act reasonably and carefully. It is quite possible that in spite of all reasonable care his leg may give way in circumstances such that as a result he sustains further injury. Then that second injury was caused by his disability, which in turn was caused by the defender's fault. But if the injured man acts unreasonably he cannot hold the defender liable for injury caused by his own unreasonable conduct. The unreasonable conduct is a novus actus interveniens. The chain of causation has been broken and what follows must be regarded as caused by his own conduct and not by the defender's fault or the disability caused by it." per Lord Reid at p.1623

71.2 **Wieland v. Cyril Lord Carpets Ltd. [1969] 3 All ER 1006**

The plaintiff suffered an injury caused by the admitted negligence of the defendants. After attending the hospital she felt shaken and the movement of her head was restricted by a surgical collar. In consequence she was unable to use her bifocal spectacles properly and she fell whilst descending some stairs, sustaining further injuries. HELD: It was not unreasonable of her to attempt to descend a staircase whilst wearing a surgical collar which affected her use of the bifocals. The defendants were liable for the later injuries as well as the original one.

"It is foreseeable that one injury may affect a person's ability to cope with the vicissitudes of life and thereby be a cause of another injury and if foreseeability is required, that is to say, if foreseeability is the right word in this context, foreseeability of this general nature will, in my view, suffice."

per Eveleigh J. at p. 1010

71.3 **Corr v. IBC Vehicles Ltd [2007] QB 46 (CA)**

Thomas Corr was a maintenance engineer in a factory which produced panels for Vauxhall cars. Whilst attending to an automated arm which was malfunctioning, the machine suddenly picked up a panel and almost decapitated Corr. As it was, it severed his ear, causing him permanent scarring and disfigurement, severe headaches, tinnitus and balance problems.

These physical injuries caused him increasing psychological stress, especially as his employers constantly refused to apologise to him for the accident, even though it was clearly caused by their negligent lack of provision of a safe workplace.

Six years after the event, and following an unsuccessful suicide attempt with pills, Corr threw himself off the top of a multi-storey car-park.

His widow sued his employers (under the Fatal Accidents Act 1976) for causing his suicide through their original negligence in causing his physical injury. The employers denied liability on the basis that the chain of causation between their negligence and his suicide was broken as the suicide was not a reasonably foreseeable consequence of the original breach of duty.

The Court of Appeal disagreed, and found for the widow.

"Causation may be a matter of common sense but it also imports value judgments. As soon as the test is framed in terms of whether the action of the victim is "unreasonable" as in McKew v Holland & Hannen & Cubitts (Scotland) Ltd [1969] 3 All ER 1621, then one is making a value judgment."

per Ward L.J. at para 5

"In considering an injured person's suicide, the law has moved on. Suicide is no longer a crime. To require criminal insanity in the M'Naughten sense is artificial and out of date. Psychiatry is now a more precise science. In a just system of compensation, the tortfeasor cannot escape his responsibility by asserting a break in the chain of causation if his act has caused a depression and the depression so has unhinged the mind as to "dethrone [the] power of volition"

per Ward L.J. at para 46

"In those circumstances I conclude that the conduct of the deceased was not so wholly unreasonable nor of such overwhelmingly potent causative impact as to eclipse the defendant's wrongdoing. In my judgment the chain of causation was not broken by the suicide."

per Ward L.J. at para 49
71.4 **Hicks v. Young [2015] EWHC 1144 (QB)**

Kristopher Kicks, aged 22, and his girlfriend Abigail Noad, caught a taxi at the Abbey taxi rank in the centre of Bath at about 11:00 pm. They asked the driver to take them to Kristopher’s home, stopping en route to order a pizza and to buy some cigarettes. On arrival at the final destination, Abigail got out first, but as Kristopher stood up to leave the taxi, the driver – Michael Young – started off again towards the taxi rank, with the door still open and Kristopher still inside. This was because he believed (wrongly) that the couple were about to make off without paying the fare and so he thought he would teach them a lesson by putting Kristopher to the inconvenience of being taken back to where he had picked the taxi up in the first place.

The jolt closed the door (but did not lock it) and Kristopher sat down. Despite Kristopher’s protestations, the driver would not stop, so Kristopher opened the door and jumped out with the vehicle going at between 20 to 24 mph. He sustained brain injury.

The defendant denied liability on the basis that the claimant was injured by his own actions. Before jumping out, he had been sat down on the seat, so he was not in any danger until he deliberately chose to leave it: the leap to freedom was a *novus actus*.

The court held that the claimant’s actions were the foreseeable consequence of being unlawfully abducted, but were careless insofar as they involved a gross misjudgment of the relative risks of staying in the moving taxi or leaping from it. This was not a case of a *novus actus*, but damages would be reduced by 50% because of the contributory negligence.

71.5 **Scott v. Gavigan [2016] EWCA Civ 544**

Darren Scott, a pedestrian who was involved in a road traffic accident with a moped driver – Nicholas Gavigan – appealed against a decision that he was wholly responsible for the accident.

The judge – Mr Recorder Hollington QC – had found that the claimant pedestrian was entirely to blame as he had been in an alcohol-induced state and had run across the road into the path of the moped. However, he also found that the defendant driver had been negligent in failing to slow from 30 mph to 20 mph, in which case he would probably have missed the pedestrian, even though there was a real possibility that he would have crashed himself. The judge found that the risk of a pedestrian crossing the road in such a manner was not foreseeable as it was a *novus actus*.

The pedestrian submitted that the judge had erred in finding that his gross carelessness, fuelled by excessive alcohol consumption, was so wholly unreasonable that it (1) eclipsed any wrongdoing of the driver; (2) constituted a new intervening cause between the driver’s negligence and the injury suffered.

Held: The judge had been entitled to hold that it was not reasonably foreseeable that the pedestrian would run out into the road at an angle towards the driver and into the path of his moped. However, he had erred in finding the driver negligent for not travelling slower than he had. Visibility had been very good and he could see a considerable distance ahead, he was paying attention and there was no apparent danger.

It had been open to the judge to find that if the driver had been going 10 mph slower he would have missed the pedestrian but, given the factual findings and his conclusion on lack of foreseeability, his finding of negligence on the part of the driver could not stand. On that basis, the appeal failed.

However, the Court of Appeal stated *obiter* that it was doubtful that the pedestrian’s behaviour was a new intervening act. Although recklessness could be sufficient to break the chain of causation, it should be exceptional for a claimant who had surmounted the hurdles of foreseeability, negligence, and causation to be denied any remedy. It was unfortunately not that uncommon for a claimant to run out into the road carelessly or recklessly. A defendant who collided with such a claimant might not be held negligent, or the claimant might be found contributorily negligent to a high degree. However, the reason for imposing liability on a defendant was because he should have foreseen a risk and he owed a duty of care not to injure even the foolish. It was difficult to see why he should be absolved of all liability and the claimant denied any relief except in extreme circumstances.
In the instant case, the judge had found that the pedestrian had run out into the road because he thought he could stop in the middle and look left before completing his crossing and had thought that he was much closer to a crossing than he was. If that disentitled him to recovery, there would be many cases in which recovery would be denied, where damages had been awarded in the past, albeit heavily reduced for contributory negligence.

72 **NOVUS ACTUS INTERVENIENS: Acts of Nature**

72.1 A tortfeasor will not usually be liable if an act of nature makes the injury worse, unless the act of nature is reasonably foreseeable both to happen and to make matters worse (e.g. cold weather in winter exacerbating an injury).

*Carslogie Steamship Co. Ltd v. Royal Norwegian Government* [1952] AC 292 (HL)

A ship which was damaged in a collision with the defendant’s ship required repairs. Whilst on her way to a port for these repairs, a storm made further repairs necessary. Both sets of repairs were carried out at the same time and took 30 days. The original repairs would have taken 10 days.

It was held that the defendant was not liable for the loss of profits during the first 10 days delay as these were now contained within the 30 days delay that was not their fault. The heavy weather damage was not a consequence of the collision and the owners of the damaged ship sustained no extra loss of profitable time by reason of the fact that for 10 out of the 30 days occupied in repairing that damage she was also undergoing repairs necessitated by the collision.

73 **NOVUS ACTUS INTERVENIENS: Acts of a Third Party**

73.1 There are three types of case where a third party might cause further injury to the claimant beyond that caused by the negligent defendant.

i) Where the third party is acting/reacting reasonably;

ii) Where the third party is acting/reacting negligently;

iii) Where the third party is acting criminally

73.2 In general, the courts adopt the following principles:

i) The first type of intervention (reasonable behaviour) WILL NOT amount to a *novus actus*, so the defendant will be liable for the third parties actions as well as his own.

ii) The second type of intervention (negligent behaviour) MAY amount to a *novus actus*, but given that a key aspect of negligence is foreseeability, the court may hold that as it is foreseeable that people will be negligent, the original tortfeasor should be liable for the third party’s negligence as well as his own.

iii) The third type of intervention (criminal behaviour) WILL normally amount to a *novus actus* and so break the chain of causation. This is largely a policy matter of not making people liable for other people’s crimes. However, the court is willing to set this aside in particular cases, especially if the third party crime was highly likely to result from the defendant’s negligent act, and it was easily avoidable by the defendant.

73.3 **Reasonable Behaviour by a Third Party**

It is obviously to be expected that people will behave reasonably, so if someone takes reasonable – including instinctive – steps to avoid a danger created by the claimant, and this in itself causes an injury, the defendant will be liable for that as well.

73.4 **Scott v. Shepherd** (1773) 2 Wm. Bl. 892

This was an ancient case of trespass, but evidently illustrates the modern law of negligence. Shepherd threw a lighted squib (a small firework which hisses and then explodes) into a marketplace. It landed on a stall and the stallholder picked it up and threw it away from himself. It landed on another stall, and that stallholder also threw it away. It eventually exploded near Scott and injured him. It was held that Shepherd was liable despite the actions of the third parties as their instinctive reactions were a predictable consequence of the original tort and so did not break the chain of causation.
73.5 **Lord v. Pacific Steam Navigation Co.Ltd. (The Oropesa) [1943] P 32 (HL)**

The *Manchester Regiment* and the *Oropesa* collided off Nova Scotia. The master of the *Manchester Regiment* put 50 of his crew of 74 in a lifeboat and the reached the *Oropesa* in safety. Over an hour later, he decided to go and discuss the salvage of his ship with the master of the *Oropesa*, already over a mile away, and set off in a lifeboat with the rest of his crew. The lifeboat capsized in heavy seas, and nine men, including the plaintiff's son, were drowned.

It was held that the actions of the master and his crew were reasonable and foreseeable, and that there was an unbroken sequence of cause and effect between the negligence that caused the *Oropesa* to collide with the *Manchester Regiment*, and the actions of the master and the deceased. Therefore the defendants who had caused the collision were also liable for the subsequent drowning.

"If the master and the deceased in the present case had done something which was outside the exigencies of the emergency, whether from miscalculation or from error, the plaintiffs would be debarred from saying that a new cause had not intervened. The question is not whether there was new negligence, but whether there was a new cause. To break the chain of causation it must be shown that there is something which I will call ultraneous, something unwarrantable, a new cause which disturbs the sequence of events, something which can be described as either unreasonable or extraneous or extrinsic." per Lord Wright

73.6 **Horton v. Evans [2006] EWHC 2808 (QB)**

Cathy Horton (aged 44) was a woman of many achievements – lawyer (on about £287,000), business-woman, athlete (she was an Olympic standard swimmer) and priest! She was also 'stunning' to look at. All this changed when she was misprescribed some medicine for a minor ailment. The doctor who prescribed the medicine was Dr. Timothy Evans: the pharmacist who dispensed it was Mr N’Guessan Gabla, who worked at Lloyd’s Pharmacy Ltd.

Mrs. Horton was on a repeat prescription, for an adrenal deficiency, of 0.5mg tablets of dexamethasone of which she had been taking one a day for years. Her doctor negligently prescribed for her 90 tablets of 4mg, which the pharmacist dispensed and which she took. Then, whilst on holiday in the US, she asked another doctor for a repeat prescription, which he gave her on the basis of seeing the bottle dispensed by Mr Gabla for the 4mg tablets.

The result of taking all these high strength tablets was disastrous. (Amongst other symptoms, her eyes protruded, her face became round and she grew unwanted hair! This is known as Cushing's Syndrome, though named after the American surgeon Harvey Cushing, rather than the English horror actor, Peter.) She ended up in The Priory, trying to hang herself.

Horton claimed £5 million in damages claiming, *inter alia*, that Lloyd's were liable (as well as the doctor) as they had frequently dispensed her with the proper tablets, and should have been alert to the apparent change in the prescription and questioned it.

Lloyd's claimed that even if they had been negligent, the American doctor (Dr. Elwell) had also been negligent in providing the repeat prescription based on the tablet bottle, and that his negligence (which had led to the effective overdose) had broken the chain of causation.

The Court held that Lloyd's were liable. They were negligent not to question the prescription and it was reasonable for the American doctor to prescribe the tablets based on the label on the bottle at the request of this highly accomplished and presentable woman. Thus, the chain of causation had not been broken.

"Even though Dr Elwell was not negligent in prescribing Mrs. Horton with the prescription which he did, could it be said that his intervening act, without which the deterioration in her health would not have occurred, broke the causal connection between Mr Gabla's breach of duty and her ill-health"

The four tools which have been developed to assess the extent to which a defendant may be relieved of liability by the intervening act of someone else produce the following answers in this case. First, I do not believe that it would be right, when looking at the whole sequence of events which culminated in the devastating deterioration in Mrs. Horton's health, to say that Mr Gabla's failure to question Dr Evans' prescription was so eclipsed by Dr Elwell's intervention that Mr Gabla's conduct could properly be relegated to no more than a mere occurrence in the history of events.
“Secondly, there was nothing unreasonable in what Dr Elwell was subsequently to do.

“Thirdly, for the reasons which I shall come to later, I think that Mr Gabla should reasonably have foreseen the reliance which might be placed by a physician other than Dr Elwell on the label on the bottle. And fourthly, most important of all, for the reasons in above, I think that Mr Gabla must bear a real responsibility for why Dr Elwell thought that Mrs. Horton had been prescribed 4 mg. tablets a day.” per Keith J. at para 53

Negligent Behaviour by a Third Party

73.7 As the existence of a duty of care relies inter alia on reasonably foreseeability, it is arguable that negligent behaviour is always foreseeable, and so should not break the chain of causation. In fact, the courts tend to adopt a more common sense attitude to see if there is any sensible connection between the defendant’s negligence and the consequential event, much as they do in deciding issues of factual causation.

73.8 Rouse v. Squires [1973] QB 889 (CA)

On a frosty December night an articulated lorry (No.1) being negligently driven by Edward Allen, skidded into a jack-knife position, obstructing the centre and nearside lane of the M1. A motor car being driven in the centre lane collided with it. A second lorry (No.2) which had been following, was parked by the driver, Tobias Rouse, in the nearside lane 15 feet from No.1 with headlights on to illuminate it.

A third lorry (No.3) driven by Kevin Squires at 50 mph down the nearside lane, collided with No.2 which was pushed forward and killed Rouse who was standing in front of it. The action between Mrs. Rouse and Squires was compromised for £16,000. Squires then took third party action against the owners and driver of lorry No.1 which had caused the obstruction in the first place, claiming that they were at least in part the cause of the accident.

HELD: No.1 (Allen) had been negligent in obstructing the highway, and while the immediate cause of the accident was the negligence of No.3 (Squires) there had been no break in the chain of causation between Allen’s negligence and the accident. Allen was one-quarter to blame.

“If a driver so negligently manages his vehicle as to cause it to obstruct the highway and constitute a danger to other road users, including those who are driving too fast or not keeping a proper lookout, but not those who deliberately or recklessly drive into the obstruction, then the first driver’s negligence may be held to have contributed to the causation of an accident of which the immediate cause was the negligent driving of the vehicle which because of the presence of the obstruction collides with it or with some other vehicle or some other person.” per Cairns L.J. at p.898

73.9 Knightley v. Johns [1982] 1 All ER 851 (CA)

Thomas Johns negligently overturned his car in a tunnel in Birmingham. With the roadworks, panda cars and bodies of the passengers lying about in the tunnel it became necessary to close it to traffic. Inspector Sommerville instructed PC Knightley to do this and negligently permitted him to ride his motorcycle the wrong way down the tunnel flashing his blue lights and sounding his siren. Knightley collided with Mr. Cotton’s car entering the tunnel at 40 mph and suffered serious injuries. Knightley sued Johns for causing the accident with Cotton.

The Court of Appeal held that Inspector Sommerville’s negligence was a novus actus so Johns was not liable for the results of it.

“The question to be asked is accordingly whether that whole sequence of events is a natural and probable consequence of Mr. Johns’s negligence and a reasonably foreseeable result of it. In answering the question it is helpful but not decisive to consider which of these events were deliberate choices to do positive acts and which were mere omissions or failures to act; which acts and omissions were innocent mistakes or miscalculations and which were negligent having regard to the pressures and the gravity of the emergency and the need to act quickly. Negligent conduct is more likely to break the chain of causation than conduct which is not; positive acts will more easily constitute new causes than inaction.” per Stephenson L.J. at p.865
73.10 Roberts v. Bettany [2001] EWCA Civ 109 (CA)

Leslie and Rita Roberts lived in ‘Sea Haze’, next to their neighbours Roy and Jennifer Bettany, who lived in ‘Grove House’. ‘Sea Haze’ was in fact built on a colliery spoil heap, which extended to the embankment behind both properties. In 1991, Bettany employed a gardener to clear part of the embankment, in the course of which several bonfires were lit. As a result of the negligent execution of the work, several underground fires took hold, and the local authority (Delyn Borough Council) served an abatement notice on Bettany requiring the fires to be extinguished.

Bettany did nothing about it, so the local authority undertook the work itself, excavating the embankment and filling in the holes where the fires had been. Unfortunately, this was done so negligently that it caused subsidence under the Roberts’ property and their walls began to crack.

The trial judge held that Bettany could not be responsible for the damage to ‘Sea Haze’ as the negligence of the local authority was clearly a novus actus interveniens. The Court of Appeal overturned this decision. A defendant is not relieved of liability simply because there has been a novus actus interveniens: The act must also be such as would turn the original negligent act into a matter of the surrounding circumstances, and that was not the case here. The defendant’s inaction made the local authority’s action necessary, and the defendant’s were thus responsible for it.

“As (the judge) describes the matter, it seems to me that he comes close to saying that any incompetent intervention by a third party will suffice to break the chain of causation, or, alternatively, will suffice for, indeed will necessarily fulfill the doctrine of novus actus. That such an approach is not one that is correct in law can be seen by reference to works of authority.” per Buxton L.J. at para 16

Buxton L.J. then went on to quote several passages from Clerk & Lindsell, including:

“Whatever its form the novus actus must constitute an event of such impact that it rightly obliterates the wrongdoing of the defendant. The question which ought to be asked is ‘whether that intervening cause was of so powerful a nature that the conduct of the plaintiffs was not a cause at all but was merely a part of the surrounding circumstances.’” per Buxton L.J. at para 21

Criminal Behaviour by a Third Party

73.11 As a matter of policy, a tortfeasor will not usually be held liable for a subsequent crime by a third party. However, he will be liable if the offence of the third party was highly likely to occur as a result of the negligence. The cases can thus be divided into those where the criminal act of a third party was held to be a novus actus, relieving the defendant of liability for it, and those where it was not.

73.12 The cases where the criminal act WAS held to break the chain of causation include the following.

73.13 Wright v. Lodge [1993] 4 All ER 299 (CA)

Miss Shepherd was driving her Mini on a foggy night down an unlit part of the A45 when her car broke down. Although she had two passengers who could easily have helped her push the car off the road, she stayed on the road. A Scania lorry, being recklessly driven at 60 m.p.h. by David Lodge crashed into her Mini, skidded across the central reservation and caused a pile-up in which Philip Wright was injured and Istvan Kerek was killed. Lodge claimed that Shepherd was partly liable for the pile-up as it was initially caused by her negligence in not pushing her car off the road.

HELD: The chain of causation had been broken by Lodge’s recklessness. Although the presence of the Mini was a factor in the pile-up, it was not a factor of legal significance in light of Lodge’s unwarranted and unreasonable behaviour. Shepherd could not reasonably foresee that another driver would deliberately or recklessly collide with her car, though she might have been liable if he had merely been driving negligently.

73.14 **Lamb v. Camden London Borough Council** [1981] 1 QB 625 (CA)

Due to the negligence of the defendants, the plaintiff's house was damaged by water from a burst water-main. The plaintiff moved out so that repairs could be completed, and squatters moved in causing £30,000 worth of damage. It was held that the defendants were not liable for the damage caused by the squatters. The test of the reasonable foreseeability of damage where acts of independent third parties or events or acts not connected with the original tortious act were concerned was not to be unreasonably extended. Since, as a matter of policy, it was the responsibility of the owner of the house to see that it was secured when left unoccupied, and to insure against damage and theft, and since the squatters' behaviour was of an outrageously anti-social and criminal kind, the damage was too remote.

"It cannot be said that you cannot foresee the possibility that people will do stupid or criminal acts, because people are constantly doing stupid or criminal acts. But the question is not what is foreseeable merely as a possibility but what would the reasonable man actually foresee if he thought about it... The hypothetical reasonable man in the position of the tortfeasor cannot be said to foresee the behaviour of another person unless that behaviour is such as would, viewed objectively, be very likely to occur." per Oliver L.J. at p.642

73.15 **P. Perl (Exporters) Ltd. v. Camden LBC** [1986] 1 QB 342 (CA)

The defendants owned 2 adjoining premises, being 142 and 144 Southampton Row. No.142 was leased to the plaintiffs who sold knitwear in the shop and stored goods in the basement. No.144 had a broken lock and was known to be subject to burglaries, but the defendants took no steps to secure it. During a weekend, thieves broke into no.144, knocked a hole through the communal wall of No.142 and stole garments from the basement.

HELD: The defendants were not liable. Although there could be exceptions to the general rule at common law that a person was not liable for the acts of an independent third party, there could be no exception unless there was a high degree of foreseeability that damage would occur as a result of the act or omission of the defendant. It was not reasonably foreseeable to the defendants that the natural and probable consequence of their omission to secure their premises would be the cause of persons over whom they had no control stealing the plaintiffs' goods.

73.16 **King v. Liverpool City Council** [1986] 1 WLR 890 (CA)

The plaintiff was a tenant in a block of flats rented out by the defendants. When the flat immediately above hers became vacant, she asked the defendants to board it up against intruders. They did not do so, and the plaintiff's flat was damaged when vandals broke in to the upper flat and damaged water pipes which caused a flood in the plaintiff's flat.

HELD: The defendants were not liable. Although there was no principle of law excluding liability in negligence for damage caused by the deliberate wrongdoing of a third party, liability would only attach where there was some special relationship between the defendant and the third party, or where the injury to the plaintiff by the third party was the inevitable and foreseeable result of the defendant's act or omission.

73.17 **Smith v. Littlewoods Organisation Ltd.** [1987] 1 AC 241 (HL Scotland)

The defendants purchased a cinema with the intention of demolishing it and replacing it with a supermarket. Some initial work was done and the building was left empty. There were several acts of vandalism, including some attempts by trespassers to start fires. A fire was then started by some youths that damaged the neighbouring building. The defendants did not know of the earlier attempts to start fires and were held not to be liable.

"Held, dismissing the appeals, that whether an occupier of property owed a duty of care to adjoining occupiers in respect of acts of trespass on his property resulting in damage to adjoining properties depended on all the circumstances of the case and on socially accepted standards of behaviour; that cases in which such a duty would exist were likely to be rare; and that, since the defendants had not known of previous acts of vandalism in their cinema involving fire and since the cinema had not otherwise presented an obvious fire risk, the defendants had not been under any duty to the pursuers to anticipate the possibility of the cinema being set on fire by vandals by keeping the premises lockfast or otherwise taking steps to prevent their entry."

Headnote, cited by Henry L.J. in **Clark Fixing Ltd. v. Dudley MBC** (2001) para 5
73.18 The cases where the criminal act WAS NOT held to break the chain of causation include the following.

73.19 **Home Office v. Dorset Yacht Ltd. [1970] AC 1004 (HL)**

The Home Office was held to be liable for the vandalism of the Borstal boys who were permitted to escape to reek havoc in Poole Harbour.

73.20 **Clark Fixing Ltd. v. Dudley Metropolitan Borough Council [2001] EWCA Civ 1898**

The council compulsorily acquired certain land from Need Steels to build a bypass, including land on an industrial estate. The land included premises which adjoined that of the claimants and shared a timber roof with them. After Need Steels vacated their premises, trespassers frequently entered and set fire to the property. Complaints were made to the council by the claimants. One such fire ignited a timbered section of the building and set the communal roof alight. All the premises covered by the roof were destroyed, causing £5 million worth of damage.

It was found that the risk of fires spreading to the neighbouring buildings should have been obvious to any person whose job it was to carry out safety assessments, and that the risk could have been easily and cheaply avoided by demolishing the timbered section of the Need Steels premises for which the council had no use.

**HELD:** Distinguishing **Smith v. Littlewoods Organisation Ltd. (1987),** the defendants were liable.

"The council had both the knowledge and the means of knowledge of intruders creating fires on its property, the Need Steels building. It had the knowledge or the means of knowledge of that risk. Knowing that, it should have investigated and removed all readily moveable combustible material. The timber sectional building clearly fell within that definition. It could have been easily removed at trifling expense."

per Henry L.J. at para 46


The Royal Virgin Islands Police Force employed PC Laurent on the small island of Jost Van Dyke. He was the sole officer in charge and he had access to a .38 calibre service revolver, which was kept in the substation strongbox. On February 2, 1994, whilst on duty PC Laurent abandoned his post and took the police revolver. He travelled to the nearby island of Virgin Gorda and arrived at about 10.30pm at the bar and restaurant in which his former girlfriend worked. PC Laurent believed she was having a relationship with another man who was also present in the restaurant. He fired four shots in the crowded bar, intending to maim his girlfriend and the other man. One shot hit and seriously injured the respondent, who was a British resident visiting the island at the time. Prior to the shooting two formal complaints had been made to the police authorities about Laurent's violence to members of the public.

It was held that the Government of the Virgin Islands was directly liable for the injury to Hartwell as it knew, or ought to have known that PC Laurent was not a fit and proper person to have been given access to a police firearm.
TUTORIAL QUESTIONS
I: NEGLIGENCE: DUTY OF CARE

1. “Where there’s blame, there’s a claim!” (Solicitors’ advertising slogan)

To what extent has the concept of Duty of Care in the tort of negligence been developed to make this statement more or less accurate?

2. Ann, who is partially sighted due to a genetic defect, elects to have a sterilisation operation, as she does not feel that she can cope with bringing up a child, especially if he or she also proves to be partially sighted. Due to the negligence of Dr. Brown, the operation is unsuccessful, and two years later she gives birth to a son, Chris, who is also partially sighted.

Chris's father deserts him and Ann, leaving Ann to bring up the child alone. Chris proves to have behavioural difficulties associated with his disability. When he is two years old, the situation is assessed by a social worker from Drabshire County Council, who decides to put Chris into care, even though there is no evidence of abuse by Ann.

Chris is fostered to five different homes between the ages of 2 and 15, and is physically and sexually abused in all of them.

He becomes so traumatised as a result of this, that at the age of 15 he kills a 10-year-old child who has made fun of his strange eyes at a school bus-stop.

Chris feels empowered by this murder, and goes on a spree, killing four other 10-year-old children from the same school within a month.

The police eventually apprehend him in the act of trying to kill Ewan, another 10-year-old pupil at the school, with a claw hammer.

It transpires that the police had botched the investigation, including losing all the CCTV footage of the school in question. Had they conducted the investigation properly, it seems likely that most of the children would not have been attacked, let alone murdered by Chris.

The parents of the murdered children and Ewan wish to bring an action against the police.

Discuss the Duty of Care issues which arise from these circumstances.

3. “It may be objected that the House of Lords must act like a court of law and not like a court of morals. That would be only partly right. The court must apply positive law. But judges’ sense of the moral answer to a question, or the justice of the case, has been one of the great shaping forces of the common law. What may count in a situation of difficult and uncertainty is not the subjective view of the judge, but what he reasonably believes that the ordinary citizen would regard as right.”

per Lord Steyn in McFarlane v. Tayside Health Board [2000] 2 AC 59

Critically analyse this statement with reference to the development of the doctrine of Duty of Care in the tort of negligence.

4. “The decision of the Supreme Court in Robinson v. Chief Constable of West Yorkshire Police [2018] 2 WLR 595 has finally made sense of the public policy decisions on duty of care in negligence.”

With reference to decided cases, explain and critically analyse this statement.
II: NEGLIGENCE: BREACH OF DUTY

5. Brunfield Amateur Dramatic Society (BADS) decide to put on a charity production of the famous children's show “Peter Pan”, with all proceeds going to the Great Ormond Street Children’s Hospital. The show involves suspending members of the cast from thin wires above the stage to give the effect that they are flying. This is a stage effect that has been used in innumerable productions of “Peter Pan” for a hundred years with no reported casualties to any of the actors involved.

Joe Foy, the show's director, contacts a professional theatre effects operator to manage the flying scenes, but discovers that the cost would be so excessive that it would mean there would be no profits available to give to the charity. As Foy has some experience in amateur abseiling, he decides he can arrange a harness, wire and pulley system himself to create the flying effect.

Luke Leeves, the actor playing Peter Pan, agrees to let Foy handle the flying. However, at the first rehearsal, whilst Luke is suspended from the system devised by Foy, the pulleys fail to lock properly because Foy has not appreciated the importance of gauging the system to the weight of the actor involved. Luke is sent crashing to the floor from a height of fifteen feet and bangs his head on the stage. He is rendered unconscious and taken to hospital.

At the hospital, Luke is examined by Dr. Darling, a junior doctor on her first day in the Accident and Emergency Unit. Luke has recovered consciousness by the time of the examination but complains of a furious headache. The hospital is very busy because of a local shipwreck and Darling thinks it would be more beneficial to Luke to go home and rest than to wait for an X-Ray machine to become available. She checks this with Dr. Hook, the senior registrar. Hook agrees that Luke should be sent home as thinks the headache is probably caused by a migraine brought on by the stress.

Luke is sent home, but his headache becomes unbearable, and he calls for an ambulance to take him back to the hospital. At the hospital he is immediately given an X-Ray and it is discovered that he had fractured his skull in the fall.

The delay in treatment has caused severe swelling behind Luke’s eyes, which might lead to blindness. Hook decides to try an experimental treatment to reduce the effects, even though it is known that there is a 1:5,000 chance that the treatment might itself cause sight loss. He needs Luke to sign a consent form for the treatment, but does not disclose to him the risk of the side-effects, as he fears that Luke will not fully appreciate the importance of the treatment over the minimal risk of consequential injury. Luke signs the consent form in ignorance of the potential side-effects of the treatment.

Luke has the treatment, and as a result he loses the sight in his right eye.

Foy, Darling and Hook all deny liability in negligence on the basis that they were not in breach of their duty of care to Luke.

For the last forty years, Lord Magnet has held an annual charity fete in his grounds at Magnet Mansions in Hastings. The most popular attraction has always been the archery competition in which members of the public are given expert tuition in the use of a bow and arrow, and the best of them is invited to participate in the “Arrow Race” in which contestants have three minutes to score as many points as possible by firing arrows at a large target.

Although the spectators are kept behind the participants by a rope, there is no other barrier between them and the archers, unlike in similar contests around the country where there are sometimes high walls of clear plastic between the spectators and the participants, though these barriers spoil the view and often deter spectators from attending.

Despite this apparent lack of safety precautions, there have been very few accidents in the forty years of the contest, although a spectator was killed by a stray arrow in 1972.

William and his friend Harold attend the fete, and although he has no experience at all of archery, William decides to take some classes from the experts. He proves to be fairly competent, and is invited to join the “Arrow Race”, though he is warned that, according to the rules of the contest, he will be disqualified if he turns more than 90 degrees away from facing the target.

When the contest begins, William has some difficulty in loading the arrows onto his bow, and is clearly losing. Harold, who is standing behind him in the crowd, shouts out: “Come on William! You’re rubbish!” William, who has just managed to load his bow, turns to face Harold to show his anger, and accidentally lets the arrow go, shooting Harold in the eye.

Harold is taken to hospital, where he is seen by Dr. Dopey, a junior doctor on his first day in the Accident and Emergency Department. Dr. Dopey examines Harold and having removed the arrow, which has caused a serious but treatable injury, he detects that Harold has a rare eye infection. He wants to treat it with the experimental drug, Seemore, but he has read some reports that it might cause blindness in rare cases. He consults the Senior Registrar, Dr. Hazel, who confirms both the diagnosis and treatment. However, they agree not to tell Harold about what they were doing as they fear he might unwisely refuse the treatment. Harold thinks they are just treating him for the injuries suffered in the accident.

Harold suffers from blindness as a result of the treatment. A week after the treatment, the government withdraws Seemore on the basis that new research shows it to be highly likely to cause blindness.

Harold wishes to sue Lord Magnet, William, Dr. Dopey and Dr. Hazel in negligence.

Advise him as to whether any of these parties have breached their duty of care towards him.
Okem, a trainee lawyer, agreed to take part in a sponsored skate-boarding race through the streets of the City of London. The event was organised by the charity ‘Skate Against Suffering’ which frequently staged such events and had raised millions of pounds for famine relief through them. Okem was sent a list of regulations, including one which stated: “For the safety of all contestants, anyone who is adjudged to have caused a collision with any other contestant will be instantly disqualified.”

Okem had done very little skate-boarding and found that he was considerably older than the other contestants, whose average age was about fifteen. Despite this, he decided to give the race his best effort and was determined to win if possible.

During the race, he decided to overtake Peter, but misjudged the space he needed to do this and collided with Peter, causing him to somersault off his skateboard and to break his wrist. Peter was not wearing any protective padding or a helmet as he thought this would slow him down.

Peter was taken to hospital where he was attended by Dr. Quincy, a junior doctor on his first day in the Accident and Emergency Department. He sent Peter to have his wrist X-rayed, but Peter complained also of a very bad headache. Dr. Quincy told him that the headache was simply caused by anxiety and that it would soon ease off. When Peter insisted on a second opinion, Dr. Quincy reluctantly called for the senior registrar, Dr. Rizzo, and asked her opinion. She said to Peter: "Doctor knows best! Just do what you’re told and you’ll soon be better." She too refused to take any notice of his headache.

Peter had his wrist set and was sent home. The next day his headache got worse, and he called for an ambulance. When Peter arrived back at the hospital, Mr. Satchel, a consultant, ordered an immediate head X-ray and discovered that Peter had fractured his skull in the fall. However, having spoken to Quincy and Rizzo, he agreed that they were right not to bother with this procedure when Peter was first admitted.

Peter was admitted to the hospital, and whilst there he was visited by Trot, a practitioner of alternative medicine whom Peter had consulted in the past. Trot told Peter that his head would heal much more quickly if he took the herbal remedy that Trot had prepared for him. There had been reports in *The Lancet*, a leading journal of conventional medicine, that the ingredients in this remedy had been found to cause haemorrhages in rare cases and suggested that doctors should ensure that their patients had given informed consent before administering such a cure. Trot did not know of this report as he had never read *The Lancet*. Peter took the herbal medicine and was severely injured when he had a haemorrhage as a result.

Okem, Quincy, Rizzo and Trot all deny liability in negligence on the basis that they were not in breach of their duty of care towards Peter.

Advise Peter.
III: NEGLIGENCE: CAUSATION

8. Ray, aged 19, was a professional football player who had recently been signed to play for one of England's premier football clubs. Whilst driving to work in his Porsche, he was injured when Wayne, who was speeding in the opposite direction, veered his Jaguar across the road in front of him, causing Ray to crash his car into a lamppost and spin it into the middle of the road.

Ray's left leg was severely gashed by the crash and he was unable to get out of the car. A few minutes later, Mary, who was driving within the speed limit, crashed into Ray's Jaguar. She had not noticed the Jaguar because she had turned round momentarily to talk to her young children who were sitting in the back of the car. Ray's left leg was crushed by the second crash.

Ray was taken to a private hospital owned by Blair for treatment. The doctors at Blair's hospital examined his leg, but they realised that Ray needed specialist treatment to save his football career, and they sent him to Howard's hospital, which had a special unit for the treatment of injuries to sports players.

At Howard's hospital, Dr. Kennedy decided that the best way to save Ray's leg, so that he could continue to play football, was to perform a delicate operation which he knew may actually leave Ray's leg permanently stiff, even if performed correctly. However, as this risk was only 1:50, he decided not to worry Ray by telling him of this possibility and went ahead with the operation without revealing the risk. Unfortunately, although the operation was not performed negligently, it did leave Ray with a permanently stiff leg, thus ending his football career. When asked later, Ray said he did not know whether or not he would have refused to have the operation had he been told of the risk beforehand.

Ray was advised to rest the leg for at least six weeks, but as soon as he could stand, he attempted to kick a football around in the hope that he would be able to play again. However he lost his balance, and fell heavily, breaking his wrist.

To make matters worse for Ray, he was then diagnosed with having been infected by the MRSA virus, which was prevalent at both Blair's Hospital and at Howard's Hospital. It was clear that Ray contracted the virus at one of these hospitals, but it was not scientifically possible to tell which.

Advise Ray as to the issues of causation that will arise when he attempts to bring an action in the tort of negligence, with particular reference to the following matters:

Whether Wayne may be liable for the injury caused by Mary;

i) Whether Mary’s action has relieved Wayne of any liability;

ii) Whether Wayne or Mary may be liable for the end of Ray’s football career;

iii) Whether Kennedy may be liable for the adverse results of the operation;

iv) Whether any of the parties may be liable for Ray’s broken wrist;

v) Whether either Blair or Howard may be liable for the MRSA suffered by Ray.
9. Doris, a successful professional athlete aged 18, is jogging along the Moorgate pavement when she reaches the pedestrian crossing and decides to cross. The traffic lights controlling the vehicles have just turned to red (stop) and the pedestrian signal has not yet turned to green (go). However, she decides to risk crossing immediately as she does not want to stop moving and she runs across the road. She is knocked down by Enid, who is driving at fifty miles an hour. Enid had seen that the lights had only just changed and did not expect anyone to run off the pavement.

Enid brings her car to a sudden halt, causing it to skid across the road into the path of Fred, who is driving on the other side of the road. Fred is travelling at thirty miles per hour, and has also just driven through a red traffic light. Fred’s car spins around as he tries to stop and runs over the legs of Doris, who is still lying on the road.

Whilst Enid and Fred get into an argument, Georgina, a rival of Doris who has been watching these events, sneaks over to Doris and kicks her in the face, breaking her nose.

Doris is taken to hospital where the doctors diagnose that her damaged legs will never work properly again. This is because the breaking of her bones has set off in her a rare reaction which has caused her muscles to seize up irreparably. The doctors declare that her athletics career is at an end. Doris had expected to be able to compete professionally for at least the next ten years.

However the doctors also discover that Doris has a wasting disease of the spine which would have prevented her from competing anyway within two years. They are sure that the disease has been caused by exposure to radiation from a machine frequently used by rogue physiotherapists to help relax the muscles of athletes and to improve their performance. Doris has undergone such treatment from several such physiotherapists, most recently from Hamid.

**Advise Doris as to the issues of causation which may arise in her negligence claims for her injuries and for her loss of future income as a professional athlete.**