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NEGLIGENCE— INTRODUCTION

I. Formulation of a General Duty of Care

I. Historical Introduction

Because of the piecemeal development of civil liability under the forms of action, little thought was given by early common lawyers to the existence of any general principle underlying the various examples of liability. As late as the latter half of the eighteenth century, Blackstone in his *Commentaries on the Laws of England* described trespass on the case as a ‘universal remedy given for all personal wrongs and injuries without force’ (vol. III, ch. 8, para. 4); he thought in terms only of the form of action, not of the substantive grounds for allowing the action. Similarly, the authors of Digests and Abridgements (early types of practitioner texts) were concerned only to provide examples of factual situations where liability had been held to exist, and to state the correct form of action in which to plead those facts. As Baker points out (p. 413), even though *Comyns Digest* (published in 1762) might have had a heading ‘Action upon the Case for Negligence’, many examples of what would today be considered negligence were included under ‘Actions upon the Case for Misfeasance’ and no attempt was made to rationalise the specific examples under a general theory of liability. For parties in a pre-existing relationship, liability came to be associated with the assumption of an obligation by promise (*assumpsit*), and this provided the unifying basis for the law of contract. But it was not until a good deal later that the idea of obligation or duty was to play a similar role in the development of a general theory of tortious liability (applicable to parties who had no prior relationship). ‘Duty’ was first put forward as a unifying concept in the law of tort in Buller’s *Nisi Prius* (‘An Institute of the Law Relative to Trials at Nisi Prius’), published in 1768, in which it was suggested that:

Every man ought to take reasonable care that he does not injure his neighbour; therefore, wherever a man receives hurt through the default of another, though the same were not wilful, yet if it be occasioned by negligence or folly the law gives him an action to recover for the injury so sustained. . . . However, it is proper in such cases to prove that the injury was such as would probably follow from the act done.

The notion that liability in negligence was based on the existence of a duty owed by the defendant to the claimant was slow to take hold (see Winfield, ‘Duty in Tortious Negligence’ (1934) Col LR 41; Prichard, ‘*Scott v Shepherd* and the Emergence of the Tort of Negligence’, Selden Society Lecture, 1976), but by the early part of the nineteenth century it was said that damages could be sought for ‘the negligent or wilful conduct of the party sued, in doing or omitting something contrary to the duty which the law casts on him in the particular case’ (*Ansell v Waterhouse* (1817) 6 M & S 385). This still left the question when such a duty would

be imposed, and the earliest ‘discussions’ of the tort of negligence usually consisted of nothing more than lists of factual situations where a duty had been held to exist.

Particular problems arose where the defendant acted pursuant to a contractual obligation. By the beginning of the nineteenth century a contracting party might be able to sue the other party to the contract for breach of a tortious duty imposed by law. In addition, it was clear that a stranger to the contract might, in certain circumstances, sue for injury caused by negligent behaviour where the activity was undertaken pursuant to a contract; pedestrians injured by the negligence of a coachman were an obvious example. But the recognition of a duty where the parties were bound by a chain of contracts (e.g. between manufacturer, supplier, and consumer of goods) was a much slower process. The initial tendency was to limit the plaintiff to a claim under his contract, and to rule out any attempt to rely on an obligation arising under a contract to which he was not party. Each of the parties was expected to protect his own interests by securing appropriate warranties in the contracts to which he was party. Many of the early authorities deal with the liability of the manufacturer or supplier of defective goods or equipment, and raised the question: should a plaintiff who was not a party to the initial contract of sale or supply be able to claim the benefit of a warranty given thereunder by the manufacturer or supplier?

***Winterbottom v Wright* (1842) 10 M & W 109**

The plaintiff entered into a contract with the Postmaster General to drive a mail coach. The coach had been supplied by the defendant to the Postmaster General under a contract which provided that during the term of the contract the coach was to be kept in a fit, proper, safe and secure state. The plaintiff alleged that the defendant ‘negligently conducted himself, and so utterly disregarded his aforesaid contract and so wholly neglected and failed to perform his duty in this behalf’ that the plaintiff was injured when the coach collapsed throwing him from his seat.

Lord Abinger CB

I am clearly of opinion that the defendant is entitled to our judgment. . . . Here the action is brought simply because the defendant was a contractor with a third person; and it is contended that thereupon he became liable to every body who might use the carriage. . . . There is no privity of contract between these parties; and if the plaintiff can sue, every passenger, or even any person passing along the road, who was injured by the upsetting of the coach, may bring a similar action. Unless we confine the operation of such contracts as this to the parties who entered into them, the most absurd and outrageous consequences, to which I can see no limit, would ensue. . . .

There is . . . a class of cases in which the law permits a contract to be turned into a tort; but unless there has been some public duty undertaken, or a public nuisance committed, they are all cases in which an action might have been maintained on the contract. . . .

Alderson B

If we were to hold that the plaintiff could sue in such a case, there is no point at which such actions would stop. 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. . . .

Rolfe B

The duty, therefore, is shewn to have arisen solely from the contract; and the fallacy consists in the use of the word 'duty'. If a duty to the Postmaster General be meant, that is true; but if a duty to the plaintiff be intended (and in that sense the word is evidently used), there was none.

...

COMMENTARY

In *Langridge v Levy* (1837) 2 M & W 519, 150 ER 863, the plaintiff's father bought a gun for his own and his son's use. The defendant falsely told him it was made by a reputable gun-maker; it was not and it later exploded when the plaintiff fired it, causing him injury. The Court of Exchequer allowed the plaintiff's claim because of the fraudulent misrepresentation, but refused to found liability on the basis of a breach of a contractual duty owed to a third party. The plaintiff attempted to use this case as an authority in support of his claim in *Winterbottom v Wright* but, as the court noted, *Langridge* was decided on a narrower ground.

The judges in *Winterbottom v Wright* were clearly influenced by a form of what would today be called the 'floodgates' argument, namely, a concern that imposing liability in the instant case would lead to countless more extensions in the scope of the duty. Allied to this was a concern over the proper limits of liability in contractual settings. Once a contractual obligation was held to give rise to a duty in tort which extended beyond the parties to the contract, what other limitation was there? (See Palmer, 'Why Privity Entered Tort—An Historical Re-examination of *Winterbottom v Wright*' (1983) 27 Am JLH 85.)

With hindsight, it seems odd that the common law would allow a claim by the pedestrian injured by the negligent driving of a coachman, but not a claim by the coachman injured by the negligent maintenance of the coach (see Winfield, 'Duty in Tortious Negligence' (1934) Col LR 41). Given this anomaly, it is not surprising that the alignment of tortious product liability with contractual liability was periodically challenged. An exception was developed to the general rule of no liability in tort, resulting in the recognition of a potential liability in respect of articles 'dangerous in themselves' (*Longmeid v Holliday* (1851) 6 Ex 761, 155 ER 752). And a more direct challenge was mounted in the case of *George v Skivington* (1869) LR 5 Ex 1. In that case, the first plaintiff was injured after using hair wash which had been sold to her husband, but for her use, by the defendant. (The husband was the second plaintiff in the action.) There was no fraud; neither did the case fit into the exception to the general rule noted above. None the less, the Court of Exchequer went out of its way to hold that the wife had a good cause of action (see Ibbetson, 'The Tort of Negligence in the Nineteenth and Twentieth Centuries', extracted pp. 12–13, above). Kelly CB expressly noted that the action was not upon a contract, and hence no question of warranty arose; rather, an action on the case was brought for 'unskilfulness and negligence in the manufacture of it whereby the person who used it was injured'.

The attempt to clarify the law of liability for defective products brought with it the common law's first attempt at a normative explanation of the duty of care (see extract below).

Heaven v Pender (1883) 11 QBD 503

The plaintiff was painting a ship when one of the ropes holding up the staging on which he was working broke; he fell and was injured. The staging had been erected by the defendant dock owner under contract with the plaintiff's employer. It was found that the rope which snapped was unfit for use at the time it was supplied by the defendant. The plaintiff succeeded in recovering damages in the county court, but the Queen's Bench Division on appeal ordered that judgment be entered for the defendant. The plaintiff appealed to the Court of Appeal.

Brett MR

Actionable negligence consists in the neglect of the use of ordinary care or skill towards a person to whom the defendant owes the duty of observing ordinary care and skill, by which neglect the plaintiff, without contributory negligence on his part, has suffered injury to his person or property. . . .

If a person contracts with another to use ordinary care and 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. . . .

The questions which we have to solve in this case are—what is the proper definition of the relation between two persons other than the relation established by contract, or fraud, which imposes on the one of them a duty towards the other to observe, with regard to the person or property of such other, such ordinary care or skill as may be necessary to prevent injury to his person or property. . . .

The proposition which [the cases] suggest, and which is, therefore, to be deduced from them, is that whenever one person is by circumstances placed in such a position with regard to another that everyone of ordinary sense who did think would at once recognise that if he did not use ordinary care and skill in his own conduct with regard to those circumstances he would cause danger of injury to person or property of the other, a duty arises to use ordinary care and skill to avoid such danger. . . .

Bowen and **Cotton LJ** delivered separate judgments in favour of allowing the appeal.

Appeal allowed.

COMMENTARY

The attempt of Brett MR to enunciate a general principle defining when a duty of care exists was rejected by the other two judges in the case, who confined their reasoning to the particular facts of the case. And shortly afterwards, the House of Lords affirmed that there was no general principle of liability for negligent misstatements causing monetary loss (*Derry v Peek* (1889) 14 App Cas 337). Brett MR (as Lord Esher) subsequently attempted to resuscitate his general principle by suggesting that it would only arise where there was physical proximity between the parties. In *Le Lievre v Gould* [1893] 1 QB 491, an action by a mortgagee against a surveyor who had prepared certificates for the mortgagor, he stated:

A man is entitled to be as negligent as he pleases towards the whole world if he owes no duty to them. The case of *Heaven v Pender* has no bearing upon the present question. That case established that, under certain circumstances, one man may owe a duty to another, even though there is no contract between them. If one man is near to another, or is near to the property of another, a duty lies upon him not to do that which may cause a personal

injury to that other, or may injure his property. For instance, if a man is driving along a road, it is his duty not to do that which may injure another person whom he meets on the road, or to his horse or his carriage. In the same way it is the duty of a man not to do that which will injure the house of another which he is near. . . . That is the effect of the decision in *Heaven v Pender*, but it has no application to the present case. . . .

Notwithstanding Lord Esher's efforts, the general principle enunciated in *Heaven v Pender* did not result in more extensive liability, as can be seen from Lord Sumner's statement in *Blacker v Lake & Elliot Ltd* (1912) 107 LT 533 at 536 that 'the breach of the defendant's contract with A to use care and skill in and about the manufacture or repair of an article does not of itself give any cause of action to B when he is injured by reason of the article proving to be defective'. The courts continued to think in terms of a general rule of no liability, to which only limited exceptions were made (in respect of articles dangerous in themselves and also, eventually, articles which were not normally dangerous but had become so because of a defect known to the manufacturer). It was not until 1932 that the limited notion of duty explained in *Le Lievre v Gould* was expanded into the notions of closeness, proximity, and neighbourhood—used in a metaphorical rather than literal sense—that define the modern duty of care.

2. *Donoghue v Stevenson*

Lord Atkin of Aberdovey, 'Law as an Educational Subject'

[1932] JSPTL 27

It is quite true that law and morality do not cover identical fields. No doubt morality extends beyond the more limited range in which you can lay down the definite prohibitions of law; but, apart from that, the British law has always necessarily ingrained in it moral teaching in this sense: that it lays down standards of honesty and plain dealing between man and man. . . .

[A man] is not to injure his neighbour by acts of negligence; and that certainly covers a very large field of the law. I doubt whether the whole law of tort could not be comprised in the golden maxim to do unto your neighbour as you would that he should do unto you. It imposes standards . . . and and it is of the utmost importance to the community that those standards should be maintained; and it teaches a man to respect his neighbour's right of property and person.

...

Donoghue v Stevenson [1932] AC 562

The pursuer alleged that she and a friend had entered a café in Paisley, near Glasgow, and her friend had purchased a bottle of ginger beer for her consumption. The dark green colour of the bottle made it impossible to see its contents. The pursuer drank some of the ginger beer, and as she was pouring more into her glass the partly decomposed remains of a snail came out of the bottle. She alleged that she suffered shock and severe gastro-enteritis as a result. The defender argued that the pursuer's claim disclosed no cause of action.

Lord Atkin

My Lords, the sole question for determination in this case is legal: Do the averments made by the pursuer in her pleading, if true, disclose a cause of action? I need not restate the particular facts. The question is whether the manufacturer of an article of drink sold by him to a distributor,

in circumstances which prevent the distributor or the ultimate purchaser from discovering by inspection any defect, is under any legal duty to the ultimate purchaser or consumer to take reasonable care that the article is free from defects likely to cause injury to health. I do not think a more important problem has occupied your Lordships in your judicial capacity: important both because of its bearing on public health and because of the practical test which it applies to the system under which it arises. The case has to be determined in accordance with Scots law; but it has been a matter of agreement between the experienced counsel who argued this case, and it appears to be the basis of the judgments of the learned judges of the Court of Session, that for the purposes of determining this problem the laws of Scotland and of England are the same. I speak with little authority on this point, but my own research, such as it is, satisfies me that the principles of the law of Scotland on such a question as the present are identical with those of English law; and I discuss the issue on that footing. The law of both countries appears to be that in order to support an action for negligence the complainant has to show that he has been injured by the breach of a duty owed to him in the circumstances by the defendant to take reasonable care to avoid such injury. In the present case we are not concerned with the breach of the duty; if a duty exists, that would be a question of fact which is sufficiently averred and for present purposes must be assumed. We are solely concerned with the question whether, as a matter of law in the circumstances alleged, the defender owed any duty to the pursuer to take care.

It is remarkable how difficult it is to find in the English authorities statements of general application defining the relations between parties that give rise to the duty. The courts are concerned with the particular relations which come before them in actual litigation, and it is sufficient to say whether the duty exists in those circumstances. The result is that the courts have been engaged upon an elaborate classification of duties as they exist in respect of property, whether real or personal, with further divisions as to ownership, occupation or control, and distinctions based on the particular relations of the one side or the other, whether manufacturer, salesman, landlord, customer, tenant, stranger, and so on. In this way it can be ascertained at any time whether the law recognises a duty, but only where the case can be referred to some particular species which has been determined and classified. And yet the duty which is common to all cases where liability is established must logically be based upon some element common to the cases where it is found to exist. To seek a complete logical definition of the general principle is probably to go beyond the function of the judge, for the more general the definition the more likely it is to omit essentials or to introduce non-essentials. The attempt was made by Brett MR in *Heaven v Pender* (1883) 11 QBD 503, in a definition to which I will later refer. As framed, it was demonstrably too wide, though it appears to me, if properly limited, to be capable of affording a valuable practical guide.

At present I content myself with pointing out that 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 rare 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 in question. This appears to me to be the doctrine of *Heaven v Pender*, as laid down by Lord Esher (then Brett MR) when

it is limited by the notion of proximity introduced by Lord Esher himself and AL Smith LJ in *Le Lievre v Gould*. Lord Esher says: 'That case established that, under certain circumstances, one man may owe a duty to another, even though there is no contract between them. If one man is near to another, or is near to the property of another, a duty lies upon him not to do that which may cause a personal injury to that other, or may injure his property'. . . . I think that this sufficiently states the truth if proximity be not confined to mere physical proximity but be used, as I think it was intended, to extend to such close and direct relations that the act complained of directly affects a person whom the person alleged to be bound to take care would know would be directly affected by his careless act. . . .

With this necessary qualification of proximate relationship as explained in *Le Lievre v Gould*, I think the judgment of Lord Esher expresses the law of England; without the qualification I think the majority of the court in *Heaven v Pender* were justified in thinking the principle was expressed in too general terms. There will no doubt arise cases where it will be difficult to determine whether the contemplated relationship is so close that the duty arises. But in the class of case now before the court I cannot conceive any difficulty to arise. A manufacturer puts up an article of food in a container which he knows will be opened by the actual consumer. There can be no inspection by any purchaser and no reasonable preliminary inspection by the consumer. Negligently, in the course of preparation, he allows the content to be mixed with poison. It is said that the law of England and Scotland is that the poisoned consumer has no remedy against the negligent manufacturer. If this were the result of the authorities, I should consider the result a grave defect in the law, and so contrary to principle that I should hesitate long before following any decision to that effect which had not the authority of this House. I would point out that, in the assumed state of the authorities, not only would the consumer have no remedy against the manufacturer, he would have none against any one else, for in the circumstances alleged there would be no evidence of negligence against any one other than the manufacturer; and, except in the case of a consumer who was also a purchaser, no contract and no warranty of fitness, and in the case of a purchase of a specific article under its patent or trade name, which might well be the case in the purchase of some articles of food or drink, no warranty protecting even the purchaser consumer. There are other instances than of articles of food and drink where goods are sold intended to be used immediately by the consumer, such as many forms of goods sold for cleaning purposes where the same liability must exist. The doctrine supported by the decision below would not only deny a remedy to the consumer who was injured by consuming bottled beer or chocolates poisoned by the negligence of the manufacturer, but also to the user of what should be a harmless proprietary medicine, an ointment, a soap, a cleaning fluid or cleaning powder. I confine myself to articles of common household use, where every one, including the manufacturer, knows that the articles will be used by other persons than the actual ultimate purchaser—namely, by members of his family and his servants, and in some cases his guests. I do not think so ill of our jurisprudence as to suppose that its principles are so remote from the ordinary needs of civilised society and the ordinary claims it makes upon its members as to deny a legal remedy where there is so obviously a social wrong.

It will be found, I think, on examination that there is no case in which the circumstances have been such as I have suggested where the liability has been negated. There are numerous cases, where the relations were much more remote, where the duty has been held not to exist. There are also dicta in some cases which go further than was necessary for the determination of the particular issues, which have caused the difficulty experienced by the courts below. I venture to say that in the branch of the law which deals with civil wrongs, dependent in England at any rate entirely upon the application by judges of general principles also formulated by judges, it is of particular importance to guard against the danger of stating propositions of law in wider terms than is necessary, lest essential factors be omitted in the wider survey, and the inherent adaptability of English law be unduly restricted. For this reason it is very necessary

in considering reported cases in the law of torts that the actual decision alone should carry authority, proper weight, of course, being given to the dicta of the judges. . . .

[His Lordship considered various decided cases, including *Winterbottom v Wright*, and continued:]

I do not find it necessary to discuss at length the cases dealing with duties where the thing is dangerous, or, in the narrower category, belongs to a class of things which are dangerous in themselves. I regard the distinction as an unnatural one so far as it is used to serve as a logical differentiation by which to distinguish the existence or non-existence of a legal right. In this respect I agree with what was said by Scrutton LJ in *Hodge & Sons v Anglo-American Oil Co* (1922) 12 L1 L Rep 183 at 187, a case which was ultimately decided on a question of fact: 'Personally, I do not understand the difference between a thing dangerous in itself, as poison, and a thing not dangerous as a class, but by negligent construction dangerous as a particular thing. The latter, if anything, seems the more dangerous of the two; it is a wolf in sheep's clothing instead of an obvious wolf'. The nature of the thing may very well call for different degrees of care, and the person dealing with it may well contemplate persons as being within the sphere of his duty to take care who would not be sufficiently proximate with less dangerous goods; so that not only the degree of care but the range of persons to whom a duty is owed may be extended. But they all illustrate the general principle. . . .

My Lords, if your Lordships accept the view that this pleading discloses a relevant cause of action you will be affirming the proposition that by Scots and English law alike a manufacturer of products, which he sells in such a form as to show that he intends them to reach the ultimate consumer in the form in which they left him with no reasonable possibility of intermediate examination, and with the knowledge that the absence of reasonable care in the preparation or putting up of the products will result in an injury to the consumer's life or property, owes a duty to the consumer to take that reasonable care.

It is preposition which I venture to say no one in Scotland or England who was not a lawyer would for one moment doubt. It will be an advantage to make it clear that the law in this matter, as in most others, is in accordance with sound common sense. I think that this appeal should be allowed.

Lord Macmillan

On the one hand, there is the well established principle that no one other than a party to a contract can complain of a breach of that contract. On the other hand, there is the equally well established doctrine that negligence apart from contract gives a right of action to the party injured by that negligence—and here I use the term negligence, of course, in its technical legal sense, implying a duty owed and neglected. The fact that there is a contractual relationship between the parties which may give rise to an action for breach of contract, does not exclude the co-existence of a right founded on negligence as between the same parties, independently of the contract, though arising out of the relationship in fact brought about by the contract. Of this the best illustration is the right of the injured railway passenger to sue the railway company either for breach of the contract of safe carriage or for negligence in carrying him. And there is no reason why the same set of facts should not give one person a right of action in contract and another person a right of action in tort. . . .

Where, as in cases like the present, so much depends upon the avenue of approach to the question, it is very easy to take the wrong turning. If you begin with the sale by the manufacturer to the retail dealer, then the consumer who purchases from the retailer is at once seen to be a stranger to the contract between the retailer and the manufacturer and so disentitled to sue upon it. There is no contractual relation between the manufacturer and the consumer; and thus the plaintiff, if he is to succeed, is driven to try to bring himself within one or other of the exceptional cases where the strictness of the rule that none but a party to a contract can found

on a breach of that contract has been mitigated in the public interest, as it has been in the case of a person who issues a chattel which is inherently dangerous or which he knows to be in a dangerous condition. If, on the other hand, you disregard the fact that the circumstances of the case at one stage include the existence of a contract of sale between the manufacturer and the retailer and approach the question by asking whether there is evidence of carelessness on the part of the manufacturer, and whether he owed a duty to be careful in a question with the party who has been injured in consequence of his want of care, the circumstance that the injured party was not a party to an incidental contract of sale becomes irrelevant, and his title to sue the manufacturer is unaffected by that circumstance. The appellant in the present instance asks that her case be approached as a case of delict [i.e. tort], not as a case of breach of contract. She does not require to invoke the exceptional cases in which a person not a party to a contract has been held entitled to complain of some defect in the subject matter of the contract which has caused him harm. The exceptional case of things dangerous in themselves, or known to be in a dangerous condition, has been regarded as constituting a peculiar category outside the ordinary law both of contract and of tort. I may observe that it seems to me inaccurate to describe the case of dangerous things as an exception to the principle that no one but a party to a contract can sue on that contract. I rather regard this type of case as a special instance of negligence where the law exacts a degree of diligence so stringent as to amount practically to a guarantee of safety. . . .

The law takes no cognisance of carelessness in the abstract. It concerns itself with carelessness only where there is a duty to take care and where failure in that duty has caused damage. In such circumstances carelessness assumes the legal quality of negligence and entails the consequences in law of negligence. What, then, are the circumstances which give rise to this duty to take care? In the daily contacts of social and business life human beings are thrown into, or place themselves, in an infinite variety of relations with their fellows; and the law can refer only to the standards of the reasonable man in order to determine whether any particular relation give rise to a duty to take care as between those who stand in that relation to each other. The grounds of action may be as various and manifold as human errancy; and the conception of legal responsibility may develop in adaptation to altering social conditions and standards. The criterion of judgment must adjust and adapt itself to the changing circumstances of life. The categories of negligence are never closed. The cardinal principle of liability is that the party complained of should owe the party complaining a duty to take care, and that the party complaining should be able to prove that he has suffered damage in consequence of a breach of that duty. Where there is room for diversity of view, it is in determining what circumstances will establish such a relationship between the parties as to give rise, on the one side, to a duty to take care, and on the other side to a right to have care taken. . . .

Now I have no hesitation in affirming that a person who for gain engages in the business of manufacturing articles of food and drink intended for consumption by members of the public in the form in which he issues them is under a duty to take care in the manufacture of these articles. That duty, in my opinion, he owes to those whom he intends to consume his products. He manufactures his commodities for human consumption; he intends and contemplates that they shall be consumed. By reason of that very fact he places himself in a relationship with all potential consumers of his commodities, and that relationship which he assumes and desires for his own ends imposes upon him a duty to take care to avoid injuring them. . . .

Lord Buckmaster (dissenting)

I do not propose follow the fortunes of *George v Skivington*; few cases can have lived so dangerously and lived so long . . . So far, therefore, as the case of *George v Skivington* and the dicta in *Heaven v Pender* are concerned, it is in my opinion better that they should be buried so securely that their perturbed spirits shall no longer vex the law. . . .

The principle contended for must be this: that the manufacturer, or indeed repairer, of any article, apart entirely from contract, owes a duty to any person by whom the article is lawfully used to see that it has been carefully constructed. All rights in contract must be excluded from consideration of this principle; such contractual rights as may exist in successive steps from the original manufacturer down to the ultimate consumer are *ex hypothesi* immaterial. Nor can the doctrine be confined to cases where inspection is difficult or impossible to introduce. This conception is simply to misapply to tort doctrine applicable to sale and purchase. . . .

The principle of tort lies completely outside the region where such considerations apply, and the duty, if it exists, must extend to every person who, in lawful circumstances, uses the article made. There can be no special duty attaching to the manufacture of food apart from that implied by contract or imposed by statute. If such a duty exists, it seems to me it must cover the construction of every article, and I cannot see any reason why it should not apply to the construction of a house. If one step, why not fifty? . . . Were such a principle known and recognised, it seems to me impossible, having regard to the numerous cases that must have arisen to persons injured by its disregard, that, with the exception of *George v Skivington*, no case directly involving the principle has ever succeeded in the courts, and, were it well known and accepted, much of the discussion of the earlier cases would have been a waste of time, and the distinction as to articles dangerous in themselves or known to be dangerous would be meaningless. . . .

I am of opinion that this appeal should be dismissed, and I beg to move your Lordships accordingly.

Lord Thankerton delivered a speech allowing the appeal, whilst **Lord Tomlin** delivered a speech dismissing the appeal.

Appeal allowed.

COMMENTARY

Readers who take for granted the wide scope of the tort of negligence in the modern law may well underestimate the importance of *Donoghue v Stevenson*. Its immediate importance was to impose a duty on manufacturers in respect of the production of certain types of goods, i.e. those which could not be inspected before consumption or use. A similar case had only recently been dismissed in Scotland (*Mullen v AG Barr* [1929] Sess Cas 461—ginger beer bottle containing a mouse) so this action was hardly a foregone conclusion when it reached the House of Lords. That the case ever made it to the Lords was due to the perseverance of the pursuer's lawyers (who had also acted for the pursuers in *Mullen*) who successfully petitioned the House of Lords to allow Mrs Donoghue to proceed as a pauper (the case being before the advent of legal aid). The development of the law of products liability from this beginning will be considered briefly below.

The 'Privity Fallacy'

On a wider doctrinal level, the majority of the House of Lords held that the existence of a contract between the defendant and a third party did not prevent the defendant owing a duty to the plaintiff in tort in relation to the performance of that contract. Hence the 'privity of contract' fallacy was exposed. *Winterbottom v Wright* was distinguished on the ground that the plaintiff in that case had sought to found his claim on the defendant's breach of

contract with a third party, not his breach of an independent tortious duty owed directly to the plaintiff ('no duty was alleged other than the duty arising out of the contract': [1932] AC 562 at 589, per Lord Atkin). Whether *Winterbottom* and the cases which followed it could be distinguished so easily is another matter (see Palmer, 'Why Privity Entered Tort—An Historical Re-examination of *Winterbottom v Wright*' (1983) 27 Am JLH 85) but, after *Donoghue*, the existence of a contract between the defendant and a third party has rarely affected the defendant's tort liability to a claimant who suffers personal injury. However, it should be noted that Lord Buckmaster's 'floodgates' concerns, rejected in *Donoghue*, have proved much more persuasive in cases involving pure economic loss.

The 'Neighbour Principle'

Despite the above achievements, the case is probably best known for Lord Atkin's neighbour principle. As can be seen from the majority speeches, it does not form part of the ratio of the case, but the decision has nevertheless been regarded as introducing into the law a general moral principle of 'good neighbourliness'. To answer the question whether A owes B a duty of care necessarily requires a consideration of whether A ought to take care to look after B's interests (see Howarth, 'Negligence after Murphy: Time to Re-Think' [1991] CLJ 58, 68–70). Knowledge of Lord Atkin's personal views helps to explain his conviction that we all have a duty to take care of our 'neighbours'. His biographer has described his Christian faith as a 'strong constant in his life', and a speech he gave to an audience at King's College London in October 1931 (less than two months before *Donoghue v Stevenson* was argued) is replete with references to the relationship between law and morality (see 'Law as an Educational Subject', extracted above); in addition, it is known that Lord Atkin discussed the concept of 'neighbour' with his family and guests over the summer of 1931 (see generally G. Lewis, *Lord Atkin* (London: Butterworths, 1983)).

Lord Atkin's reliance upon a broad moral principle should be contrasted with the more pragmatic approach of Lord Macmillan. Lord Macmillan had originally drafted a speech deciding the case by reference to Scottish law, but it seems likely that Lord Atkin persuaded him (and perhaps also Lord Thankerton) to widen the decision to cover English law as well (see Rodger, 'Lord Macmillan's Speech in *Donoghue v Stevenson*' (1992) 108 LQR 236), a not unreasonable suggestion as the case had been argued on the basis that English and Scottish law were the same. For Lord Macmillan, the 'categories of negligence are never closed' and 'the conception of legal responsibility may develop in adaptation to altering social conditions and standards'. This gives little practical guidance on when a duty of care should be owed and leaves the issue to be decided in each and every specific factual matrix. Although it can hardly be regarded as conducive to certainty in the law, his cautious, case-by-case approach bears very great similarities to that currently favoured by the courts (see especially *Caparo Industries plc v Dickman*, below).

Further historical background on the case can be found in Rodger, 'Mrs Donoghue and Alfenu Varus' (1988) CLP 1; P. Burns (ed.), *Donoghue v Stevenson and the Modern Law of Negligence* (Vancouver: CLE, 1991); McBryde, *Donoghue v Stevenson: The Story of the "Snail in the Bottle" Case* in A. Gamble (ed.), *Obligations in Context* (Edinburgh: EUP, 1990). It was never actually determined whether there was a snail in the ginger beer bottle; the defender died before proofs were required and the matter was settled with his estate in December 1934 (see (1955) 71 LQR 472).

3. *Donoghue v Stevenson* in Action—The Development of Liability for Defective Products

***Grant v Australian Knitting Mills Ltd* [1936] AC 85**

The plaintiff bought two pairs of long underwear (known as Long Johns) from a retail shop. The defendants were the manufacturers who had supplied the goods to the retailers and the retailer. After he had worn one of the pairs for a couple of days, the plaintiff's legs began to itch and appeared red. After a week he sent that pair for washing and wore the second pair, and by the time he visited a dermatologist and was advised to dispose of the garments one pair had been washed twice and the other once. Despite this the rash worsened and spread; he was in bed for seventeen weeks and spent a further three months in hospital after a relapse. His dermatologist at one stage feared he might die. He sued the retailers for breach of contract and the manufacturers in negligence. He was successful against both at first instance, but the High Court of Australia overturned the decision on the basis that the goods were not sold in breach of contract and there was no evidence of negligence. The manufacturers provided details of the precautions they took to ensure no chemicals remained in the clothes, and stated that they had received no complaints in respect of 4,737,600 other garments treated in the same manner. The plaintiff successfully appealed to the Privy Council, who held that the Australian High Court could not be satisfied that the inferences drawn by the trial judge as to defectiveness were wrong.

Lord Wright

[W]hen the position of the manufacturers is considered, different questions arise; there is no privity of contract between the appellant and the manufacturers; between them the liability, if any, must be in tort, and the gist of the cause of action is negligence. The facts set out in the foregoing show in their Lordships' judgment negligence in manufacture. According to the evidence, the method of manufacture was correct; the danger of excess sulphites being left was recognised and was guarded against; the process was intended to be foolproof. If excess sulphites were left in the garment, that could only be because someone was at fault. The appellant is not required to lay his finger on the exact person in all the chain who was responsible or to specify what he did wrong. Negligence is found as a matter of inference from the existence of the defects taken in connection with all the known circumstances; even if the manufacturers could by apt evidence have rebutted that inference they have not done so.

On this basis, the damage suffered by the appellant was caused in fact (because the interposition of the retailers may for this purpose in the circumstances of the case be disregarded) by the negligent or improper way in which the manufacturers made the garments. But this mere sequence of cause and effect is not enough in law to constitute a cause of action in negligence, which is a complex concept, involving a duty as between the parties to take care, as well as a breach of that duty and resulting damage. It might be said that here there was no relationship between the parties at all; the manufacturers, it might be said, parted once and for all with the garments when they sold them to the retailers and were, therefore, not concerned with their future history, except in so far as under their contract with the retailers they might come under some liability; at no time, it might be said, had they any knowledge of the existence of the appellant; the only peg on which it might be sought to support a relationship of duty was the fact that the appellant had actually worn the garments but he had done so because he had acquired them by a purchase from the retailers, who were at that time the owners of the goods, by a sale which had vested the property in the retailers. It was said

there could be no legal relationship in the matter save those under the two contracts between the respective parties to those contracts, the one between the manufacturers and the retailers and the other between the retailers and the appellant. These contractual relationships (it might be said) covered the whole field and excluded any question of tort liability; there was no duty other than the contractual duties.

This argument was based on the contention that the present case fell outside the decision of the House of Lords in *Donoghue (or McAlister) v Stevenson* [1932] AC 562. Their Lordships, like the judges in the courts in Australia, will follow that decision, and the only question here can be what that authority decides and whether this case comes within its principles. . . .

It is clear that the decision treats negligence, where there is a duty to take care, as a specific tort in itself, and not simply as an element in some more complex relationship or in some specialised breach of duty, and still less as having any dependence on contract. All that is necessary as a step to establish the tort of actionable negligence is to define the precise relationship from which the duty to take care is to be deduced. It is, however, essential in English law that the duty should be established; the mere fact that a man is injured by another's act gives in itself no cause of action; if the act is deliberate, the party injured will have no claim in law even though the injury is intentional, so long as the other party is merely exercising a legal right; if the act involves lack of due care, again no case of actionable negligence will arise unless the duty to be careful exists. In *Donoghue's* case, the duty was deduced simply from the facts relied on, namely, that the injured party was one of a class for whose use, in the contemplation and intention of the makers, the article was issued to the world, and the article was used by that party in the state in which it was prepared and issued without it being changed in any way and without there being any warning of, or means of detecting, the hidden danger; there was, it is true, no personal intercourse between the maker and the user; but though the duty is personal, because it is inter partes, it needs no interchange of words, spoken or written, or signs of offer or assent; it is thus different in character from any contractual relationship; no question of consideration between the parties is relevant; for these reasons the use of the word 'privity' in this connection is apt to mislead because of the suggestion of some overt relationship like that in contract, and the word 'proximity' is open to the same objection; if the term proximity is to be applied at all, it can only be in the sense that the want of care and the injury are in essence directly and intimately connected; though there may be intervening transactions of sale and purchase and intervening handling between these two events, the events are themselves unaffected by what happened between them; proximity can only properly be used to exclude any element of remoteness, or of some interfering complication between the want of care and the injury, and, like 'privity', may mislead by introducing alien ideas. Equally also may the word 'control' embarrass, though it is conveniently used in the opinions in *Donoghue's* case to emphasise the essential factor that the consumer must use the article exactly as it left the maker, that is in all material features, and use it as it was intended to be used. In that sense the maker may be said to control the thing until it is used. But that again is an artificial use, because, in the natural sense of the word, the makers parted with all control when they sold the article and divested themselves of possession and property. An argument used in the present case based on the word 'control' will be noticed later.

It is obvious that the principles thus laid down involve a duty based on the simple facts detailed above, a duty quite unaffected by any contracts dealing with the thing, for instance, of sale by maker to retailer, and again by retailer to consumer or to the consumer's friend. . . .

If the foregoing are the essential features of *Donoghue's* case they are also to be found, in their Lordships' judgment, in the present case. The presence of the deleterious chemical in the pants, due to negligence in manufacture, was a hidden and latent defect, just as much as were the remains of the snail in the opaque bottle: it could not be detected by any examination that could reasonably be made. Nothing happened between the making of the garments and

their being worn to change their condition. The garments were made by the manufacturers for the purpose of being worn exactly as they were worn in fact by the appellant; it was not contemplated that they should be first washed. It is immaterial that the appellant has a claim in contract against the retailers; because that is a quite independent cause of action, based on different considerations, even though the damage may be the same. Equally irrelevant is any question of liability between the retailers and the manufacturers on the contract of sale between them. The tort liability is independent of any question of contract . . .

Counsel for the respondents, however, sought to distinguish *Donoghue's* case from the present on the ground that in the former the makers of the ginger beer had retained 'control' over it in the sense that they had placed it in stoppered and sealed bottles, so that it would not be tampered with until it was opened to be drunk, whereas the garments in question were merely put into paper packets, each containing six sets, which in ordinary course would be taken down by the shopkeeper and opened and the contents handled and disposed of separately so that they would be exposed to the air. He contended that, though there was no reason to think that the garments, when sold to the appellant were in any other condition, least of all as regards sulphur contents, than when sold to the retailers by the manufacturers, still the mere possibility and not the fact of their condition having been changed was sufficient to distinguish *Donoghue's* case; there was no 'control' because nothing was done by the manufacturers to exclude the possibility of any tampering while the goods were on their way to the user. Their Lordships do not accept that contention. The decision in *Donoghue's* case did not depend on the bottle being stoppered and sealed; the essential point in this regard was that the article should reach the consumer or user subject to the same defect it had when it left the manufacturer. That this was true of the garment is in their Lordships opinion beyond question. At most there might in other cases be a greater difficulty of proof of the fact.

Counsel further contended on behalf of the manufacturers that, if the decision in *Donoghue's* case were extended even a hair's-breadth, no line could be drawn and a manufacturer's liability would be extended indefinitely. He put as an illustration the case of a foundry which had cast a rudder to be fitted on a liner; he assumed that it was fitted and the steamer sailed the seas for some years; but the rudder had a latent defect due to faulty and negligent casting and one day it broke, with the result that the vessel was wrecked, with great loss of life and damage to property. He argued that, if *Donoghue's* case were extended beyond its precise facts, the maker of the rudder would be held liable for damages of an indefinite amount, after an indefinite time and to claimants indeterminate until the event. But it is clear that such a state of things would involve many considerations far removed from the simple facts of this case. So many contingencies must have intervened between the lack of care on the part of the makers and the casualty that it may be that the law would apply, as it does in proper cases, not always according to strict logic, the rule that cause and effect must not be too remote. In any case the element of directness would obviously be lacking. Lord Atkin deals with that sort of question in *Donoghue's* case at 591 where he refers to *Earl v Lubbock* [1905] 1 KB 253; he quotes the common sense opinion of Mathew LJ: 'It is impossible to accept such a wide proposition, and, indeed, it is difficult to see how, if it were the law, trade could be carried on.'

In their Lordships' opinion it is enough for them to decide this case on its actual facts. No doubt, many difficult problems will arise before the precise limits of the principle are defined: many qualifying conditions and many complications of fact may in the future come before the courts for decision. It is enough to say that their Lordships hold the present case to come within the principle of *Donoghue's* case and they think that the judgment of the Chief Justice was right and should be restored as against both respondents. . . .

Appeal allowed.

COMMENTARY

Unlike *Donoghue v Stevenson*, the above appeal was about the correctness of a judgment on the merits, and not a decision on a preliminary issue of law. Hence the court was required to consider whether all the elements of a cause of action in negligence were complete: there had to be a duty of care, and a breach of that duty which had caused the claimant damage. We shall consider each of the elements in turn in order to provide a general overview of the most important issues that arise in negligence litigation.

Duty

The existence of a duty of care is the primary requirement for a successful claim in negligence. If there is no duty, the failure to take reasonable care cannot give rise to liability. The chief significance of *Donoghue v Stevenson* was in providing a generalised concept of duty which was applicable to a wide range of different situations. Gradually, with the passage of time, the circumstances in which duties of care were recognised moved further and further from the specific factual context of the leading case. And potential limitations on the scope of liability under the principle of *Donoghue v Stevenson* were rejected.

The early stages of this process are evident in *Grant*. One question for the Privy Council was whether *Donoghue v Stevenson* applied only to products which the manufacturer supplied in a sealed and opaque container (like the bottle of ginger beer in the earlier case). This was a plausible interpretation of certain passages of their Lordship's speeches in *Donoghue*, but it was rejected by the Privy Council, who ruled that the essential question was whether the product reached the consumer subject to the same defect it had when it left the manufacturer. Another question for the Privy Council was whether the fact that the defect might have been discovered precluded the imposition of a duty of care on the manufacturer, given that Lord Atkin had stated in *Donoghue* that there should be 'no reasonable possibility of intermediate examination'. On the facts, the Privy Council ruled that the presence of the chemicals in the pants could not have been detected by any examination that could reasonably have been made, and so the limitation—which arose only where there was a reasonable possibility of discovering the defect—did not apply. Subsequently, it has been made clear that Lord Atkin's words did not lay down a separate requirement of liability under *Donoghue v Stevenson* and that liability can arise even if a third party did have a reasonable opportunity of inspecting the goods (*Griffiths v Arch Engineering Co Ltd* [1968] 3 All ER 217). It seems therefore that the possibility of intermediate examination goes to the question of causation rather than to the existence of a duty.

Later decisions take the process of 'stretching' the principle still further. It has been recognised, for instance, that a manufacturer owes a duty of care not only to the consumer of the product in question, but to anyone—even a 'by-blow victim'—who is injured by the product (*Stennett v Hancock* [1939] 2 All ER 578). And the range of potential defendants has also been extended, for example, to the repairer of a product who negligently leaves it in a dangerous state (*Haseldine v Daw & Sons Ltd* [1941] 2 KB 343). The result has been, in the last seventy years or so, a rapid expansion in the scope of the tort of negligence as the number of 'duty situations' has multiplied. In so far as physical injury is caused by the positive act of a private individual, it is now safe as a general rule to assume the existence of a duty of care.

Nevertheless, the extension of liability into other types of case has proved problematic—especially where the type of loss that the claimant has suffered is purely economic or psychiatric, or the alleged negligence consists of an omission rather than a positive act, or the defendant is a public body rather than a private individual. In such cases,

the courts have limited the circumstances in which a duty of care will arise for a variety of reasons (see Chs 7–10). A major concern has been that the recognition of a duty of care would result in a ‘liability in an indeterminate amount for an indeterminate time to an indeterminate class’ (*Ultramares Corp v Touche, Niven & Co* (1931) 174 NE 441 at 444, per Cardozo J). This ‘floodgates’ concern has not, however, been a significant factor restricting liability in simple cases of physical harm caused by another’s positive act. Indeed, in *Grant*, counsel for the defendants, paraphrasing Cardozo’s famous words, argued with a conspicuous lack of success that the court should not recognise a duty lest it open up a vista of indeterminate liability. The restrictive approach to the recognition of duties in ‘problematic’ cases should not mask the broad scope of the duty of care applying to ‘simple’ cases (as defined above). It is quite unthinkable, for instance, that anyone would ever deny the existence of a duty of care in respect of personal injuries caused by accidents in the workplace, collisions on the roads or railways, or dangerously defective products.

Breach

The case also raises the question of breach of duty (i.e. actual carelessness) by the defendant. All the plaintiff could do was point to the existence of the sulphur in the clothing; he could not suggest how or why it was there or who was responsible for it. In response the manufacturer suggested they had received no complaints about the 4,737,600 other garments treated the same way. If these figures are to be believed, the percentage chance that sulphur would remain in a garment was 0.000021. *Weir* (p. 26) suggests that such a low rate of failure should have entitled the manufacturer to a prize rather than a finding of negligence.

If such a high standard of performance can amount to negligence, one might question the extent to which liability is really fault-based. In the United States, the common law liability of the manufacturer to the ultimate consumer developed beyond negligence to strict liability, that is, liability without fault (see Prosser, ‘The Fall of the Citadel’ (1966) 50 *Minn L Rev* 791), and a similar regime of strict liability for defective products was introduced in the United Kingdom by the Consumer Protection Act 1987, Part 1 (see Ch. 11, Section 4). In strict liability the issue is not whether the defendant has exercised reasonable care in manufacturing the product but whether the product in question was defective. Strict liability can be defended on economic grounds: ‘The cost of accidents should be “internalised” to the enterprise that is the best cost-avoider; and in so far as that cost is passed on by the producer to the customer, it may not only reflect itself in competitive pricing but the cost will be spread among all consumers of the product’ (*Fleming*, p. 551). Seen thus, liability for defective products is simply a cost of business and is dealt with like other costs; the price of a product ought therefore to include an element to reflect the cost of obtaining insurance against that liability. Although strict product liability has been the subject of intense criticism in recent years in the United States (see P. Huber, *Liability* (New York: Basic Books, 1990); W. Olson, *The Litigation Explosion* (New York: Truman Tally, 1992)), most of the criticism has been directed at the number of actions and the level of damages rather than at the idea itself. In the United Kingdom, the introduction of strict liability for defective products seems to have excited little opposition. The question whether other strict liabilities should be introduced into English law is considered below, p. 963.

It is worth noting at this point that it was the English common law’s preference for a tort—rather than contract—based analysis of the manufacturer’s liability that led it to rest that liability on a finding of fault. If the courts had recognised a contractual warranty as to fitness for purpose or quality owed to the ultimate consumer of the product then the resultant liability would have been strict, for the taking of all reasonable care is no defence to an action

for breach of warranty. It was perhaps open to the House of Lords in *Donoghue* to set the law along this course by straightforwardly overruling *Winterbottom v Wright*, rather than distinguishing it on the basis that the plaintiff in the earlier action had pleaded his case in contract, not tort. This solution would undoubtedly have required a significant modification of the contractual doctrines of privity and consideration, but it would have accorded consumers the benefits associated with strict liability. Professor Milsom has commented: 'At the time [of *Donoghue*] it seemed a triumph to reach the manufacturer purely on the basis of wrong, and to exclude any trace of contractual analysis. But perhaps it was the contractual position that really needed reconsidering' (*Historical Foundations of the Common Law*, 2nd edn. (London: Butterworths, 1981), p. 400). However, as *Grant* illustrates, the malleability of the fault concept allows tribunals of fact to impose liability even where the manufacturer appears to have done all that could reasonably be expected of it.

Causation

There must be a causal link between the claimant's injury and the defendant's breach of his duty of care. The concept of causation brings together a number of discrete principles, which are well illustrated by the product liability cases. First, it must be established that the defendant's negligent conduct was the factual cause of the claimant's loss, in the sense that the loss would not have occurred but for the negligence. In *Evans v Triplex Safety Glass Co Ltd* [1936] 1 All ER 283, the plaintiffs sued in respect of an allegedly defective windscreen which had broken and showered them with shards of glass. The claim failed because, even assuming negligence on the defendants' part, there was no evidence that this rather than various other possible causes was the actual cause of the windscreen's disintegration: the damage might very well have occurred even if the defendants had taken all reasonable care. (Additionally, the court ruled that the allegation that the defendants had failed to take reasonable care could not be substantiated.) Secondly, there is the requirement of legal causation. Even if the hurdle of but-for or factual causation is overcome, the court may have to consider whether acts or omissions intervening in point of time between the defendant's breach of duty and the claimant's injury 'break the chain of causation' so as to negate the defendant's responsibility for the injury. In *Burrows v March Gas & Coke Co* (1872) LR 7 Ex 96, the defendants supplied the plaintiff with a defective pipe; when a gas-fitter called in to look for the source of an escape of gas searched for it with a lighted candle, he caused an explosion which did damage to the plaintiff. Although the explosion would not have happened but for the defendants' earlier breach of duty, they could not be regarded as a cause of loss which resulted immediately from a third party's reckless conduct. Although the case (which pre-dated *Donoghue v Stevenson*) was in fact decided in contract, there is no doubt that the court would have reached exactly the same conclusion even if it had recognised a tortious duty (as a modern court would be sure to do). Lastly, there is the question of remoteness. A defendant is only responsible for types of loss that are the reasonably foreseeable consequence of his negligence. If the claimant sustains a loss of a different type, that is too remote.

What if the claimant makes use of a product which obviously has a dangerous defect? In such a case it could be said that he was the cause of his own loss, but this will depend on whether he ignored the danger deliberately or inadvertently. In *Grant* Lord Wright stated that 'the man who consumes or uses a thing which he knows to be noxious cannot complain in respect of whatever mischief follows because it follows from his own conscious volition in choosing to incur the risk or certainty of mischance'. The same result is achieved whether the court finds the causal link with the manufacturer's negligence to have been broken or relies instead on the defence that the claimant has voluntarily assumed the risk of harm

(*volenti non fit iniuria*). If, however, the claimant has not consciously adverted to the danger, it may not be appropriate to allow the manufacturer to escape all liability. This might be a case for the operation of the partial defence of contributory negligence, which provides for a reduction in the damages award in proportion to the claimant's own responsibility for the injury. (Even where the claimant consciously runs the risk of injury, it may be going too far to prevent him from claiming altogether and the court may prefer simply to reduce his damages for contributory negligence.) The interaction of principles of causation with the various defences that can be raised to a negligence action is considered further at pp. 263–7, below.

Damage

Unlike trespass to the person, negligence (descended from the action on the case) is not actionable *per se*: it is necessary to prove that the claimant suffered legally-recognised damage as a result of the defendant's breach of duty. However, not all kinds of damage receive equal treatment from the law of negligence. The law reserves its most general protection for interests in the physical integrity of property and the person. But purely financial interests, for example, are protected only exceptionally. So if a negligently-manufactured product causes physical injury or property damage, there is generally no obstacle to recovery, but if the claim is simply that the product does not work—and so has caused the claimant to incur repair costs or to lose trade or business—this purely economic loss is unlikely to give rise to liability (see Ch. 8). Financial interests are of a lesser order than interests in physical integrity, and the law by and large leaves individuals to make their own (contractual) arrangements for the protection of their financial affairs.

It is crucial to note that English law treats the classification of the claimant's loss as a matter going primarily to the existence of a duty of care. The existence of the duty must be considered separately in respect of each different type of loss suffered by the claimant; a finding that the defendant owed a duty of care in respect of one type of loss does not entail that there is a duty in respect of others. Other legal systems address the nature of the claimant's loss more directly. Under the German civil code, the *Bürgerliches Gesetzbuch* (BGB), for example, the most general principle of liability for negligence, under 823 I BGB, applies only in respect of certain 'protected interests' which, for the most part, are set out in the code itself (see pp. 124–5, below). English law's rather indirect way of attaching significance to the type of loss suffered by the claimant should nevertheless not be allowed to obscure the vital role played by that factor in determining liability in negligence.

II. The Duty of Care in the Modern Law

As we have seen, *Donoghue v Stevenson* established the pre-eminent role of the 'duty of care' concept in the tort of negligence. Fault, causation, and damage are all irrelevant if the defendant is under no duty to the claimant, although each of the above may be factors influencing whether a duty will be owed. The Roman lawyer Buckland may have been able to suggest in 1935 that the duty of care was 'an unnecessary fifth wheel on the coach, incapable of sound analysis and possibly productive of injustice' ('The Duty to Take Care' (1935) 51 LQR 637), but the modern law treats the duty concept as an indispensable tool with which to denote when a person should be held responsible for the consequences of his negligence—and when he should be safeguarded against liability in respect of those consequences. In

fact, it is helpful to regard the duty concept as primarily concerned with cases of the latter sort: ‘duty of care cases are really about giving the defendant an immunity against liability in negligence’ (Howarth, ‘Negligence after Murphy: Time to Re-Think’ [1991] CLJ 58 at 93–4. The reasons why such an immunity should be granted are considered below.

Some modern commentators have argued that there is not a single ‘duty of care’; there are numerous ‘duties of care’ of a relatively high degree of specificity—a duty to do *x* rather than a general duty to exercise reasonable care in the circumstances (see McBride, ‘Duties of Care—Do they Really Exist?’ (2004) 24 OJLS 417). One difficulty with this approach is that it tends to conflate the ‘duty of care’ question with the ‘breach of duty’ question. As Howarth, ‘Many Duties of Care—Or a Duty of Care? Notes from the Underground’ (2006) 26 OJLS 449, 466 argues:

Judges who follow the ‘many duties’ path tend to use the phrase ‘there was no duty’ even where the defendant’s case is that they acted reasonably, not that there was no legal requirement for them to act reasonably. These judges tend to claim that the question is whether there was a duty to take precisely the precaution the defendant is accused of failing to take. But that view collapses the distinction between the two arguments. Indeed, if such a way of thinking were taken to its logical conclusion, there would never be any separate consideration of breach of duty since the issue would already have been resolved in setting the precise ‘duty’ involved. The concept of fault would disappear.

In our view, the duty of care is best viewed as a ‘control device’ for determining when defendants will (or will not) be placed under a generalised duty to exercise reasonable care in respect of their conduct, and held liable in damages for failing to do so, as opposed to giving specific advice to defendants as to how they should have acted in a given situation. The latter determination is made in the breach of duty element of the cause of action in negligence.

1. Introduction: Duty as ‘Control Device’

The duty of care’s role as a control device can be illuminated by comparing the approach of English law with that of other jurisdictions that do without any concept of ‘duty’ at all. In France, for example, the basis of the law of negligence is set out in a single provision of the *Code civil*. Article 1382 states:

Any act whatsoever which causes injury to another obliges the person by whose fault it was caused to pay compensation.

(Article 1383 makes it clear that this liability extends beyond acts and includes ‘negligence or carelessness’.) This simple formula provides no obvious way of limiting the scope of liability for injury caused by fault, and it is the law of causation that operates as ‘the control mechanism to prevent infinite liability’ (*van Dam*, para. 604–3). Such control is exerted in a much less systematic fashion than in English law, and it is apparent that French law has a much more expansive conception of liability for fault than that to be found in the common law.

The equivalent ‘general liability clause’ of the German civil code should also be considered in this context. (For general analysis, see B. Markesinis and H. Unberath, *The German Law of Torts: A Comparative Treatise*, 4th edn. (Oxford: Hart Publishing, 2002),

ch. 2.) By 823 I BGB:

Anyone who intentionally or negligently injures the life, body, health, freedom, ownership or any other right of another in a manner contrary to law shall be obliged to compensate for the loss arising.

Of particular note here is the highlighting of the interests that the liability clause protects. It is the protected interests (*Rechtsgüter*) that provide the principal limitation on the scope of liability for negligence (and indeed for intentional injury). In English law, that function is performed by the concept of the duty of care, though the set of protected interests is nowhere set out in explicit fashion, while the related question of what constitutes actionable ‘damage’ has been neglected to a very considerable extent (see further Nolan, ‘New Forms of Damage in Negligence’ (2007) 70 MLR 59). Additionally, the duty concept’s role in delimiting the interests protected in the tort of negligence may be obscured by the sheer variety of factors—including an apparently unlimited set of potentially relevant policy considerations—that affect the decision whether or not a duty of care arises on the facts. To the advantage of the English practice, however, is the possibility of taking account of the protected interests in a more nuanced fashion—allowing for greater or lesser protection according to the perceived importance of the interest infringed in the individual case. A different approach is therefore possible depending on whether the damage takes the form of personal injury, property damage, pure economic loss, or some other type of actionable harm.

The *Principles of European Tort Law* (Vienna: Springer, 2005) elaborated by the European Group on Tort Law, an informal study group of tort law experts from different jurisdictions, attempt a synthesis of the best elements of common law and civil law tort traditions. Their ‘general conditions of liability’, applicable (as in most European systems) to both intentional and negligent conduct, state that ‘[d]amage requires material or immaterial harm to a legally protected interest’ (Article 2:101). The protected interests are then introduced in a fashion which seeks to combine explicit statement (as in the German civil code) with flexibility of treatment (as under the common law).

Principles of European Tort Law, Article. 2:102: Protected Interests

- (1) The scope of protection of an interest depends on its nature; the higher its value, the precision of its definition and its obviousness, the more extensive is its protection.
- (2) Life, bodily or mental integrity, human dignity and liberty enjoy the most extensive protection.
- (3) Extensive protection is granted to property rights, including those in intangible property.
- (4) Protection of pure economic interests or contractual relationships may be more limited in scope. In such cases, due regard must be had especially to the proximity between the actor and the endangered person, or to the fact that the actor is aware of the fact that he will cause damage even though his interests are necessarily valued lower than those of the victim.

The function of the duty of care concept in English law, and its role in determining which interests are protected by the English law of negligence, and what counts as actionable damage, were considered recently by the House of Lords in *D v East Berkshire Community NHS Trust*, below.

D v East Berkshire Community Health NHS Trust

[2005] 2 AC 373

The claimants alleged negligence on the part of the defendants' child welfare professionals (doctors and social workers) who had formed the opinion, subsequently shown to be erroneous, that the claimants had been guilty of abuse towards their children. The case is given fuller consideration below (p. 529), where the facts are stated in more detail. For now, it is enough to note that one argument advanced for the claimants was that the duty concept was an inappropriate 'control mechanism' for dealing with the relevant policy considerations, and that the material factors were better taken into account in determining whether or not there had been a breach of duty.

Lord Nicholls

92 A wider approach has also been canvassed. The suggestion has been made that, in effect, the common law should jettison the concept of duty of care as a universal prerequisite to liability in negligence. Instead the standard of care should be 'modulated' to accommodate the complexities arising in fields such as social workers dealing with children at risk of abuse... The contours of liability should be traced in other ways.

93 For some years it has been all too evident that identifying the parameters of an expanding law of negligence is proving difficult, especially in fields involving the discharge of statutory functions by public authorities. So this radical suggestion is not without attraction. This approach would be analogous to that adopted when considering breaches of human rights under the European Convention. Sometimes in human rights cases the identity of the defendant, whether the state in claims under the Convention or a public authority in claims under the Human Rights Act 1998, makes it appropriate for an international or domestic court to look backwards over everything which happened. In deciding whether overall the end result was acceptable the court makes a value judgment based on more flexible notions than the common law standard of reasonableness and does so freed from the legal rigidity of a duty of care.

94 This approach, as I say, is not without attraction. It is peculiarly appropriate in the field of human rights. But I have reservations about attempts to transplant this approach wholesale into the domestic law of negligence in cases where... no claim is made for breach of a Convention right. Apart from anything else, such an attempt would be likely to lead to a lengthy and unnecessary period of uncertainty in an important area of the law. It would lead to uncertainty because there are types of cases where a person's acts or omissions do not render him liable in negligence for another's loss even though this loss may be foreseeable. My noble and learned friend, Lord Rodger of Earlsferry, has given some examples. Abandonment of the concept of a duty of care in English law, unless replaced by a control mechanism which recognises this limitation, is unlikely to clarify the law. That control mechanism has yet to be identified. And introducing this protracted period of uncertainty is unnecessary, because claims may now be brought directly against public authorities in respect of breaches of Convention rights.

Lord Rodger

100 ...[T]he 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.

101 Other relationships are also important. We may have children, parents, grandparents, brothers, sisters, uncles and aunts—not to mention friends, colleagues, employees and employers—who play an essential part in our lives and contribute to our happiness and prosperity. We share in their successes, but are also affected by anything bad which happens to them. So it is—and always has been—readily foreseeable that if a defendant injures or kills someone, his act is likely to affect not only the victim but many others besides. To varying degrees, these others can plausibly claim to have suffered real harm as a result of the defendant's act. For the most part, however, the policy of the law is to concentrate on compensating the victim for the effects of his injuries while doing little or nothing for the others. In technical language, the defendants owe a duty of care to the victim but not to the third parties, who therefore suffer no legal wrong.

COMMENTARY

These extracts highlight a number of important points. First, one of the important functions of the duty of care in English law (but not its only function) is to determine whether or not the claimant has suffered loss that is recognised by law. In fact, we should say 'by the law of negligence' because what constitutes actionable damage may vary from tort to tort. Lord Rodger's examples are of cases where the loss in question may be styled *damnum* but not *iniuria*, following a famous distinction made in Roman law: i.e. a loss that the law does not recognise as actionable damage. Secondly, the duty concept allows not just for a distinction between actionable and non-actionable damage, but also for an intermediate category of damage actionable under a limited set of circumstances. The 'ricochet' losses considered by Lord Rodger in [100] provide examples. The relatives of the victim may, in certain limited circumstances, have a claim against the injurer for their own losses that are consequential on the victim's injury, e.g. their mental suffering or their loss of economically valuable services. English law identifies such claims as falling in areas of 'limited duty', and prescribes specific requirements that they must satisfy (e.g. requirements of proximity or voluntary assumption of responsibility) if a duty of care is in fact to be recognised. Thirdly, whether or not a duty of care arises depends not only on the nature of the claimant's loss, but also on a variety of other 'complexities'. Depending on the circumstances of the case, the court may take account *how* the loss was caused (positive act or omission?), whether it was caused directly by the defendant or through a third party, and whether the claim has a public law dimension because the defendant is a public body, as well as an apparently unlimited set of policy factors relevant to the 'fairness, justice and reasonableness' of imposing a duty of care.

In *D v East Berkshire*, Lord Bingham stated, at [49], that he would regard a shift of emphasis from consideration of duty to consideration of breach as 'welcome', adding that 'the concept of duty has proved itself a somewhat blunt instrument for dividing claims which ought reasonably to lead to recovery from claims which ought not.' Lord Nicholls himself admitted, in the extract above, that the idea was 'not without attraction'. Why then did he (and a majority of the House of Lords) reject the approach?

Nolan (*op. cit.*, p. 125) has argued that it would be conducive to greater clarity in the law if the question of actionable damage were considered separately, and proposes a further distinction between ‘never actionable’ and ‘sometimes actionable’ harm:

[I]t seems preferable to deal with the question of whether a given harm is ever actionable under the heading of actionable damage, and to deal with the question of whether a sometimes actionable harm is actionable in this particular case under the separate heading of duty of care, since doing so draws attention to the distinction we have identified, and makes it more likely that the important issues raised by the former question will be addressed openly and comprehensively. Unfortunately, however, there is a tendency to subsume the damage issue into the duty of care question.

It is certainly true that in some cases—identified by Nolan—the damage requirement has received insufficient attention when considered as a duty of care issue. But it should not be thought that this is a general problem; as we discuss in later chapters, there are many situations where the duty of care has been denied or limited because of the particular kind of damage claimed, and the particular difficulties raised by allowing recovery for that kind of damage have been explored as part of the duty analysis. In other words, the same result that Nolan argues for can be achieved through the distinction between ‘no duty’ and ‘limited duty’ situations.

In a claim for ‘wrongful conception’, the parents of a child conceived—against their will—through the defendant’s negligence, usually relating to a failed sterilisation operation, seek damages for their losses. What interest do you think that the law is protecting in such cases: the woman’s physical integrity, the couple’s reproductive autonomy, the family’s financial wellbeing, or some other interest? See further p. 137, below.

Logically, the question whether a particular interest is protected is distinct from the question whether it has been damaged on the facts. (Cf. *Principles of European Tort Law*, Article 2:101: ‘Damage requires material or immaterial harm to a legally protected interest’.) In practice, ‘damage’ almost never emerges as a legal issue but only as a matter of proof (i.e. did the claimant in fact suffer the harm). In some very exceptional cases, however, it may be questioned whether what the claimant experienced legally constituted harm at all. One such case was *Grieves v F. T. Everard & Sons Ltd* [2006] EWCA Civ 27, [2006] 4 All ER 1161, a test case in which the ten nominated claimants sued their employers in respect of the appearance of harmless pleural plaques (fibrous tissues on the membrane of the lung) as a consequence of their exposure to asbestos in the workplace. One question addressed by the court was whether the development of pleural plaques constituted personal injury in itself. Concluding that it did not, Lord Phillips CJ and Longmore LJ explained, at [18]:

Pleural plaques undoubtedly constitute a physiological change in the body... For present purposes their relevant feature is that... they are symptomless, have no adverse effect on any bodily function and, being internal, have no effect on appearance. In short... no one is any the worse physically for having pleural plaques.

In their view, at [19] and [21], ‘[w]hile damage need not be substantial, it must be more than minimal’: ‘A claim for negligence will only lie where damage has been caused that is worth suing for.’ On the facts, the physiological changes were insufficiently significant to constitute damage on which a claim in negligence could be founded.

Applying analogous reasoning, do you think that property covered in dust by nearby building works is or could be ‘damaged’? (See *Hunter v Canary Wharf Ltd* [1996] 1 All ER 482, CA.) What about organic crops in which an unwanted GMO presence is found because of the defendant’s GM farming next door? (Cf. *Hoffman v Monsanto Canada Inc* [2005] 7

WWR 665 at [72] (Saskatchewan Court of Queen's Bench), affirmed without reference to this point: 2007 SKCA 47.)

2. The Foreseeable Claimant

An important early step in the process of limiting a wrongdoer's liability for the consequences of his negligence came with the recognition that the 'duty' recognised by the tort of negligence is a relative concept. The duty is owed not to the world at large (as a duty in criminal law would be), but only to an individual within the scope of the risk created, that is, to a foreseeable victim. This idea was explored in the well-known American case of *Palsgraf v Long Island Railroad Co* 59 ALR 1253 (1928) (New York Court of Appeals). The plaintiff was standing on a platform of the defendant's railroad when a train stopped at the station. A man carrying a package tried to get on the train, but appeared to be having difficulties, so a railway guard on the car, who had held the door open, reached forward to help him in, and another guard on the platform pushed him from behind. In doing this, the package was dislodged, and fell on the track. Although there was nothing in its appearance to suggest it, the package contained fireworks which exploded when it fell on the tracks. The shock of the explosion (as the court held) threw down some scales at the other end of the platform some distance away. The scales struck the plaintiff, causing injuries for which she sued. The New York Court of Appeals rejected the plaintiff's claim but on different grounds. Cardozo J held the plaintiff was owed no duty because it was not foreseeable that the allegedly careless acts of the guards could create a risk of harm to *the plaintiff*. The fact that the guards might have owed a duty to others (i.e. those who were foreseeably at risk as a result of the conduct) was irrelevant:

What the plaintiff must show is 'a wrong' to herself, i.e. a violation of her own right, and not merely a wrong to someone else, nor conduct 'wrongful' because unsocial, but not 'a wrong' to anyone... Negligence, like risk, is thus a term of relations. Negligence in the abstract, apart from things related, is surely not a tort, if indeed it is understandable at all. Negligence is not a tort unless it results in the commission of a wrong, and the commission of a wrong imports the violation of a right, in this case, we are told, the right to be protected against interference with one's bodily security. But bodily security is protected, not against all forms of interference or aggression, but only against some.

One who seeks redress at law does not make out a cause of action by showing without more that there has been damage to his person. If the harm was not wilful, he must show that the act as to him had possibilities of danger so many and so apparent as to entitle him to be protected against the doing of it though the harm was unintended. ... The victim does not sue derivatively, or by right of subrogation, to vindicate an interest invaded in the person of another. Thus to view his cause of action is to ignore the fundamental difference between tort and crime. ... He sues for breach of a duty owing to himself.

A different approach was taken by Andrews J:

The proposition is this: Every one owes to the world at large the duty of refraining from those acts that may unreasonably threaten the safety of others. Such an act occurs. Not only is he wronged to whom harm might reasonably be expected to result, but he also who is in fact injured, even if he be outside what would generally be thought the danger zone. There needs be duty due the one complaining, but this is not a duty to a particular individual, because as to him harm might be expected. Harm to someone being the natural result of the act, not only that one alone, but all those in fact injured may complain. ... Unreasonable risk being taken, its consequences are not confined to those who might probably be hurt. ...

Andrews J went on to hold that the defendant's negligence was not in fact the 'proximate cause' of the plaintiff's injury. So, despite the fact that he espoused a very different theory of negligence from that of Cardozo J, he reached the same conclusion as to liability on the facts of the case. In his judgment, the concept of 'proximate cause' does the work that the concept of 'duty' does in Cardozo J's. Andrews J's approach has appealed to some English commentators: Buckland (*op. cit.*) writes that the majority view in *Palsgraf* seems 'only to be another way of saying that a man ought not to be responsible for unforeseeable consequences' (at p. 648) and asks what would have happened if the plaintiff had been injured, without the intervention of the scales, by the package violently sliding along the platform: 'As there was no duty to her, it seems she would have had no remedy even in this case, but of course if it had happened it would have been held that she was near enough to have an interest' (*ibid.*). It will be considered further, below, whether the duty concept can usefully perform any function other than that which may already be performed by the concept of causation.

Doubts have been expressed whether the events described in the judgments in the *Palsgraf* decision could have occurred in the fashion envisaged. Although the court accepted that it was the shock of the explosion which threw down the scales, injuring the plaintiff, it has been suggested that the more likely explanation is that the scales were knocked down by people running about in a panic following the explosion (see Prosser, '*Palsgraf Revisited*' (1953) 52 Mich L Rev 1; cf. G. White, *Tort Law in America: An Intellectual History* (New York: OUP, 1985), pp. 263–4, n. 117). If this version of the facts had been accepted by the New York Court of Appeals, do you think Mrs Palsgraf would have been any more likely to succeed?

It may be noted that Andrews J's approach bears some similarity to that taken under Article 1382 of the French *Code civil*, which does without any concept of 'duty' at all but instead advances a generalised liability for 'fault' (see above).

The requirement that the duty of care can only be owed to a foreseeable plaintiff was explored in England in the following case.

Hay or Bourhill v Young [1943] AC 92

The pursuer, described in the opinions as a fishwife, was a passenger on a tramway car. After she had alighted at a stop, and as she was lifting her fish-basket from the driver's platform, she heard the sound of a collision between a motor-cycle and a car. The motorcyclist, a certain John Young, had been travelling at excessive speed and had been unable to avoid the car when it had crossed his path in order to make a right hand turn. Young was thrown on the street and sustained injuries from which he died. The accident occurred some 45 or 50 feet away from where the pursuer was standing, but out of her line of sight. After the cyclist's body had been removed, the pursuer approached and saw the blood left on the roadway. She alleged that, as an immediate result of the violent collision and the extreme shock of the occurrence, she wrenched and injured her back and was thrown into a state of terror and sustained a very severe shock to her nervous system. At the time of the incident, she had been about eight months pregnant, and five weeks later she gave birth to a child which was still-born as a result of her injuries. Having failed in her action before the Scottish courts, she appealed to the House of Lords.

Lord Macmillan

The duty to take care is the duty to avoid doing or omitting to do anything the doing or omitting to do which may have as its reasonable and probable consequence injury to others and the

duty is owed to those to whom injury may reasonably and probably be anticipated if the duty is not observed.

There is no absolute standard of what is reasonable and probable. It must depend on circumstances and must always be a question of degree. In the present instance the late John Young was clearly negligent in a question with the occupants of the motor car with which his cycle collided. He was driving at an excessive speed in a public thoroughfare and he ought to have foreseen that he might consequently collide with any vehicle which he might meet in his course, for such an occurrence may reasonably and probably be expected to ensue from driving at a high speed in a street. But can it be said that he ought further to have foreseen that his excessive speed, involving the possibility of collision with another vehicle, might cause injury by shock to the pursuer? The pursuer was not within his line of vision, for she was on the other side of a tramway car which was standing between him and her when he passed and it was not until he had proceeded some distance beyond her that he collided with the motor car. The pursuer did not see the accident and she expressly admits that her 'terror did not involve any element of reasonable fear of immediate bodily injury to herself.' She was not so placed that there was any reasonable likelihood of her being affected by the deceased's careless driving.

In these circumstances I am of opinion . . . that the late John Young was under no duty to the pursuer to foresee that his negligence in driving at an excessive speed and consequently colliding with a motor car might result in injury to the pursuer, for such a result could not reasonably and probably be anticipated. He was, therefore, not guilty of negligence in a question with the pursuer.

Lord Wright quoted Lord Atkin's 'well-known aphorism' in *Donoghue v Stevenson*—'You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour'—and continued:

This general concept of reasonable foresight as the criterion of negligence or breach of duty (strict or otherwise) may be criticised as too vague; but negligence is a fluid principle, which has to be applied to the most diverse conditions and problems of human life. It is a concrete not an abstract idea. . . . It is also always relative to the individual affected. This raises a serious additional difficulty in the cases where it has to be determined not merely whether the act itself is negligent against someone but whether it is negligent *vis-à-vis* the plaintiff. This is a crucial point in cases of nervous shock. Thus in the present case John Young was certainly negligent in an issue between himself and the owner of the car which he ran into, but it is another question whether he was negligent *vis-à-vis* the appellant.

In such cases terms like 'derivative' and 'original' and 'primary' and 'secondary' have been applied to define and distinguish the type of the negligence. If, however, the appellant has a cause of action, it is because of a wrong to herself. She cannot build on a wrong to someone else. Her interest, which was in her own bodily security, was of a different order from the interest of the owner of the car. . . .

The present case, like many others of this type, may, however, raise the different question whether the appellant's illness was not due to her peculiar susceptibility. She was 8 months gone in pregnancy. Can it be said, apart from everything else, that it was likely that a person of normal nervous strength would have been affected in the circumstances by illness as the appellant was? Does the criterion of reasonable foresight extend beyond people of ordinary health or susceptibility, or does it take into account the peculiar susceptibilities or infirmities of those affected which the defendant neither knew of nor could reasonably be taken to have foreseen? Must the manner of conduct adapt itself to such special individual peculiarities? If extreme cases are taken, the answer appears to be fairly clear, unless, indeed, there is knowledge of the extraordinary risk. One who suffers from the terrible tendency to bleed on slight contact, which is denoted by the term 'a bleeder;' cannot complain if he mixes with the crowd and suffers severely, perhaps fatally, from being merely brushed against. There is no actionable

wrong done there. A blind or deaf man who crosses the traffic on a busy street cannot complain if he is run over by a careful driver who does not know of and could not be expected to observe and guard against the man's infirmity. These questions go to 'culpability, not compensation'. . . . No doubt it has long ago been stated and often restated that, if the wrong is established, the wrongdoer must take the victim as he finds him. That, however, is only true . . . on the condition that the wrong has been established or admitted. The question of liability is anterior to the question of the measure of the consequences which go with the liability.

What is now being considered is the question of liability, and this, I think, in a question whether there is a duty owing to members of the public who come within the ambit of the act, must generally depend on a normal standard of susceptibility. This, it may be said, is somewhat vague. That is true; but definition involves limitation, which it is desirable to avoid further than is necessary in a principle of law like negligence, which is widely ranging and is still in the stage of development. It is here, as elsewhere, a question of what the hypothetical reasonable man, viewing the position, I suppose *ex post facto*, would say it was proper to foresee. What danger of particular infirmity that would include must depend on all the circumstances; but generally, I think, a reasonably normal condition, if medical evidence is capable of defining it, would be the standard. The test of the plaintiff's extraordinary susceptibility, if unknown to the defendant, would in effect make the defendant an insurer. The lawyer likes to draw fixed and definite lines and is apt to ask where the thing is to stop. I should reply it should stop where in the particular case the good sense of the jury, or of the judge, decides.

However, when I apply the considerations which I have been discussing to the present appeal, I come to the conclusion that the judgment should be affirmed. The case is peculiar, as indeed, though to a varying extent, all these cases are apt to be. There is no dispute about the facts. Upon these facts, can it be said that a duty is made out, and breach of that duty, so that the damage which is found is recoverable? I think not. The appellant was completely outside the range of the collision. She merely heard a noise, which upset her, without her having any definite idea at all. As she said: 'I just got into a pack of nerves and I did not know whether I was going to get it or not.' She saw nothing of the actual accident, or indeed any marks of blood until later. I cannot accept that John Young could reasonably have foreseen, or, more correctly, the reasonable hypothetical observer could reasonably have foreseen, the likelihood that anyone placed as the appellant was, could be affected in the manner in which she was. In my opinion John Young was guilty of no breach of duty to the appellant and was not in law responsible for the hurt she sustained. I may add that the issue of duty or no duty is indeed a question for the court, but it depends on the view taken of the facts. In the present case both courts below have taken the view that the appellant has, on the facts of the case, no redress and I agree with their view.

Lord Russell of Killowen, Lord Thankerton and Lord Porter delivered separate concurring opinions.

Appeal dismissed.

COMMENTARY

The law relating to 'nervous shock' has moved on significantly since this decision, albeit that the reluctance to compensate for harm caused by psychiatric means persists. The matter is considered in full detail in Chapter 7.

In the instant case, Lord Wright submitted that 'the question of liability . . . must generally depend on a normal standard of susceptibility'. He admitted, however, that what the reasonable person would foresee was a matter that was 'somewhat vague' and accepted that some

kind of infirmity might be reasonably foreseeable. In *Haley v London Electricity Board* [1965] AC 778, the House of Lords was faced with a claim by a blind man (the appellant) who, while walking along the pavement, had injured himself when he tripped over a long hammer left on the ground by the respondent company's employee with the object of warning passers-by of a trench which he had been digging at the spot. The appellant was alone but had approached with reasonable care, waving his white stick in front of him to detect objects in his way. It was accepted that the hammer gave adequate warning of the trench for normally-sighted persons, but the appellant alleged that the respondents or their employees should have taken special precautions to guard against the risk that a blind person's stick might miss the hammer. It was put in evidence that about 1 in 500 people were blind; that in Woolwich there were 258 registered blind; that the Post Office took account of the blind in guarding their excavations, using for the purpose a light fence some two feet high; and that more than once the appellant had detected such fences with his stick. The House of Lords held that the duty of care owed by persons excavating a highway was to ensure the reasonable safety of all persons whose use of the highway was reasonably foreseeable, not excluding the blind or infirm. Lord Reid stated:

We are all accustomed to meeting blind people walking alone with their white sticks on city pavements. No doubt there are many places open to the public where for one reason or another one would be surprised to see a blind person walking alone, but a city pavement is not one of them; and a residential street cannot be different from any other. The blind people whom we meet must live somewhere, and most of them probably left their homes unaccompanied. It may seem surprising that blind people can avoid ordinary obstacles so well as they do, but we must take account of the facts. There is evidence in this case about the number of blind people in London and it appears from government publications that the proportion in the whole country is near one in five hundred. By no means all are sufficiently skilled or confident to venture out alone, but the number who habitually do so must be very large. I find it quite impossible to say that it is not reasonably foreseeable that a blind person may pass along a particular pavement on a particular day.

Are pregnant woman to be encountered less frequently than blind people? If not, how can these two decisions be reconciled?

If the House of Lords had held that John Young owed a duty of care to Mrs Bourhill, might he also have owed a duty to her child *in ventre*? Consider the following extract.

Congenital Disabilities (Civil Liability) Act 1976

1. CIVIL LIABILITY TO CHILD BORN DISABLED

- (1) If a child is born disabled as the result of such an occurrence before its birth as is mentioned in subsection (2) below, and a person (other than the child's own mother) is under this section answerable to the child in respect of the occurrence, the child's disabilities are to be regarded as damage resulting from the wrongful act of that person and actionable accordingly at the suit of the child.
- (2) An occurrence to which this section applies is one which—
 - (a) affected either parent of the child in his or her ability to have a normal, healthy child;
 - or

- (b) affected the mother during her pregnancy, or affected her or the child in the course of its birth, so that the child is born with disabilities which would not otherwise have been present.
- (3) Subject to the following subsections, a person (here referred to as ‘the defendant’) is answerable to the child if he was liable in tort to the parent or would, if sued in due time, have been so; and it is no answer that there could not have been such liability because the parent suffered no actionable injury, if there was a breach of legal duty which, accompanied by injury, would have given rise to the liability.
- (4) In the case of an occurrence preceding the time of conception, the defendant is not answerable to the child if at that time either or both of the parents knew the risk of their child being born disabled (that is to say, the particular risk created by the occurrence); but should it be the child’s father who is the defendant, this subsection does not apply if he knew of the risk and the mother did not.
- (5) The defendant is not answerable to the child, for anything he did or omitted to do when responsible in a professional capacity for treating or advising the parent, if he took reasonable care having due regard to then received professional opinion applicable to the particular class of case; but this does not mean that he is answerable only because he departed from received opinion.
- (6) Liability to the child under this section may be treated as having been excluded or limited by contract made with the parent affected, to the same extent and subject to the same restrictions as liability in the parent’s own case; and a contract term which could have been set up by the defendant in an action by the parent, so as to exclude or limit his liability to him or her, operates in the defendant’s favour to the same, but no greater, extent in an action under this section by the child.
- (7) If in the child’s action under this section it is shown that the parent affected shared the responsibility for the child being born disabled, the damages are to be reduced to such extent as the court thinks just and equitable having regard to the extent of the parent’s responsibility.

1A. EXTENSION OF SECTION 1 TO COVER INFERTILITY TREATMENTS

- (1) In any case where—
- (a) a child carried by a woman as the result of the placing in her of an embryo or of sperm and eggs or her artificial insemination is born disabled,
 - (b) the disability results from an act or omission in the course of the selection, or the keeping or use outside the body, of the embryo carried by her or of the gametes used to bring about the creation of the embryo, and
 - (c) a person is under this section answerable to the child in respect of the act or omission, the child’s disabilities are to be regarded as damage resulting from the wrongful act of that person and actionable accordingly at the suit of the child.
- (2) Subject to subsection (3) below and the applied provisions of section 1 of this Act, a person (here referred to as ‘the defendant’) is answerable to the child if he was liable in tort to one or both of the parents (here referred to as ‘the parent or parents concerned’) or would, if sued in due time, have been so; and it is no answer that there could not have been such liability because the parent or parents concerned suffered no actionable injury, if there was a breach of legal duty which, accompanied by injury, would have given rise to the liability.

- (3) The defendant is not under this section answerable to the child if at the time the embryo, or the sperm and eggs, are placed in the woman or the time of her insemination (as the case may be) either or both of the parents knew the risk of their child being born disabled (that is to say, the particular risk created by the act or omission).
- (4) Subsections (5) to (7) of section 1 of this Act apply for the purposes of this section as they apply for the purposes of that but as if references to the parent or the parent affected were references to the parent or parents concerned.

2. LIABILITY OF WOMAN DRIVING WHEN PREGNANT

A woman driving a motor vehicle when she knows (or ought reasonably to know) herself to be pregnant is to be regarded as being under the same duty to take care for the safety of her unborn child as the law imposes on her with respect to the safety of other people; and if in consequence of her breach of that duty her child is born with disabilities which would not otherwise have been present, those disabilities are to be regarded as damage resulting from her wrongful act and actionable accordingly at the suit of the child.

4. INTERPRETATION AND OTHER SUPPLEMENTARY PROVISIONS

- (1) References in this Act to a child being born disabled or with disabilities are to its being born with any deformity, disease or abnormality, including predisposition (whether or not susceptible of immediate prognosis) to physical or mental defect in the future.
- (2) In this Act—
- (a) 'born' means born alive (the moment of a child's birth being when it first has a life separate from its mother), and 'birth' has a corresponding meaning; and
 - (b) 'motor vehicle' means a mechanically propelled vehicle intended or adapted for use on roads
- and references to embryos shall be construed in accordance with section 1 of the Human Fertilisation and Embryology Act 1990.
- (3) Liability to a child under section 1, 1A or 2 of this Act is to be regarded—
- (a) as respects all its incidents and any matters arising or to arise out of it; and
 - (b) subject to any contrary context or intention, for the purpose of construing references in enactments and documents to personal or bodily injuries and cognate matters
- as liability for personal injuries sustained by the child immediately after its birth. . . .
- (5) This Act applies in respect of births after (but not before) its passing, and in respect of any such birth it replaces any law in force before its passing, whereby a person could be liable to a child in respect of disabilities with which it might be born; but in section 1(3) of this Act the expression 'liable in tort' does not include any reference to liability by virtue of this Act, or to liability by virtue of any such law. . . .

COMMENTARY

The above legislation is an example of Parliament creating by statute a 'foreseeable' claimant. Before the Act was passed there was some doubt whether a child in this position had an action (see *Walker v Great Northern Railway Co of Ireland* (1891) 28 LR Ir 69; cf. *Watts v Rama* [1972] VR 353). Accordingly, the Law Commission (Law Com. 60, *Injuries to Unborn Children*, 1974) proposed legislation to put the matter beyond doubt and its

recommendations formed the basis of the 1976 Act. After the legislation was enacted, the Court of Appeal accepted a cause of action in respect of pre-natal injuries even at common law: although a foetus did not enjoy an independent legal personality, a child who had suffered pre-natal injuries because of a negligent act occurring during the mother's pregnancy would benefit from a cause of action from the moment of birth and could recover in respect of damage suffered since the birth as a result of the pre-natal injuries (*Burton v Islington Health Authority* [1993] QB 204). Although the reasoning in this case may not be convincing (see Grubb [1993] 1 Med L Rev 103 at 119), this will soon become a purely academic matter, because the Act replaces the existing common law in respect of congenital disabilities suffered after its enactment. Even granted that the limitation period does not run against a child until he attains the age of majority, there can be very few common law claims of this sort still pending.

The Act only allows a claim where the child is born alive, so that negligently killing a previously healthy foetus will not attract liability under the Act. Three injury-causing situations are covered by s. 1(2). The first relates to a period prior to conception, and deals with the ability of either parent to produce a healthy child. The second situation deals with conduct that affects the mother during pregnancy and affects her capacity to have a healthy child. The third situation covers negligence relating to the birth of the child. The Human Fertilisation and Embryology Act 1990 extended the Act's coverage to include injury caused by the selection, storage, and use of embryos and gametes during fertility treatment. However, in all these cases, the defendant is liable to the child only if he would have been liable in tort to either parent (or, in the second and third situations, to the mother). The child's claim is therefore derivative to some extent, but, as the defendant's conduct may not cause any damage to the parent, s. 1(3) provides that the actionability of the parent's claim depends upon breach of a legal duty rather than damage (which would be required in an ordinary negligence action). The derivative nature of the claim is further illustrated by s. 1(4), (6) and (7), which ensure that the duty owed to the child is no greater than that owed to the relevant parent. The child must also establish that the negligence caused the injury, which can be extremely difficult in medical negligence cases (see Ch. 5). Given the somewhat convoluted nature of the child's claim, it is not surprising that a leading commentator has described the Act as 'largely irrelevant' (M. Brazier, *Medicine, Patients and the Law*, 3rd edn. (London: Penguin, 2003), p. 373).

Unless the mother's tortious conduct relates to the driving of a motor vehicle (s. 2), the child may bring no claim against its own mother. The Law Commission thought that, on balance, the immunity should not be extended to the father and this is the position under the Act. However, the *Pearson Commission* reached the contrary conclusion (para. 1471) although it recommended that no immunity should apply to either parent where the ante-natal injury arose from any activity for which insurance was compulsory (para. 1472). Which approach do you prefer? Do you think that mother and father should be treated differently? Do you think that the fact of insurance should be treated as relevant to the imposition of liability? (If there are sound policy reasons for granting one or other of the parents an immunity from suit, why should the position be different where the parents are insured against the liability?) For more detailed comment on the Act, see I. Kennedy and A. Grubb, *Medical Law*, 3rd edn. (London: Butterworths, 2000), ch. 12; M. Brazier, *Medicine, Patients and the Law*, 3rd edn. (London: Penguin, 2003), ch. 11.

The child may claim in respect of 'disabilities', which are defined so as to cover any deformity, disease, or abnormality with which the child is born. However, what if the child's claim relates, not to any injury it was born with, but to the fact that it was born at all? For example, if a doctor negligently advises that the foetus is healthy when, in fact, it has a

serious disease which will render it severely disabled when born, can the child claim damages for the pain and suffering it has suffered by being born alive? Such a claim was rejected by the Court of Appeal at common law on the grounds of public policy: the claim entailed that the child would have been better off not being born at all (*McKay v Essex Area Health Authority* [1982] QB 1166; the position is the same in France and Germany (see *van Dam*, para. 707–2), though only after the legislative reversal of an (in)famous decision to the contrary of the French *Cour de Cassation* (in the *arrêt Perruche*), and the same result was recently reached by the High Court of Australia (*Harriton v Stephens* (2006) 80 ALJR 791)). In the same case, it was also held, obiter, that such a claim would fail under the 1976 Act because of the wording of s. 1(2)(b). Some jurisdictions still go the other way, however: see, e.g., the Baby Kelly case in the Netherlands (summarised by Faure and Hartlief in *European Tort Law 2005*, pp. 421–2).

Although there are arguments in favour of allowing such an action, the rejection of the claim may not provide much hardship where the parents can bring a ‘wrongful conception’ or ‘wrongful birth’ action. Such claims allege that, but for the negligence, the parents would not have conceived the child, or would have had an abortion, with the main head of damages being the cost of bringing up the child. However, in *McFarlane v Tayside Health Authority* [2000] 2 AC 59 the House of Lords held that the cost of raising a healthy but unwanted child was not recoverable in a wrongful birth action. At least this rule, however undesirable it may be thought, was clear, but almost immediately after *McFarlane* was decided the Court of Appeal held that child-rearing costs could be claimed in a case where the child was born with disabilities, though only the *additional* costs associated with the child’s disability were recoverable (see *Parkinson v St James and Seacroft University Hospital NHS Trust* [2002] QB 266). Shortly afterwards, the Court of Appeal held that a wrongful birth claim lay for the additional costs of raising a *healthy* child attributable to the disability of its mother but on appeal the claim was rejected by a four to three majority of their Lordships (*Rees v Darlington Area Health Authority* [2004] 1 AC 309). In obiter dicta, three members of the majority cast doubt on the correctness of *Parkinson*, but the final member of the majority appeared to agree with the minority that the additional costs attributable to the child’s disability should be recoverable. A different member of the majority thought it arguable that the *Parkinson* claim could be brought where the very purpose of the procedure was to prevent the birth of a disabled child (e.g. some type of screening or testing process to determine whether the child has a disability). Moreover, the majority in *Rees* held that, in any case where negligence resulted in the birth of an unplanned child, an award of £15,000 should be made, seemingly to the parents, to compensate for the loss of autonomy associated with having an unplanned child. Is such an award compensating for a loss to the parents, or for an infringement of their rights? (See Nolan, ‘New Forms of Damage in Negligence’ (2007) 70 MLR 59.)

Lest it be thought English courts were on their own in struggling with this area, it should be noted that the High Court of Australia split four to three in *Cattanach v Melchior* (2003) 215 CLR 1 in favour of allowing a claim for the rearing costs of a healthy child, only for a number of states legislatively to reverse the result, leaving open the possibility of a *Parkinson*-type claim (see, e.g., *Civil Liability Act 2002* (NSW), s. 71). The position in Canada is uncertain, with some courts awarding, in the case of a healthy child, damages for non-pecuniary loss to both parents to reflect their loss of autonomy (see, e.g., *Bevilacqua v Altenkirk* [2004] BCJ No. 1473). In Europe, different jurisdictions take different approaches (see *van Dam*, para. 706–2).

For further discussion of the English cases see Pedain [2004] CLJ 19; Lunney (2004) 1 UNELJ 145; Priaulx, 'That's One Heck of An "Unruly Horse"! Riding Roughshod over Autonomy in Wrongful Conception' (2004) 12 *Feminist Legal Studies* 317; Priaulx, 'Damages for the Unwanted Child: Time for a Rethink' (2005) 73 *Medico-Legal Journal* 152.

3. Additional Requirements for the Existence of a Duty

The above extracts illustrate that a duty of care is owed only to those who might foreseeably suffer damage as a result of the defendant's negligence. Foreseeability may be regarded as the factual aspect of the duty of care inquiry. It should be noted, however, that the existence of a duty is not simply a matter of factual investigation into the risks associated with the defendant's conduct (though it has been argued that this may have been what Lord Atkin intended in *Donoghue*: see Heuston, '*Donoghue v Stevenson* in Retrospect' (1957) MLR 1). The better view is that Lord Atkin never thought that his 'neighbour principle' would apply to all types of damage, whether caused by act or omission, no matter how foreseeable (see Smith and Burns, '*Donoghue v Stevenson*—The Not so Golden Anniversary' (1983) 46 MLR 147). In some of the older cases (of which *Bourhill v Young* is an example) a finding that the claimant was unforeseeable masked other policy concerns which militated against imposing a duty of care. Was the decision that Mrs Bourhill was owed no duty of care really attributable to the fact that she was not a reasonably foreseeable victim of John Young's negligent driving? There seems little doubt that the real consideration which motivated the House of Lords was the fact that the damage suffered by the claimant was shock-induced: injury of this type ('nervous shock') has long been thought to raise particular problems and to call for limitations on the circumstances in which a duty is owed (see Ch. 7). However, so long as foreseeability was seen as the touchstone of liability, these policy concerns could be given effect only in covert fashion—by holding that the claimant was unforeseeable. The reasons for this approach are complex, but part of the explanation lies in the reluctance of the courts at that time to acknowledge the influence of policy on judicial decisions.

In more modern times, the courts have shown an increased willingness to bring policy questions into the open, and have recognised that whether a duty of care arises or not is ultimately a matter of policy. Even if a court finds that injury to the claimant was a foreseeable result of the defendant's negligence, it may deny the existence of a duty of care on the basis that underlying policy concerns necessitate a restrictive answer to the question: who at law is the defendant's neighbour? This is what may be termed the legal aspect of the duty of care inquiry. By emphasising that the recognition of a duty is ultimately a legal (not factual) question, the courts have been able to introduce restrictions on the scope of liability in what they consider to be particularly sensitive areas, for example, in relation to pure economic loss or psychiatric injury, or to injuries resulting from omissions rather than positive acts.

What is required, in addition to the reasonable foreseeability of injury, in order to give rise to a duty of care has long been a matter of great difficulty. In *Caparo Industries plc v Dickman*, extracted below, Lord Bridge summarised the competing approaches, and laid the foundations for the current approach of the courts.

Caparo Industries plc v Dickman [1990] 2 AC 605

The facts of this case are not relevant for present purposes. They are set out, along with additional extracts, at p. 420, below.

Lord Bridge of Harwich

In determining the existence and scope of the duty of care which one person may owe to another in the infinitely varied circumstances of human relationships there has for long been a tension between two different approaches. Traditionally the law finds the existence of the duty in different specific situations each exhibiting its own particular characteristics. In this way the law has identified a wide variety of duty situations, all falling within the ambit of the tort of negligence, but sufficiently distinct to require separate definition of the essential ingredients by which the existence of the duty is to be recognised. Commenting on the outcome of this traditional approach, Lord Atkin, in his seminal speech in *Donoghue v Stevenson* [1932] AC 562 at 579–580 observed:

The result is that the Courts have been engaged upon an elaborate classification of duties. ... In this way it can be ascertained at any time whether the law recognises a duty, but only where the case can be referred to some particular species which has been examined and classified. And yet the duty which is common to all the cases where liability is established must logically be based upon some element common to the cases where it is found to exist.

It is this last sentence which signifies the introduction of the more modern approach of seeking a single general principle which may be applied in all circumstances to determine the existence of a duty of care. Yet Lord Atkin himself sounds the appropriate note of caution by adding:

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

Lord Reid gave a large impetus to the modern approach in *Home Office v Dorset Yacht Co Ltd* [1970] AC 1004 at 1026–1027, where he said:

In later years there has been a steady trend towards regarding the law of negligence as depending on principle so that, when a new point emerges, one should ask not whether it is covered by authority but whether recognised principles apply to it. *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.

The most comprehensive attempt to articulate a single general principle is reached in the well-known passage from the speech of Lord Wilberforce in *Anns v Merton London Borough* [1978] AC 728 at 751–752:

Through the trilogy of cases in this House, *Donoghue v Stevenson* [1932] AC 562, *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465, and *Home Office v Dorset Yacht Co Ltd* [1970] AC 1004, the position has now been reached that 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 negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed or the damages to which a breach of it may give rise (see the *Dorset Yacht* case [1970] AC 1004 at 1027, per Lord Reid).

But since *Anns's* case a series of decisions of the Privy Council and of your Lordships' House, notably in judgments and speeches delivered by Lord Keith, have emphasised the inability of any single general principle to provide a practical test which can be applied to every situation to determine whether a duty of care is owed and, if so, what is its scope. . . . What emerges is that, 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 on the one party for the benefit of the other. But 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. We must now, I think, recognise the wisdom of the words of Brennan J in the High Court of Australia in *Sutherland Shire Council v Heyman* (1985) 60 ALR 1 at 43–44, where he said:

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.

Lord Oliver

I think it has to be recognised that to search for any single formula which will serve as a general test of liability is to pursue a will-o'-the-wisp. The fact is that once one discards, as it is now clear that one must, the concept of foreseeability of harm as the single exclusive test, even a prima facie test, of the existence of the duty of care, the attempt to state some general principle which will determine liability in an infinite variety of circumstances serves not to clarify the law but merely to bedevil its development in a way which corresponds with practicality and common sense. . . .

COMMENTARY

Lord Bridge's opinion has come to be regarded as the classic exposition of the modern approach to establishing a duty of care. He denied that any simple formula could

offer assistance as a test of liability, but his analysis (contrary to his intentions?) has been understood as laying down a ‘three-stage’ test for the existence of a duty of care, the ingredients of which are (1) foreseeability, (2) proximity, and (3) the fairness, justice, and reasonableness of recognising such a duty.

His approach should be compared with that of Lord Wilberforce in *Anns* (considered by Lord Bridge in the extract above). Lord Wilberforce’s approach—taken literally—effectively recognised a presumption of liability in every case where injury to the claimant was reasonably foreseeable, and put on the defendant the onus of identifying reasons of public policy which militated against the imposition of such a duty. Perhaps defendants were not up to this task. Or maybe the courts were just not inclined to listen to them. Whichever was the case, the *Anns* approach was interpreted—for a brief period in the late 1970s and early 1980s—as giving the courts licence to overturn long-established authorities denying the existence of a duty (e.g. in the area of pure economic loss) on the basis that the mere foreseeability of injury gave rise to at least a *prima facie* duty of care (see especially *Junior Books Co Ltd v Veitchi Co Ltd* [1983] 1 AC 520). Eventually, there arose a concern amongst the members of the higher judiciary that ‘a too literal application of the well-known observation of Lord Wilberforce in *Anns* ... may be productive of a failure to have regard to, and to analyse and weigh, all the relevant considerations in considering whether it is appropriate that a duty of care should be imposed’ (*Rowling v Takaro Properties Ltd* [1988] AC 473 at 501 per Lord Keith). The result was the so-called ‘retreat from *Anns*’ in which the courts reverted to a more cautious and pragmatic approach to the recognition of duties of care and re-established many of the old rules denying the existence of any duty at all in particular circumstances. (Especially notable was *Murphy v Brentwood District Council* [1991] 1 AC 398, which overruled the narrow ratio of *Anns* itself: see further p. 387, below.)

Lord Bridge’s three-stage test should not be read simply as a new, improved version of the two-stage test in *Anns*, for Lord Bridge adds the crucial qualification that the law should be developed only incrementally, by analogy with existing duty situations (see especially his reliance upon the passage from the judgment of Brennan J in the High Court of Australia in *Sutherland Shire Council v Heyman* (1985) 60 ALR 1 at 43–4, which he cites in the extract above). Whereas *Anns* invited courts to disregard previously established limits on the number and breadth of duty situations, the *Caparo* approach gives a crucial role to consideration of precisely how far the authorities have already gone. The difference may aptly be characterised as one between an approach that starts from a presumption of duty, and requires the invocation of policy factors if the duty is to be negated, and one that starts from a presumption of no duty, and requires the invocation of policy factors if a new duty is to be established (see *Stovin v Wise* [1996] AC 923 at 949, per Lord Hoffmann).

In fact, having a test for the existence of a duty of care only becomes important in those ‘battlegrounds’ of the modern law of negligence where the legitimacy of holding a negligent party liable for losses suffered by another is disputed. The major fields of conflict lie in the areas of psychiatric illness, pure economic loss, omissions, acts of third parties, and public bodies. Detailed consideration of these issues can be found in Chapters 7–10. Outside these areas—in the traditional homeland of the tort (which deals with physical harm caused by positive acts)—the existence of a duty will often be indisputable, and the empty recitation of the three stages of Lord Bridge’s test would be a waste of time. Already by the time that *Donoghue v Stevenson* imposed a duty of care upon manufacturers of products, it was well established that one road-user owed a duty of care to another (e.g. *Williams v Holland* (1833) 2 LJCP (NS) 190) and that an employer owed a duty of care to his or her employees (*Smith v Baker & Sons* [1891] AC 325). Indeed, in the modern law it is permissible to work on the assumption that, where a private individual commits a positive act of misfeasance which

foreseeably causes physical harm to the person or property of the claimant, a duty of care will be owed. This is not because the *Caparo* requirements are of no relevance in such cases—Lord Steyn stated in *Marc Rich and Co AG v Bishop Rock Marine Co Ltd, The Nicholas H* [1996] AC 211 that it was ‘settled law that the elements of foreseeability and proximity as well as considerations of fairness, justice and reasonableness are relevant to all cases whatever the nature of the harm sustained by the plaintiff’—but because they are regarded as satisfied in most cases that fit this description. Nevertheless, there are certain exceptional cases—mainly involving property damage rather than physical injury to the person—where the courts have denied the existence of a duty of care even where these types of damage are foreseeable (e.g. where allowing a claim would upset a prior allocation of risks as between parties to a commercial venture: see *Norwich City Council v Harvey* [1989] 1 WLR 828, and *British Telecommunications plc v James Thomson & Sons (Engineers) Ltd* [1999] 1 WLR 9, noted by Convery (1999) 62 MLR 766; see also *The Nicholas H*, noted below).

Proximity

According to Weir [1991] CLJ 24 at 25, ‘[p]roximity is now the key word, though it doesn’t open many doors’. Where Lord Wilberforce’s two-stage approach had appeared to treat proximity as no more than a synonym for foreseeability (there was a relationship of proximity if harm was foreseeable), the more recent trend is to view this requirement as conceptually distinct (see, e.g., *Peabody Donation Fund v Sir Lindsay Parkinson & Co* [1985] AC 210 at 240–1, per Lord Keith). The effect was to reverse the expansion of duty situations prompted by *Anns* by placing an additional hurdle in the way of a successful claim. Yet the nature of proximity remained elusive. In *Stovin v Wise* [1996] AC 923 at 932, Lord Nicholls explained further:

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.

This suggests that considerations of proximity are not in the final analysis clearly distinguishable from those of fairness, justice, and reasonableness (i.e. policy), and in many cases the terms are used interchangeably. Yet it may be argued that ‘proximity’ has acquired a conventional (though not universal) usage as the umbrella term denoting certain particular types of restriction on the scope of the duty of care. Notable amongst these are restrictions upon liability for certain types of loss (e.g. pure economic loss and psychiatric illness) and for nonfeasance (omissions) as opposed to misfeasance (positive acts). Judicial reluctance to recognise a duty of care in these contexts is expressed in legal terms by a finding of no proximity. The absence of proximity is asserted in conclusory fashion and merely indicates that underlying policy concerns warrant a general rule of no liability in the area in question. Conversely, the courts’ analysis of the underlying policy considerations may warrant the development of rules which allow proximity (and hence a prima facie duty) to be established in exceptional cases. Such rules are conveniently termed principles of proximity.

Certain commentators have resisted the notion that proximity is just a particular way of looking at considerations of fairness, justice and reasonableness, and have argued that the

concept plays an autonomous, and more principled, role in determining the existence of a duty of care. Witting (“The three-stage test abandoned in Australia—or not?” (2002) 118 LQR 214 and ‘Duty of Care: An Analytical Approach’ (2005) 25 OJLS 33), for example, argues that the function of the test of proximity is to identify those persons most appropriately placed to take care to avoid damage to the claimant, whom he defines as those whose act or omission most closely and directly affected the claimant. According to Witting, this is a question of fact, and the criteria upon which a finding of sufficient proximity are based are ‘unequivocal’ ((2005) 25 OJLS 33, 40). He does, however, concede that policy plays some role in determining the existence of a duty of care: a finding of proximity is not conclusive as whether or not a duty of care arises is ultimately a normative question (i.e. the third stage of the *Caparo* test—fairness, justice and reasonableness—may operate to deny a duty of care even if there is a relationship of proximity). Witting’s argument rests on the notion that a finding of proximity is not a normative question: ‘Proximity can be no more than the penultimate question—the “is” upon which an “ought” is based’ ((2002) 118 LQR 214, 217). The tendency to define proximity in this way comes from a wider concern to minimise the resort to ‘policy’ (see below) as a means of determining the duty of care question; if proximity can be seen as a legal *principle* it avoids the value-laden ‘legal intuition’ that attaches to judicial assessment as to whether a particular policy argument should operate to deny the existence of a duty of care (see Beever, ‘Particularism and prejudice in the law of tort’ (2003) 11 Tort L Rev 146; Kramer, ‘Proximity as principles: directness, community norms and the tort of negligence’ (2003) 11 Tort L Rev 70). However, as Cane (2004) 120 LQR 189, 192 points out: ‘... all rules and principles that state individuals’ legal rights and obligations are underpinned by policy arguments because policy arguments are arguments about what individuals’ legal rights and obligations ought to be.’ Thus, in our view, the finding of a relationship of proximity is—indeed must be—to some extent based on policy factors, and to that extent we would disagree with Witting’s analysis. We agree with Hickman [2002] CLJ 13 at 14 that ‘[t]he requirement of proximity is itself not simply a categorisation of facts from which conclusions about responsibility can straightforwardly be drawn. A finding of proximity is underpinned by policy considerations’. However, as is argued below, we believe that a distinction can be made between the tests of ‘proximity’ and ‘fairness, justice and reasonableness’ on the basis of the type of policy considerations that are relevant in determining if the test has been satisfied and the way in which they are invoked.

Fairness, Justice and Reasonableness

Whereas the tendency is to use proximity as the heading for relatively well-settled rules limiting liability for certain types of loss and for nonfeasance, the third stage of the *Caparo* approach can be regarded as the general repository for a miscellaneous set of policy arguments, undefined in nature and unlimited in number, which are invoked haphazardly and in an ad hoc fashion by the courts in determining whether a duty of care should arise. An example which demonstrates the varied nature of the concerns which can be raised is the case of *The Nicholas H* (cited above). The defendants, a shipping classification society, were alleged to have been negligent in certifying a particular ship as seaworthy after it had undergone temporary repairs. Shortly after it left port, the vessel sank, causing the plaintiff’s cargo to be lost. Despite the fact that the harm suffered was property damage (for which a duty is normally owed merely upon foresight of damage), a majority of the House of Lords held that no duty arose. The rights and liabilities between shippers and cargo owners were the subject of an international convention (‘the Hague Rules’). These limited the ship owner’s liability

to the cargo owner in respect of the loss of cargo, and Lord Steyn argued that to impose a duty in tort would upset the balance created by these rules. Further, the defendant was an independent and non-profit-making entity, created and operated for the sole purpose of promoting the collective welfare, namely the safety of lives and ships at sea. His Lordship thought that this status might be endangered if a duty was found to exist. Do you find these reasons convincing? Do you think that the House of Lords would have reached the same result if the sinking of the ship had caused the loss of life?

Considerations of fairness, justice, and reasonableness are most commonly invoked where it is thought that the imposition of a duty of care solely on the basis of reasonable foreseeability of damage would be undesirable. Over the course of time, the most important concern has undeniably been the fear of ‘opening up the floodgates of liability’. The ‘floodgates argument’ has no doubt a number of different dimensions (see generally J. Bell, *Policy Arguments in Judicial Decisions* (Oxford: OUP, 1983), ch. 3), but the primary concern underlying its deployment in the modern law is that of overburdening the defendant—not just the defendant in the instant case, but all future defendants in similar cases. This form of the argument has been particularly influential in situations where numerous different claims are likely to arise out of a single incident (consider in particular the treatment of the ‘nervous shock’ claims arising out of the Hillsborough stadium disaster: see p. 341, below). This is partly a question of fairness: it is thought unreasonable to expose a defendant to liability grossly disproportionate to his fault or to ‘liability in an indeterminate amount for an indeterminate time to an indeterminate class’ (*Ultramares Corp v Touche, Niven & Co* (1931) 174 NE 441 at 444, per Cardozo J). But it is also, at least in part, an argument that the imposition of large and/or indeterminate liabilities might in certain circumstances have detrimental effects on society as a whole (e.g. because it would result in the curtailment of certain socially-useful activities which come to be seen as carrying a risk of excessive liabilities).

This version of the floodgates argument tends to shade into the argument about ‘overkill’. The overkill concern is that the imposition of a duty of care might encourage detrimental practice on the part of potential defendants (see, e.g. *Hill v Chief Constable of West Yorkshire*, extracted below). Although tort liability may have, as one of its purposes, the promotion of due care and attention, it may have the undesired effect of promoting undue care and attention. The (alleged) phenomenon of defensive medicine is perhaps the best example: the argument suggests that medical practitioners might be induced to perform unnecessary tests and undertake unnecessary procedures—adding to the costs of the treatment and perhaps exposing the patient to new or different risks—for the sole purpose of reducing the risk of costly litigation and of consequent increases (in the case of doctors in private practice) in insurance premiums. (Why would the risk of liability if doctors are too defensive not induce them to provide the ‘right’ treatment?) These arguments have some plausibility, but whether they are borne out by actual practice is a matter of considerable controversy. (On the question of defensive medicine, see M. Brazier, *Medicine, Patients and the Law*, 3rd edn. (London: Penguin, 2003), p. 1726.) In any case, it may be doubted whether the courts have adequate empirical evidence, or sufficient expertise, to enable them to evaluate these claims with any degree of scientific rigour. This, in fact, is one of the main problems in the modern law of negligence. Too often courts make assumptions about the empirical facts, or predictions as to the effect of different legal rules, that are simply unsupported by the evidence. Claims which to one judge seem wholly warranted are greeted with another’s extreme scepticism.

Hill v Chief Constable of West Yorkshire [1989] AC 53

The plaintiff's daughter was the final victim of the notorious 'Yorkshire Ripper', Peter Sutcliffe, who committed a series of murders and attempted murders against young women. The plaintiff, suing on behalf of her daughter's estate, alleged negligence in the conduct of the police investigations into earlier murders, in that the police failed to apprehend Sutcliffe at an earlier date which would have prevented her murder. The trial judge struck out the plaintiff's claim as disclosing no cause of action, and this was upheld by the Court of Appeal. The House of Lords dismissed the appeal, one of the grounds being that there was no proximity between the parties. The extract concerns the alternative ground.

Lord Keith

[I]n my opinion there is another reason why an action for damages in negligence should not lie against the police in circumstances such as those of the present case, and that is public policy. In *Yuen Kun Yeu v Attorney General for Hong Kong* [1988] AC 175, 193, I expressed the view that the category of cases where the second stage of Lord Wilberforce's two stage test in *Anns v Merton London Borough Council* [1978] AC 728, 751–752, might fall to be applied was a limited one, one example of that category being *Rondel v Worsley* [1969] 1 AC 191. 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 different 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 so far as concerns their function in the investigation and suppression of crime. From time to time they make mistakes in the exercise of that function, but it is not to be doubted that they apply their best endeavours to the performance of it. In some instances the imposition of liability may lead to the exercise of a function being carried on in a detrimentally defensive frame of mind. The possibility of this happening in relation to the investigative operations of the police cannot be excluded. Further it would be reasonable to expect that if potential liability were to be imposed it would be not uncommon for actions to be raised against police forces on the ground that they had failed to catch some criminal as soon as they might have done, with the result that he went on to commit further crimes. While some such actions might involve allegations of a simple and straightforward type of failure—for example that a police officer negligently tripped and fell while pursuing a burglar—others would be likely to enter deeply into the general nature of a police investigation, as indeed the present action would seek to do. The manner of conduct of such an investigation must necessarily involve a variety of decisions to be made on matters of policy and discretion, for example as to which particular line of inquiry is most advantageously to be pursued and what is the most advantageous way to deploy the available resources. Many such decisions would not be regarded by the courts as appropriate to be called in question, yet elaborate investigation of the facts might be necessary to ascertain whether or not this was so. A great deal of police time, trouble and expense might be expected to have to be put into the preparation of the defence to the action and the attendance of witnesses at the trial. The result would be a significant diversion of police manpower and attention from their most important function, that of the suppression of crime. Closed investigations would require to be reopened and retraversed, not with the object of bringing any criminal to justice but to ascertain whether or not they had been competently conducted. I therefore consider that Glidewell LJ, in his judgment in the Court of Appeal [1988] QB 60, 76, in the present case, was right to take the view that the police were immune from an action of this

kind on grounds similar to those which in *Rondel v Worsley* [1969] 1 AC 191 were held to render a barrister immune from actions for negligence in his conduct of proceedings in court.

Lord Templeman

The question for determination in this appeal is whether an action for damages is an appropriate vehicle for investigating the efficiency of a police force. The present action will be confined to narrow albeit perplexing questions, for example, whether, discounting hindsight, it should have been obvious to a senior police officer that Sutcliffe was a prime suspect, whether a senior police officer should not have been deceived by an evil hoaxer, whether an officer interviewing Sutcliffe should have been better briefed, and whether a report on Sutcliffe should have been given greater attention. The court would have to consider the conduct of each police officer, to decide whether the policeman failed to attain the standard of care of a hypothetical average policeman. The court would have to decide whether an inspector is to be condemned for failing to display the acumen of Sherlock Holmes and whether a constable is to be condemned for being as obtuse as Dr. Watson. The plaintiff will presumably seek evidence, for what it is worth, from retired police inspectors, who would be asked whether they would have been misled by the hoaxer, and whether they would have identified Sutcliffe at an earlier stage. At the end of the day the court might or might not find that there had been negligence by one or more members of the police force. But that finding would not help anybody or punish anybody.

It may be, and we all hope that the lessons of the Yorkshire Ripper case have been learned, that the methods of handling information and handling the press have been improved, and that co-operation between different police forces is now more highly organised. The present action would not serve any useful purpose in that regard. The present action could not consider whether the training of the West Yorkshire police force is sufficiently thorough, whether the selection of candidates for appointment or promotion is defective, whether rates of pay are sufficient to attract recruits of the required calibre, whether financial restrictions prevent the provision of modern equipment and facilities, or whether the Yorkshire police force is clever enough and if not, what can and ought to be done about it. The present action could only investigate whether an individual member of the police force conscientiously carrying out his duty was negligent when he was bemused by contradictory information or overlooked significant information or failed to draw inferences which later appeared to be obvious. That kind of investigation would not achieve the object which Mrs. Hill desires. The efficiency of a police force can only be investigated by an inquiry instituted by the national or local authorities which are responsible to the electorate for that efficiency.

Moreover, if this action lies, every citizen will be able to require the court to investigate the performance of every policeman. If the policeman concentrates on one crime, he may be accused of neglecting others. If the policeman does not arrest on suspicion a suspect with previous convictions, the police force may be held liable for subsequent crimes. The threat of litigation against a police force would not make a policeman more efficient. The necessity for defending proceedings, successfully or unsuccessfully, would distract the policeman from his duties.

This action is in my opinion misconceived and will do more harm than good. A policeman is a servant of the public and is liable to be dismissed for incompetence. A police force serves the public and the elected representatives of the public must ensure that the public get the police force they deserve. It may be that the West Yorkshire police force was in 1980 in some respects better and in some respects worse than the public deserve. An action for damages for alleged acts of negligence by individual police officers in 1980 could not determine whether and in what respects the West Yorkshire police force can be improved in 1988. I would dismiss the appeal.

Appeal dismissed.

COMMENTARY

In the period after *Hill* the ‘immunity’ effectively accorded to the police in respect of the investigation and suppression of crime was extended to other situations, for example, the inspection of the scene of a possible crime (*Alexandrou v Oxford* [1993] 4 All ER 328) and the attempt to disperse violent protestors (*Hughes v National Union of Mineworkers* [1991] 4 All ER 278). In *Osman v Ferguson* [1993] 4 All ER 344, the Court of Appeal held that the relevant policy considerations still applied even where the police had received advanced warning that a particular individual posed a danger to the plaintiffs. The courts also held that certain other spheres of police activity raised similar considerations to those highlighted in *Hill*, and applied the public policy immunity by way of analogy to that case, for example, in respect of certain internal matters (*Calvey v Chief Constable of the Merseyside Police* [1989] AC 1228: ‘unnecessarily protracted’ disciplinary proceedings) and the failure to remove, or warn road users of, hazards on the highway (*Ancell v McDermott* [1993] 4 All ER 355: oil spill; *aliter* if the police had actually increased the danger: see *Knightley v Johns* [1982] 1 WLR 349).

Following the Court of Appeal’s decision in *Osman v Ferguson*, the unsuccessful claimants brought proceedings before the European Court of Human Rights (ECtHR) in Strasbourg, beginning a curious interlude in which the whole approach of the English courts to the duty of care question seemed to be under threat. The story is recounted in fuller detail below (Section III). For now, it is enough to observe that the Strasbourg Court found that the effect of the *Hill* ‘immunity’ was to deprive the *Osman* claimants of their right to a court under Article 6 ECHR (*Osman v United Kingdom* [1999] 1 FLR 193). The ECtHR subsequently admitted to a misunderstanding of English law (*Z v United Kingdom* [2001] 2 FLR 612) and the House of Lords in *Brooks v Commissioner of the Police for the Metropolis* [2005] 1 WLR 1495 took the opportunity to reaffirm authoritatively the central holding in *Hill*’s case, i.e. that the police cannot generally be held liable for careless conduct in investigating crime. The context was a claim by the surviving victim of a notorious racist attack in London, following findings in an official inquiry (‘the Stephen Lawrence Inquiry’, after the deceased victim) that the police investigation had been marred by a collective failure to treat Brooks with proper concern and respect because of stereotyping based on his skin colour. The House of Lords found that, although some of the authority relied on in *Hill* had now been overruled (see, e.g., *Rondel v Worsley*, below), the majority of the policy reasons for denying a duty of care that commended themselves to the court in *Hill* remained as persuasive as before. Lord Steyn stated (at 1509): ‘If a case such as the Yorkshire Ripper case, which was before the House in *Hill*’s case, arose for decision today I have no doubt it would be decided in the same way.’ His Lordship thought, however, that the principle in *Hill* should be expressed in terms of the absence of a duty of care rather than a blanket immunity, presumably to avoid infringing Article 6 of the Convention. These concerns may be overstated as whatever ‘immunity’ *Hill* provides derives from the substantive law of negligence and is unlikely to infringe Article 6 (see Section III, below).

Moreover, it is clear that the immunity of the police is not a blanket immunity. In the first place, the courts have never exhibited the same reluctance to hold the police liable for positive acts of misfeasance, at least where these are the direct cause of the claimant’s injury and do not simply provide a third party with the opportunity to injure the claimant (see, e.g., *Marshall v Osmond* [1983] 2 All ER 225: duty owed in high-speed pursuit). Secondly, a number of recent decisions have recognised a duty of positive intervention on the part of the police. It is well established, for example, that the police may owe a duty to protect a person in their custody from both his own acts of self-injury (*Kirkham v Chief Constable of*

Manchester [1990] 2 QB 283, *Reeves v Commissioner of the Police for the Metropolis* [2000] 1 AC 360) and the attacks of other inmates (cf. *Ellis v Home Office* [1953] 2 QB 135). The Chief Constable/Commissioner may also be liable for breach of his personal and non-delegable duty to officers in his force, and this duty at least arguably extends to protecting members of the force from victimisation or bullying by fellow officers (*Waters v Commissioner of Police* [2000] 1 WLR 1607). Officers also owe duties to each other, for example, to intervene when a prisoner assaults an officer in the cells (*Costello v Chief Constable of Northumbria Police* [1999] ICR 730). Although it was accepted in these cases that the policy grounds for denying a duty of care recognised in *Hill* remained valid, it was held that other policy factors weighing in favour of a duty of care had to be balanced against the *Hill* factors. (See also *Swinney v Chief Constable of Northumbria* [1997] QB 464: need to protect informants so as to ensure members of the public would pass on relevant evidence to the police held to outweigh the *Hill* factors.)

In cases where the defendant is a public authority under the HRA (as are the police), it may be possible to circumvent the *Hill* immunity by bringing an action under the HRA for breach of the public authority's s. 6 obligation to act compatibly with the Convention. One aspect of the ECtHR's decision in *Osman v United Kingdom* that has escaped critical reassessment is that the police might have a duty to take positive action to protect an individual's right to life (Article 2 ECHR) where they were aware of a 'real and immediate risk'. The nature and extent of that positive obligation lay at the heart of the decision in *Van Colle v Chief Constable of Hertfordshire Police* [2006] 3 All ER 963. The claimant's son, who was to be a witness in an upcoming criminal trial, was subjected to threats and intimidation—which were reported to the police and of which they were aware—and then murdered before the trial could take place. The claim was brought under the HRA for breach of the obligation under Article 2. Responding to an argument that allowing recovery for breach of Article 2 would result in anomalous differences between actions under the HRA and the common law, Cox J (in the High Court) stated, at [76]:

There is no conflict, in my judgment, between the common law and human rights jurisprudence in this area. Those cases in which, on their particular facts, the existence of the Article 2 positive obligation to protect life would impose a disproportionate or impossible burden on the police, would inevitably be cases where no duty of care would be held to exist at common law. Those cases in which the claimant succeeds could well be cases in which, as Lord Nicholls observed in *Brooks*, the absence of a common law remedy in negligence, sounding in damages, would be regarded as an 'affront to the principles which underlie the common law'.

The problem with this reasoning is that the success of a claim under Article 2 depends, broadly, on the *reasonableness* of the response of the police to the threat to the right to life. Conversely, the policy factors in *Hill* operate not by determining whether the response of the police was reasonable but by denying the police were under any duty to act reasonably at all. The *Hill* immunity can be avoided only by identifying some element of the relationship between the parties (e.g. in *Swinney*, the relationship between police and informant, and, arguably, in *Van Colle*, that between police and witness) that prevents the general no-duty rule from applying. It cannot be avoided by arguing, on the facts, that the police conduct was unreasonable, even considering the policy concerns voiced in *Hill*, whereas this could clearly ground liability for breach of Article 2. This seems to have been appreciated when the case reached the Court of Appeal, Clarke MR commenting that an argument that a duty of care might be owed—an argument he recognised might have been encouraged by Cox J's

judgment—was ‘fraught with difficulty’: [2007] EWCA Civ 325 at [9]. Of course, whether the common law should adapt to ensure consistency with actions under the HRA for breach of Convention rights is a different matter (see Section III, below).

Other Immunities

The number of specific immunities recognised by the courts, at one time or another, has been very significant, although the growing influence of human rights law on the law of tort (Section III, below) has led to many of the old immunities being abolished. One of the most important of the old immunities was that enjoyed by barristers and solicitors in respect of their conduct of litigation, as well as preliminary matters which were intimately connected with the conduct of a case in court (see *Rondel v Worsley* [1969] 1 AC 191; *Saif Ali v Sidney Mitchell & Co* [1980] AC 198). This immunity was recently abolished by the House of Lords in *Arthur J. S. Hall v Simons* [2002] 1 AC 615, overruling its own previous decisions in *Rondel* and *Saif Ali*. Whilst an immunity continues to be recognised in favour of witnesses giving evidence in, or in anticipation of, legal proceedings (*X v Bedfordshire CC* [1995] 2 AC 633), recent cases have interpreted the scope of the immunity narrowly (*L (A Child) v Reading Borough Council* [2001] 1 WLR 1575, *Darker v Chief Constable of West Midlands Police* [2001] 1 AC 435). However, there remain a number of areas where the public policy reasons for denying a duty of care outweigh other factors so as to provide an effective immunity from suit in negligence. Those acting in a judicial or quasi-judicial capacity, for example, owe no duty to persons foreseeably affected by their conduct (*Yuen Kun Yeu v Attorney General for Hong Kong* [1988] AC 175; cf. *Three Rivers District Council v Bank of England (No. 3)* [2001] 2 All ER 513). It has also been held that members of the armed forces involved in a conflict situation owe no duty to take steps to protect their colleagues from the risk of ‘friendly fire’ (*Mulcahy v Ministry of Defence* [1996] QB 732). The principal concern here is that the threat of liability might take soldiers’ minds off the task in hand. Lastly, it may be observed that local authority social services departments have some immunity from suit in responding to actual or suspected child abuse (*X v Bedfordshire CC*, above; see further p. 506, below; cf. *D v East Berkshire Community Health NHS Trust*, p. 524, below).

Immunities from Negligence Liability and a Note on the Striking-Out Procedure

As is illustrated above, the practical effect of denying a duty of care (whether on grounds of proximity or ‘fair, just and reasonable’) is to provide a complete or partial immunity applying to certain types of defendant or to certain types of activity (or a mixture of both). It is important to recognise that when a court is asked to find that no duty of care is owed between the parties, it is being asked whether it wants the reasonableness of the defendant’s conduct to be discussed at all. According to orthodox theory, the decision whether the defendant has acted carelessly (i.e. unreasonably) is logically distinct from the question whether he should be held liable for the consequences of his carelessness. A finding of ‘no duty’ safeguards the defendant from all claims, no matter how carelessly he has behaved (unless, of course, he has acted deliberately or in bad faith). And whether or not a duty is owed is determined without regard for the defendant’s actual degree of fault (if any). Given this background, the law recognised—in the interests of the efficient disposal of actions—that the decision whether the defendant owes the claimant a duty of care may be decided in a preliminary or pre-trial hearing. The issue normally arises when the defendant seeks to strike out the claimant’s case as disclosing no cause of action (Civil Procedure Rules, r. 3.4; the procedure applies to all claims, not just those in tort). Striking-out applications are only appropriate for dealing with disputed questions of law (e.g. as to the existence of a duty of care), not disputed questions of

fact (e.g. as to the breach of any duty owed) as these latter can only be addressed after a full hearing and the examination and cross-examination of witnesses on both sides. (In fact, under the *Caparo* approach striking out would appear possible only in respect of the legal duty requirements of proximity and fairness (etc.), not the factual requirement of foreseeability). It follows that, for the purposes of the striking-out application, the court assumes that the facts as pleaded are true, so that (in the case of a properly pleaded negligence action) it will be deemed that the defendant has been careless and that the carelessness has caused the claimant's loss.

The striking-out procedure represents a very significant weapon in the hands of defendants, enabling them to deal quickly and cheaply with ill-founded claims without incurring the expenses associated with full trial. However, the use of the procedure has been thrown into some doubt by developments in the human rights field.

III. Negligence in the Human Rights Era

The implementation of the Human Rights Act 1998 (HRA) has resulted in a number of challenges to the law of negligence. It appears that the Act has both 'vertical' and 'horizontal' effects (i.e. it allows individuals to rely upon specified rights under the European Convention in litigation both against the state and against other private individuals or organisations). Its vertical effect lies in the obligation imposed directly upon public authorities to respect Convention rights (HRA, s. 6). The most notable consequence is the recognition of a positive duty on public authorities (e.g. local councils, government departments, regulators) to safeguard rights to life, physical integrity, private and family life, and personal property (see p. 500, below). The Act's horizontal effect stems from the fact that the courts are 'public authorities' within the meaning of s. 6, and hence (it seems) have a duty to reach decisions compatible with Convention rights even in litigation between private parties. If this is so, a number of specific rules of English tort law could be challenged from a human rights direction (e.g. the absence in English law of a tortious duty of (easy) rescue as (arguably) inconsistent with the courts' obligation to protect the Convention rights to life and physical integrity). (See generally J. Wright, *Tort Law and Human Rights* (Oxford: Hart Publishing, 2001); cf. Mullender, 'Tort, Human Rights, and Common Law Culture' (2003) 23 OJLS 301.)

However, the English courts have yet to make up their mind whether the existence of the statutory remedy provides a reason for—or against—the development of the law of negligence in the interests of compatibility with the Convention. In *D v East Berkshire Community NHS Trust* [2004] QB 558, the Court of Appeal relied upon the passage of the HRA to justify its departure from a previous decision of the House of Lords. The issue was whether social and medical care workers owed a duty of care to children in deciding to separate them from their parents for reasons of suspected child abuse. The House of Lords had previously held that it would not be fair, just and reasonable to recognise a duty of care in such circumstances (*X v Bedfordshire County Council* [1995] 2 AC 633), but the ECtHR subsequently found a violation of the claimants' rights under the Convention (*Z v United Kingdom* [2001] 2 FLR 6). In the *East Berkshire* case, the Court of Appeal ruled that the HRA's creation of a new statutory remedy for the violation of Convention rights had altered the balance of policy considerations as assessed by the House of Lords in the *Bedfordshire* case. Recognising a

common law remedy would have no additional chilling effect on the conduct of care professionals. (It may be noted that the statutory remedy was in force at the time of the court's decision, but not at the time of the alleged negligence, so there was no possibility of an action under the HRA itself.) However, the court decided at the same time that no duty of care was owed to the parents of the children, and this was affirmed by the House of Lords in *D v East Berkshire Community NHS Trust* [2005] 2 AC 373. Concern about the chilling effect of the contrary decision was again highlighted. It is striking that these decisions flew in the face of the ECtHR's decision in *TP and KM v United Kingdom*—another claim arising out of the House of Lords' decision in *X v Bedfordshire*—that care professionals may in some circumstances violate the Convention rights of parents whose children have been taken into care. If, as seems to be the case, the parents would now have a claim under the HRA, the question arises why the courts have not recognised here the same decisive change in the balance of policy considerations as they have in relation to the claim by the child. On the one hand, it may be argued that the presence of the statutory remedy absolves the courts of the responsibility of developing the common law. On the other hand, is it desirable—as Lord Bingham asked rhetorically in his dissenting opinion in the *East Berkshire* case (at [50])—that 'the law of tort... should remain essentially static, making only such changes as are forced upon it, leaving difficult and, in human terms, very important problems to be swept up by the Convention'? (Cf. *Wainwright v Home Office* [2004] 2 AC 406 at [52] per Lord Hoffmann, warning against the distortion of common law principles where the HRA provides an alternative remedy.)

A more fundamental challenge to basic doctrines of tort law and procedure came from the view that denying liability in negligence on the basis that no duty of care was owed to the claimant might infringe Article 6, ECHR, which provides:

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. . . .

This general right is regarded as giving rise to the more specific 'right to a court'. Applying this to negligence claims, the question arises whether a claimant's right to a court is satisfied where the claim had been struck out at a preliminary hearing on the basis that it was not fair, just and reasonable that a duty of care be recognised. In *Osman v United Kingdom* [1999] 1 FLR 193 the applicants were the unsuccessful plaintiffs in *Osman v Ferguson* (above), an action against the police, in which they alleged that a careless police investigation had resulted in insufficient steps being taken against a certain individual, PL, to prevent him causing harm to the applicants' family. As a result, PL killed the applicants' husband and father, and injured one of the applicants. Applying *Hill v Chief Constable of West Yorkshire*, above, the applicants' claim in negligence against the police was struck out at a preliminary hearing by the Court of Appeal on the basis that the police owed no duty to the applicants. The applicants took their case to the ECtHR, unsuccessfully alleging breaches of Articles 2 and 8 but successfully arguing a breach of Article 6. The decision on Article 6 is difficult and much of it, in practice if not in theory, has been departed from by later courts, but an important part of the decision was that the Court of Appeal had failed to balance the policy factors against imposing a duty of care (as set out in *Hill*) against the factors in the individual case which would militate in favour of a duty of care, and this resulted in a disproportionate immunity from civil action being granted to the police. According to the ECtHR, the Court of Appeal should have considered other factors such as the degree of negligence, the seriousness of the harm suffered, and the justice of the particular case in deciding whether a duty

of care should be owed. The problem with this was that these were not factors which English law, according to orthodox principles, took into account in determining the existence of a duty of care. The English approach was to deal under the heading of duty with considerations (of both proximity and policy) applicable to all cases of the same general description as the case at hand; the question was whether there should be liability if negligence was proved in this type of case, and the facts of the individual case were not relevant. As Stuart-Smith LJ explained in *Palmer v Tees Health Authority* [1999] Lloyd's Rep Med 351:

[O]nce rules are established, it is not open to the courts to extend the accepted principles of proximity simply because the facts of a given case are particularly horrifying or heart-rending. Nor in my view is ... [counsel] correct in submitting that those principles can be extended by some notion of proportionality based on the gravity of the negligence alleged or proved. In establishing liability in tort there are no gradations of negligence and the notion of gross negligence is not recognised; though culpability and causal potency are relevant in assessing apportionment for contributory negligence or between tortfeasors.

By contrast, the ECtHR appeared specifically to require domestic courts to assess whether it would be proportionate to apply a general immunity of the type under consideration in view of the particular merits of the individual case. Accordingly, whilst the ECtHR did not expressly state that the striking-out procedure of itself contravened Article 6, the traditional manner in which such striking-out decisions were decided *prima facie* appeared to contravene Article 6. Thus the practical effect of the decision was to make English courts extremely reluctant to strike out negligence claims against public authorities. However, the decision had, potentially, even wider application than claims in negligence against public authorities. Although the Convention allows claims only against the state, not private parties, it should not be thought that it was necessary in *Osman* that the claim in negligence had been brought against an organ of the state, namely, the police. The UK's breach consisted in the striking out of the claim in negligence by the court, and the same conclusion would have resulted even if the action happened to have been brought against a private party.

The reaction to *Osman* in England varied considerably, although, as Hickman, "The 'Uncertain Shadow': Throwing Light on the Right to a Court under Article 6(1) ECHR" [2004] PL 122, fn 65 points out, 'the few who were favourably disposed to the judgment saw it as curing ills largely unconnected with the right of access to court'. The decision was subjected to criticism in *Barrett v London Borough of Enfield* [2001] 2 AC 550 by Lord Browne-Wilkinson—who described it as 'extremely difficult to understand'—and, when the issue came again before the ECtHR in *Z v United Kingdom* [2001] 2 FLR 612, arising out of the House of Lords' decision in *X v Bedfordshire*, above, the ECtHR took a different approach to Article 6 and the duty of care from that which it adopted in *Osman*. The key passages of the Court's judgment follow:

96. 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.

97. 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 an adversarial procedure. . . .

98. 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 (see *Fayed v UK* (1994) 18 EHRR 393 at 429). . . . [I]t is a principle of Convention case law that art 6 does not in itself guarantee any particular content for civil rights and obligations in national law, although other articles such as those protecting the right to respect for family life (art 8) and the right to property (art 1 of Protocol 1) may do so. It is not enough to bring art 6(1) into play that the non-existence of a cause of action under domestic law may be described as having the same effect as an immunity, in the sense of not enabling the applicant to sue for a given category of harm.

Although the applicants lost the Article 6 point, they were ultimately successful in that the court found breaches of Article 3 (prohibition against torture or inhuman or degrading treatment or punishment) and Article 13 (requirement of an effective remedy in national law for breach of a Convention right). If English law chose not to give an effective remedy for breach of the applicant's Convention rights through the tort of negligence, this might not breach Article 6, but it had to accept the consequence that it would breach Article 13. Thus, on the facts, the 'victory' of the government on this point was somewhat Pyrrhic. It should also be remembered that, if the council's conduct had occurred after the Human Rights Act 1998 was in force, there would have been a direct action against the council for breach of its s. 6 obligation to act compatibly with the Convention (as was the case in *Van Colle v Chief Constable of Hertfordshire Police* (above) where, in a case not dissimilar to *Osman*, the police were found liable under the HRA for breaching their Article 2 obligations).

(a) Article 6 and the Duty of Care post-*Z*

It is clear after *Z* that the striking out of a negligence claim on the basis that it is not fair, just and reasonable to impose a duty of care on the defendant does not necessarily infringe Article 6. Why, then, did the Court hold an infringement of Article 6 in *Osman* but not in *Z*? One possibility is that *Osman* is now regarded by the ECtHR as incorrectly decided (see, e.g., para. 100 of the judgment in *Z*). In *Osman* it was incorrectly thought that the denial of the duty of care under the third limb of the *Caparo* test operated as an immunity, whereas, as the Court recognised in *Z*, notions of fairness, justice and reasonableness are intrinsic elements of the duty of care. In other words, a holding that it is not fair, just and reasonable to impose a duty of care precludes liability from arising in the first place—in the language of the Court it related to the applicable principles governing the substantive right of action in domestic law. It did not operate to give an immunity from a liability which would otherwise have arisen. As the Court noted in para. 98: 'It is not enough to bring Art 6(1) into play that the non-existence of a cause of action of domestic law may be described as having the same effect as an immunity.' If this interpretation of *Z* is correct it is hard to see that Article 6 has any relevance at all to striking out claims in negligence.

This view of the effect of *Z* receives tacit support from the decision of the House of Lords in *Matthews v Ministry of Defence* [2003] 1 AC 1163. The case did not actually concern the existence of a duty of care at all. The question was whether s.10 of the Crown Proceedings Act 1947—which until it was repealed in 1987 restricted the circumstances in which the Crown could be sued by members of the armed forces—was compatible with Article 6. In deciding that it was, the House of Lords accepted a distinction, advanced in previous decisions of the ECtHR (see e.g. *Fayed v United Kingdom* (1994) 18 EHRR 393) between restrictions on the right of access to a court based on substantive law and restrictions of a procedural nature (see also Gearty (2002) 65 MLR 87). It was only the latter that attracted Article 6 scrutiny. As Lord Walker stated (at 1207–8):

Although there are difficulties in defining the borderline between substance and procedure, the general nature of the distinction is clear in principle, and it is also clear that article 6 is in principle concerned with the procedural fairness and integrity of a state's judicial system, not with the substantive content of its national law.

In these terms the denial of a duty of care on the ground that it was not fair, just, and reasonable is substantive, not procedural, and there is no basis for scrutiny under Article 6. In effect, this is to treat Article 6 as wholly non-applicable to matters of substantive law, not merely to assert the substantive law's compliance with Article 6. That this is the correct approach now seems beyond doubt; in *Roche v United Kingdom* (2005) 20 BHRC 99 (also involving s. 10 of the Crown Proceedings Act 1947) the ECtHR, in stressing the importance of the substance/procedure divide, stated that Article 6 had in principle no application to substantive limitations on the right existing under domestic law. This has been the view taken, implicitly or explicitly, in a number of English decisions post-*Z*: *A v Essex County Council* [2004] 1 WLR 1881; *D v East Berkshire Community NHS Trust* [2004] QB 558, on appeal [2005] 2 AC 373. Although it can be argued that the decision in *Z* allowed some, albeit limited, scope to affect the substantive law of negligence (see Lunney (2001) 12 KCLJ 244; Hickman, 'The "Uncertain Shadow": Throwing Light on the Right to a Court under Article 6(1) ECHR' [2004] PL 122), in light of the case's subsequent interpretation this now seems a very unlikely possibility.

(b) Conclusion

There is little doubt that the *direct* effect of *Osman* is considerably less than was first thought; English courts since the decision of *Z* have noted that the use of the striking-out procedure where no duty of care is found to be owed does not of itself infringe Article 6, and an attempt to 'resurrect' *Osman* as a means of challenging it was comprehensively rejected by the Court of Appeal in *D v East Berkshire Community NHS Trust* [2004] QB 558 (and was not even argued before the House of Lords on appeal: [2005] 2 AC 373). Perhaps, as Lord Walker noted in *Matthews v Ministry of Defence* [2003] 1 AC 1163 at 1207, '[t]he uncertain shadow of *Osman* still lies over this area of the law', but there will be very few cases where the shadow 'stretches far enough to obscure the position' (*D v East Berkshire Community NHS Trust* [2004] QB 558 at [22] per Lord Phillips MR).

However, whatever remains of *Osman* as a means of challenging the striking out procedure as a matter of strict law, there is no doubt that the *practical* effect of the decision was greatly to inhibit the use of the strike-out procedure in actions against public authorities. As Gearty (2002) 65 MLR 87 at 94 notes: 'perhaps *Z* and others is too late to save the pre-*Osman* law of negligence? Certainly the liability of public authorities has greatly increased in the

period since that now-disgraced decision was handed down, albeit (we are asked to believe) without it having been explicitly or even implicitly “followed” in the traditional English sense’. More radically, the influence of *Osman* can be seen in the submission made to the House of Lords in *D v East Berkshire Community NHS Trust* [2005] 2 AC 373 that the common law should jettison the concept of duty of care as a prerequisite to liability in negligence see extract at p. 126, above. Viewed in this light, the lasting effect of *Osman* has been less about Article 6 and the striking-out procedure and more about reinvigorating the debate as to the role of the duty of care in the English law of negligence.