

The English Law of Tort

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Overview of the programme:

Monday 24th October 2011:

Session One: Origins and conceptual framework. Trespass Torts.

Tuesday 25th October:

Session Two: The evolution of the Tort of negligence/breach of duty from actions on the case via *Donoghue v Stevenson* to *Caparo v Dickman*.

Wednesday 26th October:

Session Three: The concept of causation in Tort - difficulties and solutions.

Session Four: Special situations in negligence: - Economic Loss, Psychiatric Harm, Occupier's Liability and Employer's liability.

Thursday 27th October:

Session Five: Nuisance Torts. Remedies - damages and injunctions.

Session Six: International aspects - jurisdiction, *forum conveniens* and the Brussels and Rome II regulations.

Session One: Origins and conceptual framework. Trespass Torts.

Origins and conceptual framework.

A study of early legal history shows that legal systems typically cover a range of topics, which in modern terminology correspond to the law of persons, the law of property, and the law of obligations, as we can see them in modern European Civil Codes.

At this stage, among the obligations we find a number of sub-categories. Contractual obligations are identified as those where the obligation arises out of the choice of the parties. In Roman law these are regarded as bonds arising out of a formal undertaking.

Tortious obligations are those arising from a *vinculum juris*, a bond arising from the general legal expectations of the society, not from a private arrangement. Primitive laws such as the Roman laws of the Twelve Tables allocate these wrongs more or less entirely to the field we now call tort in England, corresponding to the *delicta* of Roman law. Appropriation or damaging another's movable property, killing or injuring him, depriving him of liberty, defaming him, interfering with his ownership of immovable property were all wrongs, and the primary remedy was an action by the victim to obtain redress. This was also the case in the early Germanic codes, which are closer analogies to the English law, as this developed from Anglo-Saxon Germanic, and Norman Franco/Scandinavian origins. Today we also regard many of these actions as being also criminal in nature, but the prosecution of an offence by the state is intended to produce punishment and deterrence, rather than directly to compensate the victim.

This notion of 'wrong' is also at the heart of the etymology of tort – it is from a Latin root *tortus* meaning 'twisted' as in the modern words 'torsion' and 'torque' and comes into English law via mediaeval French. The word 'wrong' equally comes from a Scandinavian root meaning 'awry' or 'twisted'.

Early English law derived from pre-Conquest practice. In relation to tort the focus was on injury to persons, tangible property and real property. Post-Conquest the system developed largely independently of Continental practice. Importantly there was no general reception of Roman law. Canon law applied, and this affected probate and divorce. The *lex mercatoria* also applied, as did admiralty law. However, apart from a brief period in the C14/15, the wider impact of Roman and post-Roman civilian legal ideas was negligible.

Legal rights were heavily dependent on the existence of remedies. Each legal situation developed its own cause of action, and each cause of action had its own writ, or originating process. The intending claimant went to a court official and purchased his writ, but the official would issue the writ only if the facts of the case could be brought within the form of words prescribed for the writ.

Initially there was some flexibility in this, but eventually the writ system became rigid. The situation was also complicated because there was a lengthy conflict

between the various local jurisdictions and the central, or royal, courts over which had jurisdiction over different classes of dispute.

Writs of Trespass

There was a series of these writs. All contained an allegation that the defendant had acted *vi et armis et contra pacem domini Regis*. This was to confer jurisdiction on the royal courts.

The writs relating to trespass to the person covered assault, battery and false imprisonment.

Trespassio quare clausum fregit dealt with direct incursion onto land, while *nocumentum*, or nuisance, dealt with indirect interference. *Disseisina* dealt with usurpation of ownership.

A number of writs covered interference with goods, including *detinue* and *detinue sur trover*, as well as the broader conversion.

The law was as yet only concerned with 'deliberate' acts, and very much focussed on the act itself not the underlying motive. Brian CJ said in 1349 'We judge the act not the intent, for the devil himself knows not the intent of a man.'

The next major development was the writ of trespass *in consimilitudine casu* or 'Trespass on the Case', later shortened to 'Case'. This allowed greater flexibility, as the facts did not need to be brought within the limits of the existing writ, and in relation to personal injury, in particular, allowed the courts to start addressing harm resulting from culpable carelessness, rather than from deliberate acts, and also harm arising indirectly, rather than directly. In one case it was said that if a log was thrown out of a window and hit a passer-by as it dropped, that would be trespass, but if it was lying on the ground and a passer-by tripped over it, it would be case. By the end of the C14, this was established as a distinct, and relatively flexible form of action.

THINK POINT – why is this, and what does it say about the development of the law?

The Modern Law of Tort

In the C18 and C19 the 'action on the case' developed to include claims arising from a series of recognised 'duty situations' – these included road users, physicians and surgeons even where there was no contractual duty, and then employers, and other transport operators such as railways. As we shall see, this action for 'breach of duty of care' has now expanded, responding to the greater range of potential harm in modern society. It has embraced successively liability for:

- breach of duties imposed by particular statutes rather than by the common law;
- psychiatric harm unaccompanied by physical injury;
- economic loss unaccompanied by physical injury or damage to tangible property;
- liability of public authorities.

The older, so-called 'nominate' torts also survive, although they are less commonly used. They are too numerous to list, but each can be characterised as the breach of an obligation created by the general law, i.e. the *vinculum juris*.

Note that the law of tort is the single major area of law which is still largely regulated by pure common law – i.e. the law is stated by the judges in the cases, and it is necessary to analyse these cases to deduce from them the rules of law which apply. Statute law is of only marginal significance.

Objectives of the Law of Tort

Redress

Unsurprisingly, the primary objective remains securing redress for the wrong. This may be *restitutio in integrum*, as where goods are restored to the true owner following an action in conversion, but more typically it is an award of damages. These may be direct compensation, as in the case of loss of earnings in an injury claim, or a *solatio*, as in the case of damages for pain, suffering and loss of amenity.

Retribution

Originally, the action of the victim was the only one brought. The state did not itself prosecute crimes of this kind. Now, if a tort is also criminal in nature, the state will pursue the criminal aspects, and the civil court does not normally need to concern itself with this aspect. However, there are specific exceptions, effectively survivals from the earlier state of things, where the civil court may award aggravated or exemplary damages, which mark particular disapproval of the defendant's behaviour.

Vindication

The nominate torts, in particular the defamation torts and trespass to the person (especially false imprisonment) have a specific function of protecting certain essential interests of the individual, or civil liberties, namely the right to reputation and liberty. A decision in favour of the claimant is itself a vindication of those rights, quite apart from any award of compensation.

Prevention

It is sometimes argued that potential liability in tort acts to encourage the avoidance of risk. This is undoubtedly the case in relation to medical practice, where the threat of medical malpractice suits has led to the introduction of treatment protocols and other practices designed to eliminate error. In other cases the impact is less clear. Most potential defendants are insured, and are not likely to face multiple claims.

THINK POINT – when you are driving a car, why do you drive carefully?

Extended role

English law has a long history of creativity, using actions intended for one purpose to meet another. For many years the action of ejectment, essentially a claim in trespass, was used as the standard mechanism to resolve disputes as to the ownership of real property. Today actions in conversion are used to resolve disputes over the ownership of tangible personal property which essentially arise from fraudulent contractual dealings with the property in question.

CASE STUDY

A owns a car; he agrees to sell it to B and also agrees to accept a cheque, which turns out to be invalid. B sells the car to C for cash. Who owns the car?

TRESPASS TORTS

TRESPASS TO THE PERSON

The protection of the person from deliberately inflicted physical harm and restriction on freedom of movement were originally among the most important concerns of the law of torts. These are very old established torts. They are based on the Writ of Trespass. Strictly speaking this writ only covered direct and intentional harm to the interests referred to above.

Although we say the harm is 'intentional', that word is used in a rather specialised sense, as we will see later in relation to the individual torts.

CASE STUDY

Fred is driving down the street. He intends to cross over a junction even though the lights are turning to red against him. He collides with Ben, who is in the car in front, and who braked to stop at the lights.

Is this:

- (a) A trespass
- (b) Actionable negligence
- (c) Both
- (d) Neither

The three major sub-divisions of trespass to the person are battery, assault and false imprisonment.

Battery:

Any act of the defendant which directly and intentionally (or possibly negligently) causes some physical contact with the person of the claimant without justification.

There must be force, and the contact with the claimant must be the immediate result of the force. This will be a question of fact. If the contact is delayed or indirect there may be an action in negligence.

Physical contact may be trivial - injury is not required. As a trespass, battery is actionable *per se*. It is not necessary to prove substantial harm, merely that the claimant's rights have been infringed. An action can thus be brought to establish a principle, e.g. in relation to unlawful fingerprinting. It can also be brought where there is indignity but no physical injury. Negligence is of less assistance here since it will provide compensation only for actual tangible loss. It is worth noting, however, that where a technical touching is intended, but what actually transpires is something substantial, there is both criminal and civil liability for what actually occurs.

There are a number of cases in which it is accepted that the contact can be less than entirely direct. So it is battery to strike the horse on which the claimant is riding: *Dodwell v Burford* (1669) 1 Mod Rep 24, or to touch the claimant's clothing: *Piggly Wiggly Alabama Corp. v Rickles* (1925) 103 So. 860 (USA).

In *Haystead v Chief Constable of Derbyshire* [2000] 3 All ER 890, the defendant punched a woman, causing her to drop the child she was holding. This amounted to the criminal offence of 'assaulting by beating' the child, which requires a battery.

The defendant must be an active, not a passive, party: *Innes v Wylie* (1844) 1 Car & Kir 257. The claimant had been expelled from a society. It was known that he intended to attend a dinner of the society and a policeman, acting on the orders of the defendant, was stationed to prevent him doing so. There was a dispute on the facts as to whether the policeman had merely stood in the way or had taken positive action to move the claimant back. It was held that it would be battery only if the latter were proved.

It is now probably the case that negligence will not be enough. In the USA battery is now restricted to intentional acts, in the sense that contact with the claimant was intended, and not merely a negligent side effect. English law is still somewhat unclear on the point. No case requiring the point to be decided has come before the courts, but most commentators regard 'negligent trespass' as redundant and ripe for abolition. This would mean that, in the example given earlier of the log, it would now be necessary to show that the log was being thrown at someone. It does not matter if it hits someone other than the intended victim: *Livingston v Ministry of Defence* [1984] NI 356.

It is now clear that a mere and innocent accident will not do. In *Fowler v Lanning* [1959] 1 All ER 290 the defendant discharged a shotgun while out shooting birds. The claimant was in the vicinity and sustained pellet wounds. In consequence the claimant started proceedings and served a statement of claim alleging that at a stated time and place 'the defendant shot the claimant'. There was no suggestion of a deliberate act, and the claimant did not allege negligence. Diplock J ruled that in the absence of an allegation of negligence the pleading was inadequate. In other words, even if the claimant proved what was in the statement of claim, this did not amount to a battery. It might have been otherwise if the defendant ought to have appreciated the presence of and risk to the claimant. The claimant was then allowed to amend the statement of claim to allege negligence and the action proceeded to trial.

It has been suggested that battery is now confined to intentional acts. In *Letang v Cooper* when the defendant directly harmed the claimant it was not intentional, although it was at least arguably negligent. The claimant had three years to bring an action in negligence, but omitted to do so. She then brought an action in battery for which the time limit was arguably six years. Since the claimant was too late to bring a claim in negligence, she was trying to argue she had longer to bring a claim in trespass. The Court of Appeal held that the absence of intention was fatal to a claim in battery. However the issue before the court was really one of limitation of actions, and the decision could be justified on other grounds.

While in their comments about the case (obiter) the judges were clearly encouraging claimants to bring allegations based on negligence under the tort of negligence, it is not clear that they meant to reach a final and binding decision on the scope of battery. In *A v Hoare* [2008] UKHL 6, the House of Lords confirmed that the conceptual difference between intentional trespass and negligence remained. Nevertheless, the limitation period should be the same.

A battery will not be actionable if there is a legal justification for it (and this applies to the other trespass torts). The principal justification for battery is consent, but self defence and lawful authority may also be relevant. Lawful authority arises more frequently in relation to false imprisonment and is discussed there.

Consent raises a number of quite complex issues, which have a relevance even beyond the trespass torts.

Express consent

If you have ever undergone elective surgery you will know that you are required to sign a consent form. This consent must be genuine, but where the claimant is really complaining that, although they signed the form, they only did so because they were not properly informed about the implications of treatment, they are regarded as consenting. Any claim must be brought in negligence on the basis that advice on these matters is part of the doctor's professional responsibility: *Chatterton v Gerson* [1981] 1 All ER 257.

THINK POINT Is it reasonable for doctors to operate on you without your full, free and informed consent? If so, why? If not, why not?

Chatterton v Gerson concerned the application of intrathecal phenol (acid into the spinal cord!) as a pain relieving measure of last resort. At the time this was still experimental in the UK. The claimant framed a claim in battery on the footing that she had not given true or informed consent to the treatment in the absence of proper explanation of the possible complications. This argument was rejected. Bristow J ruled '[O]nce the claimant is informed in broad terms of the nature of the procedure which is intended, and gives her consent, that consent is real, and the cause of action on which to base a claim for failure to go into risks and implications is negligence not trespass.'

In *Chester v Afshar* [2004] UKHL 41, primacy was given to the provision of information relating to informed consent. Unfortunately, it was given effect to inappropriately, as you will see when looking at the case in the context of causation in negligence.

Patient autonomy

In general, a patient with full mental capacity has the right to consent or not to treatment. Enforced treatment will be a battery: *In re B (Consent to Treatment: Capacity)* (2002) The Times 26 March 2002; *St Georges NHS Trust v S* [1999] Fam 26. Even where a patient lacks capacity, treatment not in his best interests is unlawful: *Airedale NHS Trust v Bland* [1993] AC 789. However treatment which is in his best interests is justified by necessity.

Consent and fraud

Consent given by reason of fraud or abuse of power may be void: *Hegarty v Shine* (1878) 14 Cox CC 145. It will, however, depend on the nature of the fraudulent representation. English law takes a narrow view. If the deception goes to the essence of the transaction it will negative consent, but if it goes only to the surrounding circumstances it will not. Many of the cases are of seduction. If a man

seduces a naïve girl by pretending that what he is doing is a surgical operation there is no consent. Seducing a woman by a promise of marriage, or an assurance of infertility is a different matter; the woman does consent to intercourse, although fraud has been used.

Implied consent: general social contact

In a crowded society, some unpermitted contact is inevitable. Apart from casual contact in the street or public transport, friends and acquaintances may accept more intrusive behaviour. However, there are limits, especially if the person causing the contact is part of the machinery of government.

CASE STUDY

Which of the following are and are not batteries (paying particular regard to issues of implied consent?):

(a) Hanif collapses in the street. Jane gives him mouth-to-mouth resuscitation and also tries to administer cardiac compression treatment.

(b) Brooklyn and Jordan are 'playfighting' at school. Jordan knocks Brooklyn down. Brooklyn trips over his sarong and breaks his collar-bone.

(c) PC Plod puts his hand on Noddy's shoulder because he wants to tell Noddy that his car is causing an obstruction.

(d) Sam has just scored the winning goal in the cup final. As he goes off the pitch well-wishers slap him on the back and grab his arms. The following morning his shoulders are red and sore.

The issue is sometimes put on the basis of a hostile touching or touching in anger, as distinct from incidental contact. This is based on a comment by Hale CJ in *Cole v Turner* (1704) 6 Mod 149. While this may be a useful test it is not universal. In *Wilson v Pringle* [1986] 2 All ER 440 a schoolboy pulled, from behind, at a bag on the claimant's shoulder. The claimant fell and hurt himself. The claimant sought summary judgment, on the basis that this was a clear battery. It was held, having regard to the age of the parties, the general habits of schoolboys and the absence of malice (in the sense of actual malevolence), this was not so clearly a battery that summary judgment should be given. This case can be contrasted with *Williams v Humphreys* The Times, 20 February 1975, where the defendant, a 15-year-old, pushed the claimant into a swimming pool by way of a prank. The court held this amounted to battery. It went beyond any activity which could be described as permitted child's play.

Does the 'hostile touching' test explain why the acts of a surgeon who operates on an unconscious accident victim will not amount to battery, but the lightest restraint by a PC who is not exercising a power of arrest will do so? Lord Goff suggested both in *Collins v Willcock* [1984] 3 All ER 374 and in *Re F* [1990] 2 AC 1 that the real point is that any contact must be justified.

This may be as a result of the acceptance of incidental contact as part of 'life's give and take', but considered acts, like surgery, need to be positively justified as being in the recipient's 'best interests'. This emphasis on justification rightly focuses on the defendant. He must account satisfactorily for his behaviour. He has chosen to act and does so at his peril.

Implied consent – dealing with 'dangerous' people

Those who work with potentially dangerous people, such as teachers in special schools for children with behavioural problems, and psychiatric nurses, are clearly at risk of incidents of physical contact. However, awareness of, and acceptance of, the risk is not to be equating with consent, so such an incident is likely to be a battery: *H v CPS* LTL 14.4.10.

Implied consent: sport

THINK POINT What do you think the law says about harm caused by participating in sports and games?

There will often be contact authorised by the rules of the game, and also contact which results from a clumsy or ineffective failure to abide by the rules. Generally this sort of contact is with the consent of the victim. It is part of the risk accepted when agreeing to play. Deliberate foul play is outside that consent: *Condon v Basi* [1985] 2 All ER 453. This case involves football, but there have also been cases involving cynical foul play in both codes of rugby, e.g. *R v Billingham* [1978] Crim LR 553.

Implied consent: 'undesirable' activities

The limits of consent in areas other than 'manly sports' are now set by *R v Brown* [1993] 2 All ER 75. A number of men were prosecuted and convicted for causing actual or grievous bodily harm to adult sado-masochists. The victims had in fact consented. The trial judge ruled that this consent was not legally valid. The House of Lords, dismissing appeals against conviction, held that while consent might be an effective defence in relation to 'manly sports' and other harm of a trivial and transient nature, it could not in law be a defence where there was more serious harm, as there was in this case. The House considered that violence had always to be justified: sport could be justified positively in a way that prize fighting (*R v Coney* (1882) 8 QBD 534) and general scuffling and fighting (*A-G's Reference (No. 6 of 1980)* [1981] 2 All ER 1057) could not be. In each case it was the element of disorder or breach of the peace which made the difference. It has always been accepted that consent is not ordinarily a defence in relation to serious and permanent harm, *a fortiori* death.

THINK POINT Do you think that this decision cuts down the area for consent too far?

Self-defence

A person is entitled to use reasonable force to defend himself against an actual attack or one which he reasonably perceives to be being launched against him. The force must be proportional to the threat as perceived. In *Cross v Kirkby*, *The Times*, 5 April 2000 C attacked K with a baseball bat. K succeeded in wresting the bat from C and struck him once, causing serious injuries. The Court of Appeal considered that, on the facts as K (and independent witnesses) perceived them, this was self-defence.

In addition, the same case confirmed that the defence of illegality will apply in battery where the claimant is himself guilty of criminal behaviour to such an extent that it is offensive to justice that he be allowed to rely on a claim: *Holman v Johnson* (1775) 1 Cowp R. 341. This had been assumed to be the law in the earlier case of *Murphy v Culhane* [1977] QB 94, although where the illegality of the claimant was trivial (*Lane v Holloway* [1968] 1 QB 379) or of a different category (*Revill v Newbery* [1995] 2 WLR 239) it would not be offensive to justice to allow the claim. Contributory negligence is not applicable to the trespass torts: *CWS v Pritchard* [2011] EWCA Civ 329.

Assault:

Any unjustified act of the defendant which directly and intentionally (or possibly negligently) causes the claimant to apprehend an imminent contact with his person.

You should note that in tort the expression 'assault' is reserved for this threat of contact (or battery). In everyday language, and in the criminal law (assault occasioning actual bodily harm, sexual assault) the word has absorbed the significance of battery as well: see *R v Savage; DPP v Parmenter* [1991] 4 All ER 698. While it is possible to have a battery without an assault, as in the case of an attack from behind, or on an unconscious victim, all assaults are at least potential batteries, although in some cases the battery is prevented or not proceeded with. As a result a lot of the law is the same and these notes only consider the aspects of assault which are distinctive.

Act

This used to be regarded as indicating something more than mere words, and indeed it was said that words are no assault (Holroyd J in *Meade & Belt's Case* (1823) 1 Lewin 184). If the words are clear and threatening enough, very little more by way of gesture was required, however: *Wilson* [1955] 1 All ER 744. The context of the cases was different. The earlier one was that of an unruly crowd, singing and chanting. This was no doubt intimidatory, but could be said to lack specific and direct threat. The latter concerned a gang of men confronting a single gamekeeper in an isolated place at night. In the criminal law the Public Order Act distinguishes between serious offences involving the use or show of force (ss. 1-3), and lesser offences involving insult and abuse alone (ss. 4, 5).

The position has now changed. Lord Steyn (in a speech with which the rest of the House of Lords agreed) said in *Burstow & Ireland*: 'The proposition that a gesture may amount to an assault, but that words can never suffice, is unrealistic and indefensible. A thing said is also a thing done.

There is no reason why something said should be incapable of causing an apprehension of unlawful physical violence, e.g. a man accosting a woman in a dark alley saying "come with me or I will stab you". I would, therefore, reject the proposition that an assault can never be committed by words.'

THINK POINT Consider where the line should be drawn between words which do, and words which do not, constitute an assault.

A silent telephone call (or at least a campaign of such calls) had been held capable of amounting to an assault in the same case in the Court of Appeal: *Ireland* [1997] QB 114. The court indicated that it was immaterial whether words or silence followed the

making of the connection, and approved of the ruling in the Australian case *Barton v Armstrong* [1969] 2 NSW 451 that a threat made over the telephone was capable of amounting to an assault. The key issue is said to be whether the victim acquired an apprehension of immediate harm, usually physical, but possibly purely psychological, as a result of the behaviour of the defendant.

The House of Lords endorsed this, although accepting that there would need to be proof of a sufficient degree of immediacy of harm, which would not always be present. Some commentators argue that this is an illegitimate extension of the tort/crime of assault to meet the social need for a device to restrain and punish stalkers.

However they are mainly concerned with the issues of immediacy and the question whether the defendant has caused harm rather than fear. Is it assault or harassment?

THINK POINT Why may words alone constitute an assault? Do you agree that they should?

Where the words are spoken face to face, there is immediacy and the only question is one of degree of threat. In other cases the main issue will be immediacy. If the threat is known to come from far away, precautions can be taken. If the phone call may be from the street outside, then there is immediacy. The cases appear to suggest that, at least in criminal law, it is enough that what you say produces a psychic shock, quite distinct from the apprehension of subsequent physical attack.

Immediate

Words used may negate the threat of a gesture. In *Tuberville v Savage* (1669) 1 Mod Rep 3, the claimant during an argument with the defendant put his hand on his sword-hilt and said 'An 'twere not assize time, I would not take such language from you'. The defendant drew his own sword and stabbed the claimant in the eye. The claimant claimed battery and the defendant pleaded self-defence. The court held that this was a battery by the defendant and not self-defence. The claimant's conduct did not constitute an assault, because the words counteracted the gesture.

A future threat, or a present threat which the defendant manifestly cannot carry out, will generally not be an assault. In the first case there is no threat to the peace, the claimant can take precautions; in the second, there can be no apprehension. The example usually given is of the threat shouted from one river bank to the other, there being no bridge, boat, ford etc. available. This is illustrated in *Thomas v NUM* [1985] 2 All ER 1. The action was brought on behalf of working miners during the 1984 strike. They were seeking an injunction to restrain aggressive mass picketing by strikers. They claimed, among other things, that the various threats shouted by the strikers as the workers were driven into the mine in buses at some speed and with a substantial police guard, were assaults. There were gestures as well as words.

It was held that these threats did not amount to assaults, because there was no basis to fear that they could be carried out then and there. So we can conclude that the test is whether the defendant was clearly in a position to carry out the threat. If there was a serious risk, it will be an assault even though the attack is frustrated. In *Stephens v Myers* (1830) 4 C & P 349, the defendant was at a public meeting. He became annoyed at the conduct of the chairman and started to threaten him and

move towards him shouting that he would drag him out of the chair. His progress was halted by other members of the audience.

THINK POINT - Was this an assault, bearing in mind all that you have read so far?

Apprehend

You must consider this aspect from the claimant's viewpoint. What construction should he reasonably place on the defendant's conduct? An apparent threat which the defendant knows to be an empty one can thus be an assault, because the claimant reasonably perceives it as one. The obvious example is a threat with an unloaded gun. In the USA and in Australia there is no doubt that such a threat is an assault. The same probably applies in England: *R v St George* (1840) 9 C & P 483. Unfortunately there are comments in another case in the same year to the contrary: *Blake v Barnard* (1840) 9 C & P 626. The problem is that the precise effect of these early cases remains disputed. Oddly the issue never seems to have arisen for decision since.

CASE STUDY

What torts, if any, have been committed in the following situations:

(a) Just as Alice is sitting down in a chair, but before she has touched it, Beryl, who has crept up from behind, whips the chair from under her. Alice falls to the ground and sustains a fractured hip.

(b) Charles is asleep in his seat in a cinema. His feet are stretched out, blocking the passage along the row of seats. Duncan, who wishes to pass, shakes Charles vigorously by the shoulder. Charles awakes with a start and falls from the seat, sustaining serious injury to his shoulder.

(c) While driving his car Edgar is forced to swerve by Freda, who is driving a large lorry. Edgar shakes his fist at Freda, and leans out of the window of his car to shout that he will 'murder' her. Freda laughs and drives away.

(d) Grace is having an affair with Horace. Horace has falsely told Grace that he has had a vasectomy. Grace becomes pregnant and Horace arranges for Igor, a surgeon, to carry out a surgical abortion. The formalities prescribed by the Abortion Act have not been complied with. Although Igor was careful, the operation leaves Grace sterile. This is a recognised but accepted side effect in a small minority of cases where the method selected by Igor is employed. Grace is particularly distressed because it was her dearest wish to have children in due course.

(e) Jeremy points a toy gun at Kate as a practical joke. Kate, who is short-sighted, thinks that the gun is real, and faints, hitting her head on the edge of a table.

(f) Louise telephones Michael. On the first two occasions she tells Michael to meet her under the clock at Waterloo station in two days' time. If he does not, she says, she will 'Get him.' The tune 'Misty' is playing in the background. In later calls over a four week period nothing is said when the phone is picked up, but 'Misty' is playing. Michael develops a traumatic neurosis.

Deprivation of Liberty

Here we are concerned with three torts which overlap, namely false imprisonment, wrongful arrest and malicious prosecution (although we do not have time to look in detail at the last two).

False imprisonment is an act of the defendant which directly and intentionally (or possibly negligently) causes the claimant to be confined in a place or within an area delimited by the defendant.

False

The word is not used in the sense of 'not true'. The imprisonment is real enough! It is used in the sense of bear 'false witness'; something which is improper or unjustified.

Imprisonment

This means any confinement or total restriction of freedom of movement. Incarceration in the narrow sense (i.e. locking up in a cell) is a form of imprisonment, but is not necessary. There may, but need not, be an assault or battery associated with a false imprisonment. It depends on whether force or threats were used to restrain the claimant.

THINK POINT What is the position if the claimant voluntarily enters a room and the defendant then locks him in?

What is being protected by the tort of false imprisonment? It is the claimant's freedom of movement; because you 'act at your peril' in relation to trespass, a deliberate act leading inadvertently to imprisonment will be covered. If the defendant locks the claimant in a room, the claimant's freedom of movement is just as effectively curtailed if the defendant acts deliberately with regard to the claimant as where he fails to realise that the claimant is in the room. The locking of the door is the direct cause of the restraint in each case. The concept of trespass is that of a class of acts which may not be done unless they are positively justified; this is the concept of acting at one's peril, and certainly mere inadvertence is not a positive justification.

However, if the person 'accidentally' imprisoned is acting wrongfully, e.g. by trespassing, or carelessly, e.g. by getting drunk and falling asleep in a corner, there may well be a defence available. In the USA there is no liability in false imprisonment for negligently imprisoning, although there will be for negligently failing to release, e.g. at the end of a period of lawful custody. What is clear is that mistake as to the circumstances is no answer.

The confinement must be complete. It is not false imprisonment to block off one route but not others, provided these are not unduly hazardous. The claimant may not be able to go where he wants, but he still is free to go elsewhere. In *Bird v Jones* (1845) 7 QB 742 the defendant improperly erected a temporary grandstand in the highway. The claimant entered it. The defendant's servants refused to allow him to go forward as he wished, but did not prevent him from returning, or going in other directions. The court held that such a partial restraint was not an imprisonment. Being locked in a third floor room would, however, be imprisonment, albeit that the window is open.

Imprisonment may be static or dynamic. Confinement within a room or other space will count, but it is equally an imprisonment to force someone to travel to a particular place. Wrongful arrests often result in an imprisonment of this kind.

CASE STUDY

Henrietta falls asleep in the toilet at a night club. She wakes up at nine a.m. and the club is deserted. No one comes to release her until noon. Advise her as to her claim for false imprisonment.

As with the other trespass torts most of the legal interest centres on the various forms of justification. Consent is a defence to any tort unless excluded by public policy. It is therefore no imprisonment to rely on the terms of an agreement regulating the claimant's access to the defendant's premises. In *Robinson v Balmain New Ferry* [1910] AC 295 the defendant operated a ferry. The claimant entered the terminal, paying one penny before travelling, and then changed his mind. The defendant would only allow him to leave on payment of a further penny. The claimant tried to climb over the turnstile but was restrained. It was held that there was no false imprisonment.

(a) Firstly, the claimant entered the defendant's premises on the understanding that one penny was payable for passing the turnstile in either direction.

(b) Secondly, there was nothing to stop the claimant leaving on the ferry.

(c) Thirdly, it was suggested that the defendant was entitled to impose such conditions as he saw fit, whether the claimant was told of these or not. An analogy was drawn with a railway passenger, who was only entitled to be set down at a station.

THINK POINT -Was this a condition in this sense, or was the defendant really detaining the claimant in order to compel payment of a civil debt, namely the penny payable on leaving?

Similar issues arose in *Herd v Weardale Steel Coal and Coke Co* [1915] AC 67. The claimant was a miner in the defendant's mine. While working underground during a shift, the claimant stopped work. He demanded to be taken up to the surface. The defendant refused until the end of the shift. It was held that there was no false imprisonment. The claimant had agreed to go down the mine for a particular length of shift. The defendant's obligation was therefore to wind the claimant up at the end of the shift, and not before.

CASE STUDY

Richman attended a match at Fulchester Rovers Football Club as a guest of Dives plc in their hospitality suite. The chief of police had entered into an agreement with Fulchester Rovers to police matches; the agreement provided inter alia that the senior police officer present was to control egress from the ground after matches. Notices were posted around the ground in the following terms: 'Admission to and exit from the ground are subject to police control. Departure from the ground after matches may be delayed in the interests of public safety.' A similar term appeared in the lease of the hospitality suite.

When Richman set out to leave the ground after the match, his way was blocked at the exit from the hospitality suite by Inspector Morse, who told him that he could not leave for twenty minutes while an adjoining area was cleared of visiting fans.

Advise Richman

Lawful Authority - Custody

Imprisonment pursuant to a lawful order of a court is justified. There has been no successful modern attempt to demonstrate that imprisonment of this kind has become false as a result of the conditions in which the claimant is being detained. There have been several unsuccessful attempts, culminating in *R v Deputy Governor of Parkhurst Prison, ex parte Hague, Weldon v Home Office* [1992] 1 AC 58. Each case concerned a serving prisoner who alleged that his detention in prison was improper, in that the circumstances and conditions of detention were in breach of the Prison Act and Prison Rules. In each case it was alleged that a serving prisoner retained a residual liberty, in that the order of the court which sentenced him allowed detention only according to law, and that detention in other circumstances amounted to a deprivation of that liberty which amounted to false imprisonment. The House of Lords unanimously held the following:

(a) The relevant statutory provisions authorise detention and that necessarily involves a complete loss of liberty. There is thus no concept of residual liberty, and false imprisonment is therefore not available to challenge the circumstances of detention. (It may of course be available to challenge a detention which is itself wrongful, e.g. a failure to release a prisoner on the due date on completion of a sentence. See later in this section.)

(b) The appropriate remedy for a prisoner who alleges that the Prison Rules have not been applied properly to him, e.g. that he has been placed in solitary confinement without justification, is a public law remedy, i.e. an action for judicial review or for a declaration.

(c) The prison authorities owe a duty of care to detainees. An action for negligence can be maintained on the usual principles if a breach of this duty results in physical harm

In *R v Governor of HMP Brockhill, ex parte Evans* [2000] 4 All ER 15 the governor calculated Evans' release date according to the officially prescribed formula, which had been judicially considered and approved of. Evans herself successfully challenged the use of the formula and on the proper basis of calculation she had been detained beyond her true release date. The House of Lords, while accepting that the governor had done nothing wrong (he would have been disobeying orders and going against court rulings if he had released Evans on what later proved to be the correct date) nevertheless ruled that Evans had been falsely imprisoned. This is a very strong affirmation of the primacy of the right to liberty, particularly as against the state.

Lawful Authority - Arrest and detention

Statute, in the form of the general powers in s. 24 and 24A of the Police and Criminal Evidence Act 1984 (and many specific powers in other statutes) and the common law, gives powers of arrest to constables and to ordinary citizens. How far will the claim

of arrest by a constable (or a citizen) acting within a statutory or common law power of arrest be a sufficient answer to an allegation of false imprisonment? In principle it is such an answer, but the defendant must be able to satisfy all the conditions of the power, and, where he cannot, absence of malice is irrelevant. Note that under Art 5 of the European Convention the state must provide for compensation for improper deprivation of liberty, but this will not apply to cases where the arrest and detention were objectively justified. In other cases damages for false imprisonment represent that compensation.

For the arrest to be lawful a constable must have a reasonable suspicion that an offence has been, is being or is about to be committed, as the case may be, and also that the person arrested is guilty. This is an objective test, and it is not enough for the claimant to show that he was in fact not a wrong-doer. E.g. *Al Fayed v Metropolitan Police Commissioner* [2002] LTL 14 August 2002.

This is a significant area in practice. Actions are relatively common, frequently successful and attract substantial damages. Damages for humiliation and distress may themselves exceed £400 per hour of detention, and exemplary damages may be awarded. The (London) Metropolitan Police alone pay out over £1,000,000 each year. The key aspect of these cases is that, for an arrest to be lawful, all the requirements of the provisions giving the power of arrest must be met. So far as police powers are concerned, these are best considered in relation to other aspects of civil rights and liberties.

We need to consider here how the rules apply to citizen's arrests, which are regulated by s 24A of the Police and Criminal Evidence Act, and are significantly narrower than those of the police (and indeed than those of the citizen were until relatively recently). They now apply in respect of a person committing or reasonably suspected of committing an indictable offence while he is in the act of committing the offence, and, where an indictable offence has been committed, to a person guilty or reasonably suspected of having committed it. However there is a new requirement that it must not be practicable for the police to effect the arrest, and the arrest must be necessary to prevent injury, damage to property or the suspect making off before the police can 'assume responsibility' for him. There is no doubt that the intention is to discourage citizen's arrests and encourage reporting to the police for them to take over the investigation.

In *Davidson v Chief Constable of North Wales* [1994] 2 All ER 597 the claimant and her friend were arrested by the police after a store detective wrongly suspected they had stolen a cassette. The action against the police failed because of their reasonable suspicion based on the initial statement of the store detective. Could the detective, however, be said to have 'instigated, promoted and actively incited' the arrest, thus rendering herself and her employer liable for false imprisonment? No, according to the Court of Appeal. The police had exercised their own judgment, even though the detective said in evidence that she was accustomed to the police acting on her information, and clearly expected them to.

In *L v Bournemouth Community and Mental Health NHS Trust* [1998] 3 All ER 289 the House of Lords determined that detention of an incompetent person in a mental hospital was not false imprisonment, even though Mental Health Act powers were not used and the patient did not positively consent. The justification was that it was in the best interests of the patient. This patient was too disturbed to indicate an objection. The Court of Appeal had held that this was false imprisonment on the

ground that the Mental Health Act machinery replaced the common law of necessity. The House appeared more impressed with arguments that using the formal machinery would be very costly than with the civil liberties arguments. The decision was found unacceptable by the European Court of Human Rights (*HL v UK* Case 45508/99) as there were found to be inadequate procedural guarantees of the Art 5 right to liberty.

CASE STUDY

Elvis is behaving strangely. He is going from shop to shop, taking an item from each but leaving it in the next shop. Irene, a law student, thinks this is wrong and tells Elvis to go with her to the police station. Elvis does so. Irene tells PC Rex that Elvis has been stealing. PC Rex arrests Elvis. The custody sergeant arranges for Elvis to be seen by Dr Watson, the police medical officer, who considers that Elvis is mentally ill. Dr Watson takes Elvis to the local psychiatric unit without making any formal decision under the Mental Health Act.

Has Elvis been falsely imprisoned at any stage?

NOTE: To be guilty of theft, you have to dishonestly assume the rights of the owner of property intending to treat the property as your own to dispose of. If Elvis is mentally disturbed, he may lack the capacity to form a dishonest intention.

THINK POINT Can you be imprisoned without realising it?

In *Meering v Graham-White Aviation* (1919) 122 LT 44 the defendant suspected the claimant of theft. The claimant was not told of the suspicion. He was asked to wait in an office, and did so voluntarily. In fact, but unbeknown to him, guards were posted who would have prevented him leaving the room if he had tried to, which he did not. The question of whether there had been an imprisonment was left to the jury.

The verdict was that this was imprisonment. This was upheld on appeal as a proper verdict. The claimant's freedom of movement had in fact been curtailed; the state of his knowledge went only to the amount of damages. This view has been supported by comments made in *Murray v Ministry of Defence* [1988] 2 All ER 521. In this case too Lord Griffiths pointed out that damages should be minimal. The position is again clearer in the USA, where it is laid down that the claimant must either be conscious of his confinement or actually harmed by it.

CONVERSION AND TRESPASS TO GOODS

This general heading includes two separate torts, namely conversion and trespass to goods. The whole law relating to interference with goods is complex and difficult. It was described by a judge as long ago as 1903 as being particularly technical, and although there has been intervention by Parliament, in the form of the Torts (Interference with Goods) Act 1977, this has affected the rules relating to remedies and procedures, but not the main substantive rules.

You have already seen that the torts of trespass to the person may be relied on where there is an underlying dispute that is, in substance, a matter of civil liberty. The torts relating to interference with goods may, similarly, be the legal format for a dispute which really raises issues in the law of contract or personal property: *Ingram v Little* [1961] QB31, *Lewis v Averay* [1973] 2 All ER 229 and *Shogun Finance Ltd v Hudson* [2003] UKHL 62 are all cases where this was the situation. You should bear in mind that in many cases conversion and trespass to goods cover the same ground (in rather the same way as common law negligence and breach of statutory duty). In practice the claimant will normally claim in conversion where he can.

CONVERSION

Conversion is an intentional dealing with goods which is seriously inconsistent with the possession or right to immediate possession of another. (*Street on Torts*)

The act constituting the dealing must be deliberate, as opposed to negligent or accidental. However the consequence of the act is irrelevant. As Cleasby B said in *Fowler v Hollins* (1878) LR 7 QB 616: 'The liability ... is founded upon what has been regarded as a salutary rule for the protection of property, namely, that persons deal with the property in chattels or exercise rights of ownership over them at their peril'. There are many cases where the defendant has dealt with goods in entire good faith, with no suggestion of any want of care in all the circumstances, e.g. an auctioneer who sold goods which did not in fact belong to his client. The contract mistake cases also provide any number of instances of morally innocent converters. You must simply ignore any temptation to bring in any element of 'morality'. To this extent the rules in conversion are even more restrictive than in relation to trespass to the person, where innocent accidents are now excluded and negligence is progressively being excluded from the trespass rules. The only real protection against the true owner's claim in most cases is the passage of time. The limitation period for claims in conversion is normally six years from the date of losing possession. However the rules are fairly complex.

As with trespass to the person, the emphasis is on positive justification. It is a little harder to get to grips with here. We can all see that threatening people, sticking knives in them or locking them up requires to be justified. It is a little more difficult in the context of dealing with goods, which we have to do every day as part of ordinary life.

Forms of conversion

Dealing with goods covers a number of types of behaviour. The following list aims to cover and explain the main cases, but is not intended to be exhaustive.

Taking goods or dispossessing the claimant

Theft, or an unjustified seizure under legal process, will amount to conversion, but merely moving goods (e.g. in order to get at other goods stored behind) is not necessarily conversion, although it might become conversion if the goods were exposed to risk as a result of the removal. You should also note that the limitation rules are different for theft cases than for other forms of conversion. Time under the Limitation Act can never run against a thief, so the owner can always recover the goods from the thief. It will only start to run once the thief has sold to a buyer in good faith. See the Limitation Act 1980 s 4.

Destroying or altering goods

Damaging goods is not in itself conversion (although it may amount to trespass to those goods). There is no assertion of ownership in such cases. If the damage is the unintended result of an action, then the appropriate cause of action will be negligence. Destruction of goods will be conversion where this was advertent, and the distinction between damage and destruction is one of fact. Alteration which alters the nature of the goods, e.g. making wine from grapes, or reformatting and using a floppy disk, will amount to conversion. Only the owner has the right to make such irrevocable decisions about the way in which his property is to be exploited. Such dealings are normally advertent in the sense that the defendant means to subject this item to this process, and doing so is clearly asserting the rights of the owner.

Using goods

This assumes that the user has come by the goods legitimately. A bailee who misuses goods does not necessarily convert them. It depends whether his misuse is inconsistent with the bailment. Thus a hirer of a car who crashes it is not converting it, but if he transforms it into a stock car he is doing so. In other circumstances (e.g. finding) use of the goods represents an assumption of the rights of the owner, and thus conversion. There will of course be an action only if the owner finds out where the goods have got to!

Receiving or taking delivery of goods

If the reception of the goods is intentional and represents the completion of a transaction, e.g. a purchase, which is designed to give the defendant rights over the goods, then this will amount to conversion. However, what about someone who receives goods merely as agent for another (e.g. a warehouseman or carrier)? He will not be liable to the original owner merely by taking delivery, since the purpose of the transaction is not to give him rights over the goods. It may be otherwise if he refuses to hand them over to the person entitled to them.

Disposal of goods

The mere agreement to dispose of goods is not a conversion, but a delivery in pursuance of the disposal will be, at all events where the defendant is instrumental in the disposition. In *Fowler v Hollins* the defendant was a cotton broker who held cotton actually belonging to the claimant, in the belief that it belonged to X. He disposed of it for the benefit of X and was held liable in conversion despite the fact that he was acting in entire good faith and had no ready means of knowing that the goods did not belong to X. Likewise in *Hiort v Bott* (1874) LR 9 Exch 86 the

claimant's agent G fraudulently represented to the claimant that the defendant had bought a quantity of oats to the value of £180. The claimant sent the goods to a warehouse and an invoice and delivery order to the defendant. G visited the defendant and said that a mistake had been made. He induced the defendant to endorse the delivery order to him by saying that this was the easiest way of returning the goods and cancelling the invoice. G then produced the order to the warehouseman, obtained the goods, sold them and absconded with the proceeds. The defendant was held liable to the claimant on the basis that he had, albeit as a result of G's fraud, interfered with the title to the goods by endorsing the delivery order, thus enabling G to obtain them.

CASE STUDY

Just in case you thought that this sort of case only belongs in the pages of a Dickens novel, here is a rather more up-to-date example. In *R H Willis and Son v British Car Auctions* [1978] 3 All ER 392 X obtained a car on hire purchase from the claimant. In breach of the hire purchase agreement he sold the car to Y, using the defendant as auctioneer. X went bankrupt and Y disappeared with the car. The claimant sued the defendant for his net loss.

The Court of Appeal held that the defendant had been instrumental in the sale, and was liable. Lord Denning departed from tradition in explicitly taking note of the fact that the defendant actually insured itself against the possibility of having to meet conversion claims arising from defective titles by taking a £2 premium from each buyer. The benefit of the insurance went to the defendant and the net result was that the original owner got damages, the defendant was indemnified and the buyer got to keep the car. To refuse a remedy to the claimant would have given the defendant's insurers a windfall.

However if the auctioneer merely receives the goods with a view to sale, but does not actually sell them, this does not amount to conversion: *Marcq v Christie Manson & Woods Ltd* [2002] 4 All ER 1005. This may be an agreement to dispose, but that, as we have seen is not itself a conversion.

Refusal to surrender on demand

The motive for the refusal is irrelevant. In *Howard E Perry & Co. Ltd v British Rail* [1979] 2 All ER 579 the defendant held steel belonging to the claimant but refused to hand it over because this might inflame their own workers at a time of industrial unrest. This was not a valid excuse. Nothing was allowed to interfere with the claimant's property rights.

It may be reasonable for someone who is storing or otherwise holding goods to seek advice in the face of a demand for them where there is doubt as to the true entitlement, and a delayed response of this kind will not amount to a conversion. After all, the warehouseman is caught between the devil and the deep blue sea, since he often cannot be sure which of two or more claimants is truly entitled. In such cases there is a legal procedure called interpleader, whereby the person in actual possession notifies the court that he has no claim of his own (other than a possible lien for his charges) and asks the court to resolve the issue between the competing parties.

THINK POINT – What are the advantages and disadvantages of this strict liability for conversion?

Goods

This will include all types of chattels, including crops once severed from the land, with the single exception of cash (although coins as collectors' items or bullion are included). In the case of valuable paper (cheques etc.) the subject matter of the conversion is the paper, but the value for purposes of damages is the commercial value.

Possession or the immediate right to possession

The primary concern of conversion is not with ultimate ownership where this does not coincide with possession. *Roberts v Wyatt* (1810) 2 Taunt 268 arose out of a conveyancing transaction. The defendant as vendor delivered an abstract of his title to land to the claimant. The claimant returned it with requisitions endorsed. The defendant could or would not answer these, and retained the abstract (which in strictness he owned since it was written on his paper). The claimant successfully sued in conversion, as he was entitled to possession for the purposes of the conveyancing transaction.

Separation of possession and ownership

In most cases possession and ownership will in fact coincide. The following are the commoner special cases.

Bailment

A bailment arises whenever the owner of goods (the bailor) parts with possession, otherwise than by way of security for a loan or debt, to a bailee. This sounds highly technical, but is in fact an everyday occurrence. Can you think of situations where you get involved in bailments? Common examples are borrowing, lending or hiring out, or consigning goods for carriage, storage or repair. While most bailments are contractual in nature there are legal consequences which flow from the bailment as such, and vary with the precise nature of the transaction. The bailee, being in actual possession, will always be able to maintain an action for conversion against someone who has dispossessed him. The bailor will be able to do so only where he has an immediate right to possession. He will have this where the bailment is at will, i.e. terminable forthwith, or if it has already been terminated. The bailor may sue the bailee in conversion if the bailee departs from the terms of the bailment, e.g. a repairer who sells the goods.

Lien and pledge

These are security interests (i.e. goods are handed over to secure payment of a debt or loan (pledge), or are retained pending payment of outstanding charges (lien)), but otherwise similar to bailment.

Sale

A party to the sale in actual possession of the goods, whether the seller or the buyer, can maintain conversion against a third party. Whether the other party to the sale

has an immediate right to possession will ordinarily depend on whether he has the property in the goods. The situation must be viewed in the light of the general law of personal property.

Finders

The finder's possessory title is good against anyone other than the true owner. This is demonstrated in *Armory v Delamirie* [1558–1774] All ER Rep 121.

CASE STUDY

The claimant, a chimney sweep's boy, found a jewel. He took it to the defendant, a goldsmith, for valuation. The claimant refused the defendant's offer to buy the jewel; the defendant's servant refused to return the jewel. Did the claimant's action succeed?

Although he was only a finder, his title dated back to the time of finding. He thus had a better title than the goldsmith, who also had a possessory title, but a newer one. So the claimant won. There are, however, exceptions to this rule:

- (a) An employee who finds in the course of employment has no title as against his employer (but the employer has finder's rights);
- (b) Where goods are physically within or attached to land or the structure of a building the property owner has a better right than the finder: *South Staffs Water Co. v Sharman* [1896] 2 QB 44 (rings in the mud at the bottom of a pond); *Elwes v Brigg Gas Co.* (1886) 33 Ch D 562 (prehistoric canoe six feet underground);
- (c) Goods found on or in premises will belong to the owner of the premises rather than the finder if (but only if) the owner has, previously to the finding, manifested an intention to exercise control over the premises and anything found therein or thereon.

CASE STUDY

A passenger at an airport found a valuable gold bracelet in a lounge. He handed it to the airport operator's employee, with a note of his own name and address. He intended to claim it if the owner did not come forward. The airport operator sold the bracelet when the owner did not come forward after several months. The passenger claimed its value. Did he succeed?

In *Parker v British Airways Board* [1982] 1 All ER 834 on these facts it was held that he did. There was insufficient intention to control access to and use of the lounge. It was a public place and therefore the finder's rights prevailed. There is of course no precedent of fact and other cases must be considered on their merits. Thus in *R v Rostron & Collinson* [2003] LTL 16.7.03 golf balls lost in water hazards were held to belong to the golf club as that was the general custom of the golfing fraternity, and so divers who recovered the balls without the approval of the club in order to sell them were guilty of theft and by extension would have been liable in conversion.

CASE STUDY

It is easy to see that complex situations may arise, with several claimants. In some cases several of them will have rights. Take for instance a car owned by A, leased to

B Motor Hire, hired by them to C, stolen from C by D, sold by D to E, an innocent buyer, who has resprayed it and replaced the engine and gearbox, which were worn out. Such cases are not uncommon. Can you work out who has rights against whom and why?

It is fairly obvious that D has converted the car, but did you spot that E's acts amount to conversion as against C, and possibly A and B depending on the terms of the bailments.

The Torts (Interference with Goods) Act 1977 seeks to deal efficiently and justly with *jus tertii* (or third party rights) which arise in these cases. Section 8 of the Act makes provision for the defendant to bring into the action anyone who has, or may have, a better title than the claimant.

This is designed to achieve three objectives in relation to which the common law was defective:

- (a) To avoid double liability, i.e. to the claimant and the third party;
- (b) To avoid multiplicity of actions;
- (c) To limit the claimant's claim to his actual loss.

Remedies

The rules relating to remedies for conversion are a detailed subject of study in themselves. What follows is a brief overview.

Damages

The claimant can recover the value of his interest in the goods. If the interest is a limited one then the claimant will recover only that. Where there are several interested parties, the damages may be apportioned. Prima facie the value will be market value, ascertained as may be appropriate.

Consequential loss (e.g. hire of a replacement) is recoverable. The calculation will be done on the basis most favourable to the claimant. This may involve an element of restitutionary damages based on the advantage secured by the defendant rather than the loss suffered by the claimant. In *Strand Electric v Brisford* [1952] 1 All ER 796 the claimant hired electrical equipment to the defendant, who failed to return it. The claimant's loss would have been nominal if he had had items of that kind still in stock to hire out to others. His loss would have been substantial only if he had had to turn other hirers away. Otherwise all he lost was wear and tear on the items detained. The defendant, on the other hand, got a substantial advantage. He didn't have to pay the market rate for hiring the items from elsewhere. As a result the full hire fee for the electrical equipment was recoverable, whether or not the claimant could prove he had lost an alternative hiring. Similarly in *Hillesdon Securities v Ryjack Ltd* [1983] 2 All ER 184 the contractual hiring charge for a car was due for the period of detention, even though it far exceeded the market value.

THINK POINT - Is this a fair way of approaching the problem?

Delivery up

See s. 3 of the Torts (Interference with Goods) Act 1977. This is a remedy peculiar to interference with goods, primarily conversion. It is a specific remedy, in the sense that the claimant gets back the thing itself rather than compensation for losing it. Such an order may be made whenever the defendant retains the subject matter of the claim. The defendant may be given the option of delivering up the goods or paying their value by way of damages, and the order will in any event carry any consequential damages.

Improvement

Quite frequently someone who acquires goods will repair or upgrade them, thus enhancing their value. How should he be dealt with if the goods have been converted? Equity demands that he be reimbursed for this work, provided he acted in good faith. If he is ordered to pay damages, this will be on the basis of the value at the time of the conversion. If an order for delivery up is made, compensation for the improvement can be ordered: s. 6 Torts (Interference with Goods) Act 1977.

CASE STUDY

Del hires out a sound system to Ingrid for two days for Ingrid's 21st birthday party. At the party Tom asks Ingrid if he can borrow the system for use at his own party, a week later. Ingrid agrees. At Tom's party one of the speakers is ruined when a bottle of champagne is spilled over it. The sound desk disappears from the party and is traced to Khaled. Khaled bought the sound desk from a reputable dealer and has subsequently upgraded the electronic system.

What claims does Del have in conversion?

Del clearly has some rights. He is entitled to possession as Ingrid's bailment has expired. Ingrid has wrongfully disposed of the goods and Tom has wrongfully received them. Both will be fully liable for the value of what has been destroyed or misappropriated. Tom will also be liable for a hire fee (*Strand Electrical*). Khaled is also liable in respect of the sound desk; he cannot acquire title through the thief, except possibly after six years under the Limitation Act. As a bona fide buyer, he should be entitled to an allowance for the improvement under s. 6 of the 1977 Act.

TRESPASS TO GOODS

Trespass to goods is an intentional or negligent direct interference with goods in the possession of the claimant. (*Street on Torts*, slightly amended.)

Intentional or negligent

The same observations apply here as in the case of trespass to the person. Accidental damage is no trespass, and if goods are negligently damaged the claim will probably be brought in negligence.

Direct

This means immediate in the sense of occasioned by the operation of a physical force set in motion by the defendant.

Interference

The tort protects three separate interests of the claimant:

- (a) Retention of possession. In this aspect there is a substantial overlap with conversion and in practice it is the latter which is more usually employed;
- (b) Physical damage. Appreciable damage to goods is clearly a trespass. It is a moot point whether any alteration of goods is actionable. There are three possible positions, none of which is excluded by the authorities:
 - (i) the tort is actionable *per se* on the analogy of the other trespass torts;
 - (ii) there must be some element of hostility present to render a nominal interference actionable;
 - (iii) substantial harm is a requisite.
- (c) Inviolability. This prevents intermeddling by moving goods and carrying them away even though there may be no damage. The claimant is entitled to have his goods where he wants them. The same argument arises in relation to a nominal moving and there is some authority that this is actionable as in *Kirk v Gregory* (1876) 1 Ex D 55 where moving rings from room to room in a house was held to be a trespass.

Possession

As in conversion the emphasis is on actual possession and not ownership. An immediate legal right to possess (e.g. that of a bailor at will or a trustee) will suffice. An owner who is out of possession cannot maintain an action in trespass, but can maintain an analogous action in relation to the destruction or damage of the goods to his prejudice: *Mears v LSWR* (1862) 11 CBNS 850. There will be no claim if the goods are repaired before they were due for return.

TRESPASS TO LAND

Intentionally or negligently entering or remaining on, or directly causing any physical matter to come into contact with, land in the possession of another. (*Street on Torts*)

Intentionally or negligently

It is clear that intentional movement of oneself or one's goods which does put you or them on someone else's land is trespass whether or not you are aware that you have crossed the boundary. There is the same debate as in the other trespass torts over liability for 'pure' negligence. If I park my car, but fail to set the handbrake with the result that it rolls down a hill and into someone's garden, is that trespass?

Entering on

This will cover undermining, or entry into that part of the airspace actually in use. So an advertising sign fixed to the side wall of a tall building and projecting into the airspace above the lower neighbouring building is a trespass. That airspace is at least potentially in use, as the building could be extended: *Kelsen v Imperial Tobacco* [1957] 2 All ER 343. Similarly a site crane swinging over the claimant's land will be trespass: *Anchor Brewhouse Developments v Berkeley House* (1987) 2 EGLR 187. Where redevelopment is only possible if airspace is encroached on, this can provide a lucrative windfall for adjoining owners, who can demand substantial sums in return for their consent. Is this fair and reasonable?

There is a line to be drawn. Overflying and photographing a house from a safe height is not trespass: *Bernstein v Skyview and General* [1977] 2 All ER 902

THINK POINT -Why is this?

The area entered is not actually or potentially being utilised. There is statutory provision for civil aviation to be conducted in a normal and proper way. There is no liability for overflying at a reasonable height, and strict liability for actual harm done to person or property on the ground by an aircraft or anything falling from one: s. 76 of the Civil Aviation Act 1982

Remaining on

This simply makes it clear that there is a continuing liability.

Land

This includes some rights over land (eg. a right of way). It is also a trespass against the owner of the subsoil to commit an abuse of a highway: *Hickman v Maisey* [1900] 1 QB 752. This means use other than for passing and repassing and other incidental use which does not interfere with or obstruct the highway. In *Hickman* the defendant was loitering on a path to spy on racehorses in training nearby. Reasonable use may include political and other demonstrations of a peaceful kind as a result of the House of Lords decision in *DPP v Jones* [1999] 2 All ER 257. This decision marks a relaxation of the previous rule and appears to take into account the importance of European Convention rights of free assembly and expression.

Possession

A legal estate or equitable interest and exclusive possession (as understood by land law) are required, i.e. the appropriate claimant is the freeholder, tenant for years in possession or the equitable owner. A squatter acquires no right as against the true owner (although, like the finder of a chattel, he has a right against others), but a tenant in possession has an action against a landlord who wrongfully dispossesses him.

It is well-settled that trespass to land is actionable *per se*. This means without proof of any damage resulting.

Damages

If an action is brought for damages, nominal damages at least will be awarded to a successful claimant. Substantial damages are available where recompensable damage has occurred. In some cases an action in trespass to land is brought primarily to establish ownership. In a boundary dispute one disputant will allege that the other has trespassed on 'his' land. The judge will need to determine the question of ownership and if the claimant succeeds, the defendant has indeed trespassed. A judgment for nominal damages thus forms the basis of the claimant's title to the disputed land.

Injunctions

The remedy of choice is often the injunction, which prevents a continuance or repetition of the trespass.

Possession orders

These are in practice used against squatters, whose presence is continuous and threatens to be permanent, rather than against the casual user of a short cut or private path. In these cases an injunction is more appropriate. An expedited procedure is available in the case of pure trespassers (i.e. those who have simply entered without any arrangement with the landowner, as opposed to those who have overstayed their welcome in legal terms). The police have powers under s. 61 of the Criminal Justice and Public Order Act 1994 to remove squatters on land who have refused to leave on request and who have caused damage, been aggressive, or are present in numbers. The Act also strengthens the powers under the Criminal Law Act 1977 which provide enforcement mechanisms for the civil procedures against squatters in houses.

Self-help

Self-help is available in the sense that the landowner or those he authorises may use reasonable force to repel or expel trespassers. This remedy is not available when the trespasser has effectively obtained possession of the property. Why is the use of self-help not encouraged? It may lead to breaches of the peace. Prevention of these was one of the original reasons for developing tort remedies for trespass through the courts as we have seen. The landowner acts at his peril in relation to the degree of force: *R v Chief Constable of Devon & Cornwall, ex parte CEGB* [1982] QB 458. It is possible to use self-help in cases of a minor, continuing trespass (e.g. by branches or tree roots) or where there is urgency. The law also leans against this form of self-

help, for much the same reasons. It will cease to be available (at the latest) once an application for a mandatory injunction has been refused: *Burton v Winters* [1993] 3 All ER 847.

Distress damage feasant

A chattel which has 'trespassed' and caused damage may be detained under the ancient remedy of distress damage feasant as security for compensation. This has been applied to a railway engine trespassing on the wrong tracks: *Ambergate Rly v Midland Rly* (1853) 2 E & B 793. Most of the case law relates to cattle trespass, which is now regulated by statute (ss. 7 and 9 of the Animals Act 1971).

Session Two:

The evolution of the Tort of negligence/breach of duty from actions on the case via *Donoghue v Stevenson* to *Caparo v Dickman*.

It will assist you in relation to this session if you read the two cases referred to above. You can find *Donoghue v Stevenson* at <http://www.bailii.org/uk/cases/UKHL/1932/100.html> and *Caparo v Dickman* at <http://www.bailii.org/uk/cases/UKHL/1990/2.html>

It is important that you read the judgment of Lord Atkin in the first case and Lord Bridge in the second

As we have seen, the law developed from trespass to accepting certain actions based on negligence relatively early, although the pace of development accelerated in the C18 and C19. At this time, each area of liability was treated independently. Note in *Donoghue* how the judges focus on cases involving defective products, and pay very little attention to cases in other areas.

As a tort, negligence is said to consist of three elements:

1. Legal duty;
2. Breach of that duty;
3. Damage suffered as a consequence of that breach.

However, these elements overlap: they cannot be dealt with in isolation. As the cases are examined in more detail, you will see that the courts often regard these elements as different ways of tackling the same problem. The question is how extensively the net of liability is to be cast, and this is approached from the angle of establishing the scope of, or 'controlling', liability and the judges tackle it in a pragmatic fashion. Thus, in practice 'duty', 'breach' and 'damage' are often 'telescoped'. In *Lamb v Camden LBC* [1981] QB 625 Lord Denning reminded us that we are not here dealing with watertight compartments. His Lordship pointed out that duty, breach and damage 'continually run into one another'; they are also 'devices' used by judges to regulate the scope of liability. Another way of putting this is that the claimant must prove all of these elements, while the defendant can choose where he wishes to focus his arguments, since he only has to succeed on one issue.

DUTY OF CARE

This is probably the most significant of the control devices referred to above. The claimant must prove that a duty of care was owed by the defendant in the circumstances of the particular case. This issue raises points both of 'law' and 'fact'.

This means that first a duty must exist in principle (a question of law), and then the claimant must seek to justify the application of the 'law' to the actual 'facts' of the case. We need to look at the connection, or relationship, between the parties. Since English law is based on precedent, the question of whether a duty exists in principle may be easily answered. There are two possibilities:

- Cases involving the same relationship have already established that a duty exists, or does not, for example the driver's duty to other road users or the employer to his employees.

Here the claimant will usually be able to rely on the precedent case. It is said to be an 'established duty situation'.

- This is not the case. Here the claimant will have to satisfy the court that a duty should exist. The crucial question here is how, i.e. by what criteria, will the court approach this question.

This has been a very hotly disputed topic in the law of tort for the past century. However it is comforting to think that the problem does not arise in the vast majority of cases, which concern established duty situations, such as:

- Road users one to another;
- Employers to their employees;
- Occupiers of land to their visitors;
- Professionals to their clients (in many cases this will in practice be a contractual duty to take care);
- Manufacturers of goods to the consumer (although this has largely been superseded by a strict statutory liability under the Consumer Protection Act 1987).

Two theoretical answers to the question 'How do we decide if a duty should exist?' have found favour with judges at different times:

- The 'Incremental' theory: - the 'duty situations' are all distinct and have no essentially common features; a duty may be established by showing that the new situation is analogous to an established one - an incremental extension - so that if we know that a horse rider owes a duty to pedestrians we can extend this incrementally and by analogy to a cyclist. This was the original approach of the courts. It is the basis of the 'action on the case'.
- The 'Principle' theory: - that underlying all the actual and potential duty situations is some underlying principle, the application of which to any novel case will prove a reliable touchstone. This was first seriously suggested by Lord Esher in *Heaven v Pender* (1883) 11 QBD 503, but really came to the fore when Lord Atkin formulated the 'neighbour principle' in *Donoghue v Stevenson* [1932] AC 562.

THINK POINT – What is the status of Lord Atkin's 'neighbour principle'?

This statement was of course an obiter dictum, since it went far beyond what was needed to decide the case - which concerned the liability of a manufacturer to a consumer - and was at the time intended as a policy justification, based on an almost Biblical morality, for an incremental extension. However it was later adopted, primarily by Lord Reid in *Dorset Yacht Co. Ltd v Home Office* [1970] AC 1004 as an important statement of principle.

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* [1932] AC 562 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.

Either this 'neighbour' principle or a revised version of it has generally been the orthodox approach since the 1970s, although the incremental approach has reared its head from time to time.

Consider carefully Lord Atkin's statement. Is a defendant to be liable merely on the basis that his victim was 'foreseeable' in the circumstances?

Foreseeability has always been seen as a necessary requirement in the 'duty' equation, but very rarely, if ever, has it been regarded as sufficient in itself, otherwise there might be unbridled expansion of liability. There is also a requirement of 'proximity'. Together, these requirements can be said to comprise the 'neighbour' test. However, some judges insist that it is 'proximity' which is synonymous with 'neighbourhood'. It is probably impossible to offer a completely satisfactory explanation of the expression 'proximity'; all we can say is that it seems to mean some sort of 'nearness' between the parties; this could be physical proximity, in terms of spatial and geographical limitations (literal neighbours); or legal proximity in that, for example, there might already exist a contractual relationship between the parties (metaphorical neighbours).

Because proximity is a complex expression, it is easy for judges to use it to incorporate policy or value judgments as to whether there should be a duty. In *Alcock v Chief Constable of the South Yorkshire Police* [1992] 1 AC 310 Lord Oliver said (at p. 411) 'the concept of proximity is an artificial one which depends more on the court's perception of what is the reasonable area for the imposition of liability than upon any logical process of analogical deduction.'

In *Anns v London Borough of Merton* [1977] 2 All ER 492 Lord Wilberforce produced a variant on the neighbour principle:

Through the trilogy of cases in this House—*Donoghue v. Stevenson* [1932] A.C. 562, *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.* [1964] A.C. 465, and *Dorset Yacht Co. Ltd. v. Home Office* [1970] A.C. 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.

THINK POINT – How does this differ from what Lord Atkin had to say?

The Wilberforce 'version' became popular for a while, but there was then a reaction to it'

Consider this extract from the opinion of Lord Keith in *Yuen Kun Yeu v A-G for Hong Kong* [1987] 2 All ER 705:

Their Lordships venture to think that the two stage test formulated by Lord Wilberforce for determining the existence of a duty of care in negligence has been elevated to a degree of importance greater than it merits, and greater perhaps than its author intended. Further, the expression of the first stage of the test carries with it a risk of misinterpretation. As Gibbs CJ pointed out in *Council of the Shire of Sutherland v Heyman* 59 ALJR 564, 570, there are two possible views of what Lord Wilberforce meant. The first view, favoured in a number of cases mentioned by Gibbs CJ, is that he meant to test the sufficiency of proximity simply by the reasonable contemplation of likely harm. The second view, favoured by Gibbs CJ himself, is that Lord Wilberforce meant the expression 'proximity or neighbourhood' to be a composite one, importing the whole concept of necessary relationship between claimant and defendant described by Lord Atkin in *Donoghue v Stevenson* [1932] AC 562, 580. In their Lordships' opinion the second view is the correct one.

As Lord Wilberforce himself observed in *McLoughlin v O'Brian* [1983] 1 AC 410, 420, it is clear that foreseeability does not of itself, and automatically, lead to a duty of care. There are many other statements to the same effect. The truth is that the trilogy of cases referred to by Lord Wilberforce in *Anns v Merton London Borough Council* [1978] AC 728, 751, each demonstrate particular sets of circumstances, differing in character, which were adjudged to have the effect of bringing into being a relationship apt to give rise to a duty of care.

Foreseeability of harm is a necessary ingredient of such a relationship, but it is not the only one. Otherwise there would be liability in negligence on the part of one who sees another about to walk over a cliff with his head in the air, and forbears to shout a warning. . . . In view of the direction in which the law has since been developing, their Lordships consider that for the future it should be recognised that the two-stage test in *Anns v Merton London Borough Council* [1978] AC 728, 751–752, is not to be regarded as in all circumstances a suitable guide to the existence of a duty of care.

THINK POINT - What is the criticism being made of the Wilberforce approach?

Lord Keith suggests the Wilberforce test was too vague and ineffective as a control mechanism. Its terms of control were of an 'indefinable' nature. His Lordship thought it preferable to develop new duties incrementally and by analogy with established categories of duty. Indeed, the Wilberforce test had been 'elevated [in later cases] to a degree of importance greater than it [merited]'. This is a clear reversion to the old incremental approach, and, indeed, Lord Keith is very politely saying that the Wilberforce test is a load of rubbish. This reflects the general approach of the senior judges in the 1980s. It has even been described as an incremental 'backlash' against the principled approach.

THINK POINT - What approach, incremental or principled, was taken in *Caparo Industries plc v Dickman* [1990] 1 All ER 568?

This case is the high water mark of the 'incremental' reaction. Proximity was described as merely a useful label, rather than a defining feature. Caparo suggests that searching for a single 'test' is a fruitless exercise. It should be noted that the main message emerging from the speeches in Caparo itself is that any sort of 'test' approach to the question of 'duty' is undesirable and should therefore be avoided. If anything, Caparo's emphasis is on a 'just and reasonable'/incremental approach to the question of 'duty' or 'no duty'. Lord Oliver said: 'The three requirements of proximity, justice and reasonableness and degree of foreseeability might be regarded as facets of the same thing.' Lord Bridge described the three elements as 'labels' rather than as definitions. All the judges commend the Brennan approach, all deprecate the application of any overall principle.

This approach continues to be very influential at the highest level. Indeed Lord Bingham in *Customs & Excise v Barclays Bank* [2006] UKHL 28 said:

It seems to me that the outcomes (or majority outcomes) of the leading cases ... are in every or almost every instance sensible and just, irrespective of the test applied to achieve that outcome. This is not to disparage the value of and need for a test of liability in tortious negligence, which any law of tort must propound if it is not to become a morass of single instances. But it does in my opinion concentrate attention on the detailed circumstances of the particular case and the particular relationship between the parties in the context of their legal and factual situation as a whole.

Customs & Excise v Barclays Bank was an economic loss case so they also had to consider the separate 'voluntary assumption of responsibility' test, but while all the judges regarded a three stage approach as a valid one in practice, and recognised the need for guidance from the higher courts, they would not endorse it as a general and absolute rule. Lord Bingham indicated that the Brennan incremental test was of 'limited' assistance, but Lord Mance relied quite heavily on it. All focused on the relevant facts and context of the case, Lord Hoffmann perhaps most succinctly:

'It is equally true to say that a sufficient relationship will be held to exist when it is fair, just and reasonable to do so. Because the question of whether a defendant has assumed responsibility is a legal inference to be drawn from his conduct against the background of all the circumstances of the case, it is by no means a simple question of fact. Questions of fairness and policy will enter into the decision and it may be more useful to try to identify these

questions than simply to bandy terms like "assumption of responsibility" and "fair, just and reasonable.'

THINK POINT In that case, why do we now talk about a three stage test and apply the name Caparo to it?

The three stage test takes the 'labels' or 'elements' from *Caparo*. It recognises that the first two derive from the original Atkin neighbour principle, freed from the unhelpful restatement in *Anns*. We do therefore have a return to something of a principled approach, with an additional element, namely an explicit reliance of it being 'fair, just and reasonable' to impose a duty, with some versions even including a fourth element of public policy (although most treat this as an aspect of 'fair, just and reasonable'). The resulting 'Caparo test' referred to today is the subsequent creation of judges and lawyers, pursuing an element of 'certainty' in later cases. It is a new and different three-stage 'test' for determining a duty of care, representing a partial return to the principled approach.

Not only must there be 'foreseeability' and 'proximity'; it must also be 'just and reasonable' to impose a duty in the circumstances of the case. It is arguable, however, that each requirement overlaps with the others: they cannot be seen as forming discrete conditions of liability. The comment in *Caparo* that they are labels not definitions has some merit.

Nevertheless, this three stage test is the nearest we have to current orthodoxy.

Cases involving personal injury and/or actual damage to property will rarely cause difficulty in terms of the establishment of a duty of care. The House of Lords in *Marc Rich & Co. v Bishop Rock Marine* [1995] 3 All ER 307 has, however, held that the three stage test must be applied in all novel cases regardless of the type of damage suffered. Their Lordships said there was no logical distinction between 'physical' damage and so-called 'pure economic loss'; in both types of case damages could only be awarded in terms of financial compensation.

You should bear in mind that this is merely an attempt to describe the current 'orthodox' state of affairs in relation to the duty of care problem. There is still some difference of opinion, and a reluctance to opt either for an out and out principle, or complete reliance on incremental development.

BREACH OF DUTY

'Breach' is in many ways the core of negligence in the sense of a type of tort; it discusses the defendant's behaviour which actually injures the claimant and is often treated in practice as synonymous with 'negligence'. It is what most people would describe as 'negligence'. The question here is whether the defendant has measured up to the standard of behaviour required in the particular circumstances of the case. The defendant's behaviour at the relevant time must conform in general to the standard of the hypothetical 'reasonable man'. The question is 'What would the reasonable man have done, or not have done, in the circumstances of the case?'

THINK POINT - What do you think this statement means?

In formal terms the standard, that of the 'reasonable man', sometimes in the past referred to as the 'man on the Clapham omnibus', is constant and objective but in practice the relevant standard will have to be determined in each case, according to the circumstances of that case, judged in the light of the reasonable man test. Thus the standard eventually set will contain variable elements. An employer may be held to a very high standard in matters of health and safety. A householder engaged in DIY will be held to a lower one. It is however important to note that the standard expected appears to be rising generally, particularly in relation to those engaged in a business or professional activity, and therefore older cases need to be considered cautiously, as they may not reflect modern standards. However, this does not mean that every claim will succeed as two recent decisions show:

Orchard v Lee [2009] EWCA Civ 295 concerned a child playing a game in the school playground who collided with and injured a supervisor. It was held that this was an ordinary game, played in an ordinary way, and there was no liability.

Kmiecic v Isaacs [2011] EWCA Civ concerned a workman who slipped on a ladder. The defendant householder was not held to be in sufficient control of his activities.

The tendency towards expanding the scope of duty by increasing the level of care required has led to allegations of a 'health and safety obsessed', or 'risk averse' culture. An attempt was made to counter this in the Compensation Act 2006, section 1 of which provides:

A court considering a claim in negligence or breach of statutory duty may, in determining whether the defendant should have taken particular steps to meet a standard of care (whether by taking precautions against a risk or otherwise), have regard to whether a requirement to take those steps might—

(a) prevent a desirable activity from being undertaken at all, to a particular extent or in a particular way, or

(b) discourage persons from undertaking functions in connection with a desirable activity.

One concern was that schools were not organising educational visits because they were seen as too risky; in truth, provided a suitable risk assessment is done, the educational benefits outweigh the inherent risks. The section was considered in *Uren v Corporate Leisure* [2011] EWCA Civ 66, but it was agreed that as far as that case was concerned, it added nothing to the common law. Sport and exercise is healthy and beneficial, and the risks of injury in a contact sport or through misadventure are 'worth it', provided they are reasonably assessed – this was the issue in *Uren*.

In *Vowles v Evans* [2002] EWHC 2612, the issue was the standard of care an amateur referee at an amateur rugby match in respect of the safety of the players. On the facts, the defendant had not been negligent with regard to the control of the game. He had, however, failed to enquire properly whether a member of the rugby team was suitably trained and experienced to play as a replacement front row forward. During the course of a set scrum which 'collapsed', the claimant, who played as hooker, dislocated his neck.

THINK POINT - How would you decide this case?

It was held that the defendant was in breach of his duty of care because he did not order non-contested scrums; his failure to do so was a material cause of the claimant's injury. Although the Court of Appeal set a high threshold standard for a fast-moving and physically strenuous game, it is perhaps significant that the replacement took place after about 20 minutes of an 80 minute game and the collapsed scrum was right at the end, so it was apparently not obviously unsafe to continue with contested scrums. As a result many in the rugby community doubt the justice of the decision on the facts. It might not have been decided the same way in the light of the 2006 Act, although this is speculation. It does seem to be a case where the 'risk/benefit analysis' seems to have focussed on the risk, using hindsight, and not the benefit, unlike the more recent case of *Uren*, although as the Court of Appeal has remitted this case for a retrial, due to errors made by the trial judge, we have to await a definitive answer..

Experts

The foresight of the ordinary reasonable man is not appropriate where defendants actually possess or hold themselves out as possessing special skills or expertise. Defendants in such cases are judged by the appropriate professional or 'expert' standard of care which, in the medical context, for example, is known as the '*Bolam*' standard, from the case *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582.

This is a test based on the ordinary practice of the expert group concerned. It does not require the very best treatment, but it must reflect a reasonable and responsible body of relevant opinion.

THINK POINT - How do you establish what is reasonable and responsible?

It will generally be a matter of expert evidence, but there is a lot of guidance available.

If the defendant has followed the normal pattern of care to be expected in his trade or profession, this is cogent evidence that there was no breach of duty. However the claimant may be able to show that this practice was 'manifestly unsafe and unnecessary': *Morris v W Hartlepool Navigation Co.* [1956] AC 552. In *Edward Wong Finance v Johnson Stokes and Master* [1984] 1 AC 296 solicitors who had followed long-standing standard practice were nevertheless found to be negligent. The judges considered that the practice carried obvious dangers, even where there was no evidence that it had actually given rise to problems in the past. However such cases will be few and far between; it will be rare to find a case where 'a body of expert opinion cannot be logically supported at all', and this is the standard to be applied. On the other hand, in *Gold v Haringey Health Authority* [1987] 2 All ER 888 a doctor did not warn his patient of the failure rate for sterilisation; he was found not to be negligent although some experts said they would have warned the claimant, because there was still a considerable number of doctors (possibly 50 per cent) who would not have issued a warning. It is not for the courts to choose between two responsible schools of thought. As Lord Scarman said in *Maynard v. West Midlands Regional Health Authority* [1984] 1 W.L.R. 634, 639:

I have to say that a judge's 'preference' for one body of distinguished professional opinion to another also professionally distinguished is not sufficient to establish negligence in a practitioner whose actions have received the seal of approval of those whose opinions, truthfully expressed, honestly

held, were not preferred. ... For in the realm of diagnosis and treatment negligence is not established by preferring one respectable body of professional opinion to another. Failure to exercise the ordinary skill of a doctor (in the appropriate speciality, if he be specialist) is necessary.

Conversely, the fact that the defendant has not followed the normal practice is evidence but not proof, that he or she was negligent.

In *Bolitho v City and Hackney Health Authority* [1997] 4 All ER there are dicta which reiterate that the court always reserves the right to condemn professional orthodoxy as being wrong:

The use of [the] adjectives - responsible, reasonable and respectable - all show that the court has to be satisfied that the exponents of the body of opinion relied upon can demonstrate that such opinion has a logical basis. In particular in cases involving, as they so often do, the weighing of risks against benefits, the judge before accepting a body of opinion as being responsible, reasonable or respectable, will need to be satisfied that, in forming their views, the experts have directed their minds to the question of comparative risks and benefits and have reached a defensible conclusion on the matter.

Accepted practice may be established from the particular profession's code(s) of guidance issued by its governing body. In the case of the medical profession the General Medical Council issues such guidance. In 2006 for example the Council issued Good Medical Practice, which sets out guidelines in many areas, including clinical practice and relationships with patients.

THINK POINT - What ought to occur to the 'reasonable man' in special situations, falling short of 'professional' cases?

A defendant who has claimed to possess some special skill or expertise will normally be regarded as having 'held himself out' as possessing that skill or expertise, and will be judged accordingly. *Cattley v St John's Ambulance Brigade* (1988) QB (unreported) involved an allegation of negligence against two members of a voluntary group providing first aid services. The judge applied the *Bolam* test: 'has the defendant exercised the ordinary skill of an ordinary competent man exercising that particular art?' He found that a volunteer administering first aid would be negligent if he did not observe the standards of 'the ordinary skilled first aider exercising and professing to have that special skill of a first aider'.

In *Phillips v Whiteley* [1938] 1 All ER 566 a jeweller who pierced ear-lobes was not regarded as having purported to be anything other than what he was - he did not have to come up to medical standards. (But a jeweller piercing ear-lobes today would be expected to have an increased awareness of the risks of infection, e.g. by the HIV/Aids virus, through blood or other body fluids.)

Distinguishing legal rules from factual situations

There is no exhaustive list of factors indicating breach of duty, but the cases do show that certain common factors are considered by the courts in setting the standard of care appropriate for the circumstances of the particular case. These factors, which are not legal rules but practical guidance, can be categorised as follows. The cases cited are good examples, but only examples, of the factors in operation.

The magnitude of the risk

In *Bolton v Stone* [1951] AC 850, the House of Lords found that the risk of anyone outside a cricket ground being injured from within was so unlikely that the defendant was not liable in negligence. In other words, hits out of the ground were so rare, and the likelihood of a ball so hit injuring someone so small, that it was not a breach of duty to fail to erect extremely expensive fencing to eliminate the risk.

Importance of the defendant's objective

In *Watt v Hertfordshire CC* [1954] 1 WLR 835 firemen, in a hurry to rescue a woman trapped under a vehicle, failed properly to secure a heavy jack, which they had to transport on an ordinary lorry. The jack slipped and injured a fireman. His claim was dismissed. Lord Denning indicated that the decision might have gone the other way had the defendants been engaged in ordinary commercial pursuits. However the decision would probably not be followed today; health and safety at work has a higher priority, and professional rescuers are not expected to bear the consequences of this class of risk. In particular, there are statutory duties in relation to the provision and use of work equipment which could assist the claimant.

Striking a balance

There has, as we have seen, in recent years been a general perception that the standard of care is being set too high, with the result that desirable activities are being cancelled because of a perceived risk of being found liable. Section 1 of the Compensation Act 2006 contains a clear instruction to take a realistic and robust approach to the 'cost/benefit analysis' referred to in *Bolitho* and *Uren*. It is clear from the history of the Act that school trips, sport and similar activities are the primary target, but it is also arguable that the section could be used in relation to innovative medical treatment, and also, via (b), to 'rein in' claims against educational and child psychology professionals in respect of failure to remove children from a potentially risky environment, or failure to identify fairly unspecific 'learning difficulties'.

The seriousness of any likely injury to the claimant

In *Paris v Stepney BC* [1951] AC 367, a one-eyed workman, engaged on work underneath vehicles, was blinded in his remaining eye by a metal splinter. The House of Lords held that though his disability, which was known to the defendant, did not increase the likelihood of injury, it made any such injury much more serious than in the case of an ordinary employee. There was therefore an enhanced duty on the employer to provide, and insist on the use of, safety goggles.

The state of technical or scientific knowledge

This factor played a very important role in *Roe v Minister of Health* [1954] 2 QB 66, in which the claimant was admitted to hospital for treatment including a spinal injection of nupercaine. The drug was stored in glass ampoules kept in a sterilising solution of acid. Unknown to medical science, this acid could percolate through microscopic cracks in the ampoules. The claimant was injected with nupercaine contaminated with acid and became paralysed from the waist down. It was held that the defendant was not liable for the actions of the doctors involved. As Denning LJ

said: 'Nowadays it would be negligence not to realise the danger, but it was not then'. Between the date of the incident and the date of trial, and at least in part as a result of this incident, procedures had been improved by staining the acid with dye, so contamination could be easily detected. This was irrelevant, as the test has to be applied as at the date of the incident, without the benefit of hindsight.

The practicalities of taking precautionary steps

In *Haley v London Electricity Board* [1965] AC 778 workmen 'marked off' a hole they had been digging in the road with a single pole close to ground level, to protect pedestrians. Although rudimentary, this was regarded (at that time!) as adequate protection for sighted pedestrians. The claimant, a blind man, fell into the hole and was injured. Because the presence of blind persons was foreseeable, and adequate precautions for them would have been simple to take, the defendant was liable.

It would be a mistake to conclude that this list of 'relevant factors' is exhaustive and there is of course much overlap between them. One important lesson which you should have drawn is that the cases are very fact sensitive.

As Tony Weir says in his Casebook (at p. 188):

This decision [*Qualcast v Haynes* [1959] AC 743], which emphasised the importance of the facts of the case in breach problems should deter counsel from citing decisions on breach as authority for the case in hand, and dissuade the student faced with a problem from hunting down cases 'on all fours', like a housewife seeking a matching thread in a haberdashery. But the student may have to read a good many cases in order to gain vicariously the experience which lies at the root of sound judgment.

Despite the best efforts of the higher courts, however, [advocates] (who are paid by the day) continue to cite enormous numbers of cases (see *Lambert v Lewis* [1982] AC 225) and [Circuit] judges (who are paid to use their judgment) continue to apply decisions on breach as if they laid down fixed rules ('inching forward into traffic isn't negligence', *Worsfold v Howe* [1980] 1 All ER 1028).

Another effect of [*Qualcast*] is to emphasise that the proper form of question, when one is dealing with breach of duty, is 'Did the defendant take reasonable care?' One must not pick on some feature of the defendant's acts and say: 'Was he under a duty not to do that?' (see also *A.C. Billings & Sons v Riden* [1958] AC 240, 264, per Lord Somervell of Harrow). Of course, the claimant must normally identify what it was in the defendant's behaviour that he finds objectionable – e.g. that he omitted to give a signal before turning right on the highway. But the question remains 'Did the defendant drive with reasonable care, considering that he gave no signal?' and does not become 'Was the defendant under a duty to give a signal?' Matters of detail are to be treated as part of the question of breach, not as raising sub-duties with a specific content.

What Weir is saying, in his characteristically trenchant way, is that the question is a broad one of overall contextual assessment; you cannot find a case which is exactly the same, so there is no point looking, but only by studying cases will you learn what the important contextual features are.

Burden of Proof of Breach

The burden of proving any allegation against the defendant lies on the claimant; the evidence being assessed on the so-called 'balance of probabilities' and not on the basis of beyond all reasonable doubt (the higher standard applied in criminal law). Strictly this means that if the case advanced by the claimant is 'just' more cogent, he wins and gets 100% of the damages, and the converse is also true.

In *Hotson v East Berkshire Health Authority* [1987] 2 All ER 909 the claimant alleged that a failure properly to diagnose the injuries he had sustained by falling from a tree had led to serious disability. The defendant's expert said that the fall had definitely caused the disability, the claimant's expert said that it was about an even chance that the disability could have been averted with proper diagnosis. The judge didn't know which expert to believe, so he split the difference and said that it was 75% likely that the fall caused the disability. He went on to say that this nevertheless meant that the claimant was deprived of a 25% chance of avoiding disability, and was therefore entitled to 25% of the full damages.

THINK POINT - Was the judge correct?

The Court of Appeal agreed with the judge, but the House of Lords held that the true question was - what was the claimant's health status at the moment he went to hospital? It was for him to demonstrate that he was, on balance, a person not suffering from an untreatable disability. The judge's finding of fact meant that he had failed to do this, and was therefore entitled to nothing. So the claim failed on causation.

Res Ipsa Loquitur

In some cases a claimant cannot point exactly to the person(s) to blame for his or her injury, or how the injury came about; a typical example would be a claimant waking up after an operation in hospital to find a swab inside his or her body. It is in such situations that a court might be persuaded (after the claimant has made out an outline or prima facie case) to infer negligence by the defendant, unless the defendant can offer an acceptable explanation of the circumstances. Such a situation is summed up in the maxim *res ipsa loquitur* (in English this means 'let the thing/situation speak for itself').

Three conditions must be satisfied for the application of the maxim *res ipsa loquitur*.

- That the defendant had a right to control the thing or event; and
- That the accident was something which could not, in the normal course of events, have happened without someone's negligence; and
- That there should be no known facts on the basis of which the accident can be explained, thus excluding the operation of *res ipsa loquitur*).

Session Three:

The concept of causation in Tort - difficulties and solutions.

It will assist you in connexion with this session if you read the cases of *Fairchild v Glenhaven* [2002] UKHL 22 <http://www.bailii.org/uk/cases/UKHL/2002/22.html> and *Chester v Afshar* [2004] 41 <http://www.bailii.org/uk/cases/UKHL/2004/41.html>

In common with many other torts, such as nuisance, negligence requires proof of damage. It is for the claimant to prove that he or she has suffered 'damage' and that that damage was caused by the defendant's tort(s). It is convenient to deal with this topic within the tort of negligence, since most of the case law deals with issues arising in this tort; but please bear in mind that problems of causation and remoteness arise in all torts: they are not restricted to the tort of negligence.

We need to distinguish between causation and remoteness; they are quite distinct concepts. We should, however, remember what Lord Denning has told us on several occasions, namely, that these two concepts cannot always be separated in practical terms (see e.g. *Lamb v Camden LBC* [1981] 2 All ER 408).

THINK POINT - What do you think the difference is between causation and remoteness?

Causation refers to the chain of events between the tort and the damage; the claimant must establish an unbroken connection between his damage and the defendant's wrongful conduct. Causation is concerned with consequences and non-consequences in a factual and logical sense. The issue to be determined is whether the defendant has at least materially contributed to the damage, although his actions need not be the only cause of the injury. In principle it eliminates only the wholly irrelevant and co-incidental, although obviously causation can only be established by evidence, so if the evidence is not available, causation cannot be established.

On the other hand, remoteness is relevant at the stage following the establishment of a factual connection between tort and damage. It is concerned with consequences; but distinguishes between these on a legal rather than a factual basis, though it is not always easy to draw a satisfactory distinction between 'factual' and 'legal' in this context. Remoteness is concerned with the question of which of the established consequences is to be the subject of compensation. Thus, for example, in negligence liability exists in general only for those consequences of a reasonably foreseeable type or kind. Remoteness is therefore an exclusory or control mechanism (rather like the conditions surrounding the recognition of a duty of care).

Causation

In general, the courts approach this matter in a pragmatic way; considerations of strict logic and philosophy are avoided by judges, and policy often plays an important role in the determination of difficult issues.

The 'but for' test is the 'simple' test for causation which the judges normally look to first in the investigation of causative links between the tort and the damage. This test involves asking the question: 'would the claimant have incurred the damage "but for" the defendant's tort?' A negative answer to this question means that it is likely that the defendant's wrong factually caused the claimant's damage.

If the damage would have been sustained anyway, irrespective of the defendant's wrong, there will be no liability: *Barnett v Chelsea Hospital* [1969] 1 All ER 428, where a patient, the deceased, attended a hospital with severe vomiting, resulting from arsenic poisoning, and the doctor concerned failed, negligently, to examine him. The medical evidence showed that the patient would have died from the arsenic poisoning in any event, irrespective of the doctor's negligence, which was therefore not an operative cause of the death.

This 'but for' test is very often a useful one, but it does not always provide a satisfactory solution, especially in more complex cases.

THINK POINT - Can you think of any situations in which the 'but for' test might be an inadequate device for settling disputes concerning causative links?

Amongst such situations are the following:

First, where there are several concurrent causes of the damage, each of them being sufficient on its own to produce the end result. Here, the 'but for' test would cancel out each cause; in strict, logical terms the damage would have occurred irrespective of cause A, because the other cause(s) would produce the result; so it would be with cause B, etc. In such a case common sense is applied and the court assesses the share of blame as best it can in the circumstances. If, for example, two causes could be identified in a particular situation then, all things being equal, blame would be apportioned on a 50/50 basis. *Fitzgerald v Lane* [1988] UKHL 5, which is a case of a complex road accident involving a negligent pedestrian victim and two negligent drivers, is an example of this, as is the US case of *Summers v Tice* where the victim was shot by a bullet from one or other of two hunters.

A similar approach is taken in industrial disease cases, where there has been exposure to a cumulative disease agent, such as silica dust or asbestos. This follows from *Bonnington Castings Ltd v Wardlaw* [1956] AC 613, where the claimant was exposed to silica dust from two sources in the same workshop. One of these sources was permissible under the then rules, but the other was an actionable breach of statutory duty. As this 'guilty' source was a significant contributor to the overall exposure to dust, it was held that it made a significant or 'material' contribution to the injury. The employer was therefore liable.

Secondly, where there are successive acts/events causing damage. Here the situation can be complex – we may have two successive torts, illness or accident followed by a tort or vice versa. The basic proposition is that the claimant is evaluated at each stage, and the relevant defendant is liable for the additional damage inflicted. In *Cutler v Vauxhall Motors* [1974] 1 QB 418 the claimant grazed his right ankle in an accident caused by the defendants. The injury caused an ulcer to form and, because the claimant had been suffering for some time from varicose veins in both legs, an immediate operation was necessary. The Court of Appeal held that since the claimant would very probably have needed a similar operation within

five years in any case, the defendant's negligence could not be regarded as the cause of the operation. A similar situation had already arisen in *Performance Cars v Abraham* [1962] 1 QB 33 where the first defendant had negligently damaged the claimant's expensive car; later the second defendant collided with the car and the question of his liability for a paint respray arose. The court found that since this was already required because of the damage sustained in the first accident, the second defendant was not liable for this part of the claimant's claim.

CASE STUDY

Are the decisions in *Baker v Willoughby* [1969] All ER 1528 and *Jobling v Associated Dairies* [1982] AC 794 consistent with each other and with principle?

In *Baker* the defendant negligently injured the claimant's leg. He was later shot in that leg by an untraceable criminal, the leg had to be amputated and an artificial one fitted in its place. As a matter of policy it was found that there was a causal connection between the defendant's negligence and the claimant's disability after the operation. If the first defendant were released from all further liability after the amputation and the second potential defendant liable, at least in theory, only for causing the removal of an already damaged leg, the claimant would receive less compensation than he deserved. In *Jobling* the supervening event was a 'natural' one, i.e. a disease, which caused further injury to the claimant. The defendant was found liable by the House of Lords only up to the point at which the disease (which effectively ended the claimant's working life) took over. The court said that the later event must be taken into account in limiting the amount of damages awarded; the defendant was entitled to a 'discount'. In general, the courts make a deduction for the 'vicissitudes of life'; these cannot be ignored where they have occurred by the date of the trial. It may even be that, as the disease was an organic one, the true position is that the claimant was in the same position as Cutler – already with damaged health, and only able to recover for the additional harm done – but that is not how the judges approached the case. This rather odd approach may explain some of the difficulty which the case has caused. In *Jobling*, *Baker* was criticised in terms of its general approach (though it was not declared to be wrong on its facts). Thus the law may recognise a distinction between a supervening tort and a supervening natural event. In *Baker* and *Jobling* there were supervening events (or causes) to consider and the court in each case was obviously of the opinion that justice and fairness would not be achieved were there to be a simple application of the 'but for' test to the facts. It is clear that a more pragmatic and policy-based solution was deployed in these circumstances.

Proof of Causation

The legal burden of proof in this regard is on the claimant, on the basis of the balance of probabilities, i.e. that it is for the claimant to show that it is more likely than not that the defendant's wrong caused the loss. As we have seen, this matter is usually resolved by use of the 'but for' test. This is a difficult issue where the damage might also be due to some other cause as well as the defendant's tort. The claimant must prove that the damage is due, at least substantially or materially, to the tort.

In *McGhee v NCB* [1972] 3 All ER 1008 the claimant had contracted dermatitis through working in brick kilns belonging to his employers. There was no tort in requiring him to work in these conditions. He claimed that they had been in breach of statutory duty in not providing showering facilities. He had to go home to wash or

shower. This meant that he was exposed to the dust for longer. The state of medical knowledge concerning dermatitis at the time meant that the court could not determine whether the taking of showers after work would have prevented the claimant from contracting the disease. The risk was not directly proportional to the extent of exposure, but it was not clear whether a single momentary exposure caused a skin lesion leading to dermatitis or whether prolonged contact was required. It was held that the defendant had increased the risk of the disease, and that this was sufficient for liability.

THINK POINT - What do you think is the effect of this case on the law in general terms?

This case raised the possibility that there had been a change in the fundamental obligation placed on a claimant in such cases, from proof of factual causation to one merely of proving breach of duty. In view of the state of medical knowledge at the time, and thus the uncertainty of the cause, the 'but for' test was jettisoned and the court applied what might be called a 'probably for' test. The lower courts found the employers to be in breach of statutory duty, by not providing adequate shower facilities, but found no liability for the disease because the claimant could not show that the breach of duty had caused his injury. In other words he could not prove that it was the additional tortious exposure which was to blame. This was not a case of cumulative exposure to which the rule in *Bonnington* could apply. Nevertheless, the House of Lords held the defendants liable. The House refused to distinguish between materially increasing the risk of injury by failure to provide showering facilities and materially contributing to injury.

THINK POINT - Is the position the same if there are two *separate* causes, even though they may be operating at the same time?

In *Hotson v East Berkshire Health Authority* [1987] 2 All ER 909 the claimant was injured in a fall from a tree. He had actually suffered quite serious soft tissue damage to his hip. When he initially went to hospital, the doctor negligently diagnosed ordinary bruising. By the time the true position was discovered the claimant was suffering severe and permanent injury. The medical evidence was inconclusive as to whether the fall from the tree had inevitably caused the full injury, or whether a prompt diagnosis and treatment would have allowed for a recovery. The House of Lords held, reversing the decision of the Court of Appeal, that there is no principle in tort which would allow a percentage of a full award of damages based on probabilities. A claimant's claim could only be worked out on an 'all or nothing' basis. Note that this was an 'either/or' case on its facts, not a 'both/and' one like *McGhee*. The fall from the tree came first and, as a matter of logic, when the claimant then went to hospital he was one person who either in point of fact was, or was not, permanently damaged. He had to prove, on the balance of probabilities, that he was not damaged, before he could bring a claim, although if he could, he would recover full damages. The trial judge's finding that he was probably damaged was therefore fatal to his claim. The two causes were quite separate and distinct, coming together by coincidence. There was no common agent of harm, as there was in *McGhee*.

In *Wilsher v Essex AHA* [1988] All ER 871 a premature baby had developed a condition, known as retrolental fibroplasia (RLF), which had had serious consequences for his sight. RLF is typically found in premature babies who have been given too much oxygen, but there are various other, naturally occurring, causes also

associated with premature birth. There was one episode where this baby had negligently been given too much oxygen, but he also had several of the other, naturally occurring conditions. The House of Lords held that a claimant cannot shift the burden of proof onto the defendant merely by showing a negligent act. Therefore, even where the defendant creates the risk of a particular injury (and this amounts to a breach of duty) and the claimant suffers that injury, the burden of proof remains with the claimant. In other words the claimant had to provide evidence that it was in fact the negligent administration of oxygen, rather than the natural causes, which caused his RLF.

THINK POINT - What effect did the decision in *Wilsher* have on the ruling in *McGhee*?

McGhee may only be helpful to a claimant where a single 'agent' (per Lord Bridge) or cause is involved and the question is whether there has been a material increase in a single clearly identifiable risk. In *Wilsher* five independent causes apparently were capable of contributing to the risk of the claimant's damage. The House of Lords was not willing to find the defendant liable merely because one of them was due to negligence. In other words, in this situation the claimant bears the full burden of proof of causation by his selected tortious cause. The House in *Wilsher* suggested that *McGhee* was a case that should be confined to its own facts, but this approach in turn was disapproved of in the case of *Fairchild* (below), and *McGhee* was treated as a perfectly legitimate authority, albeit in relation to a specific class of case.

CASE STUDY

Explain the decision in *Fairchild v Glenhaven Funeral Services Ltd* [2002] UKHL 22

Fairchild was the case of a man who had worked on a number of sites, doing different jobs, for different employers, over many years. He contracted mesothelioma, a form of cancer of the lung, nearly always caused by exposure to asbestos fibres. Mesothelioma was said to be an 'all or nothing' disease: different from asbestosis or pneumoconiosis (other diseases of the lung), which are cumulative diseases, in that it merely requires asbestos fibres to 'hit' a cell in an appropriate way in order to cause malignancy. The exact time of the relevant exposure cannot be established. Fairchild's widow brought claims against one of his former employers for exposure to asbestos fibres in employment. The evidence did not, and could not, demonstrate when and where the claimant was exposed to the fibres which actually caused his disease. As we have seen, it would be impossible to do this, as any fibre could be the 'guilty' one. The judge accordingly found against the claimant since she could not establish which employer, if any, had caused or materially contributed to the disease; the Court of Appeal agreed. This was so even though it was clear that each employer was in breach of duty regarding protecting the deceased from exposure to the asbestos dust. It was not possible, on taking a 'but for' approach to the problem, to place the blame on any individual employer. The House of Lords, however, took a different view. Their Lordships held that in cases such as this justice required the Court to apply the *McGhee* test in favour of the claimant. The decision of the Court of Appeal was therefore reversed. In effect the reasoning in *McGhee* that it was enough to make a material contribution to the risk was approved and also applied where several defendants rather than one were implicated in the exposure to a single agent. The House of Lords in *Fairchild* acknowledged for the first time that *McGhee*, and *Bonnington* before it, were actually exceptions to the 'but for' test. Lord Bingham expressed his conclusions as follows:

[In a case of this type] it seems to me just and in accordance with common sense to treat the conduct of A and B in exposing C to a risk to which he should not have been exposed as making material contribution to the contracting by C of a condition against which it was the duty of A and B to protect him. [Other legal systems reach the same conclusion.] Policy considerations weigh in favour of such a conclusion. It is a conclusion which follows even if either A or B is not before the court. [Judgment should not be] for any sum less than the full compensation to which C is entitled, although A and B could of course seek contribution against each other or any other employer liable in respect of the same damage in the ordinary way. ... It would be unrealistic to suppose that the principle here affirmed will not over time be the subject of incremental and analogical development.

CASE STUDY

In *Chester v Afshar* [2004] UKHL 41 the claimant was not advised of a risk attached to a procedure her surgeon advised. The risk happened in her case. In court she said that, if she had been told of the risk, she would have deferred the treatment to think about it, but would then have gone ahead with it. It was held that not informing her of the risk was a breach of duty. The question was whether *that* breach caused the serious harm arising from the risk affecting her. Summarise the arguments of the minority and the majority. Which do you prefer and why?

The minority, namely Lord Bingham and Lord Hoffmann concluded, entirely correctly, it is respectfully suggested, that the failure to warn was not causative of the harm, since this was a risk of the operation whenever performed, and the claimant had admitted that she would have undertaken the operation, and thus exposed herself to the risk, at some point. While it was possible to depart from the usual rules on causation where justice so required, this was not such a case. The claimant had been deprived of the opportunity to give informed consent, and this required some award of damages to reflect the disrespect to her autonomy, but not full compensation for the permanent disability.

Unfortunately, a bare majority of the House was seduced by the notion that it was necessary to depart from basic principles not, as in *Fairchild*, to ensure that a claimant undoubtedly harmed by one defendant or the other recovered, but, in the words of Lord Steyn:

Standing back from the detailed arguments, I have come to the conclusion that, as a result of the surgeon's failure to warn the patient, she cannot be said to have given informed consent to the surgery in the full legal sense. Her right of autonomy and dignity can and ought to be vindicated by a narrow and modest departure from traditional causation principles.

As a result, the claimant was awarded the full damages that would have been payable if she had been negligently injured by the surgeon. While informed consent is an important principle and its belated acceptance by the House is welcome, this means of giving effect to it is not, it is submitted, 'narrow and modest' at all. It does seem to result in a claimant being capriciously compensated for what is actually a 'vicissitude of life'. It might be different if she could prove that she would not have had the treatment at all if properly advised.

A summary

The current law on causation is complex. It is however possible to provide a very approximate diagram of the position, always bearing in mind that the organising tendency of the observer does not bind the judges, who are usually reluctant to categorise in this way:

	Single causative agent cases (cumulative causation)	Single causative element cases (alternative causation)	Multiple causative agent cases (competitive causation)
Concurrent	Claimant must prove significant contribution to the harm by the tortious element: <i>Bonnington</i>	Claimant must show material increase in the risk: <i>McGhee</i>	Claimant must prove causation by his selected element on the usual basis: <i>Wilsher</i>
Consecutive	Claimant must prove significant contribution to harm by the tortfeasor: <i>Holtby</i> . Apportionment likely	Ditto: <i>Fairchild</i> But no apportionment if mesothelioma – s3 Compensation Act 2006*.	Position is assessed on basis of claimant's position prior to the relevant tort: <i>Hotson, Baker, Jobling etc.</i>

*This section applies where—

(a) a person (“the responsible person”) has negligently or in breach of statutory duty caused or permitted another person (“the victim”) to be exposed to asbestos, (b) the victim has contracted mesothelioma as a result of exposure to asbestos, (c) because of the nature of mesothelioma and the state of medical science, it is not possible to determine with certainty whether it was the exposure mentioned in paragraph

(a) or another exposure which caused the victim to become ill, and (d) the responsible person is liable in tort, by virtue of the exposure mentioned in paragraph

(a), in connection with damage caused to the victim by the disease (whether by reason of having materially increased a risk or for any other reason).

The ‘material increase’ is precisely that, there is no requirement that it be a specified proportion of the risk – the defendant was contending for a ‘double the risk rule’ but this has been rejected: *Sienkiewicz v Greif* [2011] UKSC 10. This case contains an interesting discussion of the limitations of epidemiological evidence.

Loss of Chance

CASE STUDY

You have met Ms Chester – she was unlucky enough to be the victim of a risk associated with her operation. Mr Gregg had cancer. His doctor failed to recognise this when he should have done. When it was discovered, his chances of long-term survival had gone from 42% to 25%. Who suffered worse at the hands of the doctors, Ms Chester or Mr Gregg (*Gregg v Scott* [2005] UKHL 2), and who came off better at the hands of the lawyers?

Ms Chester was not fully advised initially. This meant she couldn't make an informed decision. This is not insignificant, and is certainly reprehensible, but is not in itself dangerous. The actual treatment was perfectly competent. She suffered a regrettable but unavoidable 'side-effect'. However because her doctor had done something quite different wrong, by not fully explaining the risks, the judges decided to penalise him by compensating Ms Chester for an accident which might have happened anyway. Mr Gregg was badly let down. His GP fell below proper standards of diagnosis. Because Mr Gregg had initially a less than 50:50 prospect of medium term survival the significant deterioration in his prospect was regarded by the judges as irrelevant. It seems to follow from the reasoning that if his prospect had fallen from 51 to 49%, rather than 42 to 25%, he would have recovered full damages. A situation in which Ms Chester receives everything and Mr Gregg nothing can only tend to bring the law in this area into disrespect.

THINK POINT - Are there any circumstances in which there can be a claim for a loss of chance?

In *Allied Maples Group Ltd v Simmons* [1995] 4 All ER 907, the Court of Appeal held that where a claimant's loss flowed from the defendant's negligence but was dependent upon the hypothetical behaviour of some independent third person, issues both of causation and quantification of damages could arise. First, in terms of causation, the claimant had to prove that he acted to obtain a benefit or avoid a risk, which the defendant was obliged to assist him to achieve. Then at the quantification stage it was sufficient for the claimant to establish that there was a substantial chance (and not just a speculative one) that the third person would have acted in a way that favoured the claimant. The assessment of a substantial chance was not a matter of causation, i.e. an issue to be determined according to the balance of probability; it was a matter of quantification of damages: ranging from the barely real or substantial to the near certainty. Most such cases are ones of legal professional negligence, where the third party in question is the opposite party in the transaction in respect of which bad advice was given. Note that it is a question of the negligent advice impacting on uncertain *future* events.

Intervening Causes

A defendant may seek to establish a break in the chain of causation by introducing arguments based on a *novus actus interveniens* (act of a stranger) or a *nova causa interveniens* (intervening circumstance). The resolution of such an argument will depend on the facts of each case, as interpreted by means of such guiding principles as are available to the judges, and the requirements of policy. It is clearly recognised that this is very much a question of judicial value judgments as to the nature of the act (e.g. Lord Nicholls in *Kuwait Airways Corp v Iraqi Airways Co (Nos 4 and 5)* [2002] 2 AC 883), or, alternatively expressed, so that liability extends only so far as is fair (e.g. Lord Bingham in *Corr v IBC Vehicles Ltd* [2008] UKHL 13).

The cases suggest that in those situations where the supervening act/event is a 'natural and probable' consequence of the defendant's wrongful behaviour, the chain of causation is not broken. The claimant in *Wieland v Cyril Lord Carpets* [1969] 3 All ER 1006 was unable to use her bifocal spectacles properly, because of a neck injury caused by the defendant's negligence, and as a result fell down some stairs, suffering further injury. It was held that the defendant was liable for the fall as well as the neck injury. The claimant had acted reasonably in descending the stairs in the

circumstances; it was reasonable that she should go about her daily life and she had taken all reasonable care. In *McKew v Holland* [1969] 3 All ER 1621 the claimant's legs were liable to give way without warning owing to an injury caused by the defendant's negligence. One day the claimant descended some stairs, felt his legs weaken, jumped to avoid a fall and broke his ankle. The House of Lords found that the chain of causation was broken; the defendant was not liable at all for the broken ankle. The claimant had acted unreasonably in the circumstances and was the sole author of his misfortune because he had not taken all reasonable care in the circumstances.

THINK POINT - Do you find it possible to reconcile *Wieland* and *McKew*?

They are difficult cases to reconcile, other than on the basis that *McKew* is a case of the claimant doing something he was not fit to undertake, or doing it in an obviously inappropriate way, while *Wieland* involves a reasonable action by the claimant. The cases clearly illustrate the difficulties of applying principles to facts! There was no allegation of contributory negligence in *McKew*, although in *Spencer v Wincanton Holdings* [2009] EWCA Civ 1404 it was suggested that contributory negligence, rather than the 'all or nothing' break in the chain of causation, was the best way to deal with cases where there was a moderate degree of want of proper care leading to further injury. Perhaps *McKew* should have proceeded on this basis rather than on a finding that the claimant was wholly to blame for his own injury.

THINK POINT - What if the third party is not fully responsible for his or her actions – e.g. a child?

Many decisions have turned on this factor. The defendant will be liable for damage caused by such a person in those circumstances where he should have reasonably foreseen the third party's lack of responsibility. In *Shiffman v Order of St John* [1936] 1 All ER 557 children playing in Hyde Park brought down a flag-pole insecurely erected there by the defendants, thus injuring the claimant. The defendants were held liable in negligence to the claimant. Also, in *Thomas v Bishop* [1976] CL 1872, the defendant was held liable when a loaded pistol which he had put on top of a cupboard was found by a child of two, who shot the claimant with it. It was found that the defendant ought reasonably to have foreseen that something of the sort might occur.

THINK POINT - How is suicide by the original victim treated?

In *Corr v IBC Vehicles* [2008] UKHL 13 the deceased sustained severe head injuries in an industrial accident for which the defendant was liable. After a long period of post traumatic stress and severe depression he committed suicide. It was held that severe depression was foreseeable, and suicide was merely a mode of the development of this condition (it is only necessary to foresee the general type of harm: *Hughes v Lord Advocate* [1963] AC 837). Suicide arising from this situation was not a novus actus as it was not a sane, rational decision, but provoked by the illness. It was wrong to treat such an act as a voluntary break in the chain of causation, and earlier cases which treated suicide as a wrongdoing which ought to break the chain should no longer be followed, as they reflected an outmoded view of suicide.

THINK POINT - How is intervening medical treatment, whether or not negligent, treated?

Ordinary treatment, and the risks associated with it, will be treated as natural, foreseeable and recoverable. In general terms it is likely that supervening negligence by a third party will be unforeseeable, and therefore will break the causative link between the original wrong and the damage. The House of Lords in *Hogan v Bentinck Collieries* [1949] 1 All ER 588 held that medical negligence interrupted causation. Lord Normand said: '[However] an operation prudently advised and skilfully and carefully carried out should not be treated as a new cause, whatever its consequences may be'.

The question to be answered in all these cases where the issue of intervening causes is raised is: 'what is within the scope of the risk created by the original defendant's negligence?'

Remoteness

There are two main tests of remoteness which are applied in tort, namely direct consequences and foreseeable consequences.

a. Direct consequences

It is just a matter of tracing the chain of causation in fact. In *Re Polemis* [1921] 3 KB 560 (CA), stevedores, employed by the defendant, negligently let fall a plank into a ship's hold containing petrol in metal containers. The impact of the plank as it hit the floor of the hold caused a spark, and petrol vapour was ignited. The ship was destroyed. This was a direct consequence. Arbitrators found that the spark could not reasonably have been foreseen, though some damage was foreseeable from the impact. Unfortunately 'directness' was not defined, and there is still doubt as to whether 'direct' damage is confined to damage suffered by claimants which is foreseeable in a general sense, or to damage to the particular interest of the claimant which was likely to be affected.

b. Reasonable foreseeability

Something more is required – freak, unpredictable consequences are excluded. In *The Wagon Mound (No. 1)* [1961] AC 388 the defendant carelessly discharged oil from a ship in Sydney Harbour, and the oil floated on the surface of the water towards the claimant's wharf. The claimant's servants, who were welding on the wharf, continued their work after being advised (non-negligently) that it was safe to do so. Sparks from the welding equipment first of all ignited cotton waste mixed up in the oil; then the oil itself caught fire. The claimant sued for destruction of the wharf by fire. The defendant was found not liable in negligence, because it was not reasonably foreseeable that the oil might ignite on water in these circumstances. Damage by fouling was foreseeable; damage by fire (the case here) was not foreseeable. This approach was felt to be fairer to defendants, on the argument that the *Re Polemis* test was insufficiently precise and likely to lead to an unfair burden being placed on tortfeasors. Furthermore, it had the effect of ensuring that foreseeability governed all three stages of negligence (duty, breach and damage). The Privy Council said that in the tort of negligence *Re Polemis* was no longer good

law, and liability would lie only for foreseeable damage of the kind or type in fact suffered by the claimant.

THINK POINT -Do you think the ruling in *The Wagon Mound* resulted in a big change in the law?

There will be practical significance in relation to the 'kind' or 'type' of damage only if precision is required in their interpretation. The difference between *Polemis* and *Wagon Mound* must turn on how the two cases define 'kind of damage'. Some personal injury cases decided since 1961 suggest that the courts have not departed significantly from *Polemis*: a broad interpretation is given to 'kind' or 'type', so it need not be precisely foreseeable. In *Bradford v Robinson Rentals Ltd* [1967] 1 All ER 267, the claimant employee was sent on a 500 mile journey in a van with no heater in extremely cold weather. The defendant argued that damage by way of pneumonia or chilblains was foreseeable; but not the claimant's actual injury, which was frostbite. It was held that the claimant's injury was of a foreseeable type (injury from cold), so he succeeded.

According to *Hughes v Lord Advocate* [1963] AC 837, although the injury must itself be of a foreseeable 'type' or 'kind', it is not necessary that the whole chain of events leading to the injury be foreseeable. Post Office engineers left a hole in the road covered by a tent and marked by oil lamps. The claimant, a boy of eight, was badly burned when he entered the tent and dropped an oil lamp into the hole, which contained explosive gas. It was held that injury by burning (touching a hot lamp) was foreseeable, and injury by explosion was 'by burning'. Lord Guest said: '... it is sufficient if the accident which occurred is of a type which should have been foreseeable.' According to Lord Reid the 'precise concatenation of circumstances' need not be foreseeable.

THINK POINT - Outline the case for and against the notion of foreseeability (as opposed to directness) in relation to remoteness of damage.

Foreseeability is a more flexible concept than directness, and helps the courts to arrive more easily at policy decisions. It is also said to achieve fairer results for defendants, where their liability depends on 'fault'. On the other hand, whilst this may be a desirable state of affairs in some respects it is also the case that foreseeability entails a large measure of unpredictability. Its unpredictability in relation to the duty of care issue has been noted earlier. The role of the concept in connection with remoteness is, however, much more central than is the case with duty and it determines more precisely the extent of the defendant's liability for what is by now his or her established negligent behaviour.

CASE STUDY

Lord Reid in *Wagon Mound (No. 2)* [1966] 2 All ER 709 made the statement set out below. What is its significance in relation to remoteness of damage?

The vital ... findings of fact ... are (1) that the officers of the *Wagon Mound* 'would regard furnace oil as very difficult to ignite upon water' - not that they would regard this as impossible; (2) that their experience would probably have been 'that this had very rarely happened' - not that they would never have heard of a case where it had happened, and (3) that they would have regarded it as a 'possibility, but one which could become an actuality only in

very exceptional circumstances' - not, as in *The Wagon Mound (No. 1)*, that they could not reasonably be expected to have known that this oil was capable of being set afire when spread on water. The question which must now be determined is whether these differences between the findings in the two cases do or do not lead to different results in law.

In *The Wagon Mound (No. 1)* the Board were not concerned with degrees of foreseeability because the finding was that the fire was not foreseeable at all. ... But here the findings show that some risk of fire would have been present to the mind of a reasonable man in the shoes of the ship's chief engineer. So the first question must be what is the precise meaning to be attached in this context to the words 'foreseeable' and 'reasonably foreseeable.' ... *Bolton v Stone* [1951] AC 850 posed a new problem. [This case involved a cricket ball hit out of the ground - which only occurred once every few years - and striking a woman in a very little used street. It] could not have been said that, on any ordinary meaning of the words, the fact that a ball might strike a person in the road was not foreseeable or reasonably foreseeable - it was plainly foreseeable. But the chance of its happening in the foreseeable future was infinitesimal. ... The House of Lords held that the risk was so small that in the circumstances a reasonable man would have been justified in disregarding it and taking no steps to eliminate it.

But it does not follow that, no matter what the circumstances may be, it is justifiable to neglect a risk of such a small magnitude. A reasonable man would only neglect such a risk if he had some valid reason for doing so, e.g., that it would involve considerable expense to eliminate the risk. He would weigh the risk against the difficulty of eliminating it. ... In their Lordships' judgment *Bolton v Stone* did not alter the general principle that a person must be regarded as negligent if he does not take steps to eliminate a risk which he knows or ought to know is a real risk and not a mere possibility which would never influence the mind of a reasonable man. What that decision did was to recognise and give effect to the qualification that it is justifiable not to take steps to eliminate a real risk if it is small and if the circumstances are such that a reasonable man, careful of the safety of his neighbour, would think it right to neglect it. . . . In their Lordships' view a properly qualified and alert chief engineer would have realised there was a real risk here. [The trial judge seems to] have held that if a real risk can properly be described as remote it must then be held to be not reasonably foreseeable. That is a possible interpretation of some of the authorities. But this is still an open question and on principle their Lordships cannot accept this view. If a real risk is one which would occur to the mind of a reasonable man in the position of the defendant's servant and which he would not brush aside as far-fetched, and if the criterion is to be what that reasonable man would have done in the circumstances, then surely he would not neglect such a risk if action to eliminate it presented no difficulty, involved no disadvantage, and required no expense.

Lord Reid considers that a risk is foreseeable to the 'reasonable man' even in what might seem to be 'improbable' cases, i.e. it can be a 'real' risk for present purposes even though it is only a small risk. He also said the tort of nuisance, as well as the tort of negligence, was governed by the *Wagon Mound* test of remoteness. Whether action should have been taken will then depend on how difficult and expensive it is.

Sensitive Claimants

Here we consider the effect of the so-called 'egg-shell skull' rule, that the defendant must 'take his victim as he finds him'. According to this rule, once reasonably foreseeable damage occurs (of course it must be of the right 'kind' or 'type') the defendant is liable for the full extent of that damage, even where that extent would not normally be expected.

In *Smith v Leech Brain* [1962] 2 QB 405 the claimant was splashed and slightly burned on the lip by molten metal, due to the defendant's negligence. Through the claimant's predisposition to cancer, the burn became malignant and the claimant died. The defendant was found fully liable, although a 'normal' person would not have suffered the cancer and death in those circumstances. In assessing the amount of monetary compensation to which a claimant is entitled, the claimant's 'worth' or 'value' (the same is true of his or her property) cannot be subject to foreseeability reasoning. Thus, it is a defendant's bad luck if she happens to injure a successful and high-earning businessman rather than a vagrant. In relation to property, to paraphrase Scrutton LJ in *The Arpad* [1934] P 189, if one injures a horse which happens to be the Derby winner one cannot claim that one thought it was only 'an old nag'.

Session Four:

Special situations in negligence: - Economic Loss, Psychiatric Harm, Occupier's Liability and Employer's liability.

ECONOMIC LOSS

Until quite recently claims for 'pure' economic loss have been unsuccessful in the tort of negligence. The law of tort in general is mostly concerned with physical loss and economic loss consequential upon that physical damage. Loss of a purely economic nature was recoverable elsewhere; for example in the law of contract and, indeed, in some specialised torts, such as deceit, conspiracy and interference with contractual relations. Consequential loss, i.e. financial loss which is the direct result of physical damage (whether to person or property) is generally recoverable. The refusal to compensate for 'pure' economic loss is traditionally said to be that such loss is too remote, but clearly this is remoteness in a legal or policy sense, not in the sense that it is unforeseeable.

CASE STUDY

In *Spartan Steel & Alloys Ltd v Martin & Co (Contractors) Ltd* [1973] 1 QB 27 a contractor negligently cut off the electricity supply to an electric furnace. The special steel being melted in the furnace was spoiled and the furnace damaged. The steel became basic scrap iron. Profit was lost on this and on several other melts that could not be undertaken because of the lack of electricity. What could the claimant recover?

The Court of Appeal, by a majority, held that only the loss of value of the steel in the furnace at the time and the cost of repair of the furnace were recoverable; the loss of profit on steel not produced while the furnace was 'down' was pure economic loss not flowing from the claimant's physical loss. Lord Denning said this decision was dictated by policy: an admittedly arbitrary line had to be drawn somewhere, otherwise liability would rocket out of control. He pointed out that the claimant could insure against such a risk, so spreading the cost throughout the community. It would be an unfair burden to place liability on 'one pair of shoulders' in such circumstances.

Edmund Davies LJ (dissenting), while admitting that his view did not accord with tradition, said that he would have allowed the third head as well, since it was a foreseeable and direct consequence of the defendant's negligent act.

In this chapter we will trace the development of the law regarding 'pure' economic loss in traditional terms, i.e. according to how the loss arose; that is to say on the basis of whether the financial loss was caused by a negligent act or a negligent misstatement. It will be seen that where loss is suffered as a result of reliance on a misstatement, that loss is recoverable, provided the special conditions of recovery are satisfied.

Acts

There has traditionally been a general rule, subject perhaps to exceptions, that damages for 'pure' economic loss cannot be recovered in the tort of negligence. On this view of the law, it seems that in order to succeed in a claim for pure economic loss a claimant must bring his or her case within some recognised exception to the general rule.

CASE STUDY

In *Junior Books Ltd v Veitchi Co. Ltd* [1982] 3 All ER 201, a company who were building a book warehouse discussed their flooring requirements, with a specialist. The specialist provided great detail, and made a number of promises about his particular floor. As a result the company nominated the specialist as a sub-contractor. The floor proved unsatisfactory, and the main contractor was insolvent. Could the cost of repairs be recovered from the specialist, even though there was no contract?

It was decided in preliminary proceedings that the defendants could in principle owe a duty of care in the tort of negligence to the claimants; certainly there was a case to argue and the matter was referred back to the court of origin (in Scotland) for resolution of the issue.

This duty was owed because of the very close proximity and reliance, as the claimants had nominated the defendant as a supplier based on very detailed and specific assurances and explanations about the suitability of the defendants' product. No action was available in contract against the main contractor, and the claimants' architect had not been negligent. Because it is a Scottish case, no contractual claim on a collateral contract was possible either; compare *Shanklin Pier v Detel Products* [1951] 2 All ER 471, where, in England, it was possible to sue manufacturers of paint, who had given specific assurances about its suitability and durability which proved incorrect, under such a contract. The paint had actually been bought via a wholesaler, so there was no direct contract, but it was held that the promise of the pier owner to buy this paint from the wholesaler was consideration for the manufacturer's promise that the paint was fit for the job. There was clearly the potential for such a contract if the facts in *Junior Books* had been governed by English law.

Misstatements

Liability for negligent misstatements causing pure economic loss lies in ordinary common

law negligence: it is not a separate tort. Thus the usual requirements of duty, breach and

damage have to be proved. Special treatment is necessary because:

1. The claimant must also establish extra factors under the head of 'duty';
2. The cases are difficult;
3. There is an overlap with the law of contract; and
4. A duty has only been fully recognised since the decision of the House of Lords in *Hedley Byrne and Co. v Heller and Partners* [1963] 2 All ER 575.

The law of negligence in this respect has developed more slowly and restrictively than

liability for negligence generally.

THINK POINT - What do you think may be the reasons for this cautious development of the law?

There appear to be two main reasons for this state of affairs:

1. People are generally less careful in what they say than in what they do, particularly when expressing opinions on social or informal occasions, rather than in their business or professional capacity; and
2. In the words of Lord Pearce in *Hedley Byrne* '... words are more volatile than deeds, they travel fast and far afield, they are used without being expended.'

Under the Misrepresentation Act 1967, s. 2(1):

Where a person has entered into a contract after a misrepresentation has been made to him by another party thereto and as a result thereof he has suffered loss, then, if the person making the misrepresentation would be liable to damages in respect thereof had the misrepresentation been made fraudulently, that person shall be so liable notwithstanding that the misrepresentation was not made fraudulently, unless he proves that he had reasonable ground to believe and did believe up to the time the contract was made the facts represented were true.

THINK POINT - When may a claimant sue under this Act, and what might be the advantages to him in so doing?

The cause of action conferred by the Act differs from the common law action under *Hedley*

Byrne in that, amongst other factors, the claimant must have been induced by the defendant's misrepresentation to enter into the contract; the claimant does not have to establish a duty of care; and it is for the defendant to show that he believed on reasonable grounds that his statement was true, rather than for the claimant to prove negligence. In *Howard Marine v Ogden* [1978] QB 574 it was held that s. 2(1) provides an action in tort for misrepresentation. According to *Royscot Trust Ltd v Rogerson* [1991] 3 All ER 294, damages are assessed in tortious terms and remoteness of damage is determined as in the tort of deceit (i.e. direct rather than foreseeable loss).

CASE STUDY

In *Hedley Byrne and Co. v Heller and Partners* [1963] 2 All ER 575 (HL) an advertising agency were asked to do work for a client on credit. They obtained a banker's reference (given 'without responsibility') from the client's bank, but the client later became insolvent. Were the bank liable for the financial losses of the advertising agency?

On the facts, their Lordships decided that the respondents did not owe the appellants a duty of care, but only on the basis that the 'without responsibility' disclaimer effectively acted as an exclusion of liability clause. It was their Lordships' opinion that without that statement there would have been a duty to take care. Favourable reference was made in *Hedley Byrne* to a vigorous dissenting judgment of Denning LJ in *Candler v Crane Christmas and Co.* [1951] 1 All ER 426 (CA). According to his

Lordship the defendants in that case, a firm of accountants, owed a duty of care in negligence not only to the client for whom they prepared accounts; they also owed a duty to any third parties they knew would be shown the accounts and who would be likely to rely on them. Their responsibility was to accurately value the company for the purposes of sale. If they had undervalued it so the sellers lost money, the sellers would have a claim (in contract, as they had paid for the accounts to be prepared). Why should the buyers not have a claim when they overvalued it?

Any test will probably have to be based on very close proximity between the parties involved because of the fear of indeterminate liability, i.e. liability towards an indeterminate number of people, for indeterminate amounts of money, as Cardozo J said in the American case *Ultramares Corporation v Touche* (1931) 174 NE 441. Their Lordships in *Hedley Byrne* described this test in terms of requiring there to be a 'special relationship'. This requirement of a 'special relationship' has become an accepted feature of the law, as you will see. But it is at best a vague notion, as the various attempts to define it in *Hedley Byrne* demonstrate. It is more of a 'sum total of its parts' rather than a coherent 'whole'. In the words of Lord Morris:

If in a sphere in which a person is so placed that others could reasonably rely on his judgment or his skill or on his ability to make careful inquiry, a person takes it on himself to give information or advice to, or allows his information or advice to be passed on to another person who, as he knows or should know, will place reliance on it, then a duty of care will arise.

His Lordship went on to say that he thought a special relationship followed from proof that the defendant assumed responsibility for his advice. Lord Hodson agreed with him on this point.

Lord Devlin felt that a special relationship resembled a contractual relationship without any consideration (or, in other situations, without privity). It is submitted that this 'definition' from Lord Devlin came closest, at the time, to the necessary relationship which must exist between the parties, though we will see later that 'assumption of responsibility' has assumed an increasingly important role in more recent case law.

THINK POINT - What is the consequence of this divergence of views between Lords Morris and Devlin?

Morris appears to stress that the defendant has assumed responsibility, while Devlin looks at the nature of the relationship. The judges are not consistent in their views and any one of these views is open for adoption in later cases. It is only by examining later cases, in which the courts have been given the opportunity to consider the ramifications of *Hedley Byrne* that we can hope to draw a clearer picture of the law.

In *Mutual Life and Citizens' Assurance Co. Ltd v Evatt* [1971] AC 793, the majority of the

Privy Council narrowed the scope of 'special relationship' by confining it to cases where the defendant either was in the business of supplying information or advice, or had claimed to possess the necessary skill to give it and the preparedness to take care in giving it. Thus, it was held that no duty of care was owed by an employee of a life assurance company in giving advice to a life policy holder about the wisdom of investing in a company associated with the employee's company. There were two dissenting opinions in this case. They were delivered by Lords Reid and Morris (two

of the judges in *Hedley Byrne* (above)), who argued for a wider duty than that suggested by the majority. They said that a duty existed not only in the circumstances stated by the majority, but also where advice was sought or given by someone in the usual course of business. All their Lordships stressed that social or casual occasions must be ruled out.

There is grave doubt, however, whether the majority view in *Evatt* represents English law.

Indeed, in *Esso v Mardon* [1976] QB 801 both Lawson J at first instance, and the Court of

Appeal clearly preferred the reasoning of the minority in *Evatt*.

THINK POINT - What are the main factors behind a special relationship?

The following criteria have emerged from the case law:

1. A close, but not contractual, connection;
2. Reliance by the claimant;
3. Gratuitous advice or information may lead to liability;
4. Assumption of responsibility by the defendant;
5. The *Hedley Byrne* 'rule' encompasses statements/advice/notices/omissions, etc.

THINK POINT - Is there any advantage in paying for advice?

In principle it does not matter, in tort, that the advice or information is given free of charge, though it is always going to be easier for a claimant to establish the necessary relationship with the defendant where the latter is paid for his services, or at least has received some discernible benefit or advantage in the circumstances (if only because there may well be a contractual duty of care under the Supply of Goods and Services Act 1982). In *Chaudhry v Prabhaker* [1988] 3 All ER 718 the Court of Appeal held that the standard of care owed by an unpaid agent to his principal was an objective one, such as to be reasonably expected of him in all the circumstances. Thus, a friend was found liable for loss suffered when, in breach of his duty, he recommended to the claimant the purchase of a second-hand car which turned out to be both unroadworthy and valueless. The defendant accepted that he owed a duty of care to the claimant, claiming only that he had discharged his duty by observing the standard of care required of him in law. The case proceeded on the basis that there existed a gratuitous relationship of principal and agent between the parties and thus any question of liability arose in the law of agency. The court accepted, however, that liability could also arise under the *Hedley Byrne* principle: logically the standard of care expected in this context should be the same as that required of an unpaid agent.

May LJ, whilst concurring in the judgment against the defendant, said 'In the light of the more cautious approach taken in recent cases ... it is doubtful whether the defendant's concession [as to the existence of a duty of care] has been rightly made in law'. He did not find 'entirely attractive' the proposition that one had to impose on a family friend looking out for a first car for a 'girl of 26' a *Donoghue v Stevenson* duty of care. 'Neither can one apply the *Hedley Byrne* principle to the first defendant's answer to the claimant's inquiry about the car's history, since to do so would make social relations and responsibilities between friends unnecessarily hazardous. However, the concession has been made ...'

In *Tidman v Reading Borough Council*, *The Times*, 10 November 1994 it was found by Buxton J that liability under *Hedley Byrne* did not arise where council officials gave advice to a member of the public who had made an 'informal' inquiry about a matter concerning planning permission on land that he was trying to sell.

THINK POINT - Can you think of the judge's reasons for his decision?

1. The council owed a public duty (under the relevant legislation) to apply the planning law; an overriding obligation to advise individuals would be inconsistent with the public interest;
2. The claimant's approach to the council was by way of an informal telephone call; the advice was given on very little information available from the claimant. To impose liability in such a case would, in any event, deter local authorities from giving advice of this nature, and that would be contrary to the public interest;
3. The claimant could be reasonably expected to seek independent advice before acting in such circumstances.

THINK POINT - Think back to *Hedley Byrne*. What did we say there was the basis of liability?

The basis of liability was a 'special relationship' and an 'assumption of responsibility'. There is, however, some inconsistency in the cases concerning the nature of this assumption. Some judges regard voluntary assumption of responsibility as a requirement for recovery of damages in every case of pure economic loss, see, for example, Dillon LJ in *Simaan General Contracting Co. v Pilkington Glass (No. 2)* [1988] 1 All ER 791. On balance, though, it seems that a defendant may be regarded in law (even though not in fact) as having assumed responsibility to the claimant, if the circumstances objectively lead an observer to conclude that that is the correct interpretation, i.e. the test is an objective one, as in determining whether a party has 'offered' to enter into a contract.

Lord Keith in *Yuen Kun Yeu v A-G for Hong Kong* [1988] AC 175 (PC) said that liability depends not on 'voluntary' assumption of responsibility; it depends on a sufficient degree of proximity between the parties: thus voluntary assumption of responsibility is merely an example of a particular factual situation leading to 'proximity'. It is the directness and closeness of the relationship between the parties which is the crucial factor.

In *Smith v Bush and Harris v Wyre Forest DC* [1989] 2 All ER 514 it was found that surveyors acting for mortgagees owed a duty of care to house purchasers, i.e. the claimants, the mortgagors, who relied on negligent reports issued by the surveyors. In *Smith*, the surveyor acted for a building society and his report was shown to the claimant. In *Harris*, the mortgagees were a local authority and the surveyor was a member of their own staff; his report was not shown to the claimant but the court said that he was entitled to assume from the local authority's offer of a mortgage that the property had been professionally valued, and was worth the valuation. In both cases the claimant indirectly paid the survey fee.

Their Lordships discussed the duty of care owed by a valuer to (a) the party instructing him (usually the mortgagee) and (b) any other party likely to reasonably

rely on the valuation report (usually the purchaser). It was held that a dual responsibility exists in such cases. The claimants had not employed independent surveyors to survey the properties. In many cases, however, it will be reasonable to do this or at least opt for a full report on the structure, from the building society surveyor, because mortgage valuations at the basic level are of only a cursory nature. The lender is interested in the property only to the extent that the resale value will equal the loan. In the present cases, however, it was reasonable to rely on the basic reports (though they did not amount to full structural surveys) because the properties involved were of a standard nature and not expensive; it was common practice amongst buyers at this end of the housing market to rely simply on the mortgage valuation report.

According to Lord Templeman 'in both appeals ... the existence of such a dual duty is tacitly accepted and acknowledged because notices excluding liability for breach of duty to the purchaser were drafted by the mortgagee and imposed on the purchasers'. It is worth noting that a duty of care was found without any formal attempt to apply the principal authority, i.e. *Hedley Byrne*. There was, in any event, disagreement on the effect of that decision. Whilst Lord Templeman and Lord Jauncey said that it was necessary for the defendant in such cases to have voluntarily assumed responsibility to the claimant, Lord Griffith thought otherwise; according to him it was enough for the law to deem assumption of responsibility. Again, on the question of whether it was necessary to have a relationship equivalent to contract Lord Griffith expressed no opinion, Lord Templeman and Lord Jauncey thought the answer was 'yes' and Lord Brandon and Lord Keith agreed with them. The attempts to exclude liability were held, in each case, to be caught by ss. 2(2) and 11(3) of the Unfair Contract Terms Act 1977.

Under this Act defendants acting in the course of business cannot exclude liability for negligence causing death or personal injury. In relation to any other damage, as in *Smith and Harris*, the test of reasonableness must be satisfied. Reasonableness is assessed on the facts of each case.

THINK POINT - Do you think that the 'Caparo test' which you have already met (section one) may be of particular importance in the context of negligent misstatement?

The 'special relationship' is relevant to both proximity and whether it is fair just and reasonable to impose liability. However, in the later cases there is a rather more relaxed attitude to the tests for a special relationship, and some of the requirements once seen as essential are now seen as indicative only, reflecting the distaste in *Caparo* for tests and definitions generally.

CASE STUDY

In *Caparo* the claimants were considering a take-over bid for a company in which they held shares and, as shareholders, they received a copy of the company's audited accounts. Acting in reliance on these accounts, which showed a profit made by the company, the claimants bought more shares in it and eventually took it over. It later emerged that due to

the defendant auditors' negligence, the accounts had been wrongly audited; the company had, in fact, made a loss. The buyer therefore thought he had paid too much, and wanted to recover the difference from the auditor.

How would you defend the action in *Caparo*?

You could argue that the auditors' statutory duty to prepare accounts was owed only to the shareholders as a body, to enable them to make informed decisions concerning the running of the company; the House of Lords accepted this argument. The purpose of this duty, said their Lordships, was not to enable individual shareholders to buy shares with an eye on profits. There is therefore no proximity with any such shareholder.

THINK POINT - What is the consequence of *Caparo* in relation to economic loss?

It seems that as a result of *Caparo*, which emphasises the application of the 'three-stage' test and an incremental development of the law, the scope of *Hedley Byrne* has been considerably narrowed in one respect. Mere foreseeability of reliance by the claimant is not enough; the defendant must be actually aware of:

1. The claimant (either as an individual, or as a member of an identifiable class of persons, to whom the advice or information will be communicated);
2. The purpose for which the advice or information has been sought; and
3. The fact that the claimant is likely to rely on the advice or information for that purpose.

However *Caparo* also relaxed certain of the requirements previously held to be necessary, such as a 'near-contractual' relationship.

Three party relationships

CASE STUDY

In *White v Jones* [1995] 1 All ER 691 a man made a will excluding his daughters. He later changed his mind, and instructed his lawyer to make a new will in their favour. The lawyer delayed, and the man died. His daughters sued the lawyer for the loss they had suffered.

The majority opinion was that the defendant solicitors had 'assumed responsibility' under *Hedley Byrne* for their professional work, and that assumption of responsibility to the testator should be extended so to include 'the intended beneficiary [of the testator] who, as the solicitor could reasonably foresee, might, as a result of the solicitor's negligence, be deprived of his intended legacy in circumstances in which neither the testator nor his estate would have a remedy against the solicitor' (Lord Goff). Lord Goff said this approach not only produced 'practical justice' for the parties concerned; it also resulted in the following benefits:

1. There is no unacceptable circumvention of established principles of the law of contract;

2. No problem arises by reason of the loss being of a purely economic character;
3. Such assumption of responsibility will be subject to any term of the contract between the solicitor and testator which might exclude or restrict the solicitor's liability to the testator under the principle in *Hedley Byrne*, although such a term would be most unlikely to exist in practice;
4. Since the *Hedley Byrne* principle is founded upon an assumption of responsibility the solicitor might be liable for negligent omissions as well as negligent acts of commission;
5. Damages for loss of an expectation are not excluded in cases of negligence arising under the principle in *Hedley Byrne* simply because the cause of action is classified as tortious. Such damages might in principle be recoverable in cases of contractual negligence and there is, for present purposes, no relevant distinction that can be drawn between the two forms of action.

CASE STUDY

In *Marc Rich Co AG and Others v Bishop Rock Marine Co Ltd and Others* [1995] 3 All ER 307 the claimants were owners of cargo carried in a ship which sank as a result of a cracked hull. This fault had developed during the earlier part of the voyage and at one point the ship put into port and temporary repairs were carried out. The defendants, who were surveyors of ships, had inspected the vessel after the repairs were done, and had passed it as seaworthy. It sank after resuming its journey. It is important to understand the status of the defendants. In shipping terms the defendants are known as a 'Classification Society'; these societies (the defendants being one of the biggest in the world) provide services, for example in surveying, to those ship-owners who register with them. They set standards of safety, etc., and are therefore very important to ship-owners in connection with insurance and matters concerning governmental regulation. Ship-owners must abide by the rules set by the society with which they are registered, but the society can only make recommendations to the ship-owners, who are not forced to follow the recommendations. The only sanction which a society can apply is the suspension or withdrawal of classifications. The claimants in the present case had sued the ship-owners, the head charterers of the ship and, in tort, the defendants. In the event, the action against the ship-owners was settled out of court for a proportion of the loss and proceedings against the head charterer were dropped. This left proceedings in the tort of negligence against the defendants to be determined.

It was alleged that the defendants had a duty of care to avert the consequences of the shipowners' breach of duty. The claimants also contended that where physical damage was involved it was incumbent on a claimant to show only foreseeability of damage; in other words, where only physical damage was involved it was not necessary in seeking to establish a duty of care, to satisfy the three-stage test.

The court held that there is in principle no legal distinction between physical damage, whether to person or property, and pure economic loss. All claims for loss in negligence are matters of financial compensation and it followed that the three-stage test must be satisfied in all cases.

However, applying the test, it was not 'fair, just and reasonable' to impose liability. The loss should have been covered by insurance. Classification societies had never previously been thought of as open to such claims. If they were, even only where the ordinary insurance claim failed, they would need to take out insurance. They would pass the cost on to members, who would pass it on in higher freight costs. The public interest was best served by encouraging those who were financially responsible for goods in transit to insure them properly, not by allowing claims of this kind.

PSYCHIATRIC HARM

'Nervous shock', which is the traditional, though medically illiterate, legal description for psychiatric damage, may be the subject of a claim for damages in its own right within the tort of negligence, and not merely as an incidental item in some general claim for personal injury (where it is usually uncontroversial). 'Nervous shock' is regarded generally in modern law merely as another type of harm to the person. The expression does not now bear any relation to the actual medical categorisation of psychiatric or psychological trauma, but it has become a piece of routine jargon, although various judges have stated that it is time to move on and use phrases such as 'psychiatric damage' instead.

Lord MacMillan in *Bourhill v Young* [1943] AC 92 (HL) said:

The crude view that the law should take cognisance only of physical injury resulting from actual impact has been discarded, and it is now well recognised that an action will lie for injury by shock sustained through the medium of the eye, or the ear without direct contact. The distinction between mental shock and bodily injury was never a scientific one, for nervous shock is presumably in all cases the result of, or at least accompanied by, some physical disturbance in the sufferer's system.

At the outset we need to distinguish liability arising under *Wilkinson v Downton* [1897] 2 QB

57, which lies for 'intentionally' causing harm (including 'nervous shock'. In this session we are concerned only with nervous shock inflicted negligently.

Authority in general favours the 'medical' approach in determining what qualifies as 'nervous shock', in other words the courts look for medically defined damage. This is applicable in all cases, irrespective of how they are categorised (we will consider these categories later). Lord Denning said this in *Hinz v Berry* [1970] 2 QB 40. Lord Bridge, in *McLoughlin v O'Brian* [1982] 2 All ER 298, favoured the expression 'psychiatric illness', and in *Attia v British Gas* [1987] 3 All ER 455, Bingham LJ thought that the expression 'nervous shock' was misleading and inaccurate; he preferred 'psychiatric damage' because that term was more capable of embracing mental illness, neurosis and personality change. The legal profession is, in fact, gradually catching up with a change in terminology which the medical profession made about 50 years ago.

Liability does not generally lie in tort for mere anxiety, grief, etc. in the absence of a specific illness, although the position is different in contract and in the tort of deceit. The Protection from Harassment Act 1997 allows claims for 'anxiety': s. 3(2). These conditions may, however, be the subject of compensation in the tort of negligence where they are exceptional and/or pathological, or where they may be seen as symptoms which in effect provide evidence of the harm resulting from physical or psychological harm. Physical consequences of psychiatric damage are, however, routinely included: e.g. heart attack.

Liability for psychiatric illness inflicted negligently has developed in a way analogous to liability for negligent misstatements. That is to say, the law has been applied over the years in a more cautious and guarded way than has been the case in some other areas of liability in negligence.

THINK POINT - Why has liability for psychiatric illness been approached in this way?

One reason for this caution was the fear of bogus claims, based on the unreliability of medical evidence, and associated difficulties in proof of causation. As the medical profession has expanded its knowledge and expertise in this field, however, so the courts have in more recent times been more willing to expand legal liability for this type of damage. There is however still a worry over the potential scope of claims as far more people will typically be psychologically affected by a major incident than are physically harmed. The judges are still concerned to keep liability within what they would regard as reasonable limits. The 'floodgates of litigation' argument is still an important factor in this context, and many arbitrary decisions can be explained satisfactorily only by reference to judicial policy.

A claimant must establish the usual ingredients of the tort of negligence and meet a number of special requirements. We will be looking at these special conditions of recovery later, but we will first take a brief look at the history of liability for 'nervous shock' in order to prepare ourselves for an examination of the modern authorities.

CASE STUDY

In *Bourhill v Young* [1943] AC 92 a woman got off a tram. At the same time there was a serious road accident on the other side of the tram involving total strangers. The woman claimed to have suffered shock.

In the House of Lords, three judges said the claimant was not entitled to recover because she was not within the area of impact, i.e. she was not at risk of harm. The other judges found against her on another ground, i.e. that since she had no relationship with the person injured in the accident, shock to her was not foreseeable. Lord Porter said:

The driver of a car or vehicle is entitled to assume that the ordinary frequenter of the streets has sufficient fortitude to endure such incidents as may from time to time be expected to occur in them, including the noise of a collision and the sight of injury to others, and is not to be considered negligent towards one who does not possess the customary phlegm.

The 'phlegm and fortitude' approach, suitably adapted to meet the case of a person who can show some 'special relationship', may still hold good as a test of reaction to circumstances, as we will see later. The test of the susceptibility of a normal person has for long been regarded as the touchstone.

CASE STUDY

In *McLoughlin v O'Brian* [1982] 2 All ER 298 a woman was told by telephone that her husband and children had been involved in a serious accident. She lived close to the hospital where they were taken and went there, to find one child dead, and the other family members still covered in blood and dirt from the accident, and seriously injured. She suffered a psychiatric illness.

The House of Lords found unanimously in favour of the claimant. Liability was extended to a close family member who witnessed the 'immediate aftermath' of an accident. It was agreed that the claimant must establish that her actual shock was a

reasonably foreseeable result of the defendant's careless driving. Lords Scarman and Bridge found that once causation was established (the defendants had admitted negligence in respect of the collision) this was all that the claimant need show and that it was not for the courts to limit, on policy grounds, a right to recover for reasonably foreseeable damage caused by a defendant. Lord Scarman suggested that, apart from special cases, policy was not justiciable. Generally common law principle dictated the result, as in the present case, and it was the function of Parliament, not the courts, to set limits on grounds of policy. He thought that the result in the present case might be socially undesirable; there was a powerful case for legislation such as that enacted in New South Wales and the Australian Capital Territories. Lords Wilberforce, Bridge and Russell regarded policy as having a much more important role to play in judicial deliberations; reasonable foreseeability of shock to the claimant is a necessary, though not necessarily sufficient, condition of liability and policy may legitimately restrict the range of liability. The present case, it was said, came within the current boundaries of the law.

According to the speeches, these 'boundaries' can be set out as follows:

1. No claim for mere grief or sorrow.
2. No need to show direct impact or fear of immediate personal injury for oneself.
3. Shock suffered as a result of injury to, or fear for the safety of, a near relative was compensable in principle.
4. There was no English case in which a claimant out of sight and earshot of an incident involving a near relative had recovered damages for shock.
5. On proximity to the accident, it was obvious that it must be close in both time and in space; it must be proved that the defendant's negligence has caused the nervous shock. The 'immediate aftermath' fell within the required degree of proximity.
6. As to communication, there was no case in which compensation had been awarded for shock brought about by a third party. The shock must come through sight or hearing of the event or of its immediate aftermath.

THINK POINT - Can you see a problem with this kind of limitation?

There is clearly an issue over cases going beyond immediate sight and hearing.

According to

Lord Wilberforce the courts would have to consider at some time whether the equivalent of sight or hearing, e.g. 'simultaneous television', would suffice. Lord Bridge said a defendant's duty must depend on reasonable foreseeability and must be adjudicated on a case-by-case basis. If asked 'where the thing was to stop' his answer would be 'where in the particular case the good sense of the judges, enlightened by progressive awareness of mental illness, decided'. His Lordship explained a hypothetical example of a hotel fire. He said it was logical to suppose that a mother who reads a newspaper report of a fire at a hotel where she knows her children are staying and who later learns of their death would have a claim against the person responsible for the fire: imagination rather than direct perception would link together the defendant's behaviour and the shock for purposes of causation. [Today it would be live rolling news on the TV or tweeted messages conveying the bad news!]

CASE STUDY

The Hillsborough disaster in April 1989, where many Liverpool supporters died or were injured as a result of overcrowding generated a number of claims, including those of a number of claimants whose close relatives were victims. The claimants in some cases were at the stadium, but others had seen the live TV coverage or been alerted by other means, knowing that their relatives were at the game. The claims were made against the South Yorkshire police in negligence for nervous shock. The defendants argued that a finding for the claimants would open the floodgates of litigation.

The trial judge said claimants had to meet three requirements: a medically diagnosed psychiatric illness (in these cases 'post-traumatic stress disorder'); being at the match or witnessing it live on television; being a mother, father, brother or sister of a victim. Siblings as well as parents were entitled to make successful claims; there was 'no basis in logic or law' why brothers and sisters should not be able to recover damages. Not all the victims died in the disaster: two were injured and one escaped unhurt. One claimant lost her case because she was the 'unofficial fiancée' of the victim, and not a relative. Another claimant succeeded who watched television in a coach parked outside the football ground as his son died (he then went into the ground to find out what had happened)⁵; as did a claimant who was sitting in the stand above the Leppings Lane terrace, as his two brothers were killed. It was held that watching live television coverage of an accident satisfied the requirement of 'proximity'. According to the judge, a television viewer saw the same image that he would see if he were standing in the position of the camera, and would be aware that the pictures were coming live from Hillsborough football ground: 'Just as a store detective [watching on a TV monitor] sees goods put into the pocket and not in the basket, although he is not present at the scene, so does the TV watcher see the crowd surge forward in pen three of the Leppings Lane stand, though he is not present'.

The Court of Appeal, however, limited liability to spouses, and those persons in a parent/child relationship, which could include grandparents. Even in relation to close relatives such as these, the court said liability does not extend to those who witnessed the events only by watching or hearing 'live' (or simultaneous) television broadcasts, or who identified a body in the mortuary afterwards. This was not regarded as coming within the *McLoughlin* 'aftermath'. It was held that 'everyday' simultaneous television broadcasts do not, because of the television industry's code of ethics, portray recognisable suffering individuals; therefore this form of communication did not satisfy the test of 'sight' or 'hearing' of the event or its immediate aftermath. Parker LJ said: 'The vast majority of people do not suffer psychiatric illness from this sort of shock.' He thought that a television viewer was not sufficiently closely and directly connected with the police negligence in this case. According to Nolan LJ, nervous shock as used in the decided cases connotes a reaction to 'an immediate and horrifying impact' and this factor was missing in the present case. His Lordship did not, however, rule out the possibility or recovery for some television viewers. He said:

If a publicity-seeking organisation made arrangements for a party of children to go up in a balloon, and for the event to be televised so that their parents could watch, it would be hard to deny that the organisers were under a duty to avoid mental injury to the parents as well as physical injury to the children,

and that there would be a breach of that duty if through some careless act or omission the balloon crashed.

It is clear that his Lordship intended this as an example of a special 'live' broadcast that might be an acceptable means of communication in a claim for psychiatric illness. Claimants 'actively' involved in the event(s) need not, it was said, establish their relationship with the primary victim. Rescuers would be included here.

All this was accepted by the House of Lords (*Alcock v Chief Constable of the South Yorkshire Police* [1992] 1 AC 310), although a rather different approach was taken to the issue of qualifying relationships. Their Lordships adopted a more flexible categorisation of those eligible to sue for damage of this kind, indicating that outside the core categories of spouses, parents and children, evidence of a close relationship could be adduced, though the formula which emerged from the House is still of a restrictive nature. In the House of Lords, the appeals of the relatives from the Court of Appeal decision were unanimously dismissed. Their Lordships applied the *McLoughlin* 'aftermath' test: the claimant must experience the incident or its immediate aftermath by seeing and/or hearing it. Ordinary TV coverage did not count, although Lord Ackner repeated Nolan LJ's hypothetical instance.

It was held that a claimant who relied on shock suffered for the plight of others had to satisfy two basic conditions, in addition to suffering a recognisable illness:

1. It must be reasonably foreseeable that he or she would sustain psychiatric injury due to his or her close bond of love and affection with the victim; and
2. There must be proximity in terms of time and space.

The House of Lords said that none of the 'television' claimants had witnessed the actual injury to their loved ones, seeing the disaster on a live television broadcast was not equivalent to being at the ground within actual sight or hearing of the event and its immediate aftermath. Although in medical terms watching such coverage might provoke pathological reactions, there were policy reasons for denying that the law should recognize this. The explanation given was that the coverage in this case was edited in accordance with a code of practice designed to eliminate the most shocking images of recognizable people suffering. Contrast the 'special' sort of broadcast envisaged by Nolan LJ, whose example was echoed by Lord Ackner – and which occurred in the United States when the Challenger space shuttle exploded on lift-off. One of the astronauts was actually a primary school teacher.

Alcock confirms also that the shock must be the result of a sudden incident. There must be, as some judges put it, a 'shocking event' causing the immediate psychiatric illness: a gradual build-up of illness is not acceptable. Lord Oliver said that it would be 'inaccurate and hurtful' to suggest that grief was made any less real by a more gradual realisation of loss, but the law should not be extended to cover such cases. It was also said by the House that attendance at a temporary morgue to identify a relative, no earlier than nine hours after the tragedy, was not participation in the immediate aftermath. None of their Lordships was prepared to rule out the possibility of a 'mere' spectator or 'bystander' recovering damages if the circumstances were sufficiently horrific.

One claimant who succeeded at first instance was a father, who was nearby, but watching the match on TV in a coach because he did not have a ticket. When the disaster unfolded he went to the ground to look for his son, and experienced the immediate aftermath. There was no appeal.

THINK POINT – why not?

CASE STUDY

In *Page v Smith* [1995] 2 All ER 736, the claimant was involved, but not physically injured, in a minor traffic accident (a 'fender bender') caused by the defendant's negligence. The claimant claimed that his myalgic encephalomyelitis ('ME') from which he had suffered for some 20 years, but which, at the time of the accident was in remission, had been aggravated by this incident. He claimed compensation for psychiatric damage.

The Court of Appeal dismissed his claim because it was not reasonably foreseeable that someone of 'customary phlegm' would sustain any psychiatric injury due to a road accident in which he suffered no physical injury. A 'frightening experience' is not enough. (There was actually no claim by the claimant of fear for his own safety or fear for anyone else's safety.)

In the House of Lords, however, it was held, by a majority of three to two, that foreseeability of physical harm was enough to enable a claimant, who was directly involved in an accident caused by the defendant's negligence, to claim damages for 'shock'. It was not necessary that the claimant should be physically harmed.

A very different set of facts is to be found in *McLoughlin v Jones* [2002] 2 WLR 1279 (CA).

Here, the claimant was convicted of robbery and spent several months in prison before new evidence resulted in his conviction being quashed. He suffered from depression as a result of his stay in prison and sued the defendant, his solicitor, alleging that he defended the claimant negligently. It was held that the defendant owed a duty of care to the claimant as a 'primary victim'. (According to Brooke LJ the foreseeability of the 'reasonable man' in relation to 'duty of care' does not apply where the parties are in a contractual relationship, as in the present case).

The court found that the claimant, as a 'primary victim' was not affected by the 'reasonable phlegm and fortitude' test for sensitivity to psychiatric illness. (Hale LJ, in an obiter dictum, drew an analogy between McLoughlin's claim and that of the claimant's in *Page v Smith*).

Note that claims by employees that their employers have caused them illness through stress at work are also 'primary victim' cases: *Walker v Northumberland CC* [1995] 1 All ER 737. Normally the employer must be alerted to the stress the worker is under – work does not normally generate pathological stress or illness: *Sutherland v Hatton* [2002] EWCA Civ 76, confirmed in *Barber v Somerset CC* [2004] UKHL 13, and applied in *Hartman v South Essex Mental Health and Community Care NHS Trust* [2005] IRLR 293. These cases are best seen as examples of the employer's duty of care to the employee.

Similarly, in *Home Office v Butchart* [2006] EWCA Civ 239 it was held that the duty of the

Prison Service to have due regard for the health and safety of prisoners could on appropriate facts extend to a duty not to expose the prisoner to situations creating psychiatric damage. The case concerned a prisoner known to be suffering psychological problems and therefore 'at risk.' He complained of various aspects of his management, specifically being put in a cell with another 'at risk' prisoner, who then committed suicide. The claim was expressly not put on the basis that he was a witness of the suicide, but that his overall treatment had caused the known risk to his mental health to occur. Latham LJ expressly relied on *McLoughlin, Hatton and Barber* to distinguish between 'nervous shock' cases where the *Alcock* and *White* control mechanisms applied, and cases where a duty to protect against psychiatric harm arising from a relationship applied.

CASE STUDY

In *White (or Frost) and Others v The Chief Constable of the South Yorkshire Police and Others* [1998] 3 WLR 1509 six police officers brought test cases on behalf of 23 officers who played a part in the Hillsborough disaster, suffering severe psychological trauma as a result. The claimants were not on the terraces at the time, they dealt with fans on the pitch; they performed mouth-to-mouth resuscitation, sorted bodies on the pitch, and stripped bodies at the mortuary. Classing them as 'bystanders' (Another group of officers who were actually on the terraces did qualify as primary victims), the judge at first instance said that a bystander of a horrific incident was not entitled to claim damages for psychiatric damage. In any event, he said, police officers should be more able to deal with traumatic events than ordinary bystanders 'being persons of extraordinary phlegm'. It was also necessary to observe that an event might be less traumatic for someone who helped rather than watched it helplessly. Only one of the police officers was a 'rescuer' in relation to the immediate aftermath of the accident, but he was not doing anything which suggested that it would be just and reasonable to regard him as proximate when an ordinary spectator of the 'horrific scene' would not qualify as proximate. The Court of Appeal, however, held that police constables who suffered post-traumatic stress syndrome either in the course of their duty as constables or as rescuers were entitled to damages. As 'professional' rescuers police constables would, no doubt, regard rescue as one facet of their contracts of employment. The House of Lords did not approve of this approach: their Lordships found that police officers are not entitled to damages from their Chief Constable for psychiatric injury suffered as a result of assisting with the aftermath of a disaster in the course of their duties, either as employees or as rescuers.

White is authority for the proposition that all claimants in cases of negligently inflicted psychiatric damage must fall into one of the categories of primary or secondary victim. This means, in essence, that they must satisfy the requirements of *McLoughlin* and *Alcock* (or *Page v Smith*). They will then be subject to the conditions of liability applying to each category. As you know, secondary victims can claim only in special circumstances. The claimants in *White* said they were entitled to claim simply because they were 'rescuers' and 'employees'. Earlier authority, including *Alcock*, supports the view that such persons fall into special categories of claimant in the context of psychiatric injury, but the House of Lords in *White* says this is not the case i.e. even rescuers (voluntary as well as professional) and employees must be either 'primary' or 'secondary' victims. *White* says that only persons who are actually in danger of physical injury can call themselves primary victims (Lord Steyn referred to being 'objectively' exposed to danger or 'reasonably' believing oneself to be in that position): others are only secondary victims and therefore subject to the *Alcock*

criteria. On the facts the claims in *White* failed because all the claimants were merely 'secondary' victims who did not satisfy *Alcock*.

In *McFarlane and Hegarty v EE Caledonia Ltd* [1994] 2 All ER 1 the Court of Appeal rejected altogether the claim of someone seen as a 'a mere bystander' on the ground that a claimant, who is not a primary victim, must have ties of love and affection with the victim. The mere horrific nature of the incident does not affect the position. This ruling is inconsistent with *obiter* opinions expressed in the House of Lords in *Alcock*; evidently the issue awaits final resolution, but the weight to be placed on the *obiter dicta* appears to have been diminished.

OCCUPIERS LIABILITY

This topic covers two main areas. The first relates to the liability of occupiers for those lawfully on their premises, and the second to their liability for trespassers. In the first area you need to keep in mind that many instances will be governed by contract rather than, or in conjunction with, tort. A hotel guest, for example, is a visitor to the hotel, but he is there in pursuance of a contract. However many instances are not, since there is no contract, as in the case of a private householder inviting friends to a party, where there is neither consideration nor intention to create legal relations. Liability for visitors would appear to be an obvious application of the neighbour principle. A visitor is, in the literal sense, even closer than a neighbour. The common law recognised occupiers and visitors as a duty situation long before *Donoghue v Stevenson*. However, it did so in a way which created unnecessary complexity and technicality. The main problem was that there were two main classes of visitor, 'invitees' who were there for some common purpose with the occupier and 'licensees' who were allowed on the land for their own purposes. In the case of a block of flats, a guest of one of the tenants was an invitee of the tenant in the flat, but a licensee of the building owner in the 'common parts' of the building. The duties owed to invitees were greater than those owed to licensees, and it was often difficult to decide which set of rules applied. The 1957 Act, while retaining many of the rules of the common law (e.g. the definition of an occupier) set out to simplify and clarify the 'common duty of care' owed to invitees and licensees alike, while making special provision for some commonly encountered special cases, namely expert visitors, such as a tradesman, and children, who are less likely to take care for themselves (but should be supervised by their parents).

At common law no duty was owed to trespassers, who acted at their own risk, although the rigour of this rule was reduced by deeming some trespassers, particularly children, to be 'implied licensees' if they were attracted onto the land by some allurements, and/or were clearly tolerated and so treated as having implied permission. We need to be clear what a 'trespasser' is. What is important is not what is in the mind of the entrant, because one can trespass quite innocently. Honest mistake is no defence and liability for the tort of trespass to land on the part of the entrant in that sense is 'strict'. In *British Railways Board v Herrington* [1972] AC 877, the House of Lords rejected the traditional approach. Their Lordships said a new duty was needed in the light of modern society: not only were there more children, but their parents had less control over them and they had fewer places in which to play. Furthermore, modern technology had produced greater dangers for them. Where an occupier knew that there were, or were likely to be, trespassers on his land and that the condition of his land or an activity on it was likely to injure the trespasser, he

must take reasonable steps to enable the trespasser to avoid that danger. This duty arose only where the probability of the danger was such that the occupier ought to act in 'common humanity'. Section 1 of the 1984 Act says it replaces the rules of the common law governing the duty of an occupier of premises to 'persons other than his visitors'. There is no 'automatic' duty, and it is clearly a lesser duty than that under the 1957 Act, as we shall see.

LAWFUL VISITORS

The Occupiers' Liability Act 1957 provides, in section 2 that an occupier of premises owes the same duty, the 'common duty of care' to all his lawful visitors, and that this is 'a duty to take such care as in all the circumstances is reasonable to see that the visitor is safe for the purposes for which he is invited or permitted to be there'.

Lawful visitors are defined by s 1 (2) of the Act as those who were previously regarded as invitees or licensees at common law, so the concepts remain relevant, although there is no longer any distinction between them. It is important to note that the duty is owed to the visitor and in relation to his safety (and the safety of his possessions). It is a positive duty, so there can be liability for omissions, but it is not a duty to make the premises themselves safe. A hazardous area which is effectively shut off does not present a danger to visitors. A natural hazard, such as a cliff edge, may do so and the occupier must therefore take positive steps to ensure safety, although, as we shall see, the visitor is expected to deal with obvious risks.

Who is the Occupier?

There is no statutory definition, and the Act expressly states that the rules of the common law apply in this respect. 'Occupier' is a term which means a person with control of the premises, rather than one with physical occupation as such. There may be more than one occupier of the same premises at the same time. One obvious example is where premises are under repair or reconstruction; the contractor responsible for the work may be in occupation, although this will be a question of fact, and the occupation may be of a part only of the premises. The House of Lords in *Wheat v Lacon* [1966] AC 552 approved an observation of Lord Denning in the Court of Appeal: 'If a person has any degree of control over the state of the premises it is enough [to make him an occupier]'. The occupier is responsible, because he supervises and controls the premises, and normally decides who shall and who shall not enter. In other words he can determine what lawful visitors are allowed.

Who are Lawful Visitors?

This is one of the trickier problems encountered in occupiers' liability. Again, we must turn to the common law to find the answer – see s 1 of the 1957 Act. 'Visitors' for the purposes of the 1957 Act are those persons who would have been lawful entrants at common law before the Act came into operation. Such persons are primarily invitees, licensees, and other entrants under contract; it no longer matters whether there is a common purpose. The definition also includes those who enter as of right, in other words they are lawful entrants by force of law, it does not matter whether they have the occupier's permission to be on the premises or not (see s. 2(6) of the 1957 Act). Those entrants 'as of right' obtain their authority to be present from various statutes, for example meter-readers and postmen.

THINK POINT - Why might it be helpful to an entrant to establish implied permission?

If an entrant can establish that he or she is an implied licensee, then today that would make the entrant a 'visitor' for the purposes of the 1957 Act. The alternative would be to be classed as a 'trespasser'; trespassers were entitled at common law only to a minimal degree of protection from an occupier. To quote Lord Dunedin, in *Addie (Robert) and Sons (Collieries) Ltd v Dumbreck* [1929] AC 358:

Permission must be proved, not tolerance, though tolerance in some circumstances may be so pronounced as to lead to a conclusion that it was really tantamount to permission; a mere putting up of a notice 'No Trespassers Allowed' or 'Strictly Private', followed when people often come, by no further steps, would, I think, leave it open for a judge or jury to hold implied permission. There is no duty on a proprietor to fence his land against the world under sanction that, if he does not, those who come over it become licensees.

In *Edwards v Railway Executive* [1952] AC 737, however, the House of Lords warned against finding in favour of claimants for sympathetic reasons, and said that it is not enough to show that the occupier knows of the entrant's presence or has failed to take the necessary steps to prevent his entry. This was reiterated in *Tomlinson v Congleton BC* [2003] UKHL 47 and *Harvey v Plymouth City Council* [2010] EWCA Civ 860. In the latter case the fact that it was foreseeable that the claimant would enter a piece of vacant amenity land was not the point. The true question was whether he was impliedly licensed to use the land *as he did*.

THINK POINT - How does the legal status of the entrant change when he makes a wrongful use of the premises?

He becomes a trespasser on those premises. As Scrutton LJ put it in *The Calgarth* [1927] P 93: 'When you invite a person in your house to use the staircase you do not invite him to slide down the banisters' although there is authority for two exceptions:

(a) Permission to enter one piece of land may by implication be extended to another adjoining area. In *Pearson v Coleman Bros* [1948] 2 KB 359 a child wandered from a circus to an adjoining menagerie in the process of looking for a lavatory. While looking for the loo she found the lion, and was injured; the court found that she was a visitor in the menagerie because the occupier had not indicated clearly the limits of the permitted area, or effectively prevented members of the public from straying into a danger area. It is possible that *Pearson* represents a 'sympathetic' decision to avoid her being labelled a trespasser, but there is a difference between a lawful entrant who accidentally strays off-limits and someone who has no business to be there at all.

(b) A person who is a lawful entrant to begin with will probably not lose that status where it is the fault of the occupier that causes him to 'step out of line'. In *Braithwaite v South Durham Steel Co.* [1958] 1 WLR 986 a lawful entrant was forced due to the occupier's negligence to move out of the area where he had permission to be, into an area outside the scope of that permission. It was held that he was still a lawful entrant.

CASE STUDY

X attends a private party held by the manager of a bar, after closing time, and falls down some stairs outside the bar on emerging from the building. He dies and his

widow sues the local brewery, which owns the bar. The defendants say he was a trespasser at that time, but X was not aware of the fact that the manager was only allowed to have a private party outside opening hours if he first obtained permission from the defendants (the brewery company) and informed the police. The manager had not satisfied either of these two conditions.

Would you find the deceased to be a trespasser at the relevant time?

These are the facts of *Stone v Taffe* [1974] 3 All ER 1016, in which the Court of Appeal decided that the dead man was not a trespasser, as alleged by the defendant, because an occupier who wants to impose a time limit on the permission given to an entrant must make this condition clear to the entrant. Here, this had not been done and the deceased was a lawful entrant at the relevant time.

THINK POINT - Does the common duty cover all aspects of the occupation and use of premises?

There is no doubt that the common duty of care covers liability for the static condition of the premises. There is however a lively, if rather theoretical, debate over whether it applies to activities on the premises. The duty owed at common law by an occupier of premises to his lawful entrants, with respect to the static condition of those premises, was certainly abolished by the Occupiers' Liability Act 1957, which replaced it with the 'common duty of care'. But there was another duty at common law owed by occupiers and non-occupiers, covering current activities carried out on premises, and it is arguable that this remains despite the Act. The problem arises because of the apparent conflict between two parts of the 1957 Act:

(a) s. 1 (1), which says the Act applies 'in respect of dangers due to the state of the premises *or to things done or omitted to be done on them*' (emphasis added). The part emphasised would seem suggest that activities are covered by the Act;
(b) s. 2 (2) which says that the Act shall 'regulate the nature of the duty imposed by law *in consequence of a person's occupation or control of premises*' (emphasis added).

One possible explanation is that the draftsman included 'things done or omitted to be done' not in order to bring in the activity duty, but to reiterate that the common duty of care includes a positive obligation to act to remedy dangers arising naturally or by the acts of others, not merely liability for the negligent actions of the occupier. Lord Keith in *Ferguson v Welsh* [1987] 3 All ER 777 took the view that the distinction between the occupancy duty and the activity duty had disappeared as a result of the passing of the 1957 Act, relying on the words emphasised in s. 1 (1) above. However, Lord Goff in the same case came to the opposite conclusion, relying on the words 'in consequence of a person's occupation or control of premises' in s. 2 (2) of the 1957 Act. Whichever view is correct, it seems that this matter can only be one of academic interest. In practice, whether the ordinary duty of care in negligence or the 'common duty of care' under the 1957 Act is applied to 'current activities', the result will be much the same. As you will see soon, the standard of care applied under the Act is very similar to that applied at common law.

It should also be noted that some claimants ignore the Act altogether, even when it might seem appropriate. In *Ward v Tesco Stores Ltd* [1976] 1 All ER 219 the claimant slipped on yogurt which had been spilled and then not cleaned up. The crucial question was whether it had been around long enough to engage the

responsibility of the store and no-one seemed to care very much whether this was condition or activity. Likewise in *Ogwo v Taylor* [1988] AC 431 a fireman who was scalded while fighting a house fire from within a roof space did not plead the Act, but relied on the common law negligence of the householder. These cases are perhaps the strongest argument for confining the operation of the Act solely to matters which are part of the basic character of the premises in question, although in neither is it clear why the Act was not relied on.

THINK POINT - What is the 'common duty of care'?

Four points may be made concerning this statutory obligation:

(a) As Mocatta J put it in *AMF v Magnet Bowling* [1968] 2 All ER 789 an occupier is not an insurer against all the risks and is expected in general to take only reasonable care. The standard of care expected is, to all intents and purposes, indistinguishable from that in standard negligence cases.

(b) The Act refers to the safety of the visitor, not necessarily the safety of the premises. Thus a visitor may be 'safe' on 'unsafe' premises, provided the occupier has taken adequate precautions in the circumstances; for example, by providing adequate warning of some danger on the premises, or by physically preventing access to the dangerous area. It is a question of evidence, on the facts of the case, whether the common duty of care has been observed which means, of course, that it may be necessary in some situations for the occupier actually to make the premises safe in order to ensure the safety of the visitor.

(c) If there is an obvious risk, the visitor is, other things being equal, as able to take care of his own safety as the occupier is. In *Staples v West Dorset DC* [1995] PIQR 439 the claimant had slipped on the wet surface of the Cobb, part of the harbour at Lyme Regis. He complained that there were no warning notices, but the response of the court can be paraphrased as 'what part of "wet uneven stones covered with seaweed = danger" do you not understand?' This was later confirmed by *Darby v National Trust* [1999] PIQR 372, where the Court of Appeal held that swimming in a lake was an obvious risk. In doing so they discounted the evidence of a safety expert that precautions should have been taken. This applies even in relation to children, if the risk is one that should be obvious to their parents: *Bourne Leisure v Marsden* [2009] EWCA Civ 671.

(d) The visitor can be expected to behave reasonably. It is, for instance, not a breach to fail to provide a fence as against a visitor who decides that it is a good idea to leave by jumping over a boundary retaining wall in the dark: *Clare v Perry (2005)* LTL 14.1.05 (CA)

THINK POINT – What factors might a court consider when deciding whether an occupier has discharged his or her obligation(s) under the common duty of care:

(a) If there is more than one occupier, it could be that each one will be expected to observe a different standard of care;

(b) The likelihood of the injury occurring in the circumstances;

(c) The nature of the danger itself;

(d) The steps necessary to avert the danger: here the practicalities of taking precautions will come into account, for example, cost, extent and for how long the state of affairs has existed;

(e) Was a warning necessary in the circumstances of the case?

(f) In s. 2 (3) the Act says:

The circumstances relevant for the present purposes include the degree of care, and of want of care, which would ordinarily be looked for in such a visitor, so that (for example) in proper cases–

(a) an occupier must be prepared for children to be less careful than adults; and

(b) an occupier may expect that a person, in the exercise of his calling, will appreciate and guard against any special risks ordinarily incident to it, so far as the occupier leaves him free to do so.

The courts have developed a doctrine of 'traps' and 'allurements' with regard to children. Occupiers must be aware that young entrants are likely to 'go where the attraction is', as it were. In *Glasgow Corporation v Taylor* [1922] 1 AC 44, a child, aged seven, picked some berries off a bush in a public park. He died after eating what were in fact poisonous berries. The defendants were found liable because this bush, with its attractive fruit resembling edible blackberries, was an 'allurement' to a young child who could not be expected to be as aware of the danger as an adult. There was no warning of the danger and the bush had not been fenced off.

In general, as far as minors are concerned, most people would agree that there are few situations which would not pose some degree of danger to very young children. They may be so young that they cannot appreciate even the most obvious of dangers. In such cases the courts will consider all the circumstances, to decide whether occupiers could have reasonably expected adults to be accompanying the child. In *Phipps v Rochester Corporation* [1965] 1 QB 450 the claimant was aged five, and fell into a ditch on a building site, which was an obvious danger, because he was too young to get across it safely. The court found that the defendant had acquiesced in the presence of members of the public and the children were licensees, but was entitled to expect very young children to be accompanied by an adult and was therefore not liable for such an obvious danger.

In *Jolley v London Borough of Sutton* [2000] 1 WLR 1082, the defendant occupied land on which an abandoned boat had lain for at least two years. The claimant, aged 14, was injured when he jacked up the boat in order to repair it, and the boat fell on him. While the obvious type of harm would be from falling through the rotten floor of the boat from above, the House of Lords concluded that, given the ingenuity and tendency to mischief of children, this was similar harm. The simple truth was that the council, having recognised that the boat represented a danger, should have removed it altogether and at once.

We can now consider the position of those entrants with a special calling or skill. An occupier is, under the Act, quite justified in expecting those entrants to exercise their special skill and to take care to guard themselves against any risks or danger of which they ought reasonably to be aware. *Ogwo v Taylor* [1988] AC 431 is not a case under the Act, although perhaps it should be. It concerns a fireman injured by

steam when he entered a loft to fight a fire in the eaves of the house. Possibly the claimant was advised not to use the Act because he would be met with a section 2 (3) (b) argument from the defendant, that he had left the fire service to decide how best to attack the fire. The defendant in the event did not seek to meet the claim by alleging that the Act applied. It could be argued that, provided the specialist acts reasonably and properly, the defendant may still be liable for creating the danger. It might also be argued that there is a distinction to be drawn between purely voluntary action, where no-one need actually do anything, and the response to an emergency in *Ogwo*.

How far can an occupier rely on warning notices?

An occupier may seek to discharge his or her common duty of care by exhibiting a warning notice, but s. 2 (4) provides that 'where damage is caused to a visitor by a danger of which he had been warned by the occupier, the warning is not to be treated without more as absolving the occupier from liability, unless in all the circumstances it was enough to enable the visitor to be reasonably safe'. 'Without more' means without more evidence of other circumstances, or measures taken, for example, such as roping off a source of danger. Thus the notice must be clear and unambiguous if the occupier is to rely on it alone. Each visitor must be given the opportunity to avoid the danger in question. Of course, a notice can be used in conjunction with other methods of protecting a visitor, for example roping off an area of danger; in such a case the precise wording of the notice is not quite so crucial. The warning will always need to be specific, rather than general, and to allow the visitor to protect himself conveniently. The notice will need to have regard to the potential visitors, who may include children, non-English speakers and the disabled.

THINK POINT - Can you think of examples of a suitably worded warning notice?

All cases will depend on their own facts, but an appropriate notice might read as follows:

'WARNING TO ALL ENTRANTS ON THESE PREMISES. TAKE CARE. ENTRY TO THIS ROOM IS EXPRESSLY FORBIDDEN. THE FLOOR IS LIABLE TO GIVE WAY WITHOUT ANY WARNING'.

Another notice might read: 'DANGER. CLEANING IN PROGRESS. THIS FLOOR IS SLIPPERY WHEN WET'.

Notices may use symbols, for example the international symbol for electrical danger.

Notices may also be informal. 'Duck or Grouse' on a low beam in an 'olde worlde' village inn is probably appropriate.

It seems that the Act approaches the matter in a subjective way; in other words it is the effect of the notice on the individual visitor that matters. Thus, it is necessary that the particular visitor should fully understand the warning; it may, therefore, be useless to rely on a written or visual warning where a blind entrant is concerned. As the Act says, the notice must be enough to make the visitor reasonably safe in the circumstances of the case.

You may have realised by now that an occupier, by referring to a danger in his warning is making it perfectly clear that he is fully aware of its existence, therefore the burden on him to show that his warning alone is sufficient is an onerous one. In *Darby v National Trust*, The Times, 9 May 2001 (CA), the widow of a man who had drowned in a pond on the defendant's land sued for damages (under the Fatal Accidents Act 1976), alleging that there was liability under the 1957 Act. The absence of any warning referring to the danger of drowning was said to be evidence of a breach of that duty i.e. the Trust had failed to take reasonable care in the circumstances. It was held, however, that drowning was an obvious risk, therefore it was unnecessary to warn visitors about its existence. There were notices prohibiting swimming, and these were considered to be at least sufficient in all the circumstances of the case.

How is the position affected where the occupier has engaged independent contractors to carry out work?

Under s 2 (4) (b) 'the occupier is not to be treated without more as answerable for the danger if in all the circumstances he had acted reasonably in entrusting the work to an independent contractor and had taken such steps (if any) as he reasonably ought in order to satisfy himself that the contractor was competent and that the work had been properly done'.

In effect this provides a defence to occupiers; it offers a means of establishing that the common duty of care has been discharged on the facts. The burden of proof is on the occupier as to whether he has acted reasonably in the circumstances. He will have to show that he has done all that reasonable care requires in the circumstances.

The obligation can be split up into its component parts as follows.

(a) The occupier must take reasonable steps to ensure that the contractor is competent.

(b) Where the nature of the work involved allows it, the occupier is expected to see that the work has been properly done. It was said in *AMF International Ltd v Magnet Bowling* [1968] 2 All ER 789 that in the case of the re-wiring of a building, for example, an occupier could trust a contractor, but much depends on the circumstances of the case. Thus in some cases it might be necessary to see that the contractor's work is supervised by an architect or other professional person. Much will depend on the occupier's own knowledge and, presumably, resources. Our 'man in the street' would not normally be expected to know of defective technical work.

By way of contrast, in *Woodward v Mayor of Hastings* [1954] KB 74, the claimant slipped on an icy step at the defendant's school. The step had been left wet in frosty conditions by a negligent cleaning contractor. The defendant was found liable. The Court of Appeal distinguished *Haseldine v Daw* [1941] 2 KB 343, which involved the maintenance of a lift, requiring technical knowledge. This was not the case in *Woodward*, which concerned merely the cleaning of a snow-covered step.

(c) It must be reasonable in the circumstances for the occupier to give the work to an independent contractor. In general terms this is probably the case where the job needs specialist knowledge and/or equipment (indeed in such cases it may be wrong for an occupier not to employ a contractor and to attempt the work himself) or where it is usual commercial practice to do so. In *Haseldine v Daw* [1941] 2 KB 343,

the claimant was injured when the defendant's lift failed as a result of the negligence of a firm of contractors employed by the defendant to repair the lift. It was reasonable to give this work to a contractor. The defendant had employed competent contractors to maintain the lift, therefore he was not liable.

In all cases the occupier must establish that the contractor is technically competent, and in modern times, that he is adequately insured. In *Bottomley v Todmorden Cricket Club* [2003] EWCA Civ 1575 contractors were engaged to operate a firework display, but both carried it out in an obviously dangerous and unusual way, and held no insurance. The club had not even checked the insurance position, and it was held that this alone was sufficient to make them liable.

How the Unfair Contract Terms Act applies to liability under the 1957 Act

The Unfair Contract Terms Act 1977 applies in both contract and tort, but only in relation to things done or to be done, in the course of a business. 'Business liability' includes liability arising from the occupation of business premises. It includes ordinary business or commercial activities; but it goes beyond that to cover the activities of the professions, central and local government and other public authorities. Under s 2 (1) 'a person cannot by reference to any contract terms or to a notice given to persons generally or to particular persons exclude or restrict his liability for death or personal injury resulting from negligence'.

TRESPASSERS

We need to remember what a 'trespasser' is. What is important is not what is in the mind of the entrant, because one can trespass quite innocently. Honest mistake is no defence and liability for the tort of trespass to land on the part of the entrant in that sense is 'strict'. Voluntary movement is all that is required; there is no necessity for the entrant to intend to trespass. It is the intention of the occupier of the land in question that is important. In *Addie v Dumbreck* [1929] AC 358 Lord Dunedin defined a trespasser as a person 'who goes to the land without invitation of any sort and whose presence is either unknown to the proprietor, or, if known, is practically objected to'. Thus, the term 'trespasser' includes the 'innocent', as well as the 'guilty'. Someone who enters without permission is a trespasser; in this respect, there is no difference between a burglar and a person out for a walk in a field who strays accidentally from the public footpath. We will see, however, that the nature of the duty owed by the occupier may differ according to the nature of the trespasser. In any case, although all trespassers are guilty of an unlawful act, namely the wrongful entry, only trespassers such as burglars are likely to be met with the plea of illegality. Illegality is not pleaded against all trespassers because defendants recognise that modern law (quite apart from the 1984 Act) will not countenance a departure from an irreducible minimum of protection even for illegal entrants. It is also the case that even burglars are protected against the infliction of intentional harm, the setting of traps or the creation of retributive dangers such as electrified fences. The application of force to illegal entrants can in some cases be justified on grounds of self-defence or defence of others. It is long settled law that 'reasonable' force can be used to eject trespassers. However, occupiers may well find themselves facing criminal charges where unlawful force is used.

THE ORIGINAL DUTY TO TRESPASSERS

Intentional harm inflicted on a trespasser was actionable unless it was reasonably necessary to protect the property from trespassers. In *Bird v Holbrook* (1828) 4 Bing 628, an occupier of land set a trap for trespassers namely a spring-gun, on his land. The claimant, a trespasser on the land, was injured by the device and the occupier, the defendant, was found liable under a principle of the common law to the effect that it is unlawful to inflict harm upon the person of another in an intentional though indirect way. It became accepted that deterrent measures could reasonably be adopted by occupiers to discourage trespassers, but they were distinguished from measures which could be classed as retribution. These measures of retribution gave rise to liability at common law. It was a question of fact in each case whether a measure would be classified as 'deterrent' or 'retributive'. In general, dangers likely to do serious harm would be 'retributive'. An occupier could also be liable for injury inflicted recklessly on a trespasser. In both cases, the occupier had to know of the trespasser's presence although it might be enough if a trespasser's presence was extremely likely. Apart from this there was no liability. The leading case was *Addie v Dumbreck* [1929] AC 358.

THE DUTY OF COMMON HUMANITY

In *British Railways Board v Herrington* [1972] AC 877, the House of Lords rejected *Addie*. Their Lordships said as we have seen that a new duty was needed in the light of modern society. A six-year-old boy, the claimant, was playing with his friends on land bounded by an electrified railway line. He got through a fence in poor repair and

fell on to a live line. The stationmaster had been warned of the condition of the fence and, despite his knowledge that children frequented the area, the fence had not been repaired. The House of Lords held that, although the general rule remained that a person trespassed at his own risk, an occupier's duty was not limited to not harming the trespasser intentionally or recklessly. Where an occupier knew that there were, or were likely to be, trespassers on his land and that the condition of his land or an activity on it was likely to injure the trespasser, he must take reasonable steps to enable the trespasser to avoid that danger. This duty arose only where the probability of the danger was such that the occupier ought to act in 'common humanity'. It was held that the Railways Board was in breach of this duty. They had brought on to their land a specific and grave danger, i.e. an electrified rail, and had not taken reasonable steps to prevent harm to the claimant. *Herrington* introduced a duty of a very flexible nature; nowhere was 'common humanity' closely defined, their Lordships preferring a pragmatic approach which would enable the court to fashion the duty to fit the circumstances. Lords Reid and Wilberforce said that the duty would vary 'according to [the] knowledge, ability and resources' of the occupier. It was a question of whether a conscientious, humane man with this occupier's knowledge, skill and resources, could reasonably have been expected to do something which would have avoided the accident. Their Lordships appeared to have a subjective test in mind. Lord Reid also said:

[The occupier] might often reasonably think, weighing the seriousness of the damages and the degree of likelihood of trespassers coming against the burden he would have to incur in preventing their entry, or making his premises safe, or curtailing his own activities on his land, that he could not fairly be expected to do anything. But if he could at small trouble and expense take some effective action, again I think that most people would think it inhumane and culpable not to do that.

Lord Diplock said the 'kind of trespasser' (for example a burglar, vandal or child) could be an important factor, as was 'the degree of expectation that a trespasser will come.' Lord Wilberforce mentioned 'the nature and degree of the danger'. According to Neill LJ in *Revill v Newbery* [1996] 1 All ER 291 (CA), *Herrington* enabled a trespasser to recover damages in negligence (i.e. the activity duty). The *Herrington* case may today be used not only in those circumstances where the 1984 Act does not apply; it may also be helpful for illustrative purposes (only) in connection with arguments concerning liability imposed by the 1984 Act. However, there must be doubt whether judges will consider it just and reasonable to make any such duty more extensive than that owed under the 1984 Act.

LIABILITY UNDER THE 1984 ACT

Entrants to whom a duty is owed

Section 1 of the 1984 Act says it replaces the rules of the common law governing the duty of an occupier of premises to 'persons other than his visitors'. These persons are trespassers, those who enter under private rights of way or by virtue of s. 60 of the National Parks and Access to the Countryside Act 1949 or s. 2 of the Countryside and Rights of Way Act 2000.

The duty arising under the Act

The Act says, in s. 1 (1) that its objective is to determine:

(a) whether any duty is owed by a person as occupier of premises to persons other than his visitors in respect of any risk of their suffering injury on the premises by reason of any danger due to the state of the premises or to things done or omitted to be done on them; and

(b) if so, what that duty is.

It can be seen from the language used that so-called current activities may not be covered by this Act. There, are however, *obiter* opinions in the House of Lords in *Herrington* (above) that there was no distinction in the doctrine of common humanity between the occupancy duty and activities, but this case could only be used as a persuasive authority in the context of liability arising under the 1984 Act.

In an earlier case, *Videan v British Transport Commission* [1963] 2 All ER 560, which was concerned with the *Addie* duty, Pearson LJ expressed the opinion that current activities came within the terms of the then occupiers' duty. The Law Commission in its 1976 Report (see below) agreed with the view that the 1957 Act (see above) did not extend to activities, which came within the terms of common law negligence. It was also the Commission's view that what was to become the 1984 Act should not embrace activities. It was said that the liability of an occupier under statute should relate only to something which made the premises unsafe, because not all activities or omissions occurring on premises were concerned with the safety of premises as such. In that sense the occupier in relation to activities would be in the same position as a non-occupier who had injured someone on premises. Thus, if a person (whether an occupier or not) while shooting rabbits injures another person (whether a trespasser or not), whether he is liable will depend on the ordinary principles of negligence at common law.

The duty imposed by the 1984 Act is set out in s. 1 (4) as follows:

Where, by virtue of this section, an occupier of premises owes a duty to another in respect of such a risk, the duty is to take such care as is reasonable in all the circumstances of the case to see that he does not suffer injury on the premises by reason of the danger concerned.

The duty is subject to pre-conditions. These are to be found in s. 1 (3) which provides as follows:

An occupier of premises owes a duty to another (not being his visitor) in respect of any such risk as is referred to in subsection (1) above if –

(a) he is aware of the danger or has reasonable grounds to believe that it exists;

(b) he knows or has reasonable grounds to believe that the other is in the vicinity of the danger concerned or that he may come into the vicinity of the danger (in either case, whether the other has lawful authority for being in that vicinity or not); and

(c) the risk is one against which, in all the circumstances of the case, he may reasonably be expected to offer the other some protection.

The conditions of liability

The duty imposed by the Act arises only if these three conditions are satisfied. They are cumulative, so each must be met. This provision is potentially confusing, because it seems to consist of a mixture of subjective and objective tests. We have seen that *Herrington* imposed an arguably subjective test: 'What could reasonably be expected of this occupier in the circumstances?' The Law Commission, on whose Report entitled 'Liability for Damage or Injury to Trespassers and Related Questions of Occupiers' Liability' (Report No. 75, Cmnd 6428), 1976, the 1984 Act was based intended that the replacement duty for *Herrington* should be of an objective nature: 'What could be expected of a reasonable person in those circumstances?' It is debatable whether that purpose has been achieved.

As the defendant is, by definition, in occupation of his land, it will not usually be argued that he is unaware of the hazard, which is typically a building or an excavation. It is of course easy enough to think up hypothetical exceptions, such as an unexploded bomb exposed by erosion, or dangerous substances abandoned by third parties in the middle of a very large and isolated tract of land. However the focus is usually on the foreseeability of the presence of the claimant and/or whether it is just and reasonable to offer protection. Even if these two questions are answered in favour of the claimant, he must of course establish that the defendant failed to do what was reasonable.

CASE STUDY

In *White v St Albans City and District Council*, *The Times*, 12 March 1990 (CA), the claimant easily got through an inadequate fence on the defendant's land in order to take a short cut. He was injured when he fell into a trench which he could not have been expected to see. This was a danger of which the defendant was actually aware, so there was no argument on that point. What was in issue was knowledge of someone's presence in the vicinity of the danger (s. 1 (3) (b)). It was found that there was no evidence that the land was used as a short cut, and there was no reason for the defendant to believe that there would be anyone in the vicinity of the danger. This was said to be a matter of fact in each case. The claimant's argument, that it was sufficient to satisfy s. 1 (3) (b) on the present facts to show that the occupier had fenced his land, thereby establishing that there was reason to believe that someone was likely to come into the vicinity of the danger, was not accepted by the court: each case had to be looked at according to the actual state of affairs on the land at the time of the injury.

In *Swain v Puri* [1996] PIQR P442 (CA), a boy aged nine fell from the roof of a disused factory and claimed damages for his injuries from the occupier. It was argued for the claimant that he was owed a duty of care under the Act, i.e. that at the time of the trespass there had been reasonable grounds for believing that children would trespass for the purposes of s. 1 (3) (b) of the Act. The court found against a duty of care on the facts. Although the fences round the premises were by no means 'intruder proof', they were of a substantial nature and there was no evidence of earlier trespass – thus the occupiers had no 'reason to believe' that children would climb on to the roof. 'Reasonable grounds to believe' in the context of s. 1 (3) (b) meant that the occupier must have either actual knowledge of the relevant facts or know of facts which would provide evidence of 'grounds to believe' that a certain state of affairs existed.

Constructive knowledge (based on an argument that the occupier 'ought to have known') was insufficient for the purposes of s. 1 (3) (b). However this may mean no more than that the judge considered that all that the claimant had shown was that it was speculatively possible that there might be trespassers which falls short of establishing reasonable grounds for believing that there would be trespassers.

In *Ratcliff v McConnell* [1999] 1 WLR 670 (CA), the claimant was a student who, one winter's evening after a night's drinking, decided to go for a swim in the college's swimming pool which was closed for the winter. There were high walls round the pool, the gate was locked, and the college had erected signs warning of the depth of the water at the shallow end and prohibiting use of the pool at night. The water level in the pool as a whole was low. The claimant climbed over the gate and dived into the pool, hitting his head on the bottom of the pool (more likely than not at the shallow end – the evidence was not clear on this point). It was held that the defendant college was not in breach of its duty under the 1984 Act, because it was obvious to any adult that diving into the shallow end of any pool might result in a head injury: thus the risk involved in this case was not of a hidden nature and no warning was necessary. The claimant therefore failed in his action.

In this case the claimant was foreseeable. However there is no general duty to warn against an obvious danger: *Staples v West Dorset DC* [1995] PIQR 439, later confirmed by *Darby v National Trust* [1999] PIQR 372. Both cases relate to lawful visitors, but apply here *a fortiori*. The claimant in *Ratcliff* was held to be *volens* in respect of the risk of diving. *Keown v Coventry Healthcare NHS Trust* [2006] EWCA Civ 39 concerned a child claimant who decided to use a fire escape as a climbing frame and fell when he lost his grip while climbing up the underside. The court accepted that while there was no suggestion that there was a danger here against which an adult need be warned, the position might be different for children, but that here the fire escape was not unsafe, it was the actions of the claimant which created the danger. The defendant was aware both of the lack of fencing and the likely presence of trespassers, but in the circumstances it was not reasonable to expect them to offer any protection.

CASE STUDY

The leading case on the scope and application of the 1984 Act is another swimming accident case, *Tomlinson v Congleton BC* [2003] 3 WLR 705. The claimant was visiting a country park. The lake was out of bounds, but people often paddled or swam in it. The owners had had long debates on how to prevent this. The claimant dived in and hit his head on the shallow bottom of the lake.

Lord Hoffman was at pains to point out that the claimant must meet all the criteria in the Act. Here the risk was known (the Council had been debating it for years) and the presence of would-be swimmers was also well-documented. However, the House concluded that the Act did not require the occupier to protect against an obvious danger, and indeed went on to consider the position under the 1957 Act and concluded that it was the same.

CASE STUDY

Jamie was playing football near a disused gravel pit used for water sports. Swimming was not allowed and there were notices to this effect. The ball was kicked into the

water and Jamie dived in to fetch it. He hit his head on a large box lying on the bed of the gravel pit and suffered serious injury.

Can Jamie claim against the occupiers of the gravel pit?

These are the facts of *Rhind v Astbury Water Park* [2004] EWCA 756. In some respects the case mirrors *Tomlinson* in that the claimant is a trespasser, and swimming was prohibited. The same analysis must be undertaken. However there are clear differences. In *Tomlinson* the injury was caused by hitting the natural bottom of the lake, while here there is an artificial obstacle. In *Tomlinson* the House held that the injury was not due to the state of the premises, but here it clearly is. It was accepted that the occupier did not know of the obstruction; it will be a question of fact whether he ought to have done, but in *Rhind* the obstruction was invisible from the shore and boats and could only be located with difficulty by someone who knew its general location. Accordingly the claimant failed at the first hurdle as there was no basis for saying that the occupier ought to have been aware of the hazard. Even assuming that the hazard in the problem is one which the occupier was aware of, the claimant still has to prove that swimmers were foreseeable, despite the warnings, and that this was not the sort of obvious risk which is outside the Act.

In *Maloney v Torfaen CBC* [2005] EWCA Civ 1762 the claimant tripped over a retaining wall while trespassing and fell onto a concrete footpath. There had been two previous such incidents, one fatal. Although the defendant local authority accepted that if they had been aware of the fatality they would have put up fencing it was still held that there was no basis for holding that they should have been aware that the claimant would come into the vicinity of the danger. The danger was a quite specific one of walking close to the retaining wall when drunk in the dark.

Warnings and other measures bringing dangers to the attention of the entrant

According to s. 1 (5):

Any duty owed by virtue of this section in respect of a risk may, in an appropriate case, be discharged by taking such steps as are reasonable in all the circumstances of the case to give warning of the danger concerned or to discourage persons from incurring the risk. There is a difference to note here. In the 1957 Act a warning is not sufficient 'without more', unless it is enough in all the circumstances to make the visitor reasonably safe. These conditions are absent from the 1984 Act provision, suggesting that it may be easier for an occupier to discharge his duty under s. 1(5) than would be the case under s. 2 (4) (a) of the 1957 Act.

It is true that more than a mere notice may be required in the case of children, especially perhaps where 'allurements' are concerned. The notion of allurements was an important factor in *Herrington*. Other measures may be needed in such cases.

EMPLOYERS LIABILITY

Many tort claims arise from accidents in the workplace. Most adults spend a large part of their lives at work, and many types of work are hazardous. In one sense it is surprising that these are treated as tort claims because the relationship of employer and employee is by definition regulated by a contract of employment, and it would be equally sensible to regard claims as arising from breach of an express or implied term of the contract of employment. However this is not the way that the law has developed, and the allocation of these claims to the law of tort is now deeply ingrained.

It is nevertheless the case that the relationship of employer and employee has long been regarded as giving rise to a duty of care, although in the nineteenth century this was seriously distorted by judicial reluctance to impose the costs of industrial accidents on the employer. At that time employees who were paid extra to undertake heavy or hazardous work were regarded as volens and the doctrine of common employment also exempted employers where the harm was caused by a fellow employee who was not a manager. Although this doctrine has been abolished its shadow still hangs over some of the older cases.

Methods of compensation outside the law of tort are also important. One key objective of early trades unionism was to provide mutual insurance against inter alia industrial injury, and a key element of the National Insurance scheme has been to provide benefits specifically for injury and disability arising from work. In such cases there is no need to prove fault, although there is a need to prove a causal connection. Such schemes are incidentally much more cost effective than tort, typically having administration costs of 10% rather than 90% or more.

Despite all this there is nevertheless a robust set of principles establishing that employers owe a common law duty of care to their employees, one common area where vicarious liability may arise is where one employee injures another while at work, and as we one major area in which statutory duties give rise to a cause of action in tort is health and safety at work. The duty which the employer owes to his employees is a specific area of liability. Duties may be owed to others - contractors, customers, government inspectors - but these are different in kind.

One point to remember is that a claimant can rely on as many causes of action as he sees fit; accordingly a claimant injured at work may allege a breach of the employer's own common law duty, vicarious liability for the acts of a colleague and also breach of any relevant statutory duty.

THE COMMON LAW DUTY

An employer owes a personal duty of care in common law negligence to his employees. The contract between employer and employee involves taking reasonable care to provide proper equipment, and to maintain it in a proper condition, and to carry on his operations so as not to subject those employed by him to unnecessary risk. The duty of care in tort is therefore based on the consensual relationship between employer and employee, it is a corollary of the contractual obligation and is therefore influenced by the terms of the contract. Although it might be said to be a *Donoghue* type of duty, it predates the 'neighbour' principle and it has special features:

- (a) It is an obligation arising in both contract and tort;
- (b) It is specific to the relationship.

The leading, although somewhat dated, case is the House of Lords decision in *Wilsons and Clyde Coal Co v English* [1938] AC 57, in which it was held that the 'master' must use reasonable care and skill for the safety of the 'servant'. This duty may be divided into three aspects:

- (a) An obligation to provide reasonably competent supervisors and workmates;
- (b) An obligation to provide safe and suitable premises, plant and materials;
- (c) An obligation to furnish a safe system of work.

It is a single duty which could be summed up as a duty to provide a safe working environment, but of a manifold nature. Sometimes the three elements overlap (for example supervision and system), and indeed other cases and academic commentators adopt different, more modern, subdivisions, such as risk assessment. The duty is personal and non-delegable by the employer. So if the employer does delegate the performance of the duty to a manager, he himself remains responsible. In general the duty owed by an employer to his employee is one of reasonable care. This is not a liability imposed regardless of fault (unless statute intervenes, as in the case of the Employers' Liability (Defective Equipment) Act 1969, which provides that a defect in equipment due to fault of the supplier is deemed to be attributable to the negligence of the employer). The obligation is fulfilled by the exercise of due care and skill:

- (a) A mere omission may be enough, actual knowledge on the employer's part of a danger is not necessary if he ought to have known of it;
- (b) Evidence of conformity to the common practice of those engaged in the activity in question is important in showing due care, as it is in any area of negligence;
- (c) Whether there has been a breach of the duty is a question of fact, as in all cases of negligence;
- (d) Certainly in modern times the standard expected of employers is a high one.

Always remember that this is a single duty, although of a manifold nature, and that its three 'aspects' overlap with each other. They may also interact with statutory duties.

These aspects are:

- (a) An obligation to provide reasonably competent supervisors and colleagues;

This facet of the duty is no longer as important since the abolition, by the Law Reform (Personal Injuries) Act 1948, of the doctrine of 'common employment'. According to this common law doctrine, an employee was understood to have agreed to bear the risk arising from the negligence of fellow employees (but not managers) for the purpose of vicarious liability. It is no longer necessary to rely on the employer's personal duty where there is clear negligence by another employee in the

course of his employment, as vicarious liability is the more natural basis of claim. The employer's special duty may still be useful, however in respect of employees given to bullying, harassment, practical jokes and similar behaviour, although even this may now attract vicarious liability on the 'close connexion' test.

(b) An obligation to provide proper premises, plant and materials;

This aspect of the employer's duty covers the provision of appropriate equipment, including safety devices and protective clothing, as well as the maintenance of existing equipment. It also covers instruction on the use of tools and equipment. At common law the ordinary principles of negligence apply. Thus, in *Davie v New Merton Board Mills* [1959] AC 604, it was held by the House of Lords that where the claimant had been injured by a defective metal 'drift' (a type of tool) which splintered in use, his employer was not liable in negligence if all reasonable care had been taken in buying a reputable make of tool, from a reputable source and the defect was of a latent nature, i.e. was not discoverable upon reasonable inspection. The duty at common law is to provide and maintain safe plant and safe premises. Mere temporary failure of maintenance might not be enough to breach the duty although regular inspection is probably necessary in the case of complex or dangerous machinery. However modern conditions require a greater level of care, and so a higher standard of diligence is likely to be demanded. The duty includes a failure to provide equipment, which a reasonable employer would regard as needed. It covers necessary safety devices on dangerous machinery, and the provision of protective equipment where necessary. However, the employer's obligation is one of reasonable care in the circumstances, not an absolute warranty of the safety of plant and equipment. In some cases it may be sufficient to rely on the employee himself rectifying simple defects in the equipment used by him.

As far as 'premises, or 'place of work' is concerned, the employer is expected to make the place, and the access to that place, as safe as reasonable care and skill will allow. In *Latimer v AEC Ltd* [1953] AC 643, the claimant slipped, at night, on the factory floor, the surface of which was oily. The floor had been flooded as the result of a very heavy thunderstorm, and when the flood subsided it left an oily film on the surface. The House of Lords held that it was not unreasonable for the defendants to put on the night-shift rather than close the factory until the oily surface had been rendered safe. In the circumstances there was insufficient evidence of want of reasonable care. It follows from this reasoning that danger caused by some fleeting, or temporary, or exceptional condition might not invoke liability; but each case must always be considered on its facts. Again, attitudes to health and safety at work have developed in the past half century, and there is today more emphasis on risk assessment and management.

Liability may extend, in effect, to the premises of some third party; it may also cover a third party's plant and equipment. This will arise where the employee's work takes him to the premises of customers. However exactly what is required of the employer all depends on the circumstances of each case. However the occupier is entitled to assume that the visitor in the case will take care in respect of hazards relating to his calling: *Roles v Nathan* [1963] 1 WLR 1117. See also *Kmieciak v Isaacs* [2011] EWCA Civ 22.2.11.

(c) An obligation to provide a safe system of work.

This is of a twofold nature, namely the putting in place of a system and its continuing operation. In *Wilson and Clyde Coal Co* it was said that there is no responsibility on the employer for 'isolated or day-to-day acts of the servant of which the master is not presumed to be aware and which he cannot guard against'. He is responsible for 'the practice and method adopted in carrying on the master's business of which the master is presumed to be aware and the insufficiency of which he can guard against'. In this case the employer had placed dangerous cutting machinery in a narrow mine passage, despite being aware that employees used this passage on a frequent basis. It was held that this amounted to an unsafe system of work. In many instances employees do not follow approved schemes of work, ignoring measures established for their own safety. The reasons for this state of affairs cover a wide spectrum, ranging from wilful disregard, through inexperience, mere inattention, annoyance, to getting in the way of work.

The employer is always under a duty to take reasonable precautions for his employee's safety, but he is not an insurer of safety, nor is his relationship to his employee similar to that of a schoolteacher to his pupil. In appropriate circumstances, no doubt, an employer can rely on the good sense of a skilled worker to avoid danger of which he has been warned. In general, however, a master cannot expect his servants to lay down and operate a system for themselves. In *General Cleaning Contractors v Christmas* [1953] AC 180, the claimant was cleaning outside windows. He opened a window slightly, and held on to the ledge to balance. As he did so, the bottom sash moved; he fell and was injured. It was held by the House of Lords that it is not up to workmen to devise and take safety precautions. It is the duty of the employer to consider the situation, devise a suitable system, instruct the men what they must do and supply any necessary equipment, for example, window wedges in this case. Lord Oaksey said: 'An employer must take into account that workmen may have disregard for their own safety. This means they must minimise the danger of a workman's own carelessness and take reasonable care to ensure that employees comply with necessary safety precautions.'

CASE STUDY

Egbert, an experienced electrician employed by ACDC Ltd, was sent to repair a heater in a church. As the heater was high on the wall Egbert borrowed from the church a perfectly suitable ladder. While fixing the heater Egbert slipped and fell due to a combination of (a) resting the ladder on a cushion to protect the church floor and (b) climbing the ladder while Steve, the sexton, who had previously footed the ladder, was out of the church switching the current on at the mains. No risk assessment had been carried out.

Could Egbert recover damages from ACDC Ltd?

Electricians, especially experienced ones, are supposed to understand and guard against some obvious risks, not just those related directly to electricity, but also basic industrial practice. Here the ladder was suitable, but Egbert did not use it properly. Having the ladder securely based (not on a cushion), and footed by an assistant, are simple and obvious measures to take. The task was a routine one and no formal risk assessment was required; if one had been done it would have read – 'use the ladder, but ensure it is on a firm surface and footed at all times'. Assuming ACDC Ltd could also demonstrate that they had appropriate training procedures and a safety manual, Egbert will probably be seen as the author of his own misfortune.

See *Sharp v Elnaugh & Sons Ltd* (2007) LTL 18.1.07. The church will also probably escape liability as Ms Isaacs did in *Kmieciak v Isaacs* (2011).

The duty of care is that of an ordinary, prudent employer, although that is a high standard.

It will normally suffice for the defendant to show that he has in all relevant respects provided the protection which accords with the standard practice in the enterprise or undertaking concerned; or that he has complied with the terms of any relevant statutory provisions.

It must always be borne in mind, however, that the duty is of a personal nature, i.e. personal to the employer and personal to the employee. The duty is personal to the employer in that it is non-delegable, which means that though practical performance of the duty can be delegated to another, legal responsibility for its performance cannot.

As far as the employee is concerned, the employer's obligation is of a personal nature in that it is owed to him, or her, as an individual. Thus, there may be circumstances of which the employer is aware, or ought to be aware, making an individual employee a more likely victim of injury than another worker in the same situation. In *Paris v Stepney Borough Council* [1951] AC 367, the House of Lords said that in considering whether employers are negligent, regard must be had to their knowledge of the physical characteristics of a particular employee. In this case the employer had not taken reasonable care to protect the particular employee by providing him with safety goggles when they knew he was one-eyed. A two-eyed employee doing the same job would not have needed the same protection, because the risks in general were not too high.

In *Walker v Northumberland County Council* [1995] 1 All ER 737, it was held that the employer's duty of care to provide a safe system of work extended to a case where it was reasonably foreseeable that the employee might suffer psychiatric damage, due to stress brought on by the amount or nature of the work expected from the employee. Subsequently in the case of *Sutherland v Hatton* [2002] EWCA Civ 76 the Court of Appeal gave general guidance on the approach to such cases. It is not foreseeable that employees should be suffering from work generated stress unless there is some basis for the employer being aware. In *Walker* the claimant had already had one breakdown, so the employer was on notice. The court made it clear that employees who feel under stress at work should inform their employers and give them a chance to remedy the situation. If they 'suffer in silence' a compensation claim may not succeed. Signs of stress must be plain enough for any reasonable employer to realise that something should be done.

VICARIOUS LIABILITY

'Vicarious liability' means liability which falls on one person as a result of an action of another person, i.e. it is not personal, primary, liability. In terms of the law of tort, it means that one person is made to account for the damage caused by another person's tort. We are concerned only with the situation where one person is liable for a tort actually committed by someone else where the fault lies with that other, and the only basis of liability is the relationship between the two defendants, not the conduct of the first defendant. In other words the first defendant is not at fault. Originally the basis of vicarious liability lay in two rather vague Latin maxims, which can be roughly translated as 'let the superior person be responsible', and 'who acts by another acts himself'. In modern times, the operation of this rule has been almost

wholly confined to the situation where the superior employs someone to work for him as a servant under a contract of service and the servant commits a tort within the scope of his employment. The tort may be common law negligence or breach of statutory duty.

This form of liability is based on the satisfaction of the following three conditions:

1. There must exist a relationship of 'employer' and 'employee' (in older language there must be a relationship of 'master' and 'servant'); and
2. That employee must have committed a tort (for which he is personally liable); and
3. That tort must have been committed 'in the course of the employment' of the employee.

We now have to consider how the law distinguishes between 'independent contractors' and 'employees' (or 'servants') since the employer is only vicariously liable for the latter. Chambers English Dictionary defines 'employee' as: 'a person employed', and the word 'employ' as: 'to occupy the time or attention of; to use as a means or agent; to give work to'. This is a rather circular and unhelpful definition, since in everyday language a householder is as likely to talk about 'employing' a decorator, who will be an independent contractor, as the decorator is to talk about 'employing' an assistant who is likely to be a 'servant'.

It is very important to be able to identify an employee, but, surprisingly at first sight, the law is very uncertain on the definition of 'employee' (or 'servant'). This is partly because the question of whether someone is an employee is relevant for a number of reasons, which include:

- Income tax – is it payable on an employment basis with deduction at source, or on a self-employed basis.
- National Insurance – are employed contributions payable by employee and employer, or is the contractor alone liable to self-employed contributions.
- Statutory duties – is a duty which applies to 'employees' relevant to the case.
- Employer's common law duty of care – does it apply to this particular person.
- Does employment protection legislation apply – can the 'employee' claim unfair dismissal, redundancy, discrimination in employment etc.

The cases are drawn from the range of contexts mentioned above, and extreme care is needed in transferring arguments to another context by way of analogy.

Given these complications, it is not surprising that there is no single, comprehensive test to answer the question 'Is Vera the employee of Winifred, or not?' What makes sense in one context may not do so in another. We also have to remember that in any given case someone, whether Vera, Winifred or a third party such as Revenue and Customs or the victim of Vera's tort, has an interest in arguing one way or the other. In theory, it is difficult to see how someone can be an employee for one purpose but not another, but it is clear that they can.

An independent contractor is said to have a contract for his services with his employer, whilst an employee (or servant) works under a contract of service. Thus, a

convenient starting point for our inquiry is the terms of the contract between the parties: how does the contract classify the person in question, as an employee or as an independent contractor? The terms of the contract, however, are not conclusive where liability to third parties is concerned and, in any case, the contract may be silent or ambiguous on the matter. Nevertheless, this is obviously a factor to be considered by the court.

No single authoritative test for determining this issue is available, but various possible tests have been formulated in the cases. The oldest of these is the 'control' test. The weakness of this traditional approach is that in the case of modern, highly specialised tasks it is difficult for the employer to exercise control over the method of doing the work, for example in the case of airline pilots, lawyers or surgeons.

A variant on this is the 'organisation or integration test', is the worker an integral part of the organisation, or an accessory to it. A chauffeur would, for example, be an employee, whereas a taxi driver would be an independent contractor on this reasoning. This test has, however, been little used as a discrete formula; it is regarded as just another, wider, way of looking at 'control'.

The same can be said for the 'economic reality' test suggested by MacKenna J in *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* [1965] 2 QB 497. This would take into account such factors as the method and frequency of payment, and the power of selection, suspension and dismissal, holiday entitlement, pension rights, whose tools, equipment and premises are to be used and the intention of the parties.

It is still probably the case that 'control' is the main criterion considered by the courts. Ultimately the decision must be taken on the facts; all the above factors are weighed up and evaluated and a balancing act is undertaken.

One common factual problem arises where an employee is 'loaned out' or otherwise placed at the disposal of a third party who makes use of his services. This raises the problem of who, in law, employs, and is liable for, the loaned person. Many 'lenders' in these situations put a clause into the contract of loan, providing that the 'borrower' is to indemnify the 'lender', where the lender has paid damages for the loaned employee's tort, so they are protected whatever the actual status of the employee turns out to be. In fact, there is a rebuttable presumption in such a case that the employee is still in the employment of the lender, and the lender will only shift the presumption in exceptional circumstances. However, in modern circumstances there is perhaps a greater willingness to accept that responsibility has shifted: *Hawley v Luminar* [2006] EWCA Civ 30, although all these cases are very fact sensitive. It seems that it will be necessary for the lender to show that he no longer has sufficient control in this sense. However, note that a clause in the agreement specifying that the hirer is deemed to be the employer may still be effective, even if he is not found to be so, in the sense that it will allow for the hirer to be made ultimately liable by means of the indemnity against damages which this clause will provide.

Vicarious liability only arises where the employee was acting in the course of his employment at the relevant time. This issue is again essentially one of fact in each case. Thus, although decided cases are useful for purposes of analogy and illustration, they must be treated with caution, and not regarded as binding authority other than in relation to the particular issue(s) before the court.

Many of the cases cannot be readily reconciled with each other. The decisions often turn on fine distinctions, and are influenced quite clearly by policy factors (i.e. whether the employer 'ought' to be liable because this will achieve what society, in the person of the judge, considers appropriate). These policy factors have also changed over time (in particular the extent to which the employer should 'insure' his employee against injury at work, as opposed to this falling on the taxpayer through social security or on the worker himself). There is also a distinction in the cases between what might be called 'ordinary' or 'casual' negligence, and other torts. Another important factor is the distinction between liability to outsiders and liability to employees for the acts of other employees. In the first situation there is usually a much stronger 'business liability' argument for holding the employer liable.

However, the main question is whether the act is regarded as being 'in the course of employment.' This means that it must be an act which is sufficiently connected with the employer's business that it is considered appropriate for liability to rest on the employer. This is sometimes a policy decision, and it is important to note that the approach of the judges as to where to draw the line has changed over the years, and is sometimes inconsistent. Cases, especially older ones, are therefore best regarded as examples rather than precedents, although there are some broad principles which apply. It is possible, for instance to distinguish between torts committed:

- In actually carrying out the assigned authorised task;
- In doing things which have been expressly forbidden;
- In doing something ancillary to the assigned task, but still relevant to the employer's business;
- In travelling to and from work, or on other work-related journeys;
- In doing things purely for the employee's benefit, but where the employment has provided the opportunity (there is a 'close connexion' between the two).

Every employee who does not live on site (such as some hotel staff) has to get to and from work. This journey is not normally regarded as part of their work. At the other extreme, some employees drive as part of their work, whether as lorry, bus or taxi drivers, or as salesmen, customer service engineers etc.. These journeys will normally be regarded as within the course of employment. Between these extremes are many more debateable situations.

- Where an employee is travelling between his ordinary residence and work by any means of transport whether or not provided by his employer he is not acting in the course of his employment unless contractually obliged to undertake the journey.
- Travelling between workplaces is in the course of employment.
- When an employee is paid for travelling in his employer's time the fact that the employee can choose the time and mode of transport does not take the journey out of the course of his employment.

- When an employee is travelling from his ordinary residence to an unusual place of work or to an emergency the employee would be acting in the course of his employment.
- A deviation or interruption of a journey would for that time take an employee out of the course of his employment.

THINK POINT - What are the main problems relating to work related journeys in relation to vicarious liability?

What constitutes a 'deviation'. Since the nineteenth century the colourful phrase 'a frolic of his own' has been used. It seems that deviating from the approved route, while still carrying out the basic purpose of the journey is still within the course of employment, as in *A & W Hemphill Ltd v Williams* [1966] 2 Lloyd's Rep 101 (HL), where passengers persuaded the driver to depart significantly from the approved route, but they were still on their way to their destination. In other cases, distinctions are very fine ones. In *Whatman v Pearson* [1868] LR 3 CP 422 a deviation to allow for a lunch break at home was held to be within the course of employment, while in *Storey v Ashton* [1869] LR 4 QB 476 a detour to collect some belongings for a fellow employee was not. The only difference between the cases appears to be the size of the deviation.

How breaks within the working day are handled. In principle, if an employee chooses to make a journey to take a break, that is a matter for him. However the cases in practice demonstrate a more than usually inconsistent approach.

o In *Hilton v Burton (Rhodes) Ltd* [1961] 1 WLR 705 a journey from a demolition site to a café was held not to be within the course of employment.

o In *Harvey v O'Dell* [1958] 1 All ER 657 a very similar journey from a temporary workplace to a café was held to be within the course of employment

It is suggested that *Hilton* is the preferable decision, because it is the worker's lunch break and the choice to make the journey (rather, say, than bringing a packed lunch) is for his own convenience. Again, many of the cases relate to a period when compulsory motor insurance was not as comprehensive and there was therefore rather more justification for finding the employer liable.

The question of liability for the deliberate wrongdoing of the employee has a long and complex history. In some cases liability has been denied on the basis that the employment only provided an opportunity for a private wrongful act, while in others (usually fraud or theft) it was held that the employer had put the employee into contact with the victim. The modern approach is to ask whether there is a sufficiently close connection between the employment and the tort. In a case of abuse by a residential school housemaster (*Lister v Hesley Hall Ltd* [2001] UKHL 22) it was held that a broad approach should be taken to this question. The court should ask: "What was the job on which the employee was engaged at the time?" It would not then be necessary to inquire whether the abuse was a way of performing authorised acts; it was better to consider vicarious liability in the light of whether the employer had taken on the care of the boys through the employee (the abuser) and whether there was sufficient connection between his employment and his torts.

On the facts, the torts had been committed on the premises of the employer and in the employer's time: the employee was caring for the boys, on behalf of his

employer, in discharge of his duties at the relevant time. Thus the torts were sufficiently connected to the employer's duties, and his employer was vicariously liable. A similar conclusion was reached in relation to abuse by a priest in *Maga v Birmingham Roman Catholic Diocese* [2010] EWCA Civ 256.

Another recent example, where the 'close connexion' test was used to find liability where an employee stole items from a container he was employed to fumigate is *Brinks Global Services v Igrox* [2010] EWCA Civ 1207. The same result was reached as in *Lloyd v Grace, Smith & Co* [1912] AC 716 and *Morris v Martin* [1966] 1 QB 716, albeit by a different line of reasoning, since in those cases the court was looking more at a wrongful mode of doing what the employee was employed to do, which seems somewhat strange. The existence or otherwise of the close connexion is seen as part of the 'fair, just and reasonable' assessment under the *Caparo* three stage test.

Dubai Aluminium Co Ltd v Salaam and Others [2002] UK HL 48 concerned complex issues of contributory liability in respect of the alleged involvement of a solicitor in a fraud perpetrated by his clients, and the 'vicarious liability' was that of the solicitor's partners, rather than an employment relationship, although the principles applicable were stated to be the same. It was held that vicarious liability extended to, as Lord Nicholls put it 'wrongful conduct ... so closely connected with acts the partner or employee was authorised to do that, for the purpose of the liability of the firm or the employer to third parties, the wrongful conduct may fairly and properly be regarded as done by the partner while acting in the ordinary course of the firm's business or the employee's employment.'

CASE STUDY

In the later case of *Mattis v Pollock (trading as Flamingo's Night Club)* [2003] EWCA 887 a club doorman, who was under instructions to act aggressively to some extent, and whose aggression was seen and approved of by the employer became engaged in an argument, went home to arm himself with a knife and proceeded to stab one of the group he had been in dispute with. While the court accepted that there was an element of personal revenge, they followed *Lister* and *Dubai Aluminium* in holding that the whole picture must be taken into account, and the previous history of approved aggression was significant in determining that this particular piece of deliberate wrong-doing was still sufficiently connected to the employment.

A further extension of the scope of liability is provided by *Majrowski v Guy's and St Thomas's NHS Trust*, [2006] UKHL 34 where the House of Lords accepted that, in principle, vicarious liability could extend to harassment at work under the Protection from Harassment Act 1997, which was either undertaken by managers (as allegedly the case in *Majrowski*), or by fellow employees, where the employer had been made aware of this (as was actually the case in *Green v DB Group Services Ltd* [2006] EWHC 1898).

THINK POINT – Name at least two reasons justifying employers' vicarious liability.

1. The employer is in a better position to absorb the legal costs either by purchasing insurance or increasing his prices.
2. The imposition of liability should encourage the employer to ensure the highest possible safety standards in running his business.

3. The tort occurs as a by-product of the business activity and should be seen as an 'enterprise liability' rather like the costs of cleaning up contamination caused by the business. This approach is highly developed in the USA but is not particularly influential in England.

One rationale given above is that the tort is committed in the context of the business; it is part of the risk which the business generates for society and should therefore be at the expense of the business. However in this respect it seems to matter little if the acts are those of an employee or someone else acting on behalf of the business, so there is no true consistency to the 'business liability' model, although it is probably the most useful general framework. It was certainly a principal basis of a significant decision on harassment. Lord Nicholls said in *Majrowski v Guy's and St Thomas's NHS Trust*, [2006] UKHL 34 that the rationale for vicarious liability was to be found in a combination of policy factors: all forms of economic activity created a risk of harm to other persons; in fairness those persons carrying on the activity should be liable in law to someone who suffered harm as a result of wrongs committed 'in the conduct of the enterprise' because financial recompense would come from 'a source better placed financially than individual wrongdoing employees ... financial loss could be spread more widely via vicarious liability, insurance and higher prices; and employers would be encouraged to see that their employees observed standards of good practice.

BREACH OF STATUTORY DUTY

Statutory duties are common in relation to health and safety. There is not sufficient time to discuss the legal theory behind liability in tort for breach of rules usually designed to regulate and control in the public interest. Parliament has enacted in s 47 of the Health and Safety at Work Act 1974 that a breach of regulations made under the Act will give rise to a claim in damages.

The duty may impose strict liability, or whatever is practicable, or may be a duty requiring the employer to do what is reasonable. It will be detailed and specific.

- A higher duty than 'reasonably practicable' is clearly more onerous than a common law duty. 'Reasonably practicable' may be more onerous, and will certainly be specific.
- Detailed duties may exclude areas of activity.
- Statutory duties may be owed to non-employees; many duties in relation to, for instance building sites, apply to all those on site, whether employees, contractors or the employees of third parties.

There are other criteria for pursuing a claim for breach of statutory duty:

- (a) The obligation must be placed by the statute on this defendant;
- (b) The statute must protect the claimant;
- (c) The defendant must have breached the standard set by the statute;
- (d) No liability by analogy – the statute only applies within its specific terms;

(e) The defendant's breach of duty must have caused the damage;

(f) The harm suffered must be within the scope of the general class of risks at which the statute is directed.

CASE STUDIES

Correct defendant

The decision in *Harrison v National Coal Board* [1951] AC 639 provides a good illustration of this point. It was held that where statutory duties relating to safety in mines generally were imposed on the mine owner, but duties relating to shotfiring were specifically imposed on the shotfirer, the mine owner was not liable for breach of statutory duty regarding injuries caused by the shotfiring. The statute must impose the duty on the defendant himself. It is a question of interpreting the Act, or regulation, to see on whom the burden is imposed. In some cases the duty may be imposed, in effect, on the claimant. Once the statute has been interpreted to impose a duty on the defendant, the general principle is that the obligation is personal to the defendant and he cannot escape liability by delegating its performance to someone else. This rule applies whether the 'reasonably competent person' is an employee or an independent contractor.

Membership of the prescribed class

A statutory duty will normally define the classes of persons for whose benefit it was designed, and in such a case it will depend on the construction of the relevant statutory provision whether the claimant is a member of the protected class. In *Knapp v Railway Executive* [1949] 2 All ER 508, a statute provided that gates must be erected at level crossings and supervised and maintained by the railway authorities. A motorist attempted to stop his car at a crossing but, due to faulty brakes, the car hit the gate. The gate had not been maintained, and swung back and injured the train driver. The court held that there was no remedy under the statute available to the train driver against the railway authorities because the purpose of the statute was only to protect road users against danger from the railway.

Again, in *Hartley v Mayoh & Co.* [1954] 1 QB 383, a fireman was fatally electrocuted whilst attending a fire at the defendants' factory. There were statutory regulations for the protection of 'persons employed' at the factory. Since firemen did not come within that description, his widow failed in her action for breach of statutory duty. *The defendant must have breached the standard set by the statute*

The standard to be achieved is set in the statute itself, thus each case must be looked at on its own facts; nevertheless a body of precedent builds up over the years on commonly used expressions, and that factor must not be overlooked. It does not follow that the standard is the same as the common law negligence standard. There are two relatively common higher standards imposed by legislation.

- In many instances liability is strict (the word 'absolute' is often used instead of 'strict') as, for example, in regulations under the Health and Safety at Work Act where one comes across expressions such as '[some part of machinery] shall be securely fenced'. In *John Summers v Frost* [1955] AC 740, such legislation required that 'every dangerous part' of a machine be fenced. The claimant won damages for injury to his thumb caused by contact with a

grinding wheel, despite the fact that putting a guard over the only unfenced part of the wheel would have rendered it unusable.

- Frequently, the duty is to protect workers, operators and others 'so far as is reasonably practicable', or words to that effect. In *Larner v British Steel plc* [1993] 4 All ER 102, the claimant brought an action for a failure on the part of his employer to see that his workplace was 'made and kept safe', 'so far as it was reasonably practicable to do so'. The duty on the employer to do this was imposed by s. 29 (1) of the Factories Act 1961. The claimant gave evidence that reasonable steps could have been taken, but the defendant submitted no evidence. It denied liability, but did not specifically plead that it was not reasonably practicable to make the workplace safe merely that the accident which had occurred was not reasonably foreseeable. It was held that s. 29 (1) made no reference to foreseeability, thus foreseeability was not relevant to liability here. To imply such a test, said the court, would limit a claim for breach of statutory duty to a situation where negligence would also succeed. This decision shows that while a 'reasonably practicable' standard is not as strict as a 'shall do' standard, it is still stricter than a negligence standard.

Each statute must be carefully construed to see whether it was the intention that the duty should be strict or that it is dependent on wrongful intent or negligence. The term 'statutory negligence' has been used in some cases to refer to statutory standards based on negligence. However, although there may be resemblances, in some cases, between the common law action for negligence and the tort of breach of statutory duty, the modern tendency is to keep the two causes of action separate. This encourages claimants to plead both, in the hope that one will be found applicable even if the other is not.

No liability by analogy

The legislation spells out the obligations of the defendant. It applies to, and only to, the situations covered by the legislation. There is no room for extending the duty by analogy. In *Chipchase v British Titan Products* [1956] 1 QB 545 regulations provided that every platform from which a workman could fall more than six feet six inches must be at least 34 inches wide. The claimant fell from a platform which was six feet from the ground and only nine inches wide. It was held that there was no breach of the statutory duty, which simply did not apply to the platform in question. The Defendant's breach of duty must have caused the damage

Causation

As in all other torts, the claimant must prove legal causal connection between the breach and his injury. In Lord Reid's words, in *Bonnington Castings v Wardlaw* [1956] AC 613: 'at least on a balance of probabilities [that] the breach of duty caused or materially contributed to his injury'. This case involved liability for inhalation of silica dust, due to inadequate ventilation, and caused by a breach of the Factories Act. In *McWilliams v Arrol* [1962] 1 All ER 623, a steel erector fell to his death because he was not wearing a safety harness. The defendants had broken a statutory duty in failing to provide a safety harness, but the evidence did not establish that the deceased would have worn the harness even if one had been provided. Indeed the reverse seemed likely, because the defendants were able to show that the deceased, and his workmates, rarely if ever used safety harnesses. The practice was common

in the construction industry. The House of Lords held that the claimant had not discharged the burden of proving that the death was caused by the breach of statutory duty. There was no duty on the defendant to see that the harness was worn. Note that the regulations in force today are much more prescriptive, and do require that equipment is properly used, so the case would not be decided in the same way.

The harm suffered is within the scope of the general class of risks at which the statute is directed

In *Gorris v Scott* (1874) LR 9 Ex 125, a statute required animals carried as deck cargo on board ship to be penned in. In breach of the statute some sheep were not penned in and were washed overboard. The court held that an action for breach of statutory duty would fail because the statute was intended to prevent the spread of disease, not to prevent animals from drowning. Evidently, the claimant's damage must come within the terms of the statute concerned; and it is likely that the stricter the duty imposed by the legislation, the stricter the court will be in requiring the claimant to keep within the letter of the law.

Law of Tort

In *Close v Steel Co. of Wales* [1962] AC 367, the House of Lords had to consider s. 14 of the Factories Act 1961, which imposed a duty that dangerous parts of machinery 'shall be securely fenced'. The claimant workman was injured when the piece of metal being machined disintegrated and fragments flew out of the machine and hit him. It was held that the legislation was created in order to protect against dangers associated with putting hands into the proximity of moving machinery, not those associated with disintegrating work pieces. An employee can, therefore, rely on a breach of s. 14 only where he comes into contact with the dangerous part of the machine; an injury caused in a different way is not covered.

The general approach to the question of scope is somewhat less strict than in *Gorris* and *Close*. In *Grant v National Coal Board* [1958] AC 649 the Coal Mines Act 1911 provided that 'the roof and sides of every travelling road ... shall be made secure'. The accident occurred because a bogie on which the claimant was travelling was derailed as a result of a fall of stone from the roof. It was held that the protection of the statute was not limited to direct falls from the roof but covered accidents caused indirectly by such falls.

THINK POINT - Can the actions of the claimant put a defendant in breach of statutory duty?

Some duties are imposed on more than one party, and this may include the claimant. In *Ginty v Belmont Building Supplies* [1959] 1 All ER 414, the claimant was an experienced employee employed by the defendants, who were roofing contractors. Statutory regulations, imposing duties on both parties, required that crawling boards should be used for work done on fragile roofs. Although the defendants provided such boards, the claimant did not use them and consequently fell through a roof, sustaining serious personal injury. Both parties were, in law, in breach of their statutory duties, but the judge held that the only wrongful act was that of the claimant. Pearson J said: 'It would be absurd if, notwithstanding the employer having done all he could reasonably be expected to do to ensure compliance, a workman, who deliberately disobeyed his employer's orders and thereby put the employer in

breach of a regulation, could claim damages for injury caused to him solely by his own wrong-doing.'

If, however, the claimant establishes the defendant's breach of duty, and that he suffered injury as a result, he establishes a prima facie case against the defendant, who will escape liability only if he can rebut this by proving that the only act or default which caused the breach was that of the claimant himself. Thus, where some fault can be attributed to the defendant, e.g. a failure to provide adequate instructions or supervision, the claimant will recover some damages. They may, of course, be substantially reduced for his contributory negligence. In *Ross v Associated Portland Cement Manufacturers Ltd* [1964] 2 All ER 452 the deceased, a charge-hand steel erector, had to repair a safety net in the employer's factory. He was simply left to get on with the work as he thought best and without any proper equipment. The evidence showed that the deceased could use any equipment he could find, and could also ask the chief engineer for advice or equipment, though no encouragement was given with regard to the latter possibility, in spite of the fact that he was a newcomer to the job and the task was of an unusual nature for a steel erector. Whilst using a ladder (according to the evidence a moveable platform should have been used) the deceased met his death. In the House of Lords it was found that the employer was partly responsible (66 per cent) because it had not provided proper equipment and kept the place of work as safe as was reasonably practicable; in particular it was important that the deceased's decision to use the ladder was forced upon him because of the absence of appropriate equipment for the job.

Session Five: Nuisance Torts. Remedies - damages and injunctions.

NUISANCE

Few words in the legal vocabulary are bedevilled with so much obscurity and confusion as 'nuisance' ... Much of the difficulty and complexity surrounding the subject stems from the fact that the term 'nuisance' is today applied as a label for an exceedingly wide range of legal situations, many of which have little in common with each other.

Fleming *Law of Torts*, 8th edn, at p. 409.

This chapter deals with a number of torts which regulate the way land can be used, and in some cases protect landowners against interference with their occupation by others. Although the emphasis is firmly on the protection of the rights of the individual claimant, the nature of the interference in some cases such as air, land, water pollution, does lead to a tie in with environmental and planning law. The House of Lords has, however, recently stated in the clearest terms in two cases that the common law rules only come into play when there is no relevant statutory regulation. We shall be looking at these cases (*Marcic v Thames Water Utilities* [2004] 1 All ER 135 and *Transco v Stockport MBC* [2003] 3 WLR 1467) in more detail later on.

Definitions

The first thing to get firmly in mind is that there are two distinct torts with names incorporating the word nuisance, i.e. private nuisance and public nuisance. Some commentators deny that there is anything other than the name in common, and that this similarity of names produces only confusion and an illegitimate tendency to apply rules relating to the one in the context of the other. The two torts certainly do not share a common history, although both deal with activities which are unacceptable as between neighbours. There are also 'statutory nuisances' dealt with under public law principles

The word 'nuisance' is well established in everyday English as being an activity, state of affairs, or person which or who is upsetting, annoying or discommoding, in virtually any context. In law the word is restricted to:

- (a) A harmful or noxious activity or state of affairs, extending over time;
- (b) The harm resulting from (a).

The nuisance must be 'actionable' which means the sub-class of (a) which is within the scope of legal liability.

Private Nuisance

This occurs where the defendant culpably creates or permits a state of affairs which (a) causes or permits physical damage to the claimant's property or (b) appreciably interferes with the claimant's enjoyment of his property.

The judges tend to reduce the principle of private nuisance to a Latin tag: *sic utere tuo ut alienum non laedas* (you must use your own property so as not to damage the property of others). This does not bring into the equation the balancing of interests. Some word such as 'culpably' is required to qualify 'damage'. This word is used as it is more precise than 'improperly' in suggesting the notion of legal liability.

'Culpably' needs to be handled with care. It is used as a synonym for 'actionably', in the sense that it is bringing into the equation the fact that not all nuisances are recognised and penalised by the law, and can be analysed into three quite separate elements. The first relates to the mental element of intention or negligence, the second to the foreseeability of the damage complained of and the third to the extent or quality of the interference, which goes to reasonableness.

Such interference, where it affects the home, may engage the European Convention. Article 8 provides:

1 Everyone has the right to respect for his private and family life, his home and his correspondence.

2 There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

So where there is a complaint of a nuisance affecting enjoyment of the home, certainly where the nuisance is created by a public authority, this may also be a breach of Article 8 rights. The European Court of Human Rights has so held on a number of occasions, starting with *López Ostra v Spain* (1995) 20 EHRR 99 which concerned smells and other interference from ineffectively managed industrial effluent, and culminating in the case of *Hatton v United Kingdom* (Application 36022/97 3rd July 2003) which concerned night flying regulations at Heathrow Airport. The claimants in *Hatton* failed on the merits; the night flying scheme was held to have achieved a fair balance between the rights of the aggrieved residents and the interests of society as a whole in having adequate airport capacity.

CASE STUDY

In *Marcic v Thames Water Utilities* [2004] 1 All ER 135 the claim related to flooding which resulted from the failure of the local water undertaker to provide adequate storm drains. The House of Lords pointed out that the obligations of statutory water and drainage undertakers had for many years been regulated by statute, with the authority under a duty to secure effective drainage. An aggrieved party can complain to the regulator, who can make enforcement orders if the duty is not being complied with. The regulator's performance of his functions is subject to judicial review. Failure to comply with an order of the regulator is itself an actionable breach of statutory duty. The legislation makes clear that this is the sole means of controlling the operations of the water undertaker. The House held that the claimant could not use private nuisance to sidestep the statutory scheme. They confirmed that there

was a potential claim under Article 8, but decided, with some reservations, that the statutory scheme did adequately protect the claimant's interests. Crucially it allowed for the regulator to take a broad view of the public interest and to establish rational priorities for remedial work.

WHO CAN SUE?

Before we address the wider issues, it is important to grasp firmly a significant limitation to the scope of private nuisance. It is an action only available to an owner or occupier with a recognised legal or equitable interest (which excludes family of the occupier, visitors etc.), and is in respect of damage to his interest in the land. Although in some cases this damage takes the form of interference through noise or smells, which are actually perceived by the occupier, the claim in nuisance is for the diminution in value or utility of the land which this produces.

In *Malone v Laskey* [1907] 2 KB 141 the wife of the occupier was injured when a defective cistern fell on her while she was using the lavatory. Her claim fell between two alternatives. At that time a claim in 'pure' negligence did not lie for defective premises in these circumstances. The position here has now changed (see *AC Billings & Sons Ltd v Riden* [1958] AC 240). Although it was found as a fact that the reason for the fall of the cistern was that the supporting bracket had been loosened by vibrations from the working of machinery on the defendants' adjoining property, which is an entirely typical form of nuisance, the claimant could not recover in nuisance for her personal injuries as she was regarded as a mere licensee (i.e. having no interest of her own in the land). The majority of the House of Lords in *Hunter v Canary Wharf* [1997] 2 All ER 426 expressly approved *Malone v Laskey*. Lord Goff cited with approval passages from an article by Professor Newark asserting a very traditional view of the scope and purpose of nuisance ('The Boundaries of Nuisance' (1949) 65 LQR 480):

Disseisina, transgressio [trespass] and *nocumentum* [nuisance] covered the three ways in which a man might be interfered with in his rights over land. Wholly to deprive a man of the opportunity of exercising his rights over land was to disseise him, for which he might have recourse to the assize of novel disseisin. But to trouble a man in the exercise of his rights over land without going so far as to dispossess him was a trespass or a nuisance according to whether the act was done on or off the claimant's land ... In true cases of nuisance the interest of the claimant which is invaded is not the interest of bodily security but the interest of liberty to exercise rights over land in the amplest manner. A sulphurous chimney in a residential area is not a nuisance because it makes householders cough and splutter but because it prevents them taking their ease in their gardens. It is for this reason that the claimant in an action for nuisance must show some title to realty ... The term 'nuisance' is properly applied only to such actionable user of land as interferes with the enjoyment by the claimant of rights in land.

THINK POINT – Should nuisance be so restricted?

In the decade preceding *Hunter* there were many actions similar to *Khorasandjian v Bush* [1993] 3 All ER 669. This case appeared to allow non-owners to allege nuisance. Antisocial behaviour, often referred to as stalking, was either becoming commoner or attracting more forceful legal action. Assimilating it to private nuisance was clearly an extension of the existing law, but one which could, in principle, be justified by the application of the incremental approach advocated in *Caparo v Dickman* [1990] 1 All

ER 568. Indeed Lord Cooke endorsed this approach in his very forceful dissent in *Hunter*. However the majority overruled *Khorasandjian* and made it clear that harassment was not a sub-species of private nuisance. The reasoning of Lord Goff is formidable, and certainly draws on and develops in a coherent way the old case law. The existence of the new statutory tort of harassment does remove some of the necessity for the common law to fill this gap. It can, however, be seen as a victory for historical analysis over a developmental one. We will look at this area in more detail when we consider harassment generally.

However it should be noted that the action for breach of Article 8 of the European Convention is not restricted to landowners. A person's entitlement to enjoyment of his home does not depend on him owning or renting the home: *McKenna v British Aluminium* [2002] Env LR 30.

CULPABILITY I: THE MENTAL ELEMENT

Liability for acts

Nuisance is essentially a tort of strict liability, in the sense that it will be no defence to show that the nuisance was not created intentionally, or even that the defendant used all reasonable care.

CASE STUDY

In *Cambridge Water v Eastern Counties Leather* [1994] 1 All ER 53 The defendant had used an industrial solvent quite carelessly, allowing it to spill. At that time it was considered to be so volatile that it would evaporate quickly. The claimants found traces of the solvent polluting the water in their new bore-hole. It was traced to the defendants, and it was found that some of the solvent had penetrated the ground and remained there.

The relevant legal finding was that, in a case of this kind, where the nuisance complained of is by way of a positive act of the defendant there is no need to prove intention or want of reasonable care. Thus the mere fact that ECL had acted in accordance with accepted practice and certainly with no desire or intention to pollute their neighbour's water was not sufficient to exonerate them.

Of course in many cases the behaviour complained of is either deliberate or careless. This is however largely irrelevant to liability in private nuisance.

CASE STUDY

Fred drops a tin of paint stripper as he is trying to open it while standing on his front porch. The stripper splashes. Some goes on Bert's car, which is parked in the street. Some goes on to a planter in the next door garden. The pansies and petunias in the planter are poisoned. They belong to Fred's neighbour, Gladys.

What cause of action do Bert and Gladys have against Fred?

This could easily be seen as negligence – Fred should be careful handling this product. The harm is foreseeable. It is unlikely to be nuisance. Although Bert is a road user whose use of the highway is affected (which could be public nuisance) and Gladys is a neighbour whose property is harmed, this does not arise from a state of affairs but from a single action. It is thus not likely to be nuisance even though it is one neighbour harming another neighbour's property. Although there is a separate rule regulating harm caused by the escape of dangerous things from property, this must be in the course of a 'non-natural user' of the property, which is not the case here.

Most nuisances do arise from a positive act of the defendant, and are therefore covered by the general rule. There are, however, three exceptional cases.

Positive duty to act and liability for omissions

There are a limited number of circumstances where the defendant is under a positive duty of this kind, either by a specific assumption of responsibility or by a general rule of law, such as the liability of the owner of premises fronting the highway to keep them in repair: *Tarry v Ashton* (1876) 1 QBD 314. This is of course not actually

private nuisance, but it is treated as equivalent by the courts. The defendant bought a property with a gas lamp suspended from a wall bracket overhanging the pavement. As a prudent man he had this inspected by a competent gas fitter, who negligently reported that it was in good condition. In fact it was old and decayed, and a few months later after it had been weakened when a workman rested a ladder against it, climbed up the ladder, slipped and fell, the lamp itself fell on a passer-by. Although the defendant was not negligent, he owed a non-delegable duty in relation to the lamp, and remained liable for the non-performance of that duty, notwithstanding the employment of an apparently competent contractor. A similar duty can arise in a private nuisance context, where for example one property owner has assumed a liability to repair, as in *Wringe v Cohen* [1939] 4 All ER 241, where the Court of Appeal relied on *Tarry v Ashton* to hold an owner liable when a wall for which he was responsible collapsed on to his neighbour's shop. Where premises were a nuisance as a result of want of repair, rather than the act of a trespasser or concealed natural forces, liability was strict. The defendant had the right and responsibility to inspect and repair, and was liable for this default. The rule is expressed as relating to harm on the highway or to neighbours where the property fronts the highway. It is thus not universally applicable in nuisance. The defendant was not actually aware of any defects, but he had been fairly lackadaisical in inspecting the property, and could therefore be said to be at fault, but the court considered that immaterial. A similar conclusion was reached in *Spicer v Smee* [1946] 1 All ER 489, where a defective electrical system caused a fire. The House of Lords has subsequently regarded liability for trees as dependent on the usual standard of good estate management, not as a strict rule. However the standard required will be high where the tree overhangs a highway because of the high degree of risk of harm: *Caminer v Northern and London Investment Trust* [1951] AC 88. A tree on the defendants' premises was internally diseased; a branch fell on a car parked on the adjacent street. The defendants argued that they had employed expert and competent technical experts to advise. It was held that they were not under an absolute liability, but an obligation to act reasonably, albeit up to a very high standard of performance, given the impact of any default on the public.

Nuisance arising from natural causes

In this situation, the defendant has not brought the nuisance about himself, he is simply the unwilling host to a natural phenomenon. In such cases liability is dependent on fault in a sense equivalent to the position in negligence. The defendant must act reasonably in the position in which he finds himself placed.

CASE STUDY

In *Goldman v Hargrave* [1967] 1 AC 645 (PC) a tree on the defendant's land was struck by lightning. The defendant felled the tree and took steps to extinguish the fire which were inadequate; as a result the fire spread. The defendant was liable in nuisance. Similarly in *Leakey v National Trust* [1980] 1 All ER 17 the claimant's property was damaged as a result of natural subsidence of land forming part of the defendant's property. The defendant knew of the situation, had failed to take measures which were reasonable, proportionate and affordable and was liable in nuisance.

In *Bybrook Barn Garden Centre v Kent CC* (2001) *The Times*, 5 January 2001 this principle was applied to a case where a culvert in a stream was adequate when

installed, but became inadequate after a change in the nature of the catchment area. The Council knew, or ought to have known, of this, and were held liable on the *Leakey* principle for flood damage (which resulted from natural rainfall). *Marcic* appears to deny such a right in the context of statutory undertakers, but to the extent that *Bybrook Barn* is concerned with common law liability it appears still to be good law.

A similar approach was taken in *Wandsworth LBC v Railtrack plc* [2002] Env LR 218 where the nuisance was from pigeon droppings from a roost in a railway overbridge.

The criteria for liability are a nuisance in fact, arising on premises for which the defendant is responsible and which it is reasonable to expect the defendant to take action to abate. However this rule does not apply where a landowner is faced with the threat of flooding. He is entitled to protect his own property against the 'common enemy' of the river or sea, even if this results in his neighbour's property flooding: *R v Commissioners of Sewers for the Levels of Pagham* (1828) 8 BC 356; *Nield v LNWR* (1974) LR 10 Exch 4. Here of course the water does not arise on the defendant's land. In *Arscott v Coal Authority* [2004] EWCA Civ 892 this rule was reaffirmed and applied. It was also held that it was compatible with Article 8. There is, however, a *Leakey* duty in relation to water on one's land which runs off onto your neighbour's land: *Green v Lord Somerleyton* (2003) 11 EG 152 (CS).

THINK POINT - How do you account for defendants being held responsible for the consequences of the operation of natural forces?

In the above cases it was recognised that the duty owed by the defendant was not absolute; it was conditioned by reference to the defendant's resources. It is also a duty of care, in the sense that, where what is relied on is non-feasance (inaction) following an extraneous incident, there must be an appreciation (assessed objectively) of the foreseeability of harm. This obviously introduces concepts and terminology familiar from the law of negligence. It has been suggested as a result that nuisance, rather like occupiers' liability, is merely a special case of negligence. This goes too far. It is pointless to deny similarities which do exist, but in nuisance liability for malfeasance depends on the result produced, not on the mental attitude thereto of the producer. In relation to physical harm one acts at one's peril, and in discomfort cases it is not carelessness but the character of the locality and the degree of disturbance which will decide. Consider, however, the observations of Lord Goff in the *Cambridge Water* case which adopt the above analysis of *Leakey* and *Goldman*. Since lack of foreseeability is, in practice, very much a long-stop to deny liability where proper activities, carried out without consciousness of risk creating potential, turn out to have adverse effects, and since those consciously doing things which have a potential to disrupt are well aware of this, foreseeability is not generally a live issue. A claim against Scarborough council over the collapse of the Holbeck Hall Hotel because of lack of support from the council's adjoining land was framed in nuisance by analogy with *Leakey*, although the court regarded negligence as being a necessary ingredient of the cause of action: *Holbeck Hall Hotel Ltd and Another v Scarborough Borough Council* [2000] 2 All ER 705.

Acts of third parties

In *Sedleigh-Denfield v O'Callaghan* [1940] 3 All ER 349 the local authority put a culvert into a stream on the defendant's land. The culvert was inefficient, and flooded the claimant's land when it became clogged with leaves. The defendant knew of the problem (although he had not granted permission for the construction of the

culvert), but did nothing either to get those responsible to deal with the problem or to clear the blockage himself. This was sufficient to establish liability. It was, however, essential to the decision that the defendant was aware of the position and had not acted reasonably in the light of the position in which he was placed, i.e. that there was negligence. It was also the case that the defendant had adopted the nuisance in the sense that he took advantage of the improved drainage of his land which the culvert normally provided.

CULPABILITY II: FORESEEABILITY

Again, the leading case is *Cambridge Water*. Lord Goff considered the case to be within the rule in *Rylands v Fletcher* (see later). He did, however, express certain views on liability in nuisance because he regarded *Rylands v Fletcher* as essentially a special case of nuisance. In his Lordship's view, there was no strict (in the sense of absolute: note the apparent verbal inconsistency) liability in nuisance. It was an essential prerequisite that there should be foreseeability of the relevant kind of harm. In this respect he relied on the decision in *The Wagon Mound (No. 2)* [1967] 1 AC 617. This does not need further discussion here, as it is the same principle which applies in relation to negligence.

THINK POINT - Does Lord Goff's approach mean that we can forget about the first meaning of 'culpable'?

It is clear that there is now much more emphasis on the effects of the defendant's behaviour. Where action is deliberate you will not need to enquire what the reasonable man ought to have foreseen. The requirement of foresight where the behaviour is not designed to produce the results the claimant complains of, does retain some element of fault. A defendant who sees a risk, and runs it, believing that he has the situation under control, is 'culpable' even if only to a very limited extent. At the least he has put his interests ahead of others. The defendant who acts with the best intentions, but who has not weighed up the risks properly, is more clearly 'culpable'. He has not had proper regard for the interests of others.

THINK POINT - Why does the law impose liability for omissions and treat acts as unlawful by reference to the results and not to the culpability of the defendant in nuisance, but not in negligence?

Negligence is not a relationship. The only necessary link between the claimant and the defendant is the incident. The key is that the defendant must have been at fault in handling the circumstances surrounding the incident. In nuisance the two occupiers each have rights, and it is the infringement of the rights, not the fault involved, which is crucial.

CULPABILITY III: UNREASONABLENESS

'What would be a nuisance in Belgrave Square would not necessarily be so in Bermondsey'. *Sturges v Bridgman* (1879) 11 Ch D 852 at p. 865 per Thesiger LJ.

Striking the balance

Most of our activities impinge on our neighbours. Theirs in turn impinge on us. To a great extent we accept this on a basis of live and let live. However, when there is a claim that someone has gone outside this region of civilised coexistence, a balance

must be struck. The law generally seeks to hold a fair balance between the gravity, persistence and motive of the defendant's conduct and the nature and quality (but not duration) of the claimant's occupation of his land, in the light of the character of the locality. Judges have tried down the years to sum up this process in a single sentence:

Those acts necessary for the common and ordinary use and occupation of land and houses may be done, if conveniently done, without subjecting those who do them to an action: *Bamford v Turnley* (1862) 3 B & S 62 at p. 83 *per* Bramwell B.

A balance has to be maintained between the right of the occupier to do what he likes with his own and the right of his neighbour not to be interfered with: *Sedleigh-Denfield v O'Callaghan* [1940] AC 880 at p. 903 *per* Lord Wright.

[A] useful test is perhaps what is reasonable according to the ordinary usages of mankind living in society, or, more correctly, in a particular society: *Ibid.*

There is here no dispute that there has been and is likely to be in the future an interference with the claimant's enjoyment of [his property]. The only question is whether this is unreasonable. It is a truism to say that this is a matter of degree: *Miller v Jackson* [1977] 3 All ER 338 *per* Geoffrey Lane LJ.

The judge in concluding that the noise did not constitute an actionable nuisance had applied the correct test, namely whether according to the standards of the average person and taking into account the character of the neighbourhood, the noise was sufficiently serious to constitute a nuisance: *Murdoch v Glacier Metal Ltd*, *The Times*, 21 January 1998 *per* Pill LJ.

It is equally a truism that the resolution of this question is going to involve a balancing exercise which will in the end be categorised as a question of fact. This is to be assessed pragmatically, case by case, and not by reference to abstract criteria. In the *Glacier Metal* case the judge was held to have rightly refused to accept that the fact that the noise was marginally above a World Health Organisation approved level for disturbance of sleep was itself conclusive that there was an actionable nuisance. On the other hand there are certain recurrent factors which the courts have recognised as having weight where they are relevant. There will inevitably be a degree of overlap, in the sense that certain facts will fit into two or more categories. In *Delaware Mansions v Westminster CC* [2002] 1 AC 332 Lord Cooke took this approach rather further:

The answer to the issue falls to be found by applying the concepts of reasonableness between neighbours (real or figurative) and reasonable foreseeability which underlie much modern tort law and, more particularly, the law of nuisance. The great cases in nuisance decided in our time have these concepts at their heart ... In both the second *Wagon Mound* case and *Goldman v Hargrave* the judgments.... are directed to what a reasonable person in the shoes of the defendant would have done. The label nuisance or negligence is treated as of no real significance. In this field, I think, the concern of the common law lies in working out the fair and just content and incidents of neighbour's duty rather than affixing a label and inferring the extent of the duty from it.

THINK POINT - What factors do you consider relevant for the balancing exercise described above?

Material considerations

The defendant's unworthy motive

Some activities are either lacking in social utility (e.g. storing unsightly refuse) or are motivated by spite or malice. This will be taken into account when deciding whether they are unreasonable. In *Christie v Davey* [1893] 1 Ch 316 the claimant was a music teacher. The defendant took exception to what he perceived as a noise nuisance arising from lessons and other musical activities, and retaliated by creating a cacophony of his own to distract the claimant. How should these conflicting interests be reconciled? The judge accepted that the claimant's actions were in good faith, but the defendant's were not, and appears to have assumed that the claimant's actions were not sufficiently disruptive to be unreasonable. The defendant was enjoined from creating a further nuisance because he was not acting in good faith. It was not legitimate to use his property for the purpose of annoying his neighbours.

In *Hollywood Silver Fox Farm v Emmett* [1936] 1 All ER 825 following a difference of opinion over a right of way, the defendant arranged for his son to go shooting near the boundary of the claimant's fur farm. There were rooks and other vermin there to be shot, but the defendant also knew that loud noise deterred mating, impeded whelping and provoked infanticide among silver vixens. Again the malicious intent was enough to constitute a nuisance. There is no absolute right to make a noise, and motive is relevant.

Utility of the defendant's activity

It is easy to condemn those who are acting out of spite or malice. Should particularly beneficial activities be given special privileges? This is not what happens in practice, although they are not treated with undue rigour. There is also a need to distinguish between the activity as such and an unreasonable approach to carrying it out. In *Southwark LBC v Mills; Baxter v Camden LBC* [1999] 4 All ER 449 it was held that the activities of neighbouring occupiers in a block of flats would not amount to a nuisance unless there was something excessive or unusual about them, even where the sound insulation was poor.

This is an example of things being 'conveniently done'. In *Sampson v Hodson-Pressinger* [1981] 3 All ER 710 the claimant recovered damages in nuisance against the occupant of a terrace above his sitting room in respect of noise and vibration. This was explained in *Southwark* as an example of an excessive or inconvenient use. In *Andreae v Selfridge* [1937] 3 All ER 255 the defendant was rebuilding his shop which adjoined the claimant's hotel. In order to reduce the period of closure to a minimum, work went on unabated round the clock, rendering sleep impossible. The court acknowledged that a certain amount of disruption during normal working hours was inevitable, and would not be a nuisance, on a basis of 'live and let live'. The defendant conceded that he had not in fact had proper regard to the effect of his operations on the claimant, with the result that there was an actionable component to the disruption which the claimant had suffered. In *Bellew v Irish Cement* [1948] IR 61 an injunction was granted in respect of nuisance from a cement factory, which had the effect of closing the factory down although it was the only local source of supply at a time of global shortages. On a smaller scale, in *Adams v Ursell* [1913] Ch 269 the local fast food shop was closed down because it caused unreasonable

interference, although it too was, in its way, a valuable local resource. In *Dennis v MoD* [2003] EWHC 793 (QB) it was held that a serious and prolonged noise nuisance from RAF flight training could not be justified on grounds of public interest. However the public interest aspect did influence the remedy.

CASE STUDY

In *Miller v Jackson* [1977] 3 All ER 338 the defendant was a cricket club and the claimants the owners of a house recently built on land adjoining the club, and in easy range of the wicket. It was generally agreed that cricket was a good thing on health and cultural grounds. A majority of the Court of Appeal (Lord Denning dissenting) held that the regular hitting of balls into the claimants' property, with an appreciable risk of damage, constituted a nuisance. The decision was reached reluctantly, but the reluctance was largely on the basis of the claimants coming to the nuisance (and taking the benefit of a quiet open area beyond their boundary on all but 20 or 30 days in the year). The utility of cricket as a healthy pastime or essential part of English culture cut little ice with the majority.

Coming to the nuisance

Is it fair for a newcomer to complain? He can see what the defendant is up to, and if he doesn't like it, he should settle down elsewhere. Indeed, if the law had not been laid down in the last century, when there was much greater stress on rights of property and less respect for activities, this point might have been accepted. However, the position is otherwise. In *Sturges v Bridgman* (1879) 11 Ch D 852 the defendant was a manufacturing confectioner, whose operations were long established and provoked no complaint until the claimant, a physician, erected a consulting room on his property immediately adjacent to the workroom. Noise and vibration in the consulting room were intolerable. The claimant's action succeeded. His property right to use his premises as he wished had been interfered with. It was an area where the preponderance of activity was professional rather than industrial. The claimant was thus appropriate to the area, the defendant was not. The fact that the claimant had 'come to the nuisance' was regarded as subsidiary. There was some reluctance to accept this argument in *Miller v Jackson*, but the matter was regarded as being concluded by authority.

Character of the locality

How is this relevant? Is everyone not entitled to the same level of amenity? It has sometimes been argued that the law of private nuisance operated as a primitive form of town and country planning control. How effective do you think it was to allow the pattern of development to be controlled by those who complained about their neighbours? There may have been some impetus given to the concentration of noxious trades in particular places, on the ground that they would not complain of each other, but this seems to be largely accidental. The factories were certainly well away from the factory owners' houses, but then the owners could afford to move away from the nuisance!

There has, however, traditionally been a distinction drawn between nuisances involving 'material injury to [the claimant's] property' and those 'productive of sensible personal discomfort', and we need to consider what this is. This distinction was made in those terms in *St Helen's Smelting Co. v Tipping* (1865) 11 HL Cas 642.

In the former category of case, the claimant's rights are absolute while in the latter there is an element of relativity.

CASE STUDY

Karl operates a chemical plant in Coketown, one of the last centres of heavy industry in England. Fumes from the plant create nasty smells and smuts which make life very messy for Vladimir and Joe. Vladimir is Karl's immediate neighbour, and the operator of a smelting plant. Joe lives half a mile away, across the river on the edge of Squire's Chase, an exclusive residential area. In addition, chemicals in the fumes are eroding the stone mullions of Nikita's boardroom windows. Nikita is Karl's neighbour on the other side, and runs an oil refinery.

Advise Karl as to his liability in nuisance.

Nikita appears to have an action: he has suffered physical damage. Joe also appears to have an action: he is relying on discomfort, but is entitled to the environmental quality appropriate to an exclusive residential area. Only Vladimir is likely to miss out: his claim is based on discomfort, but he is only entitled to the environmental quality appropriate to a heavy industrial zone.

Sensitive users

The concept of reasonableness cuts both ways. If the defendant can cause only a reasonable amount of disturbance, the claimant is entitled only to a reasonable quality of amenity. As I hope you can see, this category is confined to the interference type of nuisance. In *Bridlington Relay v Yorkshire Electricity* [1965] 1 All ER 264 the claimant claimed that the defendant's main power cable would interfere with TV reception by its relay station. Is such interference a nuisance? The judge was 'prepared to take judicial notice of the fact that the reception of television has become a very common feature of domestic life', but as it was recreational rather than occupational, and there was no (perceived) element of noxious or dangerous interference, it was held no nuisance to interfere with TV reception as such. The claimant required a greater freedom from interference than a domestic viewer to justify charging for a relay service. Bridlington at the time had poor reception from domestic aerials because the transmitters were hidden behind hills. The Bridlingtonians, being Yorkshiremen, would only pay for the relay if it gave a much better picture. This need for an ultra-high quality of reception was an undue sensitivity which itself disentitled the claimant from a remedy.

[Is TV really so unimportant? Couch potatoes will be relieved to learn that the low value placed on TV as such has been rejected in the later Canadian case *Nor-Video v Ontario Hydro* (1978) 84 DLR (3rd) 221, and also in *Hunter v Canary Wharf*.]

In *Network Rail v Morris* [2004] EWCA Civ 172 the complaint was of electrical interference with electric guitars caused by railway signalling circuits. The Master of the Rolls treated it as an issue of foreseeability – should the railway operator have foreseen that interference could be caused 80m away – rather than sensitive user (although the expert evidence was that electrical equipment manufactured to current European standards should not be so sensitive) and Buxton LJ suggested that 'ultra-sensitivity' should no longer be an independent reason for denying liability, although it might relate to foreseeability.

WHO IS LIABLE?

The actual perpetrator

The definition of private nuisance refers to 'cause or permit'. The person actually physically responsible will be liable, as will anyone who actually employed or requested him to do so. The actual perpetrator can be liable whether or not he is in control of premises: *Hubbard v Pitt* [1975] 3 All ER 1.

Landlords

The test of liability is whether the letting necessarily involves the commission of a nuisance: *Tetley v Chitty* [1986] 1 All ER 663.

CASE STUDY

Jeremy lets a shop to Ken. Ken undertakes to operate the shop as a fried fish shop and for no other purpose. Jeremy's object is to provide a service to the 5,000 residents of a nearby housing estate with no other fast food outlets. Jeremy lets the house next door to Lout. Lout, as Jeremy knows full well, is a 'neighbour from Hell'. He plays loud music at all hours, his 12 children are totally out of control, and he always has three or four cars semi-dismantled in the garden. This fits in well with Jeremy's plans to upset Minnie, who lives next door, and who once rebuked Jeremy for smoking when he was 11. Minnie also complains that the smell and fumes from the fish shop are adversely affecting her bedroom.

Advise Jeremy as to his potential liability in nuisance.

The landlord will be liable where premises are let solely as a fast food outlet where this is bound to create a nuisance: *Adams v Ursell* [1913] Ch 269. The position is different where the nuisance is 'collateral'. In *Smith v Scott* [1973] Ch 314 a local authority which put a problem family into a house as tenants was not liable to the next door neighbour in nuisance for their activities. This was so even though it seemed fairly clear that the local authority wanted to get the claimant to move, as she was holding up their development plans, and the tenants had been carefully chosen to cause mayhem.

There are further complications to this area of the law. The courts have:

- Refused to hold a local authority liable for the actions of tenants who racially harassed a local shopkeeper. This was a collateral nuisance, like that in *Smith v Scott*. *Hussain v Lancaster City Council* [1999] 4 All ER 449.
- Held a local authority liable for the activities of travellers encamped (as long-term trespassers) in a council-owned lay-by. The council was held to be in occupation of the lay-by and were responsible for their failure to evict or control the trespassers: *Lippiatt v South Gloucestershire Council* [1999] 4 All ER 149.

In *Fowler v Jones* [2002] LTL 27 June 2002 the claimants complained of a series of activities, some of which were actually perpetrated by visitors to the defendant's home. The judge held at first instance that the acts of the visitors could be counted as part of the nuisance for which the defendant was liable if she acquiesced in them; it was not necessary to show that she actively aided and abetted them. This was of

course a case in which the defendant was in actual control of the situation, not one where she had handed over control of the premises altogether to tenants.

THINK POINT – Do you think this aspect of the law is fair?

There seems to be a separate rule for nuisances arising from want of repair. The landlord remains liable for those parts of the building over which he retains control, but will also be liable for the part which is let, provided that the tenant cannot be shown to be exclusively responsible: *Wringe v Cohen* [1940] 1 KB 229, *Mint v Good* [1951] 1 KB 517.

PHYSICAL DAMAGE OR APPRECIABLE INTERFERENCE

The interference must be to an interest recognised in law. One of the claims in *Hunter v Canary Wharf* [1997] 2 All ER 426 was for interference with TV reception because of the 'shadow' cast by the Canary Wharf tower. This was considered to be analogous to interference with a view. This has been consistently held in a series of cases from the sixteenth century onwards not to be actionable as a nuisance or otherwise. TV reception is an important amenity of life, but it cannot outweigh the right to develop one's land in an otherwise reasonable manner. There is, of course, no reason why interference to TV reception caused by the operation of machinery which is not 'suppressed' should not be a nuisance, by analogy with vibrations etc. perceived by the occupier directly.

Interference may be moral. In *Thompson-Schwab v Costaki* [1956] 1 All ER 652 the claimant's complaint was of the activities of the staff and clients of a brothel operated in a disorderly fashion by the defendant across the road from the claimant's property. This was held to be a sufficient potential threat both to current convenience and to property values to be a nuisance. See also *Hubbard v Pitt* [1975] 3 All ER 1, where the claimant was an estate agent whose activities in relation to tenanted property attracted adverse attention, taking the form of a picket of its premises. Although this was business disturbance it related to preventing the use of premises.

Are these the only categories of harm, or will others do? What if the defendant damages the claimant's economic interests by broadcasting racing commentaries of races on the claimant's track from a convenient vantage point, thus devaluing the 'exclusive' broadcasting rights the claimant had sold to someone else? It has been held in Australia that this does not constitute nuisance: *Victoria Park Racing v Taylor* (1938) 58 CLR 479.

THINK POINT - Where do you draw the boundary between those activities which are, and those which are not nuisances, where what is complained of is not the result of physical processes?

The distinction between the cases above is that in the successful claims, occupation of premises became less beneficial in a direct sense; it was less pleasant in some respect. In the unsuccessful case, the real problem was loss of money, not loss of amenity.

DEFENCES

Prescription

Where the subject matter of the alleged nuisance is capable of being an easement (e.g. a right of eavesdrop – to allow water to run from your eaves on to a neighbouring property) it can be acquired prescriptively (i.e. by 20 years user without action). Many of the nineteenth century cases leave a rather larger scope for prescription than would be the case today; there is less emphasis on rights of property now.

Statutory authority

This defence is available to an individual or authority exercising functions or doing works in pursuance of statute. There is a presumption that Parliament intended the defendant to carry out functions without causing a nuisance so far as practicable: *Metropolitan Asylum District Managers v Hill* (1881) 6 App Cas 193. In *Allen v Gulf Oil Refining* [1981] 1 All ER 353 the defendant was authorised by statute to construct an oil refinery. The claimant complained that the refinery as built and operated constituted a nuisance. The defendant pleaded statutory authority. It was held that the defence succeeded in relation to those matters of complaint which related to 'the nuisance which inevitably resulted from any refinery on the site' but not to other matters which might arise because of the economic and operational choices of the defendant as to the actual construction and operation of the refinery. It is sometimes said that the statutory powers must be exercised without negligence, but the word is being used in a special sense; the statutory immunity carries with it an obligation to use all care and skill to avoid harm. In *Gulf Oil* it was also said that the approval of development by statutory authority might alter the prevailing environment, thus 'moving the goalposts' in relation to nuisances affecting enjoyment of the property. In *Gillingham BC v Medway (Chatham) Dock Co.* [1992] 3 All ER 923 there was a nuisance in fact (it was in fact a public nuisance but this is immaterial for the present discussion) arising out of the use 24 hours a day by commercial traffic of residential streets in the vicinity of the old Chatham dockyard. The local authority sought an injunction (using powers under s. 221 of the Local Government Act 1972 authorising it to act as the custodian of the local public interest). The claim failed because the council had itself granted planning permission for the use of the dock for this purpose, and this had moved the goalposts in this way. Note that the grant of permission necessarily involved the use of this access to this extent (pending the creation of a new access at some unspecified future date). This was therefore a foreseeable side effect. If the dock company had a choice of access routes and had selected this one for their own convenience the result might have been different. This basis of the decision would apply to other potential claimants.

THINK POINT - Is it right that the goalposts can be moved in this way? Are the rights of neighbours adequately protected?

While planning authorities are normally careful to research the environmental and disturbance implications of planning decisions, a grant is not normally a binding assurance that the activities can be lawfully carried on (c.f. restrictive covenants which may be enforceable by individual neighbours). In *Wheeler v JJ Saunders Ltd* [1996] Ch 19 the claimants complained of smells arising from pig units constructed, with the benefit of planning permission, on farmland next to their holiday cottages. The defendant's argument that the grant of planning permission was conclusive was rejected. There had been no change in the nature of the area, and unless the

planning permission effected such a change, it could not take away the rights of the claimants at common law.

REMEDIES

The remedies of choice will be damages or, more usually, an injunction. The injunction may be *quia timet* (i.e. to restrain a threatened harm) as long as the potential nuisance is established. Harm will be foreseeable if the potential victim can demonstrate that it is liable to occur. An injunction may be granted on terms (i.e. with its full operation suspended) to give the defendant the opportunity to put his house in order. An injunction can only restrain the actionable element of a nuisance, e.g. excessive noise. Damages may be awarded in lieu of an injunction under s. 50 of the Supreme Court Act 1981, but this will not allow the defendant to effect a compulsory purchase of the right to make a nuisance of himself, see *Allen v Gulf Oil*; however, an injunction is a discretionary remedy. This may explain the actual decision in *Miller v Jackson*. Compare *Dennis v MoD* [2003] EWHC 793 (QB) where a number of factors, including public interest and delay, were collectively considered sufficient to restrict the claimant to a money claim

CASE STUDY

Raisa is the proprietress of the 'Tap'n'Tutu Academy of Dance', which is established on the top floor of a three-storey building. The middle floor is used as a lace warehouse until the tenant moves out, and is then let to Shady, the proprietor of the 'Intimate Bliss Massage Parlour'. After three months Shady complains that the noise and vibration of Raisa's tapdancing classes is disturbing his customers and affecting his trade.

A number of parents of Raisa's pupils complain that Shady's customers regularly harass their teenage daughters on the stairs while they are on their way to and from dancing classes.

Advise Raisa as to her rights and liabilities in tort.

The first question is whether the tap dancing is a nuisance; it may be intrusive enough to disturb a normal neighbour, as opposed to a very undemanding one. If so, Raisa will be liable. It is not relevant that she is performing a socially useful function. The harassment of her pupils may be a nuisance. It does directly affect the property. However, it is not clear whether Shady is responsible for the activities of his visitors.

Hazardous Activities

We have seen earlier in this chapter that the law of tort has a role, if a limited one, to play in regulating land use. A balance has to be struck between the rights of the owner to carry out his desired activities and those of the neighbours to undisturbed enjoyment of their own property. There are, however, some activities that appear to demand special treatment because they have a greater capacity to cause harm than most. In general these are activities which have been made possible only by the scientific and technical advances of the nineteenth and twentieth centuries: rock blasting, chemical plants, oil refineries, nuclear power stations, aircraft etc. In some cases, such as reservoirs, it is not so much new technology as the increased scale of operation required by modern society which creates the extra risk.

It is impossible to prohibit these hazardous activities. Some are essential to modern life, such as oil refineries and chemical plants. Others are at least arguably beneficial, such as nuclear power stations. A balance has to be struck, as in cases of 'ordinary' nuisance, between the rights and responsibilities of those concerned.

HOW THE 'HAZARDOUS ACTIVITIES' RULE DEVELOPED

The starting point in examining how the law strikes this balance is the leading nineteenth century case, *Rylands v Fletcher* (1866) LR 1 Ex 265, Court of Exchequer Chamber (1868) LR 3 HL 330, House of Lords. This case has usually been regarded as stating the elements of a discrete tort, but in *Cambridge Water Co. v Eastern Counties Leather* [1994] 2 All ER 53, Lord Goff preferred to regard it as a species of nuisance, and this view prevails in England. The '*Rylands v Fletcher* tort' has been adopted in the US, in this instance as the starting point for a new tort imposing strict liability for 'abnormally dangerous activities'.

THE CASE OF RYLANDS v FLETCHER ITSELF

The defendant built a reservoir, carefully, on his land. Water leaked through old mine workings and flooded the claimant's nearby mine. It is clear that the building and operation of the reservoir caused the claimant's loss. It also seems clear that the defendant had done his best. Could he nevertheless be liable?

There seems to be a difference between the reasoning of Blackburn J and that of Lord Cairns. Blackburn J stresses that the defendant brought the water on to his land: 'The person who, for his own purposes, brings on his land and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril'.

According to Lord Cairns, had the flooding been by the operation of natural forces, albeit altered by works done by the defendant on his land, it was for the claimant to take precautions, but if the defendant: 'not stopping at the natural use of their close, had desired to use it for any purpose which I may term a non-natural use ... and if in consequence of their doing so, or in consequence of any imperfection in the mode of their doing so, the water came to escape ... [t]hat which the defendants were doing they were doing at their own peril'.

THINK POINT - Lord Cairns, after the passage cited above, went on to cite with approval the above passage of Blackburn J's judgment, the principles of which he said led to the same result. Are the two judges indeed saying the same thing, and if not, what is the difference?

Blackburn J gives a number of examples of analogous situations. These fall into two groups:

(a) Cattle trespass, which is an old common law tort of strict liability (see today s. 4 of the Animals Act 1971, which gives statutory form to the tort, but retains the strict liability);

(b) Situations which appear to be orthodox nuisance, e.g. sewage from a privy flooding a cellar, fumes from an alkali works. There is clearly a state of affairs brought about by the accumulation.

On a narrow view, all that Blackburn J is deciding is that in those circumstances a single escape will create liability. There does not have to be a persistent infliction of damage or inconvenience. There is no doubt that dangerous escapes arising from the non-natural user of land are a distinct category: it is not entirely clear what sort. It is unlikely that Blackburn J was conscious of creating a new tort, as opposed to developing the law of private nuisance by declaring that it applied to isolated escapes rather than a state of affairs. Lord Goff in *Cambridge Water* confirms this view.

THE CURRENT RULES

For the tort to be made out, a number of ingredients must be present:

- a deliberate accumulation;
- of things which are hazardous in the event of an escape;
- in the course of a non-natural user of the land;
- an actual escape;
- causing harm which is reasonably foreseeable.

Accumulation

The rule does not apply to things which arrive or occur naturally, e.g. rainfall or groundwater: *Wilson v Waddell* (1876) 2 App Cas 95, wild vegetation: *Giles v Walker* (1890) 24 QBD 656, soil and rock: *Pontardawe RDC v Moore-Gwyn* [1929] 1 Ch 656, but will apply to, e.g. planted vegetation, reservoirs, chemicals etc. Where rocks were scattered by blasting the rule can apply, on the basis that the blasting powder

had been accumulated: see *AG v Cory Bros* [1921] AC 521, and the US case, *Caporale v C W Blakeslee Inc* (1961) 149 Conn. 79, 175 A 2d 561.

Hazardous things

The cases give a long catalogue of hazardous things: water, electricity, gas, petrol, fumes etc., chair-o-planes (a type of funfair ride) and explosives. They do not need to be dangerous in themselves (although many of them will be), merely liable to cause harm if they do escape. There have been decisions which suggest that a defendant may be liable for the actions of people he brings together on his land. In *AG v Corke* [1933] Ch 89 the defendant allowed caravan-dwellers on his land; they caused annoyance and damage in the neighbourhood. It was held that the rule could extend to people. However, this has been doubted in New Zealand: *Matheson v Northcote College* [1975] 2 NZLR 106 (on the footing that people operate under free will) and an extension to the case of undesirable tenants or licensees (even where put in by way of harassment of the neighbours) has been refused on the ground that the landlord had no sufficient control of the tenants: *Smith v Scott* [1973] Ch 314. It is unlikely that people will in future fall within the rule.

Non-natural user

This requirement is of course based on Lord Cairns' speech in *Rylands v Fletcher*. The formulation by Lord Moulton in *Rickards v Lothian* [1913] AC 263 (PC) has always been considered to be the best: 'It must be some special use, bringing with it increased danger to others, and must not merely be the ordinary use of the land or such a use as is proper for the general benefit of the community'. In *Rickards* domestic water supplies were held to fall outside the rule and this was reiterated in *Transco v Stockport MBC* [2003] UKHL 61 where the pipe in question was the main feed to a block of flats.

The question of whether or not a user is non-natural is one of fact and degree, which, being interpreted, means, a question of discretion for the court. In 1919 garaging a car with a full petrol tank was non-natural: *Musgrove v Pandelis* [1919] 2 KB 43. In 1964 storage of strips of metal foil was natural: *British Celanese Ltd v A H Hunt (Capacitors) Ltd* [1969] 1 WLR 959. During the First World War a munitions factory was non-natural: *Rainham Chemical Works v Belvedere Fish Guano* [1921] 2 AC 465; during the Second World War probably natural: *Read v J Lyons* [1947] AC 15. The cases before *Cambridge Water* favoured a narrow approach in order not to stifle proper economic activity. Indeed, the reluctance of courts to declare that user was non-natural was the main limiting factor on the rule, and there were suggestions that the rule was being marginalised by the strict requirements for a user to be non-natural. The high-water mark was probably the decision of Ian Kennedy J at first instance in *Cambridge Water Co. v Eastern Counties Leather* (unreported, 31 July 1991). He decided that, as a matter of policy and balance, industrial activities of the kind carried on by Eastern Counties Leather were not non-natural, at least in this geographical context: 'In reaching this decision I reflect on the innumerable small works that one sees up and down the country with drums stored in their yards. I cannot imagine that all those drums contain milk and water or some other like innocuous substance. Inevitably that storage presents some hazard, but in a manufacturing and outside a primitive and pastoral society such hazards are a part of the life of every citizen'.

Lord Goff rejected this narrow view and preferred a wider concept of what is non-natural: 'I cannot think that it would be right [if the risk of harm were foreseeable] to exempt ECL from liability under the rule in *Rylands v Fletcher* on the ground that

the use was natural or ordinary. The mere fact that the use is common in the tanning industry cannot, in my opinion, be enough to bring the use within the exception, nor the fact that Sawston contains a small industrial community which is worthy of encouragement or support. Indeed I feel bound to say that the storage of substantial quantities of chemicals on industrial premises should be regarded as an almost classic case of non-natural use'.

Escape

In *Read v J Lyons* [1947] AC 156 a factory inspector was injured in an explosion in a munitions factory. A claim under *Rylands v Fletcher* failed. As Viscount Simon said, there must be an 'escape from a place where the defendant has occupation of or control over land to a place which is outside his occupation or control'. What is the 'place' from or to which there is an escape? In either case it need not be premises in the ordinary sense, but may be a conduit under the highway, or a part of a building: *Midwood v Manchester* [1905] 2 KB 597. Indeed Taylor J accepted in *Rigby v Chief Constable of Northants* [1985] 1 WLR 1242 that the rule might apply in the case of things brought on to the highway and allowed to escape on to other property. There is no requirement that the defendant have any interest in the property from which the thing escapes, merely that he be in control of the thing: *Benning v Wong* (1969) 122 CLR 249.

Reasonable foreseeability

The position is now regulated by *Cambridge Water*. The test is whether harm of the kind which transpired was foreseeable. This is the same test, derived from the *Wagon Mound (No. 1)* [1961] 1 All ER 404, which you have already met in relation to nuisance and to negligence generally. Lord Goff's speech is clear support for those who have regarded *Rylands v Fletcher* as a species of nuisance rather than an independent entity largely because the *Wagon Mound* test of foreseeability is applied. In the *Cambridge Water* case, his Lordship accepted that, at the time of the escapes, it was not foreseeable that the relevant type of harm would occur because the solvent in question was thought to be so volatile that it presented no risk of contamination of the soil and groundwater.

You should note that the decision in *Cambridge Water* has been criticised on the basis that the judges wrongly treated the standard of knowledge against which foreseeability was judged as being that of a reasonable foreman, rather than the higher standard to be attributed to a qualified technical director, but the principle is not objectionable, unless the tort is expected to operate as a general purpose absolute environmental protection rule. Lord Goff declined to adopt the general purpose absolute rule approach, and pointed out that the Law Commission had expressed reservations about a strict liability rule for hazardous activities: *Civil Liability for Dangerous Things and Activities* (1970, Law Com No. 32).

Lord Goff did stress that environmental protection was now regarded as important and was the subject of much legislation, national and international (without referring to the previous UK government's attempts to dismantle significant elements of the EC legislation in this field) and clearly considered that legislation was preferable to an extension of the common law. This approach was adopted by the Privy Council in *Hamilton v Papakura DC* [2002] UKPC 9.

SPECIFIC ASPECTS OF THE RULE

Who can sue?

As the rule is a branch of private nuisance, it protects interests in land only, so the rule in *Hunter v Canary Wharf* will apply.

DEFENCES

Act of war/malicious third parties

An example of this is *Rickards v Lothian*. The claim failed not only because the user was natural, but because the harm was caused by a third party for whom the defendant was not liable. But if vandalism was foreseeable, failure to take precautions may result in liability; see *Environment Agency (formerly National Rivers Authority) v Empress Car Co.* [1998] 2 WLR 350 (HL).

Consent

This may either be to the presence of the source of danger: *Gill v Edouin* (1894) 71 LT 762, 72 LT 579 or on the basis that there is a common benefit: e.g. from the mutual use of a gas or electricity supply: *Carstairs v Taylor* (1871) LR 6 Ex 217. The consent is to the inherent risks and will not cover negligence: *Prosser v Levy* [1955] 1 WLR 1224. Consent is not to be inferred merely because the claimant has come to the danger.

Statutory authority

This will apply exactly as in nuisance. In *Green v Chelsea Waterworks Co.* (1894) 70 LT 547 the defence applied to a water undertaker whose pipes burst, but it was material that the undertaker was under a duty to maintain a supply of water under pressure. In the case of reservoirs and water pipes there is now statutory strict liability which overrides the defence (s. 28 of the Reservoirs Act 1975 and s. 209 of the Water Industry Act 1991 respectively).

Sensitive user

You have seen that this is a defence in nuisance. There is little authority under the rule, but in *Eastern SA Telegraph Co. v Cape Town Tramways* [1902] AC 381, the defendant was not liable for interference to telegraph instruments by leakage of electric current where the evidence showed that there was a problem only because of the peculiar design of the equipment.

THE STATUS OF THE TORT

There is clearly an anomaly, in that liability for dangerous escapes is subject to a 'strict liability' rule, while in other cases there is a fault principle. The Pearson Commission in 1978 recommended a new statutory tort of strict liability in relation to activities which were either ultrahazardous (e.g. use or storage of explosive, corrosive or poisonous chemicals) or created a risk of extensive harm (e.g. collapse of large buildings or civil engineering works such as the Channel Tunnel or the Dartford bridge). There would be a statutory mechanism for including types of hazard. The scheme appears to reflect in some ways the existing statutory regulation of ionising radiation and civil aviation risks (see Civil Aviation Act 1982 and Nuclear Installations Act 1965). It reflects a move from fault to loss-sharing as the rationale of tort, and as such appears to have little legislative priority, except in the environmental area.

PUBLIC NUISANCE

In origin and essence public nuisance was (and is) a crime, although many of the anti-social activities formerly charged as a common law public nuisance are now the subject of specific statutory offences, e.g. offences under the food and drugs legislation, noise abatement and matters covered by the Environmental Protection Act 1990. There are a number of definitions:

An act not warranted by law or an omission to discharge a legal duty, which act or omission causes damage or inconvenience to the public in the exercise of rights common to all of Her Majesty's subjects: (Stephen, *Digest of the Criminal Law*, 1883.)

In civil law public nuisance has been described as 'an act or omission which materially affects the reasonable comfort and convenience of life of a class of Her Majesty's subjects' (*per* Romer LJ in *AG v PYA Quarries Ltd* [1957] 2 QB 169, or a nuisance 'so widespread in its range or indiscriminate in its effect that it would not be reasonable to expect one person to take proceedings as his own responsibility to stop it' (*per* Lord Denning *ibid*).

SCOPE

As with private nuisance, the judges have consistently avoided general pronouncements seeking to define the scope of public nuisance. Why is this? There are two principal reasons. In the first place, a definition which will comprise disturbance from quarrying, failure to repair highways, permitting an offensive encampment of transients and the incompetent operation of public transport services, all of which have been held to be public nuisances, will be so wide as to be valueless. In the second place, the existence of a definition would fetter the discretion of the courts to declare a novel factual situation to be a nuisance, thus rendering the law less flexible.

This was done, in a rare modern instance of a criminal prosecution, in *Johnson (AT)*, *The Times*, 22 May 1996, where the making of hundreds of obscene phone calls to at least 13 women throughout South Cumbria was held to be not only (self-evidently) a private nuisance in respect of each victim, but also a public nuisance under the above tests (especially Lord Denning's). The decision on private nuisance probably cannot stand after *Hunter v Canary Wharf*, but as there is no requirement for an interest in land in public nuisance, this aspect of the decision would seem to be valid. It therefore follows that some matters which are really harassment may qualify as public nuisance, although they would not be private nuisances. Perhaps unsurprisingly there has been a challenge (in a criminal context) to the compatibility of public nuisance with Article 7 of the ECHR on the grounds of lack of certainty and predictability. It was also suggested that statute was now the appropriate means to criminalise unacceptable behaviour. These submissions were rejected. Through the cases, public nuisance was sufficiently clear, precise and adequately defined. While most relevant behaviour would fall within a statutory prohibition the offence had valuable residual functions: *Rimmington & Goldstein* [2005] UKHL 63. Although this case concerns the crime of public nuisance, it is suggested that it applies equally where the only claim is in the derivative tort.

REMEDIES

The primary remedy in public nuisance is by way of prosecution, or by an action for an injunction on the part of the Attorney General (a 'relator action'), or by a local council under s. 221 of the Local Government Act 1972. In theory the Attorney General represents the public interest. In practice he is simply invited to lend his name to an action carried on by and at the expense of a private objector (known because of the original legal terminology as a relator, i.e. the person who 'relates' to the AG the fact that there is the need for an action). The Attorney General may refuse his consent to the institution of a relator action, but this is very much a reserve power.

PRIVATE ACTIONS

There is a derivative action in tort giving a private remedy in damages where there is special damage, e.g. *Halsey v Esso* [1961] 2 All ER 145. This is a case where public and private nuisance were both occasioned by the same acts. It is also a rare modern environment/pollution case not brought under specific legislation. Note that the claim for damages is a by-product, not the main reason for an action.

EXAMPLES OF PUBLIC NUISANCES

Highways

Many of the cases relate to highways. The right to free passage and free access to one's premises is an essentially public one. Note that a navigable river may also be a highway: *Tate & Lyle v GLC* [1983] 1 All ER 1159.

Obstruction

A minor obstruction such as a hosepipe across a country lane may not be a nuisance: *Trevett v Lee* [1955] 1 All ER 406, but the position will be very different in a busy street: *Farrell v John Mowlem & Co.* [1954] 1 Lloyd's Rep 437. Temporary scaffolding for a reasonable purpose may not be a nuisance: *Harper v Haden & Sons* [1933] Ch 298. Again it is a question of degree. In many areas there are specific regulations controlling building operations. Scaffolding and other disruptions require a licence.

The special damage which the claimant will seek to prove will usually be business disruption, as in *Benjamin v Storr* (1874) LR 9 CP 400, where the defendant's horses and vans were constantly stood outside the claimant's premises, obstructing the light, interfering with access and causing offensive smells. This was found to be sufficiently intensive and unreasonable to be a public nuisance

Danger on the highway

There is an overlap with obstruction. Many of these cases are older ones and appear to be nuisance/negligence hybrids. Today there would be a duty of care apparent, and the action would be in negligence, based on this. *Dollman v Hillman* [1941] 1 All ER 355 is a good example. A piece of fat was thrown or swept from a butcher's shop on to the pavement, where it was left lying. The claimant slipped and injured himself. This was held to be a nuisance. Today the natural cause of action would be negligence. The special damage is fairly obvious; the injuries resulting from exposure to the danger.

Abuse of right of passage

Although there is normally a public right to pass and repass on the highway, a grossly excessive and disruptive use of this right is capable of amounting to a public nuisance: *Gillingham BC v Medway (Chatham) Dock Co.* [1992] 3 All ER 923.

Others

Many types of activity will qualify, e.g.: quarrying affecting a whole village: *AG v PYA Quarries*; factory operations affecting a neighbourhood: *Halsey v Esso*.

STATUS OF THE TORT

A loose parallel can perhaps be drawn with the tort action for breach of statutory duty, although the action derived from public nuisance is of greater antiquity. It may perhaps have influenced the development of the younger tort, but any temptation to draw close parallels should be resisted, as the specific ingredients of the two torts are very disparate. In addition, in the light of *Transco* and *Rimington* there is a parallel with the rule in *Rylands v Fletcher*. Both remain as residual common law bases of liability in areas largely regulated by statute.

PARTICULAR DAMAGE

Physical harm

As we have seen in relation to *Dollman v Hillman* such harm will count. This is as you should expect. This is the form of harm most likely to be compensated. There appears to be a requirement of something akin to negligence in such cases. The situation is confused by the fact that a cause of action in negligence may well coexist.

Economic loss

Economic loss has long been recognised as constituting particular damage. In *Rose v Miles* (1815) 4 M & S 101 the defendant obstructed a waterway, as a result whereof the claimant, who was a regular user, was put to the expense of offloading his barges and transporting the cargoes by land round the obstruction. This was held to be particular damage, although no property belonging to the claimant had actually been physically harmed in any way.

THINK POINT - Why is this recognition of pure economic loss surprising?

In negligence pure economic loss is only recoverable in special situations, e.g. where there is a special *Hedley Byrne* relationship, or where it can be shown to be consequential on physical harm.

Loss of trade

This may be seen as economic loss, as in *Tate & Lyle v GLC* [1983] 1 All ER 1159. The defendant's construction of a ferry terminal under statutory powers caused unnecessary silting of the approaches to the claimant's jetties. The claimant incurred substantial costs in extra dredging. A claim in negligence was dismissed, but a claim in public nuisance for interference with the public right of navigation on the Thames succeeded.

Inconvenience

Mere inconvenience will not suffice, but extreme and exceptional inconvenience may: *Benjamin v Storr* (1874) LR 9 CP 400. There are a number of similar cases dealing with disruption to the trade of shops by crowds, queues or parked vehicles attracted by neighbouring activities. If the disruption is, on the facts, extreme, a remedy will be given. It can fairly be said that some inconvenience is part of life's give and take. I have a builder's lorry parked on the street this week, you have your brother's minibus parked there next week. We each inconvenience the other, but not to such an extent that the law should intervene.

REMEDIES

Remedies are often, and wrongly, neglected by students of law. Why this should be so is not clear. It is of course vital to the litigant to know what remedy he may expect to receive if he is successful as claimant, and conversely what his liability may be if he is an unsuccessful defendant. One difficulty is that torts are so disparate that it is often easier to discuss remedies in the context of the individual torts, and this has been done sometimes in these lectures, as you will have noticed.

There are two distinctions that you must clearly understand at the outset, that between legal and equitable remedies, and that between tortious and contractual remedies.

LEGAL REMEDIES AND EQUITABLE REMEDIES

Some remedies are described as 'legal' (e.g. damages) and others as 'equitable' (e.g. injunctions). Originally the distinction arose from the division of the courts into those which were courts of common law and those which were courts of equity. A court could only grant remedies from its own side of the divide. This is no longer the case and all courts have for many years administered both law and equity, including the relevant remedies. The distinction is still important because, while legal remedies are available 'as of right', which means that if the claimant proves his case he must obtain the remedy, equitable remedies are discretionary. The court may decline to award them if it would be unreasonable to do so. There are nevertheless well-established areas (such as the grant of injunctions to restrain trespass and nuisances) where there are clear guidelines indicating how the discretion is likely to be exercised. In theory, equity only intervenes to remedy the deficiencies of the common law, and this means that an equitable remedy will only be granted if damages, or some other legal remedy, are inadequate. In practice, as stated above, there are areas where the equitable remedy has become the normal one.

REMEDIES IN TORT AND REMEDIES IN CONTRACT

Remedies in tort are intended to compensate for or protect from harm done or, in some cases, threatened. In contrast, remedies in contract are designed to compensate for failure of the other party to fulfil his promise. The distinction has been discussed many times in the courts. Two succinct expressions of the purpose of damages, which point up the contrast between the two approaches are:

Tort: '[The measure of damages is] that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation.' Lord Blackburn, *Livingstone v Rawyards Coal Co.* (1880) 5 App Cas 25.

Contract: 'The rule of common law is that where a party sustains a loss by reason of a breach of contract he is, so far as money can do it, to be placed in the same situation with respect to damages as if the contract had been performed.' Parke B, *Robinson v Harman* (1848) 1 Exch 850.

There is a large area of potential overlap, where a claim can arise in both contract and tort. This includes the area of professional responsibility, arising both out of the specific contract and out of the general tortious obligation resulting from the

professional undertaking to engage his professional responsibility. Professional is used in a wide sense to include a trade or service. This does not, however, cause much difficulty in relation to the remedy. The nature of the contractual obligation is to take reasonable care in carrying out the contract, so, in broad terms, the tortious measure will apply.

CASE STUDY

What do you consider to be appropriate and adequate remedies to deal with the following tortious activities? Do not confine yourself to remedies you know or believe the courts can in fact award. If you consider money damages to be appropriate, think what they are designed to cover and how they should be calculated.

- A prosperous doctor with a young family is rendered quadriplegic in a road accident.
- A police officer wrongly, but without violence or any public humiliation, arrests and detains (a) a fine upstanding pillar of the community, (b) a habitual criminal, against whom the evidence is not quite strong enough this time.
- Your next-door neighbour proposes to hold a four day rock and reggae festival in his (relatively small) garden.
- Your next door neighbour deliberately tips a load of hedge trimmings on to your patio.

Self-help

In some situations the law allows the victim of a tort to take action without recourse to the courts to put matters right. There is some overlap with the defence of self-defence here. If you consider the case of *Tuberville v Savage* (1669) 1 Mod Rep 3, where the claimant apparently threatened the defendant by putting his hand on his sword as though to draw it, but negated the threat by saying that he would have done something about the insults the defendant had uttered to him if it had not been assize time, the defendant argued that he was exercising his right to self-help by self-defence in drawing his own sword and getting his retaliation in first. This was a perfectly good argument in principle, but failed on the facts as the defendant was not actually under threat.

There is also an overlap with the defence of necessity. A man may trespass on his neighbour's land to prevent major harm, e.g. to extinguish a fire before it spreads: *Cope v Sharpe (No. 2)* [1912] 1 KB 496.

The law does not favour self-help, but tolerates it. There is obviously a danger (as happened in *Tuberville*) that matters will get out of hand. The self-help remedies tend to arise in the context of trespass torts:

(a) A landowner may use reasonable force to deter or remove a trespasser. The owner of a chattel may likewise use reasonable force to recover it if he is entitled to immediate possession (but not if it has been hired out for a period which has not expired, or he owes money for repairs, storage etc.);

(b) Material which is trespassing may be removed and returned. This may apply to overhanging branches, or to a wall built in the wrong place;

(c) Material which is trespassing may be detained as security for compensation for damage it has caused. There is no right to sell these things, but in the case of animals, while the assumption is that the owner will wish to recover them on payment of compensation, there is power under s. 7 of the Animals Act 1971 to sell them if they are not claimed within a specified time.

THINK POINT -Does self-help provide a solution to any of the scenarios in the last Case Study?

DAMAGES

GENERALLY

While damages are normally seen as representing substantial compensation to the victim for harm suffered by him, this is by no means their only function. Even where damages are compensatory, a distinction must be drawn between those cases where the loss is a money one (loss of earnings following an accident, the cost of repairs to or replacement of a damaged motor car, or loss of profits etc. where allowable) and those where the harm is either physical (death or personal injury) or 'moral' (loss of reputation or infringement of privacy). In the former case there may be complexities of calculation, but the damages do represent direct and actual compensation. In the latter, the award of a cash sum is not direct amends, but an attempt to provide a money equivalent. This is inevitably an imprecise exercise. One of the most notorious examples is the disparity between awards for pain and suffering (where the maximum is around £170,000–£180,000 for a young adult reduced to quadriplegia, in physical pain and fully aware of his/her plight) and those for defamation (where Lord Aldington was awarded £1,500,000 in respect of unfounded allegations that he was implicated in war crimes). Historically the award of damages was a matter for the jury. Now juries only hear some defamation cases, some cases of false imprisonment and some cases of fraud. There is no provision for other types of case to be heard by jury. Judges can and do have regard to the awards made in comparable cases. There are textbooks such as Kemp & Kemp, *Quantum of Damages*, which collate and compare awards, using multipliers to account for inflation. This material is used both in argument in court and when settlements take place out of court. There is in effect a tariff for various types of injury, e.g. £5,000 for a simple fracture of the leg, £20,000–£25,000 for the loss of an eye. This is adjusted in the case of multiple injuries, but there is a fair measure of certainty. The Judicial Studies Board also produce guidelines, which are similar, although based on hypothetical typical cases rather than collation of all actual cases.

THINK POINT - Does this account square with your answers for Activity 1?

ECONOMIC THEORIES

There is a divergence of views on why victims of torts should be compensated. It is highly probable that there is no one single basis, since torts are so disparate. There are, however, several bases which have been and are influential in the development and operation of the law.

Fault is the traditional basis for imposing liability for negligent breach of duty. The defendant has culpably failed to live up to the expected standard, and 'ought' to

compensate his victim. This leads on to the argument that it is not 'fair' to extend this liability to certain forms of harm which are unforeseeable or otherwise problematic. They fall outside the defendant's moral responsibility.

Another basis is enterprise liability, or loss distribution. Any enterprise carries a risk of harming others. That risk is run in order to allow the enterprise to operate and accrue benefits for its owners and for those who utilise the goods or services which it produces. If the risks come to pass, compensating the victims is one of the costs of the enterprise, to be absorbed or passed on to the customers. It is immaterial whether the risk arises because of poor organisation and management, which is the 'fault' of the enterprise or the casual negligence of a worker, for which the enterprise is vicariously but not morally liable. The essential link with moral fault is broken in favour of loss distribution.

Similar considerations apply to strict liability. Indeed the major cases of this, product liability and hazardous escapes, are typically cases of enterprise liability. It can of course be argued that this is merely a half-way house. If loss distribution is the prime concern it can be better achieved by comprehensive insurance schemes, coupled with no fault compensation. In New Zealand most accident claims are covered by such a scheme, largely funded by 'insurance' premiums. In Sweden medical accidents are covered by a government funded, no fault scheme. In the UK, until recently, there was National Insurance no fault compensation for industrial injuries in parallel with the fault based tort scheme. Recent changes have modified National Insurance cover significantly. One interesting comparison is the transaction costs of the two schemes. There are no recent definitive figures, but the Pearson Commission established that in the early 1970s annual tort damages amounted to £202 million, while the legal and other costs of the system amounted to £175 million. Industrial injuries benefits at the same period amounted to £259 million, while the cost of administration was £28 million.

THINK POINT - Can you identify the arguments which support the use of the fault principle? Are they convincing?

The fault principle is often defended on the basis of deterrence. A rational entrepreneur, aware that if he harms others through fault he will be penalised in damages, will take steps to eliminate fault. What if, however, the cost of the precautions to eliminate the risk exceeds the likely cost of a claim. Market economists will argue that this is inefficient. Resources are being squandered in precautions; it is better to bite the bullet and pay the compensation. This is a largely American approach. Judge Posner gave the example of a railroad company considering whether to install crossing gates, on the assumption that they would be liable to compensate those injured in accidents at ungated crossings. If installing and operating the gates costs \$10,000 a year, and the average cost of an accident in compensation and costs is \$60,000, it is rational to install the gates if there is likely to be an accident once every five years, but not if it is once every seven years. This approach can be extended to other torts. In its pure form, the Coase Theorem (named after the American academic who developed it), the doctrine states that rational parties will maximise resources. He gives the example of a polluter causing a smoke nuisance. If it is worth \$100,000 to him to carry on polluting, but the detriment to his neighbour is only \$70,000, it is efficient to let him carry on and pay compensation. If the figures are reversed it is not. The actual price paid to continue or stop is of course negotiable in the \$70,000-100,000 range. In practice the picture is complicated by the transaction costs, e.g. of litigation or installing alternative

technology. There is a close analogy with the principle of environmental law that the polluter pays for the costs of pollution. He will only meet these costs so long as there is no cheaper alternative.

Economic theories carry little weight in English law. In the first place, they assume that people act only in the manner dictated by economic rationality. This is not true in the real world. Non-economic criteria are interposed, and it is also far from clear in practice where the line of economically rational behaviour is. Secondly, they are based on a particular ideology, of extreme market-oriented, *laissez-faire* capitalism. This ideology is not necessarily compatible with established common law doctrine. Thirdly, at best, the economic argument only applies to business liability. It is absurd to suggest that a driver decides to drive carefully to avoid the cost of an accident. There is no clear correlation between good driving and cost, and the individual has only occasional episodes of liability. Businesses, on the other hand, can plausibly be said to plan for liability, and their costs, whether in meeting claims or in insuring, are a material consideration.

THINK POINT - What principles should underlie the imposition of liability in tort?

There is no simple, obvious answer. Fault and loss distribution have some merit, but loss distribution only really works where the liability arises from a prolonged activity. It can also be argued that some interests are so important that they should be protected in all cases, even where there is no fault. See the trespass torts in particular.

COMPENSATORY DAMAGES

Land and buildings

Where land or (more likely) buildings are damaged by the defendant, the claimant is entitled at least to the diminution in value of this holding, although if it is land being held by way of speculative investment and the destruction of buildings reduces the cost of site clearance, this must be set against the claim: *C R Taylor (Wholesale) Ltd v Hepworths Ltd* [1977] 1 WLR 659. This is not mitigation as such but simply an accurate calculation of the net loss. Where the claimant is occupying the premises he is entitled to the cost of reinstatement: *Ward v Cannock Chase DC* [1986] Ch 546, but may have to settle for a reasonably workmanlike repair rather than meticulous restoration if the latter is disproportionately expensive, as the excess amounts to overcompensation:

Dodd Properties (Kent) Ltd v Canterbury City Council [1980] 1 WLR 433. This is one area where the English courts have taken some account of efficient use of resources. In *Lodge Holes Colliery Co. v Wednesbury Corporation* [1908] AC 323, the claimant council insisted on restoring a road damaged by subsidence exactly, including building it up to its original level, when it could have been left at a lower level just as well and far cheaper. Allowing the claimant to insist on exact replacement whatever the cost and whether it benefited him or not 'might lead to a ruinous and wholly unnecessary outlay'. This was a case where there was no reason to insist on exact replacement, but if the property is of historical, architectural or merely sentimental value, this must be weighed in the equation.

Generally damages are assessed at the time of the tort, but if the cost of repairs is awarded, these will be assessed at the time they were incurred if it was reasonable to defer them until then. In considering what is reasonable, the claimant's financial

position will be considered, particularly if liability is being denied: *Dodd Properties; London Congregational Union v Harriss & Harriss* [1985] 1 All ER 335.

Personal Property

The basic measure of damage where a chattel is damaged or destroyed is diminution in value. This is usually taken as the cost of repair or replacement, which in turn will normally be market value. Where a unique item is destroyed the compensation, although reflecting the market value will, of course, not allow replacement. The cost of repair will not be allowed where it is excessive in relation to the pre-accident value. In *Darbishire v Warran* [1963] 1 WLR 1067 a vehicle was repaired at a cost of £192, but could have been replaced for under £100. This was held to be a case where the repair cost was disproportionate and the lower figure was awarded. Compare *O'Grady v Westminster Scaffolding* [1962] 2 Lloyd's Rep 238 where repairs costing £450 to a car valued at £150 were allowed because it was a cherished vehicle.

Compensation for loss of use is also recoverable. It is possible to use accountancy and actuarial techniques to calculate this accurately, but the courts have tended not to do this, but to adopt common sense methods. Where the chattel is not being used to make a profit, damages for loss of use are typically calculated by reference to the notional cost of the capital tied up in the chattel. This approach has been taken in respect of publicly owned ships, such as warships and lightships: *Admiralty Commissioners v SS Chekiang* [1926] AC 637. An alternative approach is to consider the actual operating cost; this approach was taken in a case involving a Birmingham Corporation bus, although the court was concerned that this might reward inefficiency if the operating cost were unreasonably high: *Birmingham Corporation v Sowsbery* [1970] RTR 84. Where the chattel is a profit earning one, it will normally be appropriate to hire a substitute if it is damaged. This should avoid most claims for loss of profits, although any which arise in the period which elapses before the replacement is in place will be recoverable, as will the hire costs. There will of course be cases where no replacement is available and the measure of damages is then the actual or reasonably anticipated loss of profit. A similar rule applies where a profit earning chattel is destroyed, but the appropriate response is to replace the chattel as soon as possible. The measure of damages will therefore be the cost of the replacement, including any necessary adaptation and transport to the location of the destroyed item, together with any additional expenses incurred in the intervening period, such as wages for operatives who are kept idle, and compensation payable to third parties for delay: *Liesbosch Dredger v SS Edison* [1933] AC 449. This case is also celebrated for the ruling that the financial position of the claimant must be ignored. In this case the owner of a dredger which was sunk did not have the capital available to buy a replacement, although one was available. Instead he hired a replacement. This was more expensive overall, but could be financed out of income earned while completing the dredging contract. The additional cost was not recoverable. This rule has been forcefully criticised. It is not followed in contractual cases, was held inappropriate in the *Dodd Properties* case, and was specifically rejected in a 'consumer' case where the victim of a car accident was held justified in not paying to replace the car until after the litigation was settled, thus incurring higher hire costs and paying more in money terms for the replacement due to inflation: *Mattocks v Mann* [1993] RTR 13. However the *Liesbosch* rule has been upheld against a haulage

company who could not afford to replace an uninsured lorry, but were refused hire costs: *Ramwade Ltd v W J Emson & Co. Ltd* [1987] RTR 72.

PERSONAL INJURIES

Awards must be broken down into non-pecuniary loss (general damages for pain, suffering and loss of amenities), pecuniary loss (loss of earnings, medical expenses and other outlays) to date, and future pecuniary loss. The main reason is that interest is paid at different rates on these heads.

Non-pecuniary loss is assessed at the date of trial and carries a fairly nominal rate of interest from the date the action was commenced. This reflects the fact that the claimant gets the benefit of an award at the higher figure appropriate to the date of trial. Interest on pecuniary loss to date runs from the date of the accident at half the normal rate. This is a rough and ready way of reflecting that the loss occurred over the period to trial. No interest is payable on future pecuniary loss; this is in fact a payment in advance: *Jefford v Gee* [1970] 2 QB 130.

General damages

Loss of amenity and pain and suffering normally attract a single award, but cover different ground. Loss of amenity is in essence the reduction in the capacity to enjoy life. It will depend in part on the nature of the injury, so that it will be greater where there is permanent loss of mobility, or of an organ or limb. Tetraplegia is regarded as the most serious loss of amenity, and attracted an award of £75,000 in 1986 (equivalent to some £195,000 in 2011): *Housecroft v Burnett* [1986] 1 All ER 332. The level of these awards has to be 'conventional' as money is not a direct recompense for suffering. The Law Commission in its Report on Damages for Pain Suffering and Loss of Amenity (No. 257) in 1999 considered that values of award had slipped behind legitimate expectations, based on various research exercises, and in *Heil v Rankin* [2000] 3 All ER 138, a general uprating took place. The award will also depend in part on the characteristics of the claimant, so that there will be a higher award if the injury prevents or curtails continued enjoyment of sport or hobbies, e.g. *Moeliker v Reyrolle & Co.*

Ltd [1977] 1 All ER 9. Although claims for damages arising from failure to diagnose or treat dyslexia and other similar learning deficits are not actually claims for personal injury, they do attract a similar award for loss of amenity to reflect loss of prospects of more congenial employment, and 'a history of frustration, anti-social behaviour, loss of confidence and loss of self esteem': *Phelps v Hillingdon* [1998] ELR 38 (QB); [2001] 2 AC 619 (HL). However such claims are likely to be modest: *Skipper v Calderdale MBC* [2006] EWCA Civ 238.

One vexed area has been the level of award appropriate to a claimant so seriously injured as to be largely or wholly unaware of the reduction in quality of life. Logically it can be argued that the unconscious patient has not lost any amenity, in the sense of subjective enjoyment of the quality of life, but the practice is to award a reduced figure (it seems to be about 25 per cent of the 'full' figure) on the basis that there is an objective diminution in the quality of life actually enjoyed.

Pain and suffering is essentially subjective, and so no award will be made to a claimant who is wholly unconscious: *West & Son Ltd v Shephard* [1964] AC 326; *Lim*

Poh Choo v Camden & Islington AHA [1980] AC 174. An award may include distress due to a consciousness of reduced life expectancy: s. 1(1) (b) of the Administration of Justice Act 1982.

Pecuniary loss

Loss of earnings is recoverable, and usually causes little conceptual difficulty. There may be problems establishing exactly what the net loss was, particularly where the employment pattern was irregular, or overall earnings depended on overtime or piecework. The cost of care is also recoverable. This includes the cost of private medical treatment, and the defendant cannot argue that NHS facilities were available free of charge: s. 2(4) of the Law Reform (Personal Injuries) Act 1948. Problems have arisen in relation to nursing care. If this is provided by a professional, it is clearly recoverable. Where it is provided by a relative out of a sense of moral obligation, it is strictly the case that the claimant has not suffered a loss, in the sense of paying for the care. The law takes the common sense view that there is a need which is being met and the claimant should be in a position to reward the provider, even though it may, in these family cases, actually amount to compensation to a third party rather than to the accident victim: *Cunningham v Harrison* [1973] QB 942. This is the logic behind the refusal to allow the claim where the tortfeasor himself provided the care: *Hunt v Severs* [1994] 2 All ER 385.

It is clearly relatively easy to assess pecuniary loss to date, although in practice, especially in cases of average or below average complexity, a settlement figure is reached which can take a broad approach rather than analysing each item of the claim in fine detail.

It is on the other hand extremely difficult to assess future loss. There are three key variables:

- (a) The future progress of the injury;
- (b) The impact of all the other vagaries of life, such as unrelated illness, on the claimant;
- (c) The claimant's future employment prospects.

Until fairly recently it was necessary to assess all these in every case, as the court was obliged to award a final lump sum to cover all heads of claim. In all cases assumptions were made. In the case of the development of the injury, the main problem in practice is the uncertainty surrounding such complications as late onset post-traumatic epilepsy following head injuries or osteo-arthritis following limb and joint injuries. In these cases the impact of the complication if it occurred is assessed and then discounted by the likelihood of it occurring. Thus if osteo-arthritis has a 'value' in the particular case of £30,000, and there is a 10 per cent chance of it occurring, the damages are increased by £3,000. This of course has the result that the claimant is in effect gambling. He is hoping that he is getting £3,000 for 'nothing' against the risk of suffering substantial uncompensated additional harm. Clearly the figure for damages must always be the 'wrong' one.

The other factors, together with the necessary allowances for inflation and for the fact that the claimant receives a lump sum now rather than a stream of income over a period, and can invest that lump sum to produce further income, are dealt with by

a complex process of discounting. The total loss per annum is calculated, and a multiplier is then used to get the final figure. Calculating such returns, for annuities, life assurance etc. is a highly skilled task, and there is a profession, that of actuary, devoted to it. Judges have traditionally had little time for actuaries. As recently as 1984 Oliver LJ said in *Auty v NCB* [1985] 1 All ER 930: 'The predictions of an actuary can be only a little more likely to be accurate (and will almost certainly be less entertaining) than those of an astrologer'. There has been considerable pressure from the Law Commission and elsewhere for a more scientific approach. Shortly after the decision in *Auty* a set of actuarial tables for use in this situation was published by the official state publisher. In more recent cases there have been suggestions that the judges are prepared to use them, at least as the basis for the decision; e.g. Bingham MR in *Hunt v Severs* [1993] 4 All ER 180.

The traditional method has been rough and ready at best. In particular it has led to under compensation because inflation has not been fully allowed for. Further, the courts have been very ready to accept arguments for reducing the multiplier. A young man on the threshold of his working life is unlikely to receive an award based on a multiplier of more than 18, although his potential working life is more than double that.

In *Wells v Wells* [1998] 3 All ER 481, the House of Lords redressed the balance slightly. Traditionally, it was assumed that damages would be invested in a mixture of shares and government securities as a prudent investor would do with his savings. This provided a better rate of return, so a smaller capital sum was needed to secure a given annual multiplier. There was however a risk of loss, particularly with the shares. The House accepted that a recipient of very high damages was wholly reliant on them, and could take no risks. A more cautious investment strategy was indicated, and so the capital sum was to be increased accordingly.

THINK POINT - Does the tort system achieve full compensation in personal injury cases? If not, how could it be improved?

It is impossible to say what the 'right' level is for pain and suffering. Our awards are low compared to, say, the USA, but this may not mean they are wrong. Compensation to the date of trial is fairly accurately assessed. Thereafter, the use of multipliers and the refusal to give proper weight to actuarial evidence tends to depress the value of awards.

Social security and other benefits

Awards of damages are tax free, so the calculations, e.g. of loss of earnings, must all be net of tax: *BTC v Gourley* [1956] AC 185. Where the claimant has himself taken out insurance, or is entitled to a pension or other allowance as part of his terms of employment (whether the scheme is contributory or not), benefits received are regarded as independent of the defendant, and will thus not be set against damages. The principle was first established in relation to insurance, being justified on the basis that the claimant had paid for and earned those benefits: *Bradburn v GWR* (1874) LR 10 Exch 1. It was extended by analogy to the pension situation by *Parry v Cleaver* [1970] AC 1, and applies even where the pension provider is also the tortfeasor: *Smoker v London Fire & Civil Defence Authority* [1991] 2 AC 502. *Parry v Cleaver* is also authority for stating that voluntary payments from charitable or other benevolent sources will be treated as independent and thus not set off. The rule for state benefits currently applying to all claims is that all benefits arising during the first five years of the incapacity period may be recouped from damages. The onus is

on the defendant to obtain the recoupment figure and account to the government for it. However, recoupment applies only to the amounts awarded for loss of earnings and other specified heads, and applies to benefits which are directly relevant to this head of claim: Social Security (Recovery of Benefits) Act 1997. There is a detailed schedule indicating which benefits are recoupable against loss of earnings, cost of care and loss of mobility respectively. Damages awarded for pain and suffering cannot be recouped. However, the claimant is still entitled to have his care needs met under the National Assistance Act 1948 s.29 and the Chronically Sick and Disabled Persons Act 1970 s.2, since such needs are assessed without taking into account the resources represented by the damages award: *Crofton v NHSLA* [2007] EWCA Civ 71. Sick pay received from an employer will be deducted from the claim. The principle was established in *Hussain v New Taplow Paper Mills* [1988] AC 514, where the employer was also the tortfeasor, and the sick pay could be seen as in effect a payment on account of damages. The rule also applies to sick pay where the employer is not the tortfeasor unless the contract of employment contains, as it normally will, an obligation to refund sick pay if it is paid in consequence of a tortiously inflicted injury. In essence the law treats the employee as an agent for the purposes of reimbursing his employer who has shouldered a burden which properly falls on the tortfeasor.

Provisional damages

There is now a limited exception to the rule that damages must be awarded as a single lump sum. Where there is a recognised potential complication, there is now provision for an award of damages based on the claimant's condition on the assumption that this complication or deterioration will not arise. This award is of course itself a lump sum, with the imperfections discussed above. The court records the nature of the anticipated problem, and the claimant is then allowed to apply to the court for a further award if, within the time-scale set by the court, the problem does occur. This provision (s. 32A of the Supreme Court Act 1981) is useful in some cases, where there is a specific and serious potential complication. It can only be used where there is a clearly identifiable problem; it thus will not assist where the claimant's prognosis cannot be firmly established. The provision has been further restricted by the decision in *Willson v Ministry of Defence* [1991] 1 All ER 638 that the section applies only to a specific 'clear and severable' event rather than the general risk of deterioration posed by conditions such as osteo-arthritis. A further restriction on the use of the provision is the reluctance of insurers to agree to provisional awards. They have to keep their file open and cannot finalise their financial situation. They therefore put pressure on claimants to accept a conventional lump sum settlement.

Other exceptions to the lump sum rule

There is power to obtain interim payments of damages on account of the final award. Although there are restrictions these do not apply to the majority of personal injury cases where the defendant will be insured. This power is particularly useful in cases where the claimant is suffering financial hardship, but a final resolution cannot be reached because his medical condition has not stabilised.

A recent development is the so-called 'structured settlement'. In these quite elaborate schemes, which are only suitable for the most serious cases, a lump sum award is made for general damages and pecuniary loss to date in the usual way, but all or part of the award for future pecuniary loss is made in the form of the purchase of annuities for the claimant by the defendant, rather than in a lump sum. This is cheaper than giving the claimant a lump sum to buy his own annuity, as the whole of the receipts under a structured settlement is treated as being capital and is thus not liable to tax, while part of the proceeds of any annuity which the claimant bought for himself, and any dividends or interest on investments he made would be taxable. While the claimant is thus guaranteed a certain level of income, this must be properly calculated and inflation protected in exactly the same way as a conventional lump sum award.

DEATH

Where the victim dies, the case cannot be treated just as a serious instance of personal injury. The main difference is the treatment of dependants. An award to an injured claimant is intended to replace his total income, out of which he is expected to maintain his dependants as he would have done out of his earnings. This is not how fatal cases are treated.

Funeral expenses are payable.

The deceased person's personal representatives may have a claim for personal injuries on behalf of the estate if there was a significant gap between the infliction of injury and death, and this is assessed on the usual principles as set out above. Where death is essentially immediate there will be no claim under this head, as was established in the case brought on behalf of two victims of the Hillsborough disaster: *Hicks v Chief Constable of South Yorkshire* [1992] 2 All ER 65.

Statutory damages for bereavement are recoverable by the parents of a deceased minor, and by a bereaved spouse. This is a fixed, conventional sum under s. 1A of the Fatal Accidents Act 1976, which is currently £10,000. It is designed as recognition of, rather than in any real sense compensation for, the grief and distress of close relatives. There are some calls for higher awards to be made, but these seem to be for punitive rather than compensatory awards.

At common law no action lay for the death of another, but there is now provision for dependants to make a claim for loss of dependence under the Fatal Accidents Acts 1846–1976. In law, dependants include all ascendant and descendant relatives, close collateral relatives, established co-habitees and children treated by the deceased as a child of the family. In fact they must prove that they were receiving some support from the deceased. The usual situation is where the deceased was a breadwinner and supporting the claimant. Such claimants will typically be spouse or children, but if it can be shown that a child is supporting, or would in the future have supported elderly parents etc., then they may claim: *Kandalla v BEA* [1981] QB 158. An alternative situation is where the deceased was providing benefits to the dependants by work as a homemaker. The value of the benefit must be established: *Berry v Humm & Co.* [1915] 1 KB 627. It may not be the full commercial cost of the services: *Spittle v Bunney* [1988] 3 All ER 1031. In the typical case of a breadwinner with little surplus savable income, the dependence can virtually be calculated as the net income less the amount actually spent by the deceased on himself. When calculating the period of the dependence, allowance must be made for the vagaries of life as they affect the deceased, e.g. the possibility of unemployment, ill health etc., and also as they affect the dependant, including the possibility of premature death, the point at which children are likely to achieve independence, and the possibility of divorce between a widow and the deceased (but not the widow's prospects of remarriage: s. 3(3) of the Fatal Accidents Act 1976). In *Harland & Wolff plc v McIntyre* [2006] EWCA Civ 287 the deceased had received a payment from his employer's provident fund when he ceased work due to the illness from which he died, a mesothelioma for which the defendant employer was liable. Had he lived to retirement age he would have received retirement benefits under the scheme, and the claimant successfully argued that these formed part of her dependency claim. The tort had deprived the deceased and hence the claimant, of the retirement benefits, and the two payments were not to be treated as cancelling each other out.

AGGRAVATED AND EXEMPLARY DAMAGES

The normal principle for the award of damages in tort is a compensatory one. You have seen this at work in relation to common law negligence, occupiers' liability, and breach of statutory duty. Although this is the dominant principle, it is not the sole one. It is clearly recognised that in certain circumstances exemplary damages may be awarded. These are 'awarded by reference to the defendant's conduct and are intended to deter similar conduct in the future ... and to signify condemnation or disapproval'. (Law Commission Consultation Paper No. 132,

Aggravated, Exemplary and Restitutionary Damages, 1993.) Aggravated damages occupy a debatable middle ground between the exemplary and the compensatory principles. They are intended to cover intangible loss arising from injury to feelings, reputation and personality as a result of the nature of the defendant's actions.

The present law

At present entitlement to exemplary damages is based on a schematic rather than a principled approach. This derives from Lord Devlin's speech in *Rookes v Barnard* [1964] AC 1129 as reinterpreted by the House of Lords in *Broome v Cassell* [1972] AC 1027. This schematic approach is reinforced by the decision in *AB v South West Water Services Ltd* [1993] QB 507 that exemplary damages are only available in relation to causes of action where they had been established as available before the *Rookes* case.

Until recent cases and statutory reforms which gave the judges some control over the level of awards, there was also concern that jury awards could be capricious. In *Thompson v MPC* [1997] 3 WLR 403, the Court of Appeal laid down guidelines for the calculation of damages in police assault/malicious prosecution cases, which are an important category. In *Thompson* it was stressed that exemplary damages are only relevant if a significant amount (say £5,000 minimum) would be the appropriate figure, but that they are demonstrative, and therefore should be moderate. £25,000 is a high figure, and £50,000 the absolute ceiling for cases involving serious personal misconduct by senior officers.

There are three categories of case where exemplary damages may be awarded.

Oppressive, arbitrary or unconstitutional action by the servants of the government

These terms are *disjunctive*, so unconstitutional action which is not oppressive or arbitrary may qualify. This derives from the eighteenth century civil liberty cases: *Wilkes v Wood* (1763) 98 ER 489, *Huckle v Money* (1763) 95 ER 768. The test is now a broad one. It includes policemen, solicitors executing search and seize orders and EU officials. Many trespasses to the person fall squarely into this category. The Law Commission points out that it plays 'an important role in the protection of civil liberties' and 'it has been the basis for significant development in the law concerning police misconduct'. In *Rowlands v Chief Constable of Merseyside* [2006] EWCA Civ 1773 it was held that wrongly arresting the claimant and then giving evidence rejected by the jury in a criminal case which resulted in acquittal fell squarely within the scope of such behaviour.

Wrongdoing which is calculated to make a profit

It is not necessary that there be a precise calculation. The concept is a broad one and covers those cases, such as defamation in a tabloid newspaper, where the conduct is designed to be commercially profitable, and also cases of winking out of tenants to use premises more lucratively.

Statutory cases

The main instances are provisions of the Copyright, Designs and Patents Act 1988 which allow additional damages for breach of copyright and design right depending on the flagrancy of the breach and any benefit accruing to the defendant from the breach.

The latter two categories of cases could in fact be said to be restitutionary in nature. Albeit in a rough and ready way the defendant is being deprived of the fruits of his unjust enrichment, obtained by disregarding the claimant's legitimate interests.

NOMINAL DAMAGES

These are awarded when the claimant has established his case, particularly in relation to torts actionable *per se*, such as trespass, but has not shown that there is any actual loss. The award marks his success. It does not reflect badly on the claimant, who may have been making an important, if not expensive, point about, for instance, the existence of a right of way. There is a conventional figure (currently £10) which is awarded.

INJUNCTIONS

Damages are all very well when harm has occurred and can be calculated, but in many cases prevention is better than cure. Also in many cases it will be difficult to work out what loss has been sustained. It is to deal with these cases that the equitable remedy of the injunction was developed. The word injunction simply means 'order'. In this context it is an order of a court addressed to a party to litigation and requiring him to do, or refrain from doing, something on pain of punishment for contempt of court by way of fine, imprisonment or sequestration of goods.

It is important to recognise that there are different types of injunction. The main subdivisions are between interlocutory and final injunctions and between negative and mandatory injunctions. The first distinction is as to the stage in the proceedings that the injunction operates. An interlocutory injunction takes effect, during the case, usually in order to maintain the existing position until the rights and wrongs can be sorted out. A final injunction is normally permanent and represents part of the final disposal of the case. A mandatory injunction positively requires the addressee of the injunction to do something, while a negative injunction requires him not to act. Negative injunctions are much commoner overall, and particularly at the interlocutory stage.

PRINCIPLES OF THE INJUNCTION

The High Court may grant an injunction in any case where it is 'just and convenient' to do so: s. 37(1) of the Senior Courts Act 1981. This may be the only relief sought. In the county court an injunction may only be granted as ancillary to some other relief, but a purely nominal claim for damages will suffice: s. 38 of the County Courts Act 1984.

Although law and equity remain separate, they are administered together and the rules of equity prevail where there is a conflict. This had been recognised in the case of remedies since the *Earl of Oxford's Case* (1615) 21 ER 485, 576.

Equity operates on the conscience, so the judge must consider it to be the right and conscionable thing to do before he will grant an injunction. Injunctions are therefore, in common with all equitable remedies, discretionary. However, this discretion is in the hands of judges, who behave consistently. There are therefore clear guidelines as to when an injunction is likely to be granted, and on what terms.

WHERE INJUNCTIONS ARE LIKELY TO BE USEFUL

There are many areas not involving tort where an injunction will be sought, but in relation to tort the commonest areas of application will be those where there is a course of conduct, rather than a single incident. Unless that incident has been

foreshadowed, it will not be practicable to seek an injunction, and damages will have to suffice.

If harm to the claimant is being clearly threatened, as where a neighbour is planning a rock festival, then an injunction may well be appropriate on a *quia timet* ('because he fears' (i.e. that there will be a nuisance)) basis.

The victim of a nuisance or repeated trespass, or indeed of harassment falling into the area in between and recognised as a tort by *Khorasandjian v Bush* [1993] 3 WLR 476, is usually more concerned to prevent or halt the defendant than to claim damages. It is now accepted that where proprietary rights are being interfered with by a defendant who intends to carry on doing so, the claimant is 'entitled' to an injunction unless there is strong evidence that damages are an appropriate remedy: *Pride of Derby & Derbyshire Angling Association v British Celanese* [1953] Ch 149, a case concerning pollution of the River Derwent, over which the claimants had rights, which was likely to damage fish in an unpredictable manner.

An injunction can only be granted in respect of a legal wrong. So when a defendant called his house by the same name as the claimant next door, no injunction could be granted. The similarity of names was no doubt annoying, but there is no exclusive right to a house name: *Day v Brownrigg* (1878) 10 Ch D 294. The position might have been different if they were both traders or professionals and the similarity amounted to passing off the defendant as the claimant. Similarly, if a claimant complains of a range of activities, but not all are held to be tortious, the injunction can apply only to the tortious activities: *Kennaway v Thompson* [1981] 3 All ER 329.

INTERLOCUTORY INJUNCTIONS

The court has to be careful in granting these. On the one hand, if the *status quo* is not preserved or restored, one party may be so damaged by what happens in the period before a full trial that he will not enjoy the benefit even if he wins. If, for example, a noise nuisance so affects a music teacher that all his pupils desert him, he may never be able to rebuild his practice. On the other, care must be taken that action is not taken on inadequate evidence, bearing in mind that the full trial is not taking place. The normal approach is that in *American Cyanamid v Ethicon* [1975] AC 396:

(a) The claimant must first establish that there is a serious issue to be tried. This is not a major hurdle; it is really designed to weed out the frivolous and hopeless cases;

(b) The court will then investigate whether damages are an adequate remedy. If they will be then, unless there are special circumstances (e.g. that it is quite clear that the defendant will not be able to pay any damages) no injunction will issue;

(c) the court next considers the effect on the defendant of the grant of an injunction. In other words, assuming he wins at trial, whether damages will be an adequate remedy to him for the restrictions on his freedom of action imposed by the injunction.

If the issue remains balanced the court considers whether the claimant has acted expeditiously, whether the injunction is designed to restore the *status quo* or to maintain it, and finally, the relative strength of the parties' cases.

NEGATIVE INJUNCTIONS

Although these are the commonest sort they require little further discussion. The defendant is ordered not to behave in a particular way. If he does he is in breach. This is easy for the court to control. Provided the prohibited activity is properly defined it will be easy to recognise when there has been a breach. It is, however, important to note that the injunction must be framed so as to cover only those activities which are actionable. Thus an injunction against noise from a factory may be expressed to apply only at night and at weekends.

MANDATORY INJUNCTIONS

These can be problematic for the court, in that they require the defendant to do things. The court is not in a position to police this, and there is considerable reluctance to grant a long-term mandatory injunction. In *AG v Staffordshire CC* [1905] 1 Ch 336 this was given as a reason for not granting an injunction to keep a right of way in a specified state of repair. Injunctions requiring one-off actions, such as demolishing a wall or other structure, will be granted more readily, at least where the application has been made before the work was too far advanced. In *Truckell v Stock* [1957] 1 WLR 161 an injunction was granted to remove a completed outbuilding which was built in part over the boundary, and was thus trespassing. It was significant that it was built almost up to an existing wall and this would therefore be very difficult to maintain if the new structure were allowed to remain.

DAMAGES IN LIEU OF AN INJUNCTION

Since, as we have seen, an injunction will not normally be granted where damages is an adequate remedy, it may seem surprising that there is power to award damages on a claim for an injunction. The power originated in Lord Cairns' Act 1858, which reduced the procedural difficulties then existing by allowing the equity courts to award damages, so avoiding the need for a second action if an injunction was refused. It is now contained in s. 50 of the Supreme Court Act 1981. It is sparingly exercised, since the effect of substituting an award of damages where the proper remedy is an injunction is to allow a wealthy defendant compulsorily to purchase the right to infringe the claimant's rights: *Shelfer v City of London Electricity* [1895] 1 Ch 287. You have already met

Miller v Jackson [1977] 3 All ER 338 in relation to nuisance. The court declined to grant an injunction to restrain a continuing nuisance from cricket balls being hit into a garden. One argument was the relative utility of the activities of the parties, but this was rejected in *Kennaway v Thompson* [1981] 3 All ER 329 which is a similar case of nuisance by sporting activities. It is possible to support the decision in *Miller* on the grounds that the claimants moved to the nuisance. This line has been adopted in several US cases.

Where the wrong complained of is one which is commonly resolved by money payments, the judges are more willing to decline to grant an injunction or use this power. See for instance *Wrotham Park Estate v Parkside Homes* [1974] 1 WLR 798, where the complaint was that houses were built in breach of a restrictive covenant. It is well known that such covenants are released for cash. The judge indicated that the demolition of these houses would be a criminal waste of resources in the circumstances, which indicates some element of economic utility in his thinking. However, the presumption is still in favour of an injunction, and the burden of proof is on the defendant to show that there should be an award of damages, not on the claimant to show that there should be an injunction: *Regan v Paul Properties* [2006] EWCA Civ 1319. Damages are calculated as the greater of (a) the loss of amenity

etc., and (b) a 'fair figure' reflecting the price of consent, usually a share of the 'profit' made by the defendant: *Tamara v Fairpoint Properties*, *The Times*, 14 February 2007.

UNDERTAKINGS AS TO DAMAGES

These are important in relation to interlocutory injunctions. The claimant must normally undertake to pay damages in respect of harm suffered by the defendant if the injunction is granted. Some claimants seek to get round this by applying for a final injunction, without also applying for an interlocutory one and in this case they do not have to give the undertaking. If the defendant carries on in the meantime, and then loses at trial, he may well have to undo all his work. This will be a substantial deterrent if this is, for instance, building work. Normally the claimant will be allowed to act like this, as in *Oxy Electric Ltd v Zainuddin* [1990] 2 All ER 902, where the claimants objected to the defendants' plan to erect a mosque on a particular site. The defendants argued that they could not proceed until after the trial, and that if they won, they would have to build the mosque later and at greater cost. This would have been covered by a cross-undertaking in damages. Nonetheless no order was made preventing the claimants from acting as they did. It might have been otherwise if they had misled the defendants by initially indicating that they had no objection, or were ready to negotiate: *Blue Town Investments v Higgs & Hill* [1990] 1 WLR 696.

Session Six:

International aspects - jurisdiction, *forum conveniens* and the Brussels and Rome II regulations.

APPLICABLE LAW

The Rome II Regulation (864/2007) specifies that for all EU states (except Denmark) the general rule is that the law applicable to a tort or other non-contractual obligation shall be 'the law of the country in which the damage occurs irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur'. (Art 4.1). However, Art 4.2 makes an exception where both claimant and defendant are habitually resident in the same state; in this case the law of that state will apply. Art 4.3 (and other articles dealing with specific types of non-contractual obligation) provides for a different law to apply if it is more closely connected, e.g. because there is a linked contractual relationship. Art 14 provides for the parties to agree a different applicable law after the event, or, in the case of a commercial relationship, before the event. Art 17 provides that the rules on safety and conduct of the place of the accident shall apply.

THINK POINT – What law governs claims arising from a car crash in France between a Spanish driver and an English driver, whose family are injured, where the evidence is that both drivers are at fault?

The applicable law, according to Art 15 governs:

- (a) the basis and extent of liability, including the determination of persons who may be held liable for acts performed by them;
- (b) the grounds for exemption from liability, any limitation of liability and any division of liability;
- (c) the existence, the nature and the assessment of damage or the remedy claimed;
- (d) within the limits of powers conferred on the court by its procedural law, the measures which a court may take to prevent or terminate injury or damage or to ensure the provision of compensation;
- (e) the question whether a right to claim damages or a remedy may be transferred, including by inheritance;
- (f) persons entitled to compensation for damage sustained personally;
- (g) liability for the acts of another person;

(h) the manner in which an obligation may be extinguished and rules of prescription and limitation, including rules relating to the commencement, interruption and suspension of a period of prescription or limitation.

JURISDICTION

CASES WITH AN EU DIMENSION

These are governed by the Brussels I Regulation (44/2001). The default rule of the Regulation is that persons domiciled in a member state shall be sued in the courts of that member state. [NB, English law has a different concept of domicile, so there is a special definition for the purposes of the Regulation.]

There are exceptions provided for, and under Art 5.3 action may be brought 'in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or may occur'; and under Art 5.4 'as regards a civil claim for damages or restitution which is based on an act giving rise to criminal proceedings, in the court seised of those proceedings, to the extent that that court has jurisdiction under its own law to entertain civil proceedings'.

The mandatory nature of the rule can have unfortunate consequences. In *Owusu v Jackson (t/a Villa Holidays Bal Inn Villas)* (C281/02) [2005] Q.B. 801 the ECJ ruled that a claim against an English travel agent had to be heard in England, despite the fact that the claim related to an incident in Jamaica, all the witnesses were in Jamaica, and other defendants were domiciled there.

OTHER CASES

Basic Jurisdiction

Here the English rules will apply. English courts assert jurisdiction in tort if the tort was committed in England, i.e. where (a) damage was sustained within the jurisdiction; or (b) the damage sustained resulted from an act committed within the jurisdiction: CPR PD 6B, the defendant is served with proceedings in England (*Maharanees of Baroda v Wildenstein*, [1972] 2 QB 283), the defendant is domiciled in England or there is some other reason why England is the appropriate court (e.g. there are other defendants within the jurisdiction).

Forum non conveniens

This principle has two limbs – firstly, the English courts will not accept jurisdiction where another jurisdiction is more appropriate, and secondly, if there are proceedings in an inappropriate foreign court, the English court will intervene to prohibit these proceedings: *Spiliada Maritime Corp v Cansulex Ltd (The Spiliada)* [1987] AC 460.

The factors to be taken into account are the same in each case: any legitimate procedural advantages (e.g. limitation periods); where the witnesses are; whether the foreign court will do justice.

Anti-suit injunctions

Historically, the English courts made these orders to prevent foreign proceedings. They have only with difficulty been prevented from using them in Brussels Regulation cases, as England does not have a 'court first seised' principle: *West Tankers Inc v RAS Riunione Adriatica di Sicurtà SpA (The Front Comor)* [2007] UKHL 4. Today, it is more accepted that justice can be done outside England, and such orders have become rarer.