



Negligence: duty of care

Learning objectives

At the end of this chapter you should be able to:

- have an overview of the history of negligence;
- describe the function of duty of care in negligence;
- appreciate the way duty of care has been defined and developed; and
- apply the principles of duty of care in the areas of omissions and liability of public bodies.

Introduction

Negligence began to be recognised as a tort in its own right around the beginning of the nineteenth century. Before that time, the dominating action for personal injury was the writ of trespass. Trespass was initially concerned only with *direct* acts, however, during the nineteenth century the focus shifted to the distinction between intentional wrongs (trespass) and the unintentional (negligence). As we have seen, negligence was originally described in terms of a *duty imposed by law* and thus it will be seen that *duty* is one of the three key elements of negligence today.

Negligence evolved as a means of loss-shifting at a time when there was little or no insurance or state welfare provision. The industrial revolution in the nineteenth century brought with it increased risks of injury to those working in factories, mines, quarries, and other dangerous situations. The development of railway transportation and mass production dramatically increased the potential for many people to be affected by the faulty conduct of strangers, at the same time that the development of incorporations meant that there would be a company to sue rather than an individual. The damage in such cases would have been personal injury or death and, to a lesser extent, property damage.



thinking point

Victorian values (laissez-faire or individualistic) are said to have implied that those who were negligent were somehow blameworthy. How might that attitude have changed as the twentieth century developed?

The Workmen's Compensation Act 1897 was the first step in the gradual introduction of compulsory compensation schemes for victims of accidents. It gave certain workers entitlement to compensation from their employers if they were injured in accidents 'arising out of and in the course of employment'. Increasingly during the twentieth century, the government took responsibility for citizens' welfare generally, particularly following World War II when the Welfare State and the National Health Service were created. This meant that tort law was no longer the primary support for those suffering loss due to accidents.

The foundations of negligence

Winfield's definition is as follows: 'Negligence as a tort is a breach of a legal duty to take care which results in damage to the claimant.' Contained within this definition are the three key elements which must always be established for a successful action in negligence. We will study these elements separately; however, you should be aware that they are not always neatly self-contained. Often during this chapter you will be referred to Chapter 7, where the main 'problem areas' of duty of care are dealt with.

- (1) *Duty of care*: Does the defendant owe the claimant a duty of care?
- (2) *Breach*: Has the defendant broken that duty?
- (3) *Damage*: Had that breach caused damage of a legally recognised kind to the claimant?

4.3

Duty of care

According to John Fleming ‘...the basic problem in the tort of negligence is that of limitation of liability’. He points out that negligence is different from some torts such as assault or defamation in that it is not tied to a particular relationship, type of harm, or the protection of a particular interest:

[T]o permit the imposition of liability for *any* loss suffered by *anyone* as the result of carelessness would have imposed too severe and indiscriminate a restriction on individual freedom of action by exposing the actor to the prospect of unpredictable liability.

Prior to 1932, liability in negligence was restricted by the finding of a duty of care on a case-by-case basis – primarily in situations where there was a pre-existing relationship between the parties such as guest and innkeeper or employer and employee. In *Donoghue v Stevenson* (1932), Lord Atkin provided the first general rule for determining duty of care. The case is also significant for its ground-breaking ‘narrow rule’ which established that manufacturers owe a duty of care in negligence to the ultimate consumers of their products.

Mrs Donoghue and a friend went to a café in Scotland where the friend purchased a bottle of ginger beer for her. Mrs Donoghue drank some of the beer from the opaque bottle but when more beer was poured into her glass, a decomposed snail fell out. She claimed that she had suffered shock and sickness as a result and sought compensation. She could not claim in contract from the sellers because their contractual relationship was with her friend who had made the purchase. Instead she sued the manufacturers of the bottled beer in negligence.

preliminary point of law

a particular issue in a case is decided without the court determining the ultimate issue in the case.

In ruling in the plaintiff’s favour on a **preliminary point of law** the House of Lords held that the existence of a contract between the defendant and the purchaser would not bar a claim in tort by Mrs Donoghue, despite the fact that she was effectively ‘a third party’. This opened the way for a general duty of care of manufacturers to consumers. Lord Atkin described it thus:

... a manufacturer of products, which he sells in such a form as to show that he intends them to reach the ultimate consumer in the form in which they left him with no reasonable possibility of intermediate examination, and with the knowledge that the absence of reasonable care in the preparation or putting up of the product will result in an injury to the consumer’s life or property, owes a duty to the consumer to take that reasonable care.

The implications of this ‘narrow rule’ in *Donoghue v Stevenson* will be discussed further in Chapter 12.

The wider importance of *Donoghue v Stevenson* lay in the test which Lord Atkin employed for the existence of a duty of care. It is known as the ‘neighbour principle’:

The [Biblical] rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer’s question, ‘Who is my neighbour?’ receives a restricted reply. You

must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who then, in law, is my neighbour? The answer seems to be – persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts and omissions which are called into question.

Lord Atkin was using the word ‘neighbour’, not to describe geographical closeness, but in terms of those we might reasonably foresee as in danger of being affected by our actions if we are negligent. There are some problems with the words used in this speech. ‘Omissions’ are spoken of; however, you will learn that the law of negligence as a general rule does not impose a duty of care in respect of failure to act. The speech contains no specific information about what sort of damage the duty of care will relate to. You will see that the law of negligence favours loss which occurs in the form of *personal injury* or *property damage* but is less likely to impose liability for loss which is termed psychological injury or pure economic loss. The neighbour principle was not immediately or widely adopted as the definitive test for duty in the courts but over time it has become the foundation on which later approaches have been based.



thinking point
Why did Mrs Donoghue's friend not sue the café in contract for the faulty bottle of beer?

Having brought her action as a ‘pauper’ Mrs Donoghue settled her action with the defendants for £200 – a considerable amount of money at that time. A bench dedicated by lawyers now marks the site of the infamous café!

4.3.1 Policy

Before we proceed to examine the development of duty of care in the case law subsequent to *Donoghue v Stevenson*, it will be helpful to consider the way in which this concept is used by the courts. Duty of care can be broken down into *two questions*: first, one which is general and determined as a matter of law and policy; followed by one which is specific and fact-based.

(1) Is this a case of the *type* to which the law of negligence is applicable?

If so:

(2) Was it foreseeable that *this* claimant would be harmed by the defendant's act?

Comparing two significant negligence cases will illustrate what is meant by Question 1 and will introduce the important concept of *policy*.

In *Rondel v Worsley* (1969), the House of Lords confirmed that the barrister does not owe a duty of care in negligence to his clients in respect of his conduct of their case in court. This so-called ‘immunity’ was gradually extended over the years to include other matters closely connected to the preparation of the court case and, as solicitors gained rights of audience, to include all advocates. Among the unanimous Law Lords’ justifications for upholding the immunity were as follows: the advocate’s overriding duty lies not to his client but to the court; to permit actions in negligence might result in the effective retrial of a number of cases (‘collateral attacks’) with a consequential impact on confidence in the administration of justice; there is a ‘cab-rank rule’ whereby the barrister is

not at liberty to pick and choose which cases are accepted and, lastly, that the advocate must exercise his skill with complete independence, rather than in fear of a negligence claim.

Thirty years later the issue of advocates' immunity came before the House of Lords for reconsideration in *Arthur JS Hall v Simons* (2000). In view of the possibility that it might be decided to overrule their previous decision in *Rondel*, seven judges rather than the usual five considered the case. This time, the consensus on the matter was different. In closely argued and detailed speeches, the Law Lords reflected on the changes over the years in both professional culture and attitudes towards entitlements to remedies for wrongs and concluded that the advocates' immunity from liability for the conduct of a court case must be abolished. Lord Browne-Wilkinson reasoned as follows:

First . . . , given the changes in society and in the law that have taken place since the decision in *Rondel v Worsley* . . . , it is appropriate to review the public policy decision that advocates enjoy immunity from liability for the negligent conduct of a case in court. Second, that the propriety of maintaining such immunity depends upon the balance between, on the one hand, the normal right of an individual to be compensated for a legal wrong done to him and, on the other, the advantages which accrue to the public interest from such immunity. Third, that in relation to claims for immunity for an advocate in civil proceedings, such balance no longer shows sufficient public benefit as to justify the maintenance of the immunity of the advocate.

Lord Browne-Wilkinson mentions the word *policy*. This can be defined as the *non-legal* considerations; perhaps economic, social, or ethical, which a judge may employ in deciding the outcome of a case. Policy plays a significant part in the law of negligence, particularly in relation to duty of care. When deciding whether a given situation is one in which there should be a duty of care, the judge may be estimating whether an affirmative decision would bring a flood of further similar claims which could overwhelm the courts or devalue legal credibility. This is often referred to as the *floodgates* issue. Closely related to this is the potential impact which a decision might have on the insurance industry in the future and it includes calculations about where it is most economically efficient for loss to lie. Recently judges have begun voicing concerns about the impact of negligence liability on socially beneficial activities such as school trips. Policy may also include reference to other options available to the client for obtaining redress.

McLachlin J in the Canadian Supreme Court described policy as meaning 'pragmatic' considerations (*Norsk Pacific Steamship Co Ltd v Canadian National Railway Co* (1992)). As demonstrated in *Hall v Simons*, in recent years judges have become more open about expressing their views on policy matters and this transparency has let us know more about what lies behind their conclusions on the issue of duty of care. One problem with the influence of policy considerations, however, is that it involves a degree of guesswork. How much detailed evidence would need to be presented to the court before it was possible to estimate accurately a decision's likely future effect on, say, accident prevention? Thus we see that declarations of policy can be subjectively based, with judges differing on interpretations of what may be little more than informed guesswork.

cross reference

see also
Compensation Act 2006 in Chapter 2.

thinking point

Could the decision in *Hall v Simons* cause the floodgates to open? What legal approaches might be used to prevent a flood of successful negligence claims against advocates?



(1) Expansion of the duty concept in the 1960s and 1970s

In *Donoghue v Stevenson*, Lord Macmillan observed that ‘the categories of negligence are never closed’ and indeed some new duty situations soon came to be recognised, for instance that due to bystanders by manufacturers of products (*Stennett v Hancock* (1939)). There was a period of general expansion of the reach of negligence during the 1960s and early 1970s.

A key case which illustrates that expansive trend is *Home Office v Dorset Yacht Co.* (1970). A group of young Borstal inmates were taken to Brownsea Island in Poole Harbour for a weekend’s leave and training. During the night five of the boys escaped their guards and found their way to the claimants’ yacht club where they vandalised several yachts. When the Home Office was sued for the alleged negligence of their employees in failing to restrain the boys, the preliminary point which arose was whether the Home Office could be said to owe a duty of care in negligence in this situation.

The House of Lords held, by a majority of four to one, in the affirmative. They recognised that in doing so they were extending the *Donoghue v Stevenson* neighbour principle into a novel set of circumstances, for two reasons. First because the wrong against the claimants had not been committed directly by the defendants (or their employees) but rather by a third party, the Borstal boys. Any liability of the defendants would then be based upon an *omission* – that is, their failure to control the actions of the boys. Secondly, there were two possible relationships of ‘neighbourhood’, in the *Donoghue v Stevenson* sense: that between the defendants and the boys and that between the defendants and the nearby yacht owners.

We will deal with the law relating to omissions below, but at this stage it will be sufficient to point out that the court felt that this situation came within the group of cases in which there could be liability for a failure to act, that is when the wrongdoer was (or should have been!) under the care of the defendants. However, it was then necessary to focus or narrow the scope of who would be owed that duty of care, as described by Lord Diplock:

To give rise to a duty on the part of the custodian owed to a member of the public to take reasonable care to prevent a Borstal trainee from escaping from his custody before completion of the trainee’s sentence there should be some relationship between the custodian and the person to whom the duty is owed which exposes that person to a particular risk of damage in consequence of that escape which is different in its incidence from the general risk of damage from criminal acts of others which he shares with all members of the public . . .

I should therefore hold that any duty of a Borstal officer to use reasonable care to prevent a Borstal trainee from escaping from his custody was owed only to persons whom he could reasonably foresee had property situated in the vicinity of the place of detention of the detainee which the detainee was likely to steal or to appropriate and damage in the course of eluding immediate pursuit and recapture.



**thinking point**

Would the Home Office have been liable to a car owner if the boys had sailed the yacht to the mainland and walked two miles to find a car which they then vandalised?

cross reference

see Chapter 7 for discussion of whether the damage was physical or purely economic.

prima facie

'at first sight'; meaning that there is sufficient evidence to prove a case, unless it is disproved.

Reading between the lines, we can see that Lord Diplock's concept of duty of care is based upon reasonable *foreseeability of harm* (what would a reasonable person in the defendant's position have foreseen?) and a closeness or *proximity* of those in the yacht club who were more at risk than the general public. It must be noted that the claimants were strangers to the defendants, so in this particular case the proximity was purely geographical.

According to Lord Reid:

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

The 'justifications' and 'explanations' which Lord Reid was referring to included matters of policy. Policy in this case concerned the public interest in supporting programmes whose aim was to reform young delinquents but which had to be balanced with private interests in personal safety and security of property.

The case of *Anns v London Borough of Merton* (1978) heralded a period in which the reach of the tort of negligence was expanded. The facts of the case concerned a local authority's liability for the negligent inspection of building plans. Here it will be seen that the ratio in *Anns* was overruled by the House of Lords in *Murphy v Brentwood DC* (1991).

Lord Wilberforce attempted to summarise the current principles for determining duty of care:

... 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...

The above is sometimes referred to as 'the *Anns* two-stage test'. The first stage is satisfied by establishing whether the *Donoghue* neighbour principle can be satisfied. If so, a duty of care *prima facie* exists. The second stage involves looking at whether there are any reasons, or policy considerations, that this duty should *not* exist. Professor Cooke has likened the second stage of the *Anns* test to a 'long-stop'.

Anns was expected to lead to an increase in successful negligence actions, as there would be many more situations in which a duty of care would be found to exist. It was, indeed, followed by a number of cases which fulfilled this expectation. For example, in



Junior Books Ltd v Veitchi Co Ltd (1983), the House of Lords held that a duty of care was owed by flooring sub-contractors, who were liable to the owner of the factory whose floor they negligently laid. The court relied on the fact that the relationship between the parties was as close as it could be without being directly contractual. *Junior Books* was a controversial decision because the Law Lords were seen to have evaded the doctrine of privity of contract in order to find liability for damage which was technically pure economic loss and thus not normally allowable in negligence. The case was subsequently distinguished by later courts to the extent that it is now of historical interest only.

(2) The reach of negligence is restricted

It was not long after *Anns* and *Junior Books* that judges began to make decisions which restricted this potential expansion of negligence, showing an awareness that it could open the floodgates. In *Rowling v Takaro Properties Ltd* (1988), Lord Keith said:

a too literal application of the well-known observation of Lord Wilberforce in *Anns*... may be productive of a failure to have regard to, and to analyse and weigh, all the relevant considerations in considering whether it is appropriate that a duty of care should be imposed.

In *Yuen Kun Yeu v Att-Gen of Hong Kong* (1988), Lord Keith went further in rejecting the *Anns* test:

[T]he 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... [Their] Lordships consider that for the future it should be recognised that the two-stage test in *Anns* is not to be regarded as in all the circumstances a suitable guide to the existence of a duty of care.

The test for duty of care which is currently regarded as definitive is that described by Lord Bridge in *Caparo Industries plc v Dickman* (1990). The case itself concerned professional negligence and the question of whether auditors could be liable when their statements were relied on detrimentally by investors. However, it is important at this stage to consider the view of Lord Bridge:

[I]n addition to the foreseeability of damage, necessary ingredients in any situation giving rise to a duty of care are that there should exist between the party owing the duty and the party to whom it is owed a relationship characterised by the law as one of 'proximity' or 'neighbourhood' and that the situation should be one in which the court considers it fair, just and reasonable that the law should impose a duty of a given scope upon the one party for the benefit of the other. But it is implicit in the passages referred to that the concepts of proximity and fairness embodied in these additional ingredients are not susceptible of any such precise definition as would be necessary to give them utility as practical tests, but amount in effect to little more than convenient labels to attach to the features of different specific situations which, on a detailed examination of all the circumstances, the law recognises pragmatically as giving rise to a duty of care of a given scope. Whilst recognising, of course, the importance of the underlying general principles common to the whole field of negligence, I think the law has now moved in the direction of attaching greater significance to the more traditional categorisation of distinct and recognisable situations as guides to the existence, the scope and the limits of the varied duties of care which the law imposes.

cross reference
for the details of
Caparo, see
Chapter 7.



**thinking point**

The incremental approach involves deciding new cases on the basis of similar cases already decided. Would you expect this approach to have an expanding or restricting influence on the development of the law of negligence?

We must now, I think, recognise the wisdom of the words of Brennan J. in the High Court of Australia in *Sutherland Shire Council v. Heyman* (1985) 60 A.L.R. 1, 43–44, where he said:

‘It is preferable, in my view, that the law should develop novel categories of negligence incrementally and by analogy with established categories, rather than by a massive extension of a prima facie duty of care restrained only by indefinable considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed.’

The *Caparo* ‘Three-Stage Test’ comprises:

- foreseeable harm to the claimant;
- proximity or neighbourhood between the claimant and defendant; and
- that it is ‘fair, just and reasonable’ to impose a duty of care in this situation.

It is generally accepted that Lord Bridge’s third element, ‘fair, just and reasonable’, combines the policy factors with what is regarded as just between the parties. The three elements are given equal weight and, contrary to the position in *Anns* where there appeared to be a primary assumption of duty which could be cancelled by policy considerations, it has been argued that *Caparo* creates an assumption *against* duty, which policy considerations might overcome.

According to Lord Hoffmann in *Stovin v Wise* (1996):

The trend of authorities has been to discourage the assumption that anyone who suffers loss is prima facie entitled to compensation from a person (preferably insured or a public authority) whose act or omission can be said to have caused it. The default position is that he is not.

At the same time as setting out his Three-Stage Test, it is significant that Lord Bridge also endorsed an *incremental* approach to duty of care, as described by Brennan J in the Australian case of *Sutherland Shire Council v Heyman* (1985).

In *Marc Rich & Co v Bishop Rock Marine Co Ltd (The Nicholas H)* (1996), we can see how the House of Lords put Lord Bridge’s test for duty into practice. A ship, *The Nicholas H*, was carrying the claimant’s cargo when she developed cracks in her hull. NKK, a marine classification society, a non-profit making organisation, was consulted in order to determine the extent of repair that would be required. An employee of NKK approved limited temporary repairs, after which the ship could resume its voyage. A few days later it sank and all the plaintiffs’ cargo was lost. Because the liability of the ship-owners was limited, the plaintiffs attempted to recover the full extent of their financial loss (\$5.7 million) from NKK.

The House of Lords found in favour of the defendants because no duty of care was owed by the marine classification society to the cargo owners. On a preliminary point of law, it was assumed that the defendants had acted negligently and that the cargo loss (property damage) was a foreseeable outcome of that negligence and it was assumed that the necessary proximity between the parties also existed. But the Law Lords discussed a number of

policy reasons which led them to the conclusion that it would not be fair, just, and reasonable to impose a duty in this type of case. The first was that the law of international trade, underpinned by a network of contracts and supported by insurance cover, already covered the events. To allow this to be evaded to the claimant's advantage by imposing liability on the marine classification society could undermine the whole system of international trade in the future. The insurance implications of imposing a duty of care could make international trade more effective and the settlement of disputes less efficient.

Lord Steyn put it this way:

Is the imposition of a duty of care fair, just and reasonable?

By way of summary, I look at the matter from the point of view of the three parties concerned. I conclude that the recognition of a duty would be unfair, unjust and unreasonable as against the shipowners who would ultimately have to bear the cost of holding classification societies liable, such consequence being at variance with the bargain between shipowners and cargo owners based on an internationally agreed contractual structure. It would also be unfair, unjust and unreasonable towards classification societies, notably because they act for the collective welfare and unlike shipowners they would not have the benefit of any limitation provisions. Looking at the matter from the point of view of cargo owners, the existing system provides them with the protection of the Hague Rules or Hague-Visby Rules. But that protection is limited under such Rules and by tonnage limitation provisions. Under the existing system any shortfall is readily insurable. In my judgment the lesser injustice is done by not recognising a duty of care. It follows that I would reject the primary way in which counsel for the cargo owners put his case.

The incremental approach was impossible in *Watson v British Boxing Board of Control* (2001). A boxer who suffered brain damage following a title fight in London alleged that the Board which regulates boxing had been negligent in not providing a better level of ringside medical care. Lord Phillips in the Court of Appeal described the case as a unique one because here, rather than preventing it, the causing of physical harm was the object of the activity. The role of the defendant was in reducing the effects of these foreseeable injuries once they occurred. Because using the analogy of previous cases was not possible, the court considered all the circumstances of the case, including the reliance placed upon the Board by boxers and concluded that it was fair, just and reasonable to impose a duty of care. Even the fact that the Board was a non-profit making organisation (like the defendant in *Marc Rich*) was not enough to deny the justice of finding liability.



thinking point

What would be the wider implications of allowing tort law to effectively overrule the existing rules of international trade?

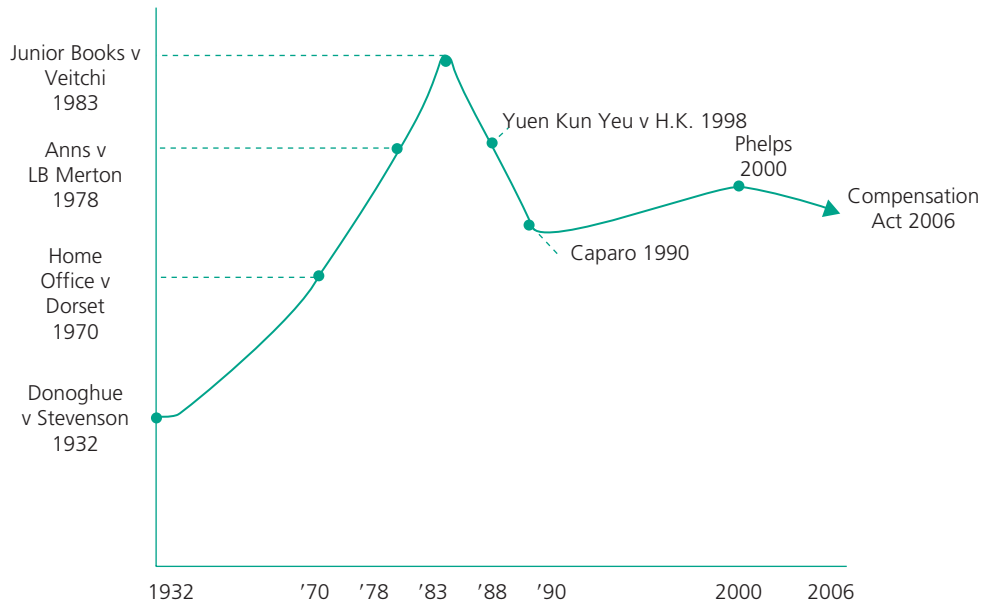
Duty of care so far

Before moving on to look at some of the problematic aspects of duty of care, it will be helpful to recap this large and unwieldy topic.

- Duty of care is a key limiting device for the law of negligence.
- It is a matter of law and is strongly policy-based.
- The key cases on the general principles of duty of care are *Donoghue v Stevenson* and *Caparo Industries v Dickman*.
- The factors which courts take into account in determining duty of care are *foreseeability of harm*, *proximity*, and whether imposing a duty would be *fair, just, and reasonable*.

Diagram 4.1

The 'reach' of negligence

**4.4****Insurance**

We know that the vast majority of tort actions are based upon insurance, for the simple reason that it is only the insured defendant who is likely to be able to pay compensation should he be held liable. It has been explained above that while the cases appear to be between individuals, in reality they are usually brought against the wrongdoer's insurer and are often brought by the claimant's insurer. Two areas of liability are noted for their statutory requirements of compulsory insurance. Employers are required by the Employers' Liability (Compulsory Insurance) Act 1969 to hold liability cover for their employees and the Road Traffic Act 1988 requires motorists to be insured for damage to third parties. It is, then, no surprise to hear that the Pearson Commission discovered that 47% of all tort claims concerned employers' liability and another 41% were for motor accidents.

cross reference

see Chapter 2 for the tort system.

To what extent do the courts take insurance into account when making decisions about negligence liability? Judges have not always agreed on this. The traditional view is represented by Viscount Simonds in *Davie v New Merton Board Mills Ltd* (1969):

It was at one time suggested . . . that the House should take into consideration the fact that possibly or even probably the employer would, but the workman would not, be covered by insurance, and for that reason should be the more ready to fasten upon the employer liability . . . I will only say that this is not a consideration to which your Lordships should give any weight at all in your determination of the rights and liabilities of the parties . . . It is not the function of a court of law to fasten upon the fortuitous circumstance of insurance to impose a greater burden on the employer than would otherwise lie upon him.

However, in the same way that judges have become more open about discussing the policy behind their decisions, they have also begun to cite, and at times to justify, their decisions at least partly upon insurance considerations.

In *Smith v Eric Bush* (1990), Lord Griffiths put it this way:

What are the practical consequences of the decision on the question of reasonableness? This must involve the sums of money potentially at stake and the ability of the parties to bear the loss involved, which, in its turn, raises the question of insurance. There was once a time when it was considered improper even to mention the possible existence of insurance cover in a lawsuit. But those days are long past. Everyone knows that all prudent, professional men carry insurance, and the availability and cost of insurance must be a relevant factor when considering which of two parties should be required to bear the risk of a loss.



thinking point

What effect might the prevalence of insurance have on the tort system as a means of deterrence?

He reflects an awareness that one of the functions of tort is to spread the cost of losses efficiently. It is about more than simple blameworthiness. Insurance will be relevant between the two parties in the case, but once duty is established in a certain type of situation there will be wider implications. Carol Harlow (in *Understanding Tort Law*, 3rd edn, p 24), however, has noted that in many cases judges will only be guessing about the possible future insurance considerations of certain outcomes. While openness about decision-making cannot be disputed, the finding of a duty of care and thus liability on the basis of perceived insurance implications could be risky when not well-supported.

4.5

What kind of damage?

You will recall that the foundations of negligence law were laid in cases concerning bodily injury and property damage. Despite the amount of time given to the topic in this chapter, very little litigation actually comes before the courts concerning the issue of duty of care. That is because in cases of personal injury, death, and property damage there tends to be an assumption in favour of a duty of care. According to Lunnay and Oliphant:

.....
misfeasance
wrongdoing.
.....

... [I]n the modern law it is permissible to work on the assumption that, where a private individual commits a positive act of **misfeasance** which foreseeably causes physical harm to the person or property of the claimant, a duty of care will be owed.

The authors go on to point out that this assumption can be rebutted in some cases and *Marc Rich* (above) is such an example.

cross reference
see Chapter 7.

Negligence liability has developed to cover other types of damage as well, such as particular types of psychological injury and pure economic loss. It is now necessary to consider other situations which are also outside Lunnay and Oliphant's description: when the damage is attributed not to a private individual but to a *public body* and when it is the result not of a 'positive act of misfeasance' but due to an *omission*.

4.6

Public bodies as defendants

Negligence actions against public bodies have in the past raised difficulties around the issue of duty of care. Examples of what is meant by 'public bodies' are the central government (eg Home Office in *Dorset Yacht*), local authorities, schools, police, or fire authorities and 'quangos' such as Thames Water or the Milk Marketing Board. There has been a general reluctance by the courts to impose negligence liability on public bodies, based on an awareness that the actions of public bodies are subject to different considerations than private individuals or organisations. When allocating resources and taking decisions on risk, public bodies are likely to be both empowered and constrained by statutory authority. Judges are also aware that when liability is imposed, this will usually be indirectly underwritten by the tax-payer. As Professor Harlow has put it:

...[British judges] are more likely to take the view that the 'deep pockets' of government should not be treated as a free and bottomless insurance fund.

ultra vires

this Latin phrase means that someone is acting beyond the powers they have been given, in this case by legislation.

Courts have at times used public law concepts such as *ultra vires* to address the problem of tort liability of public bodies. A focus on the issue of whether or not the public body was acting within its powers was suggested in *Dorset Yacht*, but case development subsequently has favoured a different approach: that of determining *justiciability*. According to this there are some aspects of public bodies' activities which can be looked into by the courts and others which are outside the scope of the courts. One approach to this distinction was described by Lord Wilberforce in *Anns v London Borough of Merton* as a choice between *policy* and *operational* decisions. The former, which is not justiciable, is one in which the public body may be using its discretion concerning, say, the allocation of resources. In *Dorset Yacht* it would have been a policy decision that a Borstal is an appropriate institution for young offenders and that a certain number of Borstals were needed nationally. The operational, which is justiciable, is in a more practical realm of day-to-day running of a Borstal, such as decisions made by prison officers about how to guard a particular party of youths on a given night.

The policy/operational distinction proved unworkable in practice because there was no clear consensus about which activities fell into which category. Instead, the current situation has been described by Winfield as a continuum or spectrum. At one end are matters of 'high policy' which can never be the subject of a negligence action – for instance a Cabinet decision to go to war. At the other end, are decisions which would seem to be very appropriate for a court to review in a negligence action, such as a school's educational psychologist's misdiagnosis of a child's learning difficulty. It is important to remember that just because an issue is justiciable, it does not mean that the public body will owe a duty of care to all parties concerned. The cases will show that there may be a duty to some but not to others. Neither does a finding of justiciability mean that the public body defendant will be liable in negligence: the court may impose a very high threshold on the question of breach.



thinking point

Where on the spectrum of justiciability would you put the following activities and why?

- (1) A decision by a local authority social worker not to take a child into care.
- (2) A failure by an ambulance service to promptly dispatch an ambulance.
- (3) The failure of a psychologist employed by an education authority to diagnose a pupil's dyslexia.
- (4) A decision by a local authority highways department concerning dangerous obstructions in the road.

The answers given by the courts will be revealed below!

4.6.1 Liability of public bodies gathers pace

The door on tort liability of public bodies began to open with *Dorset Yacht*. However, in a number of important and high level cases the courts continued to wrestle with the implications of negligence liability in this area.

X v Bedfordshire CC (1995) was one of a number of conjoined cases heard by the House of Lords concerning local authority liability for children's welfare. In *Bedfordshire* itself, five children in a family had been under the supervision of the local authority social services department. They were suffering a high level of neglect and mistreatment by their parents; however, the decision was made not to have them taken into care. As adults they sued the Bedfordshire County Council for damages for the personal and psychological injuries which they sustained. Lord Browne-Wilkinson indicated that although the way the initial care decision had been taken was a practical matter which was probably justiciable, it would not be fair, just, or reasonable (in *Caparo* terms) to impose a duty of care on the local authority in respect of it.

He gave a number of policy reasons which included: first, the fact that this type of decision was a delicate one which cut across a number of different disciplines; and second, the local authority's power was given by the Children Act 1989 and this was not the sort of statute under which an individual should be able to sue in tort. Lastly was the awareness that this was an area which might give rise to unfounded legal actions. It should be noted that when the case was appealed to the European Court of Human Rights in *Z v UK* (2001), judgment was given in favour of the claimants and the UK was held to neither have protected the children from inhuman or degrading treatment (a breach of Article 3 of the ECHR) nor to give them an effective legal remedy for this failure (a breach of Article 13 of the ECHR).

In *Kent v Griffiths* (2000), a GP made a 999 call for an ambulance to take a pregnant woman suffering from an asthma attack to hospital. The call was taken and an ambulance dispatched; however, it took 38 minutes to arrive despite two further calls by the GP, although the distance was only 6½ miles. Because the patient suffered brain

damage and lost her baby she sued the ambulance service in negligence for the damage attributable to the delay. The Court of Appeal reversed the earlier ruling against the claimant and held that the acceptance of the call created a duty of care in respect of the patient. The ambulance service was liable.

Educational failures were the concern of *Phelps v Hillingdon LBC* (2000), where the House of Lords heard a group of conjoined cases brought against local authority education departments. One claimant had been referred to her school's educational psychologist at the age of 11 to be tested for a learning disability. Although she was later privately diagnosed as dyslexic, the problem was missed by the psychologist. As a result the claimant did not receive the sort of remedial teaching she needed and her earning potential was diminished. The House of Lords found the defendants vicariously liable for the failure of their employee and awarded damages for the lost educational opportunities. According to Lord Slynn, '... where an educational psychologist is specifically called in to advise in relation to the assessment and future provision for a specific child and it is clear that the parents acting for the child and the teachers will follow that advice, a duty of care prima facie arises'. There were no reasons in this case to overturn that presumption.

Stovin v Wise (1996) concerned a road verge on which a bank of earth obstructed drivers' views and had been responsible for several accidents. Norfolk County Council was aware of the problem but failed to exercise its statutory power to require the land owner to remove the obstruction. The House of Lords denied a duty of care in negligence by a majority of three to two. The case was complicated by the fact that it involved an omission and this aspect will be dealt with below. On the issue of liability of a public body, Lord Hoffmann spoke for the majority. He reflected on the inadequacy of the policy/operational distinction, because it there was little predictability or consistency in allocating functions into each category. For him the significant factor in this case was that Parliament had chosen to give the council a *power* rather than a *duty* in respect of the removal of obstructions: '... the fact that Parliament has conferred a discretion must be some indication that the policy of the act conferring the power was not to create a right to compensation.' In *Gorringe v Calderdale MBC* (2004), the Law Lords reached a similar conclusion in another highways case, this time concerning a council's failure to replace a warning sign on a dangerous stretch of road.

We are left, then, with a degree of unpredictability about when courts will impose liability on public authorities, though there appears to be a growing sympathy for claimants against education authorities. Before finishing this topic, it is interesting to observe that the same action may well be held to carry with it a duty to one of the parties involved but not to another. *JD v East Berkshire Community Health Trust* (2005) was a case in which three different sets of parents sued for the psychological injuries they had suffered due to misdiagnosis of child abuse by social services or health authorities. In *JD* itself, a boy's

allergic reaction was interpreted wrongly by the social services department as indicating mistreatment by his mother and he was put on the at-risk register for some months until the mistake was discovered. His mother's claim for damages was rejected by the House of Lords for a number of policy reasons, many of which were similar to those we have seen discussed in relation to the *Bedfordshire* case, above. Lord Rodger, however, also felt that there could be a potential conflict of interest if a duty were owed to the mother as well as the child:

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



thinking point

What argument would you make to contradict the view of Lord Rodger?

4.7

Omissions

Although Lord Atkin in *Donoghue v Stevenson* refers to 'acts or omissions' as forming the basis of the negligence action, English law has been reluctant to impose liability for omissions, or failures to act. Another way of describing this is to say that in English law there is generally no duty to perform actions to help someone or to prevent their injury. The example is often given in terms of the possible rescue of a non-swimmer struggling in the water. The general position is that tort law would impose no liability on someone who had the means to rescue the drowning person but chose not to! This may be surprising and indeed there are many other jurisdictions, such as that of France, which provide for both civil as well as criminal liability in such situations.

Why should duty of care be restricted in the case of omissions? Read the following excerpt from the opinion of Lord Hoffmann in *Stovin v Wise* (1996) and look for the following reasons:

- invasion of freedom;
- 'why pick on me?'; and
- economic inefficiency.

There are sound reasons why omissions require different treatment from positive conduct. It is one thing for the law to say that a person who undertakes some activity shall take reasonable care not to cause damage to others. It is another thing for the law to require that a person who is doing nothing in particular shall take steps to prevent another from suffering harm from the acts of third parties (like Mrs. Wise) or natural causes. One can put the matter in political, moral or economic terms. In political terms it is less of an invasion of an individual's freedom for the law to require him to consider the safety of others in his actions than to impose upon him a duty to rescue or protect. A moral version of this point may be called the 'why pick on me?' argument. A duty to prevent harm to others or to render assistance to a person in danger or distress may apply to a large and indeterminate class of people who happen to be able to do something. Why should one be held liable rather than another? In economic terms, the efficient allocation of resources usually requires an activity should bear its own costs. If it benefits from being able to impose some of its costs on other people (what economists call 'externalities,') the market is distorted because the activity appears cheaper than it really is. So liability to pay compensation for loss caused by negligent conduct acts as a deterrent against increasing the cost of the activity to the community and reduces externalities. But there is no similar justification for requiring a person who is not doing anything to spend money on behalf of someone else. Except in special cases (such as marine salvage) English law does not reward someone who voluntarily confers a benefit on another. So there must be some special reason why he should have to put his hand in his pocket.

Before going on to look at case law in this area and the very important exceptions to the above rule, it is necessary to clarify what is meant by an omission in law. Obviously, many negligent courses of action involve *not* doing something. When a driver fails to stop at a red light, he has failed to put his foot on the brake pedal. This would not be treated in law as an omission, but rather just as one aspect of his negligent way of driving his car. We are often, here, looking at a defendant's failure to protect the claimant from a risk of harm caused by a third party or by himself. Another way of describing it, suggested by Lunney and Oliphant, is the difference between 'making things worse' (which could bring liability) and 'failing to make things better' (which often does not).

In *Stovin v Wise*, we have seen that the cause of the danger to road users was the bank of earth projecting from land owned by British Rail (in addition to the negligent driving of one of the vehicles which crashed). Norfolk County Council was being sued for its failure, or omission, to enforce removal of the obstruction, of which it was aware. The fact that the Council's wrong was an omission was the major factor, combined with the fact that it was a public body, in concluding that there had been no duty of care. Lord Hoffmann (in the majority) and Lord Nicholls (in the minority) agreed that although there could often be uncertainty about categorising omissions, it was correct that there should be a presumption against duty of care in these cases. Lord Nicholls said:

... the recognised legal position is that the bystander does not owe the drowning child or the heedless pedestrian a duty to take steps to save him. Something more is required than being a bystander. There must be some additional reason why it is fair and reasonable that one person

should be regarded as his brother's keeper and have legal obligations in that regard. When this additional reason exists, there is said to be sufficient proximity. That is the customary label.



thinking point

Discussions around duty of care often use religious terminology, such as reference to the parable of the Good Samaritan and, above, 'my brother's keeper'. Do you think that the approach of English law to the duty to rescue can be attacked as immoral or can you defend it?

What is Lord Nicholls' 'something more'? Looking at *Smith v Littlewoods* (1987) will help to provide the answers. The defendants owned a disused cinema which they were intending to demolish. Before they could do so, people began to break in to the property and several times, unknown to the defendants, attempted to start fires in piles of rubbish which had accumulated. A fire was started which spread to and damaged adjoining properties. The owners of those properties sued the defendants in negligence for their failure to adequately secure the premises. The damage was done by the arsonists (who would not be worth suing), so instead the claimants sought compensation from Littlewoods, who were no doubt well insured!

According to Lord Goff:

That there are special circumstances in which a defender may be held responsible in law for injuries suffered by the pursuer through a third party's deliberate wrongdoing is not in doubt. For example, a duty of care may arise from a relationship between the parties, which gives rise to an imposition or assumption of responsibility upon or by the defender, as in *Stansbie v. Troman* [1948] 2 K.B. 48, where such responsibility was held to arise from a contract. In that case a decorator, left alone on the premises by the householder's wife, was held liable when he went out leaving the door on the latch, and a thief entered the house and stole property. Such responsibility might well be held to exist in other cases where there is no contract, as for example where a person left alone in a house has entered as a licensee of the occupier. Again, the defender may be vicariously liable for the third party's act; or he may be held liable as an occupier to a visitor on his land. Again, as appears from the dictum of Dixon J. in *Smith v. Leurs*, 70 C.L.R. 256, 262, a duty may arise from a special relationship between the defender and the third party, by virtue of which the defender is responsible for controlling the third party: see, for example, *Dorset Yacht Co. Ltd. v. Home Office* [1970] A.C. 1004. More pertinently, in a case between adjoining occupiers of land, there may be liability in nuisance if one occupier causes or permits persons to gather on his land, and they impair his neighbour's enjoyment of his land. Indeed, even if such persons come on to his land as trespassers, the occupier may, if they constitute a nuisance, be under an affirmative duty to abate the nuisance. As I pointed out in *P. Perl (Exporters) Ltd. v. Camden London Borough Council* [1984] Q.B. 342, 359, there may well be other cases.

These are all special cases. But there is a more general circumstance in which a defender may be held liable in negligence to the pursuer, although the immediate cause of the damage suffered by the pursuer is the deliberate wrongdoing of another. This may occur where the defender negligently causes or permits to be created a source of danger, and it is reasonably foreseeable that third parties may interfere with it and, sparking off the danger, thereby cause damage to

persons in the position of the pursuer. The classic example of such a case is, perhaps, *Haynes v. Harwood* [1935] 1 K.B. 146, where the defendant's carter left a horse-drawn van unattended in a crowded street, and the horses bolted when a boy threw a stone at them. A police officer who suffered injury in stopping the horses before they injured a woman and children was held to be entitled to recover damages from the defendant. There, of course, the defendant's servant had created a source of danger by leaving his horses unattended in a busy street. Many different things might have caused them to bolt – a sudden noise or movement, for example, or, as happened, the deliberate action of a mischievous boy. But all such events were examples of the very sort of thing which the defendant's servant ought reasonably to have foreseen and to have guarded against by taking appropriate precautions.

4.7.1 Exceptions to no liability for omissions

The areas of exception which emerge from Lord Goff's speech are:

- (1) a relationship between the parties which gives rise to an assumption of responsibility. This might be based on a contract but not necessarily;
- (2) a relationship of control between the defendant and a third party; and
- (3) the defendant creates or permits a source of danger to be created, which is interfered with by third parties. Additional to this is a failure of a defendant to remove a source of danger of which he is aware.

Lord Goff also refers to nuisance, vicarious liability, and occupier's liability but they will not be dealt with at this stage.

We will now consider cases which illustrate the exceptions to the basic rule about liability for omissions.

(1) Relationship creating an assumption of responsibility

In *Stansbie v Troman* (1948) a decorator was held liable to the homeowners for a theft of jewellery which took place when he left the house unlocked when going out for two hours to buy wallpaper. The contractual relationship between the parties was held to have created a duty on the defendant to take positive steps to protect the claimant from loss.

In *Barrett v Ministry of Defence* (1995), there had been a pattern of excessive drinking amongst soldiers at a remote Navy base, where drinks were very cheap. One night a soldier collapsed while drunk. The duty officer arranged for him to be taken to his room where he was left and later died due to choking on his own vomit. His widow brought a negligence action against the Ministry of Defence. The Navy was not held to be under a general duty to prevent its employees from excessive drinking; however, here a relationship of care had been undertaken.

Lord Justice Beldam in the Court of Appeal observed:

In the present case I would reverse the judge's finding that the defendant was under a duty to take reasonable care to prevent the deceased from abusing alcohol to the extent he did. Until



he collapsed, I would hold that the deceased was in law alone responsible for his condition. Thereafter when the defendant assumed responsibility for him, it accepts [sic] that the measures taken fell short of the standard reasonably to be expected. It did not summon assistance and its supervision of him was inadequate.

A recent case in which the failure to assume responsibility was clearly established by the lack of proximity between the defendant and the claimant's harm was *Sutradhar v NERC* (2006). A large number of people in Bangladesh had been poisoned by drinking from a well which had been contaminated by arsenic. The defendants had been commissioned by the Overseas Development Agency to test local water for minerals which might be harmful to fish. They had not been required to, nor did they ever consider, the testing of the water for arsenic. A negligence action failed in both the Court of Appeal and, unanimously, in the House of Lords. There was held to be no relationship of proximity between the claimants and the defendant that would give rise to a positive duty to test for arsenic in the water. Lord Hoffmann expressed his position strongly:

[The] principle is not that a duty of care is owed in all cases in which it is foreseeable that in the absence of care someone may suffer physical injury. There must be proximity in the sense of a measure of control over and responsibility for the potentially dangerous situation. Such a principle does not help the claimant... The [defendant] had no control whatever, whether in law or in practice, over the supply of drinking water in Bangladesh, nor was there any statute, contract or other arrangement which imposed upon it responsibility for ensuring that it was safe to drink.



(2) Existing relationship with wrongdoer involving control

It will be recalled that a duty of care was held to be owed to property owners in the vicinity of the Borstal camp in *Home Office v Dorset Yacht*. Again it must be emphasised that this was another example of an omission – that is, the failure of the prison authorities to prevent the boys' escape. In the House of Lords it was held that because the custodial relationship between the prison authorities and the wrongdoers could be described as one of control, that the torts committed by the boys were the responsibility of the Home Office.

Carmarthenshire County Council v Lewis (1955) concerned a young child who ran from his nursery school premises onto the busy road which ran nearby. The plaintiff's husband swerved his car to avoid hitting the child and was himself killed when his car hit a tree. The defendant County Council and the teachers at the school were held to have been jointly in control of the child and therefore under a duty to take reasonable steps to prevent them becoming a danger to others.

(3) Creation of or failure to remove a danger which is then used by third parties

We have seen that in *Smith v Littlewoods* (1987) the House of Lords carefully considered whether the defendants could be held liable for negligently failing to 'abate a fire risk created by third parties on their property without their fault'. Lord Goff believed that



cross reference
see Chapter 13.

this was the sort of situation in which liability could be imposed for a failure to act. Here it was concluded that the risk of arson to the claimant's property was not reasonably foreseeable and on that basis their neighbours could not have been liable in negligence for failing to address it.

Goldman v Hargrave (1966) was a nuisance case; however, Lord Goff used it as an example of the sort of situation in which negligence liability might be imposed for an omission. In Australia lightning struck a large tree on the defendant's land causing it to catch fire. The defendant did not sufficiently put the fire out and, when the wind changed, the fire spread to the claimant's land. This had been a hazardous state of affairs which the defendant omitted to remedy and for this Lord Goff suggested that a duty in negligence could be in some circumstances be owed.

It would seem, however, that the courts are often reluctant to impose liability. In *Topp v London Country Buses Ltd* (1993), a bus driver left his bus, along with the ignition keys, in a lay-by near to a pub for a relief driver who never arrived. Some nine hours later the bus was stolen and while being driven by the thief, hit and killed the claimant's wife. The Court of Appeal held that no duty of care arose. The theft was not foreseeable as a result of the defendants' negligence. Proximity between the bus company and the deceased was doubtful. In any case it would not be fair, just, and reasonable to impose a duty. It would appear that it was crucial to the decision that the defendants had not been aware of the nature of the clientele of the pub!



thinking point

Liz is a doctor driving home from her 36-hour shift at the local hospital. She sees a motorbike hit a pedestrian on a quiet road but fail to stop.

Liz gets out and looks at the pedestrian and decides, wrongly, that his injuries are not serious, so she leaves him by the side of the road and drives home. Could Liz be liable in tort for the additional injury which the pedestrian suffers due to her failure to assist him?

4.8

Case study: police

Concentrating on police liability will serve as an illustration of the way the concept of duty of care has been linked to the more general evolution of negligence liability.

4.8.1 'Operational' liability

It is well established that the police can be liable in negligence when they directly injure someone due to their positive act or (in some cases) omission. For example, there is a clear duty of care upon a police driver in relation to the safety of pedestrians and other road users.

Knighthley v Johns (1982) involved a complicated chain of events. An accident occurred at the end of a one-way tunnel. When the police attended, the officer in charge ordered two motorcyclists to ride the wrong way through the tunnel, without first closing the end of the tunnel. One of the motorcyclists was hit by a car driving into the tunnel, without any fault on the part of that driver. The officer in charge was held to be solely liable in negligence for the second accident. In *Rigby v Chief Constable of Northamptonshire* (1985), the police used flammable CS gas in an operation to flush a suspect out of a building. They were liable in negligence for damage caused by the resulting fire because they had omitted to take the usual precaution of having fire-fighting equipment standing by.

4.8.2 Immunity?

The situation changes when the question is one of police liability for harm caused in the course of the 'investigation and suppression' of crime or due to resource allocation decisions. Here the courts have been slow to impose duties of care, using a range of different devices to justify their decisions.

Hill v Chief Constable of W Yorks (1989) is a key House of Lords case which illustrates the range of principle-based and policy considerations that may come into play in duty of care decisions. Jacqueline Hill was the last victim of the serial killer Peter Sutcliffe, also known as the 'Yorkshire Ripper'. Her mother brought a tort action against the police force who had searched for the Ripper unsuccessfully over a number of years. Her case was that, had it not been for their negligence in the way they had conducted their inquiries, her daughter would not have died.

The judge at first instance struck out the case as disclosing no cause of action due to the lack of a duty of care. The claimant eventually appealed to the House of Lords. For the purpose of this **striking-out action**, the Lords assumed that there had been negligence on the part of the police. Had there been held to be a duty of care, the breach of duty point would then have been debated on the facts. They then applied the 'two-stage test' from *Anns v London Borough of Merton* in order to determine whether there could be a duty of care in this type of situation. It was agreed that the requirement of foreseeability was fulfilled in the sense that there was 'likely harm to such as Miss Hill if Sutcliffe were not identified and apprehended'. But, under *Anns*, more was needed to establish a duty of care: either a relationship of control between the police and the killer (similar to that between the prison guards and the boys in *Dorset Yacht*) or a proximity of the police to the victim. As Sutcliffe could not be said to have been under their control and there was nothing to set Miss Hill apart as being more at risk than the rest of the female population, then this element of the *Anns* equation was not fulfilled and there had not been a duty of care.

..... striking-out action

A procedural tactic whereby one party applies to the court to strike out all or part of the other party's statement of case because it shows no reasonable grounds for bringing or defending the action.
.....



thinking point

What might be the outcome if the police were to adopt an attitude of 'defensive policing'?

For the avoidance of doubt, Lord Keith went on to itemise the policy reasons why there should not be a duty of care in this type of situation – in this sense tackling the second part of the *Anns* test as well as the first:

- the police's general sense of public duty would not be reinforced by negligence liability;
- potential liability could lead to 'defensive policing';
- conducting murder investigations is a complex task involving decisions, often resource-dependent, on 'matters of policy and discretion';
- defending negligence actions would be demanding of money, time, and manpower and divert the police from their main function; and
- negligence actions would effectively re-open formerly closed cases.

Lord Templeman added:

- internal or public inquiries are the more appropriate means of supervising the efficiency of the police.

It is this policy reasoning which gave rise to the view that the police might hold an immunity from negligence actions concerning their role in the prevention and investigation of crime. This was applied to an extreme degree in *Osman v Ferguson* (1993). A mentally unstable teacher developed an obsession with one of his pupils. He conducted a campaign of harassment and violence against the boy's family, of which the police were aware. Eventually he seriously wounded the pupil and killed his father. A negligence action against the police was struck out at trial and this was upheld in the Court of Appeal. It was agreed that, unlike *Hill*, here there was a high degree of proximity between the claimants and the police and also that the culprit had been identified. However, the policy reasons behind *Hill* were held to apply similarly to this case and pointed away from the imposition of a duty of care. In *Osman v UK* (1999), the decision was brought before the European Court of Human Rights which held that giving a blanket immunity to the police, according to which claims could be struck out before any investigation into the facts, was contrary to the Article 6 right of access to the courts. The claimants were awarded compensation to be paid by the UK government.

The Court of Appeal reconsidered the validity of the *Hill* blanket immunity in *Swinney v Chief Constable Northumbria* (1997). The claimant in this case had given the police information about someone they were seeking in connection with a murder. The claimant's name and contact details were recorded and left in a police car from where they were obtained by the alleged criminal, who then subjected the claimant and her husband to a campaign of intimidation. They suffered psychological injury and had to move house and so sued the police in negligence on the basis that there had been a duty of care to keep her details confidential. The Court of Appeal found the required foreseeability and proximity but when they came to the policy stage, there were some aspects of the situation which had not been present in *Hill* or *Osman*. According to Ward LJ, there was at least an arguable case:

... it is incontrovertible that the fight against crime is daily dependent upon information fed to the police by members of the public, often at real risk of villainous retribution from the criminals and their associates. The public interest will not accept that good citizens should be expected

to entrust information to the police, without also expecting that they are entrusting their safety to the police. The public interest would be affronted were it to be the law that members of the public should be expected, in the execution of public service, to undertake the risk of harm to themselves without the police, in return, being expected to take no more than reasonable care to ensure that the confidential information imparted to them is protected. The welfare of the community at large demands the encouragement of the free flow of information without inhibition. Accordingly, it is arguable that there is a duty of care, and that no consideration of public policy precludes the prosecution of the plaintiffs' claim, which will be judged on its merits later.

In *Swinney v Chief Constable Northumbria (No 2)* (1999), the facts were examined and it was held that, apart from the duty issue, there would be no liability because the police, in leaving the information in a locked briefcase in a locked car, had not been negligent.

The basic approach of *Hill* was confirmed in *Brooks v Commissioner of Police for the Metropolis* (2005). Duwayne Brooks was violently attacked and abused by a racist gang. At the same time he was witness to the murder of his friend Stephen Lawrence, whose case became a nationally publicised campaign against racism in the police service. Duwayne was left with post-traumatic stress following the incident. He sued the police for negligently worsening his condition in the way they treated him: allegedly as a suspect and later as a witness, but not as a victim of crime which he was.

Before the House of Lords, three aspects to the police duty were claimed on behalf of the respondent, Duwayne Brooks:

- (1) To take reasonable steps to assess whether the respondent was a victim of crime and then to accord him reasonably appropriate protection, support, assistance, and treatment if he was so assessed.
- (2) To take reasonable steps to afford the respondent the protection, assistance, and support commonly afforded to a key eyewitness to a serious crime of violence.
- (3) To afford reasonable weight to the account that the respondent gave and to act upon it accordingly.

This claim was struck out at first instance, reinstated by the Court of Appeal, but finally rejected by the House of Lords.

According to Lord Steyn:

[T]he core principle of *Hill* has remained unchallenged in our domestic jurisprudence and in European jurisprudence for many years. If a case such as the Yorkshire Ripper case, which was before the House in *Hill*, arose for decision today I have no doubt that it would be decided in the same way. It is, of course, desirable that police officers should treat victims and witnesses properly and with respect: compare the Police Conduct regs 2004 (No. 645). But to convert that ethical value into general legal duties of care on the police towards victims and witnesses would be going too far. The prime function of the police is the preservation of the Queen's peace. The police must concentrate on preventing the commission of crime; protecting life and property; and apprehending criminals and preserving evidence... A retreat from the principle in *Hill* would have detrimental effects for law enforcement. Whilst focusing on investigating crime,



thinking point

If a duty of care is owed regarding the psychological safety of informants, according to Swinney, on the basis of the public interest in criminal justice, could not a similar argument be made for the psychological safety of crime victims? What difference might there be between the two groups?

In *Van Colle v Chief Constable of Hertfordshire Police* (2007), G was required to give evidence for the prosecution at the theft trial of a former employee, B. There had been interference with witnesses and intimidation of G, of which the police defendants were or 'ought to have been' aware. B murdered G, just days before he was due to give evidence, for which he was sentenced to life imprisonment. The case was brought by the parents of G under s 7 of the Human Rights Act 1998 claiming that the way the defendants had acted breached s 6 (1) of the Act which made it unlawful for a public authority to act in a way incompatible with a convention right. The Convention rights which were engaged were the Article 2 right to life and the Article 8 right to private and family life. A common law negligence action was not attempted, due to the precedents of *Hill v Chief Constable of W Yorks* and *Osman v Ferguson*. It was held that there had been a 'real and immediate' threat to the life of the witness. The police should have been aware of this threat and were thus under a duty to take steps to protect his life. Their failure to do so led directly to the death and so compensation was payable for breach of Article 2.

4.9

Duty to *this* claimant

You will recall that at the outset, duty of care was said to be dependent on the answers to *two questions*. We have now completed discussion of the first question, that is whether the case is one of the *type* in which a duty of care should be imposed. However, there will be some cases where we can answer 'yes' at the first stage, but the facts will raise doubts over the particular claimant involved.

This leads us to the second question: was it foreseeable that *this* claimant would be harmed by the defendant's act? It is necessary to consider this because a duty to one party does not necessarily entail a duty to all – otherwise tort liability could potentially be unlimited.



The American case of *Palsgraf v Long Island Railroad* (1928) provides an early example of the unforeseeable claimant. The defendant's employee, a porter, was assisting a passenger who was boarding a train. He jostled a package which the passenger dropped. Unfortunately the package contained fireworks, which exploded. The explosion caused weighing scales to fall onto the plaintiff, who was waiting for a train some distance away down the platform. Her negligence action against the railroad failed because, although the defendants owed a duty of care to the nearby passengers regarding their person and property, it was unforeseeable that the plaintiff was at risk and therefore no duty was owed to her. This was because of the combination of the factors of her distance and the absence of any indication that the package contained explosives. Cardozo CJ put it this way:

If no hazard was apparent to the eye of ordinary vigilance, an act innocent and harmless, at least to outward seeming, with reference to her, did not take to itself the quality of a tort because it happened to be wrong, though apparently not one involving the risk of bodily insecurity, with reference to someone else . . . The orbit of the danger as disclosed to the eye of reasonable vigilance would be the orbit of the duty.

A British counterpart to *Palsgraf* is *Bourhill v Young* (1943), which dealt with the problematic topic of duty of care for psychological injury. A pregnant fishwife in Edinburgh was disembarking from a tram when she heard a crash between a car and a motorcyclist taking place some 50 yards away. Because it was on the other side of the tram, she did not see the crash although she later saw evidence of blood on the pavement. She suffered nervous shock as a result. She was outside the range of physical danger and psychological injury to her was not to have been foreseeable in a person of 'normal susceptibility'. The House of Lords had to consider whether or not a duty of care had been owed to her by the negligent driver.

The speech of Lord Porter is a convenient summary of the law:

In the case of a civil action there is no such thing as negligence in the abstract. There must be neglect of the use of care towards a person towards whom the defendant owes the duty of observing care, and I am content to take the statement of Lord Atkin in *Donoghue v Stevenson*, as indicating the extent of the duty. 'You must take', he said, 'reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be – persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.' Is the result of this view that all persons in or near the street down which the negligent driver is progressing are potential victims of his negligence? Though from their position it is quite impossible that any injury should happen to them and though they have no relatives or even friends who might be endangered, is a duty of care to them owed and broken because they might have been but were not in a spot exposed to the errant driving of the peccant car? I cannot think so. The duty is not to the world at large. It must be tested by asking with reference to each several complainant: Was a duty owed to him or her? If no one of them was in such a position that direct physical injury could reasonably be anticipated to them or their relations or friends normally I think no



duty would be owed, and if, in addition, no shock was reasonably to be anticipated to them as a result of the defender's negligence, the defender might, indeed, be guilty of actionable negligence to others but not of negligence towards them. In the present case the appellant was never herself in any bodily danger nor reasonably in fear of danger either for herself or others. She was merely a person who, as a result of the action, was emotionally disturbed and rendered physically ill by that emotional disturbance.

As was said in *Bourhill*, '[T]he duty is not to the world at large.' Foreseeability of risk to the claimant, or a claimant of his type, is required. In *Haley v London Electricity Board* (1965), a blind pedestrian fell on a tool which had been left guarding a trench in which the defendants were working. The barrier would have been obvious to a sighted person but the plaintiff's white stick did not detect it and he fell over it. His injuries left him almost completely deaf. The House of Lords heard evidence about the numbers of blind people living in London and concluded that a member of that class should have been within the reasonable foresight of the defendants in considering obstacles on the pavement.

Maguire v Harland & Wolff (2005) was a case brought on behalf of the wife of a shipyard worker who had been exposed to asbestos at work due to the negligence of his employers from 1961 to 1965. He had not suffered illness as a result. She, however, contracted asbestos-related cancer, from which she died. The only source of her exposure to asbestos was in washing his work clothes, which had been covered in asbestos dust. Although there was no dispute about the duty of care owed to her husband as an employee, the court had to decide whether there was a duty in respect of what was called 'secondary exposure'. As in *Haley*, expert evidence was offered about the extent of knowledge about the dangers of asbestos at the relevant time. On the basis of this evidence, the Court of Appeal concluded that the level of knowledge was not such as to make it reasonably foreseeable that there would be such a degree of danger to someone in the wife's position that the defendants should take precautions.

cross reference
for more on remoteness, see Chapter 6.

The question of whether a duty was owed to the particular claimant in question is closely related to that of remoteness. We will see below that a question such as that considered by the court in *Bourhill* in terms of duty of care could be looked at in a different way. That is, not in terms of duty but instead as a question of *causation*, ie by asking whether damage of *this kind* was reasonably foreseeable at the time of the defendant's negligence.

4.10

Conclusion

We have looked at a number of cases in which the courts have dealt with some complex policy debates on duty of care. You would be forgiven for thinking that such cases form a key aspect of the practitioner's workload. In fact, litigation on the topic of duty of care is relatively rare. That is because the vast majority of negligence actions pertain to either road traffic accidents or employers' liability (due to the statutory requirement

for compulsory insurance in these areas). Here, duty of care is rarely contested because of the long history of established duty in these situations. We will see that, instead, breach of duty or causation would be more likely to be the source of dispute. Duty of care remains, however, highly important as perhaps the main regulator on the spread or restriction of negligence liability.



Summary

- Duty of care is the first of the three main elements of negligence.
- It is determined by proximity, foreseeability, and policy.
- It is most likely to be established in cases of positive acts which cause physical injury or property damage.
- Finding duty of care is not the same as finding liability.



Further reading

Harlow, C, *Understanding Tort Law* (3rd edn, 2005)

Howarth, D, 'Many Duties of Care – Or a Duty of Care? Notes from the Underground' (2006) 26(3) OJLS 449–472

Lunney, M and Oliphant, K, *Tort Law: Text and Materials* (2nd edn, 2003)

Smith, JC and Burns, P, '*Donoghue v Stevenson* – The Not So Golden Anniversary' (1983) 46 MLR 147

Stapleton, J, 'Tort Insurance and Ideology' (1995) 58 MLR 820

Witting, C, 'Duty of Care – An Analytical Approach' (2005) 25 OJLS 417