2. THE DUTY OF CARE

(A) GENERAL

[4.2] English law excludes negligence liability in many cases through a denial that the defendant owed a duty of care to the claimant. The House of Lords refined its definition of the duty of care throughout the 20th century, with the concept reaching its most expansive formulation in Lord Wilberforce's "two-stage test" in *Anns v Merton London Borough* [1978] AC 728 at page 751:

> "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 test in *Anns v Merton* was criticised for over-extending the law, in particular for suggesting that proximity between the parties required no more than that damage to the claimant was foreseeable by the defendant (see *Yuen Kun Yeu v Attorney General of Hong Kong*, at para [4.5] below). Responding to this criticism the House of Lords set down three essential ingredients of the duty of care in *Caparo Industries plc v Dickman*, which is now the leading case on the duty of care (see para [4.6]): that injury to the claimant was reasonably foreseeable, a relationship of sufficient proximity between claimant and defendant, and that it would be fair, just and reasonable to hold the defendant liable for damage.

Their Lordships in *Caparo v Dickman* warned against seeing the three ingredients as more than useful "labels". What really matters are the factual scenarios of previous cases where liability was imposed, particularly those elements which made it just for a duty of care to be imposed, and which may be extended by analogy to other scenarios. Well-established situations where a duty of care is imposed include the duty of an employer not to expose his employees to an unnecessary risk of injury, and the duty on the driver of a motor car to observe ordinary care or skill towards persons using the highway whom he could reasonably foresee as likely to be affected. In these scenarios, the duty of care is so entrenched that arguments founded on the ingredients of the duty of care are unlikely to undermine the fact of the prima facie duty of care. As Lord Browne-Wilkinson said in *Barrett v Enfield London Borough Council* [2001] 2 AC 550 (see para [4.34]):

> "Once the decision is taken that, say, company auditors though liable to shareholders for negligent auditing are not liable to those proposing to invest in the company . . . that decision will apply to all future cases of the same kind. The decision does not depend on weighing the balance between the extent of the damage to the plaintiff and the damage to the public in each particular case."

[4.3] Donoghue v Stevenson

[1932] AC 562, [1932] All ER Rep 1, 101 LJPC 119, 147 LT, 48 TLR 494

Per Lord Atkin: The rule that you are to love your neighbour becomes, in law, you must not injure your neighbour; and the lawyer's question, who is my neighbour? receives a

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

[4.4] Home Office v Dorset Yacht Co Ltd

[1970] AC 1004, [1970] 2 All ER 294

See para **[4.71]** for details of the case.

Per Lord Reid: 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.

[4.5] Yuen Kun-Yeu v A-G of Hong Kong

[1988] AC 175, [1987] 2 All ER 705

Per Lord Keith: Foreseeability of harm does not of itself automatically lead to a duty of care. All the circumstances of the case, not only the foreseeability of harm, are to be taken into account in determining whether a duty of care arises. There needs to be sufficient close and direct relation between the parties to give rise to the duty of care.

[4.6] Caparo Industries plc v Dickman

[1990] 2 AC 605, [1990] 1 All ER 568

Per Lord Bridge of Harwich: What emerges is that, in addition to the foreseeability of damage, necessary ingredients in any situation giving rise to a duty of care are that there should exist between the party owing the duty and the parties to whom it is owed a relationship characterised by the law as one of 'proximity' or 'neighbourhood' and that the situation should be one in which the court considers it fair, just and reasonable that the law should impose a duty of a given scope on the one party for the benefit of the other.

. . . [The] concepts of proximity and fairness embodied in these additional ingredients are not susceptible of any such precise definition as would be necessary to give them utility as practical tests, but amount in effect to little more than convenient labels to attach to the features of different specific situations which, on a detailed examination of all the circumstances, the law recognises pragmatically as giving rise to a duty of care of a given scope. Whilst recognising, of course, the importance of the underlying general principles common to the whole field of negligence, I think the law has now moved in the direction of attaching greater significance to the more traditional categorisation of distinct and recognisable situations as guides to the existence, the scope and the limits of the varied duties of care which the law imposes. We must now, I think, recognise the wisdom of the words of Brennan J. in the High Court of Australia in *Sutherland Shire Council v Heyman* (1985) 60 ALR 1 , 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"'

Per Lord Roskill: . . . There is no simple formula or touchstone to which recourse can be had in order to provide in every case a ready answer to the questions whether, given certain facts, the law will or will not impose liability for negligence or, in cases where such liability can be shown to exist, determine the extent of that liability. Phrases such as "foreseeability", "proximity", "neighbourhood", and "just and reasonable", "fairness", "voluntary acceptance of risk" or "voluntary assumption of responsibility" will be found used from time to time in the different cases. But, as your Lordships have said, such phrases are not precise definitions. At best they are but labels or phrases descriptive of the very different factual situations which can exist in particular cases and which must be carefully examined in each case before it can be pragmatically determined whether a duty of care exists and, if so, what is the scope and extent of that duty.

Note—See also at para [37.40].

[4.7] Spring v Guardian Assurance plc

[1995] 2 AC 296, [1994] 3 All ER 129, [1994] IRLR 460, [1994] 3 WLR 354, [1994] ICR 596

Per Lord Goff of Chieveley: The central issue in this appeal is whether a person who provides a reference in respect of another who was formerly engaged by him as a member of his staff . . . may be liable in damages to that other in respect of economic loss suffered by him by reason of negligence in the preparation of the reference.

In a series of well known cases, your Lordships' house has commenced a gradual case by case approach to the development of the law of negligence, particularly in cases concerned with claims in respect of pure economic loss. Even so, one broad category of cases has been recognised in which there may be liability in negligence for loss of this kind. These are the cases which spring from, or have been gathered under the umbrella of, the landmark decision of your Lordships' House in *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465, [1963] 2 All ER 575.

It is my opinion that an employer who provides a reference in respect of one of his employees to a prospective future employer will ordinarily owe a duty of care to his employee in respect of the preparation of the reference. The employer is possessed of special knowledge, derived from his experience of the employee's character, skill and diligence in the performance of his duties while working for the employer. . . . Furthermore, when such a reference is provided by an employer, it is plain that the employee relies upon him to exercise due skill and care in preparation of the reference before making it available to the third party. In these circumstances, it seems to me that all the elements requisite for the application of the *Hedley Byrne* principle are present.

[4.8] Tomlinson v (1) Congleton Borough Council (2) Cheshire County Council

[2003] UKHL 47, [2004] 1 AC 46, [2003] 3 All ER 1122, [2003] 3 WLR 705

The claimant dived into a lake at Brereton Health Park, a site owned and occupied by the first defendant and managed by the second defendant, and sustained a serious injury.

Irrespective of the fact that there were notices by the lake clearly stating 'Dangerous Water, No Swimming', it was still a popular place to swim. The defendants were aware of the danger from previous accidents. The claimant was also aware of the depth of the shallow water having previously stood in it up to the depth of his mid-

thigh. It was not disputed that the claimant had seen and ignored the warning signs and so therefore he became a trespasser rather than a bone fide visitor and the Occupiers Liability Act 1984 applied.

At first instance, Jack J dismissed the claimant's claim but the Court of Appeal held that the risk was one against which the defendants might reasonably be expected to offer trespassers some protection. To simply post notices was shown to be ineffective and consequently was not enough to discharge the duty of care. The defendants appealed to the House of Lords.

HELD, ON APPEAL: The characteristics of the lake and the potential danger were matters which were obvious to the claimant and were ones which did not need to be warned against and in any event, the warning signs gave the claimant no additional information beyond what was already obvious. Accordingly, the defendants owed no duty of care.

Per Lord Hoffmann: Mr Tomlinson was freely and voluntarily undertaking an activity which inherently involved some risk. . . . My Lords, as will be clear from what I have just said, I think that there is an important question of freedom at stake. It is unjust that the harmless recreation of responsible parents and children with buckets and spades on the beaches should be prohibited in order to comply with what is thought to be a legal duty to safeguard irresponsible visitors against dangers which are perfectly obvious. The fact that such people take no notice of warnings cannot create a duty to take other steps to protect them. . . . A duty to protect against obvious risks or self-inflicted harm exists only in cases in which there is no genuine and informed choice, as in the case of employees whose work requires them to take the risk, or some lack of capacity, such as the inability of children to recognise danger (*Herrington v British Railways Board* [1972] AC 877) or the despair of prisoners which may lead them to inflict injury on themselves: *Reeves v Comr of Police of the Metropolis* [2000] 1 AC 360.

[4.9] Thompson v Renwick Group Plc

[2014] EWCA Civ 635

The claimant developed diffuse pleural thickening as a result of exposure to asbestos whilst employed by two companies between 1969 and 1978. He worked for the first employer from 1969 to 1975.

In 1975 the second employer acquired the assets and liabilities of the first employer. The two employers were subsidiaries of the defendant parent company. Shortly after the takeover, a new director took over the running of the depot where the claimant worked and it was likely that he had been nominated by the defendant.

The claimant sought damages but neither employer was able to satisfy a judgment or had in place insurance so he issued proceedings against the defendant.

The question of whether the defendant owed a direct duty of care to the claimant was tried as preliminary issue and, at first instance, the claimant was successful.

The defendant appealed.

HELD, ON APPEAL: The defendant had not assumed a duty of care to the subsidiary and its employees by appointing a director. He was responsible for the day to day operation of the subsidiary and was not acting on behalf of the defendant. There was no evidence of a relationship between the director and defendant beyond the inferred nomination as director. Further, the limited evidence available had fallen far short of that required to establish such a duty which will be imposed only if the threefold test in *Caparo Industries Plc v Dickman* [1990] 2 AC 605 (see para **[4.6]**) is satisfied.

[4.10] Personal Representatives of the Estate of Biddick (deceased) v Morcom

[2014] EWCA Civ 182

The claimant, a multi-skilled tradesman, was seriously injured while fitting insulation in the defendant's loft. The defendant was 80 years old at the time and the claimant agreed to fit some insulation to the defendant's hatch cover. The defendant indicated that he would stand underneath the hatch, keeping it in the locked position with a pole to prevent the mechanism working itself loose from the vibrations of the claimant's drill. The claimant fell through the hatch when the defendant left his position to answer the phone.

At first instance, judgment was given for the claimant for one third of his damages to be assessed and both parties appealed.

HELD, ON APPEAL:

(1) On the evidence, it was impossible to say that the judge had wrongly concluded that the cause of the collapse of the hatch was that the catch was only partially engaged.

(2) The defendant had assumed responsibility for ensuring that the latch remained closed. It was fair and reasonable to find that a duty of care arose and it did not matter that the claimant had not relied on the defendant's input.

(3) The judge's reasoning for the apportionment of liability was entirely sound.

[4.11] Cook v Swansea City Council

[2017] EWCA Civ 2142, 168 NLJ 7775

The defendant owned and operated a public car park which was outside, unmanned and open 24 hours a day. The claimant slipped and fell on ice in the car park and claimed that the defendant was in breach of duty under section 2 of the Occupiers' Liability Act 1957 for failing to inspect and grit the car park. The defendant would only grit the car park if reports were received by members of the public about potentially dangerous weather conditions.

HELD: The claim was dismissed. The defendant was not in breach of the duty of care owed to the claimant. It was unreasonable to impose a duty of care on the defendant to grit an unmanned car park whenever icy conditions were reported.

A balancing exercise is required when assessing liability, to include assessing the likelihood that someone might get injured, the seriousness of any injury that could occur, the social value of the activity giving rise to the risk, and the cost of preventative measures. In respect of the likelihood of injury, the risk of ice in cold weather was an obvious danger which the claimant could reasonably be expected to watch out for and take care. There is generally no duty for an occupier to guard and protect visitors against obvious dangers (*Tomlinson v Congleton Borough Council* [2004] 1 AC 46 applied).

Although a serious injury could result from a person falling, the use of the car park benefitted members of the public and imposing an obligation on the defendant to have it manned and regularly gritted would result in additional costs and resources being needed, which could lead to the undesirable result of the car park closing. Also, proof of an accident occurring is not sufficient to establish a breach of duty of care.

[4.12] Robinson v Chief Constable of West Yorkshire

[2018] UKSC 4, [2018] 2 All ER 1041, [2018] 2 WLR 595

The claimant, a 76-year-old lady, was walking along a shopping street in the centre of Huddersfield when she was knocked over by three men who were struggling with each other. Two of the men were police officers who were attempting to arrest a suspected drug dealer. The men fell on top of the claimant who was caused to suffer injury. The

principal question for determination was whether the police officers owed the claimant a duty of care, and, if so, whether they were in breach of that duty.

HELD: It is mistaken to believe that the test set out in *Caparo Industries Plc v Dickman* [19990] AC 605 applies to all claims in the modern law of negligence and that the court will only impose a duty of care where it considers it fair, just and reasonable to do so. The whole point of the judgment in *Caparo* is to repudiate the idea that there is a single test which can be applied to cases to determine whether a duty of care exists. Instead, common law principles, precedent and established authorities should be applied.

The general duty of the police to enforce the law does not carry with it a private law duty towards individuals (*Michael v Chief Constable of South Wales* [2015] UKSC 2 applied). However, the police were not generally immune from liability, and established authorities supported that there would be liability for negligence where such liability arises under normal principles of tort. As a result, police officers might be under a duty of care to protect individuals from a danger of injury which they have created but are not under a duty to protect individuals from dangers caused by third parties. The police officers owed a duty of care to the claimant and they were in breach of this duty as the chain of events leading to the risk of injury had been initiated by them. The actions of the drug dealer resisting arrest did not constitute a new intervening cause because these actions were what the police officers were duty bound to guard against.

(B) FORESEEABILITY

[4.13] Hay (or Bourhill) v Young

[1943] AC 92, [1942] 2 All ER 396, 111 LJPC 97, 167 LT 261, 86 Sol Jo 349

A woman was at the front of a stationary tramcar on the offside loading a creel on to her back. A motorcyclist passed on the near side of the tramcar and collided with a car 45 to 50ft ahead. The woman did not see the impact but merely heard the noise of the collision. She alleged shock caused by the noise of the collision. It was admitted that her terror did not involve any element of reasonable fear of immediate bodily injury to herself.

HELD: The motorcyclist owed no duty to the woman as he could not reasonably have foreseen the likelihood that she could be affected by his negligent act. She was outside the area of potential danger. The question was one of liability, not remoteness of damage. The mere accidental and unknown presence of a person upon the same street as, and somewhere within earshot of, the occurring of an accident in mid-carriageway, does not per se create any relationship of duty raising liability – some other and special element of immediacy is required.

Per Lord Wright: The breach of duty must be vis-à-vis the claimant. The claimant must sue for a wrong to herself. She cannot build on a wrong to somebody else. A blind or deaf man who crosses the traffic on a busy street cannot complain if he is run over by a careful driver who does not know of and could not be expected to observe and guard against the man's infirmity. These questions go to culpability, not compensation.

Per Lord Thankerton: The duty is to take such reasonable care as will avoid the risk of injury to such persons as he can reasonably foresee might be injured by failure to exercise such reasonable care.

Per Lord Macmillan: The duty to take care is the duty to avoid doing or omitting to do anything the doing or omitting to do which have as its reasonable and probable consequence injury to others, and the duty is owed to those to whom injury may reasonably and probably be anticipated if the duty is not observed.

Note—See also *McLoughlin v O'Brian* (at para [38.24]); *Smith v Littlewoods Organisation Ltd* (at para [4.75]); and *Hevican v Ruane* [1991] 3 All ER 65.

[4.14] Berrill v Road Haulage Executive

[1952] 2 Lloyd's Rep 490

Per Slade J: Paraphrasing the words of Lord Uthwatt in *London Passenger Transport Board v Upson* [1949] AC 155, [1949] 1 All ER 60, [1949] LJR 238, 65 TLR 9, 93 Sol Jo 40, HL, a driver is not bound to foresee every extremity of folly which occurs on the road. Equally he is certainly not entitled to drive upon the footing that other users of the road, either drivers or pedestrians, will exercise reasonable care. He is bound to anticipate any act which is reasonably foreseeable, which the experience of a road user teaches that people do, albeit negligently.

Note—See also *Nettleship v Weston* (at para [9.14]) on the duty of care of a driver.

[4.15] Ancell v McDermott

[1993] 4 All ER 355, 137 Sol Jo LB 36, [1993] RTR 235

The police attended the scene of a road accident in which diesel fuel had been spilt. Two officers noted the spillage but left it to attend to the individuals involved in the accident. A car driven by one of the claimants, and in which the other claimant was a passenger, later skidded on the diesel and collided with another vehicle, as a result of which the claimants suffered injury.

The question to be decided was whether individual police officers who, in the course of their employment, come across a potential hazard on the highway caused by a third party, owe a duty to individual members of the public who may subsequently be injured.

HELD: The extent of the duty owed depends on the precise circumstances such as the nature of the hazard, the extent of the danger and the likelihood of injury. In this instance the court did not consider that the officers' duty extended to the warning of an indeterminate number of third parties of an obvious hazard.

[4.16] Alcock v Chief Constable of South Yorkshire Police

[1992] 1 AC 310, [1991] 4 All ER 907, [1991] 3 WLR 1057

The claimants were relatives and friends of football supporters injured or killed at the Hillsborough Stadium disaster as a result of overcrowding in part of the stadium. The defendant was responsible for policing the football match. The claimants were either present in another part of the stadium; outside the stadium; watching the football match live on television or later watched recorded television pictures. The claimants claimed damages for psychiatric illness.

HELD: The claimants' claims failed. They were either not within the class of persons to whom the defendant owed a duty or they were not sufficiently proximate to the accident in time and space. Nolan LJ in the Court of Appeal expressed the view that:

> 'I would accept at once that no general definition is possible but I see no difficulty in principle in requiring a defendant to contemplate that the person physically injured or threatened by his negligence may have relatives or friends whose love for him is like that of a normal parent or spouse, and who in consequence may similarly be closely and directly affected by nervous shock . . . the identification of the particular individuals who come within that category, like that of parents and spouses themselves, could only be carried out *ex post facto*, and would depend on evidence of the "relationship" in a broad sense which gave rise to the love and affection. It is accepted that the proximity to the accident must be close both in time and space . . . in the circumstances of this case the simultaneous television broadcasts of what occurred cannot be equated with the "sight or hearing of the evidence or its immediate aftermath". Accordingly, shock sustained by reason of these broadcasts cannot found a claim.'

Note—See also at para [38.29] and the case of *Hicks v Chief Constable of the South Yorkshire Police* (at para [38.30]), and paras [38.21]–[38.47] of CHAPTER 38 generally.

[4.17] French & ors v Chief Constable of Sussex

[2006] EWCA Civ 312

(2006) Times, 5 April

Five police officers participated in an armed raid that resulted in a fatal shooting. The shooting was not witnessed by these five officers. Disciplinary and criminal charges were initiated against the officers which they claimed caused them stress and psychiatric damage. The officers brought a claim for negligence against the Chief Constable alleging systemic shortcomings in training with the type of operations that led to the fatal shooting. The claims for psychiatric damage were supported by medical evidence.

HELD: The claim was struck out at first instance on the basis that the allegations had no reasonable prospect of success. The police officers had not witnessed the shootings and were not secondary victims. They had also not established that their employers were on notice that they were vulnerable to stress. The Court of Appeal upheld the decision. It was not reasonably foreseeable that corporate failings would cause the officers psychiatric injury by reason of disciplinary and criminal proceedings. Police officers who witness shootings cannot claim as secondary victims and therefore the officers in this claim, who were more remotely affected, could not succeed.

[4.18] Topp v London Country Bus (South West) Ltd

[1993] 3 All ER 448, [1992] RTR 254

A public service mini-bus was left unattended, unlocked and with the keys in the ignition. The bus was stolen and driven negligently causing the death of a cyclist.

HELD: No duty of care was owed by the bus operators to the cyclist for:

(1) there was no duty to prevent deliberate wrongdoings by a third party;
(2) it would be difficult to assess the degree of negligence based on the type of vehicle left and the period for which it was left unattended; and
(3) the likelihood of the vehicle being stolen, driven negligently and causing injury was low.

An appeal to the Court of Appeal was dismissed.

[4.19] Eileen Corr (administratrix of the estate of Thomas Corr (deceased)) v IBC Vehicles Ltd

[2008] UKHL 13, [2008] 2 All ER 943

Mr Corr was injured in a factory accident that caused post-traumatic stress disorder (PTSD) and depression requiring hospital admission. Six years after the accident Mr Corr committed suicide. Mrs Corr claimed damages under the Fatal Accidents Act 1976 against Mr Corr's employers who were responsible for the negligent accident. The trial judge dismissed the claim on the grounds that the death was not reasonably foreseeable and that Mr Corr's suicide broke the chain of causation. The Court of Appeal (with Ward LJ dissenting) held that there was no break in the chain of causation and that there was no need for the claimant to show at the time of the accident that Mr Corr's suicide was reasonably foreseeable as a separate damage. It was adequate that the employers were responsible for the depression and the suicide

flowed from that psychiatric injury. Mrs Corr could claim damages against the employer as a result of her husband's suicide. The defendant appealed to the House of Lords.

HELD: The House of Lords affirmed the Court of Appeal's decision and held:

(1) The employer owed the deceased a duty to avoid causing him both psychological and physical injury. The claimant's suicide was not outside the scope of the employer's duty of care.

(2) The deceased's depression was a foreseeable consequence of the employer's breach. Suicide is a common consequence of severe depression and therefore suicide was reasonably foreseeable.

(3) The chain of causation could be broken when a person of sound mind voluntarily committed suicide. Here the suicide was not voluntary because the deceased's capacity to make reasoned decisions was impaired by his severe depression.

(4) The deceased did not consent to the accident at work and therefore could not have consented to the psychological injury which caused the suicide.

(5) A deduction in damages could be made for contributory negligence where a person suffering from depression committed suicide but the House of Lords could not address the issue, as it was not investigated by the Court of Appeal.

[4.20] Trustees of the Portsmouth Youth Activities Committee v Poppleton

[2008] EWCA Civ 646

The claimant visited an indoor simulated rock climbing ("bouldering") centre with two friends. The floor of the centre was covered in a 12-inch thick safety matting, and at the top of the bouldering features, there were steel bars linking the different walls. The centre's rules prohibited jumping from the walls and climbing on top of the climbing structures, including onto the steel bars. The claimant saw others jumping from the wall to grab the bars. He imitated this manoeuvre, but missed the bars, and landed headfirst on the matting, causing himself serious injury. He sued the occupiers of the premises for breach of statutory duty and negligence. The court found for the claimant only insofar as there was a breach of the common law duty of care in failing to warn that the thick safety matting did not make the climbing wall safe. However, the claimant was 75% contributory negligent. The defendants appealed the finding of liability, and the claimant cross-appealed the finding on contributory negligence.

HELD: The appeal was allowed, and the cross-appeal was therefore dismissed. Per May LJ: *Tomlinson v Congleton Borough Council* [2004] 1 AC 46 is a decision mainly about the application of the Occupiers Liability Act 1984 . But the speech of Lord Hoffmann in particular has dicta relevant to policy considerations underlying the scope of duties which may be owed in cases such as this. . . . It is, therefore, in my view, necessary to consider whether the risk in the present case was inherent and obvious. The risk of falling from the wall was plainly obvious. . . . Evidence apart, it is to my mind quite obvious that no amount of matting will avoid absolutely the risk of possibly severe injury from an awkward fall and that the possibility of an awkward fall is an obvious and inherent risk of this kind of climbing. . . .

There being inherent and obvious risks in the activity which Mr Poppleton was voluntarily undertaking, the law did not in my view require the appellants to prevent him from undertaking it, nor to train him or supervise him while he did it, or see that others did so. If the law required training or supervision in this case, it would equally be required for a multitude of other commonplace leisure activities which nevertheless carry with them a degree of obvious inherent risk — as for instance bathing in the sea. It makes no difference to this analysis that the appellants charged Mr Poppleton to use the climbing wall, nor that the rules which they displayed could have been more prominent.

[4.21] Hadlow v Peterborough City Council

[2011] EWCA Civ 1329, [2011] All ER (D) 193 (Oct)

The claimant had been working in a secure facility for women operated by a local authority. The facility was secure on account of the women's dangerous behaviour. The local authority's policy specified that staff members should not be alone with more than two women. The claimant was to teach a class, when two escorts brought the women into the locked classroom and then left. When the claimant tried to get to the door quickly to ask an escort to stay, she tripped on her chair trying to navigate her way through a narrow gap between the furniture, and injured herself.

HELD: Having regard to the breach of duty, it was clear that H's accident had not happened in the most likely manner, namely via attack or the threat of an attack from the women she was teaching. It had arisen as a result of her taking action, quite reasonably, to remove the risk and remedy the local authority's breach of duty in leaving her alone with the three women, contrary to its policy. The known source of danger had been the women, but it was not necessary to postulate foreseeability leading up to the particular circumstances of the accident. The local authority had created a risk of injury and H had responded in a way it conceded was appropriate. The risk of physical injury was indeed foreseeable, and although it did not occur in the most likely manner, H's being injured could be sufficiently envisaged and was caused by the local authority's breach of duty.

[4.22] Everett v Comojo (UK) Ltd (t/a The Metropolitan)

[2011] EWCA Civ 13, [2011] 4 All ER 315, [2012] 1 WLR 150, [2011] NLJR 172, 155 Sol Jo (no 3) 39, [2011] All ER (D) 106 (Jan)

The defendant was a nightclub, and was part of a hotel. The claimant was a guest at the nightclub. A waitress working in the nightclub was concerned that there might be a confrontation between A and B, a member of the nightclub, and went to speak to the manager. At that time, one of the member's associates attacked the claimants and stabbed them with a knife.

HELD: The relationship between the management of a nightclub and its guests was of sufficient proximity to justify the existence of a duty of care. It was foreseeable that there was some risk that one guest might assault another; that was recognised by C's own risk assessment. It was fair, just and reasonable to impose a duty of care on the management of a nightclub in respect of injuries caused by a third party, provided that the scope of the duty was appropriately set. The degree of proximity, including the economic relationship, between the two was so close that no special rule of foreseeability was required in the interests of fairness, justice and reasonableness. In all the circumstances, the waitress had not been in breach of duty. She had realised that there was a possibility of a confrontation between the parties, but there was no reason to think that a confrontation was imminent.

[4.23] Cornish Glennroy Blair-Ford v CRS Adventures Ltd

[2012] EWHC 2360 (QB)

The claimant, a teacher, was taking part in a mini-Olympics event at an outdoor pursuits centre operated by the defendant with other staff and a number of pupils. The games included "welly-wanging" which involved throwing a wellington boot. To make it fairer for the children, the teachers were asked to throw the boot between their legs.

The claimant threw the boot in such a way that he rotated forward and his head hit the ground causing serious injury.

Whilst the defendant had undertaken a general risk assessment, the claimant contended that his injury was a logical and foreseeable consequence of throwing the

boot in that particular way and that the defendant failed to carry out a formal risk assessment on that method.

HELD: The defendant ran an efficient and professional operation for the benefit of the public and schoolchildren which also provided immense social value. The mini-Olympics were not regarded as an event of such inherent danger that they came within any licensing requirements but, in any event, the risk assessment would have accorded with such requirements, if required. The overall risk assessment was satisfactory and the manner in which the claimant sustained his injury was not foreseeable.

[4.24] Dean & Chapter of Rochester Cathedral v Debell

[2016] EWCA Civ 1094

The claimant fell over a small lump of concrete protruding from the base of a bollard. At the time of the accident, he was walking through a narrow gap between the bollard and a low wall and had been following his wife in single file. The claimant alleged that the piece of concrete gave rise to a foreseeable risk of injury, which was agreed by the judge at first instance.

HELD: The concept of reasonable foreseeability applied a practical and realistic approach to the kind of factors which the defendant was obliged to remedy. The question to consider was whether the piece of concrete created a danger and risk of injury over and above what could be expected from normal everyday blemishes. It is reasonably foreseeable that any defect however trivial can create a risk of injury, but this does not mean that the defect is a real source of danger because the question of foreseeability and the question of what constitutes a danger are not one and the same (*Mills v Barnsley MBC* [1992] PIQR 291 applied).

(C) PROXIMITY

[4.25] The necessary ingredient of proximity developed in 19th century negligence cases, where it was held that the physical nearness of the defendant to the injured party was such that a duty of care arose. For instance, in *Le Lieve v Gould* [1893] 1 QB 491 Lord Esher MR said at page 497:

> "If one man is near to another, or is near to the property of another, a duty lies upon him not to do that which may cause a personal injury to that other, or may injure his property. For instance, if a man is driving along a road, it is his duty not to do that which may injure another person whom he meets on the road, or to his horse or his carriage. In the same way it is the duty of a man not to do that which will injure the house of another to which he is near. If a man is driving on Salisbury Plain, and no other person is near him, he is at liberty to drive as fast and as recklessly as he pleases. But if he sees another carriage coming near to him, immediately a duty arises not to drive in such a way as is likely to cause an injury to that other carriage. So, too, if a man is driving along a street in a town, a similar duty not to drive carelessly arises out of contiguity or neighbourhood."

Lord Atkin's comments upon this passage in *Donoghue v Stevenson* [1932] AC 562 at page 581 exemplify the widening of the concept of proximity:

> "I think that this sufficiently states the truth if proximity be not confined to mere physical proximity, but be used, as I think it was intended, to extend to such close and direct relations that the act complained of directly affects a person whom the person alleged to be bound to take care would know would be directly affected by his careless act."

The requirement of proximity therefore refers to the type of relationship between the parties which is required in order for a duty of care to be said to exist. That relationship may be minimal for some types of damage. If an act directly causes physical injury, for instance, it is unnecessary to show any special relationship exists (see *Caparo v Dickman Industries plc* [1989] QB 653 (CA), per Lord Bingham at 686). However, for other forms of damage, such as economic loss and psychiatric injury, strict proximity requirements apply.

(For psychiatric injury, see especially *Alcock v Chief Constable of South Yorkshire Police* [1992] 1 AC 310 and *Hicks v Chief Constable of South Yorkshire Police* [1992] 2 All ER 65, at paras [38.29] and [38.30].)

[4.26] Muirhead v Industrial Tank Specialities

[1986] QB 507, [1985] 3 All ER 705, [1985] 3 WLR 993, 129 Sol Jo 855

The claimant, a wholesale fishmonger, wanted to purchase lobsters in the summer and store them in tanks so he could sell them for higher prices at Christmas. The pump which kept the water in the tanks oxygenated continually failed. The claimant depended heavily on advice from the tank installers but neither knew of, nor had any contact with, the pump manufacturers. The judge held that there was sufficient reliance, in the circumstances, by the claimant on the manufacturers for a duty of care to be owed, and that the economic loss suffered, through loss of fish farm stock in stale uncirculated water, was reasonably foreseeable. The manufacturers appealed against this finding. He also held that the actual physical damage (ie the death of the lobsters) was unforeseeable. The claimant contended, on appeal, that this was wrong.

HELD, ON APPEAL: The manufacturers were not liable to the claimant for economic loss. In the circumstances of this case there was no sufficient proximity or reliance by the claimant on the manufacturers to create a duty of care extending to liability for economic loss. But the physical damage (to the lobsters, as stock) was a foreseeable result of the pump motor failure and the manufacturers were liable for the cost of this and the consequential financial losses. *Junior Books Ltd v Veitchi Co Ltd* [1983] 1 AC 520, [1982] 3 All ER 201, [1982] 3 WLR 477, 126 Sol Jo 538, HL was very much a decision on its specific facts and represented only a very limited extension in principle.

Note—See also *Simaan General Contracting Co v Pilkington Glass Limited (No 2)* [1988] QB 758, [1988] 1 All ER 791, [1988] 2 WLR 761, 132 Sol Jo 463, CA.

[4.27] Denton v United Omnibus Ltd

(1986) Times, 6 May

The defendant garaged its buses in an open depot without doors or gates. Early one morning a thief drove one of the buses away and hit the claimant's parked car. The claimant claimed that even though this person was unidentified and unauthorised, the defendant was in breach of a duty of care to him because it had failed to secure its premises (despite previous incidents) and that this damage was foreseeable.

HELD: The defendant owed no duty of care to the claimant: there was no special relationship and the bus was taken unlawfully by an unauthorised person over whom it had no control. In any event, the defendant had not been negligent. *P Perl (Exporters) Ltd v Camden London Borough Council* [1984] QB 342, [1983] 3 All ER 161, [1983] 3 WLR 769, 127 Sol Jo 581, CA applied.

[4.28] Hill v Chief Constable of West Yorkshire

[1989] AC 53, [1988] 2 WLR 1049, [1988] 2 All ER 238

The mother of the last victim of a notorious serial killer (Peter Sutcliffe) brought an action in negligence against the police. The allegations were that the defendant failed to properly collate information that was already in their possession that pointed to the identity of the killer, and that they negligently failed to give due weight certain evidence in their knowledge. The claim was struck out on the defendant's application for failing to disclose a reasonable cause of action. The Court of Appeal affirmed this decision. The claimant appealed to the House of Lords.

HELD: The question of law which arises is whether members of the police force, in the course of carrying out their public functions, owe a duty of care to individual members of the public who suffer injury to their person or property through the actions of criminals. In common law the police owe the general public a duty to enforce the criminal law, but have a wide discretion as to how that duty is discharged (*R v Commissioner of Police of the Metropolis, Ex parte Blackburn* [1968] 2 QB 118). The case of *Dorset Yacht Co Ltd v Home Office* [1970] AC 1004 shows that public authorities owe no duty to individual members of the public for convicted criminals' wrongdoing unless the complainant has some special characteristics, beyond reasonable foreseeability, which mean that failure to control the convicts would cause the complainant harm. The *Dorset Yacht* case is distinguishable: Sutcliffe was never in the custody of the police, his identity was unknown, and Miss Hill was one of a vast number of the female general public who were at risk. In these circumstances, although it was reasonably foreseeable that one such as Miss Hill would be murdered, she lacked the special characteristics required to render the police liable for her death. In addition, the imposition of such liability would result in a significant diversion of police manpower and attention from their most importance function, that of the suppression of crime.

Note—Hill has been criticised by the European Court of Human Rights in *Osman v United Kingdom* [1999] Crim LR 82, on the basis that it amounts to an absolute defence to police negligence which disproportionately interferes with individual's ECHR Article 6(1) rights. However, the *Hill* principle has been preserved by the House of Lords in the conjoined cases of *Chief Constable of Hertfordshire Police v Van Colle* and *Smith (FC) v Chief Constable of Sussex Police* [2008] UKHL 50.

[4.29] Fernquest v Swansea City and Council

[2011] EWCA Civ 1712, [2012] All ER (D) 82 (Feb)

Users of a scheme paid a fee to the local authority to park in a car park and use a bus service to the city centre. The bus service was operated by a private contractor. The claimant had alighted from a bus and slipped on ice on the pavement a few paces away from the bus stop. The bus driver had already noticed the ice and reported it to the local authority.

HELD: The local authority had not created the hazard and had not been in occupation of the place where it was situated. The case was not about a failure to warn of a hazard which might be encountered during the journey or in the course of alighting, but after the journey had been completed. It would be a considerable extension of liability in the tort of negligence to say that bus companies were liable to compensate passengers who fell near bus stops shortly after alighting because of ice on the pavements which the bus company had knowledge of but failed to warn passengers about before boarding. Moreover, it would be difficult to justify. The hazard was not a particularly unusual one. On the contrary, it was one which members of the public could have been expected to be aware of and could have been expected to be on their guard against that morning. The fact that the local authority had not been the carrier which delivered F also reduced the degree of proximity between the local authority and

F and made it much more difficult to justify the imposition of a continuing responsibility for his safety.

[4.30] Taylor v A Novo (UK) Ltd

[2013] EWCA Civ 194; [2014] QB 150; [2013] 3 WLR 989; [2013] PIQR P15; [2013] Med LR 100

The claimant's mother had been injured in an accident at work. She was making a good recovery when she suddenly and unexpectedly collapsed and died at home. The death was witnessed by the claimant and she suffered PTSD and she brought a claim for damages as a secondary victim.

At first instance, it was held that the event which caused the damage was the sudden death of the claimant's mother and she was entitled to recover damages. There was no gap between the event and the injury suffered, which was a reasonably foreseeable consequence.

The defendant appealed and argued that, as the claimant was not present at the accident scene or involved in its immediate aftermath, she did not have the required proximity and could not claim as a secondary victim.

HELD, ON APPEAL: The judge was wrong to find that the death was the relevant event for the purposes of deciding the proximity question. The court of appeal held that it was the accident and not the death that was the relevant event for the purposes of establishing proximity.

The reasoning in *Taylor v Novo* was also applied to the statutory scheme for compensating victims of crime by the Court of Appeal in *RS v Criminal Injuries Compensation Authority* [2013] EWCA Civ 1040, [2014] 1 WLR 1313.

(D) FAIR, JUST AND REASONABLE

[4.31] The third ingredient in the duty of care is the "fair, just and reasonable" test. As this test operates in conjunction with the foreseeability and proximity tests, this third requirement does not extend the duty to all cases where a court may consider liability fair. Instead, it is an additional restriction which excludes liability on policy grounds where harm is foreseeable and there is a proximate relationship between the parties. As Sedley LJ said in *Dean v Allin & Watts* [2001] EWCA Civ 758 at para [48]:

> "What is not always understood in this context is that the 'fair, just and reasonable' test is not a gate opening on to a limitless terrain of liability but a filter by which otherwise tenable cases of liability in negligence may be excluded."

[4.32] Marc Rich & Co v Bishop Rock Ltd ("The Nicholas H")

[1995] 3 WLR 227, [1996] AC 211

The claimants were owners of cargo on board a bulk carrier. The ship developed a crack in her hull in transit between Peru and the Black Sea. A surveyor acting on behalf of a marine classification society ("NKK") inspected the ship and recommended that it return to a dry dock in Puerto Rico for permanent repairs. However, the ship's owners preferred to make temporary repairs and return to sea. The surveyor reversed his decision. Once at sea, the temporary repairs cracked, and the vessel was lost with all its cargo. The claimants sued both the ship owners and NKK. The ship owners settled up to the limitation of liability amount under international maritime trade conventions. At first instance the Commercial Court held that NKK was liable to the claimants. This decision was reversed by the Court of Appeal, who held that there was no duty of care. The claimants appealed to the House of Lords.

HELD: Per Lord Steyn: The critical question is therefore whether it would be fair, just and reasonable to impose such a duty. For my part I am satisfied that the factors and arguments advanced on behalf of cargo owners are decisively outweighed by the cumulative effect, if a duty is recognised, of the . . . outflanking of the bargain between shipowners and cargo owners; the negative effect on the public role of NKK; and the other considerations of policy. 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 . . . Under the existing system any shortfall is readily insurable. In my judgment the lesser injustice is done by not recognising a duty of care.

Note—Marc Rich has been distinguished in personal injury cases by *Perrett v Collins and ors* [1999] PNLR 77 (see para [4.35]).

[4.33] X & ors (minors) v Bedfordshire County Council

[1995] 2 AC 633, [1995] 3 All ER 353, [1995] 3 WLR 152

Five conjoined appeals were considered the House of Lords on the issue of to what extent authorities charged with statutory duties are liable in damages to individuals injured by the authorities' failure properly to perform such duties. Two of the cases concerned the alleged abuse of children in care, and the three others raised questions about authorities' education policies.

HELD: Most of the appeals against strike out were dismissed.

Per Lord Browne-Wilkinson: Where Parliament has conferred a statutory discretion on a public authority, it is for that authority, not for the courts, to exercise the discretion: nothing which the authority does within the ambit of the discretion can be actionable at common law. If the decision complained of falls outside the statutory discretion, it can (but not necessarily will) give rise to common law liability. However, if the factors relevant to the exercise of the discretion include matters of policy, the court cannot adjudicate on such policy matters and therefore cannot reach the conclusion that the decision was outside the ambit of the statutory discretion. Therefore a common law duty of care in relation to the taking of decisions involving policy matters cannot exist.

If the plaintiffs complaint alleges carelessness, not in the taking of a discretionary decision to do some act, but in the practical manner in which that act has been performed (eg the running of a school) the question whether or not there is a common law duty of care falls to be decided by applying the usual principles, ie those laid down in *Caparo Industries Plc v Dickman* [1990] 2 AC 605. . . . However, the question whether there is such a common law duty and if so its ambit, must be profoundly influenced by the statutory framework within which the acts complained of were done . . . in my judgment, a common law duty of care cannot be imposed on a statutory duty if the observant of such common law duty of care would be inconsistent with, or have a tendency to discourage, the due performance by the local authority of its statutory duties.

Note—Bedfordshire has been significantly qualified by the decisions in *Barrett v Enfield London Borough Council*, *S v Gloucestershire County Council*, *Phelps v Hillingdon*

London Borough Council, and *D v East Berkshire Community Health NHS Trust* (see paras [4.34], [4.36], [4.37] and [4.39]).

In *D v East Berkshire Community Health NHS Trust* [2005] 2 AC 373 at page 405:

> "But the law has moved on since the decision of your Lordships' House in *X (minors) v Bedfordshire County Council* [1995] 2 AC 633. There the House held it was not just and equitable to impose a common law duty on local authorities in respect of their performance of their statutory duties to protect children. Later cases, mentioned by my noble and learned friend, Lord Bingham of Cornhill, have shown that this proposition is stated too broadly. Local authorities may owe common law duties to children in the exercise of their child protection duties."

[4.34] Barrett v Enfield London Borough Council

[2001] 2 AC 550, [1999] 3 All ER 193, [1999] 3 WLR 79

The claimant's action against the Borough Council for psychiatric injury, which he alleged was caused by their negligence while he was in their care as a child, was struck out for not disclosing a reasonable cause of action. The Court of Appeal upheld the strike out, on the basis that the *Bedfordshire* case (above at para **[4.33]**) established that the claimant had to show that the defendant council had negligently exercised statutory discretions, and that their exercise of their statutory powers was "so unreasonable that it falls outside the ambit of the discretion". On appeal to the House of Lords, the claimant submitted that the European Court of Human Rights' decision in *Osman v The United Kingdom* (see the note at para **[4.28]** above) had undermined the principle in *Bedfordshire*.

HELD: the appeal was allowed. The effect of *Osman* and the implementation of the Human Rights Act 1998 was that there was no longer a clear and obvious case for striking out the claim.

Per Lord Browne-Wilkinson: The problems in applying [the reasoning in *Osman*] to the English law of negligence are many and various. For example, the correct answer to the following points is not immediately apparent.

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

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

3. In English law, questions of public policy and the question whether it is fair and reasonable to impose liability in negligence are decided as questions of law. Once the decision is taken that, say, company auditors though liable to shareholders for negligent auditing are not liable to those proposing to invest in the company (see the *Caparo Industries* case [1990] 2 AC 605), that decision will apply to all future cases of the same kind. The decision does not depend on weighing the balance between the

extent of the damage to the plaintiff and the damage to the public in each particular case.

[4.35] Perrett v Collins & ors

[1999] PNLR 77

The claimant was injured when the light aircraft in which he was a passenger crashed. The first defendant had built and flown the plain, the second defendant was an inspector employed by the third defendant, an amateur flying association, who had certified that the plane was airworthy. The claimant alleged that one or more of the defendants was at fault in respect of the accident. The trial judge held, as a preliminary issue, that the second and third defendants owed a duty of care to the claimant. They appealed to the Court of Appeal.

HELD: The appeal was dismissed.

Per Hobhouse LJ: The *Marc Rich* case (see above at para **[4.32]**) does not assist the second and third defendants' argument. The factors distinguishing it from the present case are (*inter alia*): Its reasoning was essentially directed to considerations relevant to economic loss and is not germane to personal injury. It does not, nor does it purport to, re-open established categories of liability, in particular, established categories of liabilities for personal injury. The decision was based upon broad policy considerations relating to the organisation and structure of maritime trade which are peculiar to that situation. A passenger about to be taken up in an aircraft is entitled to assume that it has met the applicable safety requirements and that those involved have taken proper care, and to rely upon it; this element was absent in *Marc Rich*.

Marc Rich should not be regarded as an authority which has a relevance to cases of personal injuries or as adding any requirements that an injured plaintiff do more than bring his case within established principles. If a plaintiff is attempting to establish some novel principle of liability, then the situation would be different and the considerations discussed by Lord Steyn could be relevant (*Barrett v Enfield LBC* [1998] QB 367). But that is not this case.

[4.36] S v Gloucestershire County Council, L v Tower Hamlets London Borough Council

[2000] 3 All ER 346, [2001] 2 WLR 909

Per May LJ: It is clear from these principles that in an ordinary case a local authority defendant is unlikely to establish a defence which relies on a blanket immunity . . . . Remembering always that the critical question is a composite one which embraces the alleged duty of care and its breach in the context of the damage alleged to have been caused, the court has to consider the nature of the actions and the decisions of the local authority which are said to have been negligent.

[4.37] Phelps v Hillingdon London Borough Council, Anderton v Clwyd County Council, Jarvis v Hampshire County Council, Re G (a minor)

[2001] 2 AC 619, [2000] 4 All ER 504, [2000] 3 WLR 776

Per Lord Slynn: I accept that, as was said in *X (minors) v Bedfordshire County Council* [at para **[4.33]**] there may be cases where to recognise such a vicarious liability on the part of the authority may so interfere with the performance of the local education authorities duties that it would be wrong to recognise any liability on the part of the authorities. It must, however, be for the local authority to establish that: it is not to be presumed and I anticipate that the circumstances where it could be established would be exceptional.

But 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 would follow that advice, prima facie a duty of care arises.

[4.38] Vowles v Evans

[2003] EWCA Civ 318

[2003] All ER (D) 134 (Mar), [2003] 1 WLR 1607

The claimant was playing hooker for Llanharan RFC in an amateur rugby match. Thirty minutes into the game a Llanharan prop was injured. The prop was replaced by a Llanharan flanker. The referee did not ask the flanker about his experience of playing in the position of prop and neither did the referee continue the game with uncontested scrums which was an option for him under the rules by which this particular game was being played. At the very end of the game the claimant was seriously injured when a scrum collapsed. The claimant alleged that the referee (and vicariously, the second defendant) owed him a duty of care and he was in breach of that duty by failing to check the flankers experience or continue the game with uncontested scrums.

At first instance the judge held the referee did owe the claimant a duty of care. The defendants appealed.

HELD, ON APPEAL: The judge's decision was upheld. It was fair, just and reasonable to impose a duty of care on the referee of an adult amateur rugby match. Rugby was a dangerous sport and the rules were there to reduce the risk of injury. The players relied on the referee to exercise reasonable care in enforcing those rules to reduce the risk of injury. The referee was in breach of his duty to exercise this reasonable care and that breach was the cause of the claimant's injury.

Note—See also *Van Oppen v Clerk to the Bedford Charity Trustees* [1989] 1 All ER 273, where it was held that the school did not owe a duty to a pupil to obtain personal accident insurance or advise the pupils' parents to do so.

Per Boreham J: The relationship of proximity which existed between the school and its pupils did not of itself give rise to a duty to insure or to protect the claimant's economic welfare. That was beyond what either party to the relationship contemplated.

[4.39] D v East Berkshire Community Health NHS Trust

[2005] 2 AC 373, [2005] 2 All ER 443

Three joined cases in the House of Lords considered whether local authorities could be liable to parents who claimed to have suffered psychiatric injury as a result of investigation for child abuse, where the allegations were false and the investigation was initiated or carried out in good faith but negligently.

HELD: the parent's appeals were dismissed (Lord Bingham dissenting). It would not be fair, just or reasonable for the pleaded duty to exist.

Per Lord Nicholls: The existence of such a duty would fundamentally alter the balance in this area of the law. It would mean that if a parent suspected that a babysitter or a teacher at a nursery or school might have been responsible for abusing her child, and the parent took the child to a general practitioner or consultant, the doctor would owe a duty of care to the suspect. The law of negligence has of course developed much in recent years, reflecting the higher standards increasingly expected in many areas of life. But there seems no warrant for such a fundamental shift in the long established balance in this area of the law.

[4.40] Grimes v Hawkins

[2011] EWHC 2004 (QB)

The householder had gone out for an evening and had left his 18-year-old daughter at home. There had been a gathering of people at the house who had been using his

2. PRE-ACTION PROTOCOL FOR PERSONAL INJURY CLAIMS

(A) TEXT OF THE PROTOCOL

[19.3]

PRE-ACTION PROTOCOL FOR PERSONAL INJURY CLAIMS

1. Introduction

1.1

1.1.1 This Protocol is primarily designed for personal injury claims which are likely to be allocated to the fast track and to the entirety of those claims: not only to the personal injury element of a claim which also includes, for instance, property damage. It is not intended to apply to claims which proceed under—

(a) the Pre-Action Protocol for Low Value Personal Injury Claims in Road Traffic Accidents from 31 July 2013;
(b) the Pre-Action Protocol for Low Value Personal Injury (Employers' Liability and Public Liability) Claims;
(c) the Pre-Action Protocol for the Resolution of Clinical Disputes; and
(d) the Pre-Action Protocol for Disease and Illness Claims.

1.1.2 If at any stage the claimant values the claim at more than the upper limit of the fast track, the claimant should notify the defendant as soon as possible. However, the "cards on the table" approach advocated by this Protocol is equally appropriate to higher value claims. The spirit, if not the letter of the Protocol, should still be followed for claims which could potentially be allocated multi-track. All parties are expected to consider the Serious Injuries Guide in any claims to which that guide applies.

1.2 Claims which exit either of the low value pre-action protocols listed at paragraph 1.1.1(a) and (b) ("the low value protocols") prior to Stage 2 will proceed under this Protocol from the point specified in those protocols, and as set out in paragraph 1.3.

1.3

1.3.1. Where a claim exits a low value protocol because the defendant considers that there is inadequate mandatory information in the Claim Notification Form ("CNF"), the claim will proceed under this Protocol from paragraph 5.1.

1.3.2 Where a defendant—

(a) alleges contributory negligence;
(b) does not complete and send the CNF Response; or
(c) does not admit liability,

the claim will proceed under this Protocol from paragraph 5.5.

1.4

1.4.1 This Protocol sets out conduct that the court would normally expect prospective parties to follow prior to the commencement of proceedings. It establishes a reasonable process and timetable for the exchange of information relevant to a dispute, sets standards for the content and quality of letters of claim, and in particular, the conduct of pre-action negotiations. In particular, the parts of this Protocol that are concerned with rehabilitation are likely to be of application in all claims.

1.4.2 The timetable and the arrangements for disclosing documents and obtaining expert evidence may need to be varied to suit the circumstances of the case. Where one or both parties consider the detail of the Protocol is not appropriate to the case, and proceedings are subsequently issued, the court will expect an explanation as to why the Protocol has not been followed, or has been varied.

1.5 Where either party fails to comply with this Protocol, the court may impose sanctions. When deciding whether to do so, the court will look at whether the parties have complied in substance with the relevant principles and requirements. It will also

consider the effect any non-compliance has had on another party. It is not likely to be concerned with minor or technical shortcomings (see paragraphs 13 to 15 of the Practice Direction on Pre-Action Conduct and Protocols).

Early Issue

1.6 The Protocol recommends that a defendant be given three months to investigate and respond to a claim before proceedings are issued. This may not always be possible, particularly where a claimant only consults a legal representative close to the end of any relevant limitation period. In these circumstances, the claimant's solicitor should give as much notice of the intention to issue proceedings as is practicable and the parties should consider whether the court might be invited to extend time for service of the claimant's supporting documents and for service of any defence, or alternatively, to stay the proceedings while the recommended steps in the Protocol are followed.

Litigants in Person

1.7 If a party to the claim does not have a legal representative they should still, in so far as reasonably possible, fully comply with this Protocol. Any reference to a claimant in this Protocol will also mean the claimant's legal representative.

2. Overview of Protocol – General Aim

2.1 The Protocol's objectives are to—

(a) encourage the exchange of early and full information about the dispute;
(b) encourage better and earlier pre-action investigation by all parties;
(c) enable the parties to avoid litigation by agreeing a settlement of the dispute before proceedings are commenced;
(d) support the just, proportionate and efficient management of proceedings where litigation cannot be avoided; and
(e) promote the provision of medical or rehabilitation treatment (not just in high value cases) to address the needs of the Claimant at the earliest possible opportunity.

3. The Protocol

An illustrative flow chart is attached at Annexe A which shows each of the steps that the parties are expected to take before the commencement of proceedings.

Letter of Notification

3.1 The claimant or his legal representative may wish to notify a defendant and/or the insurer as soon as they know a claim is likely to be made, but before they are able to send a detailed Letter of Claim, particularly, for instance, when the defendant has no or limited knowledge of the incident giving rise to the claim, or where the claimant is incurring significant expenditure as a result of the accident which he hopes the defendant might pay for, in whole or in part.

3.2 The Letter of Notification should advise the defendant and/or the insurer of any relevant information that is available to assist with determining issues of liability/suitability of the claim for an interim payment and/or early rehabilitation.

3.3 If the claimant or his legal representative gives notification before sending a Letter of Claim, it will not start the timetable for the Letter of Response. However, the Letter of Notification should be acknowledged within 14 days of receipt.

4. Rehabilitation

4.1 The parties should consider as early as possible whether the claimant has reasonable needs that could be met by medical treatment or other rehabilitative measures. They should discuss how these needs might be addressed.

4.2 The Rehabilitation Code (which can be found at: http://www.iua.co.uk/IUA_member/publications) is likely to be helpful in considering how to identify the claimant's needs and how to address the cost of providing for those needs.
4.3 The time limit set out in paragraph 6.3 of this Protocol shall not be shortened, except by consent to allow these issues to be addressed.
4.4 Any immediate needs assessment report or documents associated with it that are obtained for the purposes of rehabilitation shall not be used in the litigation except by consent and shall in any event be exempt from the provisions of paragraphs 7.2 to 7.11 of this Protocol. Similarly, persons conducting the immediate needs assessment shall not be a compellable witness at court.
4.5 Consideration of rehabilitation options, by all parties, should be an on going process throughout the entire Protocol period.

5. Letter of Claim

5.1 Subject to paragraph 5.3 the claimant should send to the proposed defendant two copies of the Letter of Claim. One copy of the letter is for the defendant, the second for passing on to the insurers, as soon as possible, and, in any event, within 7 days of the day upon which the defendant received it.
5.2 The Letter of Claim should include the information described on the template at Annexe B1. The level of detail will need to be varied to suit the particular circumstances. In all cases there should be sufficient information for the defendant to assess liability and to enable the defendant to estimate the likely size and heads of the claim without necessarily addressing quantum in detail.
5.3 The letter should contain a clear summary of the facts on which the claim is based together with an indication of the nature of any injuries suffered, and the way in which these impact on the claimant's day to day functioning and prognosis. Any financial loss incurred by the claimant should be outlined with an indication of the heads of damage to be claimed and the amount of that loss, unless this is impracticable.
5.4 Details of the claimant's National Insurance number and date of birth should be supplied to the defendant's insurer once the defendant has responded to the Letter of Claim and confirmed the identity of the insurer. This information should not be supplied in the Letter of Claim.
5.5 Where a claim no longer continues under either low value protocol, the CNF completed by the claimant under those protocols can be used as the Letter of Claim under this Protocol unless the defendant has notified the claimant that there is inadequate information in the CNF.
5.6 Once the claimant has sent the Letter of Claim no further investigation on liability should normally be carried out within the Protocol period until a response is received from the defendant indicating whether liability is disputed.

Status of Letters of Claim and Response
5.7 Letters of Claim and Response are not intended to have the same formal status as a statement of case in proceedings. It would not be consistent with the spirit of the Protocol for a party to 'take a point' on this in the proceedings, provided that there was no obvious intention by the party who changed their position to mislead the other party.

6. The Response

6.1 Attached at Annexe B2 is a template for the suggested contents of the Letter of Response: the level of detail will need to be varied to suit the particular circumstances.
6.2 The defendant must reply within 21 calendar days of the date of posting of the letter identifying the insurer (if any). If the insurer is aware of any significant omissions from the letter of claim they should identify them specifically. Similarly, if they are aware that another defendant has also been identified whom they believe would not be a correct defendant in any proceedings, they should notify the claimant without delay, with reasons, and in any event by the end of the Response period. Where there has

been no reply by the defendant or insurer within 21 days, the claimant will be entitled to issue proceedings. Compliance with this paragraph will be taken into account on the question of any assessment of the defendant's costs.
6.3 The defendant (insurer) will have a maximum of three months from the date of acknowledgment of the Letter of Claim (or of the CNF where the claim commenced in a portal) to investigate. No later than the end of that period, The defendant (insurer) should reply by no later than the end of that period, stating if liability is admitted by admitting that the accident occurred, that the accident was caused by the defendant's breach of duty, and the claimant suffered loss and there is no defence under the Limitation Act 1980.
6.4 Where the accident occurred outside England and Wales and/or where the defendant is outside the jurisdiction, the time periods of 21 days and three months should normally be extended up to 42 days and six months.
6.5 If a defendant denies liability and/or causation, their version of events should be supplied. The defendant should also enclose with the response, documents in their possession which are material to the issues between the parties, and which would be likely to be ordered to be disclosed by the court, either on an application for pre-action disclosure, or on disclosure during proceedings. No charge will be made for providing copy documents under the Protocol.
6.6 An admission made by any party under this Protocol may well be binding on that party in the litigation. Further information about admissions made under this Protocol is to be found in Civil Procedure Rules ("CPR") rule 14.1A.
6.7 Following receipt of the Letter of Response, if the claimant is aware that there may be a delay of six months or more before the claimant decides if, when and how to proceed, the claimant should keep the defendant generally informed.

7. Disclosure

Documents
7.1
7.1.1 The aim of early disclosure of documents by the defendant is not to encourage 'fishing expeditions' by the claimant, but to promote an early exchange of relevant information to help in clarifying or resolving issues in dispute. The claimant's solicitor can assist by identifying in the Letter of Claim or in a subsequent letter the particular categories of documents which they consider are relevant and why, with a brief explanation of their purported relevance if necessary.
7.1.2 Attached at Annexe C are specimen, but non-exhaustive, lists of documents likely to be material in different types of claim.
7.1.3 Pre-action disclosure will generally be limited to the documents required to be enclosed with the Letter of Claim and the Response. In cases where liability is admitted in full, disclosure will be limited to the documents relevant to quantum, the parties can agree that further disclosure may be given. If either or both of the parties consider that further disclosure should be given but there is disagreement about some aspect of that process, they may be able to make an application to the court for pre-action disclosure under Part 31 of the CPR. Parties should assist each other and avoid the necessity for such an application.
7.1.4 The protocol should also contain a requirement that the defendant is under a duty to preserve the disclosure documents and other evidence (CCTV for example). If the documents are destroyed, this could be an abuse of the court process.

Experts
7.2 Save for cases likely to be allocated to the multi-track, the Protocol encourages joint selection of, and access to, quantum experts, and, on occasion liability experts, eg engineers. The expert report produced is not a joint report for the purposes of CPR Part 35. The Protocol promotes the practice of the claimant obtaining

a medical report, disclosing it to the defendant who then asks questions and/or agrees it and does not obtain their own report. The Protocol provides for nomination of the expert by the claimant in personal injury claims.

7.3 Before any party instructs an expert, they should give the other party a list of the name(s) of one or more experts in the relevant speciality whom they consider are suitable to instruct.

7.4 Some solicitors choose to obtain medical reports through medical agencies, rather than directly from a specific doctor or hospital. The defendant's prior consent to this should be sought and, if the defendant so requests, the agency should be asked to provide in advance the names of the doctor(s) whom they are considering instructing.

7.5 Where a medical expert is to be instructed, the claimant's solicitor will organise access to relevant medical records – see specimen letter of instruction at Annexe D.

7.6 Within 14 days of providing a list of experts the other party may indicate an objection to one or more of the named experts. The first party should then instruct a mutually acceptable expert assuming there is one (this is not the same as a joint expert). It must be emphasised that when the claimant nominates an expert in the original Letter of Claim, the defendant has a further 14 days to object to one or more of the named experts after expiration of the 21 day period within which they have to reply to the Letter of Claim, as set out in paragraph 6.2.

7.7 If the defendant objects to all the listed experts, the parties may then instruct experts of their own choice. It will be for the court to decide, subsequently and if proceedings are issued, whether either party had acted unreasonably.

7.8 If the defendant does not object to an expert nominated by the claimant, they shall not be entitled to rely on their own expert evidence within that expert's area of expertise unless—

(a) the claimant agrees;
(b) the court so directs; or
(c) the claimant's expert report has been amended and the claimant is not prepared to disclose the original report.

7.9 Any party may send to an agreed expert written questions on the report, via the first party's solicitors. Such questions must be put within 28 days of service of the expert's report and must only be for the purpose of clarification of the report. The expert should send answers to the questions simultaneously to each party.

7.10 The cost of a report from an agreed expert will usually be paid by the instructing first party: the costs of the expert replying to questions will usually be borne by the party which asks the questions.

7.11 If necessary, after proceedings have commenced and with the permission of the court, the parties may obtain further expert reports. It would be for the court to decide whether the costs of more than one expert's report should be recoverable.

8. Negotiations following an admission

8.1

8.1.1 Where a defendant admits liability which has caused some damage, before proceedings are issued, the claimant should send to that defendant—

(a) any medical reports obtained under this Protocol on which the claimant relies; and
(b) a schedule of any past and future expenses and losses which are claimed, even if the schedule is necessarily provisional. The schedule should contain as much detail as reasonably practicable and should identify those losses that are ongoing. If the schedule is likely to be updated before the case is concluded, it should say so.

8.1.2 The claimant should delay issuing proceedings for 21 days from disclosure of (a) and (b) above (unless such delay would cause his claim to become time-barred), to enable the parties to consider whether the claim is capable of settlement.

8.2 CPR Part 36 permits claimants and defendants to make offers to settle pre-proceedings. Parties should always consider if it is appropriate to make a Part 36

Offer before issuing. If such an offer is made, the party making the offer must always try to supply sufficient evidence and/or information to enable the offer to be properly considered.

The level of detail will depend on the value of the claim. Medical reports may not be necessary where there is no significant continuing injury and a detailed schedule may not be necessary in a low value case.

9. Alternative Dispute Resolution

9.1

9.1.1 Litigation should be a last resort. As part of this Protocol, the parties should consider whether negotiation or some other form of Alternative Dispute Resolution ("ADR") might enable them to resolve their dispute without commencing proceedings.

9.1.2 Some of the options for resolving disputes without commencing proceedings are—

(a) discussions and negotiation (which may or may not include making Part 36 Offers or providing an explanation and/or apology);
(b) mediation, a third party facilitating a resolution;
(c) arbitration, a third party deciding the dispute; and
(d) early neutral evaluation, a third party giving an informed opinion on the dispute.

9.1.3 If proceedings are issued, the parties may be required by the court to provide evidence that ADR has been considered. It is expressly recognised that no party can or should be forced to mediate or enter into any form of ADR but unreasonable refusal to consider ADR will be taken into account by the court when deciding who bears the costs of the proceedings.

9.2 Information on mediation and other forms of ADR is available in the Jackson ADR Handbook (available from Oxford University Press) or at—

- http://www.civilmediation.justice.gov.uk/
- http://www.adviceguide.org.uk/england/law_e/law_legal_system_ e/law_taking_legal_action_e/alternatives_to_court.htm

10. Quantification of Loss - Special damages

10.1 In all cases, if the defendant admits liability, the claimant will send to the defendant as soon as reasonably practicable a schedule of any past and future expenses and losses which he claims, even if the schedule is necessarily provisional. The schedule should contain as much detail as reasonably practicable and should identify those losses that are ongoing. If the schedule is likely to be updated before the case is concluded, it should say so. The claimant should keep the defendant informed as to the rate at which his financial loss is progressing throughout the entire Protocol period.

11. Stocktake

11.1 Where the procedure set out in this Protocol has not resolved the dispute between the parties, each party should undertake a review of its own positions and the strengths and weaknesses of its case. The parties should then together consider the evidence and the arguments in order to see whether litigation can be avoided or, if that is not possible, for the issues between the parties to be narrowed before proceedings are issued. Where the defendant is insured and the pre-action steps have been taken by the insurer, the insurer would normally be expected to nominate solicitors to act in the proceedings and to accept service of the claim form and other documents on behalf of the defendant. The claimant or their solicitor is recommended to invite the insurer to nominate the insurer to nominate solicitors to act in the proceedings and do so 7 to 14 days before the intended issue date.

Note—The Annexes are not reproduced here

(B) TEXT OF PRACTICE DIRECTION – PRE-ACTION CONDUCT AND PROTOCOLS

PRACTICE DIRECTION – PRE-ACTION CONDUCT AND PROTOCOLS

[19.4]

Introduction

1. Pre-action protocols explain the conduct and set out the steps the court would normally expect parties to take before commencing proceedings for particular types of civil claims. They are approved by the Master of the Rolls and are annexed to the Civil Procedure Rules (CPR). (The current pre-action protocols are listed in paragraph 18.)

2. This Practice Direction applies to disputes where no pre-action protocol approved by the Master of the Rolls applies.

Objectives of pre-action conduct and protocols

3. Before commencing proceedings, the court will expect the parties to have exchanged sufficient information to—

(a) understand each other's position;
(b) make decisions about how to proceed;
(c) try to settle the issues without proceedings;
(d) consider a form of Alternative Dispute Resolution (ADR) to assist with settlement;
(e) support the efficient management of those proceedings; and
(f) reduce the costs of resolving the dispute.

Proportionality

4. A pre-action protocol or this Practice Direction must not be used by a party as a tactical device to secure an unfair advantage over another party. Only reasonable and proportionate steps should be taken by the parties to identify, narrow and resolve the legal, factual or expert issues.

5. The costs incurred in complying with a pre-action protocol or this Practice Direction should be proportionate (CPR 44.3(5)). Where parties incur disproportionate costs in complying with any pre-action protocol or this Practice Direction, those costs will not be recoverable as part of the costs of the proceedings.

Steps before issuing a claim at court

6. Where there is a relevant pre-action protocol, the parties should comply with that protocol before commencing proceedings. Where there is no relevant pre-action protocol, the parties should exchange correspondence and information to comply with the objectives in paragraph 3, bearing in mind that compliance should be proportionate. The steps will usually include—

(a) the claimant writing to the defendant with concise details of the claim. The letter should include the basis on which the claim is made, a summary of the facts, what the claimant wants from the defendant, and if money, how the amount is calculated;
(b) the defendant responding within a reasonable time - 14 days in a straight forward case and no more than 3 months in a very complex one. The reply should include confirmation as to whether the claim is accepted and, if it is not accepted, the reasons why, together with an explanation as to which facts and parts of the claim are disputed and whether the defendant is making a counterclaim as well as providing details of any counterclaim; and
(c) the parties disclosing key documents relevant to the issues in dispute.

Experts

7. Parties should be aware that the court must give permission before expert evidence can be relied upon (see CPR 35.4(1)) and that the court may limit the fees recoverable. Many disputes can be resolved without expert advice or evidence. If it is necessary to obtain expert evidence, particularly in low value claims, the parties should consider using a single expert, jointly instructed by the parties, with the costs shared equally.

Settlement and ADR

8. Litigation should be a last resort. As part of a relevant pre-action protocol or this Practice Direction, the parties should consider whether negotiation or some other form of ADR might enable them to settle their dispute without commencing proceedings.

9. Parties should continue to consider the possibility of reaching a settlement at all times, including after proceedings have been started. Part 36 offers may be made before proceedings are issued.

10. Parties may negotiate to settle a dispute or may use a form of ADR including—

(a) mediation, a third party facilitating a resolution;
(b) arbitration, a third party deciding the dispute;
(c) early neutral evaluation, a third party giving an informed opinion on the dispute; and
(d) Ombudsmen schemes.

(Information on mediation and other forms of ADR is available in the Jackson ADR Handbook available from Oxford University Press) or at—

http://www.civilmediation.justice.gov.uk/
http://www.adviceguide.org.uk/england/law_e/law_legal_system_e/law_taking_legal_action_e/alternatives_to_court.htm)

11. If proceedings are issued, the parties may be required by the court to provide evidence that ADR has been considered. A party's silence in response to an invitation to participate or a refusal to participate in ADR might be considered unreasonable by the court and could lead to the court ordering that party to pay additional court costs.

Stocktake and list of issues

12. Where a dispute has not been resolved after the parties have followed a pre-action protocol or this Practice Direction, they should review their respective positions. They should consider the papers and the evidence to see if proceedings can be avoided and at least seek to narrow the issues in dispute before the claimant issues proceedings.

Compliance with this Practice Direction and the Protocols

13. If a dispute proceeds to litigation, the court will expect the parties to have complied with a relevant pre-action protocol or this Practice Direction. The court will take into account non-compliance when giving directions for the management of proceedings (see CPR 3.1(4) to (6)) and when making orders for costs (see CPR 44.3(5)(a)). The court will consider whether all parties have complied in substance with the terms of the relevant pre-action protocol or this Practice Direction and is not likely to be concerned with minor or technical infringements, especially when the matter is urgent (for example an application for an injunction).

14. The court may decide that there has been a failure of compliance when a party has—

(a) not provided sufficient information to enable the objectives in paragraph 3 to be met;
(b) not acted within a time limit set out in a relevant protocol, or within a reasonable period; or
(c) unreasonably refused to use a form of ADR, or failed to respond at all to an invitation to do so.

15. Where there has been non-compliance with a pre-action protocol or this Practice Direction, the court may order that

(a) the parties are relieved of the obligation to comply or further comply with the pre-action protocol or this Practice Direction;
(b) the proceedings are stayed while particular steps are taken to comply with the pre-action protocol or this Practice Direction;
(c) sanctions are to be applied.

16. The court will consider the effect of any non-compliance when deciding whether to impose any sanctions which may include—

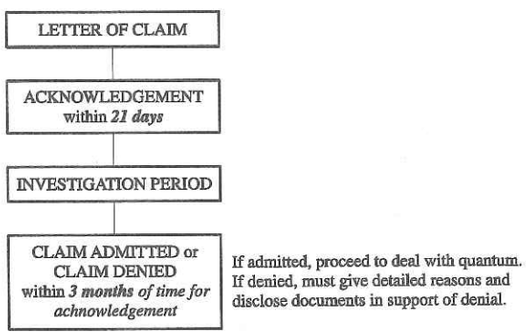
(a) an order that the party at fault pays the costs of the proceedings, or part of the costs of the other party or parties;
(b) an order that the party at fault pay those costs on an indemnity basis;
(c) if the party at fault is a claimant who has been awarded a sum of money, an order depriving that party of interest on that sum for a specified period, and/or awarding interest at a lower rate than would otherwise have been awarded;
(d) if the party at fault is a defendant, and the claimant has been awarded a sum of money, an order awarding interest on that sum for a specified period at a higher rate, (not exceeding 10% above base rate), than the rate which would otherwise have been awarded.

Limitation

17. This Practice Direction and the pre-action protocols do not alter the statutory time limits for starting court proceedings. If a claim is issued after the relevant limitation period has expired, the defendant will be entitled to use that as a defence to the claim. If proceedings are started to comply with the statutory time limit before the parties have followed the procedures in this Practice Direction or the relevant pre-action protocol, the parties should apply to the court for a stay of the proceedings while they so comply.

(C) FLOW CHART SUMMARY

[19.5]



[19.6] (1) Nelson's Yard Management Company (2) Christopher Leverick (3) Susan Leverick (4) Alastair Munroe v Nicholas Eziefula

[2013] EWCA Civ 235

The defendant had failed to respond to pre-action correspondence, therefore the claimant had to issue court proceedings. Upon receiving the defence, the claimant served a notice of discontinuance and requested that the defendant pay the costs given its pre-action behaviour.

HELD: The Court of Appeal held that given the conduct of the defendant, it was appropriate for him to pay the claimant's costs of the action to the date the defence was served, but with no order for costs thereafter.

3. THE CIVIL PROCEDURE RULES

(A) THE OVERRIDING OBJECTIVE

CPR 1.1 – The overriding objective

[19.7]

(1) These Rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly and at proportionate cost.
(2) Dealing with a case justly and at proportionate cost includes, so far as is practicable–
  (a) ensuring that the parties are on an equal footing;
  (b) saving expense;
  (c) dealing with the case in ways which are proportionate–
    (i) to the amount of money involved;
    (ii) to the importance of the case;
    (iii) to the complexity of the issues; and
    (iv) to the financial position of each party.
  (d) ensuring that it is dealt with expeditiously and fairly;
  (e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases; and
  (f) enforcing compliance with rules, practice directions and orders.

[19.8] Whitfield v Revenue and Customs Commissioners

(2016) UKFTT 685

In this action the tribunal found that the respondents' conduct in returning relevant documents to the defendant unread as they had been disclosed three days late was contrary to the overriding objective of dealing with cases fairly and justly. The parties are obliged to help the tribunal further that objective, and dealing with a case justly and fairly could mean seeking flexibility in the proceedings and avoiding unnecessary formality.

CPR 1.2 – Application by the court of the overriding objective

[19.9]

The court must seek to give effect to the overriding objective when it –
(a) exercises any power given to it by the Rules; or
(b) interprets any rule subject to rules 76.2, 79.2 and 80.2, 82.2 and 88.2.

CPR 1.3 – Duty of the parties

[19.10]

The parties are required to help the court to further the overriding objective.

[19.11] Whitfield v Revenue and Customs Commissioners

(2016) UKFTT 685

In this matter the tribunal found that the respondents' conduct in returning relevant documents to the defendant unread as they had been disclosed three days late was contrary to the overriding objective of dealing with cases fairly and justly. The parties are obliged to help the tribunal further that objective, and dealing with a case justly and fairly could mean seeking flexibility in the proceedings and avoiding unnecessary formality.

[19.12] Emmanuel v Revenue and Customs Commissioners

[2017] EWHC 1253 (Ch)

In obtaining a bankruptcy order against a taxpayer concerning unpaid tax, HMRC had satisfied their obligations under the Insolvency Rules 1986, rules 6.3 and 6.14, and Practice Direction – Insolvency Proceedings in attempting to serve the tax demand and bankruptcy petition via personal service and then effecting them by post. The court held that it could not realistically have known that the taxpayer was living at a different address, and HMRC had done all that was reasonable to bring the documents to his attention.

On appeal the court ruled that by the service of the statutory demand and bankruptcy petition HMRC had satisfied the high test that creditors must meet in attempting to bring a demand or petition to the debtor's attention, *Regional Collection Services Ltd v Heald* [2000] BPIR 661 followed. HMRC could not have discovered the appellant's different address by doing all that was reasonable. There was no record of his tenancy at the Land Registry and HMRC had relied on information from the police.

As to the costs of the strike-out application, it was ruled that as the appellant had withdrawn the application during the course of the hearing before the registrar, he was therefore liable for HMRC's costs in defending their position. Further, he ought to have agreed to a short extension of time that HMRC had requested after he filed the evidence of his different address. His refusal to co-operate had been contrary to the overriding objective of the court, *Hallam Estates Ltd v Baker* [2014] EWCA Civ 661, [2014] CP Rep 38 followed.

CPR 1.4 – Court's duty to manage cases

[19.13]

(1) The court must further the overriding objective by actively managing cases.
(2) Active case management includes–
  (a) encouraging the parties to co-operate with each other in the conduct of the proceedings;
  (b) identifying the issues at an early stage;
  (c) deciding promptly which issues need full investigation and trial and accordingly disposing summarily of the others;
  (d) deciding the order in which issues are to be resolved;
  (e) encouraging the parties to use an alternative dispute resolution procedure if the court considers that appropriate and facilitating the use of such procedure;
  (f) helping the parties to settle the whole or part of the case;
  (g) fixing timetables or otherwise controlling the progress of the case;
  (h) considering whether the likely benefits of taking a particular step justify the cost of taking it;
  (i) dealing with as many aspects of the case as it can on the same occasion;
  (j) dealing with the case without the parties needing to attend at court;
  (k) making use of technology; and

  (l) giving directions to ensure that the trial of a case proceeds quickly and efficiently.

(B) APPLICATION OF THE OVERRIDING OBJECTIVE IN PRACTICE

Relevance of pre-CPR authorities

[19.14] The application of the case law in respect of the overriding objective in practice has been fundamentally altered with the insertion of the wording 'and at proportionate cost' in CPR 1.1(1) and (2) and the insertion of 'enforcing compliance with rules, practice directions and orders' at CPR 1.1(2)(f).

Practitioners should be cautious when seeking to rely on case law if referring to cases relating to the overriding objective that pre-date 1 April 2013.

Also see cases on relief from sanctions (at paras [19.67]–[19.96]).

[19.15] Vinos v Marks & Spencer plc

[2001] 3 All ER 784

Per May LJ: Interpretation to achieve the overriding objective does not enable the court to say provisions which are quite plain mean what they do not mean, nor that the plain meaning should be ignored . . . The Civil Procedure Rules are a new procedural code, and the question for this court in this case concerns the interpretation and application of the relevant provisions of the new procedural code as they stand untrammelled by the weight of authority that accumulated under the former Rules.

Note—For the facts of this case, see para [23.73].

Parties on an equal footing

[19.16] Maltez v Lewis

[1999] All ER (D) 425, (1999) Times, 4 May

The claimant made an application seeking an order that the defendant be debarred from instructing leading counsel, in pursuance of the court's duty to further the overriding objective by 'ensuring that the parties are on an equal footing' – CPR 1.1(2)(a).

HELD: It was a fundamental right of any litigant to choose his own counsel, and the CPR should not be interpreted so as to remove that right. The purpose of CPR 1.1 was to ensure that a party was not exposed unfairly to excessive costs because the opposing party had instructed unreasonably expensive advisers. The court could also make orders in the course of case management to ensure a 'level playing field', for example, allowing a smaller firm more time to comply with orders, or requiring a larger firm to prepare court bundles even though the responsibility was that of the smaller firm.

[19.17] Rowland v Bock

[2002] EWHC 692 (QB)

[2002] 4 All ER 370

The claimant was a Swedish national who was subject to a request for extradition to the United States and who would have been arrested had he entered the UK. He made an application for permission to give his evidence at trial by video link. The

master refused permission, and held that for one party to give evidence by video link and one in court meant that the parties were not on an equal footing. The claimant appealed to the Court of Appeal.

HELD, ON APPEAL: Whilst it was preferable for all witnesses to give live evidence at court, the overriding objective was concerned with making use of new technology. Furthermore, if the claimant was required to attend court in the UK and thereby would be at risk of being arrested, the parties would clearly not be on an equal footing. The only other alternative would be for the claimant's witness statement to be read out pursuant to a Civil Evidence Act notice, and again, the parties would not be on an equal footing. The appeal was allowed.

Saving expense

[19.18] Burrows v Vauxhall Motors Ltd Mongiardi v IBC Vehicles Ltd

[1997] NLJR 1723, [1998] PIQR P48

In June 1993 the claimant suffered personal injury in the course of his employment with the defendant. Liability was admitted. The claimant was examined by a medical expert, and a report was produced in October 1994. It was not sent to the defendant. In May 1995 the claimant issued proceedings, appending the medical report. The claim was settled in December 1995. The defendant issued an application seeking to exclude the claimant's entitlement to costs on the basis that had been no need to issue proceedings, since if the medical report had been disclosed before the issue of proceedings, the claim would have settled.

HELD, ON APPEAL: It was unreasonable for the claimant to withhold plainly relevant medical evidence, and it was unreasonable to disclose such evidence for the first time with the proceedings. Accordingly, it was appropriate to give consideration to disallowing costs unnecessarily incurred.

Note—Whilst this authority predates the introduction of the CPR, and to some extent its relevance is nullified by the introduction of the pre-action protocols, it nevertheless provides a useful example of how the courts will approach a failure to save unnecessary expense.

[19.19] Norwich Union Linked Life Assurance Ltd v Mercantile Credit Co Ltd

[2003] EWHC 3064 (Ch)

[2003] All ER (D) 376 (Dec)

The deputy master refused the claimant's application to strike out two allegations in the defence because he ruled that the application was likely to add to the costs and extend the trial. The claimant appealed:

HELD, ON APPEAL: The court was permitted to refuse to consider the merits of an application if the court considered that the actual making of the application was in itself contrary to the overriding objective. If an application would delay resolution of the case, increase costs, or take up court time unnecessarily, then the court had jurisdiction to refuse to consider it.

[19.20] Khiaban v Beard

[2002] EWCA Civ 358

[2003] 3 All ER 362, [2003] 1 WLR 1626, [2003] RTR 419

The claimant and the defendant were involved in a road traffic accident. Both were comprehensively insured. The claimant issued proceedings in respect of his policy excess in the sum of £125. To minimise costs, the respective insurers, who each had repair costs, entered into a memorandum of understanding, agreeing to abide by the

court's decision in the proceedings brought by the claimant. The district judge ordered the claimant to amend the particulars of claim to clarify the full extent of the claim made and include the repair costs. The claimant failed to amend the particulars of claim and the case was struck out. The matter was referred by the circuit judge to the Court of Appeal.

HELD, ON APPEAL: A claimant was entitled to decide what to include in his claim, and the CPR did not give the court jurisdiction to require a claimant to include losses in a claim which the claimant had chosen not to.

Per Dyson LJ: The real issue between the parties was liability. The parties were entitled to simplify the claim, and limit the amount claimed to £125. In so doing, they have acted in accordance with the overriding objective in that expense has been saved and the case can be dealt with proportionately.

Proportionality

[19.21] Baghdadi v Sunderland

(27 August 1999, unreported)

The court will give effect to agreements made between the parties regarding the progress of the case, only if consistent with the overriding objective. In the pursuit of proportionality the court will encourage the use of consent orders so that the parties do not need to attend a directions hearing, but only if lodged and approved before the hearing.

[19.22] King v Telegraph Group Ltd

[2004] EWCA Civ 613

[2004] NLJR 823, [2005] 1 WLR 2282, [2004] All ER (D) 242 (May)

Per Brook LJ: In this judgment I am not concerned to give more than general guidance as to the procedure that should be followed in future cases to mitigate the evils of which [the defendant was] right to complain . . . It will be sufficient only to say that the claimant's lawyers appear to have advanced their client's claim from time to time in a manner wholly incompatible with the philosophy of the CPR, and that I would expect a costs judge to take an axe to certain elements of their charges if the matter ever proceeds to an assessment . . . There are three main weapons available to a party who is concerned about extravagant conduct by the other side, or the risk of such extravagance. The first is a prospective costs capping order . . . The second is a retrospective assessment of costs conducted in accordance with CPR principles. The third is a wasted costs order against the other party's lawyers . . .

Dealing with cases expeditiously and fairly

[19.23] Chilton v Surrey County Council

1999 CPLR 525

The claimant sustained personal injury when he fell over an unfenced and unlit pile of earth on a footpath which was the responsibility of the defendant. Some two weeks before trial, the claimant applied to the court for permission to file and serve an amended schedule of loss which increased the value of his claim from £5,000 to £400,000. Permission was refused, and the claimant appealed.

HELD, ON APPEAL: The value of the claim was foreshadowed in the medical evidence upon which the claimant relied. The CPR required that the court deal with the case justly, to further the overriding objective, and in this instance the case could only be dealt with justly if the claimant was permitted to serve an amended schedule of loss.

[19.24] Hannigan v Hannigan

[2000] All ER (D) 693, [2000] 2 FCR 650

The claimant issued proceedings in respect of a dispute relating to her late husband's will. She issued proceedings pursuant to CPR Pt 8, when in fact the proceedings should have been issued pursuant to CPR Pt 7. Furthermore, the particulars of claim were not verified with a statement of truth. The defendants applied to the court for an order that the claim be struck out. The district judge made such an order, and the designated civil judge refused the claimant's appeal. The claimant appealed to the Court of Appeal.

HELD, ON APPEAL: Whilst it had to be accepted that the proceedings had been instituted using the wrong form and although the form contained numerous defects, nevertheless the defendants were given all the information they required to understand the relief sought by the claimant. The overriding objective would have been better served if the defendants' solicitors had pointed out the defects rather than attempted to take a technical point, and had the claimant's solicitor accepted his incompetence and agreed to meet the expense caused by that incompetence.

[19.25] Hertsmere Primary Care Trust v Administrators of Balasubramanium's Estate

[2005] EWHC 320 (Ch)

[2005] 3 All ER 274

The claimant brought proceedings against the estate of a deceased optician, who had falsely claimed fees in respect of eye tests. The claimant obtained a freezing order, and then an order for an account of payments made to the deceased. The claimant made an offer to settle its claim, expressed to be made under CPR Pt 36. The letter did not comply with CPR Pt 36 because it did not state that the offer was to remain open for 21 days, and thereafter could only be accepted if the parties agreed their liability for costs or if the court gave permission. The estate advised that the offer did not comply with the terms of CPR Pt 36 but did not elaborate further, despite being asked to do so.

At trial, the claimant was awarded a sum in excess of the offer made, and sought an order for interest at 10% above base rate on the judgment sum, and indemnity costs. The court found that both parties were represented by lawyers, and that the error in the offer was obvious and purely a technicality, and accordingly the claimant should have the benefit of such an order. The estate appealed.

HELD, ON APPEAL: CPR 1.3 provides that the parties are required to help the court to further the overriding objective. CPR 1.4 provides that the court must further the overriding objective by actively managing cases and active case management includes encouraging the parties to cooperate with each other. Accordingly, the estate was obliged to give to the claimant the information requested, namely how the offer failed to comply with CPR Pt 36. Its failure to do was reason for the court to make an order for penalty interest and indemnity costs.

[19.26] Holmes v SGB Services plc

[2001] EWCA Civ 354

The claimant sustained an injury while unloading scaffolding using a hydraulic crane on the trailer of his lorry. Following the issue of proceedings, directions were given including a direction that the parties have permission to jointly instruct an expert. The evidence of the expert did not support the claimant's assertions, but did suggest an alternative reason why the accident might have happened. The claimant applied to vacate the trial date, amend his particulars of claim, and obtain a further report from the joint expert dealing with the new allegations in the amended particulars of claim.

The judge granted the claimant's request and made an order accordingly. The defendant appealed to the Court of Appeal.

HELD, ON APPEAL: The judge was exercising his discretion and making a case management decision. He had applied the overriding objective and considered and balanced the relevant criteria. These were matters in which the Court of Appeal would not interfere, unless the judge had erred in principle. It was not enough to argue that the judge could have come to a different conclusion.

[19.27] Zvonko Bulic v (1) Harwoods (2) Santander Consumer (UK) Plc (3) Jaguar Cars Ltd

[2012] EWHC 3657 (QB)

Mr Bulic (B) claimed damages from the respondents following a mechanical engine failure in his car. A single joint expert was instructed to comment on the cause of the engine failure. B was concerned about the technical ability of the single joint expert and applied for permission to instruct a further expert (S), and to disinstruct the single joint expert. This was unsuccessful and B appealed.

HELD: The expert evidence was fundamental to the case and S's evidence should have been allowed as it was not peripheral and it was what the overriding objective required.

Allocating the court's resources

[19.28] Arbuthnot Latham Bank Ltd v Trafalgar Holding Ltd

[1998] 2 All ER 181, [1998] 1 WLR 1426

Per Lord Woolf MR: Litigants and their legal advisers must . . . recognise that any delay which occurs . . . will be assessed, not only from the point of view of the prejudice caused to the particular litigants whose case it is, but also in relation to the effect it can have on other litigants who are wishing to have their cases heard and the prejudice which is caused to the due administration of civil justice.

The overriding objective and human rights

[19.29] Daniels v Walker

[2000] All ER (D) 608, [2000] 1 WLR 1382

The claimant was injured in a road traffic accident, sustaining serious injuries which resulted in a need for long-term care. The parties agreed that evidence was required from an occupational therapist and jointly instructed such an expert. The defendant was unhappy with the resulting report and applied for permission to obtain his own report. In support of that application, it was argued that Article 6 of the European Convention on Human Rights would be breached if the application was refused because the defendant would be barred from an essential or fundamental part of his defence.

HELD, ON APPEAL, Per Lord Woolf MR: . . . if the court is not to be taken down blind alleys it is essential that counsel . . . take a responsible attitude as to when it is right to raise a Human Rights Act point . . . Article 6 could not possibly having anything to add to the issue on this appeal. The provisions of the CPR, to which I have referred, make it clear that the obligation on the court is to deal with cases justly.

[19.30] Jones v University of Warwick

[2003] EWCA Civ 151

[2003] 3 All ER 760, [2003] 1 WLR 954

The claimant was injured during the course of her employment with the defendant. The defendant's advisers obtained surveillance evidence from enquiry agents who posed as market researchers and obtained access to the claimant's home. The defendant's medical expert viewed the resulting footage and concluded that the claimant was able to function fully. The defendant applied for permission to rely upon the footage. The claimant opposed the application, arguing that the enquiry agents' trespass infringed her right to privacy under Article 8 of the European Convention on Human Rights.

HELD, ON APPEAL, per Lord Woolf MR: Once the court has decided the order, which it should make in order to deal with the case justly, in accordance with the overriding objectives set out in CPR 1.1, in the exercise of its discretion under CPR 32.1 [to not exclude evidence unlawfully obtained by a party], then it is required or it is necessary for the court to make that order.

[19.31] Tony D Sullivan (AKA Rudey Soloman) v Bristol Film Studios Ltd

[2012] EWCA Civ 570

In this non-PI case the Court of Appeal (CA) was required to determine whether the judge at first instance had been correct to strike out the appellant's claim on the basis that pursuing his case, involving such a small amount, was a disproportionate use of court time and resources.

The appellant, a hip-hop artist known as 'Dappa Dred', contracted with the respondent, a film company, to make a digital video recording of one of his tracks. The appellant brought the action on the basis that the respondent had uploaded the video on YouTube without his consent. The respondent removed the video from the internet five days after it was posted.

The appellant began proceedings in the High Court, putting the value of his claim at £800,000. His cause of action was infringement of copyright, breach of statutory duty and a loss of chance. The respondent applied to strike out the claim as an abuse of process. The judge at first instance valued the claim at £50 and found that approximately 50 people had viewed the video during the time it was on YouTube.

HELD: Appeal dismissed. The CA recognised that a small claim should normally be dealt with by a proportionate procedure. If there is no such procedure then it is right to strike the claim out as an abuse of process. Lord Justice Etherton stressed that the disproportion justifying the strike out of the appellant's claim "is not merely between the likely amount of damages he would recover if successful in the proceedings and the litigation costs of the parties. It includes consideration of the extent to which judicial and court resources would be taken up by the proceedings".

Encouraging alternative dispute resolution

[19.32] Dunnett v Railtrack plc

[2002] EWCA Civ 302

[2002] All ER (D) 314 (Feb)

The claimant issued proceedings against the defendant seeking damages for negligence arising from the death of three of her horses which had been struck by a train on the Swansea to London railway line. During the course of proceedings, the court advised the claimant, who was acting in person, that she should explore the possibility of alternative dispute resolution (ADR). The claimant expressed a wish to proceed by way of ADR, but the defendant turned the option down. The claimant's claim was dismissed at trial, and she appealed. The appeal was unsuccessful, and the defendant applied for the costs of the appeal.

HELD, ON APPEAL: The parties had an obligation to further the overriding objective, and any party who turned down out of hand a referral to ADR when suggested by the court might face 'uncomfortable costs consequences'.

[19.33] Shirayama Shokusan Co Ltd v Danovo Ltd

[2004] 1 WLR 2985, [2004] All ER (D) 442 (Feb)

The claimants brought an action in trespass against the defendant in respect of display of signage and artwork in County Hall. The defendant had previously suggested to the claimants that the dispute could be resolved by way of mediation. The claimants refused, saying that the issue in dispute could not be resolved by mediation – either the defendant was trespassing or it was not.

HELD: The court has power to order the parties to submit to ADR, even in circumstances where one party is unwilling, in pursuance of CPR 1.4(2).

[19.34] Halsey v Milton Keynes General NHS Trust

[2004] EWCA Civ 576

[2004] 4 All ER 920, [2004] 1 WLR 3002

The claimant brought a claim against the defendant NHS Trust in respect of the death of her husband arising out of negligent medical treatment. The claim was dismissed, but the trial judge refused to award costs to the defendant because the defendant had refused invitations from the claimant to submit to mediation. The defendant appealed.

HELD, ON APPEAL: Parties sometimes needed to be encouraged to submit to ADR, and the court's role should be to encourage but not compel ADR. The question of whether a party has acted unreasonably in refusing ADR depends upon the circumstances of the case, and the court will have regard to the nature of the dispute, the merits of the case, the extent to which other settlement methods have been attempted, whether the costs of ADR would be disproportionately high, whether any delay in going to ADR would be prejudicial, and whether ADR would have a reasonable prospect of success.

Furthermore, per Dyson LJ: [the] compulsion of ADR [is likely to be regarded] as an unacceptable constraint on the right of access to the court and, therefore, a violation of Article 6 [of the European Convention on Human Rights] . . . [and] even if the court does have jurisdiction to order unwilling parties to refer their disputes to mediation, we find it difficult to conceive of circumstances in which it would be appropriate to exercise it.

(C) Application of the Rules

CPR 2.1 – Application of the Rules

[19.35]

(1) Subject to paragraph (2), these Rules apply to all proceedings in–
  (a) the County Courts;
  (b) the High Court; and
  (c) the Civil Division of the Court of Appeal.

(D) JUDGES

CPR 2.4 – Powers of judge, Master or District Judge to perform functions of the court

[19.36]

Where these Rules provide for the court to perform any act then, except where an enactment, rule or practice direction provides otherwise, that act may be performed–

(a) in relation to proceedings in the High Court, by any judge, Master, Registrar in Bankruptcy or District Judge of that Court; and

(b) in relation to proceedings in the County Court, by any judge of the County Court.

CPR 2.4A – Jurisdiction of the County Court exercisable by a legal adviser

[19.37]

A legal adviser, defined in paragraph 1.2(b) of Practice Direction 2E, may exercise the jurisdiction of the County Court specified in, and subject to, that Practice Direction.

(E) COURT STAFF

CPR 2.5 – Court staff

[19.38]

(1) Where these Rules require or permit the court to perform an act of a formal or administrative character, that act may be performed by a court officer.

(2) A requirement that a court officer carry out any act at the request of a party is subject to the payment of any fee required by a fees order for the carrying out of that act.

(F) CALCULATION OF TIME

CPR 2.8 – Time

[19.39]

(1) This rule shows how to calculate any period of time for doing any act which is specified–

(a) by these Rules;

(b) by a practice direction; or

(c) by a judgment or order of the court.

(2) A period of time expressed as a number of days shall be computed as clear days.

(3) In this rule 'clear days' means that in computing the number of days–

(a) the day on which the period begins; and

(b) if the end of the period is defined by reference to an event, the day on which that event occurs are not included.

Examples

(i) Notice of an application must be served at least 3 days before the hearing.
An application is to be heard on Friday 20 October.
The last date for service is Monday 16 October.

(ii) The court is to fix a date for a hearing.
The hearing must be at least 28 days after the date of notice.
If the court gives notice of the date of the hearing on 1 October, the earliest date for the hearing is 30 October.

(iii) Particulars of claim must be served within 14 days of service of the claim form.
The claim form is served on 2 October.
The last day for service of the particulars of claim is 16 October.

(4) Where the specified period–

(a) is 5 days or less; and

(b) includes–

(i) a Saturday or Sunday; or

(ii) a Bank Holiday, Christmas Day or Good Friday,

that day does not count.

Example

Notice of an application must be served at least 3 days before the hearing.
An application is to be heard on Monday 20 October.
The last date for service is Tuesday 14 October.

(5) Subject to the provisions of PD 5C, when the period specified–

(a) by these Rules or a practice direction; or

(b) by any judgment or court order,

for doing any act at the court office ends on a day on which the office is closed, that act shall be in time if done on the next day on which the court office is open.

CPR 2.8 only applies to the calculation of a period of time 'for doing any act'

[19.40] Anderton v Clwyd County Council

[2002] EWCA Civ 933

[2002] 3 All ER 813, [2002] 1 WLR 3174

The Court of Appeal emphasised that the several time calculation provisions in CPR 2.8 do not apply whenever there is a reference in the CPR to the calculation of time. The rule only applies to the calculation of any period of time 'for doing any act' which is so specified.

Per Mummery LJ: CPR 2.8 is about the calculation of any period of time for doing any act which is specified by the rules or by a practice direction or by a judgment or order of the court. Under CPR 2.8(4), where the specified period is five days or less and includes a Saturday or Sunday or a bank holiday, Christmas Day or Good Friday, that day does not count . . . [CPR 2.8] only applies to the calculation of any period of time 'for doing any act' which is specified in the Civil Procedure Rules, by a practice direction or court order. CPR 6.7 [which concerns deemed service of a claim form] does not specify a period of time for doing any act under the Civil Procedure Rules. It sets out the methods of calculating the days on which the event of service is deemed to happen as a result of doing other acts under other rules involving the use of the various available methods of service of a claim form.

Recognition and Enforcement of Judgments in Civil and Commercial Matters, more commonly known as the "Brussels I Regulation". In 2009, the European Commission adopted a report on the application of the Brussels I Regulation, with a view to improving its effectiveness on certain matters beyond the scope of this chapter. The report began a three-year period during which the European institutions negotiated on the detail of revisions to the Regulation.

The final revised text was agreed in December 2012 and is commonly referred to as "Brussels I recast". Its full title is Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast).

The United Kingdom (UK) opted in to the original Regulation and notified its adoption of the recast version (see recital 40). Brussels I recast applies from 10 January 2015 and expressly repeals the original version, although it provides at Article 80 that "references to the repealed Regulation shall be construed as references to this Regulation and shall be read in accordance with the correlation table set out in Annex III".

The correlation table sets out the Articles in the original Brussels I Regulation and their equivalent in the recast Regulation. The numbering of the Articles quoted in this chapter has increased by two as between the original Regulation and the recast version. Unless stated otherwise, references below to Articles of the Regulation are to Brussels I recast.

The general rule set out in Article 4.1 provides that:

> Subject to this Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State.

For the purposes of motor claims, therefore, jurisdiction is likely to lie in England and Wales if the individual defendant/tortfeasor is domiciled in England and Wales, regardless of where the accident occurred. This general rule is a straightforward solution which allows for claimants injured by English drivers in Europe to commence proceedings in England and Wales, whether they are driving their own English-registered and insured vehicles or whether they are driving locally hired vehicles which are also insured locally.

(B) SPECIAL JURISDICTION

[36.3] The Regulation offers a number of alternative or additional grounds of jurisdiction, not all of which are relevant to motor claims. Those which are include the following:

> Article 7
>
> A person domiciled in a Member State may, in another Member State, be sued . . .
>
> 2. in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or may occur;
>
> Article 8
>
> A person domiciled in a Member State may also be sued . . .
>
> 1. where he is one of a number of defendants, in the courts for the place where any one of them is domiciled, provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings;

It should be noted that the general rule and the special bases of jurisdiction above refer to "person" or "persons". This formulation does not necessarily limit the application of those Articles to claims made against natural persons only, such as the defendant driver or tortfeasor. Legal persons such as insurers may also be caught by the provisions. However, the Regulation includes separate and additional rules in respect of insurance, which are set out in full below.

(C) JURISDICTION IN MATTERS RELATING TO INSURANCE

[36.4]

> Article 10
>
> In matters relating to insurance, jurisdiction shall be determined by this Section, without prejudice to Article 6 and point 5 of Article 7.
>
> Article 11
>
> 1. An insurer domiciled in a Member State may be sued
>
> (a) in the courts of the Member State where he is domiciled, or
>
> (b) in another Member State, in the case of actions brought by the policyholder, the insured or a beneficiary, in the courts for the place where the plaintiff is domiciled,
>
> (c) if he is a co-insurer, in the courts of a Member State in which proceedings are brought against the leading insurer.
>
> 2. An insurer who is not domiciled in a Member State but has a branch, agency or other establishment in one of the Member States shall, in disputes arising out of the operations of the branch, agency or establishment, be deemed to be domiciled in that Member State.
>
> Article 12
>
> In respect of liability insurance or insurance of immovable property, the insurer may in addition be sued in the courts for the place where the harmful event occurred. The same applies if movable and immovable property are covered by the same insurance policy and both are adversely affected by the same contingency.
>
> Article 13
>
> 1. In respect of liability insurance, the insurer may also, if the law of the court permits it, be joined in proceedings which the injured party has brought against the insured.
>
> 2. Articles 10, 11 and 12 shall apply to actions brought by the injured party directly against the insurer, where such direct actions are permitted.
>
> 3. If the law governing such direct actions provides that the policyholder or the insured may be joined as a party to the action, the same court shall have jurisdiction over them.

The combined effect of the rules is to provide a potentially wide range of alternative bases of jurisdiction in road traffic accident claims.

[36.5] FBTO Schadeverzekeringen NV v Odenbreit

C-463/06, [2007] ECR I-11321

The claimant (O) was injured in a road traffic accident in the Netherlands in December 2003. The claimant was domiciled in Germany. The driver and his insurer – the

defendant, FBTO – were domiciled in the Netherlands. O sought to commence proceedings directly against the insurer, but in Germany. O argued that Articles 9.1(b) and 11.2 of the Brussels I Regulation (44/2001/EC) conferred jurisdiction on Germany as the country of domicile of an injured claimant making a direct right of action claim against an insurer. F disputed that basis of jurisdiction and argued that the claim should be brought in the Netherlands, where the defendant and the insurer were domiciled (the test in Article 2.1) and where the harmful act occurred (the test in Article 5.3). The German court referred the question of jurisdiction to the Court of Justice of the European Union (CJEU) in the following terms:

> "Is the reference to Article 9(1)(b) in Article 11(2) of . . . Regulation . . . No 44/2001 . . . to be understood as meaning that the injured party may bring an action directly against the insurer in the courts for the place in a Member State where the injured party is domiciled, provided that such a direct action is permitted and the insurer is domiciled in a Member State?"

The court answered this question affirmatively.

Its reasoning was that Article 9(1)(b) did not merely attribute jurisdiction to the courts of the Member State where the persons listed there were domiciled, but on correct interpretation with Article 11.2 it also provided that the courts of the Member State where the plaintiff is domiciled should have jurisdiction. Hence it provided plaintiffs with an option to sue the insurer directly in the courts of their own country.

This court noted that this interpretation was reinforced by the language of recital 13 to the Brussels I Regulation (recital 18 in the recast version):

> "In relation to insurance, consumer contracts and employment, the weaker party should be protected by rules of jurisdiction more favourable to his interests than the general rules provide for."

And by the terms of recital 16(a) to the Fourth Motor Insurance Directive (2000/26/EC):

> "Under Article 11(2) read in conjunction with Article 9(1)(b) of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, injured parties may bring legal proceedings against the civil liability insurance provider in the Member State in which they are domiciled."

[Recital 16(a) was itself inserted into the Fourth Directive by the Fifth Directive (2005/14/EC).]

The jurisdictional question decided in *Odenbreit* has to some extent become academic with the passage of time. The Codified Motor Insurance Directive (2009/103/EC) of 19 September 2009 deals clearly and unambiguously with the point by including the text (above) of recital 16(a) as its recital 32.

It is therefore now beyond doubt that claimants from the UK who are injured in road traffic accidents in other Member States may issue their claims in the UK directly against the insurer of the motorist alleged to be responsible for the accident.

[36.6] Hoteles Pinero & Keefe (by his litigation friend Eyton) v Mapfre Mutualidad Compania De Seguros Y Reaseguros SA

[2015] EWCA Civ 598, [2016] 1 WLR 905, [2016] Lloyd's Rep IR 94

Mr Keefe was seriously injured by a piece of hotel equipment while on holiday in Tenerife in October 2006. He initially sued the hotel's management company in Spain but, after the decision in *Odenbreit* (at para **[36.5]**) was published, he sought to sue the hotel's insurers, Mapfre, directly in England. He argued that Articles 9 and 11 of the Brussels I Regulation provided grounds for this approach to jurisdiction. [The

numbering of the Articles is that of the original Regulation rather than the recast version, but nothing turns on this.]

If the jurisdiction argument succeeded it would logically follow, in a case before Rome II applied, that the quantum of damages would be regarded as procedural and therefore governed by the law of the court, ie English law. In any event, the applicable substantive law – which would govern the issue of liability – was agreed to be Spanish.

The claim was valued (assuming liability attached) at around £5 million on an English basis, whereas its value if assessed under Spanish principles would be much lower, in the order of €800,000. An important relevant factor was that the hotel's insurance policy was subject to a limit of indemnity of around €600,000 and for this reason the claimant sought to join the hotel to the direct action which he had started in England against its insurer Mapfre. The hotel applied for an order that the English court did not have jurisdiction to hear the claim against it.

HELD: In May 2013 the hotel's application was dismissed by the Master, and in October 2013 a High Court judge upheld that decision. In July 2015 the Court of Appeal in turn confirmed that the English courts had jurisdiction because of Articles 11 and 9 of the Regulation.

The Court of Appeal was:

> "unable to accept that the exercise by the English court of jurisdiction over the hotel amounts in this context to an impermissible ouster of the jurisdiction of the Spanish courts. It is no more than a consequence of the combination of two principles: that the injured person as the weaker party in a direct claim against the insurer is entitled to sue in the courts of his own place of domicile (Articles 11(2) and 9(b)); and that, if the court has jurisdiction over the insurer in relation to a direct claim, it also has jurisdiction over the insured, if the law under which the direct claim arises permits the insured to be joined in the same action."

In addition, the court was alive to the effect that this decision on jurisdiction would have on the valuation of the claim (if liability attached), pointing out:

> "it is hard on the hotel to find that because its insurer has been sued in this country it faces a liability for damages considerably greater than would have been the case if it had been sued in Spain, but that is primarily a consequence of the differences between English and Spanish law in relation to the assessment of damages . . . "

Subsequently, in November 2015 the Supreme Court granted permission to appeal, which was heard in March 2017. Over a year later, in May 2018, the matter was withdrawn with the consent of the parties. The decision of the Court of Appeal therefore stands.

[36.7] Le Guevel-Mouly & Others v AIG Europe Ltd

[2016] EWHC 1794

The claimants were injured in an accident in Scotland in 2012 involving a hire car driven negligently by their father. All were French residents. The defendant insurer was registered in England and Wales. The claimants issued proceedings in England and Wales. The defendant admitted liability and, initially at least, did not contest jurisdiction within the relevant period allowed for in the Civil Procedure Rules. Subsequently, the defendant sought to argue that Scotland was the more appropriate jurisdiction.

HELD: As a matter of procedure, the judge granted relief from sanctions and thus permitted the insurer to raise the point after the initial period for disputing jurisdiction had elapsed. On the substantive question of jurisdiction, he noted that the insurer was domiciled in England and found that there was no compelling evidence that Scotland would be a more appropriate forum despite the accident and the damage occurring there. The English proceedings should therefore continue.

[Nowhere does the judgment refer in terms to the Brussels I Regulation. However, jurisdiction in these circumstances lying against an insurer domiciled in England is clearly permitted by Article 11(1)(a) of the recast Regulation. That provision replaces, in identical terms, Article 9(1)(a) of the original Regulation which would have applied given the date of the accident. Equally, although jurisdiction in Scotland, being "the place where the harmful event occurred", would have been available under the recast Article 12 (Article 10 in the original Regulation) and as argued for by the insurer, it was not allowed on the facts of this case.]

[36.8] Fidelidade-Companhia de Seguros SA v Caisse Suisse de Compensation & ors

(2017) C-287/16, ECLI:EU:C:2017:575, [2017] RTR 403, [2017] Lloyd's Rep IR 540

The defendant company Caisse Suisse paid income and other insured benefits to the family of a Swiss national following his death in an accident in Portugal caused by the negligence of a driver of a vehicle insured with Fidelidade, a Portuguese motor insurer. It sought to recover those sums and issued proceedings in Portugal against Fidelidade to that effect. The questions referred to the CJEU by the Portuguese Supreme Court in this case largely concerned the compatibility or otherwise of provisions of Portuguese insurance law with the Codified Motor Insurance Directive (Directive 2009/103/EC of 16 September 2009), given that Fidelidade had sought to rely on those provisions in order to avoid the motor policy for fraudulent misrepresentation.

HELD: The CJEU's decision turned largely on the avoidance point, with the court finding that:

> "[The Directive] must be interpreted as precluding national legislation which would have the effect of making it possible to invoke against third-party victims, in circumstances such as those at issue in the main proceedings, the nullity of a contract for motor vehicle insurance against civil liability arising as a result of the policyholder initially making false statements."

Of greater interest from a jurisdictional point of view, however, is that the basis of Caisse Suisse pursuing a subrogated claim in the Portuguese courts against the insurer does not appear to have been disputed. It would seem likely, therefore, that jurisdiction was founded, as in *Le Guevel-Mouly* (at para **[36.7]**), on either Article 11(1)(a) or Article 12 of Brussels I recast. If so, the additional nuance brought by this case would appear to be that those provisions apply to subrogated claims in addition to claims pursued by injured individuals.

[36.9] Landeskrankenanstalten-Betriebsgesellschaft KABEG v Mutuelles du Mans Assurances (MMA IARD SA)

(2017) C-340/16, ECLI:EU:C:2017:576

Following an accident in Italy in 2011 caused by a vehicle insured with French insurer MMA, KABEG (a public law health care organisation) continued to pay the salary of its employee who had been injured the accident. KABEG then sought to recover the sums paid from MMA and issued proceedings in Austria. It argued that the special rules of jurisdiction in matters relating to insurance – at the time, Articles 8 to 11 of the Brussels I Regulation (44/2001/EC) – should apply. MMA contented that KABEG, as an employer, could not rely on these. The Austrian Supreme Court referred the dispute to the CJEU in the following terms:

> "Is the action brought by an employer established in Austria seeking compensation for the damage passed on to that employer as a result of the continued payment of remuneration to its employee domiciled in Austria a 'matter relating to insurance' within the meaning of Article 8 of Regulation No 44/2001, in the case where:
> (a) the employee was injured in a road traffic accident in a Member State (Italy),
> (b) the action is brought against the civil-liability insurer, domiciled in another Member State (France), of the vehicle at fault, and
> (c) the employer is established as a public-law institution with legal personality?"

The CJEU found it necessary to consider whether employers seeking recovery of loss of earnings, because the rights of the person directly injured had been transferred to them, could come within the concept of "injured party" in these provisions of the Regulation.

HELD: Following *Odenbreit* (at para **[36.5]**), the purpose of Article 11(2) of the Brussels I Regulation referring to the "injured party" was to include them within Article 9(1)(b) of the Regulation, and without restricting that concept to those directly suffering damage. To ensure the high predictability required by the Regulation in its recital 11 (recital 15 in Brussels I recast), the concept of injured or weaker party should not be decided on a case-by-case basis.

An employer to whom the rights of its employee had passed and who sought recovery of earnings it had paid should, solely in that capacity, be regarded as weaker than the liability insurer. It followed that it should be permitted to rely on Articles 9 and 11 to sue the insurer of the vehicle involved before the courts of the Member State in which the employer was established where a direct action is permitted.

[36.10] Hofsoe v LVM Landwirtschaftlicher Versicherungsverein Münster AG

(2018) C-106/17, ECLI:EU:C:2018:50, [2018] All ER (D) 149 (Jan)

This case dealt with issues similar to those raised in *KABEG v MMA* (at para **[36.9]**) and turned on the interpretation of the same provisions, albeit in the recast version of the Brussels I Regulation.

The defendant, a German motor insurer, provided cover in respect of an accident in Poland in July 2014 caused by its insured and in which a Polish car was damaged. The owner of the car hired a replacement for around two months and was partially indemnified by LVM's claims representative. Hofsoe traded as a claims professional and acquired the rights to recover the balance by way of a commercial assignment from the owner of the damaged car. He issued proceedings in Poland directly against LVM in February 2015, meaning that Brussels I recast applied.

The Polish Court referred the question of whether Articles 11 and 13 should be interpreted to permit Hofsoe to bring the claim acquired by the assignment in the same way in which the party who suffered the loss would themselves have been able to do.

HELD: The purpose of these special rules of jurisdiction in insurance matters was set out at recital 18 to Brussels I recast:

> "In relation to insurance, consumer and employment contracts, the weaker party should be protected by rules of jurisdiction more favourable to his interests than the general rules."

An assignee of the injured party's rights could be considered to be a weaker party and if so should also benefit from the special rules. The Court referred to its decision in *KABEG* (at para **[36.9]**) that the concept of "injured party" was not restricted to those who directly suffered damage.

However, no special protection was justified on the facts of this case. Both parties were professionals in the insurance sector and thus neither was in a weaker position than the other. The fact that Hofsoe carried out his business on a small scale did not make him a weaker party. Therefore, according to the Court:

> "Article 13(2) of Regulation No 1215/2012, read in conjunction with Article 11(1)(b) of that regulation, must be interpreted as meaning that it may not be relied on by a natural person,

whose professional activity consists, inter alia, in recovering claims for damages from insurers and who relies on a contract for the assignment of a claim concluded with the victim of a road accident, to bring a civil liability action against the insurer of the person responsible for that accident, which has its registered office in a Member State other than the Member State of the place of domicile of the injured party, before a court of the Member State in which the injured party is domiciled."

[36.11] Four Seasons Holdings Incorporated (FSHI) v Brownlie

[2017] UKSC 80, [2018] 2 All ER 91, [2018] 1 WLR 192

The claimant was injured and her husband was killed in a traffic accident in Egypt in 2010 which happened during an excursion booked with the Four Seasons hotel in Cairo. This was not a case to which the Brussels I Regulation applied because it did not involve deciding on jurisdiction between different EU Member States.

The claimant attempted to bring contract and tort claims in England against the Four Seasons' holding company based in Canada, ie outside the jurisdiction. In order to allow service outside the jurisdiction of a claim in tort, the Civil Procedure Rules require that the "damage was sustained within the jurisdiction" (CPR PD 6B para 3.1(9)(a)).

HELD: The outcome of the claims against FSHI actually turned on the identity of the correct defendant. On the evidence available, the Supreme Court found that FSHI did not operate the hotel in Cairo and it did not contract with the claimant to provide the excursion. The contractual claim against it therefore had no prospects of success and it could not be vicariously liable in tort for the negligent driving during the excursion. The claims therefore failed on that basis and it was not strictly necessary to consider whether "damage" in tort "was sustained within the jurisdiction".

However, the Court nevertheless examined the meaning of "damage" for these purposes in *obiter* remarks, reaching a split decision on the point. The majority of three would have found that the ordinary meaning of the word would cover all the physical and financial disadvantage suffered by the claimant as a result of the tort, including secondary damage sustained in England. The minority preferred to regard "damage" as complete when the incident occurred and therefore sustained at the time of the accident and at the place of the accident. Thus, what was sustained in England and Wales was the financial measure of the damage rather than the damage itself. The minority argued that this approach would be consistent with that in Brussels I recast, which allows, at Article 12, jurisdiction "in the courts for the place where the harmful event occurred".

2. APPLICABLE LAW

(A) THE ROME II REGULATION

[36.12] Regulation 864/2007 of the European Parliament and of the Council of 11 July 2007 on the Law Applicable to Non-Contractual Obligations, known as "the Rome II Regulation", governs the applicable law relating to non-contractual obligations, including claims in negligence arising out of road traffic accidents. The intention behind it is to standardise, in all courts throughout the EU, the approach to deciding which national law should be applied to non-contractual disputes and thereby to reduce 'forum shopping' – whereby parties seek to select both the jurisdiction and the applicable law which appear most favourable to their case.

The Regulation is an instrument of private international law and hence will be of relevance in road traffic claims with a foreign element. It is directly applicable in the UK and came into force on 11 January 2009.

Importantly, Rome II does not affect jurisdiction, ie the question in which Member State claims may be brought. The determination of the applicable law is separate to and distinct from jurisdiction, which has been dealt with in the previous section. The rules in the Regulation on the applicable law are of universal application (Article 3) and apply where a claim arising from a tort which occurred after it came into force is brought before any court in a Member State.

Rome II sets out a series of rules for designating the applicable substantive law and therefore it does not affect procedural issues, which are subject to the law of the court which is seized of the dispute. This general principle of private international law is restated, for the avoidance of doubt, in Article 1.3: "This Regulation shall not apply to evidence and procedure . . . ". Rome II completely replaces the rules and principles in earlier English legislation, most notably the provisions of the Private International Law (Miscellaneous Provisions) Act 1995, for claims arising after it came into force.

(B) THE GENERAL RULE FOR DESIGNATING APPLICABLE LAW

[36.13] Generally, the law applicable to the claim will be that of the country in which the damage occurs (Article 4(1), below).

There are no specific rules for road traffic accidents. Hence, the general rule applies and the applicable law is that of the country in which the damage occurs. In practice, this is likely in most – but not necessarily in all – road traffic accident claims to equate to the law of the country in which the accident took place.

Article 4(2) provides a mandatory exception to the general rule, being where the parties have a common habitual residence (note that nationality is not used here). Hence, if two people resident in England were involved in a single vehicle accident in France, English law would apply to any claim the passenger would bring against the negligent driver. Article 4(3) also provides a catch-all exception or 'escape clause' where another country is manifestly more closely connected with the claim.

Article 4 – General rule

1. Unless otherwise provided for in this Regulation, the law applicable to a non-contractual obligation arising out of a tort/delict 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.
2. However, where the person claimed to be liable and the person sustaining damage both have their habitual residence in the same country at the time when the damage occurs, the law of that country shall apply.
3. Where it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with a country other than that indicated in paragraphs 1 or 2, the law of that other country shall apply. A manifestly closer connection with another country might be based in particular on a pre-existing relationship between the parties, such as a contract, that is closely connected with the tort/delict in question.

[36.18] Homawoo v GMF Assurances SA

(2011) C-412/10, ECLI:EU:C:2011:747

The claimant applicant, who was domiciled in the UK, was injured in a road traffic accident in France in August 2008. The applicant issued proceedings in the UK on 8 January 2009. He argued that the applicable law was that of England and Wales, on the grounds that the Regulation did not apply to events giving rise to damage which occurred before 11 January 2009, the date from which he accepted that the regulation should apply. Article 31 of the Regulation provides, "This Regulation shall apply to events giving rise to damage which occur after its entry into force." And the relevant part of Article 32 provides, "This Regulation shall apply from 11 January 2009".

In the alternative, the applicant submitted that the Regulation did not apply where proceedings were issued before that date, irrespective of when the damage occurred.

The respondent insurer – sued directly in the UK – argued that the Regulation was applicable to the dispute and hence that the assessment of damages should be under French law. Its argument was that the date of "entry into force" would, following ordinary principles of European Law, be the 20th day after its publication in the Official Journal of the European Union. If so, the date of "entry into force" would be in mid-August 2007 and the Regulation would apply to damage, as in this claim, occurring in August 2008. The English court referred the question of the temporal application of the Regulation to the ECJ.

HELD: On 17 November 2011, the ECJ held that the Regulation applies only to events giving rise to damage occurring after 11 January 2009. Consequently, it did not apply to the accident in question, in August 2008, and the claimant could therefore recover damages assessed under English law.

[36.19] Bacon v Nacional Suiza Cia Seguros y Reseguros SA

[2010] EWHC 2017 (QB), [2010] ILPR 46

The claimant B was injured in September 2007 crossing a road in Spain and brought a claim for damages directly against the defendant Spanish insurance company.

It was common ground that the system of law for determining the defendant's liability would be Spanish law. B argued that the Rome II Regulation did not apply to an accident in September 2007 and that damages should therefore be subject to the law of the court seised, ie to English law. The defendant insurer submitted that Spanish law was the applicable law because the Regulation applied due to the accident occurring after its "entry into force" in mid-August 2007, that being 20 days after its publication in the Official Journal.

HELD: The defendant was not found to be in any way at fault for the accident. It was therefore not necessary to determine the question of which was the law applicable to the quantum of damages. However, the judge held, *obiter dictum*, that had the driver been in some way responsible for the accident, the nature and assessment of damages would have been governed by Spanish law because Rome II would have applied.

Bacon was decided after the judge in *Homawoo* had referred the point to the ECJ, but before the ECJ had reached its decision (immediately above). It is impossible to reconcile the judge's *obiter* remarks in *Bacon* with the ECJ's subsequent decision, and to that extent it is suggested that *Bacon* should be disregarded.

[36.20] Maher v Groupama Grand Est

[2009] EWHC 38 (QB), [2009] 1 All ER 1116, [2009] 1 CLC 22, [2009] Lloyd's Rep IR 659, [2009] RTR 20, [2009] ILPR 45, [2009] 1 All ER (Comm) 793, WLR 1752

The claimants were injured in an accident in France in July 2005. The other driver was domiciled in France and was entirely responsible for the accident. Proceedings were issued in England directly against the driver's insurers. Neither liability nor jurisdiction was in dispute. The point before the court was whether the assessment of damages in the direct claim against the insurer of the tortfeasor (and the question of interest thereon) should be subject to English or French law.

The claimants argued that the insurer's liability flowed from that of its insured and was therefore tortious. Under well-established rules which preceded Rome II, the assessment of damages in tort is a procedural issue and therefore a matter for the law of the court, ie English law. Against this, the insurers argued that they were involved only because of the contractual obligation to indemnify their insured and therefore that their liability should be characterised as contractual. If so, it would be subject to the law governing the contract of insurance, ie French law.

HELD: The judge found that the assessment of damages in the direct claim against the insurer should be subject to English law. The liability of the insured was tortious and there was no dispute on coverage or policy terms.

The judge referred in passing to the Rome II Regulation and observed "the accident happened on 29 July 2005 and these provisions have no application". It was nevertheless noted that the damage occurred in France and hence French law would have governed the assessment of damages had the Regulation applied.

[36.21] Walton v AXA Belgium

[2011] PIQR P12

The claimant was travelling in a taxi in Brussels in June 2006 and was seriously injured when it left the road and fell around ten metres on to the underpass below. He issued proceedings in England and Wales directly against the taxi driver's insurer. Liability was admitted.

HELD: Little of the reported decision actually deals with the foreign elements. In fact, the critical issue before the judge concerned whether or not he should make an interim payment and if so in what amount.

However, the judgment records that there was no dispute that Belgian law was the applicable law (the accident pre-dated the application of Rome II) and that such heads of damages allowable under Belgian law would be assessed in accordance with English principles. The court was content to follow the decision in *Maher* (at para **[36.20]**).

[36.22] Middleton v Allianz IARD SA

[2012] EWHC 2287 (QB), [2012] All ER (D) 166 (Aug)

The claimant, an English national, was injured in an accident France in 2002. She was around two and a half years old at the time and was resident in France, as was her English mother. Her injuries were sustained when she was hit by a car driven by another English national who was also resident at the time in France. Some time after the incident the claimant and her mother, who was named as a third party in the claim, returned to live in England. Proceedings were issued in England directly against the driver's insurer.

Given the date of the accident, the Private International Law (Miscellaneous Provisions) Act 1995 governed the question of the applicable law as opposed to Rome II. The relevant general rule in section 11 of the 1995 Act is that the applicable

law "is the law of the country in which the events constituting the tort or delict in question occur".

The claimant argued that under this general rule French law should apply to the question of liability. If this succeeded the defendant insurer's liability would, at French law, be strict. It would be required to compensate the claimant fully.

Conversely, the insurer submitted that English law displaced French law. It argued that "it is substantially more appropriate" to apply English law because of "the significance of any factors connecting the tort or delict with another country"; in this instance, England. This was the test in section 12 of the 1995 Act. The effect of the insurer's argument, if successful, would have been to allow for the possibility of seeking a liability contribution from the claimant's mother on the arguable basis of failure to supervise the young child.

HELD: The insurer's arguments were dismissed. The judge found that the nationality of the claimant and her mother and their subsequent return to England were "of no real relevance and certainly not factors of such weight as to make it substantially more appropriate for French law to be displaced".

The substantive French law would therefore apply. However, the assessment of damages was a procedural matter (the accident pre-dated Rome II) and therefore such heads of damages as would be allowed by the French law would be assessed using the law of the court, ie English law. The judge noted that this would be the outcome "whether the applicable law on the substantive issue is French law or the law of England and Wales".

[36.23] Wall v Mutuelle de Poitiers Assurances

[2013] EWHC 53 (QB), [2013] PIQR P9, [2013] ILPr 20, [2013] 1 WLR 3890, [2013] 2 All ER 709, [2013] RTR 18

The claimant was injured in an accident in France in July 2010 and subsequently issued proceedings in England against the other driver's insurers. There was no dispute between the parties on any of the main elements, ie jurisdiction, liability, and the substantive applicable law. The latter was French law, under the general rule in Article 4(1) of the Rome II Regulation. The claimant sustained multiple complex injuries and sought to adduce expert reports about the nature and extent of his injuries. He argued that these were matters of evidence and procedure and hence excluded from the applicable law by Article 1(3) of the Regulation. He therefore sought to adduce English medico-legal reports in the ordinary way under CPR Pt 35. The defendant argued that the English court, in applying French law, should seek to arrive at the amount of damages a French court would have awarded and therefore proposed a single or joint medico-legal report of the type used in France.

HELD: The judge observed, almost casually, that the question of jurisdiction in this sort of claim was no longer seriously questionable. He said, of the claimant issuing directly in England against foreign insurers: "There is no dispute that this is a course which he was entitled to adopt following Council Regulation (EC) No 44/2001 of 22 December 2000 ('Brussels I') and Case C-463/06 *FBTO v Odenbreit* [2007] ECR I-11321. In the past he would have been obliged to pursue any claim through the French courts."

It was common ground that Rome II applied. Its purpose was to improve the predictability of the outcome of litigation in part by achieving greater certainty about as to the applicable law. However, the English court was not obliged to put itself in the position of a court in France and to decide the case as that court would have done. The question of expert evidence was clearly a matter of procedure, which in the terms of Article 1.3 is excluded from the substantive applicable law. The experts' reports would therefore be governed by the law of the court, ie by English law.

[36.24] Wall v Mutuelle de Poitiers Assurances

[2014] EWCA Civ 138, [2014] WLR(D) 105, [2014] WLR(D) 86

The defendant pursued its argument to the Court of Appeal.

HELD: The Court of Appeal upheld the decision of the lower court.

Nothing in the Rome II Regulation required the English court, when applying a foreign law due to the Regulation, to award the same amount of damages as the foreign court would. The Regulation did not envisage that the applicable law should govern the way in which evidence of fact or opinion would be given before the court hearing the case. In any event, English courts were ill-equipped to receive expert evidence delivered in the French manner.

[36.25] Vann and ors v Ocidental-Companhia de Seguros SA

[2014] EWHC 545 (QB)

The claimant pedestrians were injured in an accident in Portugal in September 2010. They issued proceedings in England against the insurers of the Portuguese driver. There was no dispute that Portuguese law applied to establishing liability and contributory negligence. Expert evidence of the provisions of Portuguese road traffic law was before the court. There was lay evidence from the driver and the claimants as to the circumstances of the accident. In addition, English accident reconstruction experts for both parties had prepared a joint statement having visited the accident site.

HELD: The judge found, on the evidence available, that the accident was entirely the fault of the driver. The case is notable because, with the parties having agreed that Portuguese law applied, the judgment turned largely on the factual evidence alone.

[There is no reference to *Wall* (above) in the judgment, but it seems implicit from the inclusion of the joint statement of the accident reconstruction experts that that must have been regarded as a matter of evidence and hence properly for the law of the court.]

[36.26] Vann and ors v Ocidental-Companhia de Seguros SA

[2015] EWCA Civ 572, [2015] All ER (D) 36 (Jun)

The insurer, Ocidental, appealed the finding that the pedestrians were not contributorily negligent. The application of Portuguese law pursuant to Article 4(1) of the Rome II Regulation was not contested. The point at issue was an aspect of the judge's decision on the factual evidence.

HELD: The Court of Appeal observed that it was not disputed that relevant Portuguese principles were essentially the same as the English law on contributory negligence.

The judge had drawn an inference from the facts that the injured pedestrians had kept a proper look out. That was not a permissible inference because the judge had found, consistent with the expert evidence, that the Portuguese driver had his headlights on. The crossing pedestrians ought therefore to have noticed him approaching but, by continuing to cross the road, it must follow that they did not take reasonable care for their safety. However, the driver was nevertheless principally at fault for driving too fast. A reduction of 20% should be made for the contributory negligence of the pedestrians.

[36.27] Cox v Ergo Versicherung AG

[2014] UKSC 22, [2014] 2 All ER 926, [2014] RTR 20, [2014] WLR(D) 150, [2014] 2 WLR 948

The claimant's husband died as a result of injuries sustained in a road accident in Germany in 2004. The accident was caused by a German driver insured by the defendant. Sometime afterwards, the claimant returned to the UK and issued proceedings directly against the insurer, seeking to recover damages for the loss of financial dependency on her late husband.

The parties agreed that liability for the accident should be determined by German law and that the case should be heard in England. The accident occurred before 2009, so the applicable law would be subject to the Private International Law (Miscellaneous Provisions) Act 1995 rather than the Rome II Regulation.

C argued that damages should be quantified under English law, following the Fatal Accidents Act 1976 (FAA 1976). She contended that the 1976 Act had extra-territorial effect, meaning that English courts should apply it to the exclusion of foreign law. The defendant insurer argued that German law should be used in the assessment of damages. The critical difference between the approaches of the two laws to the assessment of loss of financial support from the deceased was whether to take account of subsequent financial support provided by the claimant's new partner. That would be done under German law but not under FAA 1976.

The High Court and Court of Appeal rejected C's arguments. She could not rely on the provisions of FAA 1976. The courts took the view that the quantum of damages should, as a matter of English private international law, be assessed using German law principles. C appealed to the Supreme Court.

HELD: C's claim for damages should be assessed under German law principles for the following reasons.

First, the accident occurred before Rome II came into force, so the applicable law was governed by the 1995 Act. That provides that the applicable law is that of the place where "the events constituting the tort or delict occur". In personal injury and fatal accident claims, that means the law of the country where the individual was when they sustained the injury, unless that law could be displaced because it would be "substantially more appropriate" to apply the law of another country. That had not been shown in this case and therefore German law applied.

Second, FAA 1976 did not, on its proper construction, have an extra-territorial effect.

Third, it would make no difference whether or not a dependency claim under FAA 1976 was treated as substantive or procedural. If substantive, it was irrelevant to a tort claim subject to German substantive law. If procedural, it could have no effect because the court could not envisage any basis on which an English procedural provision could expand on a defendant's liability under the substantive principles of the relevant applicable law.

[The above summary would tend to suggest that the applicable substantive law – German – also applied to the computation of the damages. In cases before Rome II, as *Cox* was, the quantification of damages would ordinarily be subject to law of the court (see *Homawoo* and *Wall* (at paras **[36.18]** and **[36.23]** respectively), ie English law. *Cox* does not in fact offend against such an outcome. Lord Sumption, in the leading judgment, found that FAA 1976 did not apply as above. He therefore reverted to the English common law, ie prior to FAA 1976, in the assessment of damages. Its approach was to give credit for subsequent receipts referable to the loss. He found that C was entitled as a matter of German substantive law to an award of damages for the loss of her legal right of maintenance from her late husband. Furthermore, German law required credit to be given so far as she received corresponding benefits by virtue of an alternative legal right of maintenance from someone else, that being her new partner. In essence, therefore, the approaches of the English common law and the German law were the same. This conclusion explains why the case summary above adopts the shorthand that damages should be assessed using German principles.

Lord Sumption also speculated on the question of the assessment rules of the court conflicting with the substantive rules of the applicable law. He preferred not to express an opinion on this but observed that, "The rational answer is that someone in Mrs Cox's position should recover in respect of a German cause of action what she would have recovered in a German court." Even allowing for his remark being *obiter dictum*, it is somewhat difficult reconcile with the Court of Appeal's view in *Wall v Mutuelle de Poitiers* (at **[36.24]**) that the Rome II Regulation does not require an English court, when applying a foreign law, to award the same amount of damages as the foreign court would.]

[36.28] Winrow v Hemphill & Ageas Insurance

[2014] EWHC 2164 (QB), 164 NLJ 7629

The claimant was the wife of a British army officer stationed in Germany at the time of the accident in November 2009. She worked at an army school. The defendant driver, who was at fault in the accident, was the wife of another British officer and was also living in Germany at the time. Her car was insured with Ageas, based in England. The claimant brought proceedings in England in 2011 after having returned to the UK. The key issue was the correct applicable law under Article 4 of the Rome II Regulation. The claimant argued that it should be English law, under Article 4(2) or (3).

HELD: Given that the accident happened in Germany and the damage occurred there, German law would apply under Article 4(1) unless either of the exceptions was made out. Article 4(2) required for the claimant and "the person claimed to be liable" to have a common habitual residence at the time when the damage occurs. Following one aspect of *Jacobs v Motor Insurers' Bureau*, the judge found that "the person claimed to be liable" in Article 4(2) meant the tortfeasor (in this case, the negligent driver) and not the insurer, despite it being a named defendant in the proceedings. [This aspect of *Jacobs* was not overruled by the Supreme Court in *Moreno* (see para **[36.31]**).]

It was therefore irrelevant that the insurer was registered in England. On the facts, the claimant was not "at the time when the damage occurs", habitually resident in the UK but in Germany. Her husband and family had been established there for several years. She was employed in Germany and her children were being educated there. A stated intention eventually to return to the UK was not sufficient and the exception in Article 4(2) was not made out.

The claimant's alternative argument was that the tort was "manifestly more closely connected" with England under Article 4(3). The judge found this to be a high threshold but, unlike Article 4(2), the test in Article 4(3) has no temporal limitation to "the time when the damages occurs". Connecting factors to England were that the parties were resident in England when proceedings were issued here, both were English nationals, and the claimant's injuries required ongoing care and treatment in England. However, the accident had occurred in Germany, the parties were at the time habitually resident there (the claimant for some eight years previously) and the claimant continued to live there for a year and a half after the accident. The judge found that the high threshold required of Article 4(3) was not met in this case because, "taking into account all the circumstances, the relevant factors do not indicate a manifestly closer connection of the tort with England than with Germany". German law therefore applied according to Article 4(1).

[36.29] Bianco (widow and administratrix of the estate of the late Vladimiro Capano on behalf of herself and dependent children) v Bennett

[2015] EWHC 626 (QB), [2015] All ER (D) 178 (Mar)

The claimant's husband was killed in a road traffic accident in Surrey in February 2011. At the time, he was living in Italy but had been commuting to the UK for a short while on weekly basis as part of an engineering project. Proceedings were issued in England seeking damages under English law, ie the Fatal Accidents Act 1976 (FAA 1976) and under the Law Reform (Miscellaneous Provisions) Act 1934 (LRMPA 1934). The parties agreed a 2:1 apportionment of liability against the defendant. The damages sought by the claimant under both Acts were around £500,000.

However, in addition, recovery was also sought of sums of around £340,000 and £65,000. These were described as subrogated claims which related, respectively, to amounts paid or to be paid to the family by the Italian Workers Compensation Authority and by the deceased's employers. It was argued that these were recoverable under Article 85 of Regulation (EC) No 883/2004 on the Co-ordination of Social Security Systems:

> '1. If a person receives benefits under the legislation of one Member State in respect of an injury resulting from events occurring in another Member State, any rights of the institution responsible for providing benefits against a third party liable to provide compensation for the injury shall be governed by the following rules:
>
> (a) where the institution responsible for providing benefits is, under the legislation it applies, subrogated to the rights which the beneficiary has against the third party, such subrogation shall be recognised by each Member State;
>
> (b) where the institution responsible for providing benefits has a direct right against the third party, each Member State shall recognise such rights.'

HELD: On the material before him as pleaded, the judge found that the supporting Italian law which might provide for subrogation or direct claims (at (a) or (b) above) was not proven. The subrogated claims could not be brought within the applicable English law, that being FAA 1976 and LRMPA 1934. On the one hand they were not causes of action possessed by the deceased before his death, so LRMPA 1934 could not vest them in his estate. On the other hand, FAA 1976 provided only for recovery of damages for bereavement, for loss of dependency and funeral expenses. No other heads of damage were recoverable and hence the subrogated claims were outside it.

The judge was also asked to decide the position assuming the Italian law had been proven and it had been shown that subrogation was possible under its provisions. He essentially reached the same decision this *obiter* point. The law applicable to the dispute was English Law because the damage occurred in England. As the subrogated claims were not recoverable in English law, it followed that – regardless of the rights of subrogation that might exist in Italian law – they were not recoverable by the claimant on behalf of the Italian payers.

[36.30] Syred v Powszecnny Zaklad Ubezpieczen (PZU), Bednorz & HDI Gerling

[2016] EWHC 254 (QB), [2016] All ER (D) 157 (Feb)

The claimant, an English resident, was a rear seat passenger injured in an accident in Poland in February 2010. The drivers were Polish and the cars were insured by Polish and German insurers PZU and HDI. There was no dispute that Article 4(1) of the Rome II Regulation designated Polish law as the applicable law and that it governed questions of contributory negligence and quantum because of Article 15.

The claimant admitted not wearing a seat belt and thus the question of what deduction to make arose. The experts on Polish law agreed that failure to wear a seat belt in the rear seat was negligent and raised the question whether this negligence caused the injuries or made them worse than they would otherwise have been.

HELD: The burden of proving foreign law falls on the party seeking to rely on it which, here, was the defendant insurer(s). They would be required to show that the failure to

wear the seat belt caused the injuries or made them worse. The judge found that although the claimant was thrown from the vehicle and sustained head injuries, he would have done so in any event because he would have been forced violently against the car's frame had he been wearing a seat belt. The defendants had failed to establish that the head injury would have been less severe.

The parties had agreed that the claim for pecuniary losses should be assessed in accordance with English law, subject to giving credit for state benefits received. Although the applicable Polish law requires that credit be given for all benefits, the claimant sought to argue that the equivalent English legislation (on compensation recovery) should apply. If it did apply, the claimant would have to give credit only for benefits received in the five years after the accident. His argument was that this rule was an overriding mandatory provision in accordance with Article 16 of Rome II:

> "Nothing in this Regulation shall restrict the application of the provisions of the law of the forum in a situation where they are mandatory irrespective of the law otherwise applicable to the non-contractual obligation."

The judge dismissed this argument on the basis that the English legislation on compensation recovery could hardly be said to be so critical to the protection of the political social or economic order of the UK as to override a rule of Polish law which was properly designated by the Rome II Regulation.

[36.31] Moreno v Motor Insurers' Bureau

[2015] EWHC 1142 (QB), [2016] UKSC 52, [2015] All ER 213 (Apr)

The claimant was injured in Greece in 2011 by an uninsured driver. No other car was involved in the accident. She pursued the MIB under the Motor Vehicles (Compulsory Insurance) (Information Centre and Compensation Body Regulations 2003, SI 2003/37. But for the statutory rights under these regulations, the Rome II Regulation would have applied and would have designated Greek law as the applicable law and it would, under Article 15, have applied to the assessment of damages.

HELD: The judge found himself bound by the Court of Appeal's decisions in *Jacobs v Motor Insurers' Bureau* [2011] 1 All ER 844 and *Bloy and Ireson v Motor Insurers' Bureau* [2014] 1 Lloyd's Rep IR 75 [both of which appeared in earlier editions of this chapter] regarding the 2003 Regulations. He therefore found that the claimant's damages should be assessed according to English law. 'Leapfrog' permission to appeal was granted to the Supreme Court.

In August 2016, the Supreme Court unanimously allowed the MIB's appeal and held that the damages should be assessed according to Greek law. In this respect, it expressly overruled the earlier decisions of *Jacobs* and *Bloy*.

The Supreme Court reasoned that the various European Motor Insurance Directives had put in place a scheme for compensating victims of road traffic accidents that should be interpreted in English law so as to deliver consistent compensation regardless of whether a driver, an insurer or a home or host state's guarantee fund was pursued. The 2003 Regulations should therefore be understood in that context. Lord Mance gave the judgment of the court and concluded that:

> " . . . the Directives . . . do not leave it to individual member states to provide for compensation in accordance with any law that such states may choose. On the contrary, they proceed on the basis that a victim's entitlement to compensation will be measured on a consistent basis, by reference to the law of the state of the accident, whichever of the routes to recovery provided by the Directives he or she invokes."

Although it is not clear if anything turns on it, it should nevertheless be noted that his preferred formulation here – "the law of the state of the accident" – differs slightly