act or omission would apart from the provisions of this Act have given rise to a cause of action in tort against that servant or agent or his estate."[16]

Proceedings must be instituted against the appropriate government department,[17] a list of which is published by the Treasury. Where there is doubt, proceedings may be taken against the Attorney General.[18] The defence of Crown act of state remains available, notwithstanding the passage of the 1947 Act.[19] The defence applies where an act which is alleged to be tortious is inherent in the exercise of the Crown power to conduct international relations, including through military force.[20]

Breach of statutory duty The Crown is also liable for breach of statutory duty. By s.2(2): 3-05

> "Where the Crown is bound by a statutory duty which is binding also upon persons other than the Crown and its officers, then, subject to the provisions of this Act, the Crown shall, in respect of a failure to comply with that duty, be subject to all those liabilities in tort (if any) to which it would be so subject if it were a private person of full age and capacity."[21]

Acts binding on the Crown Sometimes a statute will say in terms that it binds the Crown, as did the Factories Act 1961.[22] By ss.4(2) and (3) of the 1947 Act, the provisions relating to contribution and indemnity contained in s.6[23] of the Law Reform (Married Women and Tortfeasors) Act 1935, and those relating to contributory negligence contained in the Law Reform (Contributory Negligence) Act 1945, bind the Crown. Where a statute is silent as to its application to the Crown, the common law principle of construction, preserved by the 1947 Act, is that the Crown is not bound in the absence of express words or necessary implication. Nevertheless, the provisions of the Fatal Accidents Act 1976 and the Law Reform (Miscellaneous Provisions) Act 1934 s.1, are generally regarded as binding on the Crown.[24] 3-06

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16 Apart from the Act, the Crown still cannot be sued in tort; see *Trawnik v Lennox* [1985] 1 W.L.R. 532 (the claimants could not bring an action against the Crown based on a threatened tort by its servants, the Ministry of Defence, in relation to the construction of a shooting range on an airfield in the British sector of Berlin, which would cause nuisance to the adjoining householders).

17 e.g. *Roe v Minister of Health* [1954] 2 Q.B. 66; *Waldon v War Office* [1956] 1 W.L.R. 51; *Keatings v Secretary of State for Scotland* (1961) S.L.T. (Sh.Ct) 63; *Ready Mixed Concrete (South East) Ltd v Ministry of Pensions and National Insurance* [1968] 2 Q.B. 497; *Ministry of Housing and Local Government v Sharp* [1970] 2 Q.B. 223; *Bright v Ministry of Transport* (1970) 114 S.J. 475; *Becker v Home Office* [1972] 2 Q.B. 407; *Asher v Secretary of State for the Environment* [1974] Ch. 208.

18 e.g. *Darling v Attorney General* [1950] 2 All E.R. 793; *Blackburn v Attorney General* [1971] 1 W.L.R. 1037; cf. *Attorney General and Minister for Defence v Ryan's Car Hire* (1964) 101 I.L.T.R. 37.

19 *Rahmatullah v Ministry of Defence (No.2)* [2017] UKSC 1; [2017] A.C. 649, discussed more fully in para.3-25.

20 *Rahmatullah v Ministry of Defence (No.2)* [2017] UKSC 1; [2017] A.C. 649.

21 For liability in breach of statutory duty see Ch.13.

22 s.173. Other relevant Acts are the Law Reform (Personal Injuries) Act 1948 s.4; the Occupiers' Liability Act 1957 s.6; the Congenital Disabilities (Civil Liability) Act 1976 s.5; the Civil Liability (Contribution) Act 1978 s.5; the Limitation Act 1980 s.37; the Latent Damage Act 1986 s.3; the Consumer Protection Act 1987, ss.1–9.

23 The Civil Liability (Contribution) Act 1978 ss.1 and 9(1) and Sch.2, repealed and replaced the provisions contained in s.6 of the Law Reform (Married Women and Tortfeasors) Act 1935.

24 As to which see Ch.17.

of the duty of care, examining whether on particular facts it was fair, just and reasonable to impose a duty upon, say, the police or social workers.[6] For the future, and save where Parliament itself has intervened, it is likely that claims in negligence against certain types of defendant will be scrutinised both from the aspect of a traditional immunity, where the facts of a claim are essentially irrelevant, and from the aspect whether, on the facts, it is fair, just and reasonable that a duty of care should not be owed, taking into account relevant policy factors.

(A) THE CROWN

3-03 **At common law** The position at common law was that the Crown could not be sued in tort either personally or by an action against one of its employees in a representative capacity, such as the head of the department or the superior officer of the wrongdoer.[7] An individual wrongdoer could be sued for a wrong which he had committed personally[8] or to which he was directly privy, such as by having ordered it,[9] but not otherwise. This was because the relationship of employer and employee did not lie between superior and subordinate officials,[10] they being all fellow employees of the Crown. Accordingly, the Postmaster-General was not liable for the negligence of a sectional engineer in the Post Office after the claimant was injured by falling on the pavement, it not having been re-laid properly after the flagstones had been taken up to allow a telegraph cable to be repaired.[11] The only available procedure for seeking a remedy was by way of a petition of right.

3-04 **Crown Proceedings Act 1947**[12] By virtue of the Crown Proceedings Act 1947, the Crown's immunity in tort was brought to an end and it could thereafter be sued as of right, inter alia, in actions for negligence. Section 2(1) provides:

> "Subject to the provisions of this Act, the Crown shall be subject to all those liabilities in tort to which, if it were a private person of full age and capacity, it would be subject:
>
> (a) in respect of torts committed by its servants or agents[13];
>
> (b) in respect of any breach of those duties which a person owes to his servants or agents at common law by reason of being their employer[14]; and
>
> (c) in respect of any breach of the duties attaching at common law to the ownership, occupation, possession or control of property.[15]
>
> Provided that no proceedings shall lie against the Crown by virtue of paragraph (a) of this subsection in respect of any act or omission of a servant or agent of the Crown unless the

4 *Jones v Kaney* [2011] 2 A.C. 398.
5 On the other hand, the existence of combat immunity was confirmed in *Smith v Ministry of Defence* [2014] A.C. 52, but the immunity was interpreted narrowly.
6 See Ch.2, paras 2-330 to 2-337; 2-342 to 2-343 and particularly the consideration of *Michael v Chief Constable of South Wales* [2015] A.C. 1732 at para.2-332.
7 *Raleigh v Goschen* [1898] 1 Ch. 73; *Hutton v Secretary of State for War* (1926) 43 T.L.R. 106; *Roper v HM Works and Public Buildings Commissioners* [1915] 1 K.B. 45; *Tobin v The Queen* (1864) 16 C.B.(N.S.) 310.
8 See *Royster v Cavey* [1947] K.B. 204.
9 *Mackenzie-Kennedy v Air Council* [1927] 2 K.B. 517 at 533.
10 *Bainbridge v Postmaster-General* [1906] 1 K.B. 178.
11 However, for the legal position of the Post Office today, see para.3-29.
12 As regards proceedings in Ireland against the state, see the Civil Liability Act 1961 s.57. Further, see *Byrne v Ireland* [1972] I.R. 241.
13 Agent includes an independent contractor: Civil Liability Act 1961 s.38(2).
14 See Ch.12 generally.
15 See now the common law as replaced by the Occupier's Liability Act 1957: Ch.9.

> act or omission would apart from the provisions of this Act have given rise to a cause of action in tort against that servant or agent or his estate."[16]

Proceedings must be instituted against the appropriate government department,[17] a list of which is published by the Treasury. Where there is doubt, proceedings may be taken against the Attorney General.[18] The defence of Crown act of state remains available, notwithstanding the passage of the 1947 Act.[19] The defence applies where an act which is alleged to be tortious is inherent in the exercise of the Crown power to conduct international relations, including through military force.[20]

3-05 **Breach of statutory duty** The Crown is also liable for breach of statutory duty. By s.2(2):

> "Where the Crown is bound by a statutory duty which is binding also upon persons other than the Crown and its officers, then, subject to the provisions of this Act, the Crown shall, in respect of a failure to comply with that duty, be subject to all those liabilities in tort (if any) to which it would be so subject if it were a private person of full age and capacity."[21]

3-06 **Acts binding on the Crown** Sometimes a statute will say in terms that it binds the Crown, as did the Factories Act 1961.[22] By ss.4(2) and (3) of the 1947 Act, the provisions relating to contribution and indemnity contained in s.6[23] of the Law Reform (Married Women and Tortfeasors) Act 1935, and those relating to contributory negligence contained in the Law Reform (Contributory Negligence) Act 1945, bind the Crown. Where a statute is silent as to its application to the Crown, the common law principle of construction, preserved by the 1947 Act, is that the Crown is not bound in the absence of express words or necessary implication. Nevertheless, the provisions of the Fatal Accidents Act 1976 and the Law Reform (Miscellaneous Provisions) Act 1934 s.1, are generally regarded as binding on the Crown.[24]

16 Apart from the Act, the Crown still cannot be sued in tort; see *Trawnik v Lennox* [1985] 1 W.L.R. 532 (the claimants could not bring an action against the Crown based on a threatened tort by its servants, the Ministry of Defence, in relation to the construction of a shooting range on an airfield in the British sector of Berlin, which would cause nuisance to the adjoining householders).
17 e.g. *Roe v Minister of Health* [1954] 2 Q.B. 66; *Waldon v War Office* [1956] 1 W.L.R. 51; *Keatings v Secretary of State for Scotland* (1961) S.L.T. (Sh.Ct) 63; *Ready Mixed Concrete (South East) Ltd v Ministry of Pensions and National Insurance* [1968] 2 Q.B. 497; *Ministry of Housing and Local Government v Sharp* [1970] 2 Q.B. 223; *Bright v Ministry of Transport* (1970) 114 S.J. 475; *Becker v Home Office* [1972] 2 Q.B. 407; *Asher v Secretary of State for the Environment* [1974] Ch. 208.
18 e.g. *Darling v Attorney General* [1950] 2 All E.R. 793; *Blackburn v Attorney General* [1971] 1 W.L.R. 1037; cf. *Attorney General and Minister for Defence v Ryan's Car Hire* (1964) 101 I.L.T.R. 37.
19 *Rahmatullah v Ministry of Defence (No.2)* [2017] UKSC 1; [2017] A.C. 649, discussed more fully in para.3-25.
20 *Rahmatullah v Ministry of Defence (No.2)* [2017] UKSC 1; [2017] A.C. 649.
21 For liability in breach of statutory duty see Ch.13.
22 s.173. Other relevant Acts are the Law Reform (Personal Injuries) Act 1948 s.4; the Occupiers' Liability Act 1957 s.6; the Congenital Disabilities (Civil Liability) Act 1976 s.5; the Civil Liability (Contribution) Act 1978 s.5; the Limitation Act 1980 s.37; the Latent Damage Act 1986 s.3; the Consumer Protection Act 1987, ss.1–9.
23 The Civil Liability (Contribution) Act 1978 ss.1 and 9(1) and Sch.2, repealed and replaced the provisions contained in s.6 of the Law Reform (Married Women and Tortfeasors) Act 1935.
24 As to which see Ch.17.

3-07 **The sovereign** The Act specifically provides by s.40(1) that nothing in it shall apply to proceedings by or against, or authorise proceedings in tort to be brought against, the sovereign in a private capacity.

3-08 **Torts committed by employees or agents** It is clear from s.2(1) of the 1947 Act that the Crown is made vicariously liable[25] to injured third parties for torts committed by its employees in the course of their employment. It is also liable for torts committed by its independent contractors, where in the like circumstances a private employer would be liable.[26] There is an important proviso inasmuch as the Crown can avail itself of such defences as act of state[27] and the exercise of statutory or prerogative powers,[28] but the Crown is not protected from liability for either its servants' tortious acts, which are ultra vires the statute creating the powers purported to be exercised, or its servants' negligence in the exercise of such powers.[29] By s.2(3) of the Act where any functions are conferred or imposed upon an officer of the Crown by any rule of the common law or by statute, and that officer commits a tort while performing or purporting to perform those functions, he will be taken as acting by virtue of instructions lawfully given by the Crown.

3-09 The Crown's liability for the torts of its officers, including any employee or Minister of the Crown, is limited to those cases where the officer is appointed by it, directly or indirectly, and at the material time is paid wholly out of the Consolidated Fund, moneys provided by Parliament or a fund equivalent thereto in respect of his duties as its officer.[30] This provision has the effect of excluding liability for the police and other public officers who are either appointed or paid by local or other public authorities.[31] Privatised bodies are clearly not within the scope of the Crown's liability. Section 2(4) gives the Crown the benefit of any statutory provisions which negate or limit the amount of the liability of a government department or Crown officer.

3-10 **Liability for negligence** The liability of government departments in negligence is discussed elsewhere in this work.[32]The Crown may owe a duty of care in relation to act or omissions. Further, since s.2 of the Crown Proceedings Act 1947 was designed to put the Crown in the same position as an ordinary private person of full

[25] For vicarious liability generally, see Ch.7.
[26] Crown Proceedings Act 1947 s.40(2)(d).
[27] There is no principle in our law which permits the Crown in time of peace to act for the public good as it thinks best: *Entick v Carrington* (1765) 95 E.R. 807. The Crown must be prepared to justify before the courts the legality of any act which interferes with the person or property of the subject. This does not apply when the claimant is a non-resident alien and the wrong is suffered elsewhere than in British territory. See *Burton v Denman* (1848) 2 Exch. 167; *R. v Bottrill* [1947] K.B. 41 at 57; *Rahmatullah v Ministry of Defence (No.2)* [2017] UKSC 1; [2017] A.C. 649.
[28] See Crown Proceedings Act 1947 s.11. The Crown, nevertheless, incurs liability to pay compensation for any loss and damage caused by the exercise of its prerogative powers: *Burmah Oil Co Ltd v Lord Advocate* [1965] A.C. 75; *Nissan v Attorney General* [1970] A.C. 179 at 227–228, per Lord Pearce.
[29] See *Dorset Yacht Club Ltd v Home Office* [1970] A.C. 1004. See further at para.3-10.
[30] ibid. s.2(6).
[31] *Stanbury v Exeter Corp* [1905] 2 K.B. 838 (agricultural inspector); *Fisher v Oldham Corp* [1930] 2 K.B. 364 and *Lewis v Cattle* [1938] 2 K.B. 454 (police officers).
[32] See in particular Ch.2 and for example *Dorset Yacht Club Ltd v Home Office* [1970] A.C. 1004.

age and capacity, the Home Office can be liable, by way of a non-delegable duty of care,[33] for the negligent actions of an independent contractor.[34]

3-11 **Nationalised bodies and hospitals** Since the decision in *Mersey Docks Trustees v Gibbs*,[35] it is settled law that the mere fact that a body has been created by statute for public purposes does not mean that it is a servant or agent of the Crown. Accordingly, in *Tamlin v Hannaford*,[36] the Court of Appeal held that the nationalised railways' authority was not a servant or agent of the Crown, the proper inference being, at any rate in the case of a commercial corporation, that it acted on its own behalf, although it was subject to control by a government department. Similarly, there is no argument that banks "bailed-out" by the government are Crown agents. Hospital authorities are not servants or agents of the Crown.[37]

3-12 **Foreign judgments against the State** Section 18 of the State Immunity Act 1978[38] requires final judgments given against the United Kingdom by a court in another state which is party to the European Convention on State Immunity to be recognised in the courts of the United Kingdom. However, the courts in this country need not give effect to such requirements, either where to do so would be manifestly contrary to public policy or where the judgment was the result of proceedings which were unfair procedurally, or were in conflict with other earlier judgments, or were otherwise inadequate.[39]

(B) JUDGES AND QUASI JUDGES, PROSECUTORS, THE POLICE

3-13 **Judicial acts**[40] Section 2(5) of the Crown Proceedings Act 1947 excludes proceedings against the Crown "in respect of anything done or omitted to be done by any person while discharging or purporting to discharge any responsibilities of a judicial nature vested in him, or any responsibilities which he has in connection with the execution of judicial process". It follows that no vicarious liability attaches itself to the Crown for torts that may be committed by judges, magistrates and those others executing judgment who exceed the limits of the immunity which the law otherwise allows.

3-14 It has long been the case that judges and jurors are immune from suit in a civil action in relation to anything done by them in court during the course of a trial.[41] Further, where a judge, acting in a judicial capacity, does an act which is in fact outside his jurisdiction but which he believes, mistakenly, is within it, he, as well as police officers acting under his instructions, will be immune from any proceedings which may be taken against him in respect of that act.[42] Indeed, as the New

[33] In relation to such duties see para.7-93 and *Woodland v Essex County Council* [2014] A.C. 537.
[34] *GB v Home Office* [2015] EWHC 819 (QB), Coulson J.
[35] *Mersey Docks Trustees v Gibbs* (1866) L.R. 1 H.L. 93. See also *Bank Voor Handel en Scheepvaart v Administrator of Hungarian Property* [1954] A.C. 584.
[36] *Tamlin v Hannaford* [1950] 1 K.B. 18. See also *Glasgow Corp v Central Land Board* (1956) S.C.(HL) 1.
[37] *Bullard v Croydon Hospital Committee* [1953] 1 Q.B. 511 at 514.
[38] Which came into force on 22 November 1978.
[39] See State Immunity Act 1978 s.19, which sets out the exceptions to recognition.
[40] See Morgan, "Judicial Immunity" 123 S.J. 398; also Ch.2, para.2-312.
[41] *Sutcliffe v Thackrah* [1974] A.C. 727 at 757, per Lord Salmon.
[42] *Sirros v Moore* [1975] Q.B. 118.

Zealand Court of Appeal[43] has said, the absolute immunity of a judge from civil proceedings for acts done in the exercise of judicial office is given, not as a private right, but to ensure, in the public interest, that the administration of justice will be carried on without fear of the consequences, just as much as it must also be carried on without hope of favour.

3-15 Persons discharging quasi-judicial functions, such as arbitrators,[44] have the same exemption as judges. In order to claim immunity on the basis of exercising a quasi-judicial function "there should be a formulated dispute between at least two parties which his decision is required to resolve."[45]

3-16 In determining the immunity of a judicial or quasi-judicial officer Buckley LJ identified four relevant questions:

> "(1) Was the act non-judicial?
> (2) If the act was, or purported to be, a judicial act, was it within the judge's jurisdiction?
> (3) If the act purported to be a judicial act in the exercise of a jurisdiction which the judge possessed and about the extent of which he was under no misapprehension, did the judge act as he did upon an erroneous judgment that the circumstances were such as to bring the case within the ambit of that jurisdiction?
> (4) If the act was not in truth within the judge's jurisdiction, did he act in conscientious belief that it was within his jurisdiction and, if so, (a) was this belief due to a justifiable ignorance of some relevant fact, or (b) due to a careless ignorance or disregard of some such facts, or (c) due to a mistake of law relating to the extent of this jurisdiction?
>
> He will, in my opinion, be immune in cases (2), (3) and (4)(a), but not otherwise."[46]

3-17 Although a sequestrator appointed under a writ of sequestration is an officer of the court, he is not as such immune from liability in respect of any negligent act done or omission in the course of the sequestration, because he owes a duty of care to the owners of the sequestered property.[47] Likewise, a surveyor acting under a rent review clause is acting as an expert and not an arbitrator or quasi-arbitrator where he is entitled to rely on his own judgment and experience and is not obliged to decide the matter on the evidence and submissions of the parties, and thus is not immune from liability for negligence.[48]

3-18 An official receiver is immune from suit when acting in the course of bankruptcy proceedings and within the scope of his powers and duties.[49] No immunity from suit arose in favour of the Crown Prosecution Service, which had assumed the responsibility, where, as a result of an administrative error, the claimant was arrested on a warrant not backed for bail after failing to appear for trial of offences already "taken into consideration" in the Crown Court.[50]

43 *Nakhla v McCarthy* [1978] 1 N.Z.L.R. 291 (an allegedly improper determination of the claimant's appeal in criminal proceedings by the defendant, the former President of the Court).

44 For the immunity of a valuer when acting as an arbitrator, see *Re Hopper* (1867) L.R. 2 Q.B. 367 and *Re Carus-Wilson and Greene* (1886) 18 Q.B.D. 7 but cf. the distinctions made in *Arenson v Arenson* [1977] A.C. 405, reversing the Court of Appeal [1973] Ch. 346. An ombudsman appointed under the Financial Services and Markets Act 2000 to determine disputes between consumers and providers of financial services makes a judicial decision when making an award, see *Clark v In Focus Asset Management & Tax Solutions Ltd* [2014] P.N.L.R. 19, CA, per Arden LJ at [82].

45 *Arenson v Arenson* [1977] A.C. 405 at 424 per Lord Simon of Glaisdale.

46 *Sirros v Moore* [1975] Q.B. 118 at 140–141.

47 *IRC v Hoogstraten* [1985] Q.B. 1077.

48 *Palacath v Flanagan* [1985] 2 All E.R. 161.

49 *Mond v Hyde* [1999] Q.B. 1097, CA. See Ch.10, para.10-47.

Advocates and witnesses Formerly, barristers, solicitors and witnesses were also immune from suit in relation to what was said and done in court in the course of a trial.[51] The absolute immunity of advocates has now disappeared[52] and the immunity of witnesses requires qualification. At one time it was decided that the immunity of a witness extended to any statement made prior to and in contemplation of the civil or criminal proceedings under consideration, as well as to the collection and analysis of material relevant to them. More recently it has been stressed that the immunity granted must not be any wider than absolutely necessary in the interests of the administration of justice.[53] It does not extend to the fabrication of evidence.[54] It was at least arguable that an employee of the Forensic Science Service owed a duty of care to someone arrested on suspicion of the offence of possession of live ammunition, not to present evidence in a witness statement whose effect was that a bullet seized from his home was live, when in fact it was not.[55] Following the closure of the Forensic Science Service and the consequent provision of forensic science services in the private sector, it is likely that providers of forensic science services owe a duty to accused persons in the conduct of forensic analysis on ordinary negligence principles. **3-19**

Expert witnesses Witnesses who give the court evidence on a matter within their expertise, used to have immunity from suit in negligence in relation both to their evidence in court and to any statements made before a trial preliminary to giving evidence, as where a report was produced or approved for purposes closely connected to trial.[56] That immunity has now been removed. So, where in a personal injury action one issue was whether the claimant had suffered post-traumatic stress disorder and the defendant, a clinical psychologist instructed on behalf of the claimant, signed a memorandum apparently agreeing that he had not, that being very different from the opinion she had earlier expressed in a written report, proceedings against her on the ground that her negligence had contributed to a poorer outcome should not have been struck out.[57] **3-20**

50 *Welsh v Chief Constable of the Merseyside Police* [1993] 1 All E.R. 692 but cf. the situation in *Elguzouli-Daf v Commissioner of Police of the Metropolis* [1995] 2 W.L.R. 173, CA.

51 *Sutcliffe v Thackrah* [1974] A.C. 727. See also *Evans v London Hospital Medical College* [1981] 1 W.L.R. 184 (organs removed from a dead child negligently contaminated leading to a false charge of murder: immunity granted).

52 See Ch.2, para.2-307; Ch.10, para.10-100. In *A v Chief Constable of Hampshire Constabulary* [2012] EWHC 1517 (QB) the claim of an informer who alleged damage as a result of insufficient measures by the police to protect his identity was struck out where it depended in part on alleged disclosures of a barrister in court. The submission that the advocate's immunity for what was said and done in court had not survived *Jones v Kaney* [2011] 2 A.C. 398, was rejected.

53 *Darker v Chief Constable of West Midlands Police* [2001] 1 A.C. 435, at 435D.

54 *Darker v Chief Constable of West Midlands Police* [2001] 1 A.C. 435 at e.g. 466F.

55 *Smart v Forensic Science Service Ltd* [2013] P.N.L.R. 32, CA.

56 See e.g. *Stanton v Callaghan* [2000] Q.B. 75 (no liability in negligence where a consulting engineer retained to provide an expert report on subsidence in an action against insurers modified his views after a joint meeting of the experts on both sides). See Passmore, "Expert witness immunity" in 148 N.L.J. 1758. The immunity even extended to a case where the evidence given was allegedly dishonest: *Raiss v Paimano* [2001] P.N.L.R. 21, following *Palmer v Durnford Ford* [1992] 2 Q.B. 483 (although, of course, a dishonest witness may face criminal sanctions).

57 *Jones v Kaney* [2011] 2 A.C. 398. See Ch.2 para.2-310. See further, Carr QC and Evans, "The

3-21 **Police**[58] Although a constable is not the employee or agent of the Crown, a chief officer of police, by virtue of the provisions of s.88(1) of the Police Act 1996, is liable in respect of torts committed by constables under his direction or control in the purported performance of their functions, in the like manner as a master is liable in respect of torts committed by his servants in the course of their employment.[59] The chief officer, usually the chief constable, will be a joint tortfeasor[60] with any police constable guilty of negligence but any damages and costs awarded against him are met out of the police fund. A chief constable can potentially be vicariously liable for injury to a subordinate officer caused by the negligence of an officer holding a superior position to himself.[61] Police 'immunity'[62] has already been discussed in relation to the duty of care generally and the topic is therefore not repeated here.[63]

(C) THE ARMED FORCES

3-22 A claim may be brought against the State in relation to the acts or omissions of the armed forces by either a member of the armed forces or by a non-combatant. The correct defendant will be either the Secretary of State for Defence or the Ministry of Defence.

3-23 **Crown Proceedings Act 1947** Formerly, s.10(1) of the Crown Proceedings Act 1947 gave a substantial immunity[64] covering negligent acts by members of the armed forces on duty causing injury. Although the section was repealed in 1987,[65] it continues to apply in relation to injury suffered by a person in consequence of an act or omission committed prior to 15 May 1987.[66] Whilst this may be particularly relevant to cases involving industrial diseases resulting from exposure to causative agents whilst serving in the armed forces prior to 15 May 1987, nevertheless, the situations in which s.10 might have some relevance are becoming rarer with the passage of time and for a detailed discussion the reader is referred to earlier editions of this work.

3-24 Pursuant to s.10, no act or omission of a member of the armed forces on duty should subject either himself or the Crown to liability in tort for causing the death of another person, or for causing personal injury[67] to another person, who was a

removal of immunity for expert witnesses: the decision in Jones v Kaney and some unanswered questions" (2011) 3 P.N., 128; Capper, "Professional Liability in the trial process" (2013) 1 P.N. 7.

58 For some decisions on the liability of police generally, see Ch.2, paras 2-330 to 2-337.

59 See also, e.g. *N v Chief Constable of Merseyside Police* [2006] EWHC 3041 (QB), (the chief constable was not liable for the actions of a police officer who used his uniform and position to create the opportunity to commit sexual assaults upon the claimant).

60 See generally paras 3-99 to 3-118.

61 *Hughes v National Union of Mineworkers* [1991] 4 All E.R. 278.

62 The use of the phrase 'immunity' in relation to the Police has been described as "not only unnecessary but unfortunate" (see *Michael v Chief Constable of South Wales* [2015] UKSC 2; [2015] A.C. 1732, [44] per Lord Toulson)

63 See Ch.2 para.2-331.

64 s.10 is not incompatible with art.6 of the European Convention on Human Rights: *Matthews v MOD* [2003] 1 A.C. 1163, 1171. See Weir, "The armed forces and Crown immunity" 152 N.L.J. 231.

65 Crown Proceedings (Armed Forces) Act 1987 s.1.

66 Also, s.10 of the 1947 Act may be revived for all or some purposes by an order made under s.2.

67 But other losses caused by negligence were not excluded and the Crown's liability for other torts remained.

member of the armed forces.[68] In order for the immunity to attach the victim had (a) to be either on duty or be on any land, premises, ship or vehicle being used for the purposes of the armed forces of the Crown[69]; and (b) the Minister of Pensions[70] had to have certified that the death or injury would be treated as attributable to service for pension purposes.[71] By virtue of the proviso to the subsection, exemption from liability extended to the tortfeasor personally, unless the court was satisfied that the act or omission complained of was not connected with the performance and execution of his duties as a member of those forces. Section 10(2) provided a similar exemption from liability in tort where the death or personal injury had been sustained by a member of the armed forces in consequence of the nature or condition of any land, premises, ship, aircraft, or vehicle being used for the armed forces' purposes or in consequence of the nature or condition of any equipment or supplies used for those purposes.[72]

3-25 **Crown Act of State** Where the claimant is a foreign national injured by the conduct of military action the Crown may rely on the defence of Crown Act of State. The act must be an exercise of sovereign power done outside the United Kingdom with the prior authorisation (or subsequent ratification) of the Crown in the conduct of relations with other states or their subjects.[73] In order for the defence

68 s.10(1) granted exemption in respect of "anything suffered" while a member of the armed forces. In *Pearce v Secretary of State for Defence* [1988] A.C. 755, Lord Brandon expressed the view, obiter, that this was a reference to the casualty or other event caused by the act or omission from which the personal injury or death resulted. In *Derry v Ministry of Defence* (1999) 11 Admin. L.R. 758, a case of allegedly negligent failure to diagnose and treat a pre existing carcinoma, it was held that the "thing suffered" was the progression of the claimant's condition, and the exemption accordingly applied (Appeal dismissed [1999] P.I.Q.R. P204, CA). See also *Re Post Traumatic Stress Disorder Group Litigation, Multiple Claimants v Ministry of Defence*, *Times*, 29 May 2003 (in claims by former members of the armed forces for alleged failures by the defendant to take any or any adequate steps to prevent the development of psychiatric illness, and/or to detect, diagnose or treat such illness, it was held that the "thing suffered" was either exposure to traumatic events without the protection of the relevant preventative measures, or in relation to failures after exposure to traumatic events, a state of greater vulnerability to the onset of psychiatric injury. Both were continuing states of affairs, the overwhelming probability was that the claimants were either on duty or on Crown property at the time that such a state of affairs arose, and they were thus within the scope of s.10).

69 e.g. *Bell v Secretary of State for Defence* [1986] Q.B. 322 (army medical officers and staff were held immune from all tortious liability in respect of alleged negligence treatment of a member of the armed forces as well as the failure to provide proper notes for a civilian hospital which had taken over the treatment. However, the civilian hospital did not enjoy immunity).

70 Subsequently, the Ministry of Social Security Act 1966 s.2(3) (now fully repealed), and SI 1968/1699, by which the Secretary of State for Social Services took over the functions.

71 See *Adams v War Office* [1955] 1 W.L.R. 1116 (soldier killed during a gunnery exercise).

72 An attempt to circumvent the exemption from liability in the case of a former member of the Royal Navy who had worked with asbestos during his service, failed in *Quinn v MOD* [1998] P.I.Q.R. P387, CA: the exemption applied even where the complaint was framed as failure to provide a safe system of work. See also *Re Post Traumatic Stress Disorder Group Litigation, Times,* 29 May 2003 (for employers' liability to be excluded from the section would have been anomalous and inconsistent with its wording). In *Pearce v Secretary of State for Defence* [1988] A.C. 755 s.10 immunity did not protect the defendant against actions in respect of alleged negligence by employees of the Atomic Energy Authority's weapons group: not only was the Secretary of State merely an officer of the Crown (and not the Crown itself), but, in order to claim immunity under s.10(1), the loss had to arise from activities of a member of the armed forces on duty as such, which membership did not encompass employees of the Authority.

73 *Mohammed v Ministry of Defence* [2017] UKSC 1; [2017] A.C. 649, [36]–[37] per Baroness Hale and [81] per Lord Sumption.

to apply the Crown authorisation (or ratification) must be lawful as a matter of domestic public law (although it need not be lawful in international law).[74]

3-26 **Combat immunity** Where s.10 does not apply, the liability of the Crown for injury sustained by a member of the armed forces falls to be decided on usual principles. It has been recognised that those principles require some modification where a serviceman is injured in the course of active operations. A "combat immunity" can arise, although the phrase should be narrowly construed.[75]). In *Smith v Ministry of Defence*[76] it was said that combat immunity was not limited to the presence of the enemy or the occasions when contact with the enemy had been established. It extended to all active operations against the enemy in which service personnel were exposed to attack, including the planning and preparation for the operations in which the armed forces might come under attack or meet armed resistance. However, the extension of the immunity to the planning of and preparation for military operations applied to the planning of and preparation for the operations in which injury had been sustained, and not to planning and preparation for combat in general. That might involve steps taken far away in place and time from the circumstances in which the injury complained of had arisen. The immunity should not extend to the stage, whether pre deployment or in theatre, when men were being trained or decisions taken about the fitting of equipment to tanks or other fighting vehicles. It was not unreasonable to impose a duty of care at that stage, leaving to a judgment on the facts whether the appropriate standard of care had been achieved. "It will be easier to find that the duty of care has been breached where the failure can be attributed to decisions about training or equipment that were taken before deployment, when there was time to assess the risks to life that had to be planned for, than it will be where they are attributable to what was taking place in theatre."[77]

3-27 **Peacekeeping operations** Members of the armed forces have been held to owe duties of care to civilians when conducting peace keeping operations under the auspices of the United Nations. So, the Ministry of Defence was liable for the negligence of soldiers who fired shots at two Kosovar Albanians in the course of such an operation, where one man was killed and another seriously wounded. The defence of self-defence was rejected on the facts. For the defence to succeed, the soldiers' belief that they were going to be attacked had to be honest and reasonable.[78] The witness and expert evidence suggested that the soldiers were not

[74] *Alseran v Ministry of Defence* [2017] EWHC 3289 (QB), [76].

[75] *Mulcahy v Ministry of Defence* [1997] 1 W.L.R. 20, CA (no duty owed to a soldier who alleged that his hearing had been damaged by the negligent firing of a howitzer during the Gulf War). See also *Shaw Savill and Albion Co Ltd v The Commonwealth* (1940) 66 C.L.R. 344. See also *Re Post Traumatic Stress Disorder Group Litigation, Times,* 29 May 2003 (but the width of the combat immunity described by the trial judge was doubted in *Smith v Ministry of Defence* [2013] UKSC 41.

[76] *Smith v Ministry of Defence* [2013] UKSC 41.

[77] per Lord Hope at [99]. See Ch.2, para.2-122; also Morgan, "Negligence: into battle" C.L.J. 2013, 72(1), 14. In his dissenting judgment in *Smith*, Lord Mance questioned the practicality of a distinction between e.g. the procurement of equipment for use in combat and its use by those on the ground, the latter being covered by combat immunity. He also emphasised the traditional reluctance of the court to examine the reasons of policy which may have determined why procurement decisions were made as they were.

[78] See *Ashley v Chief Constable of Sussex* [2008] UKHL 25; [2008] 1 A.C. 962.

being threatened by the deceased when they fired their guns and there were no reasonable grounds for them to believe that they were being threatened.[79]

Ships and aircraft By virtue of s.29 of the 1947 Act, no proceedings in rem can be commenced against any of HM ships[80] or aircraft.[81] 3-28

(D) POST OFFICE AND TELECOMMUNICATION SERVICES

History The postal and telecommunications services have a complex legislative history which it only possible to summarise here to the extent that it is relevant to the liability in tort of the service providers for the time being. By s.6 of the Post Office Act 1969[82] the Post Office was given authority to administer all postal and telecommunication services. It operated as a commercial corporation independent of the Crown. Section 9 of the Crown Proceedings Act 1947 was repealed, although the exemptions from and conditions of the liability of the Post Office bore considerable similarity to those formerly governing the Crown's liability. 3-29

Subsequently, a decision was made to separate the postal services from those relating to telecommunication and data processing, which was achieved by the British Telecommunications Act 1981. As from 1 October 1981,[83] the British Telecommunications Corporation, had responsibility for these latter services. Then, following a decision to privatise the industry, the Telecommunications Act 1984[84] dissolved[85] the British Telecommunications Corporation after the transfer date[86] and transferred its operations to its successor limited liability company, British Telecommunications Plc. 3-30

The Post Office and other Postal Service Operators The Post Office was converted from a statutory corporation to a public limited company owned by the Crown, by the Postal Services Act 2000.[87] The Act introduced a system of licensing and regulation for postal service operators and providers in the market previously reserved as a monopoly for the Post Office. This process of opening the postal market to competition continued with the Postal Services Act 2011, which provided that postal services could be provided without the need for licencing or authorisation but that postal operators could be subject to regulatory conditions imposed by 3-31

[79] *Bici v Ministry of Defence* [2004] EWHC 786 (QB). Different issues may well arise where civilians are injured in the course of armed conflict: see Yang, "Absolute immunity of foreign armed forces from tort proceedings" 71 C.L.J. (2), 282, in which the author draws attention to the decision of the ICJ in "Case Concerning the Jurisdictional Immunities of the State (Germany v Italy)" unreported 3 February 2012 and see the discussion of the defence of Crown Act of State above para.3-25.

[80] See s.38(2) of the Crown Proceedings Act 1947 for an extended definition of "ship."

[81] s.38(2) above also defines "aircraft".

[82] Which came into force on 1 October 1969.

[83] British Telecommunications Act 1981 (Appointed Day) Order No.1274.

[84] c.12.

[85] See s.79.

[86] Telecommunications Act 1984 (Appointed Day) (No.2) Order (SI 1984/876) appointed August 6, 1984, for the purposes of Pt V of the Act.

[87] For developments before the coming into force of the Postal Services Act 2000 which largely repealed earlier legislation, see the 10th edn of Charlesworth & Percy on Negligence (London: Sweet & Maxwell, 2001) at Ch.2, para.2–170.

that a firm of accountants which had prepared at short notice draft accounts for the use of a company's chairman owed no duty of care to a bidder who had taken over the company after having inspected such accounts. In deciding whether a duty of care was owed to a third party in relation to a statement made by a professional, certain matters were of particular importance. They were: (1) the purpose for which the statement was made; (2) the purpose for which it was communicated; (3) the relationship between an adviser, the advisee and any relevant third party; (4) the size of any class to which the advisee belonged; (5) the state of knowledge of the adviser, and (6) reliance by the advisee.

10-39 In later cases the touchstone of liability has been whether, in relation to a particular statement, the maker assumed responsibility towards a category of persons which included the claimant.[133] It has been stressed that it requires exceptional circumstances before auditors can be found to owe a duty of care to anyone other than the company to which they are engaged.[134] A special relationship is required between the auditor and the third party in question before a duty will arise. In particular there must have been an intention (actual or to be inferred) on the part of auditors that a third party should rely upon their audit, together with actual reliance.[135] It has been said that it must be shown that some conscious[136] responsibility was assumed by the auditor, not so much for a statement made by him, but for the task in which he was engaged.[137] However, use of the word "conscious" should not be taken to imply a subjective test. The essential inquiry is, "... whether having regard to all the circumstances of the case and looking at the matter objectively it can be said that [the accountant] undertook responsibility to [the potential investor] for the substantial accuracy of the accounts."[138] The pres-

ment of Neill LJ for discussion of the principles set out in the text.

133 *Henderson v Merrett Syndicates Ltd* [1995] 2 A.C. 145, particularly per Lord Goff of Chieveley at 180. See e.g. *Swynson Ltd v Lowick Rose LLP* [2014] P.N.L.R. 27 (accountants who admitted negligence in preparing a due diligence report for a company considering whether to make a loan did not owe a concurrent duty of care to the sole owner of the company even though it may have been foreseeable that his personal assets would be at stake). For the appeal, on a different point, see Ch.6, para.6-73.

134 See Lightman J in *Anthony v Wright* [1995] B.C.C. 768 at 770. But see also *Siddell v Smith Cooper & Partners* [1999] P.N.L.R. 511, CA (an auditor's duty of care is not necessarily limited to the company for whom he acts where he concurrently enters a contract to act as accountant to certain of its shareholders).

135 *Anthony v Wright* [1995] B.C.C. 768.

136 See, e.g. Carnwath J in *Electra Private Equity Partners v KPMG Peat Marwick* [1998] P.N.L.R. 135 (no duty owed to potential investors for statements made at an informal meeting to the effect that a company's audited accounts were likely to meet the claimants' expectations). In the same case the judge drew attention to the dangers of extracting isolated statements of principle from earlier authorities where the law has been in a state of evolution. See also fn.138.

137 *White v Jones* [1995] 2 A.C. 207. For a review of the various tests, see *BCCI (Overseas) Ltd (in liquidation) v Price Waterhouse (No.2)* [1998] P.N.L.R. 564, CA (whether the threefold *Caparo* test, the assumption of responsibility test of *White v Jones*, or an incremental approach was adopted, it was arguable, where the allegation was that two banks were operated as a single entity, that auditors of one bank owed a duty of care to the other).

138 per Morritt LJ in *Peach Publishing v Slater* [1998] P.N.L.R. 364, CA at 373 (no assumption of responsibility by accountants of a company towards a second company formed to acquire the first, in respect of a statement made to shareholders of the first that management accounts were substantially accurate). Contrast *ADT Ltd v BDO Binder Hamlyn* [1996] B.C.C. 808, CA, where, in a similar situation, auditors who said they "stood by" the audited accounts and attached no qualification to their statement were held to owe a duty of care. See also *Electra Private Equity Partners v KPMG Peat Marwick* fn.136, above (it is too exacting a test to say that the assumption

ence of a disclaimer can be an important part of the factual background when deciding whether, objectively speaking, auditors assumed responsibility to a third party for the accuracy of an audit report.[139]

The law evolves, and it is always necessary to be aware of the historical context **10-40** in which examples of the duty of care have arisen. Nevertheless the following illustrations may still have some utility. So, it has been said that while an auditor owes no duty of care to potential takeover bidders in certifying company accounts, the directors, auditors and financial advisors of a target company might well owe a duty of care to such bidders not to mislead them.[140] A district auditor, employed by the Audit Commission to audit the accounts of a local authority in accordance with Pt III of the Local Government Finance Act 1982, owed a duty of care to the local authority itself rather than its officers because the purpose of the audit was directed primarily to the protection of the authority, as well as local electors.[141] Accountants who prepared annual reports on solicitors' accounts for the latter to submit to the Law Society owed to the Society a duty of care in relation to the accuracy of their reports. The duty was not unreasonably open-ended where it was limited in time (until receipt of the following year's report) and where the potential liability was limited to payments to clients whose funds had been misappropriated.[142]

Although accountants may owe a duty of care to a third party, for instance in the **10-41** preparation of accounts where the claimant intended to inject cash into a company that had run into difficulties, such duty did not free him from the need to take care to protect himself by making inquiries to obtain the customary warranties.[143] It was arguable that accountants who acted as a company's auditors, were under a common law duty of care to advise the directors of the company that loan payments to another company which had acquired the first company's issued shares contravened s.151 of the Companies Act 1985.[144] When an auditor's report on the finances of a company was prepared for and at the request of its bankers, it did not give rise to a duty of care owed either to the directors, whether or not they were guarantors of the company's debts, or the shareholders.[145] Similarly, no duty of care was owed to banks that were not existing creditors of a company at the date of its auditors' latest report which had not been made directly to the banks, or with the intention, or in the knowledge, that its contents would be communicated to them.[146] Account-

of responsibility must have been a conscious one).

139 *Barclays Bank Plc v Grant Thornton UK LLP* [2015] EWHC 320 (Comm), Cooke J., Ch.2, para.2-223.

140 *Morgan Crucible Co Plc v Hill Samuel & Co Ltd* [1991] Ch. 259.

141 *West Wiltshire DC v Garland* [1993] Ch. 409. But no duty of care was owed by auditors of a company to investors who were the beneficiaries of a trust where they did not rely on the audit and where in any event their relationship was not close enough to make such a duty appropriate: *Anthony v Wright* [1995] 1 B.C.L.C. 236. See also *Andrew v Kounis Freeman* [1999] 2 B.C.L.C. 641, CA (accountants who audited the accounts of an air travel organiser, knowing of a deadline which meant there would be no reasonable opportunity to check them, and also that the Civil Aviation Authority would rely on the information given when deciding whether to renew the organiser's licence, could owe a duty of care to the Authority, which suffered loss when the organiser ceased trading and its bookings had to be fulfilled at the Authority's expense).

142 *Law Society v KPMG Peat Marwick* [2000] 1 W.L.R. 1921, CA.

143 *Lloyd Cheynham & Co Ltd v Littlejohn & Co* [1986] P.C.C. 389.

144 *Coulthard v Neville Russell* [1998] B.C.C. 359.

145 *Huxford v Stoy Hayward & Co* [1989] 5 B.C.C. 421.

146 *Al Saudi Banque v Clarke Pixley* [1990] Ch. 313, approved in *Caparo Industries Plc v Dickman* [1990] 2 A.C. 605.

ants asked to provide a letter as to the worth of a client providing an unlimited personal guarantee as a condition of receiving a loan, owed a duty of care to the lender in formulating the letter.[147] A disclaimer appearing on the first page of a non-statutory audit report, which followed the standard wording produced by the Institute of Chartered Accountants in England & Wales in respect of statutory audits save for changing "the company's members" to "the company's director[s]", was held to prevent a duty of care arising to a third party bank in respect of the carrying out of a non-statutory audit.[148] An accountant does not owe a personal duty to a company director, notwithstanding that it is foreseeable that a director may suffer loss as a result of negligent accountancy advice to the company.[149]

10-42 **The standard of care** Accountants and auditors are liable for failing to exercise the skill and diligence of a reasonably competent and careful accountant or auditor.[150] The standard remains the same no matter upon what terms the defendant has been engaged, although the steps required to achieve it may vary with the nature of the task given.[151] In determining whether the standard has been achieved regard can be paid to formal accounting and auditing standards set by professional bodies, such as the Accounting Standards Committee and the Auditing Practice Committee.[152] Third parties reading accounts are entitled to assume that they have been drawn up in accordance with approved practice unless there is some clear indication to the contrary. Courts will attach considerable importance to formal standards in deciding whether auditors have been negligent in performing their work.[153] Nevertheless, the Financial Ombudsman's conclusion that arrangements put in place by an accountant largely met the claimant's needs was not fatal to her claim for loss suffered as a result of her financial advisor's negligence: statutory codes of conduct, while persuasive, are not conclusive of the issue of common law negligence.[154] A minority shareholder's action failed where the company had appointed an auditor to value its shares, wishing to have the job done quickly and cheaply so as to enable the claimant to leave. It was held that the standards of a specialist valuer could not be applied to the auditor, who had not fallen short of the care required of a reasonably competent accountant acting as auditor.[155] Just as with other professionals, accountants and auditors are bound to have a knowledge of the practical rules of law which affect them in the exercise of their calling.[156] Where an accountant has accepted a retainer, and a particular matter is within the area within which he or she should have been competent to give advice, liability will

147 *HIT Finance Ltd v Cohen Arnold & Co* [2000] Lloyd's Rep. P.N. 125 (but no breach of duty was established where, on a proper construction, a statement as to the client's worth made in the letter was attributed to information provided by the client, the accuracy of which the accountants did not warrant).

148 *Barclays Bank Plc v Grant Thornton UK LLP* [2015] EWHC 320 (Comm).

149 *Swynson Ltd v Lowick Rose LLP* [2014] P.N.L.R. 27, fn.133 above; see also Ch.2, para.2-238. Appeal, on a different point, allowed: [2017] UKSC 32, see Ch.6, para.6-73.

150 See *Re Kingston Cotton Mill Co Ltd (No.2)* [1896] 2 Ch. 279, CA.

151 *Henry Squire, Cash Chemist Ltd v Ball Baker & Co; Mead v Ball Baker & Co* (1912) 106 L.T. 197 at 199–200.

152 See Gwilliam, "Trucking on: audit in the real world?" (2010) 4 P.N. 180.

153 *Lloyd Cheynham & Co Ltd v Littlejohn & Co*, fn.143, above.

154 *Lenderink-Woods v Zurich Assurance Ltd* [2017] P.N.L.R. 15, per Norris J at [94].

155 *Whiteoak v Walker* (1988) 4 B.C.C. 122.

156 e.g. See *Thomas v Devonport Corp* [1900] 1 Q.B. 16; *Re Republic of Bolivia Exploration Syndicate Ltd* [1914] 1 Ch. 139; *Frank H. Wright (Constructions) v Frodoor* [1967] 1 W.L.R. 506.

arise for a failure to give that advice even where if the client is told to consult a specialist.[157] However, an accountant retained to give a standard accountancy service, with some general tax advice, is only required to draw attention to matters that would be within the knowledge of a reasonably competent generalist accountant, not matters that would be known only to a specialist.[158]

10-43 Occasions will frequently arise when accountants have to give advice to a client about the implications of a particular course as a matter of tax law. Where it is subsequently alleged that advice was given negligently the court may well have to decide whether it was right or wrong. It is insufficient to approach the matter simply on the basis that there is a good chance that the advice was wrong.[159]

10-44 **Acting as arbitrators** When auditors truly act as arbitrators, they do not owe a duty of care, since they perform a quasi-judicial function.[160] However, in *Arenson v Arenson and Casson Beckman Rutley & Co*,[161] it was submitted that, since the auditors were acting as arbitrators in valuing shares on a contract of sale as between shareholders, they owed no duty of care in respect of such valuation, because they were performing a quasi-judicial function. In consequence, so the argument proceeded, they were immune from liability in an action for negligence, on the ground of public policy. Lord Salmon, in rejecting such submissions, expressed the opinion that they were discharging no function even remotely resembling a judicial function but were merely exercising a purely investigatory role.[162]

10-45 **Liquidators, receivers and sequestrators** The liquidator of a company is liable for negligence in the discharge of a liquidator's statutory duties. This gives rise to liability in damages to an injured creditor,[163] and to the creditors in general by means of a summons for misfeasance.[164] However, an administrator appointed under the Insolvency Act 1986 is in a position, as regard creditors, directly analogous to the position of the director of a company and its shareholders: *absent* special

157 *Sayers v Clarke Walker* [2002] B.C.L.C. 16 (a claim for allegedly avoidable tax liabilities and penalties against accountants, retained to advise in the purchase of a company, who failed to give appropriate advice about the structure of the sale agreement having told the claimant to consult specialist tax counsel).

158 *Mehjoo v Harben Barker* [2014] EWCA Civ 358, para.10-25.

159 See e.g. *Grimm v Newman* [2003] 1 All E.R. 67, CA (an allegation of negligence on the basis of incorrect advice about the tax consequences of a gift where the court had to decide whether, against a complex background, the advice given was right).

160 In *Re Hopper* (1867) L.R. 2 Q.B. 367. See, generally, Ch.3, paras 3-13 to 3-21.

161 *Arenson v Arenson and Casson Beckman Rutley & Co* [1977] A.C. 405.

162 *Arenson v Arenson & Casson Beckman Rutley & Co* [1977] A.C. 405 at 840. The claimant held shares in a private company on terms that if his employment by the company ceased he would sell them back at "a fair value," defined as the value "determined by the auditors for the time being of the company, whose valuation, acting as experts and not as arbitrators, shall be final and binding". On the termination of his employment the auditors duly valued the shares but a dispute arose whether that valuation was negligent. The HL remitted the case for trial to determine whether the auditors had acted as arbitrators or not and, if so, were entitled to immunity or, if not, were in breach of duty.

163 *Pulsford v Devenish* [1903] 2 Ch. 625, followed in *James Smith & Sons (Norwood) Ltd v Goodman* [1936] Ch. 216 where the CA in extending the principle, held the liquidator liable in negligence for disregarding even a contingent claim of a creditor.

164 *Re Windsor Steam Coal Co* [1929] 1 Ch. 151; *Re Home and Colonial Insurance Co* [1930] 1 Ch. 102.

circumstances any duty of care is owed exclusively to the company and not to the shareholders themselves.[165]

10-46 Although sequestrators are officers of the court, they are not exempt from liability for professional negligence, based upon ordinary standards of care, in respect of the management of the property of a contemnor which comes into their possession.[166]

10-47 The position of official receivers is somewhat different. An official receiver has been held immune from suit on the grounds of public policy for an allegedly negligent statement made in the course of bankruptcy proceedings, and within the scope of his powers and duties in those proceedings.[167] However, where a receiver is appointed to manage the business of, for instance a mortgagee,[168] his duty is not limited to one of good faith. His main duty is to proceed so as to procure repayment of the debt and interest and if he is managing a business he has a duty to manage it with due diligence, which includes taking reasonable steps to carry it on profitably.[169] By way of example where a receiver appointed by mortgagees to manage several mortgaged properties let to different tenants, failed to serve "trigger" notices to enable rent reviews to be initiated, it was held that he was in breach of a duty of care thereby owed to the mortgagors. As a result he was liable for the losses incurred by them when subsequently the properties were sold pursuant to the mortgagees' power of sale.[170]

10-48 **Causation and damages** An accountant's liability in damages is assessed by reference to the same principles as for professional persons generally. The claimant must establish a causative link between the loss alleged and the defendant's negligent act or omission.[171] Even where accountants had been negligent in failing to detect deficiencies in the accounts of their client, an ex-solicitor who had been struck off the Roll, liability was not established where the claimant's loss and damage were the consequences solely of his own dishonesty.[172] Causation was not established where an accountant had been negligent in failing to advise the developer of a holiday resort to enter into a formal contract with a building contractor, but had that advice been given it would not have been followed.[173]

10-49 It is always important, as in actions for professional negligence generally, to identify the scope of the duty of care owed by the claimant to the defendant, before questions of causation can be properly addressed. So, a claim was struck out where

[165] *Kyrris v Oldham* [2004] P.N.L.R. 18.
[166] *IRC v Hoogstraten* [1985] Q.B. 1077.
[167] *Mond v Hyde* [1999] Q.B. 1097, CA. per Beldam LJ at 114, "to be afforded immunity from suit in respect of the statement made, the official receiver must be acting in the course of bankruptcy proceedings and within the scope of his powers and duties."
[168] i.e. not an official receiver.
[169] *Medforth v Blake* [2000] Ch. 86.
[170] *Knight v Lawrence* [1991] 01 E.G. 105, Browne-Wilkinson VC having concluded that the receiver had power to serve "trigger" notices under the Law of Property Act 1925 s.109, as amplified by the provisions of the legal charge.
[171] *Re City Equitable Fire Insurance Co* [1925] 1 Ch. 407 at 482-483, para.10-31, also *JEB Fasteners Ltd v Marc Bloom & Co* [1981] 3 All E.R. 289 (claimants would have acted no differently even had they known the true position).
[172] *Luscombe v Roberts and Pascho* 106 S.J. 373.
[173] *Harlequin Property (SVG) Ltd v Wilkins Kennedy* [2016] EWHC 3188 (TCC), para.10-27 (although the claim in negligence for failing to advise on the need for a binding valuation process for the building work was successful)

auditors were alleged to have been negligent in failing to report that a company was insolvent and the damages that were sought were trading losses that had thereafter accrued. It was inappropriate to consider causation simply in terms of the traditional "but for" analysis and, on the facts, the losses arose from trading as opposed to the relevant breach of duty.[174] It may be otherwise where the claimant can demonstrate that in reliance upon figures represented to him as correct, he traded in a particular way that gave rise to loss.[175] Where, as a result of an auditor's negligence, company profits were overstated and a dividend to shareholders consequently paid, the argument was rejected that the proportion of the dividend paid out of capital was irrecoverable. The payment out of capital was a loss to the company because it was paid to the shareholders who were legally separate. It was not material, given the hypothetical nature of the point, that the shareholders might benefit twice if the money was restored to the company.[176]

10-50 Where the accountant's negligence consists of some positive act or misfeasance, the question of causation is approached as one of historical fact, to be determined on a balance of probabilities. Where the negligence consists in an omission, as where there has been a failure properly to advise, causation depends upon an answer to the hypothetical question, what the claimant would have done had the defendant acted without negligence, for instance in the giving of advice. If the claimant proves that, had the defendant acted properly, matters would have been as arranged as to avoid the loss alleged, then the full extent of that loss will be recovered, without discount for the possibility he or she would have acted otherwise. A discount for chance will, however, be made where the loss depends, in addition to the acts of the claimant, upon the hypothetical actions of a third party. The claimant must then establish there was a real—as opposed to speculative—chance that the loss would have arisen but for the negligence in question. Once a real chance of loss is proved, the claimant will recover, subject to a discount for the risk that the third party would not have acted as claimed.[177]

[174] *BCCI (Overseas) Ltd v Price Waterhouse (No.3)* [1999] B.C.C. 351, applying *Banque Bruxelles Lambert SA v Eagle Star Insurance Co Ltd* [1997] A.C. 191. The "but for" test had been applied in *Galoo v Bright Grahame Murray* [1994] 1 W.L.R. 1360, CA (where it was alleged that as a result of negligence in the preparation of auditors' accounts, companies continued to trade, when in fact they were insolvent and made losses which were claimed as damages: the claims were rejected on the basis that although it might be said that the losses would not have arisen but for the auditors' negligence, that test was not on its own determinative of liability and as a matter of common sense the negligence gave the occasion for such losses but did not itself cause them). *Galoo* was followed in *Sasea Finance Ltd v KPMG*, *Times*, 25 August 1998, but criticised in *Aneco Reinsurance Underwriting Ltd v Johnson & Higgins Ltd* [2000] P.N.L.R. 152, Evans LJ indicating his preference for a formula to the effect that "the risk was one which the claimant retained for himself." (at 161).
[175] *Temseel Holdings v Beaumonts Chartered Accountants* [2003] P.N.L.R. 27.
[176] *Segenhoe Ltd v Akins* [2002] Lloyd's Rep. P.N. 435, Sup. Ct (NSW). In contrast in *Floyd v John Fairhurst & Co* [2004] P.N.L.R. 41, CA it was said that in a case where the claimant was the sole shareholder in a company, principles of reflective loss applied by analogy, so that he should give credit for a gain that the company received as a result of the negligence on which he sued in his personal capacity.
[177] *Allied Maples Group v Simmons & Simmons* [1995] 1 W.L.R. 1602, CA; also *First Interstate Bank of California v Cohen Arnold & Co* [1996] 1 P.N.L.R. 17, CA (in assessing the damages recoverable for accountant's negligent misrepresentation of their client's ability to service a debt, it was necessary to decide whether the claimant, knowing the truth, would have sold its security sooner than it did and, if it had, whether there was a real, not merely speculative, chance of a sale at the value suggested). See also *Demarco v Bulley Davey* [2006] P.N.L.R. 512, CA. (loss of the chance, as-

10-51 A negligent auditor's liability in damages can be reduced by the operation of s.1157 of the Companies Act 2006, which permits a court to relieve an auditor of liability for negligence, albeit only if the auditor has acted reasonably.[178] In a case where the auditors' negligence was technical, and minor in character, not "pervasive or compelling," and they had acted in good faith, a reduction in the damages for which their negligence rendered them liable was made.[179]

3. ARCHITECTS, QUANTITY SURVEYORS, STRUCTURAL AND OTHER ENGINEERS, BUILDING CONTRACTORS

10-52 **The duty of care** The duty of architects,[180] quantity surveyors,[181] engineers and building contractors is primarily determined by the contract[182] under which they are engaged.[183] In addition duties may be owed under statute[184] or in tort.[185] These duties may extend beyond the immediate client to third parties.

10-53 The extent and nature of the architect's duty is initially determined by the instructions given. Where instructions are ambiguous it is not necessarily incumbent on the architect to seek clarification.[186] The duty of care is the same whether the architect is fully qualified or not.[187] Where a specialist consultant is appointed for a particular aspect of building work, an architect owes no duty of care in relation to the consultant's work unless an ordinarily competent architect ought to be aware, and could reasonably be expected, to warn of a problem arising in connection with

sessed at 85 per cent, to obtain an IVA, had no market value or any intrinsic or inherent monetary value and only general damages could be awarded, to include the stigma of bankruptcy).

178 Perhaps more usefully ss.534-536 of the Act, in force since April 2008, allow for agreements limiting the liability of an auditor for statutory audit work, subject to a number of conditions. See further, Butcher QC, "Auditors, Parliament and the courts: the development and limitation of auditors' liability" (2008) 2 P.N. 66.

179 *Barings Plc v Coopers & Lybrand (No.7)* [2003] P.N.L.R. 34.

180 See Leong and Chan, "Architect's design duties: a shift from Bolam's to the objective test", (1999) 1 P.N. 3.

181 For the liability of surveyors other than quantity surveyors see para.10-331.

182 However, a duty of care in tort can arise even where an architect provides professional services free to friends: *Burgess v Lejonvarn* [2017] P.N.L.R. 25, CA; [2017] EWCA Civ 254, para.10-18. (The architect chose a builder for friends and performed some project management in the expectation that a fee would be chargeable for a second phase of the proposed works once the initial phase was completed).

183 The Supply of Goods and Services Act will in many cases imply terms that the services of a building professional are performed with reasonable care. Where at the suggestion of the client a subcontractor was employed by the main contractor under a building contract and thereafter the subcontractor negligently damaged the client's goods, the liability of the main contractor was restricted to procuring the sub-contractor's services and did not extend to a parallel liability for the subcontractor's tort: *Raflatac Ltd v Eade* [1999] 1 Lloyd's Rep. 506 (the sub-contractor failed to shut off the water supply when installing a sprinkler system).

184 See the discussion of the Defective Premises Act 1972 below at Ch.9, para.9-149.

185 See above at para.10-18 for a discussion of concurrent liability generally. See also *Wessex Regional HA v HLM Design* (1994) 10 Const.L.J. 165 and *Conway v Crowe Kelsey & Partners* (1995) 39 Con. L.R. 1 where the existence of concurrent duties upon architects and engineers was accepted; also *Storey v Charles Church Developments Ltd* (1996) 12 Const.L.J. 206 (where a builder designs as well as builds he is under concurrent duties in contract and tort not to cause economic loss); also Newman, "Help—I do not have a contract" Cons. Law 2003, 14(6), 29.

186 *Stormont Main Working Men's Club and Institute v J Roscoe Milne Partnership* 13 Con. L.R. 127 (failure to provide facilities for competitive snooker at a workingmens club not negligent where client had not indicated any clear desire for such facilities).

187 *Cardy & Co v Taylor and Roberts* 38 Con.L.R. 79.

it.[188] Architects and engineers both owe a duty of care to the building owner to avoid economic loss, whether arising from delay in the execution of building works governed by the JCT form or from negligent extensions of time granted to the builder.[189] A structural engineer employed by the building owner can owe a duty to his client to point out obvious and apparent dangers in temporary works erected by the builder, even though those works are not within the engineer's sphere of responsibility.[190] Where architects provide a certificate of proper completion in relation to building works, which a purchaser does not rely upon in acquiring the property, there is no additional cause of action available for breach of a duty of care properly to inspect the works for purposes of preparing and issuing the certificate.[191]

10-54 While a duty of care in tort may be owed by a builder to a client for whom work is being performed, concurrently with a contractual duty, it does not arise in every case. It did not, for instance, where the claimant sued the builder who built his home for economic loss and the circumstances were inconsistent with an assumption of responsibility for such loss. The parties had contracted on terms that the client's protection from any default by the builder would be limited to that provided by the National House-Building Council standard form of Agreement. The terms satisfied the test of reasonableness in the Unfair Contract Terms Act 1977. It was not possible for the client to invoke the law of tort to impose on the builder liabilities inconsistent with their contract.[192] Without an assumption of responsibility a builder's duty in tort is to protect a client from personal injury or damage to other property. The duty can be owed not simply to the first person who acquires the property but also subsequent owners or users.[193]

10-55 **The Defective Premises Act 1972** A duty is imposed on anyone taking on work in connection with the provision of a dwelling "to see that the work which he takes on is done in a workmanlike or, as the case may be, professional manner, with proper materials and so that as regards that work the dwelling will be fit for habitation when completed". The statutory duty[194] is imposed upon building contractors and sub-contractors, together with professional men such as architects, surveyors

188 *Investors in Industry Commercial Properties v South Bedfordshire DC* [1986] Q.B. 1034. But the status of this case is in doubt after *Murphy v Brentwood DC* [1991] 1 A.C. 398: see further see further Ch.9, paras 9-134 to 9-137.

189 *Wessex Regional HA v HLM Design* [1994] 10 Const. L.J. 165. In *Abbott v Will Gannon & Smith* [2005] P.N.L.R. 30 (a claim against an allegedly negligent structural engineer) it was said that the building owner's claim arose when physical damage to the property came into existence not at an earlier time when a negligent design was implemented, thereby arguably giving rise to economic loss. See further Ch.9, paras 9-134 and following.

190 *Hart Investments Ltd v Fidler* [2007] P.N.L.R. 26 (the engineer had been employed in connection with underpinning of the basement of the property; the builder's works left the façades of the properties dangerously unsupported so that they collapsed).

191 *Hunt v Optima (Cambridge) Ltd* [2014] P.N.L.R. 29, CA, Ch.2, para.2-203, per Tomlinson LJ at [114].

192 *Robinson v PE Jones (Contractors) Ltd* [2012] Q.B. 44. See O'Sullivan, "Building contracts - is there concurrent liability in tort?" C.L.J. 2011, 70(2), 291.

193 *Robinson v PE Jones (Contractors) Ltd*, fn.192, per Jackson LJ at [68]. See further, Ch.2, paras 2-263 to 2-264, and Ch.9, para.9-129. See also Carrington, "A crucial distinction" (2014) 4 P.N. 185.

194 See Ch.2, para.2-80, Ch.9, para.9-148 above, for further consideration of the Act.

and engineers, who take on work of the kind described in the section.[195] The liability imposed cannot be excluded.[196]

10-56 **Duty to a third party in tort** Attention has already been drawn to the basis upon which a professional may be liable in tort to a third party.[197] *Hedley Byrne & Co Ltd v Heller & Partners Ltd*[198] confirmed the potential for such a duty, although its extent remains open to argument in each case. For instance, while a consulting engineer and an architect owed building contractors a duty of care in respect of supervision of the works, the duty did not extend to instructing them in the manner in which they were to carry out their work. The duty was limited by the assumption that the contractors would perform their obligations competently.[199] Similarly, the duty of a structural engineer who, together with an architect, was employed on the construction of an extension to an existing building, was held to be limited to notifying the architects of any defects of which he had knowledge. There was no obligation on the engineer to supervise the remedial work.[200] Where architects and consulting engineers each gave "duty of care" letters to a third party who intended to purchase a building they were engaged to construct, no duty of care arose under *Hedley Byrne* when a subsequent survey, after the purchase, revealed design and construction faults which led to a lower offer being made on a further attempted sale.[201] Engineers, appointed by employers to supervise extensive dredging and reclamation work off Dubai, owed no duty of care to the main contractors in the absence of contract between them.[202]

10-57 Employers under a building contract did not owe a duty of care, based upon assumption of responsibility, to a sub-contractor of the builder to whom their senior civil engineer gave directions expressing what would be satisfactory if carried out.[203] Nor was any duty owed, by way of the principles set out in *Caparo Industries Plc v Dickman*[204] where an architect provided a letter to the effect that works to that date had been satisfactorily completed, where the prospective purchaser of the property, to whom the seller supplied the letter, did not rely on the architect's advice and the latter was ignorant of the purpose for which the letter was to be used.[205] No duty of care was owed by engineers retained by the building owner, who provided docu-

[195] Property developers and local authorities who arrange for other persons to take on such work, shall be treated as "included among the persons who have taken on the work": s.1(4).
[196] s.6(3).
[197] See para.10-18 (general discussion); also para.10-36 (accountants); para.10-235 (solicitors); and para.10-332 (valuers).
[198] *Hedley Byrne* [1964] A.C. 465.
[199] *Oldschool v Gleeson (Construction)* (1976) 4 Build. L.R. 1053.
[200] *Kensington & Chelsea & Westminster HA v Wettern Composites* [1985] 1 All E.R. 346.
[201] *Hill Samuel Bank v Frederick Brand Partnership* [1994] 10 Const. L.J. 72.
[202] *Pacific Associates Inc v Baxter* [1990] 1 Q.B. 993.
[203] *Plant Construction Plc v Clive Adam Associates*, 55 Con.L.R. 41.
[204] *Caparo Industries Plc v Dickman* [1990] 2 A.C. 605.
[205] *Machin v Adams*, 84 B.L.R. 79, CA; also *Strathford East Kilbride Ltd v HLM Design Ltd* 1999 S.L.T. 121 (no duty owed to tenant by architects contracted to the landlord); also *Howes v Crombie* [2002] P.N.L.R. 60, OH (no forseeability of reliance sufficient to establish a duty of care where, not knowing that what he said would be relied upon to secure lending upon a property, a structural engineer wrote commending the structural integrity of a property he had inspected in the course of construction).

ments which formed the basis of the claimant builder's tender, in relation to alleged misrepresentations in those documents.[206]

10-58 Aircraft maintenance engineers have been held to owe a duty to exercise reasonable care to make accurate entries in log-books, since persons flying the aircraft to which the entries relate will rely on their accuracy, and if there is any want of care, personal injury or property damage may reasonably be expected to result.[207] In contrast, a marine classification society, engaged by ship-owners to carry out the task of surveying a vessel, were not liable to cargo-owners who suffered loss when it proved to be unseaworthy. It was not fair, just or reasonable to impose a duty of care which would have a substantial impact on international trade, where there was an existing system of protection in respect of such loss under the Hague Rules.[208]

10-59 *Hedley Byrne* was applied in *Clay v AJ Crump & Sons Ltd*[209] where it was held that an architect's duty was not confined to his contractual duty to the owners of a dangerous wall, which collapsed injuring a builder's workman, but extended to all those persons who would be so closely and directly affected by his acts or omissions that he ought reasonably to have had them in contemplation. Similarly, in *Voli v Inglewood Shire Council and Lockwood*,[210] the High Court of Australia concluded that an architect owes a duty of care to anyone entering a structure designed by him, when it could reasonably be expected that such person might be injured by a negligent design.

10-60 In *Murphy v Brentwood DC*,[211] the House of Lords, considered the scope of the duty of care owed by a builder to the purchaser of a house he had constructed. He was liable under the principle in *Donoghue v Stevenson*[212] in the event of any defect, prior to its discovery, causing either physical injury to person or damage to property other than the building itself.[213] On the other hand, where a purchaser who had discovered the defect, however such discovery had come about, spent money to make the building safe and suitable for its intended purpose, there was no sound basis in principle for holding the builder liable for the purchaser's pure economic loss.[214] The question was left open whether a negligent builder could be held responsible for the cost necessarily incurred by a building owner in protecting himself from potential liability to third parties, for example on the adjacent highway or the neighbouring land's boundary.[215]

[206] *Galliford Try Infrastructure Ltd v Mott Macdonald* [2008] EWHC 1570 (TCC) (in the ordinary course of events, an architect or engineer engaged by a developer will not owe any duty of care, at least in relation to economic loss, to tendering contractors, even where the latter are supplied by the architect or engineer with tender information, drawings and specifications upon which to base their tenders).
[207] *Hawke v Waterloo-Wellington Flying Club Ltd* (1972) 22 D.L.R. (3d) 266.
[208] *Marc Rich & Co AG v Bishop Rock Marine Co Ltd* [1996] A.C. 211, distinguished in *Perrett v Collins* [1999] P.N.L.R. 77, CA, Ch.11, para.11-179 on the basis that the reasoning of the HL was directed to claims for economic loss rather than claims for personal injury.
[209] *Clay v AJ Crump & Sons Ltd* [1964] 1 Q.B. 533.
[210] *Voli v Inglewood Shire Council and Lockwood* [1963] A.L.R. 657.
[211] *Murphy v Brentwood DC* [1991] 1 A.C. 398, which overruled *Dutton v Bognor Regis UDC* [1972] 1 Q.B. 373 and held that *Anns v Merton LBC* [1978] A.C. 728 was wrongly decided. See Ch.2, paras 2-263 to 2-264.
[212] *Donoghue v Stevenson* [1932] A.C. 562.
[213] The application of this principle to complex structures is discussed at Ch.2, para.2-266.
[214] To this effect, see per Lord Keith in *Department of the Environment v Thomas Bates & Sons Ltd* [1991] 1 A.C. 499, following *Murphy v Brentwood DC* [1991] 1 A.C. 398.
[215] *Murphy v Brentwood DC* [1991] 1 A.C. 398 at 475 (Lord Bridge) and 489 (Lord Oliver).

10-61 *Murphy* does not operate to impose upon the builder liability to subsequent purchasers for defects that are patent, as opposed to latent. A patent defect is one which is discoverable with due diligence whether or not due diligence is exercised.

> "Where in the normal course of events, a surveyor would be engaged in a survey of a building for a purchaser, and, with the exercise of due diligence, that surveyor would have discovered a defect, that defect is patent whether or not a surveyor is engaged, and, if engaged, whether or not the surveyor performs his task competently."[216]

10-62 The principles set out in *Murphy* should apply equally to those advising in relation to building works, or structural engineers, as to builders.[217] Accordingly, where specialist engineering consultants had been instructed by a local authority to advise in relation to ground conditions and the requirements for adequate foundations for a proposed dwelling-house, upon which advice it relied, it was held that such specialists did not owe a duty of care to the subsequent purchaser from the local authority and or the owner occupier for the time being.[218]

10-63 An architect may, in appropriate circumstances, owe a duty of care in tort and be liable to a subsequent occupier of a building which he has designed, or the construction of which he has supervised, in respect of latent defects in the building of which there was no reasonable prospect of inspection. Conversely, he is not liable to a subsequent occupier of a building, in relation to a latent defect if, in the ordinary course of events a subsequent survey would have been expected, and would if carried out, have revealed the defect.[219] The question whether a particular defect in a building comes within the scope of his duty of care will depend upon the extent of his responsibility for the original design or the extent of any supervisory obligations he undertook. No duty of care would be owed in respect of defects for which he never had any design or supervisory responsibility in the first place.[220]

10-64 Where a number of persons acquire an interest in a property after a defect arises, knowledge by one of them of the defect is not automatically acquired by successors in title: the defect remains latent so far as they are concerned until the circumstances in which it loses its "latent" quality, so far as they individually are concerned, arise. It will depend upon the facts whether the potential cause of action of a successor survives unaffected, or is lost because the defect is no longer latent. The successor's claim may also be defeated because the chain of causation

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216 *Baxall Securities v Sheard Walshaw* [2002] P.N.L.R. 564, CA, per Steel J at 577.

217 See, e.g. *Payne v John Setchell Ltd* [2002] P.N.L.R. 146. See Duncan, "Lucky architects: snail in an opaque bottle?" 2003 L.Q.R., (119) 17.

218 *Preston v Torfaen BC* [1993] N.P.C. 111, CA (the claimant buyers had alleged that Northwest Holst Soil Engineering owed a duty of care to the ultimate buyers of property, which was built on an infilled quarry, for further economic loss they would suffer if the expert's advice to the council had been negligent).

219 *Pearson Education Ltd v The Charter Partnership Ltd* [2007] B.L.R. 324, CA.

220 See, e.g. *Bellefield Computer Services v E Turner & Sons Ltd* [2003] Lloyd's Rep. P.N. 53, CA (a claim against architects based upon alleged faulty design of fire protection works for a dairy extension: no liability where the architects were not engaged to supervise the relevant work and a specialist sub contractor who did the work, failed to install the fire protection measures specified). See also *Sahib Foods Ltd v Paskin Kyriakides Sands* [2003] P.N.L.R. 30 (architects owed no duty of care to a freehold owner, in relation to the absence of proper fireproofing in factory premises, where there was no proof that the lack of fireproofing would not have been spotted by a reasonably competent surveyor engaged at the time the freehold was acquired); also the same case on appeal, [2004] P.N.L.R. 22, CA, para.10-68 (a duty *was* owed to the tenant in occupation of the premises).

was broken by the earlier discovery, or there may be a reduction in the damages awarded on account of contributory negligence. Finally, the claim may be defeated because it is no longer fair, just and reasonable for it to be maintained.[221] Applying these principles, architects were liable to lessees, with whom they had no contractual connection, where stock contained in a warehouse subject to the lease was damaged by a flood. The architects had designed a rainwater drainage system for the developer but negligently failed to provide it with appropriate capacity. Their argument that the under-capacity was a patent defect, failed. At the time the capacity of the system was specified, there was no reason to expect an inspection would reveal any error. There was no reason why the claimant should have carried out any investigation of the adequacy of the system for draining rainwater. The claimant was not fixed with knowledge of a flood which arose during an earlier tenancy.[222]

10-65 While it is possible for a sub-contractor to owe a duty of care to the employer under a building contract the circumstances in which such a duty will be imposed are likely to be rare.[223] In *Henderson v Merrett Syndicates Ltd*,[224] Lord Goff of Chievely pointed out that:

> "if the sub-contracted work or materials do not in the result conform to the required standard, it will not ordinarily be open to the building owner to sue the sub-contractor or supplier direct under the *Hedley Byrne* principle, claiming damages on the basis that he has been negligent in relation to the performance of his functions. For there is generally no assumption of responsibility by the sub-contractor or supplier direct to the building owner, the parties having so constructed their relationship that it is inconsistent with any such assumption of responsibility."[225]

10-66 In considering whether such a duty should be imposed it will no doubt be appropriate to consider the circumstances generally, but in particular, the terms of the contract between the employer and the main contractor. So, where that contract contained a term requiring the employer to insure against certain specified perils and that nominated sub-contractors should have the benefit of cover under the policy, it was fair, just and reasonable to impose a duty of care on a sub-contractor outside of the relevant provisions, in respect of physical damage which accrued as a result of his careless act.[226]

10-67 From a different perspective, both an independent contractor and the owner of a

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221 *Pearson Education Ltd v The Charter Partnership Ltd* [2007] B.L.R. 324, fn.219. See particularly per Lord Phillips MR: if an architect who had the primary responsibility for producing a safe design, produced a design that was defective, it was not obviously fair, just and reasonable that he should be absolved from liability in tort in respect of its consequences, on the ground that another professional could reasonably be expected to discover his shortcoming. See further, Minogue, "Here comes the rain again" 2007 *Building*, 12, 51; Murdoch, "After the flood has receded" 2007 E.G. 0721, 129; generally, Harder, "Is liability for defective buildings negated by a surveyor's intervening negligence" 2007 Conv. Sep/Oct, 417.

222 *Pearson Education Ltd v The Charter Partnership Ltd* [2007] B.L.R. 324 fn.219.

223 A duty was imposed in *Junior Books Ltd v Veitchi Co Ltd* [1983] 1 A.C. 520, but that decision, while not formally overruled, has subsequently been said to be confined to its own special facts: see the summary in *Architype Properties Ltd v Dewhurst MacFarlane & Partners* [2004] P.N.L.R. 38 from 742.

224 *Henderson v Merrett Syndicates Ltd* [1995] 2 A.C. 145.

225 *Henderson v Merrett Syndicates Ltd* [1995] 2 A.C.145 at 195.

226 *BT Plc v James Thomson & Sons (Engineering) Ltd* [1999] 1 W.L.R. 9, HL, para.10-22, fn.81, above; also *RM Turton & Co Ltd v Kerslake & Partners* [2000] Lloyd's Rep.P.N. 967, CA (NZ); and *Norwich CC v Harvey* [1989] 1 W.L.R. 828, CA.

tor will not be liable if he has warned a client in suitably clear terms that the works may not be fit for purpose and has been instructed to proceed regardless.[246]

10-73 Where architects' plans are so inaccurate on a matter such as ventilation as to make the building almost uninhabitable, a building contractor may be liable for breach of contract even where he has followed the plan and specification exactly. A builder's responsibility is not limited to matters of workmanship. Where a builder ought to recognise obvious defects in the design of a building, the obligation to carry out work which will perform its intended function overrides that of following the specification slavishly, particularly when he has agreed to "give efficient supervision … using his best skill and attention".[247]

10-74 The extent of a builder's duty to investigate and examine land before building on it is to be determined by what a careful and competent builder would have done in the circumstances. Such duty is not restricted merely to observable defects on land owned by the builder or to which he has a legal right of entry, where if he was careful and competent he would have observed defects on neighbouring land and would not have built until either there had been a further investigation of the site, or a satisfactory report had been received from an expert, for instance, on the condition of the subsoil.[248] Where damage was caused to houses by heave in the foundations, resulting from the removal of trees, both the builders and consulting engineers were liable in negligence as well as breach of contract.[249] A builder can be liable for the dust deposited during the building process, depending upon proof of physical damage.[250] As in other areas where the defendant holds himself out as having expertise, a builder is to be judged by the knowledge he ought, as a reasonably competent professional, to possess at the relevant time.[251] A structural engineer was negligent in failing to advise prospective purchasers of a house that its external walls were tilting to such a degree that industry guidance could consider the property's condition as dangerous and requiring demolition.[252]

10-75 **Evidence of negligence** Failure of the works which he has been employed to design and superintend may be evidence of negligence on the part of the architect or engineer concerned, throwing upon him the burden of establishing that he has not been negligent. This will not be the case when he is required to engage in

[246] *Baylis Farms Ltd v RB Dymott Builders Ltd* [2010] EWHC 3886 (QB).

[247] *Brunswick Construction v Nowlan* (1975) 49 D.L.R. (3d) 93.

[248] *Batty v Metropolitan Property Realisations Ltd* [1978] Q.B. 554, Ch.2, para.2-260, above (although again this case is of uncertain status after *Murphy v Brentwood DC* [1991] 1 A.C. 398).

[249] *Balcomb v Ward's Construction (Medway)* (1981) 259 E.G. 765.

[250] If he is sued by someone with an interest in the land affected: *Hunter v Canary Wharf Ltd* [1997] A.C. 655.

[251] See *Barclays Bank v Fairclough Building Ltd* [1995] 1 All E.R. 289, CA (contractors performing works involving asbestos ought by 1988 at the latest to have appreciated the dangers to health and safety associated therewith. Accordingly specialist roofing cleaners who undertook the cleaning of asbestos roofing with power hoses, which broke down the cement bonding of the roof and created a slurry, were liable in tort to those with whom they contracted for the work, there being a duty of care to avoid causing economic loss arising from their failure to prevent contamination of the building). A construction company proposing to sink concrete piles on a site it was developing, was not negligent in failing to check museum archives before the concrete was laid to see whether there were any historic plans showing underground pipes not identified on current plans: *Northumbrian Water Ltd v Sir Robert McAlpine Ltd* [2014] EWCA Civ 685 (in fact the concrete escaped into a disused private drain, not shown on the claimant's plans, from which it made its way into the sewerage system maintained by the claimant).

[252] *Scott v EAR Sheppard Consulting Civil and Structural Engineers Ltd* [2016] EWHC 1949 (TCC).

something of an experiment. Thus, where an architect was employed to design and superintend the erection of model lodging-houses, with instructions to include a newly-patented concrete roofing, less costly than lead or slate, negligence was not established when the roof admitted water.[253]

10-76 Equally, however, where substantial risks have to be incurred in a project involving novel design work close to or beyond the limit of existing knowledge or experience, a very high standard of care may be required. In a case where a 1,250ft-high cylindrical steel television broadcasting mast suddenly broke and collapsed in extremes of bad weather it was said that, while judgment with hindsight has to be avoided, and allowance made for the absence of empirical knowledge and expert advice, there was a clear duty to identify and consider all foreseeable problems so that the 'venture into the unknown' could be adequately assessed and a decision as to its practicability arrived at.[254]

In the absence of expert evidence as to standard practice, the omission of an architect to provide for downstairs toilets in the design of a range of mid-priced houses was not negligent. It was not self-evidently incompetent or so glaring an omission as spoke for itself.[255]

10-77 **Measure of damages** The damages recoverable against an architect, quantity surveyor, engineer or building contractor fall to be determined on usual tortious principles. The measure of damages will depend upon the nature of the defendant's breach. The claimant should be restored, so far as he can by money, to the position he would have occupied had a breach of duty not occurred.[256] The starting point for claims will usually be the cost of rectification but in appropriate cases consequential loss[257] may be recovered and also damages for physical inconvenience.[258]

[253] *Turner v Garland* (1853) 2 Hudson's B.C. 4th edn, 1. In directing the jury, Erle J said: "You should bear in mind that if the building is of ordinary description in which he [the defendant] had abundance of experience, and it proved a failure, this is evidence of want of skill or attention. But if out of ordinary course, and you employ him about a novel thing, about which he has little experience, if it has not had the test of experience, failure may be consistent with skill. The history of all great improvements shows failure of those who embark in them."

[254] per Lord Edmund Davies in *Independent Broadcasting Authority v EMI Electronics and BICC Construction Ltd* (1980) 14 B.L.R. 1 at 31. See para.10-72, fn.245, above.

[255] *Worboys v Acme Investments* (1969) 210 E.G. 335 (the houses were valued at about £8,000).

[256] In *Partridge v Morris* [1995] E.G.C.S. 158, where a negligent architect failed to warn against employment of a builder of doubtful "track record" whose work proved unsatisfactory, the claimant recovered losses arising because he had to engage two sets of builders, together with the cost of making good the defective work.

[257] See e.g. *John Grimes Partnership v Gubbins* [2013] EWCA Civ 37 (where an engineer, retained by a property developer to produce a road and drainage design and obtain approval from the local highway authority, negligently delayed the work, he was liable for loss sustained by the developer when the property market fell during the period of delay, and the value of the development was thereby reduced). *South Australia Asset Management Corp v York Montague Ltd* [1997] A.C. 191 para.10-356 below, was distinguished on the basis that the developer's losses were foreseeable. See further Bullimore, "is it better to be wrong than late?" (2013) 2 P.N. 128.

[258] *Watts v Morrow* [1991] 1 W.L.R. 1421, CA, where the trial judge's award of £4,000 to each claimant, a husband and wife whose marriage had broken down subsequently, was reduced to £750 each, assessed on the basis that the physical discomfort had extended for about eight months. But where an architect's contract is simply to design a house, and he fails to include agreed features of the design, no damages can be recovered for frustration or distress since the object of the contract was not the provision of pleasure or peace of mind: *Knott v Bolton* [1995] E.G.C.S. 59, CA.

breach of the Factories Act.[804] These facts would now give rise to a breach of reg.5(1) of the 1998 Regulations, as already been discussed.[805]

13-242 **Good construction** The Regulations use this phrase which appeared repeatedly in the Factories Acts. The question of safety was always one of degree in each case, which had to be decided on its own particular facts.[806]

13-243 "Construction" meant the original construction of whatever was in question as opposed to its subsequent maintenance.[807] "Sound construction" meant well made for what the article was and did not mean good or sound construction for some practicable purpose.[808] It did not include design.[809] It is doubtful whether any distinction can be drawn between the actual materials used in construction and the thing itself. There did not appear to be any difference between "good", "sound" and "substantial" construction, but "good mechanical construction" probably limited the construction, which had to be good, to such part of the product that could properly be described as mechanical.

13-244 **Sound material** This phrase was not restricted to material that appeared to be sound on reasonable inspection.[810] There was an absolute duty to use material which was sound, even though it was unsound from a latent defect not discoverable on reasonable examination. The time at which material must be sound was the time of construction: its subsequent deterioration was not a breach of the duty to use sound material.

13-245 **Adequate strength** This meant strength which was adequate for the work that the occupier of a factory required it to do. Failure of the appliance was prima facie but not conclusive evidence a breach of the requirement that something be of adequate strength: it was open to a factory occupier to prove that failure occurred due to some other cause.[811]

13-246 **Cases decided under the Factories Act** Examples under the Act may still be of assistance in determining whether a dangerous part of machinery is adequately guarded. A machine was not securely fenced if the workman could get his hand through the guard without any real difficulty.[812] Where a girl was working on a pastry rolling machine and deliberately put her hand beneath the guard to push some dough against the moving rollers, it was held that the machine was not securely fenced.[813] The words "securely fenced" meant fenced at the time of the accident. A machine fitted with a fence, which was raised at the time of the accident, was not

[804] *Close v Steel Company of Wales Ltd* [1962] A.C. 367.
[805] See paras 13-222 to 13-228.
[806] *Payne v Weldless Steel Tube Co Ltd* [1956] 1 Q.B. 196.
[807] *Cole v Blackstone & Co* [1943] K.B. 615.
[808] *Beadsley v United Steel Co* [1951] 1 K.B. 408; cf. *Mayne v Johnstone & Cumbers Ltd* [1947] 2 All E.R. 159. See also *Gledhill v Liverpool Abattoir* [1957] 1 W.L.R. 1028 at 1033: "Good construction" does not import suitability for some particular purpose.
[809] *Gibby v East Grinstead Gas Co* [1944] 1 All E.R. 358, CA; *Hawkins v Westinghouse Brake & Signal Co Ltd* (1959) 109 L.J. 89.
[810] *Whitehead v James Stott Ltd* [1949] 1 K.B. 358.
[811] *Reilly v Beardmore & Co* [1947] S.C. 275.
[812] *Wood v London CC* [1940] 4 All E.R. 149, per Tucker J the decision was reversed on other grounds [1941] 2 K.B. 232.
[813] *Smith v Chesterfield Co-operative Society* [1953] 1 W.L.R. 370 (60 per cent contributory negligence).

fenced.[814] A guard, which can be lifted or removed, was not a secure fence if it were lifted or removed at the time of the accident.[815] On the other hand, a guard forced off or removed in some exceptional way which was inconsistent with a reasonable use of the machine was not a breach of the statute.

13-247 The duty to fence was not discharged by providing the necessary guards for securely fencing the machinery and then putting the responsibility for using them upon the workmen.[816] When the guard was one which required adjustment, and the workman was injured because of inaccurate adjustment, the occupier was liable, although the workman was at fault in not making the necessary adjustment[817] but if the duty of making the adjustment were expressly and properly delegated to an experienced workman, who was injured because of his failure to make the necessary adjustment, the defendant was not liable.[818]

13-248 Further, a "fence must not merely guard against accident but must be such as takes into account human weaknesses which include as well as forgetfulness and inadvertence, an inclination sometimes to run minor risks and to take short cuts. Some degree of recklessness (as well as carelessness) has to be foreseen. The fence need not be constructed so as to keep out a determined man, but I think it must be such as will deter a man who, in pursuit of a short cut, is willing to take a minor risk."[819] If a dangerous machine was securely fenced when working forwards, but remained dangerous when being worked backwards, the duty was not discharged.[820]

13-249 **When machine cannot be fenced** Even when it is commercially impracticable or mechanically impossible to fence the machine securely, it is still a breach of duty to leave it unfenced, and a workman who is injured in such circumstances can recover damages, because "if a machine cannot be securely fenced while remaining commercially practicable or mechanically useful the statute in effect prohibits its use."[821]

13-250 **Defences** In civil actions concerning breaches occurring prior to 1 October 2013,[822] apart from the denial that there had been any breach of statutory duty at all, or, if so, such breach did not cause the claimant's accident,[823] or that the machine in question was one to which the particular section applied,[824] virtually the only remaining defence available is that the accident was caused entirely[825] or partly[826] by the workman's own fault. This position will alter where the allegation is breach

[814] *Smith v Morris Motors Ltd* [1950] 1 K.B. 194.
[815] *Charles v S. Smith & Sons (England) Ltd* [1954] 1 W.L.R. 451.
[816] *Thomas v Thomas Bolton & Sons Ltd* (1928) 139 L.T. 397.
[817] *Lay v D. & L. Studios Ltd* [1944] 1 All E.R. 322; *Vyner v Waldenberg Bros Ltd* [1946] K.B. 50; *Leach v Standard Telephones & Cables* [1966] 1 W.L.R. 1392 (workman set guard much too high on mechanical saw; his breach not wholly co-extensive with his employer's breach, since the guard would not have been fully effective even if set as low as possible. This failure to fence securely was not a duty which the employers could vicariously discharge only through the workman himself).
[818] *Smith v Baveystock & Co* [1945] 1 All E.R. 531.
[819] per Devlin J in *Quintas v National Smelting Co Ltd* [1960] 1 W.L.R. 217 at 222, reversed on other grounds; [1961] 1 W.L.R. 401.
[820] *Pursell v Clement Talbot Ltd* (1914) 111 L.T. 827.
[821] *Davies v Thomas Owen & Co Ltd* [1919] 2 K.B. 39 approved in *John Summers & Sons Ltd v Frost* [1955] A.C. 740.
[822] For defences generally see further paras 13-86 to 13-100, and Ch.4.
[823] See, e.g. *Fairfield Shipbuilding & Engineering Co Ltd v Hall* [1964] 1 Lloyd's Rep. 73.
[824] e.g. the situation in *TBA Industrial Products Ltd v Laine* [1987] I.C.R. 75, DC.
[825] For an example of a finding of 100 per cent contributory negligence made against a claimant in a

of duty after the date of coming into effect of s.69 of the Enterprise and Regulatory Reform Act 2013.[827] Since a claimant's cause of action will be in negligence the general defences relevant to that tort will be available. However, while not strictly defences, arguments about the scope of particular regulations are likely to persist, given that the existence of a statutory duty upon an employer may well bear upon the extent of any common law duty of care.

13-251 **General safety provisions** Regulations 14 to 18 of the Work Equipment Regulations 1998 impose duties with regard to controls. These include the requirement that controls are provided to start and control the speed or operating conditions of work equipment and that deliberate action on the control is necessary for any of these activities to occur.[828] Controls to stop work equipment safely must be provided, accessible and given priority over other controls.[829] Work equipment must be fitted with readily accessible emergency stop controls[830] and all controls must be clearly visible and identifiable, there being consequential provisions regarding positioning and warnings whenever equipment is about to start.[831] Regulation 18 provides for control systems to be safe: a control system is not safe unless its operation does not create any increased risk to health and safety. Where appropriate, work equipment must be provided with suitable means of isolation from energy sources with appropriate measures to ensure that the resumption of the energy supply does not expose any person to risk.[832]

breach of a s.14 claim for damages, see *Cope v Nickel Electro* [1980] C.L.Y. 1268, and *Humphries v Silent Channel Products* [1981] C.L.Y. 1209, namely, that they were the sole authors respectively of their injuries. See also *McCreesh v Courtaulds Plc* [1997] P.I.Q.R. P421, CA, where a 100 per cent finding against the worker was varied to 75 per cent on appeal on a basis of evidence that the employers had acquiesced in a dangerous practice. See further the discussion at paras 13-91 to 13-93.

826 *Rushton v Turner Bros Asbestos Co* [1960] 1 W.L.R. 96. See also *McGuiness v Key Markets Ltd* (1972) 13 K.I.R. 249, CA (contributory negligence of two-thirds found). But in *Arbuckle v A.W. McIntosh & Co*, 1993 S.L.T. 857, Ct. Sess. OH it was held that the workman's own statutory duty under reg.14(1)(a) of the Woodworking Machines Regulations 1974 only arose once his employers had provided him with a mechanical circular saw with a properly adjusted guard. In *Scott v Kelvin Concrete (Ayrshire)*, 1993 S.L.T. 935 Ct. Sess. OH, no contributory negligence was established against the works manager who failed to operate an isolator button before clearing an hydraulic press, in view of his employer's gross breaches of duty in by-passing other safety features on the machine.

827 See para.13-67 and following.

828 Work Equipment Regulations 1998 reg.14(2).

829 Work Equipment Regulations 1998 reg.15.

830 Work Equipment Regulations 1998 reg.16.

831 Work Equipment Regulations 1998 reg.17. Reg 17(2) of the Provision and Use of Work Equipment Regulations 1998 provides that "Except where necessary, the employer shall ensure that no control for work equipment is in a position where any person operating the control is exposed to a risk to his health and safety." In *Willock v Corus UK Ltd* [2013] EWCA Civ 519, it was held that the regulation could apply to a risk of injury arising from the positioning of controls of equipment covered by the Regulations. It was not limited to avoiding contact with dangerous machinery but could encompass ergonomic design. The rejection of a "joystick" control by crane drivers, who complained that the existing rotary control required them to adopt a position which was ergonomically unsafe, could not constitute necessity within the meaning of reg.17(2). The claim succeeded due to the near strict liability imposed by reg.17(2) although the defendants' approach to the problem was described as 'reasonable'. This may well be one of those cases where s.69 of the Enterprise and Regulatory Reform Act 2013, would make a difference after 1 October 2013.

832 Work Equipment Regulations 1998 reg.19.

13-252 **Stability** Regulation 20[833] provides that an employer "shall ensure" that work equipment is stabilised. Whilst this wording may tend to imply strict liability, the use of the words "where necessary" have been held to import considerations of foreseeability, "since a step is realistically only 'necessary' when the mischief to be guarded against can be reasonably foreseen".[834] Thus, where it was not reasonably foreseeable that an angry workmate would push over the scaffolding tower on which the claimant was standing, the absence of stabilisers, on an otherwise stable tower, did not give rise to a breach of reg.20.[835] In *Robb v Salamis (M&I) Ltd*,[836] the House of Lords indicated that the same test should be applied in relation to what was "necessary" for purposes of reg.20 as was applied to whether work equipment was "suitable" for purposes of reg.4. The obligation upon the employer under both regulations was to anticipate situations which might give rise to accidents. The employer was not permitted to wait for an accident to happen.

13-253 Regulation 21 requires suitable and sufficient lighting to be provided at places where work equipment is used. It is not clear what reg.21 adds to reg.8 of the Workplace (Health, Safety and Welfare) Regulations 1992[837] but the duty is clearly a strict one.[838] Regulation 13 provides that both work equipment and articles or substances produced, used or stored at a high or very low temperature have protection so as to prevent injury to any persons.

13-254 **Mobile work equipment** Regulations 25 to 30 provide measures to minimise the risk of injury from mobile work equipment (not separately defined) in terms of suitability,[839] and the prevention of such equipment rolling over.[840] Provision is also made to secure the safety of self-propelled work equipment,[841] whether remote controlled or not,[842] and drive shafts where seizure may involve a risk to safety.[843]

13-255 **Power presses** Regulations 31 to 35 replace the Power Press Regulations 1965[844] and apply to power presses, namely presses or press brakes for the working of metal by means of tools, or for die proving, which are powered and embody a flywheel

833 Work Equipment Regulations 1998 reg.20 provides: "Every employer shall ensure that work equipment or any part of work equipment is stabilised by clamping or otherwise where necessary for purposes of health or safety."

834 per Bodey J in *Horton v Taplin Contracts Ltd* [2003] P.I.Q.R. P180, CA, at P182.

835 *Horton v Taplin Contracts Ltd* [2003] P.I.Q.R. P180.

836 *Robb v Salamis (M&I) Ltd* [2007] 2 All E.R. 97, HL. The pursuer suffered injury after falling to the floor when descending a suspended ladder from a bunk bed: the ladder was not properly engaged within retaining bars and came away. The employer ought to have anticipated that moveable ladders could be misplaced in position, with the risk that they could become detached in use, but the pursuer was also 50 per cent to blame. See further as to the extent to which the concept of reasonable foreseeability applies under the Work Equipment Regulations, *Hide v The Steeplechase Company (Cheltenham) Ltd* [2013] EWCA Civ 545, para.13-218.

837 Discussed at para.13-152.

838 See *Davies v Massey Ferguson Perkins* [1986] I.C.R. 580 discussed at para.13-152.

839 Work Equipment Regulations 1998 reg.25.

840 Work Equipment Regulations 1998 reg.26: forklift trucks have a separate provision in reg.27.

841 Work Equipment Regulations 1998 reg.28.

842 Work Equipment Regulations 1998 reg.29.

843 Work Equipment Regulations 1998 reg.30.

844 SI 1965/1441 as amended which continued to apply up to 4 December 1998.

will be in breach of common law duty by continuing to employ the employee.[868] All other avenues having been properly explored, the employee will have to be dismissed.[869] Personal protective equipment is defined as meaning all equipment including clothing which is intended to be worn or held by a person at work and which protects him against one or more risks to health and safety. Ordinary working clothes and uniforms are excluded[870] but the definition has been held to be wide enough to cover body armour.[871] These regulations give way to more detailed provision where such is provided elsewhere.[872]

13-262 Regulation 4(3) deals with the suitability of protective equipment.[873] In considering the section, it is first necessary to identify the risk of injury, and then ask if the equipment in fact provided to the claimant was, so far as practicable, effective to prevent or adequately control that risk. It was only if the equipment was effective, or it was not practicable to make it effective, that there is a need to consider whether the equipment was appropriate within reg.4(3)(a) or take account of ergonomic requirements or the claimant's state of health within reg.4(3)(b). So, a breach of reg.4(3) arose where the claimant, a serving police officer attending an advanced motorcycle course as part of his training, wore the standard boots issued by his employer, when required to ride off-road on an unmetalled track. He had a severe injury to his leg when he lost control of his motorcycle and it fell upon his leg. It was not a sufficient answer to the claim that the boots were appropriate for the training he was being required to undertake. The question was whether they had been effective to ensure the prevention of the significant injury he had suffered. They had clearly not been and if liability was to be avoided the defendant had then to plead and prove that it had not been practicable for protective equipment to have been supplied which would have prevented that injury. In fact, it had been possible to prevent the claimant's injury by providing stronger boots.[874]

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the glass, cutting her thumb). See *Blair v The Chief Constable of Sussex Police* [2013] P.I.Q.R. P20. When considering what constituted 'suitable' PPE it was held that "likelihood or foresight of injury does not come into the matter". See also *Kennedy v Cordia (Services) LLP* [2016] 1 W.L.R. 597 fn.865 (it was established that anti-slipping attachments were available at a modest cost; that they were used by other employers to address the risk of their employees slipping and falling on footpaths covered in snow and ice; that there was a body of research demonstrating that their use reduced the risk of slipping in wintry conditions; and there was expert evidence that such attachments made a difference).

868 *Lane Group Plc v Farmiloe* [2004] P.I.Q.R. P324, EAT: warehouseman whose feet were at risk from falling items or being run over by fork lift trucks, was unable to wear protective footwear because it aggravated his constitutional psoriasis. There was no legal basis for the employers carrying out an individual risk assessment relieving the employers of the duty to provide such footwear. Nor did the employers have to balance the risk of injury with the detriment of potential dismissal.

869 *Lane Group Plc v Farmiloe* [2004] P.I.Q.R. P324, at P335, [43(b)].

870 Protective Equipment Regulations reg.3(2).

871 *Henser-Leather v Securicor Cash Services Ltd* [2002] EWCA Civ 816 where, in the event of not being able to reduce the risk of attacks to a level comparable to that to which the public at large were exposed, the duty under reg.4 was engaged.

872 reg.3(3): see, e.g. the Control of Substances Hazardous to Health Regulations 2002, the Control of Vibration at Work Regulations 2005 (SI 2005/1093) with effect from 6 July 2005 and the Control of Noise at Work Regulations 2005 (SI 2005/1643) repealing and replacing the Noise at Work Regulations 1989 with effect from 6 April 2006.

873 reg.4(3). See *Threlfall v Hull CC* [2011] P.I.Q.R. P3, CA.

874 *Blair v Chief Constable of Sussex Police* [2012] EWCA Civ 633. See also *Threlfall v Hull CC* [2011] P.I.Q.R. P3 (liability under reg.4(3) where gloves supplied to the claimant by his employer were not cut-resistant and he cut his hand picking up a black bag of rubbish from the garden of an unoccupied local authority house: the gloves were unsuitable and liability followed even though the claimant could not say exactly how in handling the bag his hand was cut). Suitability is to be judged at the time the equipment was provided (at [39]).

There is a requirement for risk assessment.[875] Regulation 5 requires compat- **13-263**
ibility as between several pieces of personal protective equipment used simultaneously. The employer must provide information, instruction and training regarding the risks the personal protective equipment is designed to avoid or limit,[876] the purpose for which and the manner in which it is to be used and the steps required to keep it in good repair.[877] As in other similar regulations, such information and instruction must be comprehensible to the worker.[878] Having provided the personal protective equipment, duties are imposed both on employer and employee to ensure that it is used in accordance with the regulations.[879] The employee is also under a duty to report its loss or any obvious defect.[880] Although it can be a defence to establish that if particular safety equipment had been provided it would not have been worn, the burden rests on the employer to lead evidence from which that can be inferred. The burden was not discharged where a police officer was injured by the sharp edge of glass from a broken window and she herself had not led evidence that if heavy gloves had been provided she would have worn them.[881] Where an employee has been injured as a result of being exposed to a risk against which personal protective equipment should have been provided, and it is established the employee would have used it if provided, it will normally be reasonable to infer that the failure to provide the equipment made a material contribution to causation of an injury. Such an inference is reasonable because the equipment which the employer failed to provide would, by definition, have prevented the risk or rendered injury highly unlikely, so far as practicable.[882]

Maintenance Once provided, personal protective equipment must be maintained **13-264**
and replaced where necessary[883] and accommodation must be provided for it.[884] Despite the absolute duty of the nature to maintain, the House of Lords in *Fytche v Wincanton Logistics Plc*,[885] held that a claim under reg.7(1) failed where the claimant sustained frostbite in extreme weather owing to the ingress of water through a tiny hole of the steel-capped boots provided to him by the defendant employer. No one knew of the presence of the hole and nor could it reasonably have been discovered by the employer. The boots were in otherwise satisfactory condition and, in particular, the steel toecap gave the protection against the risks for which the protective equipment, namely boots of that type, had been provided. Lord Hoffmann said:

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875 reg.6.

876 In relation to analogous duties under Provision and Use of Work Equipment Regulations 1998 see para.13-229 and fn.764 and fn.765 thereunder.

877 reg.9(1).

878 reg.9(2).

879 reg.10.

880 reg.11.

881 *Taylor v Chief Constable of Hampshire Police* [2013] EWCA Civ 496, fn.867. See generally, Ch.12, para.12-91.

882 *Kennedy v Cordia (Services) LLP* para.13-261, per Lords Reed and Hodge SCJs at [119]. They added that such an inference would not be appropriate if the cause of the accident was unconnected with the risk against which the employee should have been protected.

883 reg.7: maintained in the sense discussed at paras 13-145 to 13-149, thus imposing an absolute duty.

884 reg.8.

885 *Fytche v Wincanton Logistics Plc* [2005] P.I.Q.R. P61, HL. See also McCool "Danger at work" 149 S.J. 345.

chimneys at their oil distribution depot, the claimant was entitled to recover damages.[110]

14-28 More recently, the origins of the *Rylands* rule in nuisance have been emphasised.[111] A claim for nuisance can only be maintained by someone having an interest in the land affected,[112] and logically the same should apply to a *Rylands* claim. In *Transco Plc v Stockport MBC*[113] it was said that the *Rylands* rule exists "as a remedy for damage to land or interests in land".[114] It would seem likely, given this approach, that earlier cases in which it was contemplated that the action might extend to groups without an interest in the land affected should no longer be regarded as authoritative.[115]

14-29 **What damage may be recovered** In the leading case itself, Blackburn J said that the defendant was "prima facie answerable for all the damage which is the natural consequence" of the dangerous thing's escape.[116] In light of the House of Lords' decision in *Cambridge Water Co v Eastern Counties Leather Plc*[117] that is too wide a statement to represent the modern law. Foreseeability of damage of the relevant type is required.[118] Even then, not all types of damage are recoverable.

14-30 **Personal injury** There were long-standing doubts whether the rule encompassed claims for personal injury,[119] but in *Cambridge Water* Lord Goff quoted with approval a passage from a "seminal article"[120] which described as "rash" the conclusion that a remedy for personal injury was given.[121] Thereafter, two members of the House of Lords indicated that damages for personal injuries should not be recoverable in *Rylands v Fletcher* although a contrary view was expressed by a dissenting member.[122] Taking into account further expressions of opinion in the House of Lords in *Transco*,[123] it should be regarded as settled that the rule has no application to cases of personal injury.[124] Nevertheless, in an interlocutory appeal to the Court of Appeal against a refusal to strike out as an abuse of process a claim for personal injury arising out of an alleged public nuisance in *Group Claimants v Corby BC*,[125] the

[110] *Halsey v Esso Petroleum Co Ltd* [1961] 1 W.L.R. 683. See "Wild Beasts in Fulham", 105 S.J. 579, cf. *Vaughn v Halifax-Dartmouth Bridge Commission* (1961) 29 D.L.R. (2d) 523: damage caused to a car by paint blown from painting process of bridge did not arise out of the use and occupation of land and the painting was a natural user of land.

[111] See para.14-04.

[112] *Hunter v Canary Wharf Ltd* [1997] A.C. 655.

[113] *Transco Plc v Stockport MBC* [2004] 2 A.C. 1.

[114] *Transco Plc v Stockport MBC* [2004] 2 A.C. 1 per Lord Hoffmann at [39].

[115] In *McKenna v British Aluminium Ltd* [2002] Env. L.R. 30 a judge at first instance refused an application to strike out claims by persons without an interest in land on the basis that it was arguable that the common law may be extended or changed in order to comply with the Human Rights Act 1998. Absent the Human rights argument he would have struck out the claims.

[116] *Rylands v Fletcher* (1865-66) L.R. 1 Ex. 265 at 279.

[117] *Cambridge Water Co v Eastern Counties Leather Plc* [1994] 2 A.C. 264.

[118] *Cambridge Water Co v Eastern Counties Leather Plc* [1994] 2 A.C. 264 per Lord Goff at 306.

[119] For cases on both sides of the question, see earlier editions of this work.

[120] Newark, "The Boundaries of Nuisance" (1949) 65 L.Q.R. 480.

[121] *Cambridge Water Co v Eastern Counties Leather Plc* [1994] 2 A.C. 264 at 297, 298.

[122] *Hunter v Canary Wharf Ltd* [1997] A.C. 655 per Lord Goff at 692 and per Lord Lloyd at 696, but per Lord Cooke, dissenting, at 718.

[123] *Transco* [2004] 2 A.C. 1.

[124] [2004] 2 A.C. 1 e.g. per Lord Bingham of Cornhill at [9] and per Lord Hoffmann at [35].

[125] *Group Claimants v Corby BC* [2009] Q.B. 335 P16 CA, claims by persons born with upper limb

submission that observations in *Hunter v Canary Wharf Ltd*[126] and *Transco Plc v Stockport MBC*[127] had the effect of overruling cases in which damages had been awarded for personal injury in cases of public nuisance was emphatically rejected. Dyson LJ, whilst affirming that damages for personal injuries would not be available for private nuisance or *Rylands v Fletcher*, referred to the "long-established principle that damages for personal injury can be recovered in public nuisance"[128] and added:

> "In the circumstances, it is difficult to see why a person whose life, safety or health has been endangered and adversely affected by an unlawful act or omission and who suffers personal injuries as a result should not be able to recover damages. The purpose of the law which makes it a crime and a tort to do an unlawful act which endangers the life, safety or health of the public is surely to protect the public against the consequences of acts or omissions which do endanger their lives, safety or health. One obvious consequence of such an act or omission is personal injury. The purpose of this law is not to protect the property interest of the public. It is true that the same conduct can amount to a private nuisance and a public nuisance. But the two torts are distinct and the rights protected by them are different."[129]

14-31 Loss[130] arising from damage to chattels has in the past been recovered under the *Rylands* rule.[131] Indeed claimants in nuisance may recover for consequential damage to chattels, provided always that land has also been affected in which they have an interest.[132] It seems likely, however, that purely economic loss will be regarded as too remote.[133] In *Weller v Foot and Mouth Disease Research Institute*[134] an action was brought by auctioneers, claiming the loss of business which arose when two markets at which cattle were sold by auction were closed after an outbreak of foot and mouth disease in the vicinity. On the assumption that the defendants had imported on their premises an African virus which had escaped and caused the outbreak of the disease it was held, inter alia, that the claimants were not entitled to recover their loss of profits under the *Rylands* rule. One basis of the judgment was expressed to be their lack of any proprietary interest in land on to which the

deformities who allege that their disabilities arose as a result of exposure of their mothers to toxic materials from a site controlled by the defendant during the embryonic stage of pregnancy. See also Pawlowski, "More than a nuisance: personal injury under Rylands", 153 S.J. 11 which suggests that *Rylands v Fletcher* may still give a remedy to someone claiming to have suffered personal injury as a result of a relevant escape.

[126] *Hunter v Canary Wharf Ltd* [1997] A.C. 655.

[127] *Transco Plc v Stockport MBC* [2004] 2 A.C. 1.

[128] *Group Claimants v Corby BC* [2009] Q.B. 335

[129] *Corby Group Litigation Claimants v Corby BC* [2009] Q.B. 335 at [30]. The contrary view advanced by the defendant based on "The Boundaries of Nuisance", Newark, (1949) 65 L.Q.R. 480, was acknowledged by Dyson LJ to be a "powerful argument", [31] but a matter for the House of Lords. The defendant, at the subsequent trial, accepted that it was bound by the decision of the CA but reserved its position for any further appeal: [2009] EWHC 1944 (TCC).

[130] For economic loss generally, see Ch.2, paras 2-227 to 2-259.

[131] See paras 14-01 to 14-04.

[132] *Hunter v Canary Wharf Ltd* [1997] A.C. 655 at 706 where Lord Hoffmann gave examples of recoverable consequential loss such as damage due to the loss of chattels or livestock where land is flooded.

[133] *Cattle v Stockton Waterworks* (1875) L.R. 10 Q.B. 453 (claimants failed to recover increased cost of constructing a tunnel after an escape of water from defendants' pipes).

[134] *Weller v Foot and Mouth Disease Research Institute* [1966] 1 Q.B. 569.

virus could have escaped,[135] but the case is more satisfactorily regarded as an example of the type of loss which will be regarded as too remote.

14-32 **Highway cases** The requirement that the dangerous thing must have escaped from land in the defendants' occupation or control has been held to have one exception in the case of the user of a highway. The *Rylands v Fletcher* rule has been held to cover cases where the dangerous thing is brought or carried along the highway.[136] So, when a person brought on or interfered with any dangerous thing upon the highway, as a result of which adjoining property[137] suffered damage, he was liable without proof of negligence.[138] Where a person sent on to the highway a traction engine and sparks emitted from it caused a fire, he was held liable.[139] Likewise, where an inflammable gas was created by the volatilisation of bitumen, surrounding the defendants' defective underground electricity cable laid in the street, whence it escaped into the claimant's dwelling-house and caused damage by an explosion and fire, the corporation was held liable.[140] The authority of many of these cases, including the highway exception itself, as routes to liability under the rule *Rylands v Fletcher*, though not public or private nuisance, must be considered to be in doubt in view of the restricted scope of the rule as set out in *Transco*[141] and the necessity for there to be an interference with the victim's enjoyment of property following *Hunter*.[142]

14-33 **Shipping cases** The principle has been held not to be applicable where there was an escape from a ship.[143] However, it has been said that, given the extension of the *Rylands* principle to accumulations upon the highway, there are strong arguments to extend it to accumulations in or on a vessel in a navigable river.[144]

2. DEFENCES

14-34 **Generally** In giving judgment in *Rylands v Fletcher*,[145] Blackburn J indicated that there were certain exceptions to the principle of strict liability and, because these will afford a defence to an action based on the rule, each should be considered. They

[135] *British Celanese v A.H. Hunt (Capacitors) Ltd* [1969] 1 W.L.R. 959.
[136] *Jones v Festiniog Railway Co* (1868) L.R. 3 Q.B. 733; *Powell and Fall* (1880) 5 Q.B.D. 597; *Halsey v Esso Petroleum Co* [1961] 1 W.L.R. 683 (where the dangerous thing escapes onto the public highway and damages a personal chattel such as a motorcar parked outside by the roadside).
[137] Which does not include other users of the highway. Such persons must still prove negligence: *Mitchell v Mason* (1966) 10 W.I.R. 26.
[138] "A tiger may neither trespass off the highway nor do damage on the highway without liability to the owner": per Atkin LJ in *Manton v Brocklebank* [1923] 2 K.B. 212 at 231. Nevertheless, there would be defences open to him by proving either that the accident was the result of an act of God or of a stranger.
[139] *Powell v Fall* (1880) 5 Q.B.D. 597; *West v Bristol Tramways* [1908] 2 K.B. 14.
[140] *Midwood v Manchester Corp* [1905] 2 K.B. 597; followed in *Charing Cross Electricity Supply Co v Hydraulic Power Co* [1914] 3 K.B. 772.
[141] See para.14-04. It is notable that in *Read v Lyons* [1947] A.C. 156 Lord Simmons at 183 did not regard the cases relating to escapes from pipes laid in the highway or equipment placed on the highway as establishing a settled rule that such escapes come within the rule in *Rylands v Fletcher*.
[142] See para.14-230.
[143] *Miller Steamship Co v Overseas Tank Ship (UK) Ltd; The Wagon Mound (No.2)* [1963] 1 Lloyd's Rep. 402, which point did not fall to be considered by the PC [1967] 1 A.C. 617.
[144] per Potter J in *Crown River Cruisers Ltd v Kimbolton Fireworks Ltd* [1996] 2 Lloyds Rep. 533..
[145] *Rylands v Fletcher* (1865-66) L.R. 1 Ex. 265, 279–280.

fall under the heads of: (a) act of God; (b) default of the claimant; (c) consent of the claimant; (d) independent act of third party; and (e) statutory authority.

(A) Act of God[146]

14-35 Although the question was reserved in *Rylands v Fletcher*, whether act of God might not have afforded a defence, this question was answered in the affirmative in *Nichols v Marsland*.[147] Strictly the position remains that it has not been established by any decisions of the House of Lords that act of God *is* a defence.[148] However, for an escape of a danger to fall within the description of "act of God" would be a very rare event.

14-36 It has been said that act of God arises as a defence in "circumstances which no human foresight can provide against, and of which human prudence is not bound to recognise the possibility … which when they do occur … are calamities that do not involve the obligation of paying for the consequences that may result from them."[149] Accordingly, to qualify, the occurrence in question must be the result of natural causes and not human agency.[150] If a ship on the high seas were to be overwhelmed by some abnormal wave, this would be an act of God; but if it ran aground during a thick fog as a result of careless navigation, this would be an act of man.[151] To be an act of God an occurrence must be: (a) exclusively the consequence of natural causes; (b) of an extraordinary nature; and (c) such that it could not be anticipated or provided against by the defendant.

14-37 In some old cases there was debate whether an act of God was something which could not be anticipated or guarded against (adopted by the House of Lords)[152]; or alternatively, something which could not *reasonably* be anticipated or guarded against.[153] The difference is of little practical significance. Anyone must anticipate as likely to occur such natural phenomena as have already occurred in the United Kingdom and the margin of safety must be based not on the average but on the extreme. Even when extremes have been ascertained, it is not beyond contemplation that they may be exceeded. There is "no clear-cut choice in law" between the

[146] See further Ch.6, para.6-14.
[147] *Nichols v Marsland* (1876) 2 Ex.D. 1. It is to be observed that Lord Parker in *Greenock Corp v Caledonian Railway Co* [1917] A.C. 556 at 581 expressed doubts that the finding of fact was correct. See also Barrett, "Common Law Liability for Flood Damage Caused by Storms", 142 New L.J. 1608.
[148] *Greenock Corp v Caledonian Railway Co* [1917] A.C. 556; *Attorney General v Cory Bros* [1921] 1 A.C. 521.
[149] per Lord Westbury defining the Scottish equivalent (*damnum fatale*) in *Tennent v Earl of Glasgow* (1864) 2 M. (H.L.) 22, approved by the HL in *Greenock Corp v Caledonian Railway Co* [1917] A.C. 556.
[150] *Forward v Pittard* (1785) 1 T.R. 27, per Lord Mansfield: "Now what is the act of God? I consider it to mean something in opposition to the act of man."
[151] *Liver Alkali Co v Johnson* (1874) L.R. 9 Ex. 338.
[152] *Nugent v Smith* (1875) 1 C.P.D. 19 at 34, per Brett J; *Hamilton v Pandorf* (1886) 17 Q.B.D. 670 at 675, per Lord Esher; *R. v Commrs of Sewers for Essex* (1885) 14 Q.B.D. 561 at 574, per Coleridge CJ and Cave J cf. *Great Western Railway Co v Owners of S.S. Mostyn* [1928] A.C. 57 at 105, where Lord Blanesburgh refers to an act of God as something which had taken a ship out of control "by an irresistible and unsearchable providence nullifying all human effort".
[153] *Nugent v Smith* (1876) 1 C.P.D. 423, per Cockburn CJ (at 426) and James LJ (at 444); *Nichols v Marsland* [1917] A.C. 556; *Nitro-Phosphate and Odam's Manure Co v London and St Katherine Docks* (1878) 9 Ch.D. 503, per Fry J; *Baldwin's Ltd v Halifax Corp* (1916) 85 L.J.K.B. 1769, per Atkin J.

tion of premises, "takes the premises as they are, and, accordingly, consents to the presence there of the installed water system with all its advantages and disadvantages".[173]

14-43 The defence of consent to a claim based on *Rylands v Fletcher* was not available to a negligent defendant in *Colour Quest Ltd v Total Downstream UK Plc*[174] which concerned a large number of claims arising out of explosions on 11 December 2005 at the Buncefield Oil Storage Depot at Hemel Hempstead, Hertfordshire. Petrol vapour accumulated after the failure of employees of one of the companies responsible for the storage of oil at the depot to notice that an oil tank gauge was stuck, as a result of which the amount of space within the tank for further oil to be added was incorrectly displayed. That and other systemic negligence defeated the defendants' contention that the claimants had consented to the bringing of oil product onto the site and its accumulation there.

14-44 Whether or not the claimant has agreed, expressly[175] or by implication, to take upon himself the risk of injury from the dangerous thing is a question of fact, but the mere fact that he occupies premises near to a gasworks or a munitions factory, does not mean that he has necessarily agreed to bear the risk of an explosion, except where he can prove negligence. It would be otherwise if he were the owner of the land and had let it to a tenant for that purpose.

14-45 **Common benefit** If the dangerous thing has been brought upon premises for the common benefit of the claimant and the defendant, there is an implied agreement to run the risk of damage, unless negligence on the part of the defendant can be proved. A typical example of this is to be found in cases where water is collected from the spouts of a building, or a cistern is maintained for the common use of the occupiers of different floors in the same building.[176] These cases are considered in further detail, later.[177] There is no common benefit or common interest for this purpose between a statutory supplier of gas, water or electricity and the individual consumer.[178]

14-46 In addition to these cases, there is a tendency to hold that damage caused by the ordinary domestic installation of gas, water and electricity is never actionable except on proof of negligence.[179]

a consenting party to the accumulation cannot rely simply upon the escape of the accumulated material; he must further establish that the escape was due to want of reasonable care on the part of the person who made the deposit."

173 *Peters v Prince of Wales Theatre* [1943] K.B. 73 at 79, per Lord Goddard CJ.

174 *Colour Quest Ltd v Total Downstream UK Plc* reported sub nom *Shell UK Ltd v Total UK Ltd* at [2009] 2 Lloyd's Rep 1, Ch.7, para.7-26.

175 Although an exemption clause is not subject to control so far as it excludes or restricts liability under the rule in *Rylands v Fletcher*, where the facts also give rise to liability in negligence any such exemption clause then will fall to be controlled under The Consumer Rights Act 2015 s.69.

176 *Carstairs v Taylor* (1871) L.R. 6 Ex. 217; *Rickards v Lothian* [1913] A.C. 263; *Anderson v Oppenheimer* (1880) 5 Q.B.D. 602; *Blake v Woolf* [1898] 2 Q.B. 426; *Kiddle v City Business Properties Ltd* [1942] 1 K.B. 269.

177 See paras 14-95 to 14-102 (water).

178 *Northwestern Utilities Ltd v London Guarantee and Accident Co* [1936] A.C. 108 at 120; *A. Prosser & Son Ltd v Levy* [1955] 1 W.L.R. 1224 (it was held that the claimant did not impliedly consent to the presence of a water pipe which, unknown to him, was defective).

179 *Collingwood v Home and Colonial Stores* [1936] 3 All E.R. 200; *Tilley v Stevenson* [1939] 4 All E.R. 207.

(D) Independent act of third party

14-47 The rule in *Rylands v Fletcher* does not apply where the damage has been caused by the independent act of a third party, which could not reasonably have been foreseen and guarded against. The basis for the exception[180] is that the defendant has fulfilled his duty of keeping the dangerous thing harmless and that the cause of the damage was "the conscious act of another volition".[181] In considering the escape of water from a reservoir, this question was posed[182]:

> "Suppose a stranger let it loose, would the defendant be liable? If so, then if a mischievous boy bored a hole in a cistern in any London house, and the water did mischief to a neighbour, the occupier of the house would be liable. That cannot be."

In a later case: "if the mischievous, deliberate and conscious act of a stranger causes the damage, the occupier can escape liability; he is absolved."[183]

14-48 Accordingly, when damage was caused to the occupier of the lower floor of a building by an overflow of water from the lavatory basin in the upper floor, and it was proved that the overflow was caused by the malicious act of a third person in turning the tap fully on and plugging the wastepipe, the occupier of the upper floor was held not liable.[184] The defendant could not be said "to have caused or allowed the water to escape if the malicious act of a third person was the real cause of its escaping without any fault on the part of the defendant".[185] Further, where a coach with an empty petrol tank was in a car park and some boys threw a lighted match into the petrol tank, which caused petrol fumes within to explode and injure the 10-year-old claimant, standing nearby, the owners of the coach were held not liable. The explosion was caused by the act of strangers, which could not reasonably have been anticipated and guarded against by the owners.[186] The exception does not apply in the case of damage caused by an animal in circumstances where liability attaches to the keeper under the Animals Act 1971.

14-49 **Meaning of "third party"** There has been no definition of "third party" (or the alternative expression "stranger") for these purposes, although the reported examples do provide a guide. Under the usual principles the defendant is liable for the acts of his employees or agents acting within the scope of their employment or authority.[187] Thereafter the starting point is control. Was the interfering third party one over whose activity the defendant had control?[188] The landowner can be liable for the actions of an independent contractor where he has control over him, in the sense of having invited the contractor upon the land and given a permission to work there which could at any time be withdrawn.[189] The liability goes beyond independ-

180 This exception was first recognised in *Box v Jubb* (1879) 4 Ex.D. 76 at 79, per Kelly CB.

181 Lord Dunedin in *Dominion Natural Gas Co v Collins* [1909] A.C. 640 at 647. See also *Northwestern Utilities v London Guarantee and Accident Co* [1936] A.C. 108 at 120.

182 per Bramwell B in *Nichols v Marsland* (1875) L.R. 10 Ex. 255 at 259, affirmed (1876) 2 Ex.D. 1.

183 per Singleton LJ in *Perry v Kendricks Transport Ltd* [1956] 1 W.L.R. 85 at 87.

184 *Rickards v Lothian* [1913] A.C. 263; *A. Prosser & Son Ltd v Levy* [1955] 1 W.L.R. 1224.

185 per Lord Moulton in *Rickards v Lothian* [1913] A.C. 263 at 278.

186 *Perry v Kendricks Transport Ltd* [1956] 1 W.L.R. 85.

187 *Baker v Snell* [1908] 2 K.B. 825 (inciting a dog to attack a maid); *Stevens v Woodward* (1881) 6 Q.B.D. 318 at 321 (no liability for employee going where he was forbidden to go).

188 *Perry v Kendricks Transport Ltd* [1956] 1 W.L.R. 85.

189 *Rylands v Fletcher* (1865-66) L.R. 1 Ex. 265; *Balfour v Barty-King* [1957] 1 Q.B. 496 at 505.

ent contractors to embrace anyone to whom he gives authority to interfere with the dangerous thing.[190] The defendant's licensee may or may not be a stranger depending upon whether his activities can be controlled.[191] There will be few cases in which a trespasser is not a stranger within the present meaning. A stranger is one over whom the defendant had no control and whose act was unforeseeable and without permission.[192]

14-50 **Test of negligence** Even where the damage has been caused by the act of a third party, the owner of the dangerous thing is liable if there has been negligence on his part. Negligence, in this context, means failing to guard against that which the owner ought reasonably to have foreseen. For example, in *Box v Jubb*[193] the defendants were not liable, when the act of a stranger was one which they "... could not possibly have been expected to anticipate" and which they had no means of preventing. In a later case,[194] Lord Wright said: "Though the act of a third party may be relied on by way of defence in cases of this type, the defendant may still be held liable in negligence if he failed in foreseeing and guarding against the consequences to his works of that third party's act." Accordingly, where a gas main was broken, in consequence of the removal of support by a local authority constructing a sewer, it was held that, although the cause of the fracture was the act of a third party (that is, the local authority), the gas company was liable for the consequent explosion in failing to guard against possible damage to its mains from the local authority's excavation.[195]

14-51 The exception only applies when the act of the third party is a fresh, independent act.[196] In *Rickards v Lothian*,[197] the act of a third party was described as "malicious," later interpreted as meaning a deliberate or conscious act.[198] In *Philco v J. Spurling Ltd*,[199] carriers erroneously delivered highly inflammable film scrap to the

[190] *Hardaker v Idle DC* [1896] 1 Q.B. 335; *Black v Christchurch Finance Co* [1894] A.C. 48.

[191] *Smith v Great Western Railway Co* (1926) 42 T.L.R. 391 (railway company not liable for leakage of oil from a truck into claimant's watercourse where the truck was owned by "third party" oil company); *Holderness v Goslin* [1975] 2 N.Z.L.R. 46 (defendant liable for fire damage to claimant's fences where the fire was started by the son of his farm manager, who burned gorse during the closed fire season).

[192] *Perry v Kendricks Transport Ltd* [1956] 1 W.L.R. 85, per Parker LJ at 92 and applied in *H&N Emanuel v GLC* [1971] 2 All E.R. 835, CA; see also *Hale v Jennings Bros* [1938] 1 All E.R. 579, CA.

[193] *Box v Jubb* (1879) 4 Ex.D. 76. The same test was applied in *Smith v Great Western Railway Co* (1926) 42 T.L.R. 391. In *Rickards v Lothian* [1913] A.C. 263 at 274 it was held that the omission to ask the jury the question whether the defendant ought reasonably to have anticipated the act of the third party, was fatal to any attempt to render him liable, when the damage was in fact caused by the third party's act.

[194] *Northwestern Utilities v London Guarantee and Accident Co* [1936] A.C. 108 at 125. See also to the same effect, per Atkinson J in *Shiffman v Order of St John* [1936] 1 All E.R. 557.

[195] *Northwestern Utilities Ltd v London Guarantee and Accident Co* [1936] A.C. 108. The failure to make proper inspections of a spillway so as to keep it clear of logs and boulders, even although such obstructions were caused partly by the act of another in diverting a small stream, amounted to negligence, since it ought to have been foreseen: *Lewis v District of North Vancouver* (1963) 40 D.L.R. (2d) 182.

[196] per Lord Dunedin in *Dominion Natural Gas Co v Collins* [1909] A.C. 640 at 646, quoted above at para.14-47.

[197] *Rickards v Lothian* [1913] A.C. 263.

[198] per Lord Wright in *Northwestern Utilities Ltd v London Guarantee and Accident Co* [1936] A.C. 108 at 119.

[199] *Philco v J. Spurling Ltd* [1949] 2 All E.R. 882. See also *Prosser & Son Ltd v Levy* [1955] 1 W.L.R. 1224.

wrong address. No proper warning of its dangerous character was given and when it was on the claimant's premises one of the claimant's typists set it on fire with her cigarette. An explosion occurred, causing serious damage. The defendants were held liable, because the evidence did not establish that the fire was caused by the deliberate act of the typist. Had it been so caused, the majority of the court would have held that the defendants were not liable.

14-52 **Burden of proof** The burden of proving the defence of a third party's independent act is on the defendant. On proof by the claimant that a dangerous thing, for which the defendant is responsible, caused the damage in question, the defendant is liable, unless it is shown: (a) that the damage was caused by the independent act of a third party; and (b) that the act could not reasonably have been anticipated and guarded against. These two elements, combined, form the defence. It is insufficient merely for the defendant to prove (a) and then to attempt to throw the burden of proving (b) on the claimant. So, in *Rylands v Fletcher*, Blackburn J said: "He [the defendant] can excuse himself by showing that the escape was owing to the plaintiff's default; or perhaps that the escape was the consequence of *vis major*, or the act of God."[200] In a later case it was put as follows:

> "A person who brings a dangerous thing onto his land and allows it to escape, thereby causing damage to another, is liable to that other unless he can show that the escape was due to the conscious act of a third party, and without negligence on his own part. Obviously, the burden of showing that there was no negligence is not the defendants, and it is not for the plaintiff to prove negligence affirmatively."[201]

(E) Statutory Authority

14-53 If a danger has been created or maintained under statutory authority, there is no liability under the rule in *Rylands v Fletcher*. Usually in such a case liability will only be established if negligence is proved. It "is now thoroughly well established that no action will lie for doing that which the legislature has authorised, if it be done without negligence, although it does occasion damage to anyone; but an action does lie for doing that which the legislature has authorised, if it be done negligently."[202] Accordingly, in actions against gas, water and electricity undertakings, which operate under statutory powers, the rule in *Rylands v Fletcher* is not applicable.[203] Of course, the statutory authorisation may preserve the liability of the statutory undertaker for nuisance[204] and, in such a case, it is unnecessary to prove

[200] *Rylands v Fletcher* (1868) L.R. 1 Ex. 265 at 279, 280. See further per Lord Wright in *Northwestern Utilities Ltd v London Guarantee and Accident Co* [1936] A.C. 108, at 120.

[201] per Goddard LJ in *Hanson v Wearmouth Coal Co* [1939] 3 All E.R. 47, 53.

[202] *Geddis v Proprietors of Bann Reservoir* (1878) 3 App.Cas. 430 at 455, per Lord Blackburn. See also *Dunne v North Western Gas Board* [1964] 2 Q.B. 806.

[203] *Green v Chelsea Waterworks Co* (1894) 70 L.T. 547; *Northwestern Utilities Ltd v London Guarantee and Accident Co* [1936] A.C. 108. See further para.14-132 (gas), para.14-57 (water) and para.14-160 (electricity).

[204] In *Department of Transport v North West Water Authority* [1984] A.C. 336, it was held that the Public Utilities Street Works Act 1950 s.18(2), did not alter the existing law that a body was not liable for a nuisance, which was attributable to its performance of a statutory duty, albeit the statute expressly preserved liability in nuisance (applying *Stretton's Derby Brewery Co v Mayor of Derby* [1894] 1 Ch. 431 and *Smeaton v Ilford Corp* [1954] Ch. 450).

negligence.[205] To be a defence, the statute must authorise the creation or maintenance of the dangerous thing expressly or by necessary implication[206]; it is not enough merely to permit it to be used.[207] The exact position depends on the construction of the statute in question.

14-54 In considering whether the statutory authority has been exercised without negligence, the degree of care to be taken must be proportionate to the degree of risk involved.[208] When dealing with any dangerous things, a very high degree of care is required. The statutory undertakers must use all reasonable care in the erection and maintenance of their works. They are not bound "to ransack science in the hope of discovering some scientific specific against possible accident," but are bound "to use well-known scientific means".[209] This may involve their consulting outside experts in addition to the technical and scientific members of their own staffs.[210] Whilst they must use reasonable care to maintain their works in a state of efficiency, they are not liable solely because they have not "adopted the last inventions of ever-changing, ever-advancing scientific discovery."[211] At the same time,

> "... the authority to erect and work the plant and the obligation in both respects to use reasonable care and precautions are correlative, and erection cannot be so severed from use and maintenance as to entitle the undertakers to go on permanently using a plant with all its original imperfections unremedied, merely on the ground that original faults in construction must be deemed to be irremediable in subsequent use. Reasonableness applies not merely to construction but to improvement."[212]

Inevitably what amounts to negligence will depend on the circumstances of the particular case.[213]

14-55 **Burden of proof** The burden of proof is on the statutory undertaker to prove that it has statutory authority to create, maintain or use the dangerous thing, and that it is exercising its powers without negligence.[214]

14-56 **Statutes imposing strict liability** Some statutes impose strict liability for the escape of a dangerous thing, for example, the Reservoirs Act 1975.[215] Likewise strict liability is imposed in relation to the escape of ionising radiations[216] oil pollution by ships[217] and the dumping of very long-life toxic waste materials.[218]

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[205] *Midwood v Manchester Corp* [1905] 2 K.B. 597; *Charing Cross Electricity Supply Co v Hydraulic Power Co* [1914] 3 K.B. 772.
[206] *West v Bristol Tramways* [1908] 2 K.B. 14.
[207] *Jones v Festiniog Railway Co* (1868) L.R. 3 Q.B. 733.
[208] *Northwestern Utilities Ltd v London Guarantee and Accident Co* [1936] A.C. 108 at 126, per Lord Wright.
[209] *Snook v Grand Junction Waterworks* (1886) 2 T.L.R. 308.
[210] *Manchester Corp v Farnworth* [1930] A.C. 171.
[211] *National Telephone Co v Baker* [1893] 2 Ch. 186 at 205.
[212] *Manchester Corp v Farnworth* [1930] A.C. 171 per Lord Sumner, at 202.
[213] See further: *Midwood v Manchester Corp* [1905] 2 K.B. 597 at 608; *Quebec Railway Co v Vandry* [1920] A.C. 662; *Eastern and South African Telephone Co v Cape Town Tramways* [1902] A.C. 381.
[214] *Manchester Corp v Farnworth* [1930] A.C. 171.
[215] Which, by s.28 has repealed and re-enacted the Reservoirs (Safety Provisions) Act 1930. See para.14-84.
[216] Nuclear Installations Acts 1965–1969. See paras 14-209 to 14-220 and Lloyd, "Liability for Radiation Injuries" [1959] C.L.P. 33.
[217] The Merchant Shipping Act 1995. See para.14-208.
[218] Deposit of Poisonous Waste Act 1972, which was repealed by the Control of Pollution Act 1974

3. WATER

Liability for accumulating water Someone who, as a non-natural user, accumulates water on land does so at their peril.[219] It matters not whether the water is accumulated in a reservoir,[220] a tank,[221] a mound of earth,[222] a cellar[223] or even a drain which has become blocked through neglect.[224] **14-57**

On the other hand, if a person who is a natural user of land accumulates water on it, for example in a pond or a stream, there is no liability under *Rylands v Fletcher* for damage caused by its overflow.[225] The same applies where a landowner does something on his own land, such as digging a trench to lay a pipe,[226] which causes water naturally on the land to flow more quickly onto his neighbour's land, provided that he does not collect it in any way. But if he causes more water to be discharged from his land onto his neighbour's land than would normally be the case, or collects the drainage of his land into one place and discharges it onto his neighbour's land, he will be liable.[227] As already noted,[228] a landowner is entitled to abstract subterranean water flowing in undefined channels beneath his land, regardless of the consequences to his neighbours.[229] **14-58**

Water on the highway A highway authority is not entitled to discharge water from the highway onto the lands of adjoining occupiers, or to construct roads which are so inadequately drained that water is caused to flow onto the adjoining land. Where a local authority built a road on the side of a hill, so that it acted as a catch-water for rain-water from the upper slopes and also caught loose shale brought down by the rain, with the result that, in a heavy rain, vast quantities of water and shale were caught and overflowed onto property in the valley below, the authority was liable for failing to provide against what occurred.[230] A highway authority was **14-59**

Sch.4, and re-enacted in s.88.
[219] *Rylands v Fletcher* (1868) L.R. 3 H.L. 330.
[220] *Rylands v Fletcher* (1868) L.R. 3 H.L. 330.
[221] *Western Engraving Co v Film Laboratories Ltd* [1936] 1 All E.R. 106: closed apparatus, a boiler, a sink and other containers used in the cinematographic business.
[222] *Hurdman v North Eastern Railway Co* (1878) 3 C.P.D. 168. To the same effect is *Maberley v Peabody & Co* [1946] 2 All E.R. 192, and see *Broder v Saillard* (1876) 2 Ch.D. 692 (the defendant was liable where water from his broken soil pipe discharged into an artificial mound of earth made by him against the claimant's wall).
[223] *Snow v Whitehead* (1884) 27 Ch.D. 588.
[224] *Sedleigh-Denfield v O'Callaghan* [1940] A.C. 880.
[225] The decision that there had been a natural user of land in *Rouse v Gravelworks Ltd* [1940] 1 K.B. 489 where water had accumulated in a quarry was criticised in *Leakey v National Trust* [1980] Q.B. 485, the CA preferring *Davey v Harrow Corp* [1958] 1 Q.B. 60 where the encroachment of roots and branches onto a neighbour's land causing damage gave the neighbour an action in nuisance.
[226] *Barlett v Tottenham* [1932] 1 Ch. 114: an underground spring was tapped with the result that water was discharged on to the claimant's land.
[227] *Hurdman v North Eastern Railway Co* (1878) 3 C.P.D. 168, *Whalley v L. & Y. Railway Co* (1884) 13 Q.B.D. 131.
[228] See above, Ch.2 para.2-126.
[229] *Chetwynd v Tunmore* [2016] EWHC 156 (QB) (no liability in negligence or nuisance where it was alleged that accumulating water in four lakes caused a significant decrease in the levels of lakes on adjoining land which were used as a commercial fishery; a claim under the Water Resources Act 1991 s.48A also failed, "but for" causation not being made out).
[230] *Baldwins Ltd v Halifax Corp* (1916) 85 L.J.K.B. 1769. See also *Thomas v Gower RDC* [1922] 2 K.B. 76 (highway authority held liable when it diverted two streams to one culvert and thereby flooded the claimant's land—s.67 of the Highway Act 1835 no defence.) But cf. *Ely Brewery Co v*

v National Trust.[251] In extending the duty explained in *Goldman v Hargrave*,[252] Megaw LJ recognised the potential for injustice to a neighbour who might be affected by an overflow due to flooding: "If the risk is one which can readily be overcome or lessened, for example by reasonable steps on the part of the landowner to keep the stream free from blockage by flotsam or silt carried down, he will be in breach of duty if he does nothing or does too little."[253] The scope of the landowner's duty was considered in *Lambert v Barratt*[254] where a local authority sold land to a developer and retained adjacent land on which water accumulated, due to the developer blocking a culvert. As a result, properties on other land adjacent to that of the authority were flooded. Reference was made to the measured duty of care placed upon an occupier of land who became aware of a danger which threatened his neighbour's property. The duty required that the occupier do what reasonably ought to be expected of him bearing in mind his resources, the remedial measures required and the fact that the danger had not arisen through any fault of his own. Bearing in mind the problem had been caused by the actions of the developer from whom the owner of the properties affected had the right to recover the whole of the cost of remedial work, it was not fair, just or reasonable to require the local authority itself to carry out or pay for the necessary work. Its duty was limited to co-operating in the construction of suitable drainage, which would include giving access to its land for that purpose. Financial pressure in on a public authority will not, however, inevitably amount to a defence to such a claim.[255]

14-68 **Discharging accumulated water onto land of another** Proprietors of higher land have a natural right to have the water, which naturally falls on their land, discharge onto the contiguous lower land of other proprietors[256]; but if water has accumulated naturally on a person's land he must not interfere with it, so as to discharge it onto his neighbour's land. If the water goes onto his neighbour's land in the ordinary course of nature, without assistance from him, he is not liable for the resultant damage[257]; but, if he digs a drain or does any other act, which causes it to go into his neighbour's land, he is liable. Where a quantity of rainwater accumulated against a railway embankment and, to prevent the embankment from giving way, the railway company made cuttings which caused the water to go on to the neighbouring land, the company was liable.[258]

K.B. 115 at 121, per Goddard LJ who said: "I think that the common law of England has never imposed liabilities upon landowners for anything which happens to their land in the natural course of affairs if the land is used naturally."

251 *Leakey v National Trust* [1980] Q.B. 485, CA. See also *Holbeck Hall Hotel Ltd v Scarborough BC* [2000] Q.B. 836, *Delaware Mansions Ltd v Westminster City Council* [2002] 1 A.C. 321 and *Green v Lord Somerleyton* [2004] 1 P. & C.R. 33.

252 *Goldman v Hargrave* [1967] 1 A.C. 645, PC.

253 at p.526 per Megaw LJ. The scope of the duty is to do that which it would have been reasonable for the particular defendant to do, taking into account his means, where serious expenditure would be required to avert the danger, although this would have to be looked at in a broad way.

254 *Lambert v Barratt* [2010] B.L.R. 527 CA. See further Ch.2 para.2-72.

255 *Vernon Knight Associates v Cornwall Council* [2014] Env. L.R. 125 (a case where pressure on finances did not avail the authority, and Jackson LJ, at [49], summarised the principles applicable to a land owner's liability for non-feasance in respect of a natural nuisance, doubting the availability of insurance as a relevant consideration in determining the scope of the duty).

256 *Gibbons v Lenfestey* (1915) 84 L.J.P.C. 158.

257 *Rouse v Gravelworks Ltd* [1940] 1 K.B. 489.

258 *Whalley v L. & Y. Railway Co* (1884) 13 Q.B.D. 131.

Barriers against floods A landowner can erect a barrier to prevent flood water from coming onto his own land, although the natural consequence of his doing so is to cause more water to flow onto his neighbour's land.[259] It has been said that the application of such a rule would not give rise to a breach of art.8 of the European Convention on Human Rights as it met the balance between the demands of the general interest of the community and the need for the protection of the fundamental rights of the individual.[260] In one catastrophic case, the defendant tipped spoil onto its land, raising its level by some 10 feet and, thereafter, following exceptionally heavy rainfall, the River Taff burst its banks and water, which would otherwise have flowed onto the defendant's land, flooded the homes of 32 claimants to a depth of one metre. The defendant was not liable for the damage. A landowner was permitted to erect defences, the effect of which would be to discharge elsewhere water which would otherwise have flowed onto his land, subject to two limitations: (i) interference with an established watercourse was prohibited; and (ii) the landowner would not be permitted to take measures so as to cause water which had already or would in any event come onto his land to flow from it onto that of his neighbour. On the facts of the case, those two limitations had been met.[261] 14-69

Where, in order to carry out residential development, the occupier of lower land filled in disused clay pits on his land in which the higher occupier's water accumulated, the latter had no cause of action against the former.[262] The words of Windeyer J in an Australian case were adopted: 14-70

> "Although he has no action against a higher proprietor because of a natural unconcentrated flow of water from his land, he is not bound to receive it. He may put up barriers and pen it back, notwithstanding that doing so damages the upper proprietor's land, at all events if he uses reasonable care and skill and does no more than is reasonably necessary to protect his enjoyment of his own land. But he must not act for the purpose of injuring his neighbour. It is not possible to define what is reasonable or unreasonable in the abstract. Each case depends upon its own circumstances."[263]

Thus, if the steps taken by lower occupiers to prevent water entering their land involve unreasonable user by those occupiers, such that the land of a higher occupier is damaged, the lower occupiers will be liable in nuisance. Accordingly, where a the lower occupier also filled in an osier-bed into which water had accumulated and this had the effect of squeezing out temporarily, over a five-year period, the water that was already present in the bed, thereby causing reasonably foreseeable additional flooding, he was liable in nuisance or trespass for the dam-

259 *Nield v L. & N.W. Railway Co* (1874) L.R. 10 Ex. 4: canal owners placed planks in the canal to keep off flood water from a neighbouring river with the result that the claimant's land was damaged. The owners were acquitted of blame because they "had the right to protect themselves against it and the plaintiffs cannot complain although what the defendants did in so protecting themselves augmented the damage to them": at p.8, per Bramwell B. See also *Maxey Drainage Board v Great Northern Railway Co* (1912) 106 L.T. 429.

260 *Arscott v The Coal Authority* [2005] Env. L.R. 6, CA.

261 *Arscott v The Coal Authority* [2005] Env. L.R. 6, CA. See generally, Lamont, "As the flood water recedes who pays for the damage?" 152 S.J. 12.

262 *Home Brewery Plc v William Davis & Co (Loughborough) Ltd* [1987] 1 All E.R. 637.

263 *Gartner v Kidman* (1962) 108 C.L.R. 12 at 49, applied in *Home Brewery Plc v William Davis & Co (Loughborough) Ltd* [1987] 1 All E.R. 637.