was applied in novel circumstances in *Watson v British Boxing Board of Control Ltd*[6]. The Board, a non-statutory organisation, took it upon itself to regulate professional boxing and to stipulate the level of medical support which should be available at the ringside. The Court of Appeal held that the stipulated requirements were inadequate and imposed liability upon the Board in favour of a boxer who suffered brain damage. Lord Phillips MR said[7]:

> 'It seems to me that the authorities support a principle that, where A places himself in a relationship to B in which B's physical safety becomes dependent upon the acts or omissions of A, A's conduct can suffice to impose on A a duty to exercise reasonable care for B's safety. In such circumstances A's conduct can accurately be described as the assumption of responsibility for B, whether "responsibility" is given its lay or legal meaning.'

The concept has also been applied to impose liability on a parent company in favour of an employee of one of its subsidiaries. In *Chandler v Cape plc*[8] the claimant contracted asbestosis whilst an employee of a dissolved subsidiary of the defendant company. The evidence established that the way in which health policy had been managed within the group as a whole effectively amounted to an assumption of responsibility[9] to protect the employees of its subsidiaries from the dangers of asbestos: a responsibility which, due to a systemic failure, it had failed adequately to discharge.

1 See eg K Barker 'Unreliable Assumptions in the Modern Law of Negligence' (1993) 109 LQR 461. For a powerful defence of the concept of assumption of responsibility see Robert Stevens *Torts and Rights* (OUP, 2007) at pp 34–36.
2 See [2006] UKHL 28, [2006] 4 All ER 256 at 36.
3 Cf B Hepple 'Negligence: The Search for Coherence' (1997) 50 CLP 69.
4 See, generally, the papers collected in D Owen (ed) *Philosophical Foundations of Tort Law* (1995).
5 See eg per Lord Hope in *Mitchell v Glasgow City Council* [2009] UKHL 205, [2009] AC 874, [2009] 3 All ER 205 at [23].
6 [2001] QB 1134, [2001] 1 WLR 1256, CA. See also *Perrett v Collins* [1998] 2 Lloyd's Rep 255, [1999] PNLR 77, CA.
7 See [2001] QB 1134 at para 49. The decision of the Court of Appeal in *Watson*'s case is criticised by James George in (2002) 65 MLR 106.
8 [2012] EWCA Civ 525 [2012] 3 All ER 640, [2012] 1 WLR 3111. Cf *Thompson v Renwick Group* [2014] EWCA Civ 635.
9 Arden LJ emphasised the objectivity of the concept: 'The word "assumption" is ... something of a misnomer. The phrase "attachment" of responsibility might be more accurate' ([2012] EWCA Civ 525 at [64]).

Need for precision

1.10 In order to decide whether a defendant who has assumed responsibility is liable for the losses which the claimant actually suffered, it can be crucial to determine the precise scope of the duty which the defendant undertook. In *Calvert v William Hill Credit Ltd*[1] a compulsive gambler's claim failed on causal grounds. The defendants had undertaken to prevent the claimant from gambling with *them*, but that undertaking did not extend to preventing him from gambling *generally*; and the court held that even if the defendants had not been in breach of their duty the claimant would have suffered the same losses by gambling elsewhere.

1 [2008] EWCA Civ 1427, [2009] Ch 330, [2009] 2 WLR 1065.

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Overcoming immunity

1.11 If a claimant is seeking to impose liability in a context in which a degree of policy-based immunity has been held to exist, the presence of a *specific* undertaking given by the defendant to the claimant may enable the immunity to be overcome on the basis that responsibility had been assumed in the circumstances. Thus, in *W v Essex County Council*[1] the House of Lords, affirming a majority decision of the Court of Appeal, refused to strike out a claim alleging negligence by social workers; a situation in which, at that time, the courts were reluctant to impose liability[2]. One of the distinguishing features in *W's* case, which was considered arguably to justify the imposition of liability, was that one of the social workers involved had provided specific assurances which were 'integral'[3] to the plaintiff's case[4]. In the absence of a specific assumption of responsibility, however, a local authority social services department will not be liable for omitting to take emergency measures to protect a family, of whose vulnerability they are aware, from abuse by third parties over whom the local authority has no control[5].

1 [2001] 2 AC 592, [2000] 2 All ER 237, HL.
2 See *X (minors) v Bedfordshire County Council* [1995] 2 AC 633, [1995] 3 All ER 353, HL. Cf *D v East Berkshire Community Health NHS Trust* [2005] UKHL 23, [2005] 2 All ER 443, [2005] 2 WLR 993.
3 See per Judge LJ in the Court of Appeal: [1998] 3 All ER 111 at 136.
4 Cf *Welton v North Cornwall District Council* [1997] 1 WLR 570, [1997] PNLR 108, CA. See also *Swinney v Chief Constable of the Northumbria Police* [1997] QB 464, [1996] 3 All ER 449, CA, discussed at para 1.34 below.
5 See *X v Hounslow London Borough Council* [2009] EWCA Civ 286, [2009] 3 FCR 266. But cf *Selwood v Durham CC* [2012] EWCA Civ 979, [2012] All ER (D) 177 (Jul), [2012] PIQR P20, especially per Dame Janet Smith at [52]: ' . . . it is possible to infer an assumption of responsibility from circumstances'.

Justiciability of 'policy'

1.12 An even more extreme view than that which favours the shielding of what are loosely termed 'policy' factors behind expressions such as 'proximity' and 'justice and reasonableness' is the thesis that such factors are not justiciable at all. In *McLoughlin v O'Brian*[1], in which the House of Lords had to consider the extent of liability for psychiatric damage, Lord Scarman expressed the view that consideration of the well-known 'floodgates' argument, the fear of uncontrollably large numbers of plaintiffs in certain situations, was outside the proper scope of the judicial function. He said:

> ' . . . the policy issue where to draw the line is not justiciable. The considerations relevant to a decision are not such as to be capable of being handled within the limits of the forensic process'[2].

This statement provoked a sharp response from Lord Edmund-Davies in the same case, who referred to explicit judicial statements to the contrary[3]. 'My Lords', he asserted, 'in accordance with such a line of authorities I hold that public policy issues are "justiciable"'[4].

1 [1983] 1 AC 410, [1982] 2 All ER 298, HL.
2 [1983] AC 410 at 431, [1982] 2 All ER 298 at 311. See also, per Lord Roskill in *Junior Books Ltd v Veitchi Co Ltd* [1983] 1 AC 520 at 539, [1982] 3 All ER 201 at 209: 'My Lords, although it cannot be denied that policy considerations have from time to time been allowed to play their part in the last century and the present either in limiting or in extending in the

significant that many of the cases in which the general formula developed by Lord Wilberforce in *Anns v Merton London Borough Council* was criticised involved, as had *Anns* itself, attempts to impose liability in negligence upon a defendant for *omitting* to prevent a third party from inflicting harm upon a plaintiff. It is perhaps unfortunate that the strictures on the Wilberforce formula contained in those cases were not confined to that context, so that the generalising tendency of the formula could continue to have been regarded as useful in the rather more straightforward situation of harm caused by positive action[4].

1 See Smith and Burns '*Donoghue v Stevenson*: the Not So Golden Anniversary' (1983) 46 MLR 147 (cited by Lord Bridge in *Curran v Northern Ireland Co-ownership Housing Association Ltd* [1987] AC 718 at 724, [1987] 2 All ER 13 at 17, HL).

2 There can, of course, be liability for nonfeasance provided further conditions are satisfied: eg for situations involving failure to exercise control over a third party (see below) and situations involving an assumption of responsibility by the defendant.

3 [1978] AC 728, [1977] 2 All ER 492, HL.

4 It is noteworthy that in *Yuen Kun-yeu v A-G of Hong Kong* Lord Keith sought to reinforce his argument for reducing the emphasis upon foreseeability which the *Anns* formula had promoted by observing that ' . . . otherwise there would be liability in negligence on the part of one who sees another about to walk over a cliff with his head in the air and forbears to shout a warning'. But this is an example of an omission and is therefore beside the point as far as liability for misfeasance is concerned.

Distinction applied

1.16 In *Perl (P) (Exporters) Ltd v Camden London Borough Council*[1] the plaintiffs and defendants owned adjoining basement flats. The plaintiffs ran a clothing business and used their flat for the purpose of storage. The defendants' flat was unoccupied and, despite the fact that they received complaints about lack of security, and were aware that their premises were accessible to vagrants, the defendants took no action even to ensure that their flat was adequately locked. One day thieves broke onto the defendants' premises, drilled a hole through the wall which separated the two flats, and stole a substantial number of the plaintiffs' garments. The plaintiffs sued the defendants for negligence, and although they succeeded at first instance, they failed before a unanimous Court of Appeal[2]. Waller LJ observed that: 'It is not sought here to make the appellants liable for any act, it is sought to make the appellants liable for an omission to act'[3]. His Lordship went on to conclude that, despite the 'very considerable carelessness on the part of the appellants', he was satisfied that there was 'no breach of duty by the appellants to the respondents'[4]. This decision was clearly correct. To have upheld the trial judge would have had far-reaching and unacceptably harsh potential consequences for very many occupiers[5]. The decision in *Perl* was subsequently followed, by the Court of Appeal itself, in *King v Liverpool City Council*[6]. In this case a local authority's failure to prevent vandals from so damaging an empty council flat, that water flooded from it into the plaintiff's flat, was held not to give rise to liability. In *Mitchell v Glasgow City Council*[7] the House of Lords held that the defendant authority was not liable for *omitting* to warn the deceased that one of their tenants, who subsequently killed the deceased, had in fact issued threats against him[8].

1 [1984] QB 342, [1983] 3 All ER 161, CA. For discussion see M A Jones (1984) 47 MLR 223.

2 See also *Lamb v Camden London Borough Council* [1981] QB 625, [1981] 2 All ER 408, CA, but cf *Ward v Cannock Chase District Council* [1986] Ch 546, [1985] 3 All ER 537 (a special case in which the defendants had assumed responsibility to take measures to protect the plaintiff).

3 [1984] QB 342 at 352. See also per Oliver LJ at 352: ' . . . the case is one, not of an act, but of an omission'.

4 [1984] QB 342 at 352. A duty in not dissimilar circumstances might, however, be impliedly created by a contract between the parties: see *Stansbie v Troman* [1948] 2 KB 48, [1948] 1 All ER 599, CA.

5 'Is every occupier of a terraced house under a duty to his neighbours to shut his windows or lock his door when he goes out, or to keep access to his cellars secure, or even to remove his fire escape, at the risk of being held liable in damages if thieves thereby obtain access to his own house and thence to his neighbours house? I cannot think that the law imposes any such duty', per Robert Goff LJ ([1984] QB 342 at 360). See also per Oliver LJ at 357–358.

6 [1986] 3 All ER 544, [1986] 1 WLR 890.

7 [2009] UKHL 11, [2009] AC 874, [2009] 3 All ER 205.

8 See also *X v Hounslow London Borough Council* [2009] EWCA Civ 286 at [50]–[60] per Sir Anthony Clarke MR.

Smith v Littlewood's Organisation Ltd

1.17 The distinction between acts and omissions had previously received the attention of the House of Lords in *Smith v Littlewood's Organisation Ltd*[1], in which vandals set fire to an empty cinema owned by the defendants. The fire spread to the plaintiff's adjoining property. The claim failed[2]. Although the decision was unanimous, it is of note that their Lordships revealed differing approaches to the solution of the problem. Two members of the House delivered full speeches. Lord Mackay of Clashfern insisted that foreseeability should be the determining factor, even in cases involving omissions to prevent harm being caused by third parties; but the difficulty of predicting the activities of such parties would mean that liability should rarely be imposed. Lord Goff of Chieveley, on the other hand, consistently with his earlier judgment in *Perl (P) (Exporters) Ltd v Camden London Borough Council*[3], rejected this view. 'I wish to emphasise', he said, 'that I do not think that the problem in these cases can be solved simply through the mechanism of foreseeability'. Earlier in his speech he stated simply: 'Why does the law not recognise a general duty to prevent others from suffering loss or damage caused by the deliberate wrongdoing of third parties? The fundamental reason is that the common law does not impose liability for what are called pure omissions.' It is submitted that the approach of Lord Goff is the correct one[4]. It was applied by the Court of Appeal in *Banque Financiere de la Cité SA (formerly Banque Keyser Ullmann SA) v Westgate Insurance Co Ltd (formerly Hodge General and Mercantile Co Ltd)*[5] to deny liability where one of the parties to a negotiation omitted to pass on to the other party information, of which it had happened to become aware, to the effect that that party had been defrauded by one of its own agents. In *Mitchell v Glasgow City Council*[6] two members of the House of Lords expressly stated their preference for the approach of Lord Goff over that of Lord Mackay.

1 [1987] AC 241, [1987] 1 All ER 710, HL. See Professor B S Markesinis 'Negligence, Nuisance and Affirmative Duties of Action' (1989) 105 LQR 104.

2 See also the decision of the High Court of Australia in *Modbury Triangle Shopping Centre Pty v Anzil* (2000) 75 ALJR 164 (no liability for leaving shopping centre car park unlit after dark enabling criminals to attack the claimant). For comment see Margaret Fordham 'Liability for the criminal acts of third parties' (2001) 117 LQR 178.

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negligence claim[2]. They distinguished *Hill*'s case and held that, in the circumstances, it was arguable that a special relationship had existed between the plaintiff and the police[3]. In the words of Ward LJ[4]:

> 'Proximity is shown by the police assuming responsibility, and the plaintiffs relying on that assumption of responsibility, for preserving the confidentiality of the information which, if it fell into the wrong hands, was likely to expose the first plaintiff and members of her family to a special risk of damage from the criminal acts of others, greater than the general risk which ordinary members of the public must endure . . . '

The decision in *Swinney's* case was referred to with approval by the House of Lords in *Waters v Metropolitan Police Comr*[5]. The appellant, an officer in the Metropolitan Police, claimed that she had been raped by another officer, and that the respondent had been negligent in failing adequately to investigate her complaint. Although the Court of Appeal struck out the claim[6], applying *Hill*'s case, the House of Lords reinstated it. The House emphasised that the existence, in effect, of an employment relationship between appellant and respondent was a significant distinguishing feature of the case. Nevertheless the speeches of the majority[7] are notable for their assertion of the weight which may be attached to countervailing policy considerations in limiting the sphere of application of the principle in *Hill v Chief Constable for West Yorkshire*[8]. *Hill's* case, and the other authorities on police immunity or possible liability, were extensively reviewed by the Court of Appeal in An *Informer v A Chief Constable*[9]. A police informer alleged that negligence by the police, in their relationship with him, had caused him financial loss. The case was complicated, inter alia, by the fact that the claimant became a suspect as well as an informer, but no charges were brought. The Court of Appeal held that while the police had assumed a responsibility towards the informer for his safety, it did not extend to protecting his economic interests. The judgments in the case are, however, again notable for their insistence that the principle in *Hill's* case should now be construed narrowly[10]. The *Swinney* and *An Informer* cases were, however, distinguished in *CLG v Chief Constable of Merseyside Police*[11], in which the addresses of prosecution witnesses in a criminal trial were carelessly allowed to escape into the public domain. The Court of Appeal held that there had been no assumption of responsibility towards the witnesses, comparable to those towards the claimants in the other two cases, and that the claims fell within the general principle in *Hill's* case and would therefore fail[12].

1 [1996] 3 All ER 449, CA.

2 Cf *Leach v Chief Constable of Gloucestershire Constabulary* [1999] 1 All ER 215, CA, in which a claim for psychiatric damage (by an 'appropriate adult' present at the questioning of notorious mass-murderer Frederick West) *was* partially struck out on the basis of police immunity.

3 See also the unusual case of *Costello v Chief Constable of the Northumbria Police* [1999] 1 All ER 550, CA, in which a police officer who had assumed responsibility for assisting a fellow officer was held liable for failing to come to her aid when she was attacked by a violent suspect in her police station.

4 [1996] 3 All ER 449 at 467.

5 [2000] 4 All ER 934, HL.

6 See [1997] ICR 1073, CA.

7 See especially per Lord Hutton in [2000] 4 All ER at 945–946. See also per Lord Slynn [2000] 4 All ER at 940. Cf per Lord Jauncey in [2000] 4 All ER at 941 (effectively dissenting on the point).

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8 The decision of the House of Lords in *Hill v Chief Constable for West Yorkshire* was again examined by the House itself in *Brooks v Metropolitan Police Comr* [2005] UKHL 24, [2005] 2 All ER 489 and in *Michael v South Wales Police* [2015] UKSC 2, [2015] AC 1732, [2015] 2 All ER 635: see above paras [1.33] and [1.34].

9 [2012] EWCA Civ 197.

10 See, especially, per Pill LJ, above, at [189]. But cf *Robinson v West Yorkshire Police* [2014] EWCA Civ 15: see above para [1.33].

11 [2015] EWCA Civ 836, [2015] All ER (D) 318 (Jul).

12 See [2015] EWCA Civ 836 at [24] per Moore-Bick LJ.

Emergency services

1.37 A freedom from liability similar to that sometimes accorded to the police has been extended in two decisions to other emergency services. In *Capital and Counties plc v Hampshire County Council*[1] the Court of Appeal held that the fire-brigade does not owe a common law duty of care to victims of fire unless it chooses to intervene and, through its carelessness, makes matters worse[2]. In *OLL Ltd v Secretary of State for Transport*[3] the same principles were held to be applicable in a case involving the coastguard service. These cases were, however, distinguished in *Kent v Griffiths*[4] in which a substantial delay by an ambulance service, in responding to an emergency call, had disastrous consequences. The Court of Appeal upheld a substantial award of damages in favour of the claimant holding that, once a call had been accepted, the ambulance service owed a duty of care to respond in a timely fashion. Lord Woolf MR acknowledged that 'situations could arise where there is a conflict between the interests of a particular individual and the public at large'[5], but there was no question of that in the instant case. Moreover, as a part of the health service, there was no reason why 'the position of ambulance staff [should] be different from that of doctors or nurses' who conventionally owe a duty of care. Lord Woolf concluded that[6]:

> ' . . . the arguments based on public policy are much weaker in the case of the ambulance service than they are in the case of the police or the fire service. The police and fire services' primary obligation is to the public at large . . . It is . . . appropriate to regard the London Ambulance Service as providing services of the category provided by hospitals and not as providing services equivalent to those rendered by the police or the fire service'.

1 [1997] QB 1004, [1997] 2 All ER 865.

2 For discussion based upon empirical research into the consequences of *Capital and Counties* see Hartshorne, Smith and Everton, 'Effects of Negligence Liability Upon the Fire Service' (2000) 63 MLR 502.

3 [1997] 3 All ER 897.

4 [2000] 2 All ER 474, CA. See also the interlocutory decision of the Court of Appeal in the same case: [1999] PIQR P192.

5 See [2000] 2 All ER 474 at para 45.

6 See [2000] 2 All ER 474 at para 45.

Armed services

1.38 In *Smith v Ministry of Defence*[1] a seven-member Supreme Court held, by a bare majority[2], that a doctrine known as 'combat immunity' precluding actions for negligence by members of the armed services for injuries suffered during combat should be 'narrowly construed'[3]. In *Smith's* case the court held that allegations that the defendants had been negligent as employers, in

damages in respect of conduct by the defendant which had been 'clearly dangerous and bordered on reckless'[5]. The damages were, however, reduced by two-thirds on the ground of contributory negligence.

1. [1996] QB 567, [1996] 1 All ER 291, CA.
2. See [1996] QB 567 at 579, [1996] 1 All ER 291 at 301, per Evans LJ.
3. See the Occupiers' Liability Act 1984, and Chapter 10 of this book.
4. See [1996] QB 567 at 580, [1996] 1 All ER 291 at 302, per Millett LJ.
5. [1996] QB 567 at 580, [1996] 1 All ER 291 at 302, per Millett LJ.

Suicide

1.47 Negation of liability on the ground of illegality will clearly often be appropriate where serious criminal offences are concerned. At least in theory, however, the principles of public policy are not necessarily confined to cases involving criminality. Lord Denning MR once expressed the view, obiter, that public policy should operate to prevent persons who injured themselves in unsuccessful suicide attempts, or their personal representatives if the attempt was successful, from suing for negligence those allegedly at fault in failing to prevent what had occurred[1]. Although suicide was formerly a crime, it ceased to be so with the passing of the Suicide Act 1961[2]. Lord Denning's view was, however, emphatically rejected by the Court of Appeal and, in effect, also by the House of Lords. In *Kirkham v Chief Constable of Greater Manchester*[3], the Court of Appeal disapproved of his dictum in so far as it applied to suicide attempts by persons suffering from mental illness, and the personal representatives of the deceased succeeded in obtaining damages for the negligent failure of prison authorities to follow correctly their own procedures for handling known potential suicides[4]. More recently, in *Reeves v Metropolitan Police Comr*[5], the House of Lords reached the same result in a case in which the deceased had been of sound mind at the time when he took his own life, thereby effectively rejecting a defence suggestion that the non-applicability of the public policy defence in this context should be limited to the mentally ill[6]. Although the plaintiffs in the *Kirkham* and *Reeves* cases therefore succeeded, it will often be difficult to establish carelessness on the facts in such situations. In *Knight v Home Office*[7], which also concerned the suicide in prison of a person known to be at risk, Pill J examined exhaustively the procedures which had been adopted to monitor the deceased, before dismissing on the facts the allegation that the medical staff had been negligent. Similarly, in *Orange v Chief Constable of West Yorkshire Police*[8] the Court of Appeal emphasised that the extent of the precautions required in any given case were related to the degree of risk presented by the individual prisoner. The court rejected a submission that the fact that there is a higher level of suicide among prisoners generally, when compared with the community as a whole, necessitated the taking of specific precautions in every case regardless of their apparent irrelevance. In 2008 the House of Lords held, in a case involving a mentally ill hospital patient, that failure to prevent suicide could in some circumstances make a public authority, such as the National Health Service, liable for breach of Article 2 of the European Convention on Human Rights (right to life)[9].

1. 'By his act, in self-inflicting this serious injury, [the plaintiff] has made himself a burden on the whole community . . . The policy of [the] law should be to discourage these actions': *Hyde v Tameside Area Health Authority* [1981] CLY 1854, [1981] CA Transcript 130, quoted in *Kirkham v Chief Constable of Greater Manchester Police* [1990] 2 QB 283 at 292, [1990] 3 All ER 246 at 252.

2. Section 1. Cf per Morritt LJ in the Court of Appeal in *Reeves v Metropolitan Police Comr* [1998] 2 All ER 381 at 403: 'I would not think it appropriate in those circumstances for a court to brand as contrary to public policy or offensive to the public conscience an act which Parliament has so recently legalised'. See also per Lord Bingham CJ in the Court of Appeal in the same case: [1998] 2 All ER at 404–405. Even before the Suicide Act 1961 it was held that if the deceased committed suicide as a result of depression directly induced by injuries caused by the negligence of the defendants, his dependants could recover under the Fatal Accidents Acts: *Pigney v Pointers Transport Services Ltd* [1957] 2 All ER 807, [1957] 1 WLR 1121.
3. [1990] 2 QB 283 at 291, [1990] 3 All ER 246 at 251.
4. See also *Selfe v Ilford and District Hospital Management Committee* (1970) 114 Sol Jo 935.
5. [1999] 3 All ER 897.
6. The argument was, in fact, abandoned in the House of Lords, where the argument turned solely on questions of causation: see per Lord Hoffmann in [1993] 3 All ER 897 at 902 ('The question of public policy or *ex turpi causa*, which had not found favour with any member of the Court of Appeal, was not pursued'.)
7. [1990] 3 All ER 237.
8. [2001] EWCA Civ 611, [2002] QB 347. Cf *Funk v Clapp* (1986) 68 DLR (4th) 229 (Can); see also *Funk Estate v Clapp* (1988) 54 DLR (4th) 512.
9. See *Savage v South Essex Partnership NHS Foundation Trust* [2008] UKHL 74, [2009] AC 681. See also *Rabone v Pennine Care NHS Foundation Trust* [2012] UKSC 2, [2012] 2 AC 72, [2012] 2 All ER 381, in which the Supreme Court held that the principle in *Savage* was not confined to compulsorily detained psychiatric patients but extended to voluntary psychiatric patients.

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Existing law

1.48 In *Home Office v Dorset Yacht Co Ltd*[1] Lord Reid observed that a 'justification or valid explanation' for exclusion of the ordinary principles of negligence might be found in 'cases . . . where the law was settled long ago and neither Parliament nor the House sitting judicially has made any move to alter it'. Accordingly, one of the more difficult questions to gain prominence when the law of negligence was going through a period of relative expansion, concerned those situations in which detailed rules of law already existed; having developed before the full ripening of negligence concepts. Rules which could readily be perceived as being anomalous and out-dated yielded relatively easily to the advancing tide[2]. Elsewhere, the position was often more difficult, and in a number of cases traditional formulations of doctrine remained resistant to change[3]. One conservative argument, which arguably combines excessive caution with an undue preoccupation with symmetry, concerns the relationship between the common law and the legislature. It amounts to a presumption against expanding the former if the latter has by its enactments intervened in a particular area, but done so in a limited fashion: the questionable assumption being that Parliament must thereby have intended to ossify the law and discourage further development. Thus, the limited existing scope of statutory protection for employees has been invoked as a justification for not expanding the duties resting at common law upon employers[4], and legislation regarding defective premises[5] has been similarly treated as a justification for not increasing the tortious liability of builders[6].

1. [1970] AC 1004 at 1027, [1970] 2 All ER 294 at 297, HL.
2. See paras 1.20–1.25 above, 'The erosion of traditional immunities'.
3. See *Smith v Scott* [1973] Ch 314, [1972] 3 All ER 645; *Stephens v Anglian Water Authority* [1987] 3 All ER 379, [1987] 1 WLR 1381, CA. See also per Lord Templeman in *Downsview Nominees Ltd v First City Corpn Ltd* [1993] AC 295 at 316, [1993] 3 All ER 626 at 638, PC, referring to 'the danger of extending the ambit of negligence so as to supplant or supplement other torts, contractual obligations, statutory duties or equitable rules in relation to every kind

FIRE AND FORESEEABILITY

1.58 The general tenor of the views of their Lordships in *Alcock v Chief Constable of South Yorkshire Police* was therefore that the approach of the courts as to the proper limits of liability for psychiatric damage should change, if at all, marginally in the direction of greater scrutiny and caution before admitting claims[1]. But in a 1987 case, which was not considered by the House of Lords in either of the two psychiatric injury cases arising out of the Hillsborough disaster[2], the Court of Appeal held, on trial of a preliminary issue, that a claim for psychiatric damage might be sustainable where the plaintiff had witnessed her house and its contents being damaged by a fire caused by the defendants' negligence, even though there was no threat to anyone's personal safety[3]. This decision illustrates the great variety of potential psychiatric damage situations, which makes generalisation about them hazardous[4]. Nevertheless, the negative proposition that this is a sphere in which the foreseeability test is subject to a substantial degree of qualification on policy grounds is now clearly established[5].

1 Cf per Lord Steyn in *White v Chief Constable of South Yorkshire Police* [1999] 1 All ER 1 at 39: 'In my view the only sensible general strategy for the courts is to say thus far and no further. The only prudent course is to treat the pragmatic categories as reflected in authoritative decisions such as *Alcock*'s case and *Page v Smith* as settled for the time being but by and large to leave any expansion or development in this corner of the law to Parliament.'

2 Ie *Alcock v Chief Constable of South Yorkshire Police* [1992] 1 AC 310, [1991] 4 All ER 907 and *White v Chief Constable of South Yorkshire Police* [1999] 1 All ER 1.

3 See *Attia v British Gas plc* [1988] QB 304, [1987] 3 All ER 455, CA. Cf *Owens v Liverpool Corpn* [1939] 1 KB 394, [1938] 4 All ER 727, CA.

4 See also *Yearworth v North Bristol NHS Trust* [2009] EWCA Civ 37, [2009] 2 All ER 986 (liability for psychiatric damage arising out of the wrongful destruction of the claimants' sperm, which the defendants had agreed to preserve prior to their infertility-inducing cancer treatment).

5 The relevant policy factors are clearly set out in the speech of Lord Steyn in *White v Chief Constable of South Yorkshire Police* [1999] 1 All ER 1 at 32–33. See also the Law Commission Report on *Liability for Psychiatric Illness* (Law Com no 249) (1998), paras 6.5–6.9.

Injuries self-inflicted by the defendant

1.59 Another type of situation in which policy considerations, rather than the absence of foreseeability, were held to negate liability for psychiatric harm, arose in *Greatorex v Greatorex (Pope, Pt 20 defendant)*[1]. The defendant suffered injury in a road-accident caused by his own negligent driving. His father was a fire officer who attended the scene in his professional capacity, and subsequently developed post-traumatic stress disorder as a result of witnessing his son's plight. The father brought an action against his son for damages. Cazalet J held that the claim would fail. Although the claimant obviously fulfilled the 'relationship' requirement for liability, it was the very fact that he did so which was considered to raise policy objections to his succeeding. His Lordship held that it could exacerbate tensions within the family unit for one member to be able to sue another for causing him psychiatric illness. Litigation between family members can, of course, take place in respect of *physical* injuries arising out of road accidents. But it did not follow that the special cause of action normally *only* open to family members,

by virtue of the 'relationship' requirement, should also give rise to liability.

1 [2000] 4 All ER 769. See Basil Markesinis 'Foreign Law Inspiring National Law. Lessons from *Greatorex v Greatorex*' [2002] 61 CLJ 386; Peter Handford 'Psychiatric Damage Where the Defendant is the Immediate Victim' (2001) 117 LQR 397.

Claimant in danger

1.60 If the claimant suffered psychiatric damage as a result of his involvement in an accident in which he himself, as distinct from any third parties, was at risk of injury, the test for liability *does* appear to be based upon foreseeability alone. Moreover, foreseeability of any injury to the claimant will be sufficient—ie foreseeability of physical injury (whether or not it occurred) will suffice, whereas in 'three-party' cases foreseeability of psychiatric damage itself is insisted upon. In *Page v Smith*[1] the car which the plaintiff was driving was involved in a collision with the defendant's car, for which the latter was to blame. Neither party suffered any physical injury and the plaintiff was able to drive his car home after the collision. Nevertheless, the incident unfortunately led to the recurrence of a psychiatric illness, ME, from which the plaintiff had formerly suffered. As a result of this disability the plaintiff became permanently incapable of working and he was awarded over £162,000 in damages at first instance. Although the Court of Appeal reversed the trial judge, on the ground that psychiatric damage had not been foreseeable, a bare majority of the House of Lords[2] reversed the Court of Appeal and reinstated the award. The majority saw the situation as an ordinary personal injury case. Lord Lloyd of Berwick said[3]:

> 'Foreseeability of psychiatric injury remains a crucial ingredient when the plaintiff is the secondary victim, for the very reason that the secondary victim is almost always outside the area of physical impact, and therefore outside the range of foreseeable physical injury. But where the plaintiff is the primary victim of the defendant's negligence, the nervous shock cases . . . are not in point. Since the defendant was admittedly under a duty of care not to cause the plaintiff foreseeable physical injury, it was unnecessary to ask whether he was under a separate duty of care not to cause foreseeable psychiatric injury.'

Accordingly, since the general principles relating to remoteness of damage in personal injury cases require a defendant to 'take the plaintiff as he finds him'[4], the latter's predisposition in the present case to ME afforded no defence. Lord Lloyd observed[5] that the need for 'control mechanisms' to limit the number of potential claimants, including the requirement that 'the defendant will not be liable unless psychiatric injury is foreseeable in a person of normal fortitude', does not arise 'where the plaintiff is the primary victim'.

1 [1996] AC 155, [1995] 2 All ER 736. See also *Simmons v British Steel plc* [2004] UKHL 20 (Scot), [2004] ICR 585.

2 Lord Ackner, Lord Browne-Wilkinson and Lord Lloyd of Berwick, Lord Keith of Kinkel and Lord Jauncey of Tullichettle dissenting.

3 [1996] AC 155 at 187, [1995] 2 All ER 736 at 758.

4 See CHAPTER 3 below.

5 [1995] 2 All ER 736 at 767.

Page v Smith construed narrowly

1.61 *Page v Smith*[1] was considered by the House of Lords in *Rothwell v Chemical & Insulating Co Ltd, Re Pleural Plaques Litigation*[2]. In this case one

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the case before him. It is submitted that the reasoning of Hobhouse LJ is to be preferred to that of the majority. *Hunter*'s case was not considered by the House of Lords in *White v Chief Constable of South Yorkshire Police*, but Lord Hoffmann did refer to situations in which 'the plaintiff had been put in a position in which he was, or thought he was about to be or had been, the immediate instrument of death or injury to another'[4]; and his Lordship conceded that 'there may be grounds for treating such a rare category of cases as exceptional and exempt from the *Alcock* control mechanisms'. It is not clear whether such claimants would also be exempt from the new *White* test of having been themselves in personal danger, but it is submitted that they *should* be thus exempt. The illogicality of subjecting such claims to that requirement would be even greater than in the case of rescue—a context in which its arbitrariness was emphasised by the dissentients in *White v Chief Constable of South Yorkshire Police* itself. The claimant will, however, still fail if his belief that that he caused the accident was unreasonable and irrational[5].

1 [1998] 2 All ER 97, CA.
2 See [1998] 2 All ER 97 at 109. See also per Sir John Vinelott in [1998] 2 All ER 97 at 114, who considered that where a plaintiff 'learns of the accident after it has happened, psychiatric injury suffered by him by reason of his feelings of guilt or otherwise is too remote to found an action for damages'.
3 Originally mooted by the Law Commission in their Consultation Paper on *Liability for Psychiatric Illness*: see Law Com no 137 (1995), para 5.37.
4 See [1991] 1 All ER 1 at 45–46.
5 See *Monk v PC Harrington Ltd* [2008] EWHC 1879 (QB), [2009] PIQR P52.

Situations not involving sudden catastrophe

1.67 Sudden catastrophes are not the only situations which have given rise to negligence claims for psychiatric harm[1]. In recent years, such harm induced by stress suffered over time in the course of the claimant's employment has become accepted as a basis for liability in appropriate circumstances[2]. It has also been held to be arguable that the police owe a duty to provide *counselling* to persons who attend police interviews in a voluntary capacity, as 'appropriate adults' to assist suspects, if such persons could be at risk of psychiatric harm as a result of hearing details of exceptionally gruesome crimes[3].

1 For a suggestion that the requirement that the claimant should have suffered a recognisable psychiatric illness should itself be abandoned, see the dissenting judgment of Thomas J in the New Zealand Court of Appeal in *van Soest v Residual Health Management Unit* [2001] 1 NZLR 179, discussed by Nicholas J Mullany in 'Distress, disorder and duty of care: the New Zealand front' (2001) 117 LQR 182.
2 See *Hatton v Sutherland* [2002] 2 All ER 1, CA. See, generally, Chapter 17 below.
3 See *Leach v Chief Constable of Gloucestershire Constabulary* [1999] 1 All ER 215, CA. See also *McLoughlin v Jones* [2002] 2 WLR 1279, CA, in which a solicitor's negligence was claimed foreseeably to have resulted in his client's wrongful imprisonment and consequent psychiatric illness.

W v Essex County Council

1.68 Another type of situation was considered in *W v Essex County Council*[1]. The claimants were foster parents who themselves suffered psychiatric damage when it emerged that their own children had been seriously sexually abused by a boy whom they had fostered. The abuser was already under suspicion for sexual offences before he was placed by the defendant local authority with the

claimants, and the making of the placement had been contrary to an express stipulation by the claimants that they were not willing to foster any child who was suspected to have committed sexual abuse. Although the parents' claim for psychiatric harm had been struck out below, the House of Lords unanimously reinstated it and allowed it to proceed. The House appeared to contemplate a degree of flexibility in the application of existing concepts in the area. Lord Slynn said[2]:

> '. . . the categorisation of those claiming to be included as primary or secondary victims is not as I read the cases finally closed. It is a concept still to be developed in different factual situations'.

In the circumstances of the instant case it was not beyond argument that the claimants could not qualify as 'secondary'[3], or even as 'primary'[4] victims. Too much should not be read into a decision on a striking out application. Nevertheless, the recognition by the House of Lords that liability for psychiatric damage may extend into novel types of situation is clearly significant.

1 [2000] 2 All ER 237, HL.
2 See [2000] 2 All ER 237 at 243.
3 See [2000] 2 All ER 237 at 244.
4 See [2000] 2 All ER 237 at 243.

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Reform?

1.69 As part of its Sixth Programme of Law Reform, the Law Commission undertook a major study of liability for psychiatric illness, and it produced its final report in 1998[1]. The Commission's central recommendation was that, in 'three-party' situations, the only control device, or policy limitation on liability, which should be retained is the requirement that the claimant should have had a close tie of love and affection for the victim. The requirement that the claimant should have suffered 'shock' by virtue of his own immediate sensual perception of the accident or its aftermath was considered to be unnecessary, and to make little sense in medical terms, and the Commission therefore recommended its abandonment. The central recommendation was put as follows[2]:

> 'there should be legislation laying down that a plaintiff, who suffers a reasonably foreseeable recognisable psychiatric illness as a result of the death, injury or imperilment of a person with whom he or she has a close tie of love and affection, should be entitled to recover damages from the negligent defendant in respect of that illness, regardless of the plaintiff's closeness (in time and space) to the accident or its aftermath or the means by which the plaintiff learns of it.'

The Commission also proposed[3] that there should be 'a fixed list of relationships where a close tie of love and affection shall be deemed to exist[4], while allowing a plaintiff outside the list to prove that a close tie of affection existed between him or herself and the immediate victim'. In other respects the Commission was broadly in favour of allowing the common law to develop in this area, and it therefore did not recommend the introduction of a general statutory code. In 2009 the government rejected any statutory reform at all of this area of the law, its view being that 'it is preferable for the courts to have the flexibility to develop the law rather than attempt to impose a statutory

Kensington Hospital Management Committee[3] a doctor for whom the defendants were responsible negligently failed to treat the deceased, who subsequently died from arsenic poisoning. The defendants escaped liability on the ground that even if the doctor had not been negligent, and treatment had been given to the deceased, the probability was that he would have died anyway[4]. Although the burden of proving causation is on the claimant, the court will be disposed to look benevolently on the claimant's evidence if any incompleteness in it is due to the defendant's breach of duty in failing to keep proper records. Thus in *Keefe v The Isle of Man Steam Packet Co Ltd*[5], in which the claimant contended that noise levels at work had caused his hearing loss, the fact that the defendant employers had failed to keep requisite records of noise levels prevented them from relying on gaps in the claimant's evidence to defeat his claim[6].

1 See also CHAPTER 3 below.
2 See *Page v Smith (No 2)* [1996] 3 All ER 272, [1996] 1 WLR 855, CA (burden discharged on the facts).
3 [1969] 1 QB 428, [1968] 1 All ER 1068.
4 See also *Calvert v William Hill Credit Ltd* [2008] EWCA Civ 1427, [2009] Ch 330.
5 [2010] EWCA Civ 683, [2010] All ER (D) 137 (Jun).
6 Cf *Micklewright v Surrey* CC [2011] EWCA Civ 922 (claim failed despite defendants' failure to, inter alia, keep written records).

Need for proof of actionable damage

2.22 The need for the claimant to show, not merely that a breach of duty took place, but also that he actually suffered actionable injury or damage as a result, was emphasised by the House of Lords in *Rothwell v Chemical & Insulating Co Ltd, Re Pleural Plaques Litigation*[1]. In this case negligent exposure to asbestos resulted in the claimants developing 'pleural plaques'. These are changes in the membrane which surrounds the lungs. In themselves, however, they are harmless, symptomless, painless, and invisible. In consequence the House held that they were incapable of constituting 'damage' for the purposes of supporting a negligence action. Nor could they be combined with the fact of the claimants' exposure to asbestos, which they fortuitously indicated, and the anxiety resulting from knowledge of that exposure, in order to create a cause of action. Those two factors are also not in themselves actionable, and as Lord Scott put it: 'Nought plus nought plus nought equals nought'[2]. In Scotland the decision of the House of Lords in the *Rothwell* case has been reversed by statute[3]. The government was pressed to introduce similar legislation in England but in February 2010 it declined to do so and, instead, announced that pleural plaque sufferers who had launched unresolved legal proceedings prior to the *Rothwell* decision would receive an ex gratia payment of £5,000 from public funds[4].

1 [2007] UKHL 39, [2007] 4 All ER 1047. See also *Greenway v Johnson Matthey plc* [2016] EWCA Civ 408.
2 See [2007] UKHL 39 at [73]. See also above, para **1.61**, and below para **3.10**.
3 See the Damages (Asbestos-related Conditions) (Scotland) Act 2009. See also *AXA General Insurance Ltd v Lord Advocate* [2011] UKSC 46 in which the Supreme Court rejected a contention that the Act had been outside the powers of the Scottish Parliament.
4 For criticism of this position see Richard Scorer 'Unequal victims' (2010) 160 New LJ 528

Probability not relevant to historical fact

2.23 The courts are not prepared in cases broadly similar to *Barnett* v *Chelsea and Kensington Hospital Management Committee*[1] to assess the matter on the basis of degrees of probability, and to award the claimant a percentage of his loss on the basis that the defendant's negligence had deprived the claimant of some chance of recovery[2]. In *Hotson v East Berkshire Area Health Authority*[3] the plaintiff injured his hip in a fall from a tree. Unfortunately, the medical treatment which he received included a negligent delay in the proper diagnosis of the extent of his injuries. He subsequently developed a permanent disability, which he argued that prompt treatment would have averted. The defendants, however, contended that the disability had been inevitable from the moment of the fall. The trial judge, who was upheld by the Court of Appeal, awarded the plaintiff 25% of his loss on the ground that although the risk of his developing the disability after the fall had been as high as 75%, there had been a chance, albeit a relatively small one, that prompt treatment would have brought about a complete recovery. The House of Lords, reversing the courts below, held that the plaintiff failed altogether. It was implicit in the trial judge's finding of fact that, on the balance of probabilities, the fall and not the negligent treatment had caused the disability. Accordingly, it would appear that, in personal injury cases, the question of whether a defendant's carelessness had had any causative effect must be determined one way or the other as a matter of historical fact[4].

1 See para **2.21** above.
2 See CHAPTER 3 below for the differing approach adopted in cases where the outcome would have depended upon the hypothetical future action of an independent third party.
3 [1987] AC 750, [1987] 2 All ER 909, HL. See T Hill 'A Lost Chance for Compensation in the Tort of Negligence by the House of Lords' (1991) 54 MLR 511. Cf W Scott 'Causation in Medico-Legal Practice: A Doctor's Approach to the "Lost Opportunity" Cases' (1992) 55 MLR 521.
4 For criticism of the approach of the House of Lords, see J Stapleton 'The Gist of Negligence' (1988) 104 LQR 213 and 389, who argues that it side-steps the question as to the nature of the 'damage' which the defendant needs to be shown to have caused. If that damage were to be perceived as the loss of the chance itself, rather than the actual disability, the not unattractive solution reached by the courts below would be seen to be justified. 'It cannot be over-emphasised that the formulation of the "damage" forming the gist of the action defines the causation question. Logically, one can only deal with causation after one knows what the damage forming the gist of the action is': J Stapleton (1988) 104 LQR 213 at 393. Cf M Lunney 'What price a chance' (1995) 15 LS 1.

Gregg v Scott

2.24 In *Gregg v Scott*[1] a bare majority of the House of Lords[2] applied the *Hotson* principle to a case in which there had been a negligent delay in diagnosing that the claimant had cancer. Since the prospect of cure, in the event of timely diagnosis, had been less than 50% the claim was dismissed notwithstanding that the claimant had in practice been deprived of a not insubstantial chance of cure. The decision of the majority appears to have been based, at least in part, on policy considerations: the need for certainty and the need to protect the National Health Service from increased litigation[3].

1 [2005] UKHL 2.
2 Lord Hoffmann, Lord Phillips and Lady Hale, Lord Nicholls and Lord Hope dissenting.
3 See eg per Lord Phillips at para 170.

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'. . . a "but for" test is only one customary (although itself not absolutely invariable) aspect of causation. Where a number of factors combine to lead to a situation in which a claimant incurs loss, a more sophisticated approach is required. It may become appropriate to select the "predominant" or "real" or "effective" cause . . .'

The 'but for' test notoriously breaks down in rare but much-debated cases where two persons simultaneously carry out acts, either of which would have caused the damage. The test would seem to produce the unsatisfactory result that neither person can be liable. To meet such difficulties Professor Richard Wright has argued that 'a comprehensive test of causal condition' can be formulated known as the 'NESS' test (acronym of 'necessary element of a sufficient set') which 'states that a condition contributed to some consequence if and only if it was necessary for the sufficiency of a set of existing antecedent conditions that was sufficient for the occurrence of the consequence'[5]. This sophisticated test can, in carefully defined circumstances, treat acts as 'causes' even if the outcome would have been the same if they had not occurred; and thereby produce more satisfactory results in the case of simultaneous negligent acts[6].

1 See *Clements v Clements* [2012] SCC 32 in which the Supreme Court of Canada recently emphasised the primacy of the test as the one usually to be applied.
2 See eg *Hull v Sanderson* [2008] EWCA Civ 1211 (trial judge wrongly failed to apply the 'but for' test). See also *Environment Agency v Ellis* [2008] EWCA Civ 1117, [2008] All ER (D) 163 (Oct).
3 See Jane Stapleton 'Unnecessary Causes' (2013) 129 LQR 39.
4 See [2001] ICR 316 at para 23, CA.
5 See 'Once More into the Bramble Bush: Duty, Causal Contribution, and the Extent of Legal Responsibility' (2001) 53 Vanderbilt LR 1071, at 1101 onwards.
6 Professor Jane Stapleton has put forward an alternative test known as the 'Targeted But-For Test': see 'Cause-in-Fact and the Scope of Liability for Consequences' (2003) 119 LQR 388, at 393–394 (and references there cited); see also Wright, at p 1109 onwards. For critical analysis of the problem and the views of Wright and Stapleton see Allan Beever, *Rediscovering the Law of Negligence* (2009), ch 12.

'Remoteness of damage'

3.03 The expression 'remoteness of damage' is most appropriately used to denote the problem of whether or not to ascribe legal responsibility to the defendant when it is clear that the claimant's harm would not have occurred 'but for' the defendant's negligence, but the causal chain happened to involve a particularly freakish concatenation of circumstances[1]. In practice, however, the phrase 'too remote' is sometimes used rather more widely, to refer to situations which are not in themselves factually uncommon but which happen for *other* reasons to raise controversial questions relating to the ascription of legal responsibility. This usage is unfortunate[2], since it is often associated with the temptation to evade substantive issues of principle by pretending that they are largely questions of fact[3]. Many of the cases on intervening human action, for example, especially those on 'rescue', raise normative or policy questions rather than illustrate freakish events[4].

1 See also M A Jones *Textbook on Torts* (8th edn, 2002) pp 257–258: '. . . it . . . seems sensible to maintain a distinction between cases of multiple cause, where the question is which cause is to be treated as having legal significance, and cases where on any view the defendant's negligence was the cause of the harm, but it is thought to be unfair to hold him responsible because it occurred in some unusual or bizarre fashion'.

2 On the importance of separating normative from factual issues in the causation context see Stapleton 'Cause-in-Fact and the Scope of Liability for Consequences' (2003) 119 LQR 388, and also in (2001) 54 Vanderbilt LR 941.
3 For an example of such unfortunate usage, see *SCM (UK) Ltd v Whittall & Son Ltd* [1971] 1 QB 337 at 344–346, [1970] 3 All ER 245 at 251, per Lord Denning MR (economic loss).
4 'We should explicitly focus directly on the substantive normative arguments about responsibility under the relevant cause of action . . . rather than be distracted by some alleged free-standing characterisation of the intervening factor': J Stapleton 'Cause-in-Fact and the Scope of Liability for Consequences' (2003) 119 LQR 388 at 421–422.

B NATURE OF LOSS AND MEASURE OF DAMAGES

Loss and damages

3.04 'Before one can consider the principle on which one should calculate the damages to which a plaintiff is entitled as compensation for loss', said Lord Hoffmann in *South Australia Asset Management Corpn v York Montague Ltd*[1], 'it is necessary to decide for what kind of loss he is entitled to compensation'. It may not always be self-evident whether the issue before the court is to determine whether what occurred was the defendant's responsibility at all, or whether it is merely to quantify the claimant's loss on the basis that recoverability in principle could be taken as established. Nevertheless, the distinction is fundamental. Questions relating to the assessment, in pecuniary terms, of a claimant's loss are separate from the rules, including those on remoteness, which determine what types of damage are remediable. Thus, although 'foreseeability' is the criterion for determining remoteness[2], a motorist who runs over an apparent vagrant remains liable for his victim's loss of earnings even when the latter turns out, unforeseeably, to be a prosperous member of the Bar Theatrical Society on the way to a performance of some avant-garde drama.

1 [1997] AC 191 at 211, [1996] 3 All ER 365 at 369.
2 See below para 3.11.

Relationship between duty and loss

3.05 Conversely, merely because the loss suffered by the claimant was foreseeable, and would not have occurred if the defendant had not been careless, it does not necessarily follow that the defendant will be liable, since he may not have owed any duty to the claimant in respect of the particular kind of loss which materialised[1]. In *South Australia Asset Management Corpn v York Montague Ltd*[2] Lord Hoffmann gives the following hypothetical example:

'A mountaineer about to undertake a difficult climb is concerned about the fitness of his knee. He goes to a doctor who negligently makes a superficial examination and pronounces the knee fit. The climber goes on the expedition, which he would not have undertaken if the doctor had told him the true state of his knee. He suffers an injury which is an entirely foreseeable consequence of mountaineering, but has nothing to do with his knee'.

Although the injury is a foreseeable consequence of the doctor's carelessness, in the sense that he would not have embarked upon the expedition if he had been told about the true state of his knee, Lord Hoffmann concludes that the doctor is not liable: 'The injury has not been caused by the doctor's bad advice,

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Crucial distinction

3.10 Since damages for 'loss of a chance' are only recoverable when the stage of assessing damages is reached, it is apparent that the distinction between causation and quantification will be crucial; since if causation is not established on the balance of probability no question of recovery can arise. Accordingly, if a given situation is analysed as involving an issue on causation rather than quantification, and the relevant probability is, say, 40%, the claimant will recover nothing. On the other hand, if causation is taken to have been established the claimant will recover 40% of his loss. It will not, however, always be easy to classify the issue as one of causation or quantification. The leading case is the decision of the House of Lords in *Hotson v East Berkshire AHA*[1] in which, as a result of clinical negligence, a claimant who lost a 25% chance of making a full recovery after an accident was awarded nothing: the issue was categorised as one of causation rather than quantification even though it was accepted that the case 'hover[ed] on the border' between the two categories[2]. The issue is often critical in clinical negligence claims, and in *Gregg v Scott*[3] a bare majority of the House of Lords confirmed, in 2005, that in such cases there can be no damages for a reduction in a patient's chances of recovery, caused by negligence, if the chance of recovery would have been less that 50% even in the absence of negligence[4]. This matter is also discussed in Chapter 2 above.

1 [1987] AC 750, [1987] 2 All ER 909.
2 See [1987] AC 750 at 792, [1987] 2 All ER 909 at 921.
3 [2005] UKHL 2. See generally Andrew Burrows 'Uncertainty about Uncertainty: Damages for Loss of a Chance' [2008] Journal of Personal Injury Law 31.
4 *Gregg v Scott* was referred to by the House of Lords in *Rothwell v Chemical & Insulating Co Ltd, Re Pleural Plaques Litigation* [2007] UKHL 39, [2007] 4 All ER 1047 in which the House confirmed that 'a risk, produced by a negligent act or omission, of an adverse condition arising at some time in the future does not constitute damage sufficient to complete a cause of action' (see per Lord Scott in [2007] UKHL 39 at [67]). In *Rothwell's* case an increased risk, caused by the defendant's negligence, of contracting asbestos-induced cancer was therefore held not to be actionable unless and until the disease itself developed.

C THE FORESEEABILITY TEST

Background

3.11 In the famous case of *Overseas Tankship UK (Ltd) v Morts Dock and Engineering Co Ltd, The Wagon Mound*[1], the Judicial Committee of the Privy Council held that the concept of 'foreseeability' should be used to determine the extent of the ensuing harm for which a defendant, who had been careless, should be held liable. The Board accordingly refused to impose liability on the defendant shipowners when oil, carelessly discharged from one of their ships, was ignited in a manner taken to be unforeseeable and a conflagration resulted in which the plaintiffs suffered damage. In so holding, the Board disapproved the well-known decision of the Court of Appeal, 40 years earlier, in *Re Polemis, Furniss Withy & Co*[2]. In that case the careless dropping of a plank led, due to an accumulation of petrol vapour, to a fire which, like that in *The Wagon Mound*, was on the facts unforeseeable. But liability was imposed on the ground that, once the damage was 'directly traceable to the negligent act', the fact that the precise outcome 'was not

foreseen [was] immaterial'[3]. In *The Wagon Mound*, however, the proposition that 'for an act of negligence which results in some trivial foreseeable damage, the actor should be liable for all consequences, however unforeseeable and however grave, so long as they can be said to be 'direct', was castigated as not 'consonant with current ideas of justice or morality'[4].

1 [1961] AC 388, [1961] 1 All ER 404.
2 [1921] 3 KB 560, CA.
3 [1921] 3 KB 560 at 577, per Scrutton LJ.
4 [1961] AC 388 at 422, [1961] 1 All ER 404 at 413, per Lord Simonds, delivering the judgment of the Board.

Foreseeability not a universal panacea

3.12 Although the Privy Council decision has been accepted by the courts in subsequent cases, as being the governing authority for the purposes of English law, theoretical controversy still takes place as to whether the earlier decision of the Court of Appeal did not, in fact, embody the better approach. Those who favour *The Wagon Mound* test believe that its use follows logically from the fact that foreseeability is used to determine whether the defendant's act was negligent in the first place, and that it would be inconsistent and unfair to hold the defendant liable for harm which was not part of the reason for stigmatising his act as culpable[1]. But this argument is misleading in that the concept of 'foreseeability' is being used in a different sense, when remoteness of damage is in issue, from when the earlier question of duty of care is being addressed[2]. Using it to determine the normative question of how the defendant ought to have behaved before the event is different from using it to determine how far the consequences of an accident might normally be expected to extend after it has occurred[3]. Moreover, given that some damage to the claimant must have been foreseen (and *Re Polemis* is no authority for the proposition that a wholly unforeseeable claimant can recover), it is not obvious that justice requires the innocent claimant rather than the negligent defendant to bear the loss[4].

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1 See G Williams 'The Risk Principle' (1961) 77 LQR 179. For a more recent discussion see Marc Stauch 'Risk and Remoteness of Damage in Negligence' (2001) 64 MLR 191.
2 See R Kidner 'Remoteness of Damage: The Duty-Interest Theory and the Re-interpretation of the *Wagon Mound*' (1989) 9 LS 1. See also Robert Stevens *Torts and Rights* (OUP, 2007) Chapter 7, for criticism of the *Wagon Mound*.
3 For discussion see, generally, H Hart and T Honoré *Causation in the Law* (2nd edn, 1985) ch 9. See also J Stapleton 'Cause-in-Fact and the Scope of Liability for Consequences' (2003) 119 LQR 388 at 390–391.
4 See J Jolowicz [1961] CLJ 30.

Wagon Mound a source of uncertainty

3.13 Although the Privy Council criticised the *Polemis* rule as supposedly leading 'to nowhere but the never-ending and insoluble problems of causation'[1], it is not without significance that decisions since 1961 have shown the *Wagon Mound* principle itself to be a source of considerable uncertainty. A line of cases difficult to reconcile, some of which seem to be closer in spirit to the earlier approach, have been handed down. The problem of loss which was clearly foreseeable but which arose indirectly through, for example, intervening human acts, is one of the situations which has given rise to difficulty[2]. Paradoxically, this is an area in which unqualified application of the foresee-

'The ordinary process of giving routine advice to an applicant for planning permission and answering such questions as he or she may raise, especially when the applicant is one known to have her own professional advisers, does not give rise to any duty of care'.

Of course each case will depend on its own factual context, and if formal searches are carelessly carried out, liability can arise[4]. But the requirement that the *purpose* for which the information was sought should have been known to the person providing the information[5], if liability is to arise, will apparently be construed in such cases fairly strictly in favour of the local authority[6].

1 See per Buxton J in *Tidman v Reading Borough Council* [1994] 3 PLR 72.
2 See *Fashion Brokers v Clarke Hayes* [2000] Lloyd's Rep PN 398, CA.
3 See [2000] Env LR 212.
4 Cf *Ministry of Housing and Local Government v Sharp* [1970] 2 QB 223, [1970] 1 All ER 1009, CA.
5 See below para 4.21.
6 See *Gooden v Northamptonshire County Council* [2002] PNLR 18, CA.

Social occasions

An unusual decision

4.12 In *Chaudhry v Prabhakar*[1] the defendant acted as unpaid adviser to the plaintiff, a friend of his who was seeking to buy a second-hand motor car. When the car turned out to be unroadworthy and quite valueless the plaintiff sued him for negligent misstatement, and the Court of Appeal (albeit with some reluctance on the part of one member of the court, who felt that the imposition of liability in such cases could 'make social regulations and responsibilities between friends unnecessarily hazardous'[2]) held him liable. The case is complicated by the fact that counsel for the defendant had *conceded* the existence of a duty of care[3], and fought the case on the basis of what standard of care that admitted duty imposed. The decision is therefore an uncertain guide for future cases. Indeed, Stocker LJ emphasised that 'in the absence of other factors giving rise to such a duty, the giving of advice sought in the context of family, domestic or social relationships will not in itself give rise to any duty in respect of such advice'[4]. If one single factor can be identified as having tipped the scales against the defendant, it is probably that his advice was sought in a very specific situation leading to the actual purchase of the vehicle which he sought out and recommended. Thus, Stuart-Smith LJ said:

' . . . where, as in this case, the relationship of principal and agent exists, such that a contract comes into existence between the principal and the third party, it seems to me that, at the very least, this relationship is powerful evidence that the occasion is not a purely social one, but . . . is in a business connection'[5].

1 [1988] 3 All ER 718, [1989] 1 WLR 29, CA.
2 [1988] 3 All ER 718 at 725, [1989] 1 WLR 29 at 39, per May LJ.
3 May LJ doubted whether this concession had been rightly made: see [1988] 3 All ER 718 at 725, [1989] 1 WLR 29 at 38.
4 [1988] 3 All ER 718 at 723, [1989] 1 WLR 29 at 36.
5 [1988] 3 All ER 718 at 722, [1989] 1 WLR 29 at 35.

Risk minimal

4.13 Professional people who casually express opinions on matters within their sphere of expertise at social gatherings are probably safe in assuming that they are at no greater risk of incurring *Hedley Byrne* liability after *Chaudhry v Prabhakar* than they were before. This risk would still seem to be minimal. Apart from *Chaudhry v Prabhakar*, the only decision which touches on the point is the old case of *Fish v Kelly*[1]. The defendant was a solicitor who had drawn up, and who kept in his possession, a deed relating to the terms of employment for workers at a company for which he acted. When he happened to be on the company's premises, one of the employees took the opportunity to ask him whether the deed provided for certain moneys to be paid to him if he left the company's service. The defendant honestly replied in the affirmative, having unfortunately forgotten that the detailed provisions of the deed meant that the moneys would only be payable to the plaintiff's executor after his death. The plaintiff left the company in consequence of the answer which he received, and subsequently sued the solicitor. The action failed. Erle CJ was 'unable to perceive any duty arising out of the casual conversation here'[2], and Byles J said that 'If this sort of action could be maintained, it would be extremely hazardous for an attorney to venture to give an opinion upon any point of law in the course of a journey by railway'[3].

1 (1864) 17 CBNS 194.
2 (1864) 17 CBNS 194, at 206.
3 (1864) 17 CBNS 194 at 207.

Reluctance to impose liability

4.14 Of course, the *Fish v Kelly* case was decided long before *Hedley Byrne* and was based in part (though not, interestingly enough, wholly) on the absence of a contract between plaintiff and defendant. On its facts the decision seems rather harsh. The defendant was the person best qualified to answer the plaintiff's query, and to expect the latter to cross-examine the company's solicitor to ensure that the advice given had been fully considered, or to request confirmation from him in writing, was surely expecting rather a lot of an ordinary employee. Perhaps this criticism would be less valid today, when employees are better educated and informed, than in the middle of the nineteenth century when the case was actually decided. But *Fish v Kelly* still seems to be a decision close to the borderline, and the specific context of the question posed to the defendant might possibly have led to liability if the approach subsequently adopted in *Chaudhry v Prabhakar* had been applied. There can be little doubt, however, that the courts will remain reluctant to hold liable those who are, in a sense, generous in choosing to respond to chance inquiries made in informal circumstances[1].

1 Cf The American Law Institute's *Second Restatement of the Law of Torts* (1977) p 130 (comment in para 552), denying liability 'when an attorney gives a casual and offhand opinion on a point of law to a friend whom he meets on the street'.

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the advisee. In such cases it will be necessary to look carefully at the precise purpose for which the statement was communicated to the advisee.' Cf *Machin v Adams* (1997) 59 Con LR 14, CA.

3 Cf *Punjab National Bank v de Boinville* [1992] 3 All ER 104 at 118, [1992] 1 WLR 1138 at 1153–1154, per Staughton LJ: ' . . . an insurance broker owes a duty of care to the specific person who he knows is to become an assignee of the policy, at all events if . . . that person actively participates in giving instructions for the insurance to the broker's knowledge.'

D OMISSIONS

Focus upon question of law

4.33 In many cases the distinction between making a statement and failing to do so, in effect the same as that between misfeasance and nonfeasance, will be artificial. If a statement is made, but owing to carelessness it is incomplete, seldom will anything be gained by attempting to classify the situation in those terms[1]. But if the complaint is that the defendant remained wholly silent, or failed to take a specific step which it is alleged he ought to have taken, the distinction does have utility. Just as in the rare cases of *inaction* where it is alleged that the defendant had been under a positive duty, the distinction facilitates clarification of the fundamental issue involved[2]. The investigation is less likely to be a factual one into whether or not the defendant was careless, as an inquiry into whether or not, as a matter of law, the defendant owed a duty of care to the claimant requiring the taking of positive steps[3]. Thus, in *White v Jones*[4] the plaintiff's claim failed at trial partly on the ground that the defendant solicitor had been guilty of a mere failure to draw up a will as distinct from any specific act of carelessness[5] But the Court of Appeal and House of Lords reversed the trial judge. 'That argument cannot', said Lord Nolan[6], 'have any force where the omission occurs after the duty of care has been assumed by the defendant. Once the duty exists, it can make no difference whether its breach occurs by way of omission or of positive act'[7].

1 Insurance brokers have often been held liable for omissions of this kind: see *Cherry Ltd v Allied Insurance Brokers Ltd* [1978] 1 Lloyd's Rep 274; *Reardon v King's Mutual Insurance Co* (1981) 120 DLR (3d) 196. Cf *McNealy v Pennine Insurance Co Ltd* [1978] 2 Lloyd's Rep 18, CA (failure to ask a relevant question).

2 Cf J Smith and P Burn '*Donoghue v Stevenson*—The Not So Golden Anniversary' (1983) 46 MLR 147.

3 See *Paterson Zochonis & Co Ltd v Merfarken Packaging Ltd* [1986] 3 All ER 522, CA (printers under no duty to check whether material printed involves breach of copyright).

4 [1995] 2 AC 207, [1995] 1 All ER 691, HL; affg [1995] 2 AC 207, [1993] 3 All ER 481, CA.

5 See [1995] 2 AC 207 at 254, [1995] 1 All ER 691 at 697 (per Lord Goff summarising the reasoning of Turner J).

6 [1995] 2 AC 207 at 295, [1995] 1 All ER 691 at 736. See also per Lord Goff in [1995] 2 AC 207 at 268, [1995] 1 All ER 691 at 711 ('Since the *Hedley Byrne* principle is founded upon an assumption of responsibility, the solicitor may be liable for negligent omissions as well as negligent acts of commission'), and the same Law Lord in *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145 at 181, [1994] 3 All ER 506 at 521.

7 Cf Allan Beever, *Rediscovering the Law of Negligence* (2009), p 206: '... defining the distinction between misfeasance and nonfeasance in terms of acts and omissions encounters a major problem: it is deeply inconsistent with the law of obligations as a whole. In fact, it has never been the case that omissions were immune from liability'.

No duty

4.34 Conversely, if there is no duty then a claim based on a mere omission will necessarily fail. Thus, in *Argy Trading Development Co Ltd v Lapid Developments Ltd*[1], landlords of business premises who had previously relieved their tenants of the obligation to insure the premises, by doing so themselves, suddenly decided not to renew the relevant policies, but they omitted to inform the tenants of this. The tenants were unable to sue for losses incurred when the premises were gutted by fire because it was held, after argument, that the defendants simply owed no duty to notify the plaintiffs of their decision: the responsibility for checking annually that their premises were adequately insured lay with the plaintiffs[2]. Similarly, in *Banque Keyser Ullman SA v Skandia (UK) Insurance Co Ltd*[3] the Court of Appeal held that liability for misstatement by *omission*[4] in a pre-contractual situation could not be imposed in circumstances in which that liability would upset the rule, long-established in the law of misrepresentation, that there is no general duty of disclosure in such situations[5]. It has also been held that, in the absence of a contractual provision, an employer which is trustee of its own pension scheme owes no duty in tort to give advice to members of the scheme[6].

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1 [1977] 3 All ER 785, [1977] 1 WLR 444.

2 [1977] 3 All ER 785 at 800, [1977] 1 WLR 444 at 461.

3 [1990] 1 QB 665, [1989] 2 All ER 952, sub nom *Banque Financière de la Cité SA (formerly Banque Keyser Ullmann SA) v Westgate Insurance Co Ltd (formerly Hodge General and Mercantile Co Ltd)* [1989] 2 All ER 952, CA; affd on other grounds [1991] 2 AC 249, [1990] 2 All ER 947 HL.

4 It was established by the Court of Appeal in *Esso Petroleum Co Ltd v Marden* [1976] QB 801, [1976] 2 All ER 5 that *Hedley Byrne* liability can attach to *positive statements* made in pre-contractual negotiations. See also *Cramaso LLP v Ogilvie-Grant* [2014] UKSC 9, [2014] 2 All ER 270.

5 See especially [1990] 1 QB 665 at 802, [1989] 2 All ER 952 at 1013, per Slade LJ (delivering the judgment of the court).

6 See *Outram v Academy Plastics* [2001] ICR 367, CA.

Relevance of contract

4.35 As the cases cited in the previous paragraphs (paras 4.33–4.34) illustrate, the extent of liability for omissions is one of those questions which can highlight the need to identify the appropriate relationship between tortious and contractual principles. This issue was clarified by the decision of the House of Lords, albeit not concerned with omissions as such, in *Henderson v Merrett Syndicates Ltd*[1]. In this case certain Lloyd's 'names', who had incurred large losses, sought to sue their underwriting agents in tort for negligence. Although the plaintiffs and defendants were in contractual relationships, the former needed to establish liability in tort to take advantage of the differing principles governing limitation; their contractual claims being out of time. The House of Lords held unanimously that the plaintiffs could succeed, and rejected the contention that the existence of the contracts had had the effect of creating an exclusive zone of liability which precluded the possibility of an action in tort[2]. Emphasising that 'the law of tort is the general law', Lord Goff stated that 'the common law is not antipathetic to concurrent liability' and concluded as follows[3]:

itself). See especially per Lord Denning MR in *Dutton* [1972] 1 QB 373 at 369, [1972] 1 All ER 462 at 474.

Rejection of Anns

5.11 In *Murphy v Brentwood District Council*[1] the reasoning in *Anns* was comprehensively rejected[2]. The House of Lords in the later case refused to accept that the health and safety idea rendered the situation analogous to one involving actual property damage or personal injury. It was 'incontestable on analysis', said Lord Oliver, 'that what the plaintiffs [ie in *Anns*] suffered was pure pecuniary loss and nothing more'[3]. There was 'equally nothing in the statutory provisions', his Lordship continued, 'which even suggest that the purpose of the statute was to protect owners of buildings from pure economic loss'[4]. The House also undermined the argument in favour of allowing occupiers to recover from allegedly negligent local authorities the cost of repairs, in advance of collapse, by expressly reserving its opinion on the question of whether a local authority, as distinct from a negligent building owner, could be held liable, on the basis of its statutory powers, even if a badly constructed building *did* collapse and cause injury[5]. Finally, the House considered that to impose liability in favour of occupiers on the *Anns* basis would outflank the limited scope of the statutory protection afforded to them by the Defective Premises Act 1972[6]. Lord Keith robustly summarised the views of the House in *Murphy* thus:

> 'In my opinion it is clear that *Anns* did not proceed on any basis of established principle, but introduced a new species of liability governed by a principle indeterminate in character but having the potentiality of covering a wide range of situations, involving chattels as well as real property, in which it had never hitherto been thought that the law of negligence had any proper place'[7].

1 [1991] 1 AC 398, [1990] 2 All ER 908 HL. See R O'Dair '*Murphy v Brentwood District Council*: A House With Firm Foundations?' (1991) 54 MLR 561. See also Sir Robin Cooke 'An Impossible Distinction' (1991) 107 LQR 46.
2 See I N Duncan Wallace QC '*Anns* Beyond Repair' (1991) 107 LQR 228. See also B S Markesinis and S Deakin 'The Random Element of their Lordships' Infallible Judgment: An Economic and Comparative Analysis of the Tort of Negligence from *Anns* to *Murphy*' (1992) 55 MLR 619.
3 [1991] 1 AC 398 at 484, [1990] 2 All ER 908 at 932.
4 [1991] 1 AC 398 at 490, [1990] 2 All ER 908 at 937.
5 See [1991] 1 AC 398 at 457, 463, 492, [1990] 2 All ER 908 at 912, 917, 938, per Lord Mackay LC, Lord Keith and Lord Jauncey, respectively.
6 See [1991] 1 AC 398 at 457, 472, 480, 491, 498, [1992] 2 All ER 908 at 912, 923, 930, 938, 942–943, per Lord Mackay, Lord Keith, Lord Bridge, Lord Oliver and Lord Jauncey, respectively. On the Defective Premises Act 1972 see Chapter 10 below.
7 [1991] 1 AC 398 at 471, [1990] 2 All ER 908 at 922.

'Complex structures'?

D & F Estates

5.12 In the 1988 case of *D & F Estates Ltd v Church Comrs For England*[1], decided by the House of Lords two years before its decision in *Murphy*, the House addressed directly the liability in tort for pure economic loss of a *builder*; as distinct from that of a local authority which was the focus of both

the *Anns* and *Murphy* cases. In the *D & F Estates* case the plaintiffs, who were the lessees and occupiers of a flat, sought to claim from the defendant builders, with whom they were not in a contractual relationship, the cost of repairing allegedly defective plastering work which had been carried out when the block of flats in question had been constructed. The claim failed[2]. 'It seems to me clear that the cost of replacing the defective plaster', said Lord Bridge[3], 'was not an item of damage for which the builder . . . could possibly be made liable in negligence under the principle of *Donoghue v Stevenson* or any legitimate development of that principle. To make him so liable would be to impose on him for the benefit of those with whom he had no contractual relationship the obligation of one who warranted the quality of the plaster as regards materials, workmanship and fitness for purpose'. The House criticised the *Anns* case, which had not then been overruled, but distinguished it by emphasising its focus upon local authority liability and health and safety concepts. Moreover, the argument that, since the builder would be liable if his defective structure caused personal injury or damage to property other than the structure itself, he should also be liable in tort for the cost of repairs made pre-emptively by the owner, was rejected[4]. In the words, again, of Lord Bridge[5]:

> 'If the defect is discovered before any damage is done, the loss sustained by the owner of the structure, who has to repair or demolish it to avoid a potential source of danger to third parties, would seem to be purely economic. Thus, if I acquire a property with a dangerously defective garden wall which is attributable to the bad workmanship of the original builder, it is difficult to see any basis in principle on which I can sustain an action in tort against the builder for the cost of either repairing or demolishing the wall. No physical damage has been caused. All that has happened is that the defect in the wall has been discovered in time to prevent damage occurring.'

1 [1989] AC 177, [1988] 2 All ER 992, HL. See I N Duncan Wallace QC 'Negligence and Defective Buildings: Confusion Confounded?' (1989) 105 LQR 46.
2 See also *Department of the Environment v Thomas Bates & Son Ltd* [1991] 1 AC 499, [1990] 2 All ER 943, HL (decided by the House of Lords on the same day as *Murphy v Brentwood District Council*).
3 [1989] AC 177 at 207, [1988] 2 All ER 992 at 1007.
4 Lord Bridge did, however, subsequently suggest in *Murphy v Brentwood District Council* that recovery of pre-emptive costs might be possible in one situation: ' . . . if a building stands so close to the boundary of the building owner's land that after discovery of the dangerous defect it remains a potential source of injury to persons or property on neighbouring land or on the highway, the building owner ought, in principle, to be entitled to recover in tort from the negligent builder the cost of obviating the danger, whether by repair or demolition, so far as that cost is necessarily incurred in order to protect himself from potential liability to third parties': [1991] 1 AC 398 at 489, [1990] 2 All ER 908 at 926. This suggestion, which perhaps reflects the influence of the law of nuisance was, however, doubted by Lord Oliver in his own speech in *Murphy's* case: see [1991] 1 AC 398 at 489, [1990] 2 All ER 908 at 936.
5 [1989] AC 177 at 206, [1988] 2 All ER 992 at 1006.

Attempting to identify distinct elements

5.13 Unfortunately, in an attempt to limit the scope of his own dictum, Lord Bridge continued in *D & F Estates* in a manner which was to cause some confusion, which had to be clarified when *Murphy v Brentwood District Council* was decided. He stated that, while the principle operated to negate liability on the facts of *D & F Estates* itself, he could 'see that it may

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the plaintiffs were awarded a modest sum for economic loss, the calculation of it was strictly limited to losses flowing directly from the physical damage which had occurred in the furnaces[6].

1 See also *Electrochrome Ltd v Welsh Plastics Ltd* [1968] 2 All ER 205.
2 (1875) LR 10 QB 453.
3 [1973] QB 27 at 38.
4 [1973] QB 27 at 45.
5 See *Horton v Colwyn Bay and Colwyn UDC* [1908] 1 KB 327 at 341, CA, per Buckley LJ, and per counsel, *arguendo*, in *Spartan Steel* [1973] QB 27 at 32.
6 See also *British Celanese v A H Hunt (Capacitors) Ltd* [1969] 2 All ER 1252, [1969] 1 WLR 959; *SCM (UK) Ltd v Whittall & Son Ltd* [1971] 1 QB 337, [1970] 3 All ER 245, CA. In *Conarken Group v Network Rail Infrastructure* [2011] EWCA Civ 644 the defendant's lorry negligently collided with the claimant's railway bridge. In addition to the cost of repairs the claimants were able to recover, as directly consequential economic loss, payments which they had been contractually obliged to pay to train operating companies for the non-availability of the railway.

Avalanche of claims

5.25 The underlying reason for denying liability in cases of this type remains the fear that some of them could generate a wholly oppressive avalanche of claims against the defendant. The following example was given in an Australian case[1]:

> '... if, through the momentary inattention of an officer, a ship collided with a bridge, and as a result a large suburban area, which included shops and factories, was deprived of its means of access to a city, great loss might be suffered by tens of thousands of persons, but to require the wrongdoer to compensate all those who had suffered pecuniary loss would impose upon him a burden out of all proportion to his wrong'[2].

It has been argued that this position has validity when subjected to economic analysis[3]. It would be both inefficient and impracticable to expect those whose isolated acts of carelessness could, for example, deprive a whole town of electricity, to insure against all economic losses resulting therefrom. It is much more sensible, it is said, for individual businesses to insure against interruption of production from such causes if they wish. This highly pragmatic reason for denying liability is often reinforced in the cases by two further ones. First, there is the contention that to make exceptions to the general rule in situations in which, on the facts, there would be no danger of an avalanche of claims would be potentially anomalous and a cause of uncertainty. Second, there is the conceptual argument that economic losses should be the prerogative of the law of contract. Such losses are frequently inflicted through the operation of the *market*, which is an intrinsic function of a capitalist society: even *intentional* losses thus inflicted having to be accepted if they were suffered in the ordinary course of business competition[4]. The doctrinal objection to liability has been reinforced by the decisions of the House of Lords in *D & F Estates Ltd v Church Comrs For England*[5] and *Murphy v Brentwood District Council*[6], discussed above. The hostility to the recovery of pure economic loss in tort demonstrated by these cases is not confined to their own context of defective buildings, or of products reduced in value by the tortfeasor.

1 *Caltex Oil (Australia) Pty Ltd v Dredge Willemstad* (1976) 136 CLR 529 at 551–552, per Gibbs J. Cf *Weller & Co v Foot and Mouth Disease Research Institute* [1966] 1 QB 569, [1965] 3 All ER 560.

2 Cf the Canadian case *Gypsum Carrier Inc v R* (1977) 78 DLR (3d) 175 (ship collided with railway bridge owned by third party: railway company unable to claim for cost of re-routing trains). But see also *Canadian National Rly Co v Norsk Pacific Steamship Co* (1992) 91 DLR (4th) 289 discussed below at para 5.35, in which the Supreme Court of Canada *imposed* liability in similar circumstances to those in the *Gypsum* case.
3 See W Bishop 'Economic Loss in Tort' (1982) 2 OJLS 1, especially pp 14–17.
4 See J Smith Liability in Negligence (1984) p 77: 'It would indeed be strange if one were to be held liable for doing negligently that for which there would be no liability if done intentionally.'
5 [1989] AC 177, [1988] 2 All ER 992, HL.
6 [1991] 1 AC 398, [1990] 2 All ER 908, HL.

Confirmation of orthodox view

5.26 In *Candlewood Navigation Corpn Ltd v Mitsui OSK Lines Ltd*[1] the plaintiffs, who were time charterers of a vessel which was damaged in a collision caused by the negligent navigation of the defendants' vessel, sought to recover the profits they lost due to the ship being unable to trade while it was undergoing repair. The Privy Council rejected the claim. In their capacity as time charterers the plaintiffs did not own the damaged vessel[2], so their loss was purely economic. Lord Fraser, delivering the judgment of the Board, referred to the fact that *Cattle v Stockton Waterworks* had 'stood for over a hundred years' and asserted that 'the justification for denying a right of action to a person who has suffered economic damage through injury to the property of another is that for reasons of practical policy it is considered to be inexpedient to admit his claim'[3]. Although the Board had been pressed by counsel for the plaintiffs with the argument that the policy justification for denying liability based upon an avalanche of claims was not applicable on the facts of the case, in that no such avalanche was conceivable, their Lordships remained unimpressed. To distinguish on that factual basis between economic loss cases which in principle were considered to be similar would undermine the certainty important in commercial relationships, nor were attempts to draw more principled distinctions by attempting to *classify* various groups of potential plaintiffs likely to prove successful[4].

1 [1986] AC 1, [1985] 2 All ER 935. The case is criticised in (1986) 102 LQR 13 (M A Jones), and defended in [1986] 45 CLJ 10 (A Tettenborn).
2 As it happened, the plaintiffs *were* the owners of the vessel, but due to the peculiar facts of the case they were unable to sue for the relevant loss in that capacity.
3 [1986] AC 1 at 17.
4 See [1986] AC 1 at 24.

Possibility of exceptions to the general rule rejected

5.27 Towards the end of his judgment in the *Candlewood* case[1], Lord Fraser conceded that there might be 'exceptional cases', unlike the one before him, in which liability for pure economic loss caused by a negligent act would, contrary to the general rule, be imposed. In the subsequent case of *Leigh and Sillivan Ltd v Aliakmon Shipping Co Ltd*[2], however, the House of Lords apparently set its face against the possibility of such exceptions, notwithstanding that a persistent and not unpersuasive line of earlier authorities favoured them.

1 See [1986] AC 1 at 25.

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[2] (2000) 76 Con LR 131. See also 76 Con LR 148 (Court of Appeal rejected an application for permission to appeal).
[3] See (2000) 76 Con LR 131 at para 21

LIMITED PRECAUTIONS MAY BE ACCEPTABLE

6.07 In *Bradford-Smart v West Sussex County Council*[1] the Court of Appeal was concerned with the extent to which a school might be under an obligation to take measures to prevent bullying which occurred off the premises outside school hours. Although expert evidence for the claimant was to the effect that some schools had instituted patrols to address the problem, the court considered that this was a 'matter of discretion rather than duty' and, applying the *Bolam* test, concluded that 'enough had been done'[2].

[1] [2002] 1 FCR 425.
[2] See [2002] 1 FCR 425, per Judge LJ delivering the judgment of the court.

No special skill required

6.08 In *Royal Brompton Hospital NHS Trust v Hammond (No 6)*[1] Judge Richard Seymour QC said:

> 'In a case such as the present, if I am satisfied on the evidence that an obvious mistake was made which would not have been made by any careful person of whatever profession, or, indeed, of none, then I can find that the person who made that mistake was negligent'.

Thus in the earlier case of *JD Williams & Co v Michael Hyde & Associates*[2] the Court of Appeal agreed with the trial judge who had held that an architect's decision not to make further investigations into a matter of concern, and instead simply to accept at face value assurances received after the making of initial inquiries, was not a matter for the application of special professional skill. The *Bolam* test was therefore inapplicable, and a finding that the architect had been negligent was upheld.

[1] See (2000) 76 Con LR 131 at para 26.
[2] See [2000] Lloyd's Rep PN 823 at para 30.

The court and the expert

6.09 A judge who rejects expert evidence will normally be expected to give detailed reasons for so doing. In *Eckersley v Binnie*, Bingham LJ said[1]:

> 'In resolving conflicts of expert evidence, the judge remains the judge; he is not obliged to accept evidence simply because it comes from an illustrious source; he can take account of demonstrated partisanship and lack of objectivity. But, save where an expert is guilty of a deliberate attempt to mislead (as happens only very rarely), a coherent reasoned opinion expressed by a suitably qualified expert should be the subject of a coherent reasoned rebuttal, unless it can be discounted for other good reasons'.[2]

Failure by the judge to provide appropriate reasons will, in itself, constitute a ground of appeal since, without them, the parties will not be in a position to evaluate their own chances of seeking a reversal of the decision[3]. Expert witnesses, for their part, and those commissioning them, should ensure that

their evidence is focussed on the appropriate issues, and that irrelevance and excessive length are avoided. Failure to do so is to invite adverse judicial comment and, potentially, penalties in costs[4].

[1] See (1987) 18 ConLR 1 at 77–78 (a dissenting judgment, but that is not material to the passage quoted).
[2] See also *Carribbean Steel Co Ltd v Price Waterhouse* [2013] UKPC 18, [2013] 4 All ER 338 (Note) at [11] per Lord Toulson delivering the judgment of the Board: 'if a properly qualified and reputable independent expert expresses a reasoned opinion that the . . . [defendant] . . . met the required professional standard, it is for the claimant to establish why that view should be rejected'.
[3] See *Flannery v Halifax Estate Agencies Ltd (t/a Colleys Professional Services)* [2000] 1 All ER 373, [2000] 1 WLR 377, CA. See also *English v Emery Reimbold & Strick* [2002] 3 All ER 385, CA.
[4] See per Dyson J in *Pozzolanic v Bryan Hobson Associates* [1999] Lloyd's Rep PN 125 ('Postcript on experts' reports').

Defendants who never addressed the issues

6.10 What if a defendant in a professional negligence action never consciously thought the matter through, but is nevertheless able to adduce a responsible body of opinion in support of what he actually *did*? Can such a defendant successfully invoke the *Bolam* principle to avoid liability? In *Adams v Rhymney Valley District Council*[1] the defendant council fitted, without significant deliberation upon the matter, a certain type of window lock in its council houses. In a tragic fire, the windows could not be opened and three children perished. When the council was sued for negligence it established that a respectable body of opinion could legitimately have decided, after a careful balancing of the risks involved, to install the same kind of lock. The relevant risks were ease of escape during fire as against small children opening the windows and falling out. Sedley LJ, in a vigorous dissent in the Court of Appeal, argued that since the council had never balanced the risks it could not invoke the *Bolam* principle in its defence. But the majority, Morritt LJ and Sir Christopher Staughton, rejected this view and held that the council could successfully invoke the principle so as to avoid liability.

[1] (2001) 3 LGLR 9, CA.

Advice cases

6.11 It is to be noted that *Adams v Rhymney Valley District Council* concerned specific *action* which the defendants had carried out; it might be more difficult for defendants who had given *advice* to escape liability by reliance upon the *Bolam* principle, if they had never addressed the issues. This is because the quality of advice will often be inseparably dependent upon the reasoning underlying it. Nevertheless, reliance upon the *Bolam* principle will not automatically be precluded in advice cases. In one case Chadwick LJ said, obiter, the following[1]:

> 'If the advice is correct, it may well be irrelevant whether the adviser hit upon it as the result of careful and detailed thought, or as a result of experience which overrode the need for detailed analysis of the reasoning process, or purely by luck. I would not endorse the view that, in every case, a professional adviser will be held negligent

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one in which a claim based on expense or loss of profit can be accepted, however, it is apparently not necessary for the claimant to prove actual figures providing he can show that it is inevitable that he will have suffered such damage[2].

1 See *Ball v Consolidated Rutile* [1991] Qd 524 (Aus): 'It would be a quite unsatisfactory state of affairs if upon the same facts by pursuing an action for damages for public nuisance the plaintiffs were able to avoid satisfying the test of proximity and recover in nuisance damages for economic loss caused to them in their prawn fishing endeavours which would not be recoverable in negligence', per Ambrose J, at 546.

2 See *Smith v Wilson* [1903] 2 IR 45.

General inconvenience to the public

14.18 Where the claimant is unable even to show that his suffering was pecuniary in character, or that he suffered damage measurable in pecuniary terms[1], it is very doubtful whether a claim for special damage in public nuisance can be maintained. Inconvenience to members of the public generally is the reason for holding something to be a public nuisance in the first place and it is therefore difficult to see how the suffering of such inconvenience by a particular individual, even if it is unusual in degree, can satisfy the requirement of special and particular damage[2]. Nevertheless in the Australian case of *Walsh v Ervin*[3], which concerned obstruction of the highway, it was held that 'delay and inconvenience of a substantial character . . . so long as not merely similar in nature and extent to that in fact suffered by the rest of the public, may amount to sufficient damage, particular to the individual plaintiff'[4], notwithstanding the absence of any actual pecuniary loss. But the reasoning in this case is open to criticism[5], and probably does not represent English law[6].

1 Eg personal injury.

2 See Fridman 'The Definition of Particular Damage in Nuisance' (1951–53) 2 Annual Law Review (University of Western Australia) 490.

3 [1952] VLR 361 (Sholl J).

4 [1952] VLR at 369.

5 The learned judge relied, inter alia, upon the two Irish cases of *Boyd v Great Northern Rly Co* [1895] 2 IR 555 and *Smith v Wilson* [1903] 2 IR 45, but in both of these a degree of pecuniary loss appears to have been present even though no specific figures were proved. See, further, Fridman, cited above.

6 For academic advocacy of a wider scope for recoverable damage in public nuisance see Estey 'Public Nuisance and Standing to Sue' (1972) 10 Osgoode Hall LJ 563.

Injunction

14.19 A claimant who is able to establish a valid claim on the ground of special damage in public nuisance is not necessarily limited to an action for damages as his remedy. In an appropriate case he can obtain an injunction, just as in private nuisance, without any need to invoke the assistance of the Attorney-General[1].

1 *Spencer v London and Birmingham Rly Co* (1836) 8 Sim 193, 1 Ry & Can Cas 159; *Soltau v De Held* (1851) 2 Sim NS 133, 21 LJ Ch 153. In *Halsey v Esso Petroleum Co Ltd* [1961] 2 All ER 145, [1961] 1 WLR 683, Veale J was prepared to assume that noise created by lorries on the highway was a public nuisance for the purpose of awarding an injunction to the plaintiff who lived nearby. On injunctions see, generally, Chapter 29 below.

No exemplary damages

14.20 In *AB v South West Water Services*[1] the Court of Appeal held that exemplary damages cannot be awarded for public nuisance[2]. The case arose out of a very serious pollution incident when a large quantity of aluminium sulphate was accidentally poured into the public water supply at Camelford in Cornwall, causing widespread anxiety among members of the local population as to the long-term effects upon their health. Reversing the judge below, who had held that an award of exemplary damages was possible in respect of the allegedly high-handed and inadequate response of the defendants after the initial accident, the court held that the situation did not fall within a recognised category of such damages[3]. The court also took the view that public nuisance was peculiarly inappropriate for such an award in view of the large number of potential claimants. Sir Thomas Bingham MR said[4]:

> ' . . . a public nuisance may lead to numerous complaints, which a private nuisance will not . . . in the case of a public nuisance affecting hundreds or even thousands of plaintiffs, how can the court assess the sum of exemplary damages to be awarded to any one of them to punish or deter the defendant without knowing at the outset the number of successful plaintiffs and the approximate size of the total bill for exemplary damages which the defendant must meet?'.

1 [1993] QB 507, [1993] 1 All ER 609; reversing [1992] 4 All ER 574.

2 Such damages can apparently be awarded in *private* nuisance: see *Guppys (Bridport) Ltd v Brookling and James* (1983) 14 HLR 1, [1984] 1 EGLR 29, CA.

3 But cf *Kuddus v Chief Constable of Leicestershire* [2001] UKHL 29, [2002] AC 122 in which the House of Lords disapproved of part of the reasoning in *AB v South West Water Services*. On exemplary damages, see generally, *Rookes v Barnard* [1964] AC 1129 at 1221 onwards, [1964] 1 All ER 367 at 407 onwards, per Lord Devlin. See also *Cassell & Co Ltd v Broome* [1972] AC 1027, [1972] 1 All ER 801. The Law Commission has put forward proposals for reform of this area of the law, see *Aggravated, Exemplary and Restitutionary Damages* (Law Com no 247) (1997).

4 [1993] QB 507 at 531, [1993] 1 All ER 609 at 627.

C RELEVANCE OF FAULT

Standard of liability

14.21 The question of whether a defendant has to be in some sense at fault, or even negligent, in order to be liable in public nuisance is surrounded with difficulty. In cases in which an injunction is sought it may be assumed that the position is as in private nuisance; the activity will normally be a continuing one and an inquiry narrowly focused upon mere carelessness is unlikely to be helpful[1]. In highway cases, and analogous situations giving rise to claims for personal injury or damage, the position is less clear. In *Farrell v John Mowlem & Co*[2], decided in 1954, the plaintiff sustained personal injuries when he tripped over a pipe which had been laid across the pavement by the defendants, who were undertaking certain works to a sewer under contract with the London County Council[3]. Devlin J held the defendants liable in public nuisance, and expressly rejected the suggestion that it was necessary for the plaintiff to prove negligence. He said[4]:

> 'I think the law still is that any person who actually creates a nuisance is liable for it and for the consequences which flow from it, whether he is negligent or not'[5].

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distinction would in practice threaten substantially to fetter the exercise of any given discretion and thereby limit the freedom of those charged with it to focus exclusively upon the general public interest. The second problem, which will often be related to the first, reflects concern about the impact of the imposition of negligence liability upon the *resources* of the authorities concerned. With increasing recognition of the fact that the public finances are not limitless, and that hard choices are sometimes inevitable, it has begun to seem less self-evident that the occurrence of loss or damage, which the exercise of a statutory power would probably have prevented, should result automatically in the payment of compensation to the victim from public funds; even when the exercise of a statutory power would probably have prevented the loss, and the action or inaction in question could be deemed to have been 'operationally' negligent.

1 The distinction originated in American case law: see P Craig 'Negligence in the Exercise of a Statutory Power' (1978) 94 LQR 428 at 442–447.

Loose presumption

15.10 The tendency in later cases has therefore been to treat the distinction between policy and operational matters as being, at best, a somewhat loose presumption rather than a firmly established doctrine[1]. In *Barrett v Enfield London Borough Council* Lord Slynn referred to the policy/operational distinction as a 'guide' in determining 'whether the particular issue is justiciable or whether the court should accept that it has no role to play'. He concluded that[2]:

> 'The greater the element of policy involved, the wider the area of discretion accorded, the more likely it is that the matter is not justiciable so that no action in negligence can be brought'.

1 See especially *Rowling v Takaro Properties Ltd* [1988] AC 473, [1988] 1 All ER 163 and *Lonrho plc v Tebbit* [1992] 4 All ER 280, CA; affg [1991] 4 All ER 973, discussed below.
2 See [1999] 3 All ER 193 at 211.

The policy 'immunity'

Applicability

15.11 In what might be termed 'ordinary' cases of negligence which nevertheless involve some statutory element in the background, such as a road accident caused by the careless driving of an employee of a statutory body on that body's business, the distinction between policy and operational areas of activity would seem to be neither helpful nor relevant[1]. The case should be decided on the same basis as negligence cases generally, without the added complication of that distinction. A difficulty at the outset, however, is to know precisely which cases fall within the 'ordinary' category, and which do not. In *Home Office v Dorset Yacht Co*[2] Lord Diplock suggested that the test is whether 'the act or omission complained of is not of a kind which would itself give rise to a cause of action at common law if it were not authorised by the statute'. Thus, in the *Dorset Yacht* case itself the statutory power to detain the borstal boys was the foundation of the negligence claim in the sense that, without that power, it would have been wrongful to have detained the boys at

all; and a complaint about premature release would therefore have been meaningless. Similarly, in *Anns v Merton London Borough Council*[3] the complaint about careless inspection of the building would have been meaningless without the statutory power to inspect. In the road accident cases, by contrast, the obvious analogy with ordinary litigation between private individuals would place such cases clearly on the other side of the line, even if the accident was caused by someone driving a vehicle in pursuance of a purpose ultimately referable to a statute.

1 Cf *Woolfall v Knowsley Borough Council* (1992) Times, 26 June, CA (no excuse that a local authority failed to remove rubbish which constituted a hazard merely because it wished to avoid aggravating an industrial dispute with its employees).
2 [1970] AC 1004 at 1066, [1970] 2 All ER 294 at 331, HL.
3 [1978] AC 728, [1977] 2 All ER 492, HL.

CIRCULARITY

15.12 The Diplock test does, therefore, have a certain utility as a rough and ready guide to the applicability of the policy and operational dichotomy. Nevertheless, as Harlow pointed out[1], strictly speaking the test is circular and hence cannot ultimately provide a sound basis for distinguishing between cases in which the dichotomy will be relevant and cases in which it will not[2]. This is because carelessness may take an infinite variety of forms, and it is impossible to predicate of a certain act that it could never 'give rise to a cause of action at common law'. Even the fact situations in *Dorset Yacht* and *Anns*, which give the Diplock test an appearance of plausibility, have analogies with other tort cases not involving statutory powers[3]. Thus, a private school may release a small child prematurely and hence cause an accident[4], or a solicitor's carelessness committed against the background of his contractual relationship with his client may cause loss to a third party[5]. In both situations ordinary common law claims for negligence may exist, and yet they are not wholly dissimilar from the situations in *Dorset Yacht* and *Anns* respectively. This does not, of course, in itself indicate that the policy and operational dichotomy was irrelevant, even in the cases in which it was developed, but simply that the Diplock test for the applicability of the dichotomy is flawed.

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1 See C Harlow 'Fault Liability in French and English Public Law' (1976) 39 MLR 516 at 531.
2 See also S Bailey and M Bowman 'The Policy/Operational Dichotomy—A Cuckoo in the Nest' (1986) 45 CLJ 430 at 432.
3 See D Brodie 'Public Authorities: Negligence Actions—Control Devices' (1998) 18 LS 1 at 4–5.
4 Cf *Carmarthenshire County Council v Lewis* [1955] AC 549, [1955] 1 All ER 565, HL.
5 Eg as in *White v Jones* [1995] 2 AC 207, [1995] 1 All ER 691, HL.

Presumption that claims are justiciable

15.13 To assume that every case involving an allegation of negligence against the background of a statutory power had to be subjected at the outset to some test to determine whether it was one to which the policy and operational dichotomy applied and, if so, whether the alleged carelessness fell within one category or the other, would be to adopt an approach both unnecessarily cumbersome and dubious in principle. From a constitutional standpoint the objection in principle is that the approach would notionally place all negligence claims against public bodies in a special category, and hence conflict with the ideal of equality before the law. The approach is unduly cumbersome in

D LIABILITY AT POLICY LEVEL

Carelessness relating to the discretion itself

15.39 At least in theory it seems to be clear that a body upon which a statutory power has been conferred may lose the protection of the public policy 'defence', and hence become subject to liability in negligence, even if the alleged carelessness related to the exercise or non-exercise of the discretion itself[1]. That is to say a claim in negligence is not a weapon which is inherently limited to the so-called 'operational' sphere[2]. A condition precedent to the establishment of such liability at the 'planning' or 'policy' level is that the body in question should have acted ultra vires the statutory power. This lies at the heart of the reasoning both of Lord Diplock in *Home Office v Dorset Yacht Co*[3] and of Lord Wilberforce in *Anns v Merton London Borough Council*[4]. Even if this condition is satisfied, however, it will be far from easy to make out a valid claim in negligence.

1 See per Lord Wilberforce in *Anns v Merton London Borough Council* [1978] AC 728 at 755, [1977] 2 All ER 492 at 501 ('Their immunity from attack . . . though great is not absolute'). See also *Kane v New Forest District Council* [2002] 3 All ER 914, CA rejecting the 'submission that a planning authority has blanket immunity from claims for negligence' (per May LJ at para 33).
2 But cf per Lord Browne-Wilkinson in *X v Bedfordshire County Council* [1995] 3 All ER 353 at 371: ' . . . a common law duty of care in relation to the taking of decisions involving policy matters cannot exist'.
3 [1970] AC 1004, [1970] 2 All ER 294, HL.
4 [1978] AC 728, [1977] 2 All ER 492, HL.

Ultra vires and negligence

15.40 The mere fact that a decision was ultra vires does not mean that it was necessarily taken negligently. In *Dunlop v Woollahra Municipal Council*[1] the plaintiff complained that he had suffered loss as a result of certain resolutions of a local planning authority, which had subsequently been judicially determined to have been ultra vires. The authority had, however, passed the resolutions in good faith and after taking competent legal advice. Moreover, until the resolutions were formally pronounced invalid, the arguments relating to their invalidity had been 'evenly balanced'[2]. The Judicial Committee of the Privy Council held that the plaintiff's allegation that the authority had been negligent in passing the resolutions failed.

1 [1982] AC 158, [1981] 1 All ER 1202.
2 [1982] AC 158 at 172, [1981] 1 All ER 1202 at 1209, per Lord Diplock, delivering the judgment of the Board.

Overkill

15.41 Indeed, situations in which plaintiffs will succeed in proving that ultra vires decisions were reached negligently are likely to be extremely rare. The formidable difficulties facing those who seek to establish cases on these lines were emphasised by the Judicial Committee of the Privy Council in *Rowling v Takaro Properties*[1], in which such a claim was unsuccessfully advanced. The Board identified what it described as 'overkill' as one of the arguments *ab inconvenienti* against the imposition of liability. 'Once it became known', said

Lord Keith delivering the judgment of the Board[2], 'that liability in negligence may be imposed on the ground that a minister has misconstrued a statute and so acted ultra vires, the cautious civil servant may go to extreme lengths in ensuring that legal advice, or even the opinion of the court, is obtained before decisions are taken, thereby leading to unnecessary delay in a considerable number of cases'.

1 [1988] AC 473, [1988] 1 All ER 163.
2 [1988] AC 473 at 502, [1988] 1 All ER 163 at 173.

Very difficult to prove

15.42 If a statutory body *deliberately* misuses its powers it may be liable to damages for the tort of misfeasance in public office[1]. But falling short of instances of that kind, wrongdoing capable of constituting actionable carelessness will be very difficult to prove. Political compromises and trade-offs, not to mention clashes of personality between individuals involved, are characteristic, and quite legitimately so, of the ways in which committees and similar bodies function when charged with deciding broad policy questions. To attempt to dissect their deliberations, using the delicate apparatus of the law of negligence, will seldom be anything other than a thoroughly unsatisfactory exercise.

1 See *Three Rivers District Council v Bank of England (No 3)* [2000] 3 All ER 1, [2000] 2 WLR 79, HL; *Akenzua v Home Secretary* [2003] 1 All ER 35, CA.

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Causation

15.43 If a claimant does succeed in proving that an ultra vires decision was reached carelessly, he may still experience difficulty in showing that any losses which he suffered were, in the legal sense, caused by the defendant[1]. It has even been suggested that, since everyone is entitled to ignore an invalid act, someone who relies on one to his detriment is the source of his own loss[2]! But this is quite unrealistic. Until a decision has actually been pronounced invalid by a competent court it will seldom be prudent simply to ignore it[3]. It is submitted that this particular causation argument should therefore not constitute an effective obstacle to a claimant.

1 See generally C Harlow *Compensation and Government Torts* (1982) pp 92–97.
2 See per Lord Diplock, delivering the judgment of the Privy Council in *Dunlop v Woollahra Municipal Council* [1982] AC 158 at 172, [1981] 1 All ER 1202 at 1209.
3 In any event, ignoring it may not be possible: see *Hoffmann-La Roche & Co Ltd v Secretary of State for Trade* [1975] AC 295, [1974] 2 All ER 1128, HL.

Reaching the same decision

15.44 A more formidable objection to liability is that merely because a particular decision is held to have been, in the particular circumstances, ultra vires, it does not follow that the body in question could not have reached exactly the same decision and yet have stayed intra vires[1]. This will obviously be particularly so if the basis of invalidity is simply procedural irregularity, such as breach of the rules of natural justice. It will often be perfectly possible for the administrative body to correct the defect and act *validly* against the

law remedies, such as damages and injunctions, were refused in situations where sewerage systems had overflowed due to failure on the part of the drainage authorities to expand and improve their plant and equipment[3].

1 [1896] 1 QB 592.
2 (1877) 2 Ex D 441, CA.
3 See *Glossop v Heston and Isleworth Local Board* (1879) 12 Ch D 102, CA. Cf *Robinson v Workington Corpn* [1897] 1 QB 619, CA; *Pasmore v Oswaldtwistle Urban District Council* [1898] AC 387, HL; *Smeaton v Ilford Corpn* [1954] Ch 450, [1954] 1 All ER 923. In 2003 the House of Lords affirmed the continued validity of this line of authority: see *Marcic v Thames Water Utilities* [2004] 1 All ER 135, Cf *Pride of Derby and Derbyshire Angling Association Ltd v British Celanese Ltd* [1953] Ch 149, [1953] 1 All ER 179, CA. Moreover, although occupiers can compel water companies to allow access to the public sewers, they cannot obtain damages for breach of statutory duty if access is wrongfully denied (contrary to the Water Industry Act 1991, s 106): *Dŵr Cymru Cyfyngedig (Welsh Water) v Barratt Homes Ltd* [2013] EWCA Civ 233, [2013] All ER (D) 290 (Mar).

Policy factors

16.19 The argument *ab inconvenienti* based on the large number of potential claimants[1], which is evidently one aspect of the judicial anxiety in these cases, is one which is often criticised. But it is not the only aspect of the problem. Statutory duty cases often arise out of situations involving some major objective which the legislature wishes to promote. It might still be perfectly possible to argue in a modern case, depending on the particular facts, that the legislative strategy could be excessively hindered if individual plaintiffs were permitted to polarise debate around their specific grievances[2]. Alternatively, a decision in favour of liability might provide a desirable stimulus to action, as well as meet a just claim for compensation. Whether an action for breach of statutory duty should be permitted will often call for sophisticated evaluation of these and other policy factors[3].

1 Ie the fear of 'opening the floodgates'.
2 Cf *Watt v Kesteven County Council* [1955] 1 QB 408, [1955] 1 All ER 473, CA (education).
3 It is interesting to note that the Robens Committee on Safety and Health at Work suggested that the availability of the action for breach of statutory duty in factory accident cases had hindered rather than helped accident prevention: (Cmnd 5034) pp 144–147; 185–187. See also G Williams in (1960) 23 MLR 233 at 239, who questioned the need for the action in this context, given the existence of the social security industrial injuries scheme. Cf *Haigh v Charles W Ireland Ltd* [1973] 3 All ER 1137 at 1147, [1974] 1 WLR 43 at 54–55, HL, per Lord Diplock.

Reasoning not explicit

16.20 In practice, the courts often seem to invoke the concept of a distinction between legislation intended to benefit the 'public', and legislation intended to benefit a 'class', in order to give effect to a decision reached in reliance on factors of this kind even if the reasoning is not always made explicit. An example is provided by *Church of Jesus Christ of Latter Day Saints (Great Britain) v West Yorkshire Fire and Civil Defence Authority*, sub nom *Capital and Counties plc v Hampshire County Council*[1]. In this case the plaintiffs' chapel was destroyed by a fire which the defendants had been unable to fight adequately due to defects in the fire hydrants in the vicinity. The plaintiffs claimed damages for breach of statutory duty under s 13 of the Fire Services Act 1947, which required a fire authority to 'take all reasonable measures for ensuring the provision of an adequate supply of water'. The Court of Appeal

rejected the claim. Stuart-Smith LJ, delivering the judgment of the court, observed[2] that the Act contained no reference 'to any class of person short of the public as a whole' being concerned instead with the 'function of procurement placed on the fire authority in relation to supply of water for fire fighting generally'.

1 [1997] QB 1004, [1997] 2 All ER 865, CA, distinguishing *Dawson & Co v Bingley UDC* [1911] 2 KB 149, CA.
2 [1997] QB 1004 at 1050, [1997] 2 All ER 465 at 896.

Relevance of provision in the Act for a penalty

16.21 One of the most confusing questions in this area concerns the relevance of the presence or absence of provision in the statute itself for a sanction, be it a criminal penalty or some other kind of remedy. In *Doe d Bishop of Rochester v Bridges*[1] Lord Tenterden CJ said that:

> 'where an Act creates an obligation, and enforces the performance in a specified manner, we take it to be a general rule that performance cannot be enforced in any other manner. If an obligation is created, but no mode of enforcing its performance is ordained, the common law may, in general, find a mode suited to the particular nature of the case'[2].

This dictum, which has frequently been cited in later cases, and can probably be said to represent the orthodox view, thus favoured a presumption *against* liability for breach of statutory duty where the Act provides for a sanction,[3] and a presumption *in favour* of liability where it does not do so. It is submitted, however, that both aspects of the proposition are open to serious criticism, and that a different and preferable interpretation of the authorities is tenable.

1 (1831) 1 B & Ad 847 at 859.
2 Cf *Wolverhampton New Waterworks Co v Hawkesford* (1859) 6 CBNS 336 at 356, per Willes J.
3 See *Issa v Hackney London Borough Council* [1997] 1 WLR 956, [1997] 1 All ER 999, CA.

Criminal sanctions

16.22 Despite the supposed presumption *against* liability, it has long been clear that provision for the imposition of a *fine* is not in itself conclusive against the availability of a civil action[1]. This point was occasionally obscured in the older cases by provision for recovery by a common informer[2] (who might himself be the sufferer of the mishap) of all or part of any penalty imposed, or even for payment of it direct to the victim in his capacity as such. Even in these situations, however, the courts would not hesitate to impose liability if they considered it appropriate. This was particularly apparent in the industrial injuries field, where one of the attractions of the action for breach of statutory duty was that it provided an avenue of escape from the consequences of the defence of common employment. The leading example is *Groves v Lord Wimborne*[3], in which Rigby LJ observed[4] that even if the maximum fine which could have been imposed under the provision in question, £100, were eventually to reach the plaintiff, it would nevertheless seem 'monstrous to suppose that it was intended that in the case of death or severe mutilation arising through a breach of the statutory duty, the compensation to the workman or his family should never exceed' that figure[5]. The level at which a

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restored the decision at first instance in favour of the employee. Nevertheless, the House of Lords considered the case, *Barber v Somerset County Council*[1], to be 'fairly close to the borderline'[2]; and its own decision was not unanimous[3]. Moreover, even in the one case in which the Court of Appeal itself decided in favour of the employee, it stated that it had reached its conclusion 'not without some hesitation'[4]. While claimants should not be discouraged from pursuing clear cases, it is therefore likely that the overall effect of *Hatton v Sutherland* will have been to heighten the scrutiny to which the courts will subject claims for work-related illness based on stress.

1 [2004] 2 All ER 385, HL.
2 See [2004] 2 All ER 385, HL at para 67 per Lord Walker of Gestingthorpe.
3 Lord Scott of Foscote dissented, and Lord Rodger of Earlsferry expressed reservations.
4 See [2002] 2 All ER 1 at para 66.

Barber v Somerset County Council

17.09 Despite the heightened scrutiny towards stress cases likely to be adopted as a result of *Hatton v Sutherland*, appellate courts should still hesitate before disturbing the findings of the judge who heard and saw the witnesses. In *Barber v Somerset County Council*[1] the House of Lords held that the Court of Appeal had not been justified in overturning a decision in favour of the employee in a case in which the factual evidence had been critical. In *Barber* a teacher suffered a nervous beakdown. He had previously been off sick with anxiety and depression and the House, differing from the Court of Appeal, held that this should have put his employers on notice that steps to reduce his burden should have been considered when he returned to work. Lord Walker of Gestingthorpe said[2]:

> 'At the very least the senior management team should have taken the initiative in making sympathetic inquiries about Mr Barber when he returned to work, and making some reduction in his workload to ease his return. Even a small reduction in his duties, coupled with the feeling that the senior management team was on his side, might by itself have made a real difference. In any event Mr Barber's condition should have been monitored, and if it did not improve, some more drastic action would have had to be taken. Supply teachers cost money, but not as much as the cost of the permanent loss through psychiatric illness of a valued member of the school staff'.

1 [2004] 2 All ER 385.
2 See [2004] 2 All ER 385 at para 68.

Disciplinary proceedings

17.10 In *Yapp v FCO*[1] the claimant developed a depressive illness following his being negligently subjected by the defendants to an unfair disciplinary process. The Court of Appeal held that his claim for damages for the illness would fail[2]. Even in cases where a one-off event triggered the depression, as distinct from subjection to stressful pressure over a period of time, the same *Hatton* principles would apply. Accordingly, in the absence of some known vulnerability on the part of the claimant the development of a depressive illness would not normally be foreseeable as the result of subjection even to an unfair and unjustified disciplinary process[3].

1 [2014] EWCA Civ 1512.
2 See also *Croft v Broadstairs & St Peter's Town Council* [2003] EWCA Civ 676.
3 Since each case depends on its own facts it is possible that in an extreme case it might be established that the event to which the claimant had been subjected would foreseeably have caused depressive illness even in a normally robust individual with no pre-existing vulnerability: see *Yapp v FCO* [2014] EWCA Civ 1512 at [123] per Underhill LJ.

C SAFE SYSTEM OF WORK

17.11 It was at one time usual to subdivide the employer's own common law duty to his employees into a three-fold classification relating to the need for competent fellow-employees, safe equipment, and appropriate methods of work[1]. More recently, however, the tendency has been to adopt a unified approach, since 'all three are ultimately only manifestations of the same duty of the master to take reasonable care so to carry out his operations as not to subject those employed by him to unnecessary risk'[2]. In *Parker v PFC Flooring Supplies*[3], decided in 2001, Potter LJ put it as follows:

> 'The over-all duty of the employer is to take reasonable steps for the safety of his employees against those types of risks which are reasonably foreseeable as likely to occur in the course of the employee's employment, which in turn depends upon the nature, functions, restrictions and general parameters of the employee's job and the broad areas of activity in which he is likely to be engaged or to engage himself in furtherance of his employer's interests'.

The House of Lords has emphasised that the question of the scope of the duty is essentially one of fact in each case, and that care should be taken not to convert reasons given by judges when deciding such questions into propositions of law capable of general application[4].

1 See *Wilsons & Clyde Coal Co Ltd v English* [1938] AC 57 at 78, [1937] 3 All ER 628 at 640, per Lord Wright.
2 Per Pearce LJ in *Wilson v Tyneside Window Cleaning Co* [1958] 2 QB 110 at 121, [1958] 2 All ER 265 at 271, CA; see also *Wingfield v Ellerman's Wilson Line* [1960] 2 Lloyd's Rep 16 at 22, CA, per Devlin LJ; *McDermid v Nash Dredging and Reclamation Co Ltd* [1986] QB 965 at 974, [1986] 2 All ER 676 at 681, CA, per Neill LJ (see also *McDermid*'s case in the House of Lords [1987] AC 906, [1987] 2 All ER 878, discussed below at para 17.25).
3 See [2001] EWCA Civ 1533 at para 22.
4 See *Qualcast (Wolverhampton) Ltd v Haynes* [1959] AC 743, [1959] 2 All ER 38, HL.

Equipment and supervision

17.12 If the work which an employee is required to do involves a known risk, the employer is obliged to devise a method of working which, as far as possible, minimises the risk, and also to provide appropriate safety equipment or facilities. Thus, in *General Cleaning Contractors v Christmas*[1] the House of Lords held the defendant employers liable for failing to take suitable precautions which could have prevented their employee from falling and suffering serious injuries, while cleaning the windows of a building from the outside. Lord Reid expressed himself as follows[2]:

> 'Where the problem varies from job to job it may be reasonable to leave a great deal to the man in charge, but the danger in this case is one which is constantly found and it calls for a system to meet it. Where a practice of ignoring an obvious danger has

in these circumstances, and also put the scope of that liability on a wide basis. He said[3]:

> 'The employer has the exclusive responsibility for the safety of the appliances, the premises and the system of work to which he subjects his employee and the employee has no choice but to accept and rely on the employer's provision and judgment in relation to these matters. The consequence is that in these relevant aspects the employee's safety is in the hands of the employer; it is his responsibility. The employee can reasonably expect therefore that reasonable care and skill will be taken. In the case of the employer there is no unfairness in imposing on him a non-delegable duty; it is reasonable that he should bear liability for the negligence of his independent contractors in devising a safe system of work. If he requires his employee to work according to an unsafe system he should bear the consequences'[4].

1 (1984) 55 ALR 225.
2 See [1986] QB 965, [1986] 2 All ER 676, CA.
3 (1984) 55 ALR 225 at 235.
4 See also *Morris v Breaveglen Ltd* [1993] ICR 766, CA. Cf *Nelhams v Sandells Maintenance Ltd* (1995) Times, 15 June, CA.

Duty discharged

17.27 *McDermid v Nash Dredging and Reclamation Co Ltd* was distinguished on the facts in *Cook v Square D Ltd*[1]. In this case the plaintiff was sent by his employers in the UK to work in Saudi Arabia at premises occupied by another firm, where he suffered injury due to a hazard on those premises. The Court of Appeal accepted that the duty owed by the UK employers could not be delegated but held that that duty, which was only to do what was reasonable in all the circumstances, had not been breached merely by the presence of a hazard on a site abroad occupied by supposedly competent international contractors. 'The suggestion that the home-based employer', observed Farquaharson LJ[2], 'has any responsibility for the daily events of a site in Saudi Arabia has an air of unreality'. In *McDermid*'s case the relationship between the tugboat captain and the main employers had been much closer. Although the plaintiff in *Cook's* case therefore failed, Farquaharson LJ emphasised that, as the contrast with *McDermid* indeed illustrated, decisions in other cases could well be different even where the facts were superficially similar. He said[3]:

> 'Circumstances will, of course, vary, and it may be that in some cases where, for example, a number of employees are going to work on a foreign site or where one or two employees are called upon to work there for a very considerable period of time that an employer may be required to inspect the site and satisfy himself that the occupiers were conscious of their obligations concerning the safety of people working there.'

1 [1992] IRLR 34, CA. See also *A (a child) v Ministry of Defence* [2003] PIQR P33.
2 [1992] IRLR 34 at 38.
3 [1992] IRLR 34 at 38.

D STATUTORY DUTIES

Introduction

17.28 It has long been established that an action for damages for breach of statutory duty can subsist in favour of an employee injured due to contravention by his employer of the statutory provisions or regulations relating to safety at places of work[1]. Since 1997, provisions formerly contained in legislation such as the Factories Act 1961, and the Offices, Shops and Railway Premises Act 1963, have largely been replaced by regulations and approved codes of practice gradually promulgated, over a number of years, under the Health and Safety at Work etc Act 1974. This has been done in order to improve the law in this area, by giving it a more unified and coherent structure, and in order to comply with EC directives relating to health and safety. The replacement regulations, made under powers conferred by the Health and Safety at Work etc Act[2] itself, formerly gave rise to the action for damages for breach of statutory duty, except in so far as they themselves provided otherwise[3]. But in a controversial change to the relevant provision – the Health and Safety at Work etc Act s 47(2), inserted by the Enterprise and Regulatory Reform Act 2013 s 69 – this presumption was *reversed*. Accordingly, the regulations will no longer give rise to the action for breach of statutory duty unless they themselves so provide.

1 In view of the very long incubation period of certain industrial diseases such as mesothelioma the courts may be required to construe legislation passed long ago: see eg *McDonald v National Grid* [2014] UKSC 53 which involved the Factory and Workshop Act 1901, the Asbestos Industry Regulations 1931, and the Factories Act 1937.
2 See s 15.
3 In at least one instance, regulations which did originally provide otherwise were subsequently amended so as to provide that such actions can be brought: see the Management of Health and Safety at Work and Fire Precautions (Workplace) (Amendment) Regulations 2003, SI 2003/2457, reg 6, amending the Management of Health and Safety at Work Regulations 1999, SI 1999/3242, reg 22. For discussion, see Victoria Howes 'New Civil Action Against Employers' (2003) NLJ 1794.

New regulations

17.29 The gradual process of replacement was carried significantly forward in the year 1992. New regulations that year included the Workplace (Health, Safety and Welfare) Regulations[1], the Provision and Use of Work Equipment Regulations[2], the Manual Handling Operations Regulations[3] and the Personal Protective Equipment at Work Regulations[4]. Although these sets of Regulations only came into force, for existing workplaces, on 1 January 1996, they came into effect for new workplaces on 1 January 1993. The nature and scope of the Provision and Use of Work Equipment Regulations 1998 were considered by the House of Lords in *Robb v Salamis (M&I) Ltd*[5]. Reversing the courts below, who had denied liability on the ground that the pursuer's accident had been his own fault, the House held that liability under the regulations had been established, subject to a reduction for contributory negligence. The House emphasised the need to construe the regulations in the light of the European directives which they were intended to implement[6]. Lord Clyde said[7]:

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