Key Facts Key Cases

Tort Law

Chris Turner

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Contents

Preface

This new series of **Key Facts Key Cases** is built on the two well-known series, Key Facts and Key Cases. Each title in the Key Facts series now incorporates a Key Cases section at the end of most chapters which is designed to give a clear understanding of important cases. This is useful when studying a new topic and invaluable as a revision aid. Each case is broken down into fact and law. In addition many cases are extended by the use of important extracts from the judgment or by comment or by highlighting problems. In some instances students are reminded that there is a link to other cases or material. If the link case is in another part of the book, the reference will be clearly shown. Some links will be to additional cases or materials that do not feature in the book.

The basic Key Facts sections are a practical and complete revision aid that can be used by students of law courses at all levels from A Level to degree and beyond, and in professional and vocational courses.

They are designed to give a clear view of each subject. This will be useful to students when tackling new topics and is invaluable as a revision aid.

Most chapters open with an outline in diagram form of the points covered in that chapter. The points are then developed in a structured list form to make learning easier. Supporting cases are given throughout by name and for some complex areas facts are given to reinforce the point being made. The most important cases are then given in more detail.

The Key Facts Key Cases series aims to accommodate the syllabus content of most qualifications in a subject area, using many visual learning aids.

Tort Law is a core subject in all qualifying law degrees. It is also a vital subject in which to gain a good understanding since it involves events that we commonly and unfortunately experience in our own daily lives whether through road traffic accidents or unwanted contact or even intolerable neighbours.

The topics covered for Tort Law include all of the main areas of all mainstream syllabuses.

In the Key Cases sections in order to give a clear layout, symbols have been used at the start of each component of the case. The symbols are:

Key Facts – These are the basic facts of the case.

Key Law – This is the major principle of law in the case.

Key Judgment – This is an actual extract from a judgment made on the case.

Key Comment – Influential or appropriate comments made on the case.

Key Problem – Apparent inconsistencies or difficulties in the law.

Key Link – This indicates other cases which should be considered with this case.

The Key Link symbol alerts readers to links within the book and also to cases and other material, especially statutory provisions, that are not included.

The court abbreviations used in the key case sections of this book are shown below.

Ass	Assize Court	CA	Court of Appeal
CC	County Court	CCA	Court of Criminal Appeal
CCR	Crown Cases Reserved	CH	Court of Chancery
ChDiv	Chancery Division	CJEU	Court of Justice of the European Union
C-MAC	Court Martial Appeal Court	CP	Court of Probate
DC	Divisional Court	EAT	Employment Appeal Tribunal

ECHR	European Court of Human Rights	ECJ	European Court of Justice
ET/IT	Employment tribunal/ Industrial tribunal	Exch	Court of the Exchequer
HC	High Court	HL	House of Lords
KBD	King's Bench Division	NIRC	National Industrial Relations Court
PC	Privy Council	QBD	Queen's Bench Division
RC	Rolls Court	SC	Supreme Court

The law is as I believe it to be on 1 August 2013.

Table of Cases

1 The nature of tortious liability

1.1 General principles of tortious liability

1.1.1 The character of tort

1 The word tort comes from the French, meaning 'wrong'.

2 Tort concerns civil wrongs leading to possible compensation.

3 A common definition is: 'Tortious liability arises from the breach of a duty primarily fixed by law; such duty is towards persons generally and its breach is redressable by an action for unliquidated damages' (Winfield).

4 Character is dictated by historical background, so a better definition is: 'subject to statutory intervention, a tort is a wrong which in former times would have been remediable by one of the actions for trespass (for direct wrongs) or trespass upon the case (for indirect wrongs)' (Cooke) – so should refer to a law of torts.

5 The standard modern model is as follows: the defendant's act or omission causes damage to the claimant through the fault of the defendant, and damage is of a type which attracts liability in law.

6 However, there are complications:

   a) strict liability torts do not require faults to be proved;

   b) the type of damage caused may not give rise to liability (*damnum sine injuria*);

   c) some conduct results in liability even without damage (*injuria sine damno*).

1.1.2 The aims of tort

1 There are two principal objectives in tort: deterrence and compensation.

   a) **Deterrence** operates more on a market than an individual basis – the idea is to reduce the cost of accidents.

b) **Compensation** – the purpose of damages is to put the victim in the same position as if tort did not occur (reliance loss).

2 A key question is whether the system adequately compensates victims.

3 Points to consider:

- only those who can show fault can be compensated;
- both Pearson and Woolf reports identified delay and costs as major drawbacks;
- reductions in value of compensation: pressure is on the claimant to settle – usually for two-thirds to three-quarters;
- unpredictability;
- no point suing 'a man of straw' – exceptions are third party insurance under Road Traffic Acts; vicarious liability; Employer's Liability (Compulsory Insurance) Act 1969;
- the system discourages claims: only one in ten potential personal injury claims are pursued;
- the effect of the Woolf reforms on encouraging or deterring claims.

1.1.3 Alternative methods of compensation

1 These were considered as early as Royal Commission on Civil Liability and Compensation for Personal Injury (Pearson Commission) 1978.

2 The Commission was the follow-up to the Thalidomide scandal.

3 The Commission did not recommend an end to the tort system in personal injury, but did recommend a partial no-fault system.

4 New Zealand operates such a scheme: benefits up to 80 per cent of earnings; limited lump sum amounts in permanent disability – 1982 reforms found no one in favour of returning to fault system.

5 Public insurance is one alternative – Pearson showed that the cost of obtaining tort compensation is much higher than the cost of administering the Social Security system.

6 Private insurance – too expensive for many people, and not within British culture.

7 Compensation from public schemes, e.g. Criminal Injuries Compensation Scheme, Motor Insurance Bureau, if applicable.

1.1.4 The interests the law of torts protects

1 It is possible to classify torts according to type of interest.

2 These include the following.

a) Personal security:

- original trespass actions, e.g. battery, etc.;
- more recently includes negligence, e.g. medical negligence;
- and psychiatric extensions, e.g. nervous shock;
- and now there is a developing tort of harassment under the Protection from Harassment Act 1997.

b) Property:

- interests in land protected by trespass, nuisance (*Rylands v Fletcher* (1868));
- interests in chattels by trespass, conversion, statute.

c) Reputation:

- an extension of personal security;
- protected by defamation, malicious falsehood, etc.

d) Economic loss:

- much more controversial and problematic;
- is limited because of the difficulty of distinguishing between lawful and unlawful business activities;
- economic torts associated with competing activities of trade unions and businesses, e.g. procuring a breach of contract;
- the law also recognises an action for economic loss caused by a negligently made statement;
- but not for pure economic loss caused by an action.

1.1.5 Tort and mental states

1 There are three possible states of mind relevant to liability in tort, as listed below.

2 a) Malice:

- improper motive, generally has no relevance in tort (***Bradford Corporation v Pickles* (1895)**);
- but there are two exceptions:

i) where malice is an ingredient, e.g. malicious prosecution;

ii) where malice is an unreasonable act, as in nuisance (*Christie v Davey* (1893)).

b) Intention. Three possible groups:

- torts deriving from the writ of trespass, e.g. assault;
- fraud – defendant makes statement knowing it is untrue;
- conspiracy – where claimant can show that the prime purpose of the conspirators is to harm him.

c) Negligence:

- a major tort in its own right, but also indicative of an objective standard imposed by law;
- liability results from falling below the set standard;
- the consequences of applying negligence as test of liability are that victims unable to show fault go uncompensated, and process of investigating facts needed to prove fault is costly and prohibitive.

1.1.6 Relationships with other areas of law

1 With crime.

a) Dual liability is possible, but distinctions include:

- the parties, e.g. the state's involvement in crime;
- the outcome, e.g. liability as opposed to punishment;
- terminology and procedural differences;
- the standard of proof.

b) But they are not always so different, e.g. the right of the court to impose sanctions in medieval trespass actions.

2 With contract.

a) Duties in tort are imposed by law and apply generally, but contract duties are agreed by the parties and apply to them only.

b) Statute does now impose many contractual duties irrespective of the will of the parties.

c) There are potential overlaps, e.g. negligence and breach of implied conditions.

d) Difficulties are created both by the exceptions to the privity rules in contract, and by the tort action for economic loss, which blur the distinctions between the two areas.

e) Sometimes a claimant has a choice in which area to sue, e.g. in contract for private medicine where there is negligence.

1.1.7 The effects of the Human Rights Act 1998

1 This can have a major impact on many areas of law, not just tort.

2 The Act gives statutory effect to, and incorporates into English law, the European Convention on Human Rights.

3 Judges therefore have a new role as watchdogs of the Convention.

4 The Act demands all primary and secondary legislation to be interpreted to be compatible with provisions of the Convention.

5 Many Convention Articles are appropriate to the law of torts:

- Article 2 – the right to life (appropriate to medical torts);
- Article 3 – freedom from torture, inhuman or degrading treatment (trespass to the person);
- Article 4 – freedom from slavery;
- Article 5 – the right to liberty apart from lawful arrest;
- Article 8 – the right to respect for private and family life, home and correspondence (defamation, trespass, nuisance);
- Article 9 – freedom of thought, conscience and religion (defamation, unlawful arrest);
- Article 10 – freedom of expression (defamation).

6 The UK has faced many claims in the European Court of Human Rights and has a worse record than many other signatories (***Z v UK* (2001)**).

1.2 Fault and no-fault liability

1 Fault liability is unfair to claimants, because of difficulty of proof and evidence, and because victims of publicised events are advantaged.

2 It is unfair on defendants because there is no way of accounting for degree of culpability.

3 It is unfair on society generally because it creates classes of victims who can be compensated and classes that cannot.

4 It is also depends heavily on policy, so is arbitrary.

5 It is justified both for punishing wrongdoers and deterrent value.

6 Pearson has advocated no-fault schemes – two no-fault medical negligence bills since, but neither was accepted.

1.3 Joint and several tortfeasors

1.3.1 Joint and several liability

1 Liability is straightforward, with a single act causing loss or injury.

2 Often more than one breach of duty, or more than one act causes the damage, and liability may be independent, or joint, or several.

3 Independent liability is straightforward:

- two separate tortfeasors cause damage through separate torts;
- damage is separate, so each tortfeasor is liable for the particular damage caused.

4 Joint liability can arise in a number of different ways.

- All tortfeasors commit the same tortious act, often with a shared purpose (*Brooke v Bool* (1928)).
- If vicarious liability applies both employer and employee are jointly liable though only one would be sued – (sometimes tortfeasors are joined, e.g. in medical negligence).
- In non-delegable duties a person hiring an independent contractor causing the damage can be jointly liable.
- Where one person authorises the tort of another.
- Where the tort is committed by one member of a partnership each partner is jointly liable, but, since the damage comes from one tort, the claimant can only claim one lot of damages.

5 Several liability involves two separate tortfeasors causing the same damage through coincidental, independent acts:

- the claimant chooses who to sue – usually the one with money;
- since there is only one lot of damage the claimant can only recover once.

6 The practical result of the distinction between joint and several is that release of liability to a joint tortfeasor releases the others, while release to a several tortfeasor will not.

1.3.2 Contributions between tortfeasors

1 Now governed by the Civil Liability (Contribution) Act 1978.

2 The basic proposition is in s 1: 'any person liable in respect of any damage suffered by another person may recover a contribution from any other

person liable in respect of the same damage (whether jointly liable with him or otherwise)'.

3 The person seeking a contribution must be actually or hypothetically liable.

4 Applies to any type of action, and wrongdoer's liability to claimant need not be based on breach of the same obligation – s 6(1).

5 By s 2(1) the amount of contribution is that which is 'just and equitable having regard to the extent of that person's responsibility for the damage' (*Fitzgerald v Lane* (1988)).

6 By s 1(2) a settlement by one tortfeasor does not remove his right to claim a contribution from the other, whether or not he himself was actually liable to the claimant (changing the old law where D1 could only claim from D2 if he could prove D2 was liable).

7 If a claimant's action against a person from whom contribution is sought is time barred, this does not prevent recovery of a contribution unless a two-year limitation period in s 1(3) has expired.

1.4 General defences

1.4.1 Introduction

1 Defences can be both specific and general.

2 Some torts, e.g. defamation, have a range of specific defences.

3 Many defences, e.g. those in negligence, apply generally.

4 Most provide a total defence by showing the defendant is not at fault, others provide a partial defence only.

1.4.2 *Volenti non fit injuria* (consent)

1 This means no injury is done to one who voluntarily accepts a risk.

2 It does not apply where the claimant only knew of the existence of the risk rather than understanding it (*Stermer v Lawson* (1977)).

3 Nor does it apply where the claimant is forced to accept the risk (***Smith v Baker* (1891)**).

4 It commonly applies in sporting situations if physical harm is likely (*Simms v Leigh RFC* (1969) and *Condon v Basi* (1985)).

5 It is important in the medical context (*Sidaway v Governors of Bethlem Royal Hospital* (1985)) where one issue is whether or not there is a requirement of informed consent.

6 It occasionally applies in certain employment situations (*Gledhill v Liverpool Abattoir Co Ltd* (1957)).

1.4.3 Inevitable accident

1 A defendant is never liable for a pure accident.

2 Pure accident means one beyond the defendant's control (***Stanley v Powell* (1891)**).

1.4.4 Act of God

1 Concerns extreme weather conditions.

2 However, they must be unforeseeable conditions, not merely bad weather (***Nichols v Marsland* (1876)**).

1.4.5 Self-defence

1 Everybody is entitled to defend himself.

2 But only by using reasonable force (*Lane v Holloway* (1968)).

1.4.6 Statutory authority

1 No liability if act authorised (*Vaughan v Taff Vale Railway* (1928)).

1.4.7 Illegality (*ex turpi causa non oritur actio*)

1 A defendant can avoid liability where the claimant suffers the harm while engaged in an illegal act (*Ashton v Turner* (1981)).

2 However, see more recently ***Revill v Newbery* (1996)**.

1.4.8 Necessity

1 Applies if an act is done to avoid worse damage (*Watt v Herts CC* (1954)).

2 Saving life is an obvious example (*Leigh v Gladstone* (1909)).

1.4.9 Contributory negligence

1 Originally this was a complete defence, but now governed by the Law Reform (Contributory Negligence) Act 1945 and partial only.

2 The effect is to reduce the claimant's damages where (s)he has contributed to his/her own harm (*Sayers v Harlow DC* (1958)).

3 It is now commonplace when accepting lifts from drunk drivers (*Stinton v Stinton* (1993)) or failing to wear crash helmets while a passenger on a motorbike (*O'Connell v Jackson* (1972)), or failing to wear a seat belt (***Froom v Butcher* (1976)**).

4 It is not necessary to show that the claimant owed a duty of care, merely that (s)he failed to take care in all the circumstances.

5 However, causation must always be proved – the claimant's act in fact helped cause the damage suffered (*Woods v Davidson* (1930)). This can be complex when exposure to asbestos and smoking are possible causes of lung diseases (*Badger v Ministry of Defence* (2005)).

6 There has been debate as to whether 100 per cent reduction of damages is possible – *Jayes v IMI (Kynoch) Ltd* (1985) made such an award, *Pitts v Hunt* (1990) argued this was not possible, and the possibility was raised again in *Reeves v Commissioner of Police* (1998).

Key Cases Checklist

1.1.5.2

***Bradford Corporation v Pickles* [1895] AC 587**

HL

Key Facts

The claimant supplied water to Bradford from sources that ran through underground channels beneath the defendant's land. The claimant alleged that, in an attempt to force it to buy his land, the defendant drained water from his land, causing the claimant's reservoir to empty. The claimant sought an injunction to prevent the defendant from drawing water from his land but this was denied.

Key Law

The defendant's motive for drawing water from his land was held to be irrelevant, even if it was through malice. The defendant was legitimately exercising property rights in extracting water from his land. The claimant only had rights to the water once it reached his land and the injunction was denied.

1.1.7.6 *Z and others v United Kingdom* [2001] 2 FLR 612; [2001] EHRR 3

ECHR

Key Facts

A family of young children first came to the attention of a Social Services Department in 1987. The local authority failed to apply for a care order until 1992. In the meantime, neighbours, teachers, police, doctors and health visitors all expressed concern about the children's welfare. A psychiatrist who examined the children in 1993 reported that it was the worst case of neglect and emotional abuse that she had ever seen. The Official Solicitor brought an action for negligence against the local authority, arguing that the children had suffered long-term damage that could have been avoided if the council had acted promptly. The action failed in the House of Lords (now the Supreme Court) and was taken to the European Court of Human Rights.

Key Law

The House of Lords (now the Supreme Court) held that it would not be just or reasonable to impose a duty since it would cut across the council's other statutory duties, removing resources that could otherwise be used for child protection. The Children Act 1989 was for public benefit generally, not private rights. The European Court of Human Rights accepted that the children were subjected to inhuman and degrading treatment contrary to Art 3, denied a fair trial contrary to Art 6, and refused an effective remedy contrary to Art 13.

Key Comment

The result of this ruling is that English courts will have to rethink the apparent blanket immunity from liability that they have in the past been prepared to extend to public bodies in negligence actions.

1.4.2.3 *Smith v Baker* [1891] AC 325

HL

Key Facts

A quarry worker was injured when a crane moved rocks over his head and some fell on him. He had previously complained that the practice was dangerous and the defendant argued that the fact that he continued to work meant that he had voluntarily accepted the risk of harm. The defence failed.

Key Law

The House held that, while the workman may have consented to general dangers relating to his work he could not be said to have accepted the risk of the specific harm suffered.

Key Judgment

Lord Halsbury LC explained:

'a person who relies on the maxim must shew a consent to the particular thing done . . . It appears to me that the proposition upon which the defendants must rely must be a far wider one than is involved in the maxim.'

1.4.3.2 *Stanley v Powell* [1891] 1 QB 86

QBD

Key Facts

During a pheasant shoot the defendant 'accidentally' shot a beater, a man whose role it was to beat the ground so that the birds would fly up out of the moorland. The defendant successfully claimed an inevitable accident because he was able to show that the injury was caused when the pellet ricocheted off trees.

Key Law

The court held that if the claimant was unable to show that the defendant acted negligently then the damage must have occurred accidentally, which therefore provided a complete defence.

1.4.4.2 *Nichols v Marsland* (1876) 2 ExD 1 CA

Key Facts

The defendant had created artificial lakes on his land. During an exceptionally heavy rain storm described as 'the worst in living memory' the lakes burst their banks and flooded neighbouring land.

Key Law

The court held that the defendant should not be liable if the escape occurred through reasons beyond his own fault but by Act of God.

1.4.7.2 *Revill v Newbery* [1996] QB 567 CA

Key Facts

An allotment holder, the defendant, fed up with trespassers on his allotment, lay in wait in his shed and then fired through a hole in the door at a trespasser, injuring him. The defendant's claim, that the illegal actions of the trespasser relieved him of all liability, failed.

Key Law

The court held that the defendant's actions were out of proportion in the circumstances and the defence would fail. One reason was that this would thwart the clear intentions of Parliament in the Occupiers' Liability Act 1984 to create a duty of care towards trespassers.

Key Judgment

Evans LJ suggested that if the defence were to apply in such circumstances:

'it would mean that the trespasser . . . was effectively an outlaw, who was debarred by the law from recovering compensation for any injury which he might sustain'.

Key Problem

The extent to which a person is entitled to protect his property from trespassers is very contentious with the public. The Government is currently looking at the possibility of giving greater rights to the owners of land against trespassers.

1.4.9.3 *Froom v Butcher* [1976] QB 286 CA

Key Facts

A car accident was caused by the defendant's negligence but the claimant was not wearing a seat belt. He suffered head and chest injuries. His claim succeeded but damages were reduced by 20 per cent.

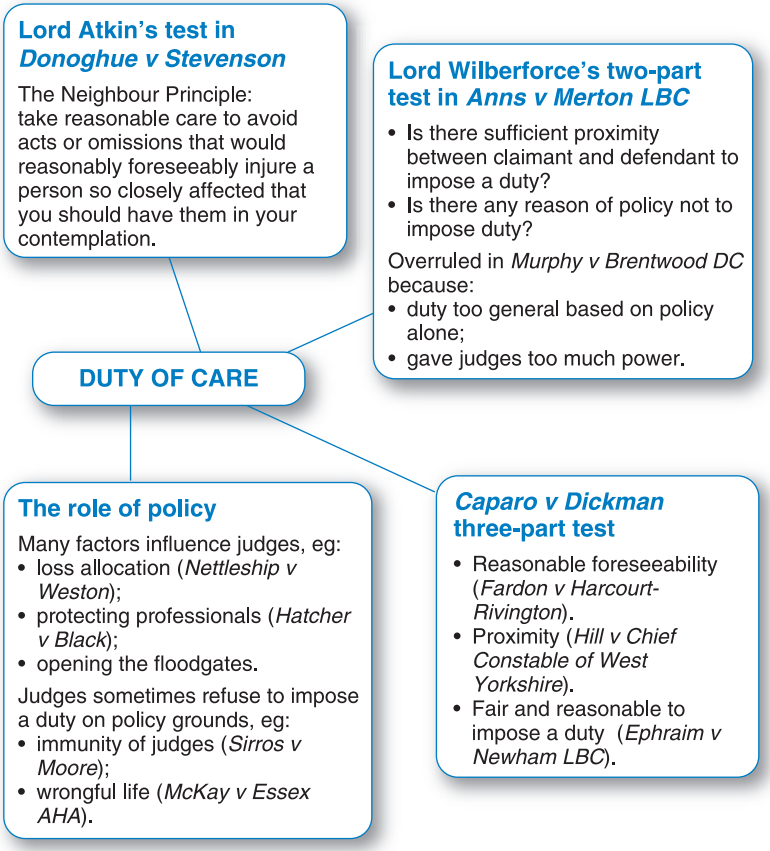
Key Law

The court applied an objective standard of care in determining that the claimant had worsened the injuries. A prudent person would have worn a seat belt, so damages were reduced by 20 per cent.

Key Comment

The judgment was at a time when reduction in damages was being used to persuade people to wear seat belts. The introduction of criminal charges has undoubtedly been more of a deterrent to failing to wear seat belts. Lord Denning's apportionment of blame also seems quite arbitrary.

2 Negligence: basic elements



2.1 Duty of care

2.1.1 Negligence – origins and character

1 The modern starting point is Lord Atkin's judgment in ***Donoghue v Stevenson* (1932)**, which established negligence as a separate tort – though its origins were in actions on the case.

2 A new approach was needed, as no other action was available.

3 The judgment contained five key elements.

- Negligence is a separate tort.
- Lack of privity of contract is irrelevant to mounting an action.
- Negligence is proved as a result of satisfying a three-part test:
  - i) there must be a duty of care owed by defendant to claimant;
  - ii) the duty is breached by the defendant falling below the appropriate standard of care;
  - iii) the defendant causes damage to the claimant that is not too remote a consequence of the breach.
- Lord Atkin's 'Neighbour Principle': 'You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law, is my neighbour? Persons who are so closely and directly affected by my act that I ought reasonably to have them in my contemplation as being affected so when I am directing my mind to the acts or omissions in question'.
- A manufacturer owes a duty to consumers and users of his products not to cause them harm.

4 Thus broad principles were established to determine liability.

5 The law developed incrementally, establishing new duties.

6 Policy has always been a crucial element so the court will not only decide whether there is a duty, but whether there should be.

7 Many factors influence the judges:

- loss allocation (*Nettleship v Weston* (1971));
- moral considerations;
- practical considerations;
- protecting professionals (*Hatcher v Black* (1954));
- constitutional obligations;

- the 'floodgates' argument;
- the possible benefits of imposing duties (*Smolden v Whitworth and Nolan* (1997)).

8 Judges have often cited policy when refusing a duty of care:

- liability of lawyers (*Rondel v Worsley* (1969)) – but now see *Arthur J S Hall & Co v Simons & others* (2000) and *Moy v Pettman Smith and Perry* (2005);
- liability of police (**Hill v Chief Constable of West Yorkshire (1988)**) so no duty to victims of crime or to witnesses (*Brooks v Commissioner of Police* (2005)) – but not where there is a positive duty to act (*Reeves v Metropolitan Police Commissioner* (1999)); nor where human rights are involved (*Osman v UK* (2000)) and breach of Article 6 ECHR; but no duty to protect a witness from attack and murder by a defendant in a criminal trial (*Chief Constable of Hertfordshire v Van Colle; Smith v Chief Constable of Sussex* (2008));
- immunity of judges (*Sirros v Moore* (1975));
- alternative ways to compensate, e.g. CICB, MIB;
- rescues (*Salmon v Seafarer Restaurants* (1983));
- specific claims (wrongful life) (*McKay v Essex AHA* (1982));
- where claimant belongs to an indeterminately large group (*Monroe v London Fire and Civil Defence Authority* (1991));
- where claimant is responsible for own misfortune (*Governors of the Peabody Donation Fund v Parkinson* (1984)).

9 At one point Lord Atkin's test was simplified by Lord Wilberforce in *Anns v Merton LBC* (1978) into a two-part test.

a) Is there sufficient proximity between defendant and claimant to impose a *prima facie* duty?

b) If so, does the judge consider that there are any policy grounds which would prevent such a duty being imposed?

10 The *Anns* test was always seen as too broad because:

a) it creates a general duty based only on proximity;

b) it gives judges too much power to decide on policy alone.

11 A long line of cases expressed dissatisfaction with the *Anns* test, e.g. *Governors of Peabody Donation Fund v Sir Lindsay Parkinson* (1985); **Caparo v Dickman (1990)**. The test was finally overruled in *Murphy v Brentwood DC* (1990).

12 It was replaced by a three-part test of Lords Oliver, Keith, Bridge in *Caparo* (1932).

   a) Reasonable foresight (*Fardon v Harcourt-Rivington* and *Topp v London Country Bus (South West) Ltd* (1993)), but see also *Margereson v J W Roberts Ltd, Hancock v JW Roberts Ltd* (1996) compared to the earlier rule in *Gunn v Wallsend Slipway & Engineering Co Ltd* (1989); and food allergies may also be foreseeable (*Bhamra v Dubb* (2010)).

   b) Proximity (*Hill* (1988) and *John Munroe v London Fire and Civil Defence Authority* (1997)). See also the Court of Appeal in *Sutradhar v Natural Environment Research Council* (2004).

   c) Is it fair and reasonable to impose duty? (*Hemmens v Wilson Browne* (1993) and *Ephraim v Newham LBC* (1993); and it is not fair, just and reasonable to impose a duty where it conflicts with a duty owed by the defendant to another party (*Mitchell v Glasgow City Council* (2009)).

13 Subsequent cases have approved this 'incremental' approach (*Spring v Guardian Assurance* (1995)); (*Jones v Wright* (1994)).

14 Policy has inevitably remained a major factor (*Hill* (1988)):

   a) as with public, regulatory bodies; compare *Philcox v Civil Aviation Authority* (1995) and *Perrett v Collins* (1998) – but assumption of responsibility and special knowledge may create liability on public bodies (*Thames Trains Limited v Health and Safety Executive* (2002));

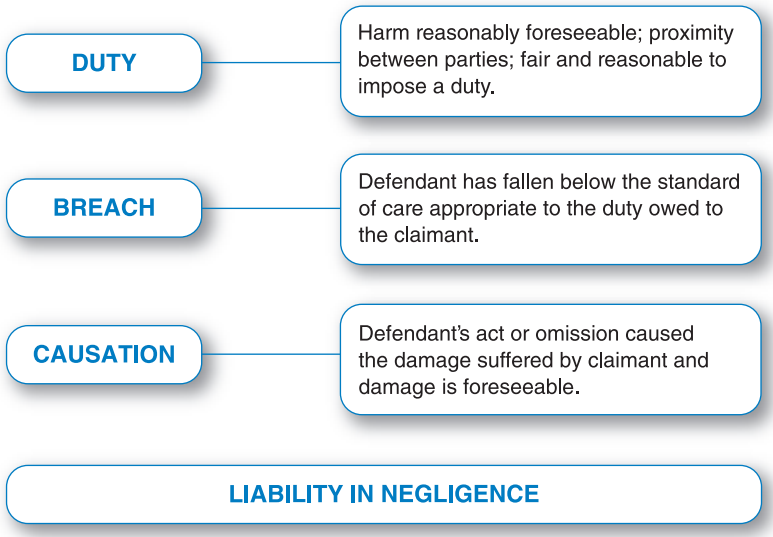
   b) and immunity from suit for professionals (*Kelley v Corston* (1997) and *Griffin v Kingsmill* (1998));

   c) and also for public services (*Capital & Counties plc v Hampshire County Council* (1997)) – so a local authority owes no duty to protect tenants from crime (*X v Hounslow LBC* (2009));

   d) in *Harris v Perry* (2008) it was held that it was impractical for parents to keep children under constant supervision and it would not be in the public interest for the law to require them to do so.

15 The *Anns* test was flawed, but the new test is arguably no better:

- it claims to follow the separation of powers theory;
- but it is more complex and secret, and restricts development.



What must be proved for negligence

2.1.2 The duty of care

1 Case law is crucial to identifying duty situations.

2 Negligence is not mere carelessness, so no duty no liability.

3 There must be a 'duty on the facts', not a mere notional duty.

4 The key questions are:

   a) Is the situation or loss of a type to which negligence applies?

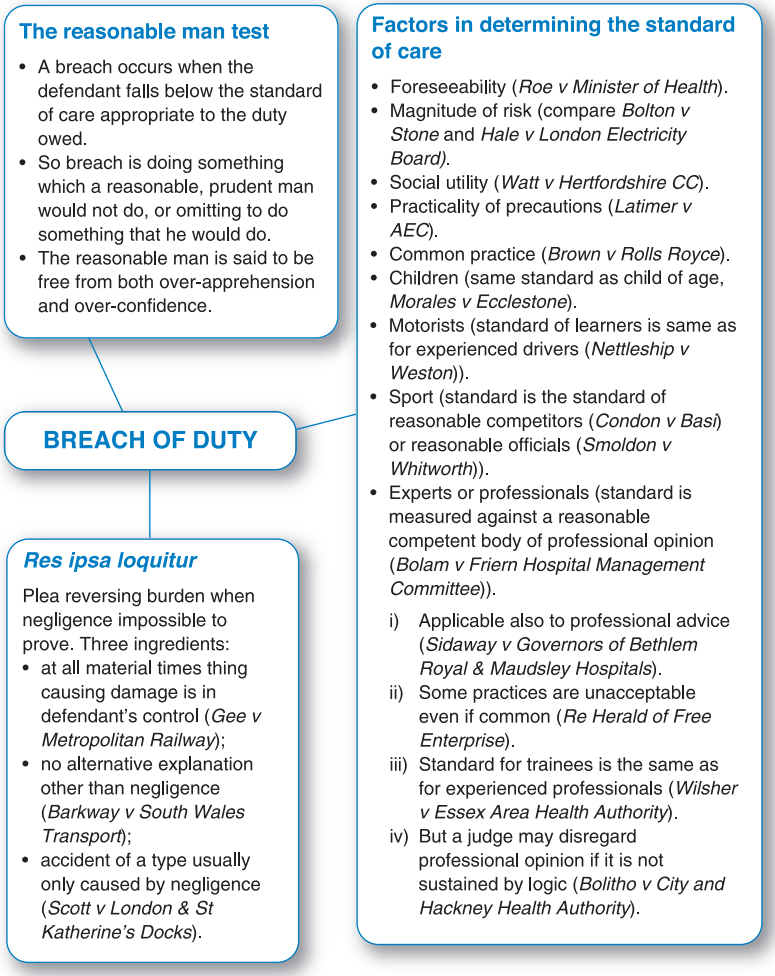
   b) Does the defendant owe a duty to the actual claimant?

5 Numerous straightforward situations, e.g. employers/employees; fellow motorists; doctors/patients, manufacturers/consumers, etc.

6 However, courts have also considered many controversial situations.

2.2 Breach of the duty of care

2.2.1 The Standard of Care and Reasonable Man Test



1 A breach occurs whenever a defendant falls below the standard of care appropriate to the particular duty owed.

2 The standard is objectively measured by the 'reasonable man' test: 'the omission to do something which a reasonable man would do, or doing

something which a prudent and reasonable man would not do.' Per Alderson B in ***Blyth v Birmingham Waterworks* (1865)**.

3 The reasonable man has been described as 'the "man on the street" or "the man on the Clapham omnibus" . . .'

4 Or, as MacMillan LJ put it in ***Glasgow Corporation v Muir* (1943)**, the test is 'independent of the idiosyncrasies of the particular person whose conduct is in question . . . The reasonable man is presumed to be free from both over-apprehension and over-confidence'.

5 So breach of duty then is merely the same as fault.

6 Factors of policy and expediency are taken into account, e.g.:

- who can best bear the loss;
- whether or not the defendant is insured;
- how the decision might affect future behaviour;
- the justice of the individual case;
- how the decision affects society as a whole.

7 Judges have established criteria by which to measure the standard.

2.2.2 Principles in determining the standard of care

1 **Foreseeability**: no obligation for defendant to compensate for incidents beyond his normal contemplation or outside his existing knowledge; compare ***Roe v Minister of Health* (1954)** with *Walker v Northumberland County Council* (1995).

2 **Magnitude of risk**: the care expected depends on likelihood of risk – compare ***Bolton v Stone* (1951)** with ***Haley v London Electricity Board* (1965)**.

3 **Social utility**: a risk averting a worse danger may be justified (***Watt v Hertfordshire CC* (1954)**), but not any risk at all (*Griffin v Mersey Regional Ambulance* (1998)).

4 **Practicality of precautions**: need not take extraordinary steps or suffer extraordinary cost (***Latimer v AEC* (1953)**) – but if defendant is in sufficient control to avoid harm then s(he) is obliged to act (*Bradford-Smart v West Sussex County Council* (2002) on preventing bullying in schools).

5 **Common practice**: usually, but not always, suggests non-negligent practice (*Brown v Rolls Royce* (1966)).

6 Specific classes of people have specific rules.

a) **Children**: originally not expected to take same care as adults (*McHale v Watson* (1966)), but see now *Morales v Ecclestone* (1991) and *Armstrong v Cottrell* (1993) and see ***Orchard v Lee* (2009)** for instance on 'boisterous activity in a playground'.

b) **The disabled and sick**: standard appropriate to disability.

c) **Motorists**: the same standard applies to all drivers, even learners (***Nettleship v Weston* (1971)**) and one becoming ill while driving (*Roberts v Ramsbottom* (1980)), but not if unaware of the illness (*Mansfield v Weetabix Ltd* (1997)).

d) **People lacking specialist skills**: not expected to show same standard as a skilled person (*Phillips v Whiteley Ltd* (1938)).

e) **Sport**: standards applicable to reasonable competitors (*Condon v Basi* (1985)), reasonable officials (***Smoldon v Whitworth* (1997)**) or reasonable sporting authority (*Watson v British Boxing Board of Control* (2001)). But standard depends on individual circumstances (*Pitcher v Huddersfield Town FC* (2001)) and 'horseplay' may be covered by the same standard as sport (but only where the defendant's conduct amounts to a high degree of carelessness (*Blake v Galloway* (2004)).

7 **Experts and professionals** are not bound by the standards of a reasonable man but those of a reasonable practitioner of that particular skill or profession (***Bolam v Friern Hospital Management Committee* (1957)**).

a) The test also applies to advice and information (*Sidaway v Governors of Bethlem Royal & Maudsley Hospitals* (1985)) and warning of risk (*Chester v Afshar* (2002)).

b) And to diagnosis (*Ryan v East London & City Health Authority* (2001)).

c) So professionals need only provide expert witnesses who agree with conduct in question (*Whitehouse v Jordan* (1981)).

d) Some practices are unacceptable even though common (*Re Herald of Free Enterprise* (1989)).

e) Trainees must show the same degree of skill as experienced professionals (*Wilsher v Essex AHA* (1988)).

f) The test applies even if the defendant does not have full professional qualifications (*Adams v Rhymney Valley DC* (2000)).

g) The rule has been approved since. 'There is seldom any one answer exclusive of all others to problems of professional judgement. A court may prefer one body of opinion to the other; but that is no basis

for a conclusion of negligence', per Lord Scarman in *Maynard v West Midlands RHA* (1985).

h) Only a small number of doctors following the practice is sufficient to relieve liability (*De Freitas v O'Brien and Conolly* (1995), where 11 out of 1,000 would have operated).

i) However, the test has been subject to many criticisms:

- it overprotects professionals;
- it allows the professionals to set the standard;
- it is inconsistent with negligence principles generally;
- it can often legitimise quite marginal practices;
- definition of a competent body of opinion is too imprecise;
- the test can lead to professionals closing ranks.

j) Numerous recent cases have challenged its authority:

- *Newell v Goldberg* (1995);
- *Lybert v Warrington HA* (1996);
- *Thompson v James and others* (1996) – failure by GP to follow guidelines in warnings about measles vaccinations, and claimant brain damaged as a result.

k) If the judge feels that the opinion held is not sustained by logic, then it may be disregarded (***Bolitho v City and Hackney Health Authority (1997)***).

2.2.3 Proof of negligence and *res ipsa loquitur*

1 Normally the burden of proof is on the claimant, who has the hard task of collecting evidence.

2 This can be relaxed in two instances:

a) for criminal convictions under s 11 Civil Evidence Act 1968;

b) if the plea of *res ipsa loquitur* is raised.

3 Literally translated this means 'the thing speaks for itself'.

4 Succeeding with the plea means burden of proof is reversed.

5 However, *Wilsher* (1987) suggests that it merely raises a refutable presumption of negligence.

6 It is narrowly construed for fairness – the facts must conform to the criteria in *Scott v London & St Katherine Docks* (1865).

7 There are three essential requirements for the plea to succeed.
   a) At all material times the thing causing injury or damage must have been in defendant's control. Compare *Gee v Metropolitan Railway Co* (1873) with *Easson v London and North Eastern Railway* (1944).
   b) The incident has no obvious alternative explanation (*Barkway v South Wales Transport Co Ltd* (1950)).
   c) The accident is of a type which would not occur if proper care was shown so is of a type commonly caused by negligence (*Scott v London & St Katherine Docks* (1865); *Mahon v Osborne* (1939); and *Ward v Tesco Stores* (1976)).
8 It is debatable whether *res ipsa loquitur* applies in medical negligence but it is often pleaded because of a difficulty in gaining evidence.
9 However, it has been rejected by both the courts and Pearson because of fear of escalating claims and insurance premiums.

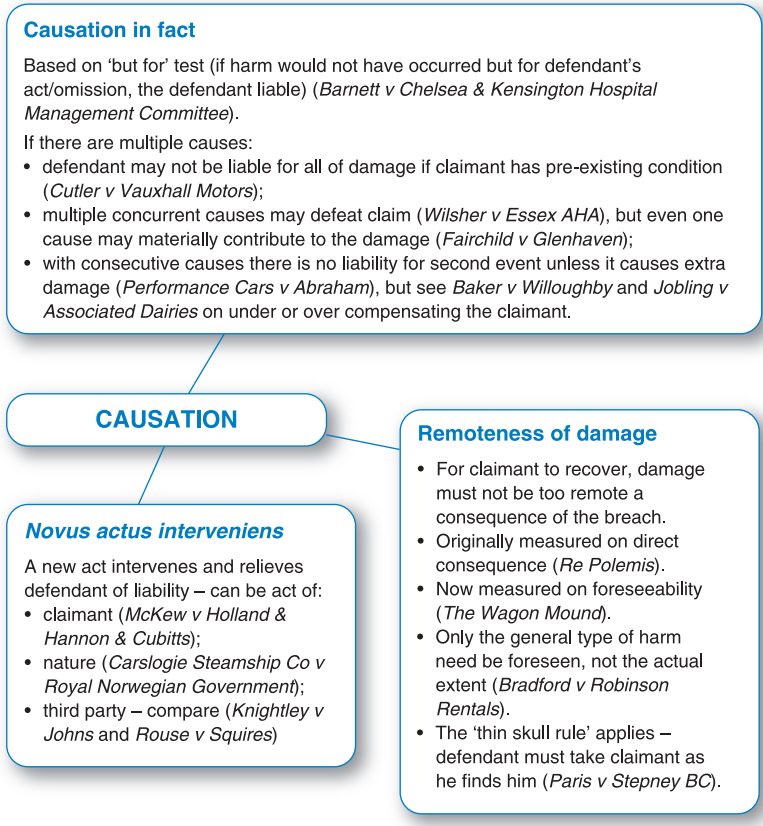
2.2.4 Strict liability in negligence

1 *Res ipsa loquitur* formerly applied to foreign bodies in food.
2 Consumer Protection Act (1987) was introduced to comply with EU directives.
   - It introduced strict liability on anyone in the distribution chain where the consumer suffers harm.
   - Fault liability was removed, but causation is still required.

2.3 Causation and remoteness of damage

2.3.1 Introduction

1 Once duty and breach are shown it must also be proved that the defendant's act or omission caused the damage.
2 Claimant must prove causal link on a balance of probabilities.
3 This may be difficult if there are multiple causes or the type of damage is unusual.
4 Policy considerations are still crucial to causation.
5 Must show: defendant's act or omission caused loss or injury to claimant (causation in fact); and sufficient proximity between act and damage to fix defendant with liability (causation in law).



2.3.2 Causation in fact

1 Based on 'but for' test – Lord Denning in *Cork v Kirby Maclean Ltd* (1952): 'if the damage would not have happened but for a particular fault, then that fault is the cause of the damage; if it would have happened just the same, fault or no fault, the fault is not the cause of the damage . . .'.

2 Often straightforwardly proved by the facts (***Barnett v Chelsea & Kensington Hospital Management Committee* (1969)**).

3 However, problems may exist in proving cause:

a) it is more about apportioning blame than scientific enquiry;

b) level of knowledge/scientific advance may make pinpointing exact cause impossible (***Wilsher v Essex AHA* (1988)**).

c) the case law is often contradictory:
   - it may be unfair to the claimant (*Hotson v East Berkshire AHA* (1987)) but see *Stovold v Barlows* (1995);
   - it may be unfair to the defendant (*McGhee v National Coal Board* (1973));
   - occasionally courts adopt a pragmatic/realistic approach (***Chester v Ashfar* (2004)**).

4 Multiple causes.

a) Proving a causal link is always difficult if there is more than one cause.

b) The problem occurs in one of three ways:
   - claimant has pre-existing condition – defendant may not be liable for all damage (*Cutler v Vauxhall Motors* (1971));
   - multiple concurrent causes:
     i) here if there are many causes and the exact cause cannot be identified then there is no liability (***Wilsher v Essex AHA* (1988)**);
     ii) there may be liability if the defendant's acts materially increase the risk of harm (***McGhee v NCB* (1973)**);
     iii) if a number of defendants could cause the same harm then liability is possible for materially increasing the risk of harm (***Fairchild v Glenhaven Funeral Services Ltd & others* (2002)**);
     iv) more recently the House of Lords held that in this situation apportionment between defendants was appropriate (*Barker v Corus Ltd* (2006));
     v) but the Compensation Act 2006 reverted to the principle in *Fairchild* for asbestos cases;
     vi) in any case, *Fairchild* only applies where the claimant can clearly show a breach of duty by the defendant (*Brett v University of Reading* (2007) and *Pinder v Cape plc* (2006));
     vii) and there can be no claim where the 'injury' is too slight e.g. 'pleural plaques' (*Johnson v NEI International Combustion Ltd; Rothwell v Chemical and Insulating Co Ltd* (2007));
     viii) but the claimant only needs to show that the increase in risk was material and not minimal *Sienkewicz v Greif* (2011).
   - consecutive causes:

i) if second event caused no extra damage, liability remains with first event (*Performance Cars v Abraham* (1962));

ii) but see **Baker v Willoughby (1970)** and **Jobling v Associated Dairies (1982)**, which concern neither under nor over compensating the claimant.

5 There can be no recovery for a mere loss of a chance of avoiding the harm (*Hotson v East Berkshire AHA* (1987)) and **Greg v Scott (2005)**, although a claim for loss of life expectancy may be possible (*JD v Mather* (2012)).

2.3.3 *Novus actus interveniens*

1 Translates as 'a new intervening act', i.e. the chain of causation is broken by a subsequent act that the court accepts is the true cause of damage.

2 The effect is to relieve the defendant of liability.

3 It does not apply if the later act is not accepted as the cause of damage (*Kirkham v Chief Constable of Greater Manchester* (1990)).

4 Cases fall into three categories.

a) An intervening act by claimant – more than contributory negligence since it breaks the chain of causation. Compare **McKew v Holland & Hannen & Cubitts (Scotland) Ltd (1969)** with *Wieland v Cyril Lord Carpets* (1969).

b) An intervening act of nature:

- rarely succeeds because it means claimant has no remedy;
- defendant may succeed if the natural act is unforeseeable and independent of his own negligence (**Carslogie Steamship Co v Royal Norwegian Government (1952)**).

c) intervening act of a third party:

- the act must be sufficient to break the chain of causation;
- it must be foreseeable;
- the defendant must not owe a duty to avoid it (compare **Knightley v Johns (1982)** with *Rouse v Squires* (1973)).

2.3.4 Remoteness of damage

1 Despite proof of a causal link the claimant may fail to recover if damage is said to be too remote a consequence of the breach.

2 It is a legal test based on policy, to avoid overburdening defendant.

3 In the old test the claimant could recover direct consequence loss, even if unforeseeable (*Re Polemis and Furness, Withy & Co* (1921)).

4 The test was criticised for its failure to distinguish between degrees of negligence. Viscount Simmonds in ***The Wagon Mound (No 1) (1961)***: 'It does not seem consonant with current ideas of justice or morality, that for an act of negligence, however slight, which results in some trivial foreseeable damage, the actor should be liable for all the consequences, however unforeseeable and however grave, so long as they can be said to be direct.'

5 So the test was changed to one of 'reasonable foreseeability' in *The Wagon Mound (No 1)* (1961).

6 The type rather than the extent of damage must be foreseen (*Bradford v Robinson Rentals* (1967) and now *Margereson v J W Roberts Ltd, Hancock v JW Roberts* (1996)).

7 Nor must the precise circumstances be foreseen (***Hughes v The Lord Advocate (1963)***).

8 There is a broad view of foreseeability in personal injury (*Jolley v Sutton London Borough Council* (2000)), except in ***Doughty v Turner Manufacturing (1964)*** and ***Tremain v Pike (1969)***.

- But policy reasons may be used to decide that an outcome is reasonably foreseeable (*Corr v IBC Vehicles* (2006) – suicide will not break the chain of causation when the psychiatric illness was caused by the defendant's negligence) and the fact that a patient is an immediate suicide risk means authorities must do everything that can be reasonably expected to avoid it (*Savage v South Essex Partnership NHS Foundation Trust* (2008));
- Contrast with *Grives v FT Everard and Sons Ltd* (2006).

9 But a narrower approach is taken to property damage:

- so in *The Wagon Mound (No 1)* the trial judge agreed some damage (fouling) possibly foreseeable, so fire satisfied direct consequence test;
- but in *The Wagon Mound (No 2)* the trial judge had suggested that fire was possible but too remote, so Privy Council reversed him.

10 The defendant must take the claimant as he finds him – the so-called 'thin skull rule'.

- So the defendant is liable for the full extent of damage where the claimant's extra sensitivity caused worse damage (*Paris v Stepney BC* (1951) and ***Smith v Leech Brain and Co Ltd (1962)***).

- This also applies where likely harm is psychiatric (*Walker v Northumberland County Council* (1994)).
- It also applies if shock is suffered but no physical injury (*Page v Smith* (1995)).
- And it applies if the claimant's impecuniosity (lack of means) may be the feature (*Mattocks v Mann* (1993)).

11 The difference between the two tests appears minimal:

- most reasonably foreseeable consequences are also natural;
- the thin skull rule means that even many unforeseeable consequences are still liable to compensation;
- insurance covers many, if not most, types of loss.

Key Cases Checklist

Duty of care

***Caparo v Dickman* (1990)**
Must show foreseeability of harm, proximity and fair, just and reasonable to impose a duty

Breach of duty

***Blyth v Birmingham Waterworks* (1856)**
Standard is that of the reasonable man
***Bolton v Stone* (1951)**
Should take into account factors such as foreseeability of harm, the magnitude of risk, practicality of precautions etc
***Bolam v Friern Hospital Management Committee* (1957)**
Standard of doctors is that of a competent body of professional opinion

Causation

***Barnett v Chelsea & Kensington Hospital* (1969)**
Must show damage would not have occurred 'but for' defendant's breach
***Fairchild v Glenhaven* (2002)**
But where there are multiple causes a material contribution may be sufficient
***The Wagon Mound* (1961)**
The damage must be foreseeable or is too remote
***McKew v Holland, Hannen & Cubitts* (1969)**
The chain of causation may be broken by a '*novus actus interveniens*'

2.1.1.1 *Donoghue v Stevenson* [1932] AC 562 HL

Key Facts

The claimant claimed to suffer shock and gastro-enteritis after drinking ginger beer from an opaque bottle out of which a decomposing snail had fallen when the dregs were poured.

A friend had bought her the drink and so the claimant could not sue in contract. She was owed a duty of care by the manufacturer despite the fact that she had no contractual relationship.

Key Law

A manufacturer owes a duty of care towards consumers or users of his products not to cause them harm (often referred to as the 'narrow *ratio*' of the case).

Key Judgment

Lord Atkin also identified the means of establishing the existence of a duty of care (the 'neighbour principle'):

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

Key Comment

Lord Atkin's judgment also exploded the so-called 'privity fallacy' and is credited with creating a separate tort of negligence. Negligence can be proved by showing:

- the existence of a duty of care owed to the claimant by the defendant;
- a breach of that duty by the defendant falling below the appropriate standard of care;
- damage caused by the defendant's breach of duty that was not too remote a consequence of the breach, i.e. that was a foreseeable consequence of the breach.

2.1.1.11

Caparo Industries plc v Dickman [1990] 1 All ER 568

HL

Key Facts

Shareholders in a company bought more shares and then made a successful take-over bid for the company after studying the audited accounts prepared by the defendants. They later regretted the move and sued the auditors, claiming that they had relied on accounts which had shown a sizeable surplus rather than the deficit that was in fact the case. Their case failed.

Key Law

The House of Lords (now the Supreme Court) held that the auditors owed no duty of care to the claimants since company accounts are not prepared for the purposes of people taking over a company and cannot then be relied on by them for such purposes. The court also developed the three-stage test for determining when a duty of care is owed:

- Firstly, it should be considered whether the consequences of the defendant's behaviour were reasonably foreseeable.
- Secondly, the court should consider whether there is sufficient legal proximity between the parties for a duty to be imposed.
- Lastly, the court should ask whether or not it is fair, just and reasonable in all the circumstances to impose a duty of care.

Key Link

The three-part test was approved in *Murphy v Brentwood District Council* [1991] 2 All ER 908, which itself overruled *Anns v Merton London Borough Council* [1978] AC 728, which had produced a simple two-part test for establishing a duty. This test was heavily based on policy and had led to much criticism from judges.

2.1.1.8

Hill v Chief Constable of West Yorkshire [1988] 2 All ER 238

HL

Key Facts

The mother of the final victim of the Yorkshire Ripper claimed against the police for their careless and ineffective

handling of the case, arguing that her daughter would not have died but for the negligence in the police investigation. The claim failed.

Key Law

The court held that there was insufficient proximity between the police and the public for a duty to be imposed to protect individual members of the public from specific crimes.

Key Comment

This was an obvious policy decision. However, even under the three-part test it would be considered unfair, unjust and unreasonable to impose such a duty on the police.

Key Links

Reeves v Metropolitan Police Commissioner [2000] 1 AC 360 (where police owed a duty to a known suicide risk while he was in custody and could not rely on *volenti* when he did commit suicide).

In *Jain v Strategic Health Authority* [2009] 2 WLR 248 claimants suffered damage to their business, a private nursing home, after the defendant had applied successfully to have the home's registration cancelled. This was later found to have been based on carelessness and overturned. The claim was rejected as a matter of policy since to impose a duty would interfere with the duty the council owed to the residents of registered nursing homes and the general public.

In *Mitchell v Glasgow City Council* [2009] 2 WLR 481 the House of Lords (now the Supreme Court) held that it would not be 'fair, just and reasonable' to impose a duty on a council to warn a tenant about a meeting with his neighbour whom he had complained about and who then killed him.

2.2.1.2 *Blyth v Proprietors of the Birmingham Waterworks* (1856) 11 Exch 781

Exch Div

Key Facts

A water main was laid with a 'fire plug', a wooden plug in the main that would allow water to flow through a cast iron tube up to the street when necessary. The plug became loose in severe frost and water flooded the claimant's house because the cast iron tube was blocked with ice. The frost was beyond normal expectation.

Key Law

The court held that the defendants had done all they reasonably could have done to prevent the damage, so there was no liability.

Key Judgment

Alderson B stated:

'Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate human affairs, would do, or doing something which a prudent and reasonable man would not do.'

2.2.1.4 *Glasgow Corporation v Muir* [1943] AC 448 HL

Key Facts

A tea urn was being carried through a narrow passage in the defendant's premises where small children were buying ice creams. Some children were scalded when the urn was dropped. Their claim for damages failed.

Key Law

The court assessed liability by using the 'reasonable man' test and held that the damage was not foreseeable and not a risk that the defendant should have guarded against.

Key Judgment

MacMillan LJ explained the objective test:

'The standard of foresight of the reasonable man is an impersonal test . . . independent of the idiosyncrasies of the particular person whose conduct is in question. Some persons are by nature unduly timorous and imagine every path beset by lions; others, of more robust temperament, fail to foresee or nonchalantly disregard even the most obvious dangers. The reasonable man is presumed to be free from both over-apprehension and from over-confidence.'

2.2.2.1 *Roe v Minister of Health* [1954] 2 QB 66 CA

Key Facts

Two patients became paralysed after being injected with nupercaine, a spinal anaesthetic. The nupercaine was sealed in glass ampoules which were stored in a sterilising fluid, phenol. Evidence at the trial showed that the phenol solution had entered the anaesthetic through hairline cracks in the ampoules, contaminating it and causing the paralysis. The claims for damages failed.

Key Law

There was no liability because such an event had not previously occurred and was unforeseeable as a result.

Key Comment

As McBride and Bagshaw point out (*Tort Law* (2nd ed, Pearson Publishing, 2005) pp 38–40):

'if . . . the function of tort law is to determine when someone who has suffered loss at another's hands [is] entitled to sue . . . you will think that tort law failed the patients in Roe . . . the truth is more complicated . . . the patients could not establish that the hospital had committed a civil wrong . . . tort law imposed a duty on the hospital to treat the patients with reasonable . . . care and skill; but the hospital fully discharged that duty . . . No one could have foreseen that treating the patients in the way they were treated would expose them to the risk of paralysis'.

2.2.2.2 *Bolton v Stone* [1951] AC 850 HL

Key Facts

Miss Stone was standing on a pavement by a cricket ground when she was hit by a cricket ball that was hit out of the ground. She was standing 100 yards from where the batsman had struck the ball. The batsman was 78 yards from a 17-foot-high fence over which the ball had been struck. It was also shown that balls had only been struck out of the ground six times in 28 years. The claimant's action in negligence failed.

Key Law

It was held that the likelihood of harm was extremely low and that the cricket ground had done everything reasonably possible to avoid risks of people being hit. There was no breach of duty.

Key Judgment

Lord Radcliffe identified the connection with the 'reasonable man' test:

'unless there has been something which a reasonable man would blame as falling beneath the standard of conduct that he would set for himself . . . there has been no breach of legal duty.'

2.2.2.2 *Haley v London Electricity Board* [1965] AC 778

HL

Key Facts

The defendant's workmen were digging a hole along a pavement and had left a hammer propped up on the pavement to warn passers-by of the presence of the hole. The claimant was a blind man who was passing and whose stick failed to touch the hammer so that he tripped over the hammer and fell heavily, becoming deaf as a result. His claim in negligence was successful.

Key Law

The court held that there was a sufficiently large proportion of blind people in the community for the risk of harm to be great. The cost of the necessary precautions to protect blind people would have been very low. The defendants were liable for negligence.

2.2.2.3 *Watt v Hertfordshire County Council* [1954] 1 WLR 835

CA

Key Facts

A woman was trapped under a heavy vehicle and seriously injured. The fire service called to free her had a special jack

for use in such circumstances. This would normally be transported securely in a special vehicle, but this was in use elsewhere. The jack was taken unsecured in another vehicle because of the emergency. When the driver was forced to brake sharply the jack moved, injuring one of the firemen. His claim for damages was unsuccessful.

Key Law

The court held that there was no negligence because the situation was an emergency; those in charge had to balance the nature of the risk against the importance of the emergency. The risk was justified in the circumstances.

2.2.2.4 *Latimer v AEC Ltd* [1953] AC 643 HL

Key Facts

A factory floor became flooded during a torrential rainstorm. The water mixed with oil and grease on the floor so that the surface was slippery and dangerous. Once the water was cleared, sawdust was spread over the floor to make it safe to walk on. There was not enough to cover the whole floor and the claimant slipped on an oily patch and injured his ankle. His action for damages failed.

Key Law

The House of Lords (now the Supreme Court) held that everything reasonable and practicable had been done in the circumstances to avoid risk of harm and, balancing out the possible risks, it was unreasonable to expect the factory to be closed. There was no negligence.

2.2.2.6 *Nettleship v Weston* [1971] 2 QB 691 CA

Key Facts

A learner driver on her third lesson crashed into a lamppost and injured her instructor. The question for the court was whether a lower standard of care should be expected of her because she was a learner driver. She was still found liable.

Key Law

The Court of Appeal found that she was liable despite being a learner driver since exactly the same standard of skill was expected of her as would be expected of a competent driver.

Key Judgment

Lord Denning stated that the law demands from a learner driver

'the same standard of care as of any other driver. The learner driver may be doing his best, but his incompetent best is not good enough. He must drive in as good a manner as a driver of skill, experience and care . . . who makes no errors of judgment . . .'.

Key Comment

It was also identified that this is probably to do with the requirement of compulsory motoring insurance so that the degree of risk associated with the particular type of driver can be reflected in the insurance premium they have to pay.

2.2.2.6 *Smoldon v Whitworth and Nolan* [1997] PIQR P133

CA

Key Facts

In a Colts rugby match, involving players under 19 years of age, the referee was approached by the coach of one team about repeated collapsing of the scrum by players from the other team. The referee did not control the scrums properly and the 17-year-old claimant was seriously injured, leading to paralysis, when the scrum was again collapsed. The claim for damages, arguing that the referee had failed to match the appropriate standard of care, succeeded.

Key Law

The Court of Appeal agreed that the referee had fallen below the standard of care that he owed to the players. This was because rules relating to scrums had been introduced for Colts' games specifically to protect young players from spinal injury which was a foreseeable risk and these rules therefore imposed a higher standard of care on the referees in such games.

Key Link

Vowles v Evans [2003] EWCA Civ 318; [2003] 1 WLR 1607, where it was held that a rugby referee owes a duty of care to the players to enforce the rules of the game because the players depended on these rules for avoiding injury.

2.2.2.6 *Orchard v Lee* [2009] EWCA Civ 295

CA

Key Facts

A thirteen-year-old boy caused injury to a lunch break supervisor when he ran backwards in a school playground.

Key Law

The court held that, although some harm was foreseeable, the risk of harm was insufficient on its own to impose liability. Since the school did not prohibit running in the playground, the boy was merely doing what any boy of the same age would do in a designated play area, and did not fall below the standard appropriate to a boy of his age in the circumstances.

2.2.2.7 *Bolam v Friern Hospital Management Committee* [1957] 2 All ER 118

QBD

Key Facts

The claimant suffered from depression and consented to undergo electro-convulsive therapy, a practice which can cause severe muscular spasms. The doctor giving the treatment failed to provide relaxant drugs or any means of restraint and the claimant suffered a fractured pelvis. The claimant maintained that the procedure carried out in this way was negligent but he failed in his action for damages.

Key Law

The court accepted evidence showing that doctors at the time were divided on whether or not to use relaxant drugs during the procedure. The defendant was not negligent because he engaged in a procedure accepted by a competent body of medical practitioners skilled in the particular field.

Key Judgment

McNair J established that a different standard of care was appropriate to doctors:

'In the ordinary case which does not involve any special skill . . . negligence . . . means a failure to do some act which a reasonable man in the circumstances would do, or the doing of some act which a reasonable man in the circumstances would not do . . . But where you get a situation which involves the use of some special skill or competence, then the test as to whether there has been negligence or not is not the test of the man on the top of a Clapham omnibus, because he has not got this skill . . . The test is the standard of the ordinary skilled man exercising and professing to have that special skill . . . Putting it the other way round, a doctor is not negligent, if he is acting in accordance with such a practice, merely because there is a body of opinion that takes a contrary view.'

Key Comment

Brazier and Miola (in 'Bye-bye *Bolam*: A medical Litigation Revolution?' (2000) *8 Med Law Review* (Spring), pp 85–114) argue that 'Many academic commentators and organisations campaigning for victims of medical accidents perceive [that] the *Bolam* test . . . has been used by the courts to abdicate responsibility for defining and enforcing patient rights.'

2.2.2.7 *Bolitho v City and Hackney Health Authority* [1998] AC 232

HL

Key Facts

A two-year-old boy was in hospital being treated for croup. His airwaves became blocked and, despite the requests of the nurses, the doctor on call failed to attend. The boy suffered a cardiac arrest and brain damage as a result. This could have been avoided if a doctor had intubated the boy and cleared the obstruction. The hospital admitted that the doctor was negligent in failing to attend, but claimed that it was not liable because the doctor would not have intubated even if she had attended, so there would have been no difference in the outcome, and that not intubating was acceptable medical practice.

Key Law

The case was ultimately decided on causation but the House rejected the view that because certain medical opinion would accept the practice of a doctor as reasonable and responsible it was bound to accept that merely because of Bolam.

Key Judgment

Lord Browne-Wilkinson suggested that

'. . . if, in a rare case, it can be demonstrated that the professional opinion is not capable of withstanding logical analysis, the judge is entitled to hold that the body of opinion is not reasonable or responsible' but added 'It is only where a judge can be satisfied that the body of expert opinion cannot be logically supported at all that such opinion will not provide the bench mark by reference to which the defendant's conduct falls to be assessed'.

Key Problem

The House of Lords (now the Supreme Court), taking up the criticism of *Bolam* expressed by many academic commentators, seems to be suggesting that there are circumstances where the test would not be followed. The problem is that it gives no examples of what circumstances this would occur in.

2.3.2.2

Barnett v Chelsea & Kensington Hospital Management Committee [1969] 1 QB 428

QBD

Key Facts

The claimant went to the casualty ward of the hospital at around 5 am on the morning of New Year's Day, complaining of vomiting and stomach pains after drinking tea. The doctor on duty, in clear breach of his duty, refused to examine him and told him to see his own doctor in the morning. The claimant later died of arsenic poisoning. It was shown that the man would have died even with treatment.

Key Law

On a straightforward application of the 'but for' test the failure to treat was not the factual cause of death so there was no liability.

2.3.2.4 *McGhee v National Coal Board* [1973] 3 All ER 1008

HL

Key Facts

The claimant worked in a brick kiln and contracted dermatitis, one possible cause being the brick dust to which he was exposed. The claimant argued a breach of duty because the employer did not provide washing facilities.

Key Law

The Board was held liable on the basis that it 'materially increased the risk' of the claimant contracting the disease because of its failure to provide washing facilities, even though it could not be shown that he would have avoided the disease if facilities had been in place.

Key Problem

As the employer was negligent in failing to provide basic health and safety the court felt that it should have the burden of disproving the causal link. The test is more advantageous to a claimant than the basic 'but for' test but potentially unfair on the defendant.

2.3.2.43 *Wilsher v Essex Area Health Authority* [1988] 3 All ER 871

HL

Key Facts

After a difficult delivery, a baby was mistakenly given too much oxygen by the doctor. The baby suffered retrolental fibroplasias, resulting in blindness. The House of Lords (now the Supreme Court) accepted evidence that excess oxygen was just one of six possible causes of the condition and dismissed the claim.

Key Law

The House of Lords (now the Supreme Court) applied the 'but for' test rigidly. Since the doctor's error was one of six possible causes the blindness could not be said to fall squarely within the risk created by the defendants.

2.3.2.4

Fairchild v Glenhaven Funeral Services Ltd and others; Fox v Spousal (Midlands) Ltd; Matthews v Associated Portland Cement Manufacturers (1978) Ltd and another [2002] UKHL 22; [2002] 3 WLR 89

HL

Key Facts

Three joined appeals involved employees who had contracted mesothelioma through prolonged exposure to asbestos dust with a number of different employers. It is currently scientifically uncertain whether inhaling a single fibre or inhalation of many fibres causes the disease, so it was impossible to say accurately which employer caused the disease. Nevertheless, the claims succeeded against the specific employers who were sued.

Key Law

The House of Lords (now the Supreme Court) held that, since greater exposure to the dust means that the chances of contracting the disease are greater, then each employer has a duty to take reasonable care to prevent employees from inhaling the dust and that any of the employers could be liable because they had all materially contributed to the risk of harm. Since the claimants suffered the very injuries that the defendants were supposed to guard against the House was prepared to impose liability on all employers. Because the employers never argued that they should only be liable for a proportion of the damages each employer should be liable to compensate its employee in full, even though the employee may have inhaled more fibres while working for another employee.

Key Comment

The House accepted that sufferers of diseases such as mesothelioma, while inevitably deserving of compensation, are unable to satisfy the normal tests for causation because they are unable to point to a single party who is responsible. The court was prepared to accept the possibility of a claim for three connected reasons:

- Because claimants could only not satisfy the normal tests for causation because of the current state of medical knowledge, although there is no doubt that exposure to asbestos fibres in whatever volume is the cause of the disease.

- As a result, it was fairer to give the defendants the burden of proving that their negligence could not be the actual cause.
- If this approach was not taken it would be almost impossible to make successful claims for the disease, so the employer's duty of care would be made meaningless.

Key Link

In *Barker v Corus* [2006] UKHL 20 the House of Lords (now the Supreme Court) held that damages for exposure to asbestos causing mesothelioma should only be for the share of the risk created by the breach. The Government effectively reversed this position in the Compensation Act 2006. *Sienkiewicz v Greif (UK) Ltd* [2011] UKSC 10 identifies that the *Fairchild* exception can be relied upon whenever the defendant's breach of duty made a material contribution to the risk of the claimant contracting mesothelioma.

2.3.2.4 *Baker v Willoughby* [1970] AC 467 HL

Key Facts

Through the defendant's negligent driving the claimant suffered a permanent disability in his leg which meant that he had to take work on a lower income. Some time later, he was shot in the same leg by an armed robber, which meant that his leg then had to be amputated. The House of Lords (now the Supreme Court) rejected the defendant's claim that he was only liable for damages up to the point of the amputation.

Key Law

The court identified that the loss of earnings was a permanent result of the original injury and unaffected by the amputation.

Key Judgment

Lord Reid explained:

'A man is not compensated for the physical injury; he is compensated for the loss which he suffers as a result. . . . His loss is not in having a stiff leg; it is in his inability to lead a full life . . . to enjoy those amenities which depend on freedom of movement and . . . to earn as much as he used to earn or could have earned if there had been no accident. In this case the second injury did not diminish any of these.'

2.3.2.4 *Jobling v Associated Dairies Ltd* [1982] AC 794

HL

Key Facts

In 1973, as a result of his employer's negligence, the claimant slipped on the floor of a refrigerator in the butcher's shop where he worked and injured his back, losing 50 per cent of his earning capacity as a result. In 1976 he developed spondylotic myelopathy, a back disorder unrelated to the fall, which meant he could not work at all. The court held that the defendant employer was liable for damages only up to when the condition developed in 1976.

Key Law

The House held that, since the condition would have occurred anyway, the defendant's negligence had only caused the loss of earnings prior to that point. Any later loss of earnings would have occurred anyway, despite the defendant's negligence.

Key Comment

The court, while not overruling *Baker*, was nevertheless very critical of the case.

2.3.2.5 *Greg v Scott* [2005] UKHL 2; [2005] 2 WLR 268

HL

Key Facts

The claimant consulted his GP about a lump under his arm. The doctor diagnosed fatty tissue and failed to send the claimant to hospital for any further tests, which he should have done because cancer was a foreseeable possibility. Nine months later it was discovered that the lump was a cancer. Medical evidence was accepted that the claimant would have had a 42 per cent chance of being alive and cancer-free in 10 years if the cancer had been diagnosed and treated after the first visit. This had reduced to a 25 per cent chance by the time the nine months had passed.

The claimant unsuccessfully sought damages for the reduction in his prospects of cure and life expectancy.

Key Law

The House held that it would be to develop the law in a way that was inappropriate to allow a claim for a proportion of what would have been awarded if the defendant had been proved to have been the cause of the claimant's premature death. In fact all that could be proved was the loss of a chance of full recovery and the law does not accept this as a basis for showing causation.

Key Link

Hotson v East Berkshire Area Health Authority [1987] 1 All ER 210; *Savage v South Essex Partnership NHS Foundation Trust* [2008] UKHL 74

2.3.2.3 *Chester v Ashfar* [2004] UKHL 41; [2005] 1 AC 134

HL

Key Facts

The defendant neurosurgeon failed to warn the claimant of a 1–2 per cent risk of partial paralysis from the procedure, and which she in fact suffered. The claimant succeeded in her claim for damages because the court accepted that she had proved that if she had been properly informed she would not have undergone the surgery.

Key Law

The House held that the claimant could not satisfy the normal 'but for' test, since it was possible that she may have consented to the operation at a future date. However, the court felt that justice required that in order to give practical force to a doctor's legal duty to warn a patient of the risks involved in surgery it should treat the injury as though it had been caused by the defendant's breach.

2.3.3.4 *McKew v Holland & Hannen & Cubitts (Scotland) Ltd* [1969] 3 All ER 1621

HL

Key Facts

The claimant suffered an injury to his leg caused by the defendants' negligence. For some time after the event, he

suffered from a condition which meant that his leg frequently gave way. While in this condition he tried to climb down a steep flight of steps with no handrail, without any help and while carrying his daughter.

He fell when his leg gave way and suffered further serious injuries. The defendants were not held liable for this further injury.

Key Law

The court held that the defendants were not liable for this fall. The claimant's act was a *novus actus interveniens*. He was fully aware of the weakness in his leg and his behaviour was unreasonable.

Key Judgment

Lord Reid explained:

'if the injured man acts unreasonably he cannot hold the defender liable for injury caused by his own unreasonable conduct. His unreasonable conduct is novus actus interveniens*. The chain of causation has been broken and what follows must be regarded as being caused by his own conduct.'*

Key Link

Lord v Pacific Steam Navigation Co Ltd (The Oropesa) [1943] 1 All ER 211, where there was no *novus actus* because the claimant's behaviour was entirely reasonable in the circumstances.

2.3.3.4 *Carslogie Steamship Co v Royal Norwegian Government* [1952] AC 292

HL

Key Facts

The claimant's ship was damaged in a collision with the defendant's ship through the defendant's negligence. Following a delay for repairs, the ship embarked on a voyage to a different destination, during which it suffered further damage caused by an exceptionally heavy storm. The claimant was not able to gain damages from the defendant for this extra damage.

Key Law

The House accepted that the extra damage was caused by the storm, which was a break in the chain of causation. It would have been unfair to fix the defendant with liability for the full extent of the damage. The storm damage was not a consequence of the collision but was a quite separate occurrence.

2.3.3.4 *Knightley v Johns* [1982] 1 All ER 851 CA

Key Facts

The defendant, through negligent driving, crashed and blocked a tunnel. The police officer in charge at the scene sent a police motorcyclist back against the flow of traffic to block off the tunnel at the other end, in order to prevent further accidents. The police officer was injured when he collided with an oncoming car while rounding a bend. The defendant was not held liable for the police officer's injuries.

Key Law

The court held that the defendant could not be said to have caused this injury. It was the fault of the senior police officer whose ill-considered action broke the chain of causation and was a *novus actus interveniens*.

Key Judgment

Stephenson LJ made a quite significant comment in suggesting that 'Negligent conduct is more likely to break the chain of causation than conduct which is not.'

Key Problem

There is a clear problem for the claimant where the chain of conduct is broken by the act of a third party. If that act is not negligent then the claimant can receive no compensation for the extra harm suffered.

2.3.4.4

Overseas Tankship (UK) Ltd v Morts Dock & Engineering Co (The Wagon Mound (No 1)) [1961] AC 388

PC

Key Facts

As a result of the defendant's negligence, oil leaked into Sydney Harbour from its tanker. The oil floated on the water to the claimant's wharf. Welding was taking place in the wharf and the claimant's manager enquired whether there was a risk of the oil igniting. This was considered unlikely since the oil had an extremely high flash point. The welder continued and sparks ignited oil-soaked wadding and set fire to ships being repaired in the wharf; the oil also caused fouling to the wharf. The trial judge had held that since some damage, the fouling, was foreseeable, the defendants were also liable for the fire damage which was a direct consequence of its breach of duty in allowing the spillage. The Privy Council reversed this decision and disallowed damages for the fire damage.

Key Law

The court held that the defendant could not be liable for the fire damage as it was too remote a consequence of the breach of duty. The true test should be based on reasonable foreseeability and, because of the unlikelihood of the oil igniting; the fire damage was not foreseeable to a reasonable man.

Key Judgment

Viscount Simonds explained why the court rejected the former test of direct and natural consequences from Re Polemis:

'if it is asked why a man should be responsible for the natural or necessary or probable consequences of his act the answer is that it is not because they are natural or necessary or probable, but because, since they have this quality, it is judged by the standard of the reasonable man that he ought to have foreseen them.'

Key Link

Re Polemis and Furness, Withy & Co [1921] 3 KB 560

2.3.4.8 *Tremain v Pike* [1969] 3 All ER 1303 QBD

Key Facts

The claimant was a herdsman who contracted Weil's disease on his employer's farm, which was infested with rats. This disease is very rare and can only be contracted through direct contact with rats' urine. The claimant argued that this did happen when he handled hay and washed in water that was contaminated with rats' urine. His claim failed.

Key Law

The court accepted that the defendant had negligently let the rat population on his farm grow too high, so that there was risk of injury from rats. Nevertheless, the court held that the defendant was not liable since the court considered that the disease was too rare in humans and so was unforeseeable.

Key Judgment

Payne J suggested that the disease was *'entirely different in kind from the effect of a rat bite or food poisoning'.*

Key Problem

This is a very narrow view of foreseeability, particularly in view of the level to which the claimant was exposed to the rat urine. If injury from the rats was foreseeable then surely injury from the exposure to the urine was an equally foreseeable cause of harm.

2.3.4.7 *Hughes v The Lord Advocate* [1963] AC 837 HL

Key Facts

Post Office employees dug a hole in the road and left a manhole uncovered inside a tent and then left the tent unattended. They also left four lit paraffin lamps at the corners of the tent at night as a warning and to avoid people falling in the hole. A boy entered the tent with one of the lamps and when it fell into the hole an explosion caused the boy to suffer burns. The boy's claim succeeded.

Key Law

The House accepted that the precise circumstances in which the injury occurred were quite remote. However, some fire-related damage was a foreseeable consequence of leaving the scene unattended and so it held the defendants liable. Providing damage of the general kind was foreseeable, then this was sufficient.

Key Comment

This is a much broader and, from the claimant's perspective, a much more generous view of foreseeability.

Key Link

Jolley v London Borough of Sutton [2000] 3 All ER 409: see p 94.

2.3.4.8 *Doughty v Turner Manufacturing Co Ltd* [1964] 1 QB 518

CA

Key Facts

The cover on a tank of heated sodium cyanide was improperly secured so that it slid into the liquid in the tank while the claimant was working by it. The cover was made of asbestos and an explosion caused by the mixing of the chemicals and the asbestos badly burned the claimant. The claim for personal injury failed.

Key Law

The Court of Appeal accepted that it was previously unknown that there would be such a chemical reaction. Applying *Wagon Mound* principles, the chemical reaction was thus unforeseeable and the damage was too remote to impose liability on the defendants.

Key Comment

This is a narrow view of the foreseeable circumstances in which an injury might occur. It seems foreseeable that injury of some type could occur if the lid fell into the chemical while the workman was by it. Interestingly, the Court of Appeal chose to apply persuasive precedent from the Privy

Council in *The Wagon Mound* rather than its own previous precedent in *Re Polemis*.

2.3.4.10

Smith v Leech Brain & Co Ltd [1961] 3 All ER 1159

QBD

Key Facts

The claimant suffered a burnt lip as a result of being splashed by molten metal while at work, because of his employer's negligence. The burn ulcerated and activated a cancer from which he died three years later. He received full damages rather than just for the burn.

Key Law

The court held that even though the death from cancer was an immediately unforeseeable consequence of the negligence, some form of injury clearly was and the defendants were held liable as a result. While it was accepted that his lip had actually been in a pre-malignant state at the time of the burn, some form of harm from the burn was foreseeable and the court rejected the argument that *Wagon Mound* principles prevented operation of the 'thin skull' rule.

Key Comment

This operates as an exception to the test of reasonable foreseeability. Where the 'thin skull' rule is applicable the test is still one of direct and natural consequences.

3 Negligence: specific duty situations

3.1 Nervous shock

1 This is a complex area which has both expanded and contracted.

2 It must involve an actual psychiatric condition, e.g. post-traumatic stress disorder; temporary grief or fright is insufficient.

3 Originally cases failed on the 'floodgates' argument and fear of faking (***Victoria Railway Commissioners v Coultas* (1888)**).

4 Liability was originally based on the Kennedy test – real and immediate personal danger must be foreseeable (***Dulieu v White* (1901)**).

5 The principle was then extended to cover family and close friends (***Hambrook v Stokes* (1925)**).

6 It was extended further, to close workmates (*Dooley v Cammell-Laird* (1951)).

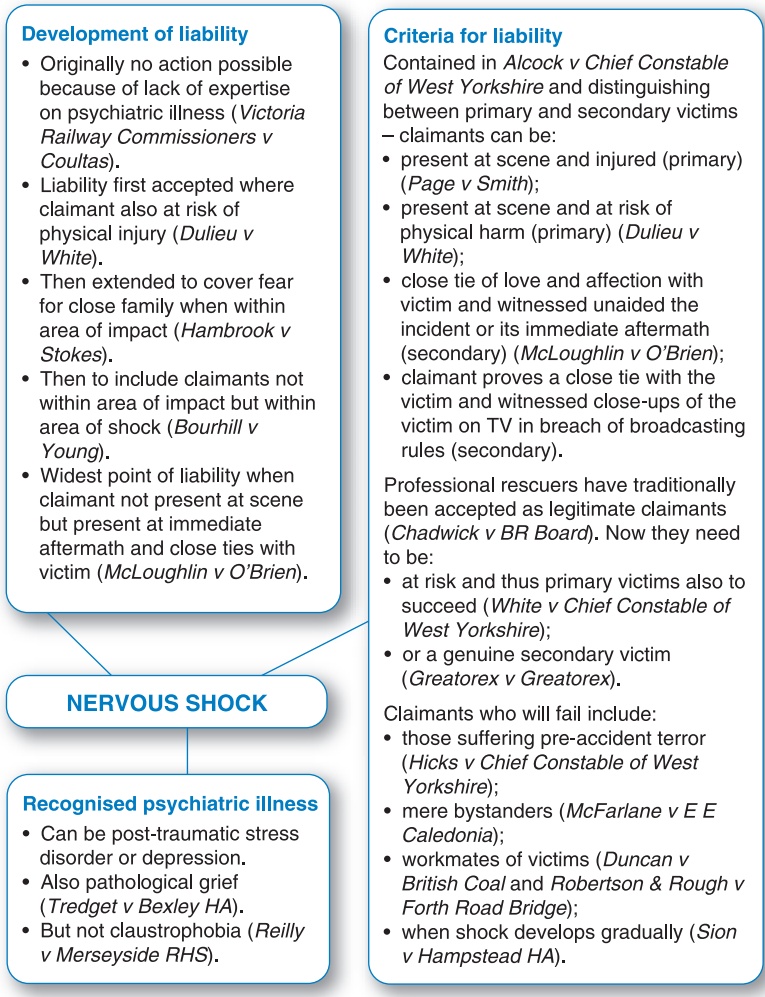
7 But it was then limited to claimant being in the area of impact. Compare *King v Phillips* (1953) and *Attia v British Gas* (1987). And no claim possible if outside the area of foreseeable shock (***Bourhill v Young* (1943)**).

8 Then an alternative was introduced where the claimant was outside the area of impact but within the area of shock. Compare *Bourhill v Young* (1943) with *Ravenscroft v Rederiaktiebolaget* (1991).

9 There are, in any case, incongruous judgments (*Owens v Liverpool Corp* (1933)).

10 The high point of liability came in ***McLoughlin v O'Brian* (1982)** – succeeded even though not a witness of the incident, but this came under Wilberforce's two-part test (there was proximity and no policy reason for denying the claim).

11 Rescuers can claim (*Chadwick v BR Board* (1993) and *Hale v London Underground* (1992)), and police at one point succeeded where relatives of Hillsborough victims failed (*Frost v Chief Constable of South Yorkshire* (1996)). Now a rescuer must be a primary victim and at risk to succeed (***White v Chief Constable of South Yorkshire* (1999)**), or a genuine



secondary victim (*Greatorex v Greatorex* (2000)). Merely proving rescuer status is insufficient on its own to claim without being either a genuine primary victim or a genuine secondary victim (*Stephen Monk v P C Harrington UK Ltd* (2008)).

12 Restrictions now exist (***Alcock v Chief Constable of South Yorkshire* (1991)**) for secondary victims and there are three key requirements to determine. The claimant must:

- be sufficiently proximate in time and space to the incident;
- have a close tie of love and affection to the victim;
- see or hear the incident or its immediate aftermath (restricted to two hours in *Alcock* but the Court of Appeal has accepted a single traumatic event lasting 36 hours in ***North Glamorgan NHS Trust v Walters* (2002)**.

13 *Alcock* (1991) suggests future successful claims will be based on:

- claimant present at scene and injured (primary victim) (***Page v Smith* (1996)**). If psychiatric injury follows a physical injury it will generally be considered foreseeable (*Simmons v British Steel* (2004));
- claimant present at scene and own safety threatened (primary victim) (*Dulieu v White* (1901));
- claimant proves a close tie with the victim and witnessed the incident or its immediate aftermath at close hand (secondary victim) (*McLoughlin v O'Brien* (1981));
- claimant is a rescuer or one of the professional services (*Piggott v London Underground* (1995)), but see *Duncan v British Coal* (1996) and *White* (1999);
- claimant proves a close tie with the victim and witnessed close-ups of the victim on TV in breach of broadcasting rules;
- claimant shows a close tie with the victim and witnessed the catastrophic event involving victim on TV (more debatable).

14 Claims for pre-accident terror have also been rejected (*Hicks v Chief Constable of South Yorkshire* (1992)).

15 Bystanders have no claim (*McFarlane v E E Caledonia* (1994)).

16 Nor do workmates witnessing the incident without sufficiently close ties (*Robertson and Rough v Forth Road Bridge* (1995)).

17 Nor does it apply where the shock happens gradually rather than suddenly (***Sion v Hampstead HA* (1994)**).

18 But see the Court of Appeal in *North Glamorgan NHS Trust v Walters* (2002) accepting a single traumatic event lasting 36 hours; and the House of Lords in *W v Essex County Council* (2000) accepting a claim for learning of child abuse after the event.

19 Many cases now focus on:

a) the nature of the psychiatric illness:

- ***Reilly v Merseyside RHA* (1994)** – claustrophobia and subsequent insomnia was insufficient for a claim;

- *Tredget v Bexley HA* (1994) – death of newborn baby did create liability because the trauma created a psychiatric disorder.

b) causation:

- ***Calascione v Dixon* (1994)** (no causal link between PTSD and accident);
- *Vernon v Bosley* (1996) (there was a causal link between death of children and pathological grief amounting to a psychiatric disorder).

3.2 Pure economic loss

1 The courts have always been reluctant to accept claims for pure economic loss, since it is more closely linked to contract law.

2 However, they have kept a distinction between economic loss caused by negligent statements and that caused by negligent acts.

- The distinction was originally seen as mainly one of policy (***Spartan Steel v Martin & Co (Contractors) Ltd* (1973)**).
- The purpose being to limit any extension of liability.

3 It was confirmed in *Weller v Foot & Mouth Research Institute* (1966); *Meah v Creamer* (1986); *Pritchard v Cobden* (1988)).

4 Liability was extended in *Dutton v Bognor Regis UDC* (1972).

- Although it was not clear-cut whether this was under *Hedley Byrne* or *Donoghue*.
- The justification for liability was risk to health.

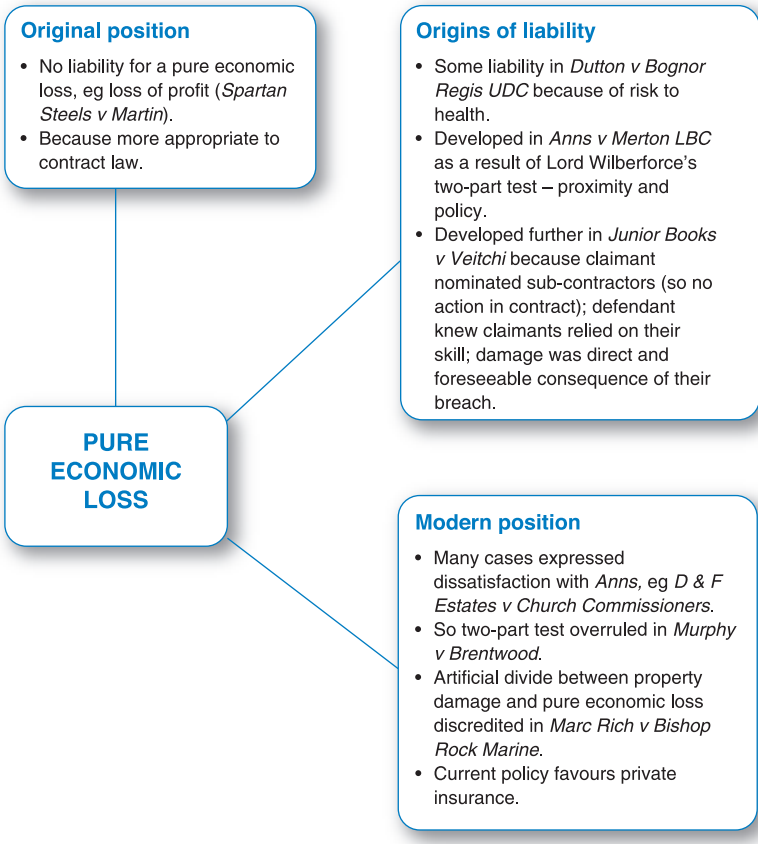
5 Liability was expanded:

- as a result of the two-part test in *Anns v Merton LBC* (1978);
- and also for a possible future threat to health (*Batty v Metropolitan Property Realisations* (1978)).

6 The 'high water mark' was *Junior Books v Veitchi Co Ltd* (1983).

a) There were three key issues:

- claimant nominated defendants to lay their floor in the new printing works, so relied on their skill;
- defendant knew of this reliance by the claimant;
- damage was a direct and foreseeable consequence of the defendant's negligence.



b) Lord Brandon dissented because the case extended tortious liability into contract areas.

7 Many later cases expressed dissatisfaction with *Junior Books*:

- *Governors of the Peabody Donation Fund v Sir Lindsay Parkinson* (1984);
- *Muirhead v Industrial Tank Specialists Ltd* (1985);
- *D & F Estates v Church Commissioners* (1988);
- *Reid v Ruth* (1989).

8 The *Anns* two-part test was overruled in **Murphy v Brentwood DC (1990)**.

9 This was followed in *Department of the Environment v Thomas Bates & Sons Ltd* (1990).

10 The artificial divide between damage to property and pure economic loss has been further discredited in *Marc Rich & Co v Bishop Rock Marine* (1995).

11 So the present policy favours private insurance rather than tort.

12 However, judges have shown themselves willing to be more relaxed in response to specific policy considerations (*Spring v Guardian Assurance* (1994)) involving negligent references.

3.3 Negligent misstatement

3.3.1 The origins of liability

1 Tort remedies physical loss and damage, but judges are reluctant to allow recovery for a pure economic loss since it is considered to be more appropriate to contract law.

2 Successful actions originally involved misrepresentations made fraudulently, not those made negligently.

3 Any action would be in the tort of deceit (*Derry v Peek* (1889)).

4 Principle reaffirmed in *Candler v Crane Christmas & Co* (1951).

5 But the impetus for creating liability came from Lord Denning's dissenting judgment in this case: defendants should owe a duty of care to 'any third person to whom they themselves show the accounts, or to whom they know their employer is going to show the accounts so as to induce them to invest money or take some other action upon them . . .'.

6 Lord Denning's judgment was finally approved *obiter* in ***Hedley Byrne v Heller & Partners Ltd* (1964)**.

a) While the action failed because a valid disclaimer was used, HL accepted a duty of care might exist despite:
   - the absence of a contractual relationship;
   - the fact that it would mean imposing liability for economic loss.

b) HL also laid down criteria for allowing such liability:
   - existence of a special relationship between the parties;
   - special skill possessed by person giving advice;
   - presence of reasonable reliance on the advice.

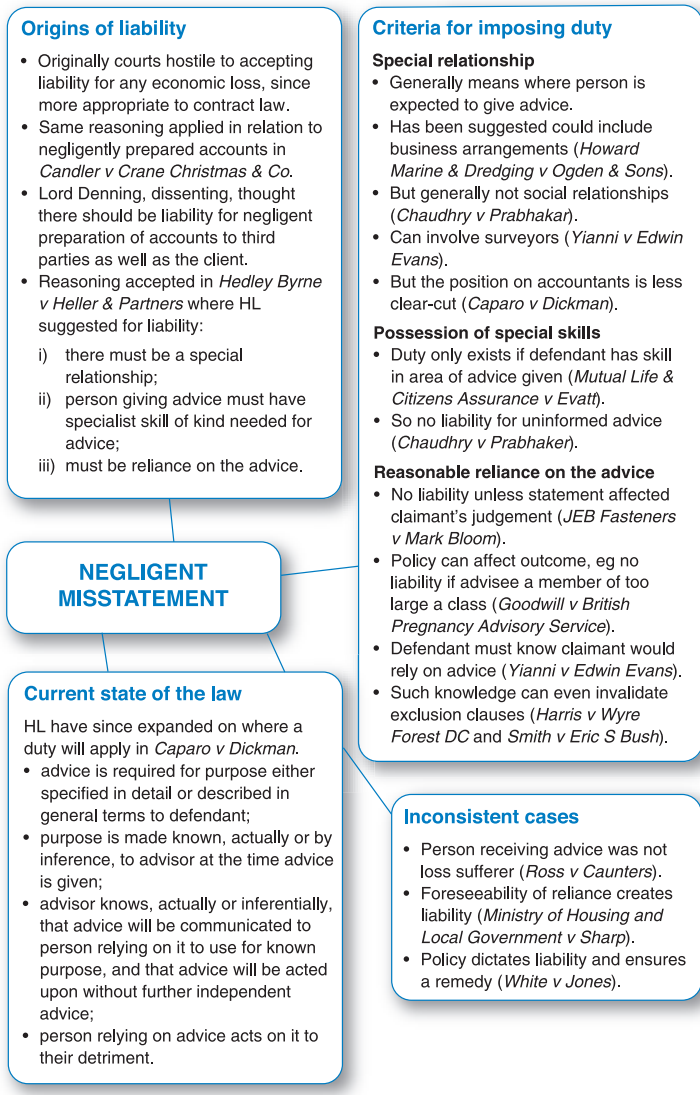
c) The basic principles have since been accepted and developed in case law.

3.3.2 The criteria for imposing liability

The special relationship

1 The meaning of 'special relationship' was not fully explained in *Hedley Byrne*, so has become an area for judicial policy.

2 Originally a narrow interpretation was preferred, to include only a relationship where the person was expected to give advice of the kind given.



3 It has later been suggested that any business or professional relationship has potential to be a special relationship (*Howard Marine & Dredging Co Ltd v Ogden & Sons Ltd* (1978)).

4 It is not possible in a purely social relationship unless circumstances show that carefully considered advice was being sought (***Chaudhry v Prabhaker* (1988)**).

5 Many cases involve surveyors or valuers. The relationship between surveyors and purchasers of houses might be special although not contractual (*Yianni v Edwin Evans & Sons* (1982)).

6 One complex issue is to whom accountants owe a duty of care:

a) it has influenced how the existence of the duty is determined;

b) originally there was held to be no duty, since any duty would be contractual (*Candler v Crane Christmas & Co* (1951));

c) since *Hedley Byrne* the existence of the duty has been established (*JEB Fasteners v Marks Bloom & Co* (1983));

d) bidders in a takeover or lenders or investors of any kind cannot rely on the annual audited accounts, so there is no duty on the accountants (*Caparo v Dickman* (1990)).

7 There must be sufficient proximity between the parties to impose a duty (*Raja v Gray*), but simple policy reasons can be used to determine that there is insufficient proximity between parties to impose liability (*West Bromwich Albion Football Club Ltd v El-Safty* (2005)).

The possession of special skill

1 Duty only exists if defendant possesses skill in area of advice given (***Mutual Life & Citizens Assurance Co v Evatt* (1971)**).

2 So there is usually no liability for advice of an uninformed and inexpert character, but see *Chaudhry v Prabhaker* (1988).

Reasonable reliance on the advice

1 If a negligent statement did not influence the claimant's judgement then no liability (*JEB Fasteners v Marks Bloom & Co Ltd* (1983) and *Lambert v West Devon Borough Council* (1997)).

2 As with special relationship, reasonable reliance has been a subject for judicial policy (*Caparo v Dickman* (1990)).

a) So reliance is not automatic in a relationship of trust (*Jones v Wright* (1994)).

b) But is more likely in contractual situations or those that are near contractual, e.g. pre-contractual arrangements (*Commissioner of Police for the Metropolis v Lennon* (2004)).

c) Neither is there reliance if the claimant belongs to too large a group (***Goodwill v British Pregnancy Advisory Service* (1996)**).

3 The defendant must have known or be reasonably expected to have known that the claimant would rely upon the advice (*Yianni v Edwin Evans* (1982)).

4 Foreseeability of reliance can even invalidate exclusions (*Harris v Wyre Forest DC* (1989) and ***Smith v Eric S Bush* (1990)**).

5 A disclaimer may be declared unreasonable and invalid, but a surveyor can still use one to discharge his duty and avoid liability (*Eley v Chasemore* (1989)).

3.3.3 The current state of the law

1 The property and financial markets boom of the late 1980s led to a large number of cases involving surveyors or accountants.

2 In *Caparo v Dickman* (1990), HL restated principles involved for both special relationships and reasonable reliance.

a) HL preferred an incremental approach to duty of care.

b) HL rejected a general test based on reasonable foresight, and led to a later request for leave to amend the statement of claim in *Morgan Crucible plc v Hill Samuel Bank Ltd* (1991).

c) HL explained that a duty will apply where:

- the advice is required for a purpose, either specified in detail or described in general terms to the defendant;
- the purpose is made known, actually or by inference, to the advisor at the time the advice is given;
- the advisor knows, actually or inferentially, that the advice will be communicated to the person relying on it to use for the known purpose;
- the advice will be acted upon without further independent advice;
- the person relying on the advice acts on it to their detriment.

3 This is a narrow approach, reflecting the move away from *Anns*. Later cases have given further advice on when a duty exists. CA in *James McNaughten Papers Group Ltd v Hicks Anderson & Co* (1991) identified areas for consideration:

a) the purpose for which the statement was made;

b) the purpose of communicating the statement;

c) the relationship between the advisor, the recipient of the advice and any third parties;

d) the size of the class to which the recipient belongs;

e) the knowledge and experience possessed by the advisee;

f) whether it was reasonable to rely on the advice.

4 Significantly, however, the narrowing in *Caparo* is at odds with EU law, which requires harmonisation of company law, including the principle that a company's auditors owe a duty of care to third parties who suffer financial loss as a result of negligence.

5 Subsequent cases suggest some relaxation of the law (***Henderson v Merrett Syndicates Ltd* (1994)**); (*Aiken v Steward Wrightson Members Agency Ltd* (1995)); (*N M Rothschild and Sons Ltd v Berensons and others* (1995)).

3.3.4 Cases inconsistent with the general principle

1 Some cases do not conform because the person relying on the advice is not the one suffering loss (*Ross v Caunters* (1980)).

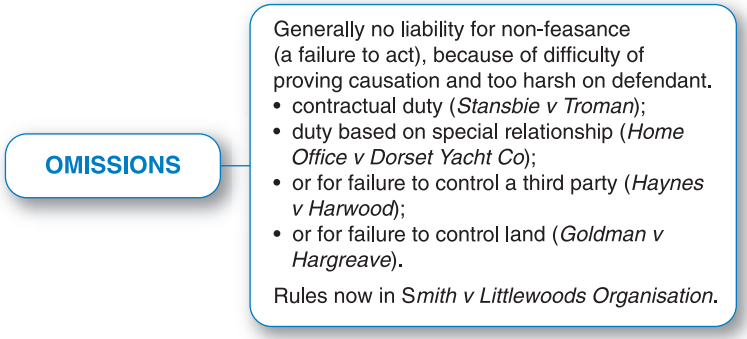
2 Liability occurs because it is reasonably foreseeable that the party relies on the advice, and indeed that such a party exists (*Ministry of Housing & Local Government v Sharp* (1971)).

3 Following *Henderson* there may still not be liability if there is no assumption of responsibility, or if the evidence shows the contrary (*McCullagh v Lane Fox and Partners* (1995)).

4 Policy determines liability in such cases to prevent a party being unreasonably denied any remedy (***White v Jones* (1995)** and *Gorham v British Telecommunications Plc* (2000)).

5 Debatable whether duty exists under *Donoghue v Stevenson* principles (*Spring v Guardian Assurance Plc* (1994)).

3.4 Omissions



1 The general rule is for no liability for omissions (non-feasance).

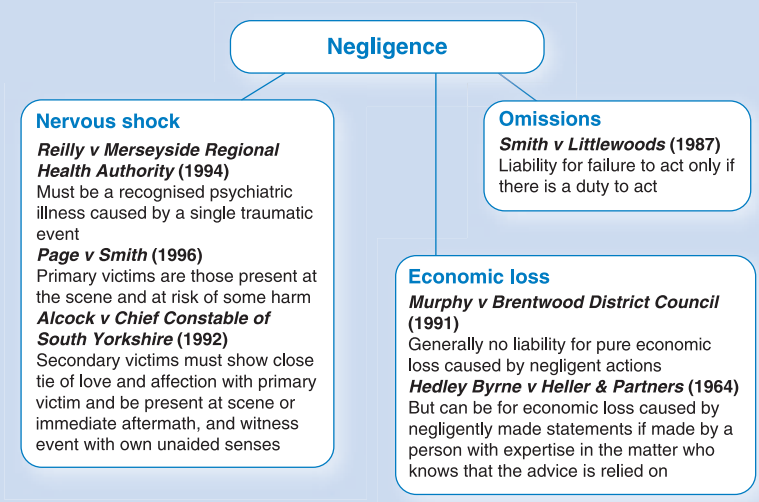
2 The reasons are fairly obvious:

- causation is significantly harder, if not impossible, to prove;
- it imposes too onerous an obligation on the defendant.

3 Exceptions have developed that Lord Goff has listed in ***Smith v Littlewoods Organisation Ltd* (1987)**.

- A contractual or other undertaking (*Barnet v Chelsea & Kensington Hospital Management Committee* (1969)); (*Mercer v SE & Chatham Railway* (1922)); (*Stansbie v Troman* (1948)); but see *Hill v Chief Constable of W Yorkshire* (1998).
- A special relationship between the defendant and a third party (***Home Office v Dorset Yacht Co* (1976)** and *Barrett v Ministry of Defence* (1993)), but there is a possibility of *volenti* (*Selfe v Ilford District Hospital Management Committee* (1970)). A special relationship may result from a statutory duty (*D v East Berkshire Community Health NHS Trust* (2005)).
- A failure to exercise control over a third party (*Haynes v Harwood* (1935)), as where sporting officials have a duty to act (*Vowles v Evans and another* (2003)).
- A failure to control land or dangerous things. Compare *Cunningham v Reading FC* (1978) with ***Goldman v Hargrave* (1966)**.

Key Cases Checklist



3.1.3 *Victoria Railway Commissioners v Coultas* (1888) 13 App Cas 222

PC

Key Facts

The claimant suffered no physical injury but claimed to suffer psychiatric injury when involved in a train crash.

Key Law

The claim was refused because there was insufficient medical understanding of the nature of psychiatric injury at that time and there was no evidence of physical injury.

Key Problem

Claims for nervous shock were originally rejected not just because of the lack of understanding of psychiatric injury, but also because of the 'floodgates' argument. The judge feared that allowing the claim would open up a 'wide field of imaginary claims'.

3.1.4 *Dulieu v White & Sons* [1901] 2 KB 669 KB

Key Facts

The claimant was the pregnant wife of a publican. She suffered nervous shock and her baby was born prematurely after a horse and van that had been negligently driven burst through the window of the pub where she was washing glasses. Her claim was successful even though she had suffered no physical injury.

Key Law

The court held that the defendant was liable because the claimant was within the zone of impact of physical injury and some damage was therefore foreseeable. Kennedy J devised the test for claiming damages for psychiatric injury (to become known as the 'Kennedy' test: a claimant might recover damages if the claimant feared real and immediate danger to himself as a result of the sudden shock).

Key Judgment

Kennedy J stated that: *'Shock, when it operates through the mind, must be a shock which arises from a reasonable fear of immediate personal injury to oneself'.*

3.1.5 *Hambrook v Stokes Bros* [1925] 1 KB 141 CA

Key Facts

A woman saw a runaway lorry going downhill towards where she had left her three children. She then heard that there had indeed been an accident involving a child. She suffered nervous shock and died.

Key Law

The court extended claims for nervous shock to include those within the area of shock, i.e. those who while not in danger themselves feared for the safety of somebody who was.

Key Comment

The court distinguished the 'Kennedy' test. The judge considered that it would be unfair not to compensate a

mother who had feared for the safety of her children when she could have claimed if she only feared for her own safety.

3.1.7 *Bourhill v Young* [1943] AC 92 HL

Key Facts

A pregnant Edinburgh fishwife claimed to have suffered nervous shock after getting off a tram, hearing the impact of a crash involving a motorcyclist, and later seeing his blood on the road. She then gave birth to a stillborn child. Her claim failed.

Key Law

The House of Lords (now the Supreme Court) held that, as a stranger to the motorcyclist, she was outside of the area of foreseeable shock. This then identifies the law on nervous shock in relation to bystanders. If they are not within the zone of danger and have no relationship with the primary victim then the damage they suffer is not foreseeable.

3.1.10 *McLoughlin v O'Brian* [1982] 2 All ER 298 HL

Key Facts

A woman was summoned to a hospital about an hour after her children and husband were involved in a car crash. One child was dead, two were badly injured, all were in shock and they had not yet been cleaned up. She suffered nervous shock as a result and her claim succeeded.

Key Law

The House of Lords (now the Supreme Court) held that since the relationship was sufficiently close and the woman was present at the 'immediate aftermath' she could claim. Lord Wilberforce identified a three-part test for secondary victims that was approved later in *Alcock*.

3.1.12

Alcock v Chief Constable of South Yorkshire [1992] 4 All ER 907

HL

Key Facts

At the start of a football match police allowed a large crowd of supporters into a caged pen as the result of which 95 people in the stand suffered crush injuries and were killed. Since the match was being televised much of the disaster was shown on live TV. A number of claims for nervous shock were made. These varied between those present or not present at the scene, those with close family ties to the dead and those who were merely friends. The House of Lords (now the Supreme Court) refused all of the claims.

Key Law

The House of Lords (now the Supreme Court) held that none of the claimants identified the factors that must be proved in order to make a successful claim as a secondary victim:

- The proximity in time and space to the negligent incident – the claimant must have been present at the scene or its immediate aftermath (limited to two hours following *McLoughlin*).
- The proximity of the relationship with a party who was a victim of the incident – the claimant must have a close tie of love and affection with a primary victim.
- The cause of the nervous shock – the claimant must show that he suffered nervous shock as a result of witnessing or hearing the horrifying event or its immediate aftermath.

Key Problem

The development of the law on secondary victims has been to develop controls based on public policy that limit the potential for a successful claim, the justification being the 'floodgates' argument. Claims were denied here even though the relationship with the primary victim was a family one. It is also possible that the proximity to and the gruesomeness of the incident makes it foreseeable that a bystander could suffer psychiatric injury in which case there is a contradiction with the reasoning for granting remedies to primary victims and many bystanders are being unfairly denied a remedy.

3.1.13 *Page v Smith* [1996] 3 All ER 272

HL

Key Facts

Page was involved in a car accident caused by the defendant's negligence. He suffered no physical injury but did suffer a recurrence of 'chronic fatigue syndrome' (ME) from which he had suffered before. He recovered damages for nervous shock.

Key Law

The House of Lords (now the Supreme Court) held that: firstly the illness in question was a recognised psychiatric injury; secondly that Page was indeed a genuine primary victim (present at the scene and at risk of foreseeable physical injury); thirdly that the 'thin skull' rule applied and that it did not matter that the single traumatic event led to injury that Page was more likely to suffer because of a pre-existing condition.

Key Problem

The situation for primary victims differs from that of secondary victims. The 'thin skull' rule applies to primary victims but a secondary victim would be expected to show 'reasonable phlegm and fortitude' – so a secondary victim with Page's condition would be unable to claim.

Key Link

Stephen Monk v PC Harrington UK Ltd [2008] EWHC 1879 (QB) – cannot be a primary victim if at no point would the claimant have considered himself to be at risk of foreseeable harm.

3.1.11 *White v Chief Constable of South Yorkshire* [1999] 1 All ER 1

HL

Key Facts

Police officers who were present at the Hillsborough disaster as rescuers claimed to have suffered post-traumatic stress disorder. Their claim succeeded in the Court of Appeal as *Frost*. The House of Lords (now the Supreme Court) rejected their claim.

Key Law

The House of Lords (now the Supreme Court) held that no claim was possible since the police officers could not be classed as primary victims since they were never in any danger. The Lords also identified that there is no longer any presumption that a rescuer is a primary victim. A rescuer can only claim if he can show that he was at risk of foreseeable physical injury, and is therefore a genuine primary victim.

Key Comment

The Law Lords were also worried about the effect on public opinion if they awarded damages to police officers from Hillsborough when all the relatives of the dead had been denied claims.

Key Link

Frost v Chief Constable of West Yorkshire Police [1998] QB 254.

3.1.12 *North Glamorgan NHS Trust v Walters* [2002] EWCA Civ 1792

CA

Key Facts

Doctors negligently failed to diagnose that a tiny baby required a liver transplant, despite reassuring his mother that he would survive. He then suffered a major fit and both were taken to a London hospital for the child to have a liver transplant. On arrival it was discovered that he had irreversible and severe brain damage. The life support system was switched off and the baby died minutes later in his mother's arms, the whole episode lasting 36 hours. The mother claimed successfully for pathological grief. The defendants appealed on the grounds that the psychiatric injury was not brought about as a result of witnessing a single shocking event but the Court of Appeal rejected this argument.

Key Law

The Court of Appeal held that the whole period from when the baby suffered the fit to when it died was 'a single horrifying event' and was part of a continuous chain of events.

Key Problem

The result seems to conflict quite sharply with the principle of single shocking event and the use of the 'immediate aftermath' test from *Alcock*. The Court of Appeal did in fact though distinguish from those cases where there is a slow realisation of the consequences of the shocking event.

3.1.17 *Sion v Hampstead Health Authority* [1994] 5 Med LR 170

CA

Key Facts

A father suffered psychiatric injury after watching his son over the space of 14 days gradually deteriorate and then die, when there was the possibility of the death resulting from medical negligence. He was unsuccessful because the psychiatric injury was not the result of the sudden appreciation of a single traumatic event.

Key Law

Nervous shock must result from a single traumatic event. There is no claim for an injury suffered over a long period of time.

3.1.19 *Reilly v Merseyside Regional Health Authority* (1994) 23 BMLR 26

CA

Key Facts

A couple became trapped in a lift as the result of negligence and suffered insomnia and claustrophobia as a result. There was held to be no liability for nervous shock.

Key Law

It was held that claims for nervous shock must involve an actual, recognised psychiatric condition capable of resulting from the shock of the incident, and recognised as having long-term effects. Claustrophobia was not accepted as a recognised psychiatric injury for the purposes of nervous shock.

3.1.19 *Vernon v Bosley* [1997] 1 All ER 577 CA

Key Facts

A father had witnessed his children being drowned in a car that was being negligently driven by the children's nanny. He recovered damages for nervous shock that was held to be partly the result of pathological grief and bereavement, but partly also the consequence of the trauma of witnessing the events.

Key Law

A secondary victim can claim if the psychiatric injury caused by the sudden traumatic event, even though it is based on profound grief if also linked to clinical depression.

3.1.19 *Calascione v Dixon* (1993) 19 BMLR 97 CA

Key Facts

The defendant caused the death of a 20-year-old in a motorcycle accident. The mother of the young man then suffered nervous shock following the inquest and a private prosecution.

Key Law

It was held that the nervous shock must be in fact caused by the single traumatic event. In other words, there must be a causal link between the event and the damage suffered. There was none here and so no liability.

3.2.2 *Spartan Steel v Martin & Co (Contractors) Ltd* [1973] 1 QB 27 CA

Key Facts

The defendant cut an electric cable, causing loss of power to the claimant, who made steel alloys. A 'melt' in the claimant's furnace when the power cut occurred had to be destroyed or it would have set and wrecked the furnace.

The claimant also lost profit on further 'melts' that it could have made during the power cut. The claimant successfully claimed for physical damage and lost profit from the 'melt' in the furnace, but was refused the further loss of profit.

Key Law

The loss was foreseeable. However, the court held that it was not possible to recover for pure economic loss caused by a negligent act since policy dictated that the loss was better borne by the insurers than by the defendants alone.

Key Judgment

Lord Denning explained:

'It seems to me better to consider the particular relationship in hand, and see whether or not, as a matter of policy, economic loss should be recoverable or not'.

3.2.8 *Murphy v Brentwood District Council* [1991] 2 All ER 908

HL

Key Facts

A council approved plans for a concrete raft on which properties were built. The raft was inadequate and later moved causing cracks in the walls and gas pipes to break. The claimant lost £35,000 from the value of his house and sought damages.

Key Law

The court held that, in the absence of any injury, loss was purely economic, and could not be recovered. Local authorities will not be liable for the cost of repairing dangerous defects unless injury occurs as well. The court also overruled *Anns*.

3.3.1.6 *Hedley Byrne v Heller & Partners Ltd* [1964] AC 465

HL

Key Facts

The claimant, an advertising company, was asked to produce a campaign for a small company. Because it had

not previously dealt with that company it sought a credit reference from the company's bank, which gave a satisfactory reference without checking on the company's current financial standing. The claimant produced the campaign but then the company went into liquidation and so the claimant could not be paid for its work. The claimant sued the bank for its negligently made advice but failed because the bank had included a disclaimer of liability in its credit reference.

Key Law

The House *obiter* approved Lord Denning's dissenting judgment from *Candler v Crane Christmas & Co* and held that it is possible to recover for a purely financial loss caused by a negligently made statement if certain conditions are met.

Key Judgment

Lord Reid explained:

'A reasonable man, knowing that he was being trusted or that his skill and judgment were being relied on, would . . . be held to have accepted some responsibility for his answer being given carefully, or to have accepted a relationship with the inquirer which requires him to exercise such care as the circumstances require'.

Key Link

Candler v Crane Christmas & Co [1951] 2 KB 164.

3.3.2 *Mutual Life and Citizens Assurance Co Ltd v Evatt* [1971] AC 793

PC

Key Facts

The claimant asked an insurance company agent to give advice about the products of another company with which he planned to invest. The advice was inaccurate and the claimant lost money.

Key Law

The court held that there was no duty owed in the circumstances because the defendant had not held himself out as being in the business of giving the type of advice asked for.

3.3.2 *Chaudhry v Prabhaker* [1988] 3 All ER 718 CA

Key Facts

The claimant asked a friend, with some experience of cars, to find her a good second-hand car. When it was later discovered that the car had been in an accident and was not completely roadworthy the claimant successfully sued her friend.

Key Law

The court held that the relationship for the purpose of the advice operated in a similar way to principal and agent and so was sufficient to impose a duty of care on the person giving the advice.

Key Problem

This is a strange result as it is generally accepted that no duty is owed in a purely social relationship.

3.3.2 *Smith v Eric S Bush* [1990] 2 WLR 790 HL

Key Facts

A building society valuation identified that chimney breasts had been removed, but the valuer failed to check whether the bricks above were properly secured. They were not and after the purchase they collapsed and the purchaser sued successfully.

Key Law

The court held that there was a duty of care because, even though the contract was between the building society and valuer, it was reasonably foreseeable that the purchaser would rely on it.

3.3.2 *Goodwill v British Pregnancy Advisory Service* [1996] 2 All ER 161

CA

Key Facts

The defendant failed properly to advise a patient of the possibility that his vasectomy could automatically reverse itself. The claimant had become pregnant after relying on the man informing her that he had had a vasectomy.

Key Law

The court held that a doctor can not be fixed with liability to the future partners of patients who they have performed a vasectomy on. The class is potentially too wide and unforeseeable. The court rejected the link drawn with *White v Jones*.

3.3.3.5 *Henderson v Merrett Syndicates* [1994] 3 All ER 506

HL

Key Facts

Insurance underwriters lost huge sums because of negligent management of the syndicates of which they were members and needed to prove that the managing agents owed them a duty in tort as well as contractual duties.

Key Law

The court held that there was a duty because of an assumption of responsibility by the defendants. The court added this requirement to the list for establishing liability from *Caparo v Dickman* (1990):

- the advice must be required for a purpose described at the time to the defendant at least in general terms;
- this purpose must be made known actually or by inference to the party giving the advice at the time it is given;
- if the advice will subsequently be communicated to the party relying on it, this fact must be known by the adviser;
- the adviser must be aware that the advice will be acted upon without benefit of any further independent advice;
- the person alleging to have relied on the advice must show actual reliance and consequent detriment suffered;

- the person giving the advice must have assumed responsibility.

Key Link

Caparo v Dickman [1990] 2 AC 605

3.3.4.4 *White v Jones* [1995] 1 All ER 691 HL

Key Facts

Solicitors failed to draw up a will before the testator's death and the intended beneficiaries consequently lost their inheritance.

Key Law

The court held that a duty was owed to the beneficiaries even though the contractual relationship was with the testator, and since a will can be changed a beneficiary is not necessarily ensured the inheritance. Nevertheless, the House was prepared to identify both a special relationship in the circumstances and reliance.

3.4.3 *Smith v Littlewoods Organisation Ltd* [1987] 1 All ER 710 HL

Key Facts

The defendant bought a cinema to demolish and rebuild as a supermarket and then left it empty. Vandals broke in and set fire to it. The fire spread and caused damage to the claimants' properties.

Key Law

The court held that there was no liability. The defendant could not be responsible for acts of strangers of which it had no knowledge.

Key Judgment

Lord Goff in the House of Lords (now the Supreme Court) stated:

'In such a case it is not possible to invoke a general duty of care; for it is well recognised that there is no general duty of care to prevent third parties from causing such damage'.

Key Comment

Lord Goff also identified the situations in which a party could be liable for an omission – where the defendant owes a duty to act:

- because of a contractual or other undertaking;
- because of a special relationship with the claimant;
- because of damage that is done by a third party who is within his control;
- because he has control of things on his land or other dangerous things.

3.4.3 *Home Office v Dorset Yacht Co Ltd* [1970] AC 1004

HL

Key Facts

Seven Borstal boys on a training camp in Poole, five of whom had escaped before, escaped when the warders, against their instructions, were all asleep. The boys caused considerable damage to yachts in the harbour. The claim for damages against the Home Office was successful.

Key Law

The Home Office was held liable for its employees' failure to control the offenders in their charge because its employees had failed in their duty to restrain the boys and protect the public from them.

3.4.3 *Goldman v Hargrave* [1967] 1 AC 645

PC

Key Facts

A 100-foot-high tree on the defendant's land was struck by lightning and ignited. The defendant cleared land around the tree, felled it and cut the burning tree into sections

to burn out. When a high wind developed the fire from the tree spread to neighbouring property causing extensive damage. The defendant was liable.

Key Law

The court acknowledged that the defendant had done nothing positive to cause the spread of fire or increase the risk of damage. Nevertheless, he failed to do something which he could have done with little extra cost or effort than he had already made, put the fire out. On this basis, he was negligent.

4 Occupier's liability

OCCUPIER'S LIABILITY

Parties to action

- **Defendants:** occupiers are those in control of premises at material time (*Wheat v Lacon*).
- **Claimants 1957 Act:** visitors include: invitees, licensees, people entering under a contract, people with a legal right to enter.
- **Claimants 1984 Act:** non-visitors include: trespassers, people using private rights of way (*Holden v Wright*), people entering under National Parks and Access to Countryside Act.
- **Claimants common law:** those using public rights of way.

Scope of duty in 1957 Act

- **Common duty of care:** by s 2(1) occupier owes same duty to all visitors.
- **Standard of care:** by s 2(2) occupier must take reasonable steps to ensure visitor safe for legitimate purpose of visit.
- **Avoiding the duty:**
  - i) warnings are acceptable if effective to keep the visitor safe (*Rae v Mars*);
  - ii) exclusions are possible by agreement or otherwise, but not, eg for sub-contractors, or those with legal right to enter;
  - iii) contributory negligence can reduce damages (*Sayers v Harlow UDC*);
  - iv) *volenti* is possible if risk is genuinely accepted (*White v Blackmore*).

Liability under 1984 Act

- Based on common duty of humanity (*Herrington v BR Board*).
- Available for personal injury only.
- Under s 1(3) duty if aware of danger, and knows or believes the non-visitor is in danger, and risk is one occupier should guard against.

Special cases

Children:

- by s 2(3) premises must be safe for child of that age;
- there should be no allurements (*Glasgow Corporation v Taylor*); occupier can expect parents to care for young children (*Phipps v Rochester Corporation*).

Those exercising a trade:

- by s 2(3) must guard against risks associated with their trade (*Roles v Nathan*);
- but occupier can still be liable (*Salmon v Seafarers Restaurant*).

Liability for acts of independent contractors:
no liability if reasonable to hire out work, competent contractor chosen, and work inspected if necessary (*Haseldine v Daw*).

4.1 Liability to lawful visitors under the 1957 Act

4.1.1 Introduction

1 Occupier's Liability Act 1957 – covers liability to visitors.

2 1984 Act covers liability to non-visitors (mainly trespassers).

3 Both Acts only cover damage resulting from state of premises – other damage is covered by negligence (*Ogwo v Taylor* (1987)).

4.1.2 Definition of occupier (potential defendants)

1 There is no real statutory definition so common law test applies: who has control of premises? (***Wheat v Lacon* (1966)**).

2 Dual occupation possible – identity of the defendant depends on the nature of the interest, etc. (*Collier v Anglian Water Authority* (1983)).

3 In an action a lawyer's main concern is who has means to be sued.

4 There is no need for proprietary interest or possession, only control, so different from trespass (*Harris v Birkenhead Corporation* (1976)).

4.1.3 Definition of premises

1 No complete definition in either Act, so common law applies.

2 It obviously includes houses, buildings, land, etc. but also:

- ships in dry dock (*London Graving Dock v Horton* (1951));
- vehicles (*Hartwell v Grayson* (1947));
- lifts (*Haseldine v Daw & Son Ltd* (1941));
- aircraft (*Fosbroke-Hobbes v Airwork Ltd* (1937));
- and even a ladder (*Wheeler v Copas* (1981)).

3 The 1957 Act in s 1(3)(a) preserves the common law ('fixed or movable structure, including any vessel, vehicle or aircraft . . .').

4.1.4 Potential claimants

1 The 1957 Act simplified complex common law classes of entrant. These were:

- invitee – enters in material interest of occupier, e.g. a shop customer, a friend visiting;
- licensee – mere permission, e.g. a person taking a short cut;
- a person entering under a contract, e.g. a painter (duty depended on contract) – a subcontractor is only a licensee;
- a person entering by legal right, e.g. meter readers, police executing warrants, but also private and public rights of way;
- trespassers – no permission and no rights.

2 The different classes were owed different duties so s 1(2) 1957 Act was replaced with 'common duty of care' to 'visitors', including:

- licensees and invitees – implied licensees must show licence created by occupier's conduct (*Lowery v Walker* (1911)) and an implied licence will not include a claimant's reckless actions that lead to his injury *Harvey v Plymouth* CC (2010);
- those entering under a contract – where the contract provides for greater protection it will be owed;
- those entering by legal right.

3 Visitor does not include:

- private rights of way (*Holden v Wright* (1982));
- those entering under an access agreement under the National Parks and Access to Countryside Act;
- trespassers (all covered by the Occupier's Liability Act 1984);
- public rights of way, covered by the common law (*McGeown v Northern Ireland Housing Executive* (1994)).

4.1.5 The scope of the Act (the common duty of care)

1 By s 2(1), 'An Occupier of premises owes the same duty, the common duty of care to all his visitors except insofar as he is free to do and does extend, restrict, modify or exclude his duty.'

2 By s 2(2) duty is to 'take such care as in all circumstances . . . is reasonable to see that the visitor will be reasonably safe in using the premises for the purpose for which he is invited . . .'. Higher duty may be owed by a professional occupier (*Ward v Tesco Stores Ltd* (1976)) than by an ordinary homeowner (*Fryer v Pearson* (2000)).

3 Three key points apply.

a) The standard of care is the same as for negligence, the standard of reasonableness (*Esdale v Dover* (2010)) – no need to guard against the unforeseeable (*Bolton v Stone* (1951)), so no liability for 'pure accidents' (***Cole v Davis-Gilbert and the Royal British Legion* (2007)**).

b) Duty only exists while the visitor carries out authorised activities.

c) The visitor must be kept safe, not the premises, so the Act elaborates on certain classes of visitor (*Searson v Brioland* (2005)).

4.1.6 Liability to children

1 Section 2(3) allows for 'children to be less careful than adults' and 'premises must be reasonably safe for a child of that age . . .'.

2 So the standard of care owed to a child is measured subjectively.

3 This is because an unthreatening object to an adult may be dangerous to a child (*Moloney v Lambeth LBC* (1966)).

4 Occupiers must not lead children into temptation (the 'allurement principle') (***Glasgow Corporation v Taylor* (1922)**).

5 However, allurement is not definite proof of liability (*Liddle v Yorkshire (North Riding) CC* (1944)).

6 It had been held that there is no liability where there is an allurement but the type of damage sustained is not foreseeable (***Jolley v London Borough of Sutton* (1998))** CA, but HL (2000) subsequently held that if damage is foreseeable then there is liability even if the way in which it is caused is not foreseeable.

7 Parents may be expected to be responsible for very young children (***Phipps v Rochester Corporation* (1955)**).

4.1.7 Liability to persons entering to exercise a calling

1 By s 2(3)(b) a person carrying out a trade 'will appreciate and guard against any special risks ordinarily incident to it . . .'.

2 So tradesmen are expected to avoid the risks associated with their trade (***Roles v Nathan* (1963)**).

3 An employer may still be liable for failing to provide safe systems of work (*General Cleaning Contractors v Christmas* (1953)).

4 The fact that the visitor has a skilled calling is not proof *per se* of the occupier's liability (*Salmon v Seafarer Restaurants Ltd* (1983)).

4.1.8 Liability for the acts of independent contractors

Under s 2(4) there is no liability for 'faulty execution of any work or construction, maintenance or repair by an independent contractor . . .' providing:

a) it was reasonable to entrust the work (*AMF International Ltd v Magnet Bowling Ltd* (1968));

b) a competent contractor was hired (*Ferguson v Welsh* (1987)):

- an occupier may be liable where a contractor is not insured (*Bottomley v Todmorden Cricket Club* (2003));
- so duty also to check that contractor is insured (***Gwilliam v West Hertfordshire Hospitals NHS Trust* (2002)**);
- but not if there are other accepted means of assessing the independent contractor's competence to carry out the work (*Naylor (t/a Mainstream) v Payling* (2004));

c) if necessary the occupier checked work was carried out properly – compare ***Haseldine v Daw*** with ***Woodward v Mayor of Hastings* (1945)**.

4.1.9 Avoiding the duty

1 **Warnings**

a) By s 2(4) warning relieves liability if 'in all circumstances it was enough to enable the visitor to be reasonably safe'.

b) What is sufficient warning is a question of fact in each case.

c) A warning may be insufficient and a barrier be necessary instead (*Rae v Mars (UK) Ltd* (1990)).

d) Genuine warnings, e.g. 'Danger: steps slippery when wet' must be distinguished from attempts to use the defence of *volenti*, e.g. 'Persons enter at their own risk', and exclusions, e.g. 'No liability accepted for accidents, however caused'.

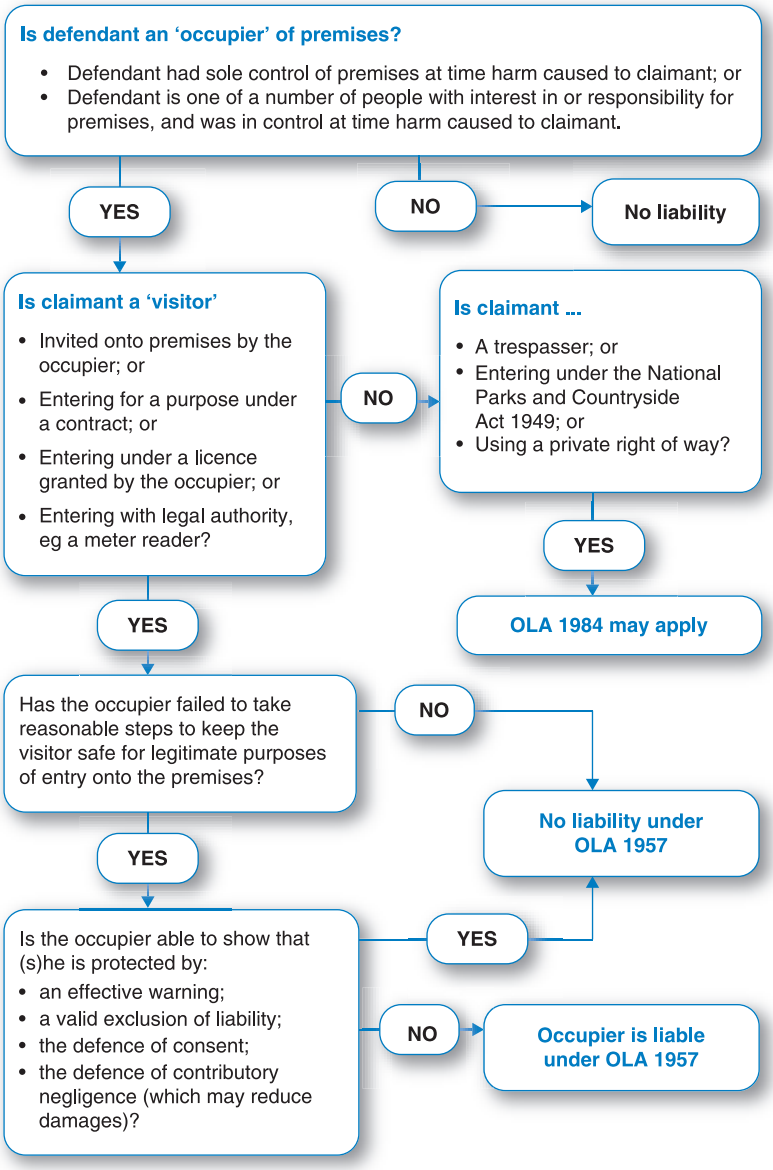
e) If the danger is obvious to all the occupier can assume that the visitor will take care (***Staples v West Dorset DC* (1995)**).

2 **Exclusion:**

a) Under s 2(1) exclusions are allowed 'by agreement or otherwise . . .', so can exclude by a term of the contract or by a communicating notice (*Ashdown v Samuel Williams* (1957)).

b) Restrictions on the principle include:

- excluding liability to persons entering by a legal right is not possible;
- nor is excluding liability when bound by a contract to admit strangers to a contract (subcontractors);
- the Occupier's Liability Act 1957 imposes a minimum standard, so one argument is that excluding liability should not be possible or trespassers will have greater rights than lawful visitors;
- exclusions may well fail against children;
- s 1(3) of UCTA applies in business premises.



Assessing liability under the Occupier's Liability Act 1957

3 **Defences**

a) Contributory negligence under the Law Reform (Contributory Negligence) Act 1945 when appropriate.

b) *Volenti non fit injuria* (s 2(5)) allows that there is no liability for risks willingly undertaken:

- if risk is fully understood (*Simms v Leigh RFC* (1960));
- mere knowledge of a risk is insufficient to raise defence – must have accepted it (***White v Blackmore* (1972)**);
- But there is no obligation on an occupier to guard against a risk that is obvious where the claimant chooses to run that risk (*Evans v Kosmar Villa* (2008));
- where claimant has no choice then there is no consent (*Burnett v British Waterways* (1973));
- express warnings of claimant entering at own risk are probably caught by UCTA.

4.2 Liability to trespassers under the 1984 Act

4.2.1 Common law and the duty of common humanity

1 The Occupier's Liability Act 1984 applies mainly to trespassers.

2 Traditionally no real duties were owed at common law except to refrain from inflicting damage intentionally or recklessly:

a) so no man traps (*Bird v Holbreck* (1828));

b) some deterrents were accepted (*Clayton v Deane* (1817));

c) and the law was harsh on children (*Addie & Sons (Colliers) Ltd v Dumbreck* (1927)).

3 So the duty of common humanity developed (***BR Board v Herrington* (1972)**).

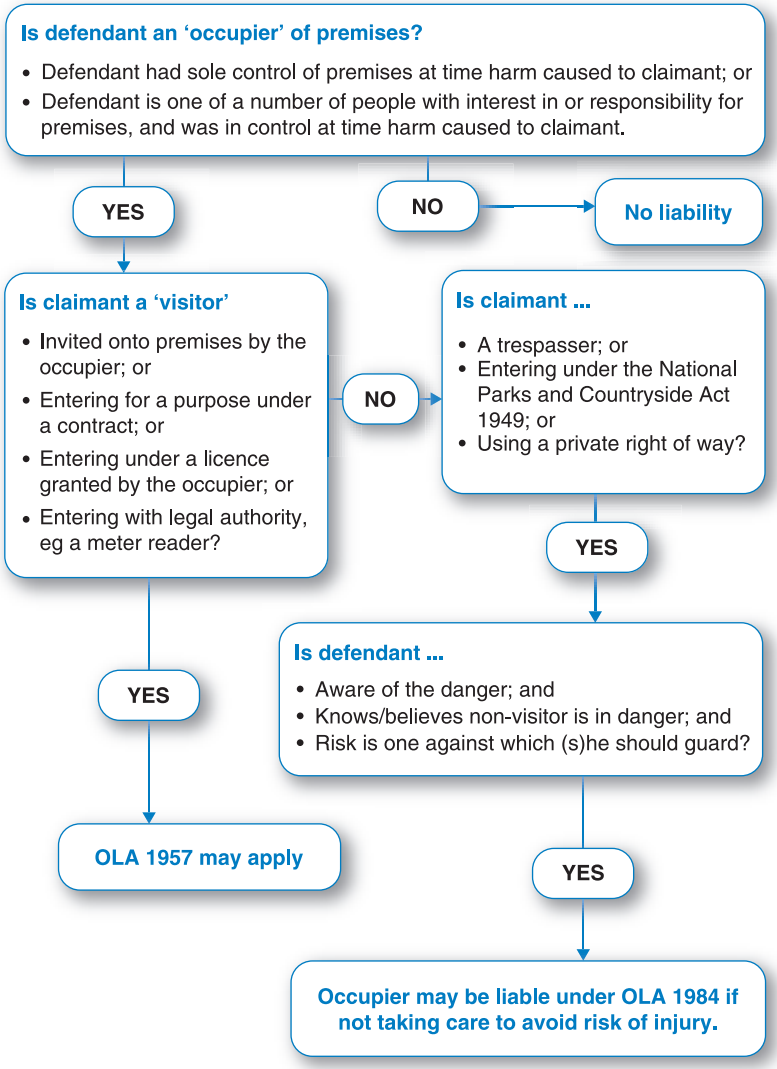
4 The 1984 Act was passed because of shortcomings in the law.

4.2.2 When the Act applies

1 Like the common duty of humanity, the Act imposes a minimum standard.

2 Under s 1(1)(a) the duty to non-visitors is for 'injury . . . due to state of premises or things done or omitted to be done on them' but not a dangerous activity of the claimant (*Siddorn v Patel* (2007)).

3 Therefore it does not cover damage to property.



Assessing liability under the Occupier's Liability Act 1984

4 'Occupier' and 'premises' are defined as in the 1957 Act.

5 Under s 1(3) the occupier owes a duty if:

   a) (s)he is aware of the danger, so no liability if the occupier is unaware of the danger or has no reason to suspect danger (*Rhind v Astbury Water Park* (2004));

   b) (s)he knows or believes that the non-visitor is in danger, so no liability if the occupier has no reason to suspect presence of trespasser (*Higgs v Foster* (2004));

   c) the risk is one against which (s)he should guard.

4.2.3 The nature of the duty

1 Duty by s 1(4) is to 'take such care as is reasonable in all the circumstances to prevent injury . . . by reason of danger'.

2 Standard of care is objective and influenced by type of premises, degree of risk, practicality of precautions, age of trespasser, etc. (***Tomlinson v Congleton BC* (2003)**).

4.2.4 Avoiding the duty

1 **Warnings**

   a) Section 1(5) says the duty can be discharged by taking 'such steps as are reasonable in the circumstances'.

   b) Warnings are enough for adults (***Westwood v Post Office* (1973)**).

   c) But children may also require barriers.

2 *Volenti* is preserved as a defence by s 1(6) (*Scott and Swainger v Associated British Ports & British Railways Board* (2000)). Defence only applies if claimant appreciates both nature and degree of risk (***Ratcliffe v McConnell* (1999)**).

3 **Exclusion clauses**

   a) There is no reference to exclusion clauses, but there is in 1957 Act.

   b) UCTA cannot apply (it never applied to trespassers in the common law before the Act).

   c) As it is a minimum standard there should be no exclusions, but public policy may prevent lawful visitors being worse off than trespassers in non-business premises.

Key Cases Checklist

Occupier's Liability Act 1957 (lawful visitors)

***Glasgow Corporation v Taylor* (1922)**
The occupier must expect children to be less cautious than adults, has a higher standard of care, and must avoid 'allurements'

***Phipps v Rochester Corporation* (1955)**
But can expect parents to be responsible for very young children

***Roles v Nathan* (1963)**
The occupier can rely on the skill and knowledge of people entering to exercise a trade or calling to avoid risks associated with the work

***Haseldine v Daw* (1941)**
The occupier is not liable for the work done by independent contractors if it was reasonable to hire them, a competent contractor is chosen and the work is checked if the nature of the work allows

***Staples v West Dorset DC* (1995)**
The occupier may use warning signs to avoid liability but has no need when the danger is obvious to a reasonable man

***White v Blackmore* (1972)**
Consent is only a defence where the visitor freely accepts the actual risk

Definition of 'occupier'

***Wheat v Lacon* (1966)**
A person who is in actual control of the premises when the damage occurs

Occupier's liability

Occupier's Liability Act 1984 (trespassers)

***BR Board v Herrington* (1972)**
Introduced the 'common duty of humanity' through common law

***Tomlinson v Congleton BC* (2003)**
The Act can apply if the danger is due to the state of the premises, and is the sort of risk that the defendant should have guarded against and one that the trespasser in fact chose to run

***Ratcliffe v McConnell* (1999)**
Volenti applies and liability is avoided if the claimant freely accepted the actual risk of harm

4.1.2.1 *Wheat v E Lacon & Co Ltd* [1966] AC 552 HL

Key Facts

A pub manager was allowed to rent out rooms in his private quarters even though he was not the owner. An action arose because a paying guest fell on an unlit staircase, although as it was later identified, a stranger had removed the bulb so there was no liability on either the pub manager or the brewery.

Key Law

The House of Lords (now the Supreme Court) held that an occupier was someone in 'actual control of the premises at the time when the damage was caused'. This meant that both the landlord and the manager could potentially be liable.

4.1.5.3 *Cole v Davis-Gilbert and the Royal British Legion* [2007] All ER (D) 20 (Mar) CA

Key Facts

The claimant suffered a broken leg after stepping on a hole hidden by grass on a village green. The hole was used for inserting a maypole during annual fêtes. She sued the owner of the village green arguing that, as an occupier, he had a duty to keep visitors safe, and also the British Legion which had erected the maypole and filled the hole after a fête 21 months before.

Key Law

The Court of Appeal held there was no duty on the owner to inspect the green for holes, as even a daily inspection could not guarantee that there would be no holes as the green was used by many people for many different purposes. Even if the British Legion owed a duty to properly fill the hole, the duty could not last indefinitely, and not for 21 months after its last use.

Key Comment

Lord Justice Scott Baker observed in his judgment that 'sometimes accidents are just pure accidents'. This

reinforces the principle that the scope of the duty only extends to guarding against foreseeable risks, not unexpected or unlikely risks.

4.1.6.4 *Glasgow Corporation v Taylor* [1922] 1 AC 44 HL

Key Facts

A seven-year-old boy was poisoned when he ate berries in an area of botanical gardens which was not fenced off in any way. The subsequent negligence claim was successful.

Key Law

The court held that occupiers must anticipate that children are less cautious than adults and that the berries amounted to an 'allurement'. Occupiers must take greater care of children than they would of adults.

Key Link

S 2(3) Occupier's Liability Act 1957: occupiers 'must be prepared for children to be less careful than adults . . . the premises must be reasonably safe for a child of that age'.

4.1.6.7 *Phipps v Rochester Corporation* [1955] 1 QB 450 QBD

Key Facts

A five-year-old boy was injured one evening when he fell in a nine-foot-deep trench dug by the defendants' workers, near which children often played. The claim for compensation failed.

Key Law

The court held that the occupier (the local council) was not in breach of its duty of care as parents of young children have a duty to prevent them from coming into contact with danger.

Key Judgment

Devlin J stated:

'Even if it be prudent, which I do not think it is, for a parent to allow two small children out in this way on an October evening, the parents might at least have satisfied themselves that the place to which they allowed these little children to go held no dangers for them . . . defendants are entitled to assumed that parents would behave in this naturally prudent way, and are not obliged to take it on themselves, in effect, to discharge parental duties'.

4.1.6.6 *Jolley v London Borough of Sutton* [2000] 3 All ER 409

HL

Key Facts

Two 14-year-old boys were injured on an abandoned boat on the Council's land. Children regularly played in the boat and it was an obvious danger but the Council had failed to remove it for two years. The boys had been injured while jacking up the boat and trying to repair it. The Court of Appeal had held that there was no liability since the circumstances in which the injuries had occurred was unforeseeable. The House of Lords (now the Supreme Court) reversed this decision.

Key Law

The House of Lords (now the Supreme Court) held that, as long as the boat created a foreseeable risk of injury, then the precise circumstances in which the injury occurred was not material in imposing liability.

Key Link

Hughes v Lord Advocate [1963] AC 387

4.1.7.2 *Roles v Nathan* [1963] 1 WLR 1117

CA

Key Facts

Two chimney sweeps, who were cleaning flues in a factory, died after inhaling fumes. There was no liability because they had been warned by the occupier of the danger of

working in the chimney while the furnace was lit but had ignored the advice.

Key Law

The occupier may assume that professional visitors will guard against risks that are within their professional knowledge.

4.1.8 *Haseldine v Daw & Sons Ltd* [1941] 2 KB 343 KB

Key Facts

The claimant was killed following the negligent repair of a lift on the occupier's premises. The occupier had hired reputable contractors for a highly technical procedure and successfully defended the claim on this basis.

Key Law

There was no liability because the technical nature of the repairs meant that the occupier was not equipped to check the work and could rely on the skill and expertise of the contractor.

Key Link

S 2(4)(b) Occupier's Liability Act 1957

The section identifies that an occupier can avoid liability if it is reasonable for him to entrust the work to an independent contractor, and that he has taken reasonable steps to ensure that a competent contractor has been hired and that the work has been carried out properly.

4.1.8 *Woodward v Hastings Corporation* [1945] KB 174 CA

Key Facts

A child was injured on school steps that had been left in an icy state when they had been cleared of snow by contractors. The claim for damages against the occupier succeeded.

Key Law

Liability stayed with the occupier since checking on the standard of the work was straightforward because of the type of work.

Key Judgment

In commenting on the occupier's responsibility Lord Denning identified that: *'there is no esoteric quality in the nature of the work which the cleaning of a snow covered step demands'.*

4.1.8 *Gwilliam v West Hertfordshire NHS Trust* [2002] 3 WLR 1425

CA

Key Facts

The hospital trust held a fund raising fair on its premises and hired a 'splat wall' from a firm, Club Entertainments, that was also responsible for operating it. (A 'splat wall' is a wall to which a person wearing a Velcro suit will stick after bouncing from a trampoline.) The wall was poorly assembled by the firm and the claimant fell, injuring herself. Club Entertainments was bound under the contract with the trust to have public liability insurance but this had expired four days before the fair so when the claimant sued the trust for damages she was unsuccessful.

Key Law

Lord Woolf CJ and Lord Justice Waller held that, while ensuring that contractors were insured was part of the duty of hiring competent contractors, the duty had not been breached here and the contractors had the duty of ensuring that the claimant was safe to use the 'splat wall'.

Key Link

Bottomley v Todmorden Cricket Club [2003] EWCA Civ 1575.

4.1.9.1 *Staples v West Dorset DC* (1995) 93 LGR 536 CA

Key Facts

The claimant slipped on wet algae on a high wall at Lyme Regis, injuring himself. His claim against the council was unsuccessful.

Key Law

The court held that the danger should have been obvious and there was therefore no additional duty to warn of the danger.

4.1.9.3 *White v Blackmore* [1972] 3 All ER 158 CA

Key Facts

The claimant, who was a competitor in a 'jalopy race', was killed while standing in front of a rope barrier to a spectators' enclosure. A car crashed into the barrier and caused it to catapult him into the air. A prominently displayed notice excluded liability. A claim failed on his behalf.

Key Law

The court held that he was an implied licensee, but the defence of *volenti non fit injuria* under s 2(5) of the 1957 Act was inapplicable because the claimant could not have consented to inadequate safety arrangements and was unaware of the full risk. However, the exclusion clause was effective.

Key Link

Evans v Kosmar Villa (2008) 1 All ER 530.

4.2.1.3 *British Railways Board v Herrington* [1972] AC 877 HL

Key Facts

A six-year-old was badly burned when straying onto an electrified railway line, through vandalised fencing. It was

well known that the fences were often broken and that small children played near the line and the railway board regularly repaired it.

Key Law

The House, using the Practice Statement, overruled the previous law in *Addie v Dumbreck* (1929) and established the 'common duty of humanity'. This was a limited duty owed to child trespassers when the occupier knew of the danger, and of the likelihood of the trespass, and had the skill, knowledge and resources to avoid an accident.

Key Problem

This duty would obviously operate in fairly limited circumstances and was not without criticism or difficulties. Because of some of the impracticalities of the rule, the 1984 Act was passed.

Key Link

Robert Addie & Sons (Collieries) Ltd v Dumbreck [1929] All ER 1.

Child trespassers were injured on industrial premises but denied a remedy by the rule that occupiers owed no duty of care to trespassers other than not to deliberately cause them harm.

4.2.3.2 *Tomlinson v Congleton BC* [2003] 1 AC 46 HL

Key Facts

A local authority owned a park in which there was a lake. It posted warning signs prohibiting swimming and diving because the water was dangerous, but the council knew that the signs were generally ignored. The council decided to make the lake inaccessible to the public but delayed start on this work because of lack of funds. The claimant, who was aged 18, dived into the lake, struck his head and suffered a severe spinal injury and was paralysed as a result. His claim under the 1984 Act was rejected by the trial judge but succeeded in the Court of Appeal. The House of Lords (now the Supreme Court) then upheld the appeal by the Council.

Key Law

The Court of Appeal had held that all three aspects of s 1(3) were satisfied as it felt that the gravity of the risk of injury, the frequency with which people were exposed to the risk, and the fact that the lake acted as an allurement all meant that the scheme to make the lake inaccessible should have been completed with greater urgency, although it did acknowledge the contributory negligence of the claimant. The House of Lords (now the Supreme Court), in accepting the council's appeal, based its decision on three reasons: that the danger was not due to the state of the premises, that it was not the sort of risk that the defendant should have to guard against but one that the trespasser in fact chose to run, and that the council would not have breached its duty even in the case of a lawful visitor since the practicality and financial cost of avoiding the danger was beyond what should be expected of a reasonable occupier.

Key Judgment

Lord Hoffmann stated that:

'A duty to protect [against] self-inflicted harm exists only in cases where there is . . . some lack of capacity, such as the inability of children to recognise danger'.

4.2.4.1 *Westwood v The Post Office* [1974] AC 1 HL

Key Facts

The claimant was injured when he took an unauthorised break at work and fell through a defective trapdoor. A sign 'Only the authorised attendant is permitted to enter' on the door of a motor room was held sufficient warning for an intelligent adult.

Key Law

The court held that there was a valid warning under s 1(5) and so there could be no liability.

Key Comment

There is still a question as to whether such warnings would succeed in the case of children who may be unable to read or may not fully understand the warning.

4.2.4.2 *Ratcliffe v McConnell* [1999] 1 WLR 670 CA

Key Facts

A warning notice at the shallow end of a swimming pool read: 'Deep end shallow dive'. The pool was always kept locked after hours and the claimant knew that entry was prohibited at this time. He was a trespasser and so when he was injured while diving into the shallow end his claim failed.

Key Law

The court held that the claimant was fully aware of the risk and that by s 1(6) the defence of *volenti non fit injuria* thus applied. The claimant had freely accepted the risk of harm.

5 Nuisance

Private nuisance – definition and parties

Definition:

continuous, unlawful (unreasonable), indirect interference with a person's enjoyment of land or rights over it.

Potential claimants:

- holder of legal/equitable title;
- landowner not in possession;
- occupier suing for benefit of those affected;
- tenant but not family (*Hunter v Canary Wharf*).

Potential defendants:

- creator of nuisance (*Southport Corporation v Esso Petroleum*);
- person authorising nuisance (*Tetley v Chitty*);
- person who adopts nuisance (*Sedleigh Denfield v O'Callaghan*);
- landlords can be liable to tenants.

NUISANCE

Public nuisance

Something affecting a reasonable class of Her Majesty's citizens materially or in reasonable comfort and convenience of life.

Involves highway and can be:

- obstructions (*Thomas v NUM*);
- projections (*Noble v Harrison*);
- conditions (*Griffiths v Liverpool Corporation*);

but must involve special damage (*Castle v St Augustine Links*).

Private nuisance – ingredients

Unreasonable use of land

- Locality is important, so what may be a nuisance in a residential area need not be in an industrial area (*Sturges v Bridgman*).
- Nuisance must be continuous (*Bolton v Stone*), although liability possible for an isolated incident arising from a continuous state of affairs (*Spicer v Smee*).
- Locality unimportant if claimant suffers damage (*Halsey v Esso Petroleum*).
- Claimant's over-sensitivity to the nuisance may defeat a claim (*Robinson v Kilvert*), but see *Network Rail v Morris* (2004).
- Malice can make a legitimate activity unreasonable (*Christie v Davey*) and a deliberate act of malice can be nuisance (*Emmet v Hollywood Silver Fox Farm*).
- A person can 'adopt a nuisance naturally present' (*Leakey v National Trust*).

Indirect interference:

- fumes (*Bliss v Hall*);
- vibrations (*Sturges v Bridgman*).

Enjoyment of land

- Pure recreational use not protected (*Bridlington Relay v Yorks Electricity Board*).

Private nuisance – defences

- Statutory authority (*Hammersmith Railway v Brand*).
- Planning permission (*Gillingham BC v Medway (Chatham) Dock Ltd*).
- Twenty years prescription (*Sturges v Bridgman*).
- Consent (*Kiddle v City Business Properties*).
- Act of a stranger (*Sedleigh Denfield v O'Callaghan*).
- Public policy (*Miller v Jackson*).

5.1 Private nuisance

5.1.1 The definition, character and purpose of the tort

1 Defined as 'continuous, unlawful and indirect interference with a person's enjoyment of land or some right over, or in connection with it'.

2 It only applies to an 'indirect' interference – direct is trespass.

3 It concerns prevention more than compensation.

4 It concerns the relationship between neighbours.

5 There are three key elements to neighbourhood:

- continuity – involving a recurring state of affairs;
- people should be free to use their land as they wish, so long as it does not harm their neighbours;
- neighbours are subject to many trivial disputes, so there is a risk of the courts being flooded with claims.

6 Only 'unreasonable' interference is a nuisance:

- so there is no protection against interference classed as reasonable;
- but if classed as unreasonable it is irrelevant whether it was reasonable for the defendant to engage in such behaviour.

7 The test is: what conduct is sufficient to justify legal intervention?

8 The court must strike a balance between conflicting interests and this now involves balancing the rights of the individual against that of the wider community even where violation of human rights (Article 8) is involved (*Hatton v UK* (2003); *Dennis v MoD* (2003); *Marcic v Thames Water Utilities Limited* (2003)).

5.1.2 Who can sue in nuisance

1 Nuisance usually affects occupiers, so traditionally a claimant is the holder of a legal or equitable title – but might include:

a) a landowner out of possession;

b) an occupier suing for the benefit of others affected;

c) a tenant, but not his/her family:

- limiting a landlord's responsibility for the state of property (*Habinteng Housing Association v James* (1994));

- so Law Commission Report No 238, 1996 recommends updating the implied covenant of fitness for human habitation in the Landlord and Tenant Act 1985;
- at one point an occupier's family harassed by offensive telephone calls was included (*Khorasandjian v Bush* (1993)), but overruled by ***Hunter v Canary Wharf* (1997)**.

5.1.3 The ingredients of the tort

There are three key elements:

a) unlawful use of land;

b) indirect interference with land;

c) indirect interference with the claimant's use or enjoyment of his/her land.

The unlawful (unreasonable) use of land

1 Interference alone is insufficient – it must be unlawful.

2 Unlawful means unreasonable so, in balancing competing interests, the question is whether in all of the circumstances it is reasonable for the claimant to suffer the particular interference (*Barr v Biffa Waste Services Ltd* (2012)).

3 In assessing the defendant's conduct the court is analysing fault (so there must be foreseeable damage), but in a more flexible way than with negligence – so a defendant might be excused liability for not having the resources to avoid the nuisance (*Solloway v Hampshire County Council* (1981)), but see *Hurst & another v Hampshire County Council* (1997), CA.

4 Many key factors are used to assess what is unreasonable.

   a) The locality:

   - The activity may be a nuisance in a residential area but not in an industrial one (*Sturges v Bridgman* (1879), where vibrations were a nuisance to a doctor's waiting room).
   - So it can include a common facility in the wrong area (***Laws v Florinplace* (1981)**).
   - The customary use of the area may be a factor (*Sturges v Bridgman* (1879)).
   - Locality may be irrelevant if damage is suffered (***St Helens Smelting Co v Tippin* (1865)**).
   - Courts may in any case try to reach a compromise (*Dunton v Dover DC* (1977)).

b) The duration of the interference:
   - The interference must be continuous (*Bolton v Stone* (1950)).
   - An isolated incident can be a nuisance if arising from a continuous state of affairs (*Spicer v Smee* (1946)).
   - The cause could be over a long time span (*Cambridge Water Co v Eastern Counties Leather plc* (1994)).
   - But very short time spans have been accepted (**Crown River Cruises Ltd v Kimbolton Fireworks Ltd (1996)**).

c) The seriousness of the interference:
   - if the claim is for interference with use or enjoyment, the test is whether it is 'an inconvenience materially interfering with the ordinary comfort of human existence, not merely according to elegant or dainty modes and habits of living, but according to plain, sober and simple notions . . .' (Knight-Bruce VC in *Walter v Selfe* (1851)).
   - Where the claimant suffers physical damage the use of land is unreasonable (**Halsey v Esso Petroleum (1961)**, where smuts from a refinery affecting the claimant's car were a nuisance even though in an industrial area).
   - This does not apply if protected by public policy (*Miller v Jackson* (1977)).
   - It does not apply if the use of land is an absolute right (*Stephens v Anglian Water Authority* (1987)).
   - It does not apply if the activity is seen to be to the public benefit (*Ellison v Ministry of Defence* (1997)).

d) The sensitivity of the claimant – if a claimant's own use of land is hypersensitive to the interference he may fail (**Robinson v Kilvert (1889)**). But the Court of Appeal in *Network Rail Infrastructure Ltd v CJ Morris* (2004) has now suggested that there may now be no need to apply such a test.

e) Malice and the conduct of the defendant:
   - Malice does play a part in nuisance.
   - A deliberately harmful act will normally be a nuisance (*Hollywood Silver Fox Farm v Emmet* (1936)).
   - An act of revenge in response to unreasonable behaviour will normally be a nuisance (**Christie v Davey (1893)**).
   - Sometimes merely selfish or unthinking behaviour is sufficient (*Tutton v Walter* (1986)).

- Where the defendant does not cause the problem, but, knowing about it, allows it to continue, is sufficient to be considered nuisance (*Leakey v National Trust* (1980)).

f) The state of the defendant's land:

- A defendant cannot ignore things that may cause interference (*Goldman v Hargrave* (1967) and *Leakey v National Trust* (1980)).
- A defendant has a duty to prevent the spread of things that may cause nuisance (*Bradburn v Lindsay* (1983)).
- But only to do what is reasonable in relation to reasonably foreseeable hazards (***Holbeck Hall Hotel Ltd v Scarborough BC (2000)***).

Indirect interference with land

1 Nuisance has included:

- fumes drifting over land (*Bliss v Hall* (1838));
- the loud noise of guns used to frighten breeding silver foxes (*Hollywood Silver Fox Farm v Emmet* (1936));
- vibrations from machinery (*Sturges v Bridgman* (1879));
- hot air rising to an upstairs flat (*Robinson v Kilvert* (1889));
- pollution of rivers (*Pride of Derby Angling Association v British Celanese* (1953)).

The use and enjoyment of land

1 Judges have limited the extent of 'enjoyment' in nuisance.

2 So there is no right to protect pure pleasure or aesthetics (*Bridlington Relay v Yorkshire Electricity Board* (1965)) and, in the USA, *Amphitheatres Inc. v Portland Meadows* (1948).

3 Confirmed in *Hunter and another v Canary Wharf Ltd* (1997).

4 A functional use supporting pure entertainment or leisure can create liability (*Crown River Cruises Ltd v Kimbolton Fireworks Ltd* (1996)).

5 So lowering the tone of the neighbourhood is not usually actionable, but see *Laws v Florinplace* (1981).

6 If personal injury is involved the claimant must have a proprietary interest (*Malone v Laskey* (1907)), and see also *Hunter v Canary Wharf* (1997).

5.1.4 Who can be sued in nuisance

1 The creator of the nuisance, who does not have to be the occupier (*Southport Corporation v Esso Petroleum* (1953)).

2 A person authorising the nuisance. Compare ***Tetley v Chitty (1986)*** with *Smith v Scott* (1973).

3 A person who adopts the nuisance:

- either of a stranger or trespasser (*Sedleigh Denfield v O'Callaghan* (1940));
- or of a previous occupier (*Anthony and others v The Coal Authority* (2005));
- or of a natural occurrence (***Leakey v National Trust (1980)***).

4 Landlords can be liable to tenants:

a) for a negligent failure to repair under the usual covenants; or

b) under the Defective Premises Act 1972; or

c) from want of repair under the rule in *Wringe v Cohen* (1940).

5.1.5 Defences

1 Statutory authority:

- this is the most effective modern defence, since so many activities are licensed (*Hammersmith Railway v Brand* (1869) and ***Allen v Gulf Oil Refining Ltd (1980)***);
- not available if a discretion is improperly exercised (*Metropolitan Asylum District Hospital v Hill* (1881));
- where statute provides another remedy a nuisance action is not available (***Marcic v Thames Water Utilities Limited (2003)***);
- not available for negligence (*Home Office v Dorset Yacht Co* (1970));
- unlike Parliament, planning authorities cannot authorise a nuisance except where they have statutory authority to do so. Compare ***Wheeler v Saunders (1995)*** and *Gillingham BC v Medway (Chatham) Dock Ltd* (1993) and see also *Watson v Croft Promosport* (2009) – the issue is whether the character of the land has changed (*Coventry v Lawrence* (2012)).

2 Prescription: this is a defence unique to nuisance – 20 years without complaint and the right to complain lapses (***Sturges v Bridgman (1879)***).

3 Act of a stranger or trespasser, but not if adopted (***Sedleigh Denfield v O'Callaghan (1940)***).

4 Consent: e.g. tall building (*Kiddle v City Business Properties Ltd* (1942)).

5 The common enemy rule: each landowner can protect against a common enemy e.g. flooding (*Arscott v Coal Authority* (2004)).

6 Public policy:

- both sides should be considered (***Miller v Jackson* (1977)**);
- usefulness is insufficient excuse (*Adams v Ursell* (1913)).

7 Coming fresh to the nuisance is no defence (*Bliss v Hall* (1838)).

5.1.6 Remedies

1 Damages.

a) Test of remoteness is the same as in *The Wagon Mound (No. 2)* (1961) – foreseeability.

b) Claimant can recover for physical loss, depreciation in value, and business loss.

2 Injunction:

a) an order to prevent the nuisance from continuing (***Kennaway v Thompson* (1981)**);

b) it can be coupled with damages.

3 Abatement of the nuisance:

a) can involve entering the defendant's property;

b) but can lead to a counter injunction (*Stanton v Jones* (1995));

c) and is not always possible (*Burton v Winters* (1993)).

5.1.7 Relationship with other torts

1 Relationship with trespass to land:

a) the difference is between direct and indirect interference.

b) repeated trespasses can be nuisances (*Bernstein v Skyways* (1940)).

2 Relationship with *Rylands v Fletcher* (1868):

a) one involves non-natural use of land, the other involves unreasonable use (but the distinction is now blurred – see *Arscott*);

b) before *Cambridge Water v Eastern Counties Leather* (1994) there was no requirement for damage to be foreseeable in *R v F*;

c) nuisance can be committed by a non-occupier, unlike *R v F*;

d) *R v F*, at least in theory, involves strict liability;

e) *R v F* covers isolated escapes, nuisance is a continuous state of affairs.

3 Relationship with negligence:

a) negligence requires the existence of a legal duty;

b) no claim in negligence for interfering with enjoyment;

c) nuisance is about creating a balance, but the merest damage in negligence can justify a claim.

5.2 Public nuisance

5.2.1 Definition

1 Unlike private nuisance it extends beyond immediate neighbours.

2 It has been defined as 'something which affects a reasonable class of Her Majesty's citizens materially or in the reasonable comfort and convenience of life'.

5.2.2 Ingredients of the tort

1 A substantial class of people must be involved before an action is possible (***Attorney General v PYA Quarries* (1957)**).

2 A claimant must have suffered a special loss over and above other subjects (*Tate & Lyle Industries v GLC* (1983)).

3 Public nuisances can also be crimes by statute.

4 Public nuisance often involves the highway:

a) obstructions to the highway, e.g. pickets (*Thomas v NUM* (1985));

b) projections on the highway, e.g. overhanging tree branches providing special damage is caused (*Noble v Harrison* (1926));

c) condition of the highway; council may have a duty to maintain it (*Griffiths v Liverpool Corporation* (1967)) subject to limitations, e.g. no general common law duty to salt roads (*Sandhar v Department of Transport* (2004)).

5 Special damage must occur which can be:

a) personal injuries (***Castle v St Augustine Links* (1922)** and *Corby Group Litigation v Corby BC* (2008) – so it is clearly different from private nuisance in this respect);

b) damage to goods (*Halsey v Esso Petroleum* (1961));

c) financial loss (*Rose v Miles* (1815));

d) loss of trade connection.

5.3 Statutory nuisance

1 Parliament has declared certain activities nuisance by statute.

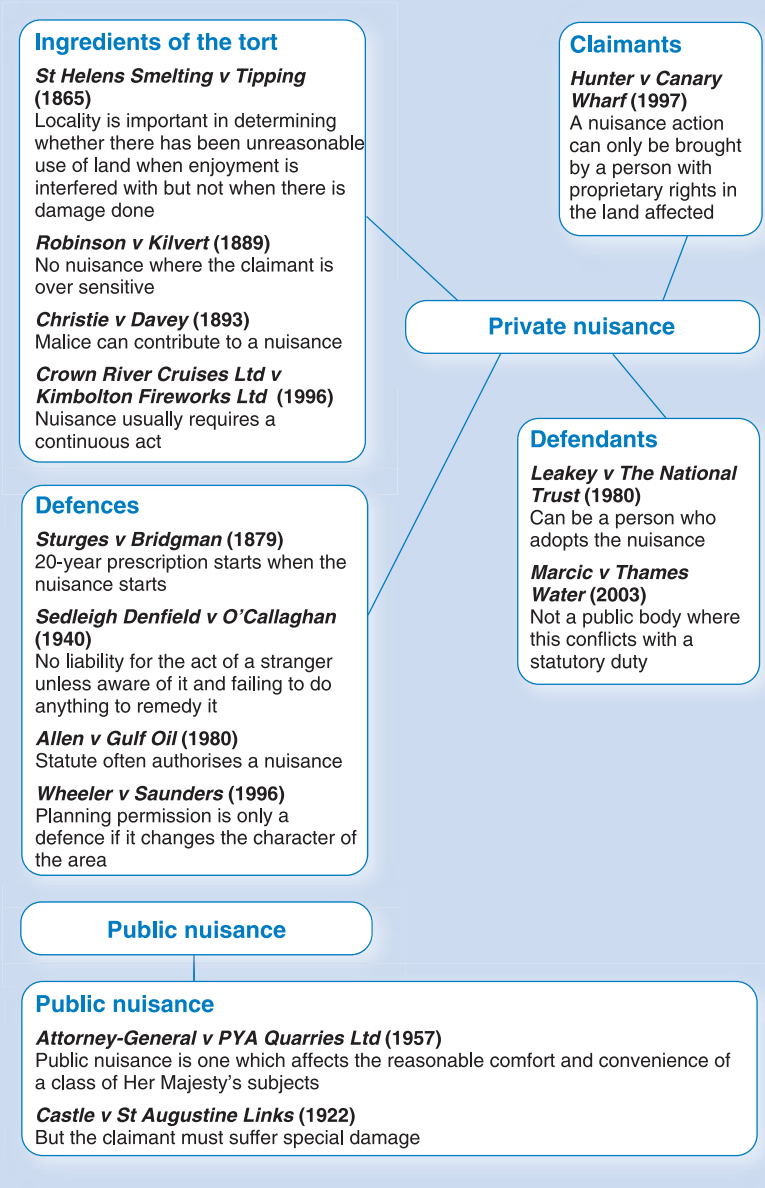
2 They are usually part of public health reform and so prejudicial to health more than prejudicial to land, e.g. Clean Air Act 1956.

3 They provide a means of stopping the nuisance and save the victim the cost and inconvenience of civil action.

4 They are quasi-criminal and enforced by local authorities through the use of abatement notices.

5 Offenders failing to comply are then tried in the Magistrates' Court.

Key Cases Checklist



5.1.2.1 *Hunter and another v Canary Wharf* [1997] 2 All ER 426

HL

Key Facts

Families of tenants made unsuccessful claims in private nuisance for dust and interference with television reception caused by the erection of a very large building near to their homes.

Key Law

The court held that there was an interference with recreational facilities only, not with the health or physical well-being of the claimants. The House also held that the claimants could not in any case bring an action as they had no proprietary interest in the land.

Key Judgment

Lord Goff explained:

'an action in nuisance will only lie at the suit of a person who has a right to the land affected'.

5.1.3.4 *St Helens Smelting Co v Tipping* (1865) 11 HL Cas 642

HL

Key Facts

The claimant owned property near to the defendant's copper smelting works and claimed in nuisance for damage to hedges and trees caused by the toxic smuts and interference with his quiet enjoyment of his land. He succeeded.

Key Law

The court held that the nuisance was actionable because, even though it involved an industrial area, damage had been caused.

Key Judgment

Lord Westbury LC stated:

'With regard to . . . personal inconvenience and interference with one's enjoyment . . . whether that may . . . be . . . a

nuisance, must undoubtedly depend . . . on . . . the place where the thing complained of actually occurs . . . when an occupation is carried on . . . and the result . . . is a material injury to property, then there unquestionably arises a very different consideration'.

5.1.3.4 *Laws v Florinplace Ltd* [1981] 1 All ER 659 QBD

Key Facts

Ten residents in a suburban area, enjoying what was described as an 'attractive village atmosphere', successfully sought an injunction against a sex shop and video club that had opened in their area.

Key Law

The court held that even if the defendant changed the name of the business and its name and its displays, it was still arguable that the repugnance caused to the residents by their awareness of the business could be an interference amounting to a nuisance.

5.1.3.4 *Robinson v Kilvert* (1889) 41 ChD 88 CA

Key Facts

The claimant stored paper in premises where the defendant manufactured cardboard boxes in the basement. The heat necessary for the manufacture damaged the brown paper and the claimant unsuccessfully sought damages in nuisance.

Key Law

The court held that the heating was not a nuisance since it was not of a sort that would cause damage in the case of the ordinary uses of the premises. Damage was only caused because the brown paper was very susceptible to variations in temperature.

5.1.3.4 *Christie v Davey* [1893] 1 Ch 316

Ch Div

Key Facts

The claimant gave music lessons and the defendant, his next-door neighbour, became annoyed by the constant noise from the music lessons next door. The defendant reacted by banging on the walls, beating trays and shouting.

Key Law

The court held that the noises were made maliciously and deliberately to annoy the claimant. They were an unreasonable use of land and the claimant was granted an injunction.

Key Link

Hollywood Silver Fox Farm Ltd v Emmet [1936] 2 KB 468.

5.1.3.4 *Halsey v Esso Petroleum Co Ltd* [1961] 2 All ER 145

QBD

Key Facts

The claimant won a claim for nuisance from the noise from the defendant's depot, the nauseating smell and also in relation to the damage which acid smuts caused to her washing and to her car.

Key Law

The court held that they were all private nuisance except for the damage to the car, which was a public nuisance. The defendant's use of land was unreasonable.

Key Judgment

Veale J stated:

'the law must strike a fair and reasonable balance between the rights of the plaintiff on the one hand to the undisturbed enjoyment of his property, and the right of the defendant on the other hand to use his own property for his own lawful enjoyment'.

5.1.3.4

Crown River Cruises Ltd v Kimbolton Fireworks Ltd [1996] 2 Lloyd's Rep 533

QBD

Key Facts

A barge was set alight by flammable debris resulting from a firework display which lasted only 20 minutes. The owners claimed successfully in negligence and it was also accepted that the action in private nuisance was also possible.

Key Law

The court held that an action for nuisance was possible because the barge owners had a licence to occupy the site.

Key Problem

The very limited duration of the display seems to run contrary to the principle of continuity required for nuisance, e.g. *Bolton v Stone* (1951).

5.1.3.4

Holbeck Hall Hotel Ltd v Scarborough BC [2000] 2 All ER 705

CA

Key Facts

The claimant's hotel stood near to a cliff by the sea. The defendant, the local council, owned the land between the hotel and the cliff top. After a long period of steady erosion a major landslip undermined the foundations of the hotel so that it had to be demolished. On appeal, the council was held not to be liable in nuisance.

Key Law

The Court of Appeal held that, since the council was unaware of the danger of the landslip, which could not merely be presumed from the previous erosion, it neither adopted nor created the nuisance.

Key Judgment

Stuart-Smith LJ explained that:

'It is the existence of the defect coupled with the danger that constitutes the nuisance; it is knowledge . . . of the nuisance that involves liability for continuing it when it could have been abated'.

5.1.4.3 *Leakey v The National Trust* [1980] QB 485 CA

Key Facts

Following heavy rain, a large natural mound of land on a hill-side, known as the Burrow Mump, slipped and damaged the claimant's cottage. The defendant was held liable in nuisance.

Key Law

The court found the defendant liable because it was aware of the possibility of the landslide happening and did nothing to prevent it.

Key Comment

The case shows what a close link there is between nuisance and negligence. The type of duty depends on the facts of the case.

5.1.4.2 *Tetley and others v Chitty and others* [1986] 1 All ER 663 QBD

Key Facts

The defendant council rented land to another party on which to run go-kart racing. Local residents succeeded in gaining an injunction.

Key Law

The court held the council liable because it was already aware of the excessive noise that the activity would cause and had accepted responsibility for the nuisance by granting the lease.

5.1.5.1 *Marcic v Thames Water plc* [2003] UKHL 66; [2003] 3 WLR 1603

HL

Key Facts

Because of the substantial rise in the number of houses in an area the sewers, which had not been modified, became inadequate to cope with the amount of sewage, even though the defendant maintained them properly. The sewers flooded periodically and the claimant, rather than using statutory enforcement measures, installed a flood defence and claimed for damages in nuisance and for interference in family life in breach of Art 8 of the European Convention on Human Rights. Both claims failed.

Key Law

The House held that there was no actionable nuisance since the common law would be unable to impose obligations on a water authority which were inconsistent with a statutory scheme and in this instance the right of complaint was to the Director-General of Water Services. There was no breach of Human Rights legislation since Art 8 of the European Convention does not guarantee absolute protection of residential properties but must balance out the rights of individuals and the rights of the public generally.

5.1.5.2 *Sturges v Bridgman* (1879) 11 ChD 852

CA

Key Facts

Eight years after he moved in, a doctor built a consulting room at the bottom of his garden. Vibrations from the defendant's machinery in the neighbouring property disturbed the claimant and prevented him from listening to his patients' chests etc. His claim succeeded.

Key Law

The court held that the defence could not apply because the twenty-year period for prescription would only begin when the nuisance commenced, here when the consulting room was built.

5.1.5.6 *Miller v Jackson* [1977] QB 966

CA

Key Facts

A new housing estate was built by a cricket club that had been used for 70 years. Balls constantly came into the claimant's garden during matches and he succeeded in claims in both nuisance and negligence, but was denied the injunction that he sought.

Key Law

The court held that while there was a plain interference with the claimant's enjoyment of his land it recognised that the remedy could not be granted because it would interfere with a public utility of importance to the community.

Key Judgment

Lord Denning dissented on the decision because, as he said, playing cricket 'is a most reasonable use of land'. On refusing to grant the injunction, he said *'I recognise that the cricket club are under a duty to use all reasonable care . . . but I do not think the cricket club can be expected to give up the game of cricket altogether'.*

5.1.5.3 *Sedleigh Denfield v O'Callaghan* [1940] AC 880

HL

Key Facts

A workman had placed grating for trapping leaves too close to a culvert pipe on the defendant's land. The defendant knew about it.

After a severe storm the pipe became blocked, and his neighbour's land was flooded. His neighbour succeeded in his nuisance claim.

Key Law

On appeal, the court held that the defendant was liable because he was aware of the nuisance but failed to do anything to remedy it and so had adopted the nuisance. The defence of act of a stranger was not applicable in the circumstances.

Key Judgment

Lord Wright said:

'The responsibility which attaches to the occupier because he has possession and control of the property cannot logically be limited to the mere creation of the nuisance. It should extend to . . . if, with knowledge, he leaves the nuisance on his land'.

5.1.5.1 *Allen v Gulf Oil Refining Ltd* [1980] QB 156 HL

Key Facts

The claimants sued for nuisance caused by a refinery. An Act authorised the defendants to purchase land for the construction of a refinery but made no mention of its use. The claim failed.

Key Law

The court held that the statutory authorisation for construction of a refinery necessarily implied its use as a refinery. The defence of statutory authority succeeded.

5.1.5.1 *Wheeler v J J Saunders Ltd* [1996] Ch 19 CA

Key Facts

The defendant, a pig farmer, was granted planning permission to expand by building two more pig houses each containing 400 pigs. One pig house was only 11 metres from the cottage of a neighbour, who then successfully claimed in nuisance.

Key Law

The defendant's appeal on the defence of planning permission failed because the defence was said to operate only in respect of those nuisances that Parliament had authorised.

Key Judgment

Peter Gibson LJ explained that planning permission can only be a defence where as the result of the permitted

activity *'there will be a change in the character of the neighbourhood'.*

Key Link

Gillingham Borough Council v Medway (Chatham) Dock Co [1993] QB 343.

See also *Watson v Croft Promosport* [2009] EWCA 15, where planning permission to convert a disused aerodrome into a motor racing circuit did change the character of the area and so was reasonable, but the Court of Appeal limited the use of the race track to 40 days annually.

5.1.6.2 *Kennaway v Thompson* [1981] 3 WLR 311 CA

Key Facts

The claimant built a house near to a lake where speedboat racing had taken place for many years. He succeeded in his claim for nuisance created by the excessive noise.

Key Law

At first instance the claimant was awarded £1,600 in damages. On appeal he was granted an injunction restraining the use of the lake for speedboat races to certain days with certain noise limits.

5.2.2.1 *Attorney-General v PYA Quarries Ltd* [1957] 2 QB 169 CA

Key Facts

Houses neighbouring a quarry suffered from dust and vibrations.

The Attorney-General successfully sought injunctions on behalf of the County Council and the District Council.

Key Law

The court rejected the defendant's argument that the nuisance was not sufficiently widespread to amount to a public nuisance.

Key Judgment

Romer LJ stated:

'any nuisance is "public" which materially affects the reasonable comfort and convenience of life of a class of Her Majesty's subjects'.

5.2.2.5 *Castle v St Augustine Links* (1922) 38 TLR 615

QBD

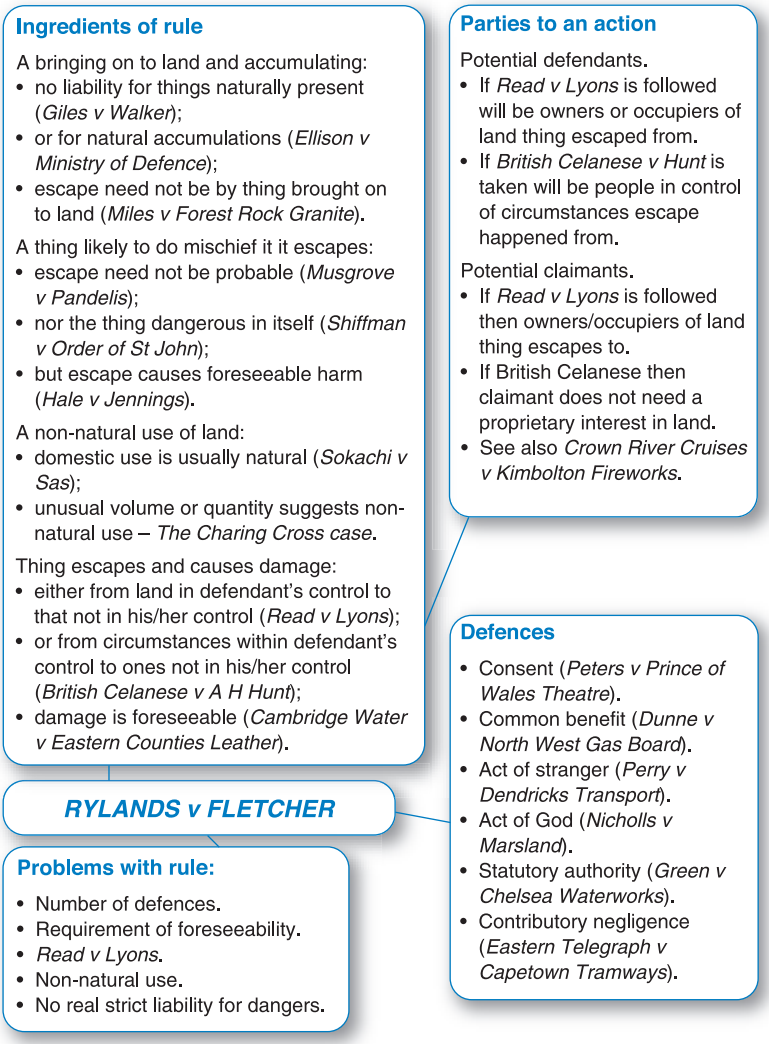
Key Facts

A taxi driver was hit in the eye by a sliced golf ball. The golf links straddled the highway so the risk of harm was great and it was shown that golf balls regularly came off the course and onto the road. The claim in public nuisance succeeded.

Key Law

The court accepted that the regularity of the occurrence was a significant interference with the public's use of the highway and the claimant had suffered special damage so the nuisance was proved.

6 Strict liability



6.1 The rule in *Rylands v Fletcher*

6.1.1 The definition, purpose, and character of the rule

1 First defined by Blackburn J in Court of Exchequer Chamber in the case: 'the person who, for purposes of his own, brings on his land, and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and, if he does not do so, he is *prima facie* answerable for all the damage which is the natural consequence of its escape.'

2 Lord Cairns in HL added requirement of non-natural use of land.

3 The tort is said to be one of strict liability, but it is possible to argue it as a type of nuisance used to cover isolated escapes.

- There are many defences available, so it is strict liability only in the sense that the claimant need not prove fault.
- If the use of land is natural an action will fail.
- It was previously distinguished from nuisance which required foreseeability, where ***Rylands v Fletcher*** did not.
- Now *Cambridge Water Co v Eastern Counties Leather plc* (1994) suggests that foreseeability is required. This is confirmed in *Transco plc v Stockport Metropolitan Borough Council* (2003).
- Judges have limited strict liability by restricting the use of the rule – to escapes from land only (*Read v Lyons* (1947)) and to 'special use of land bringing with it increased danger to others' (***Rickards v Lothian* (1913)**), and see also *Cambridge Water* and *Crown River Cruises v Kimbolton* (1996).
- Claimants have recovered even though not occupiers of land, so it is not a straightforward extension of nuisance.

6.1.2 The ingredients of the rule

1 There are four key ingredients to the tort:

a) a bringing on to land;

b) of a thing which is likely to do mischief if it escapes;

c) which amounts to a non-natural use of land;

d) the thing actually escapes, causing damage.

A bringing on to land

1 If thing is naturally present on land there can be no liability (***Giles v Walker* (1890)** and *Pontardawe RDC v Moore-Gwyn* (1929)).

2 There is no liability where the thing naturally accumulates (*Ellison v Ministry of Defence* (1997)).

3 But nuisance may be possible (*Leakey v National Trust* (1980)).

4 The person bringing the thing on to the land need not be the owner or occupier of the land (*Charing Cross Electricity Supply Co v Hydraulic Power Co* (1914) (*The Charing Cross Case*)).

5 The defendant must have had a purpose for bringing the thing on to the land, but it need not have been for his/her benefit. Compare *Smeaton v Ilford Corporation* (1954) with *Dunne v North Western Gas Board* (1964).

6 The escape can be of something other than the thing brought on to the land (***Miles v Forest Rock Granite Co* (1917)**, where explosives used in blasting caused rock to escape).

A thing likely to do mischief if it escapes

1 Escape need not be probable (***Musgrove v Pandelis* (1919)**).

2 The thing need not be dangerous in itself (*Shiffman v Order of St John* (1936), where the thing was a flag pole).

3 It must be a source of foreseeable harm if it does escape (*Hale v Jennings Bros.* (1938), where a 'chairoplane' car flew off the ride in a fairground).

4 Even people have been held as dangerous (*AG v Corke* (1933)).

A non-natural use of land

1 This was added by Lord Cairns in HL: 'if the defendants, not stopping at the natural use of their close, had desired to use it for any purpose I may term a non-natural use . . . and in consequence . . . the water came to escape . . . it appears to me that which the defendants were doing they were doing at their own peril'.

2 It was developed and explained by Lord Moulton in *Rickards v Lothian* (1913): 'not every use of land brings into play this principle. It must be some special use bringing with it increased danger to others, and not merely by the ordinary use of land or such as is proper for the general benefit of the community'.

3 Non-natural use is a fluid concept inevitably changing with technological developments.

4 It is 'extraordinary' use rather than 'artificial' use.

5 Domestic use is usually natural, e.g. *Sokachi v Sas* (1947) – fire; *Collingwood v Home & Colonial Stores Ltd* (1936) – electricity; *Rickards v Lothian* (1913) – water pipes.

6 Sometimes also applies to commercial premises (*Peters v Prince of Wales Theatre (Birmingham) Ltd* (1943)).

7 Unusual volume or quantity indicates non-natural use (*The Charing Cross* case).

8 Technical developments may be non-natural while at an innovative stage (*Musgrove v Pandelis* (1919)).

9 Context may also make them non-natural (***Mason v Levy Autoparts of England* (1967)**).

10 If a public benefit is gained from the activity it may make it a natural use (***British Celanese v A H Hunt* (1969)**).

11 Things connected with war may be a natural use even in peace time (*Ellison v Ministry of Defence* (1997)).

12 Some activities will be seen as a non-natural use despite being of public benefit, e.g. use of chemicals (*Cambridge Water* (1994)).

The thing must actually escape and cause damage

1 Blackburn's original rule was not rigidly restricted to neighbouring landowners (he probably intended a general liability for dangerous activities).

2 The rule was limited by Lord MacMillan in ***Read v Lyons* (1947)**: 'the rule derives from a conception of mutual duties of adjoining landowners'.

3 It was also limited by Lord Simons in *Read v Lyons* by defining escape as 'from a place where the defendant has occupation or control over land to a place which is outside of his occupation or control'.

4 However, escape is also defined as 'from a set of circumstances over which the defendant has control to a set where he does not' by Lawton J in ***British Celanese v A H Hunt* (1969)**.

6.1.3 The parties to an action

1 A defendant in an action will be either:

- according to Lord Simon in *Read v Lyons* an owner or an occupier who satisfies the four requirements; or according to Lawton J in *British Celanese* a person where the escape is from a set of circumstances under his control to one which is not. And see ***Hale v Jennings Bros* (1948)**.

2 Possible claimants also vary according to the judge:

- Blackburn J suggested there is no need for the claimant to have a proprietary interest.
- Lord MacMillan in *Read v Lyons* said there is.
- Lawton J in *British Celanese* was not prepared to limit the rule that much, so that a claimant could even be a party who has suffered personal injury.
- Recently a claim has succeeded where the escape was from the defendant's control of the highway on to the claimant's land (*Rigby v Chief Constable of Northamptonshire* (1985)).
- Another successful claim is an escape from accumulations in a vessel escaping on to other vessels (*Crown River Cruises Ltd v Kimbolton Fireworks Ltd* (1996)).

6.1.4 Recoverable loss and remoteness of damage

1 According to Lord MacMillan, recovery is only possible for damage to land occupied by the claimant or his chattels on that land.

2 Lawton J suggests claims for personal injury are also possible (*Hale v Jennings* (1938)).

3 A successful action for economic loss is less likely (*Weller v Foot and Mouth Disease Research Unit* (1966)).

4 The tort is not actionable *per se*, so damage must be proved.

5 So there is no liability for mere interference with enjoyment of land as there is in nuisance (*Eastern & SA Telegraph Co v Cape Town Tramways Co* (1902)).

6 By ***Cambridge Water v Eastern Counties Leather plc (1994)*** the defendant must know or ought reasonably to foresee that damage of the relevant kind might be a consequence of the escape (this is remoteness as in negligence and seems inconsistent with strict liability). And the point is affirmed in ***Transco plc v Stockport MBC (2003)***.

6.1.5 Possible defences

1 **Consent:** e.g. occupiers of tall buildings (***Peters v Prince of Wales Theatre (1943)***).

2 **Common benefit:** no liability if source of danger is kept for both defendant and claimant (*Dunne v North West Gas Board* (1964)).

3 **Act of a stranger:** if stranger over whom defendant exercises no control causes the escape then no liability (***Perry v Kendricks Transport Ltd (1956)***), but see *Mehta v Union of India* (1987).

4 **Act of God:** will only succeed for conditions of nature 'which no human foresight can provide against', e.g. extreme weather conditions (*Nichols v Marsland* (1876)).

5 **Statutory authority:** if the escape is a direct result of carrying out the duty (***Green v Chelsea Waterworks Co (1894)***).

6 **Contributory negligence:** damages reduced if claimant is partly at fault for the escape (*Eastern & SA Telegraph Co v Cape Town Tramways* (1902)).

6.1.6 Problems with the rule

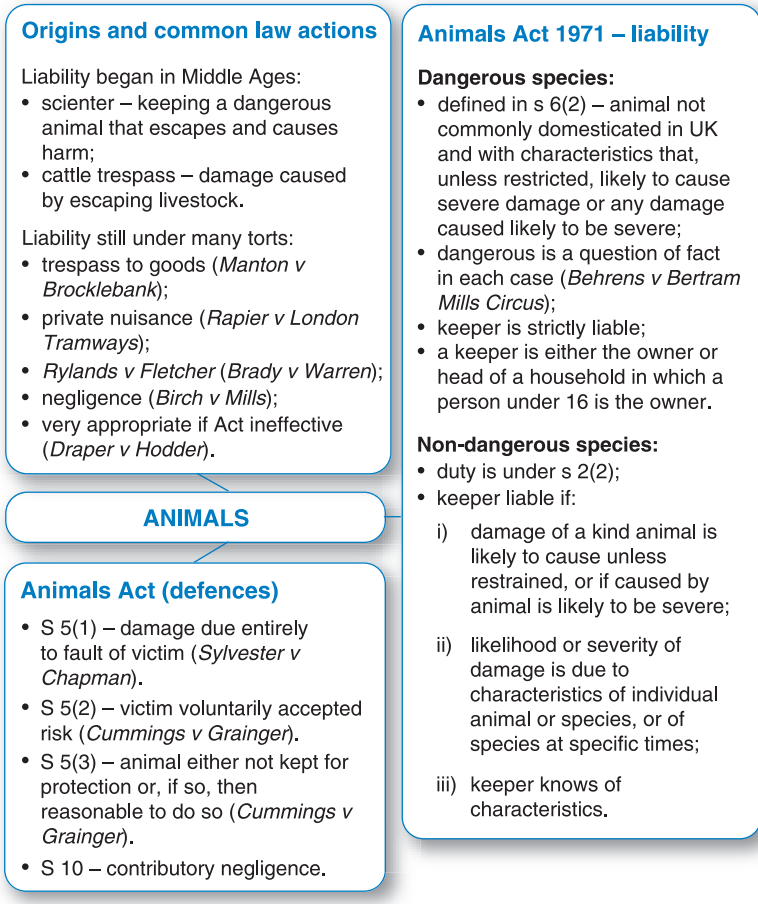
1 Often seen merely as an extension of nuisance, so there is no general strict liability for hazardous activities.

2 The principle has been constantly limited in scope:

- requirement of non-natural use;
- *Read v Lyons* reasoning on escape;
- the breadth of defences available;
- the requirement of foreseeability in *Cambridge Water*;
- reluctance to expand the principle in *Crown River Cruises*.

3 Has doubtful modern relevance:

- most instances could be covered by negligence;
- rarely used now, and rarely successfully;
- since *Cambridge Water* the Australian High Court has abolished the rule saying it was effectively swallowed up by negligence (*Burnie Port Authority v General Jones Pty Land* (1994));
- many areas concerning hazards are now covered by statute (*Blue Circle Industries plc v Ministry of Defence* (1998)).



6.2 Liability for animals

6.2.1 Introduction

1 The origins of liability are in medieval law:

a) animals were a major source of wealth so attitudes differed;

b) animals had a separate system because they are mobile (a 'will of their own').

2 There were two basic actions in the common law:

a) scienter (knowingly keeping a dangerous animal that escaped and caused harm);

b) cattle trespass (damage caused by escaping livestock).

3 The Animals Act 1971 replaced these, retaining the essentials.

4 Other torts can be used where the Act does not apply.

5 The Pearson Committee found that animals are responsible for 50,000 injuries annually, but few actions are brought.

6.2.2 Common law torts

1 If the requirements of any tort are met an action is possible e.g.:

- trespass to goods (*Manton v Brocklebank* (1923));
- trespass to land (*League Against Cruel Sports v Scott* (1985));
- private nuisance (*Rapier v London Tramways* (1893));
- *Rylands v Fletcher* (*Brady v Warren* (1900));
- defamation, e.g. a parrot taught to repeat insulting untruths;
- assault and battery, e.g. a dog trained to attack;
- with more widespread application, negligence for a failure to control an animal where some risk of harm is foreseeable (*Gomberg v Smith* (1962) and *Birch v Mills* (1995));
- negligence is useful in respect of non-dangerous species where the Act may prove ineffective (***Draper v Hodder* (1972)**);
- so a duty to take reasonable precautions against foreseeable risks exists (*Smith v Prendergast* (1984)), but there is no liability where there is only a remote possibility of an injury (*Whippey v Jones* (2009)).

2 Liability can exist simultaneously in more than one tort (*Pitcher v Martin* (1937)).

6.2.3 The Animals Act 1971

Dangerous species (*ferae naturae*)

1 By s 6(2) a dangerous species is one:

i) which is not commonly domesticated in the UK;

ii) where fully grown animals usually have such characteristics that they are likely, unless restricted, to cause severe damage, or any damage they cause is likely to be severe.

2 Under s 2(1) the 'keeper' of a dangerous species is liable.

3 Dangerous is a question of law not fact (*Behrens v Bertram Mills Circus* (1957)).

- So it could include species domesticated in other countries.
- Few native species correspond to the category.
- Dangerous even if unlikely to do harm if possible harm would be severe (***Tutin v Chipperfield Promotions* (1980)**).
- So liability is strict.

4 Keeper is defined in s 6(3) as:

i) an owner or possessor; or

ii) the head of a household of which a member under 16 possesses the animal.

NB. It is possible to have more than one keeper.

5 Dangerous Wild Animals Act 1976 requires licensing of animals, and third party insurance.

Non-dangerous species (*mansuetae naturae*)

1 There is a rather complex duty under s 2(2). Keeper is liable if:

a) the damage is of a kind which the animal is likely to cause unless restrained, or which if caused by the animal is likely to be severe;

b) the likelihood or severity of damage was due to unusual characteristics of the individual animal, or common in species only at particular times;

c) those characteristics were known to the keeper, or a person having charge of the animal who is a member of the household and is under 16.

2 The subsection requires proper interpretation, which is to consider each part in turn (***Curtis v Betts* (1990)**).

- So, by s 2(2)(a) damage need not be caused in the way which is likely (*Smith v Ainger* (1990)).
- s 2(2)(a) might include infectious animals.
- s 2(2)(b) distinguishes between permanent and temporary characteristics, and between species and breed (*Smith v Ainger* and ***Cummings v Grainger* (1977)**).
- Being trained to be aggressive need not be a characteristic involving liability (*Gloster v Chief Constable of Greater Manchester*

Police (2000)) and a horse bucking is a normal characteristic of a horse at any time (*Freeman v Higher Park Farm* (2009)).

- 'Likelihood of damage' refers to the individual animal.
- 'Likely to be severe' refers to the possible injury (*Cummings v Grainger* and *Curtis v Betts*).
- 'Knowledge' in s 2(2)(c) means actual knowledge.
- Implied knowledge may be negligence (*Draper v Hodder*).
- There must be a causal link between the characteristics of the animal and the damage it inflicts (*Jaundrill v Gillett* (1996)).
- The House of Lords has suggested that the keeper may be liable where behaviour of animal is reasonably foreseeable even though the keeper is not at fault (***Mirvahedy (FC) v Henley and another* (2003)**).

Defences

1 By s 5(1) a keeper is not liable for damage 'due wholly to the fault of the person suffering it' (*Sylvester v Chapman* (1935)) and accepting a risk knowingly can mean damage is wholly the fault of the claimant so s 5(1) and s 5(2) can be applied simultaneously (***Dhesi v Chief Constable of West Midlands Police* (2000)**).

2 By s 5(2) there is no liability 'for a person who has voluntarily accepted the risk' (*Cummings v Grainger* (1977), where a woman entered a scrap yard already afraid of the Alsatian dog guarding it).

3 By s 5(3) the keeper is not liable to a trespasser if the animal was not kept for protection of property, or if it was it was reasonable to do so (*Cummings v Grainger*), but see now also the Guard Dogs Act 1995.

4 By s 10 can apportion damages if contributory negligence shown.

Trespassing livestock

1 Section 11 defines livestock as 'cattle, horses, asses, mules, hinnies, sheep, pigs, goats, poultry and deer in the wild state'.

2 'Cattle trespass' is replaced by s 4, imposing liability if animals stray and:

- damage is done to land or property;
- or
- expenses incurred in keeping them until restored to the owner.

3 Possible defences are:

- s 5(1) if the damage is wholly due to the fault of the claimant;
- s 10 apportionment for contributory negligence;
- s 5(5) if driving livestock on to highway only liable if negligent;

- s 5(6) there is no general duty to fence the land, but if there is a customary duty then a failure to fence provides a defence (compare *Tillet v Ward* (1882) with *Matthews v Wicks* (1987));
- s 7 power to detain straying animal until damage is paid for. Must notify police within 48 hours; can sell after 14 days.

Liability for injury to livestock by dogs

1 By s 3 a keeper is liable if a dog kills or injures livestock.

2 No need to show abnormal characteristics, so greater protection than for people.

3 Straying of livestock on to land where a dog is entitled to be may be a defence under s 5(4).

4 Defences under s 5(1) and s 10 are also available.

5 By s 9 it is legal to kill a dog if it is to protect livestock.

- The dog must be worrying and there is no other way of dealing with it, or it has not left the vicinity.
- Must be entitled to protect livestock and must notify the police within 48 hours.

Animals straying onto the highway

1 Prior to the Act there was no liability.

2 Section 8(1) abolished immunity and introduced liability in negligence.

3 By s 8(2) no liability for putting animals on unfenced land if:

i) the land is common, or a customary right not to fence, or town or village green;

ii) there is a right to put the animal there.

4 Duty is only to do what is reasonable, not, for example, to fence a moor.

5 Registration of Commons Act 1971 requires registration of rights to graze on common.

Remoteness of damage

1 Not dealt with by the Act, so common law applies.

2 Liability for animals is like *Rylands v Fletcher* – this was excluded from the *Wagon Mound* foreseeability test, so probably the direct consequence test applies instead.

3 Section 2(1) in any case refers to liability being for 'any damage'.

4 By s 2(2) for non-dangerous species damages are limited to those resulting from unusual characteristics known to the keeper.

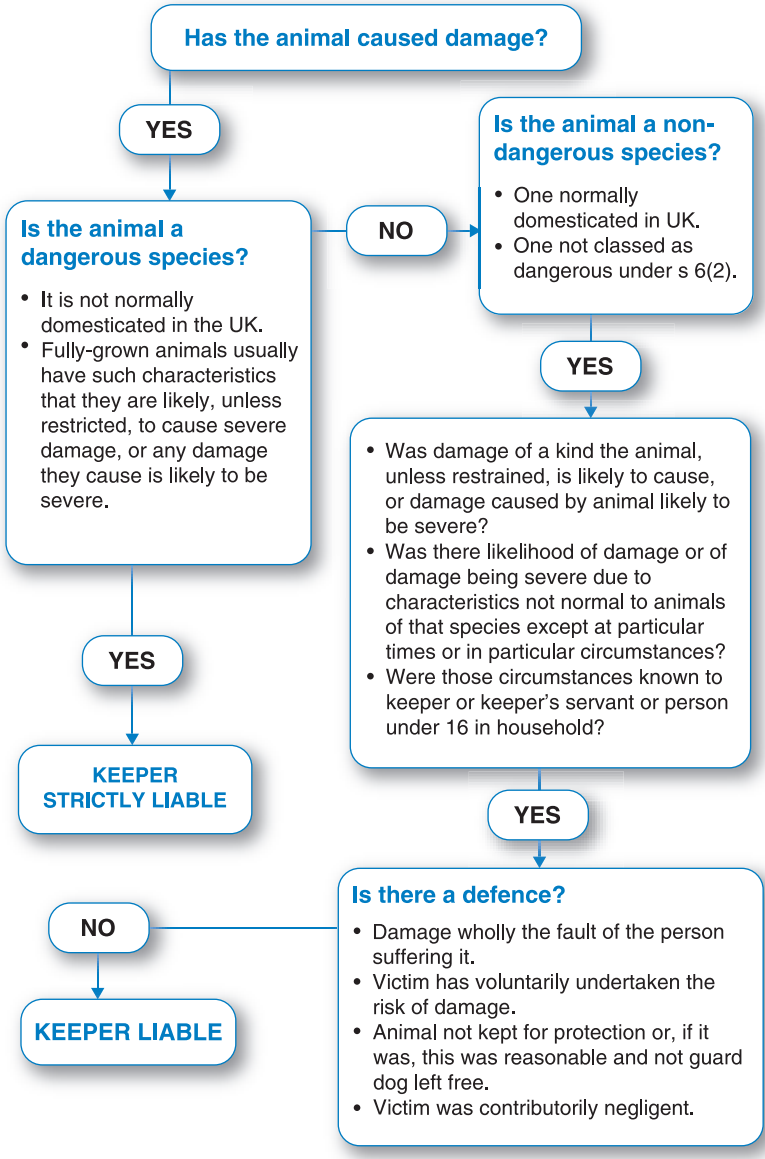


Diagram illustrating liability for dangerous and non-dangerous species under the Animals Act 1971

Key Cases Checklist

***Rylands v Fletcher* (1868)**

***Giles v Walker* (1890)**
No liability for things naturally present on the land

***Rickards v Lothian* (1913)**
A domestic water supply is not a non-natural use of land

***Mason v Levy Auto Parts* (1967)**
But potentially dangerous things stored in extremely large quantities are

***Read v Lyons* (1947)**
The thing must escape from land over which the defendant has control to land over which he has no control

***Hale v Jennings* (1948)**
It is arguable whether the tort extends to personal injuries

***Cambridge Water v Eastern Counties Leather* (1994)**
There must be foreseeable damage as the result of the escape

***Perry v Kendricks Transport* (1956)**
Act of a stranger is a common defence

***Green v Chelsea Waterworks* (1894)**
As is statutory authority

6.1.1.3

Rylands v Fletcher (1868) LR 1 Exch 265; LR 3 HL 330

CE and HL

Key Facts

The defendant, a mill owner, hired contractors to create a reservoir on his land to supply water to the mill. The contractors carelessly failed to block off disused mineshafts which, unknown to the contractors, were connected to other mine works on adjoining land. When the reservoir was filled it flooded these neighbouring mines, causing damage.

Key Law

While the facts did not fit easily into the law of nuisance as the case did not involve continuity, it was held that there could be liability for the accumulation of things that were not naturally present on the land which escaped and caused damage. Lord Cairns in the House of Lords (now the Supreme Court) added the requirement that the accumulation must amount to a 'non-natural' use of land for there to be liability.

Key Judgment

Blackburn J in the Court of Exchequer explained the rule in the following way:

'We think that the true rule of law is, that the person who, for purposes of his own, brings on his land and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and, if he does not do so, he is prima facie answerable for all the damage which is the natural consequence of its escape.'

Key Comment

It is generally agreed that the judges were creating an entirely new legal principle. A possible reason is that judges then were from the landed elite and resented the new wealth of the industrialists so wished to create a strict liability rule to prevent industrial pollution.

6.1.2 *Giles v Walker* (1890) 24 QBD 656 QBD

Key Facts

A claim for damage resulting from the defendant allowing weeds growing on his land to accumulate and spread to his neighbour's land was unsuccessful.

Key Law

There was held to be no liability for things not naturally present on the land. The rule requires artificial accumulation.

6.1.2 *Miles v Forest Rock Granite Co (Leicestershire) Ltd* (1918) 34 TLR 500 CA CA

Key Facts

The claimant brought a successful claim for injury suffered when rocks flew onto the highway from the defendant's land where blasting was being carried out.

Key Law

Even though it was the explosives that had been brought onto land rather than the rock itself, which was naturally present, it was the blasting that had actually caused the rock to escape. It was held that in such circumstances it need not be the actual thing brought onto land that escapes.

6.1.2 *Musgrove v Pandelis* [1919] 2 KB 43 KB

Key Facts

A car was kept in a garage with a full tank of petrol. When the petrol caught fire and the fire spread to the next door neighbour's house, although the fire was unlikely it was accepted that it would certainly cause mischief if it escaped.

Key Law

Because of the small number of cars in existence at the time, the practice was held to be a non-natural use of land.

Key Problem

This demonstrates the unpredictability of the rule since the same practice would not be considered non-natural use of land today, with the modern extent of car ownership.

6.1.1.3 *Rickards v Lothian* [1913] AC 263 PC

Key Facts

An unknown person turned on water taps and blocked plugholes on the defendant's premises so that damage was caused in the flat below. The defendant was held not liable.

Key Law

There was held to be no liability not just because the defendant could successfully use the defence of act of a

stranger but more importantly because a domestic water supply was not a non-natural use of land.

Key Judgment

As Lord Moulton explained:

'It is not every use . . . that brings into play the principle . . . It must be some special use bringing with it increased danger to others and must not be the ordinary use of the land or such a use as is proper for the benefit of the community'.

6.1.2 *Mason v Levy Auto Parts of England* [1967] 2 QB 530

QBD

Key Facts

The defendant stored large quantities of scrap tyres on his land. These were then ignited and the fire spread to the claimant's premises, causing great damage, and the claim under the rule was successful.

Key Law

The judge identified that storage of such large quantities of combustible material, the casual way in which they were stored and the character of the neighbourhood were all factors in determining that there was a non-natural use of the land.

Key Comment

The case illustrates that it is the context in which the thing is accumulated as much as the thing itself that can determine that there is a non-natural use of land and possible liability.

6.1.2 *Read v Lyons* [1947] AC 156

HL

Key Facts

A factory inspector was inspecting a munitions factory and was injured, along with a number of employees, one man

dying, when some of the shells exploded. Her claim for damages failed.

Key Law

The House of Lords (now the Supreme Court) held that the rule did not apply because there was 'no escape at all of the relevant kind'.

Key Judgment

Viscount Simon explained that an escape in *Rylands v Fletcher* (1868) means *'an escape from a place where the defendant has occupation or control over land to a place which is outside his occupation or control'.*

6.1.2 *British Celanese v A H Hunt (Capacitors) Ltd* [1969] 1 WLR 959

QBD

Key Facts

The defendant stored strips of metal foil on its land, for use in manufacturing electrical components. Some strips of foil blew off the defendants' land and onto an electricity substation, causing power failures to the claimant's factory. A claim was brought under negligence, private nuisance, public nuisance and under *Rylands v Fletcher* (1868) and the claim under the latter was dismissed.

Key Law

The court held that the use of land was natural. This was partly because there were no unusual risks associated with the storage of the foil and partly because of the benefit derived by the public from the manufacture, so the rule could not apply.

Key Judgment

Lawton J identified also that escape means:

'from a set of circumstances over which the defendant had control to a set of circumstances where he does not'.

Key Problem

It has been suggested that this interpretation of 'non-natural' is very similar to the idea of unreasonable risk

in negligence, making the tort indistinguishable from negligence.

6.1.3.1 *Hale v Jennings Bros* [1948] 1 All ER 579 CA

Key Facts

A stallholder on a fairground was injured when a car from a 'chair-o-plane' ride became detached from the main assembly while it was in motion and crashed to the ground. The owner of the ride was liable even though both parties occupied the same ground.

Key Law

The court held that there was liability because risk of injury was foreseeable if the car came loose and because there was an escape from the defendant's control.

Key Problem

This clearly conflicts with the meaning of escape given in *Read v Lyons*, and extends the range of potential claimants.

Key Link

Hunter v Canary Wharf [1997] AC 655.

This is a major case in private nuisance that suggests that the rule may not extend to claims for personal injury.

6.1.4.6 *Cambridge Water Co v Eastern Counties Leather plc* [1994] 2 WLR 53 HL

Key Facts

The defendant owned a tannery and used a solvent to degrease the animal skins. Sometimes this solvent spilled onto the concrete floor and over a period of time it seeped into the ground and eventually filtered through into a bore-hole more than a mile away owned by the claimant Water Company and from which water for domestic consumption and use was extracted. The solvent contaminated the water and the claim for damages was unsuccessful.

Key Law

The House of Lords (now the Supreme Court) held that storage of chemicals could always be regarded as a non-natural use of land but that, since the contamination could not be foreseen by a reasonable person, there could be no liability.

Key Judgment

Adding the requirement of foreseeability to the essential elements of a claim under the tort Lord Goff identified that *'foreseeability of damage of the relevant type should be regarded as a prerequisite of liability . . . under the rule'.*

Key Problem

The addition of foresight of harm is a fault-based concept making the tort indistinguishable from negligence, casting doubt on whether the tort is in fact strict liability and making a successful claim almost impossible to bring.

6.1.4.6 *Transco plc v Stockport MBC* [2003] UKHL 61; [2003] 3 WLR 1467

HL

Key Facts

The defendant council built a block of multi-storey flats in which, without any negligence, the water pipes supplying the flats burst and water then escaped eventually causing an embankment to collapse, exposing the claimant's gas main and posing an immediate and serious risk. The claimant took immediate remedial action and unsuccessfully sought to recover the cost.

Key Law

The House held that the claim could not succeed because it did not involve a non-natural use of land. The judges reviewed the law and identified *obiter* that *Rylands v Fletcher* (1868) is still good law and approved the views expressed in *Cambridge Water* (1994) that it is a specific type of private nuisance, requiring foreseeable harm and that it is thus unavailable in claims for personal injury.

Key Judgment

Lord Bingham did cast doubt on the concept of non-natural use of land:

'I think it is clear that ordinary user is a preferable test to natural user, making it clear that the rule . . . is engaged only where the defendant's use is shown to be extraordinary and unusual . . . I also doubt whether a test of reasonable user is helpful, since a user may well be quite out of the ordinary but not unreasonable'.

6.1.5.1 *Peters v Prince of Wales Theatre (Birmingham) Ltd* [1943] KB 73 CA

Key Facts

The claimant rented a kiosk in a theatre. His stock was damaged by water from the defendant's sprinkler system. His claim failed.

Key Law

It was held that the water supply was a natural use of land in context and for the benefit of both parties so that the claimant consented to the risk, and there was no liability for the escape.

6.1.5.3 *Perry v Kendricks Transport Ltd* [1956] 1 WLR 85 CA

Key Facts

The defendant parked its bus on its parking space after draining the petrol tank. When an unknown person removed the petrol cap a child was then injured when another child threw in a lit match, igniting the fumes in the tank. The claim for personal injury failed.

Key Law

The court accepted that the rule could apply and also that an action for personal injury was possible under the rule. However, the damage was caused by an act of a stranger. It considered that the claimant had the burden of proof to

show that such an eventuality was foreseeable. There was a valid defence and no liability.

6.1.5.5 *Green v Chelsea Waterworks Co* (1894) 70 LT 547

CA

Key Facts

The defendants were obliged by statute to provide a water supply. The water supply was inevitably pressurised and when a burst pipe occurred water escaped, causing damage to the claimant whose action for damages was unsuccessful.

Key Law

The court held that from time to time burst pipes were an inevitable consequence of the statutory duty, which provided an obvious defence, and there could be no liability without proof of negligence.

Key Judgment

Lindley LJ commented that the rule:

'is not to be extended beyond the legitimate principle on which the House of Lords (now the Supreme Court) decided it. If it were extended as far as strict logic might require, it would be a very oppressive decision'.

6.2.2.1 *Draper v Hodder* [1972] 2 QB 556

CA

Key Facts

A child was savaged by a pack of Jack Russell terriers that were rushing from their owner's house next door. They had never acted this way before, so there could be no liability under the Animals Act 1971. The claimant was successful under negligence.

Key Law

The court held that it was known that the breed of dog characteristically attacks in packs so there was foreseeable risk of harm and negligence.

6.2.3

Tutin v Mary Chipperfield Promotions Ltd (1980) 130 NLJ 807

QBD

Key Facts

The claimant was injured when she was thrown off a camel during a camel race at the Horse of the Year Show. She succeeded in her negligence claim but failed under the Animals Act 1971.

Key Law

The court accepted that the camel was a member of a dangerous species within the definition in s 6(2) of the Act, even though this conflicted with a previous decision in *McQuaker v Goddard* [1940] 1 KB 687 which held that a camel is not a dangerous species because there is nowhere in the world where a camel is wild. The court applied that part of s 6(2) 'that any damage that they may cause is likely to be severe'. However, the action would fail because the claimant by agreeing to take part in the race had voluntarily accepted the risk of harm within the meaning of s 5(2) of the Act.

Key Link

For definition of dangerous see s 6(2) Animals Act 1971.

6.2.3

Cummings v Grainger [1977] 1 All ER 104

CA

Key Facts

The owner of a scrap yard allowed an untrained Alsatian to roam free at night. The dog savaged a woman who entered with her boyfriend who worked there. The woman's claim for damages under the 1971 Act was unsuccessful.

Key Law

The claim failed because, under s 5(2), the woman had voluntarily accepted the risk of harm, she knew the dog was dangerous and was frightened of it, and also because, at that time, under s 5(3), it was held to be reasonable to keep a guard dog in a scrap yard in the East End of London.

Key Judgment

Lord Denning identified that the case was one where:

'the keeper of the dog is strictly liable unless he can bring himself within one of the exceptions . . . because the three requirements . . . are satisfied . . . Section 2(2)(a): . . . if it did bite anyone the damage was "likely to be severe". Section 2(2)(b): this animal was a guard dog . . . on the defendant's own evidence it used to bark and run around in circles . . . characteristics . . . not normally found in Alsatian dogs except . . . where they are used as guard dogs. Section 2(2)(c): those characteristics were known to the defendant'.

Key Link

The Guard Dogs Act 1995 – which would probably have produced a different result since it is now a criminal offence for guard dogs to roam premises without a handler.

6.2.3 *Curtis v Betts* [1990] 1 All ER 769 CA

Key Facts

The claimant was an 11-year-old boy who succeeded in his action for personal injury. The boy was bitten on the face by a 70 kg bull mastiff dog called Max whom he knew well and whom he had called as he was passing the car that Max was being put into. Evidence showed that a characteristic of bull mastiffs was defence of territory and also that Max regarded the car as his own territory.

Key Law

The court held that no defences under s 5 or contributory negligence applied and, although Max was considered to be a docile animal, that the damage he was likely to cause if unrestrained was likely to be severe. The court also held that s 2(2) (b) should be interpreted to mean that there should be a causal link between the characteristics of the animal and the type of damage suffered.

Key Judgment

Slade LJ said:

'Lord Denning MR in Cummings v Grainger described s 2(2) as "very cumbrously worded" and giving rise to "several difficulties". I agree. Particularly in view of the somewhat tortuous wording of the subsection, I think it desirable to consider each of the three requirements separately and in turn'.

6.2.3 *Mirvahedy v Henley* [2003] UKHL 16; [2003] 2 AC 491

HL

Key Facts

The defendant kept horses in a field. Something frightened the horses and they escaped eventually onto a major road. There was then a collision between one of the horses and the claimant's car, in which the claimant suffered personal injury. The defendant's appeal in the House of Lords (now the Supreme Court) was unsuccessful. The key issue was the characteristics of the animals.

Key Law

The House of Lords (now the Supreme Court), by a majority of three to two, held that s 2(2)(b) applied. Even though the behaviour of the horses was unusual for the species for the most part, it was nevertheless normal for the species in the particular circumstances.

Key Judgment

Lord Walker gave the reason for imposing liability:

'It is common knowledge (and was known to the appellants in this case) that horses, if exposed to a very frightening stimulus, will panic and stampede, knocking down obstacles in their path . . . and may continue their flight for considerable distance. Horses loose in that state . . . are an obvious danger on a road carrying fast moving traffic. The appellants knew these facts; they could decide whether to run the risks involved in keeping horses . . . Although I feel sympathy for the appellants, who were held not to have been negligent in the fencing of the field, I see nothing unjust or unreasonable in the appellants having to bear the loss'.

Key Comment

The problem with this interpretation of s 2 is that it means that almost any circumstances in which a domestic animal

causes harm could be classed as characteristics only exhibited at particular times. This would have the effect of extending liability to almost unlimited proportions.

Key Link

Freeman v Higher Park Farm [2008] EWCA Civ 1185, where bucking was held to be a normal characteristic of a horse and that horses do not buck at any particular time.

6.2.3 *Dhesi v Chief Constable of the West Midlands Police, The Times*, 9 May 2000

CA

Key Facts

Police had tracked the claimant, who was armed with a hockey stick, after a violent confrontation. When the claimant hid in bushes he was repeatedly warned that the dog would be set free unless he came out. The claimant was bitten when trying to escape from the dog, but was unsuccessful in his claim for personal injury.

Key Law

The court held that the claimant had caused his own injury and had accepted the risk of being injured through his actions. There was a valid defence under both s 5(1) and s 5(2) and no liability.

7 Trespass to land

7.1 The origins and character of trespass

1 Trespass is as old as the common law itself.

2 It was necessary so claimants could bring their own action where the distinction between civil and criminal law was unclear.

3 Derives from the Latin: *trans* (through) and *passus* (a pace).

4 It is most accurately used in conjunction with land.

5 But there are torts of trespass to the person and to goods also.

6 It is used generally to refer to an interference.

7 It is actionable *per se* (so without proof of damage).

8 Originally it was only actionable if it arose directly as a consequence of the defendant's direct and positive act.

9 Indirect interference or omission would be an action on the case (forerunner of negligence) when damage had to be shown.

7.2 Trespass to land

7.2.1 Definition, character and purpose of the tort

1 Developed from the writ *quare clausum fregit* by way of the taking of an enclosed area.

2 Defined as the intentional or negligent, unlawful entry upon or direct interference with the land in another 's possession.

3 The tort is actionable *per se*, so no proof of damage needed.

4 Damages are payable if there is any loss.

5 It can be intentional, but also by a person who enters lawfully, but then carries out an unlawful act.

6 There may be many purposes of suing:

- to remove unwanted intruders;
- to settle disputes over title;
- to seek compensation for loss or damage;
- to recover land from which claimant was unlawfully ejected.

7 The action can be by a possessor rather than an owner.

7.2.2 Potential claimants

1 If the tort were based only on title a tenant could not claim. If it was based on pure possession then an owner might not claim.

2 So, an action is in favour of the person in possession at the time the trespass is committed, as against the wrongdoer.

3 So 'possession is title as against a wrongdoer . . .'.

4 An action is available to lessees, mortgagees, etc., and possession need not be legal, i.e. a squatter may sue a trespassing third party (*Graham v Peat* (1861)).

5 But not the superior owner (***Delaney v T P Smith & Co (1946)***).

6 Possession means exclusivity, so a lessee can sue a lessor, but a lodger may not sue the landlord (*White v Bayley* (1861)).

7 However, a licensee may gain a proprietary interest as in estoppel.

7.2.3 Actions amounting to a trespass

1 Acts/non-acts must be direct; indirect interference is actionable, as nuisance or negligence (*Lemon v Webb* (1894), and *Esso Petroleum Co v Southport Corporation* (1956)).

2 There must be an entry on to the land (***Perera v Vandiyar (1953)***).

3 It need not be the defendant who enters (*Smith v Stone* (1647)).

4 So, it might be rocks or balls thrown, but not rubbish blown by the wind (compare *Smith v Stone* (1647) with *Esso v Southport Corp* (1956)).

5 Any presence can be a trespass, e.g. walking, standing, riding.

6 So it can be active interference (***Basely v Clarkson (1681)***).

7 It can also be a static intrusion (*Kelsen v Imperial Tobacco Co* (1956)).

8 Can be merely temporary (*Woolerton & Wilson v Richard Costain Ltd* (1970), where a crane swung over the claimant's land).

9 The merest contact can be trespass (*Westripp v Baldock* (1938)).

10 A trespass can occur even if the original entry was lawful.

7.2.4 Definition of land in trespass

1 There is no single concept. Traditional proposition is *cujus est solum ejus est usque ad coleum et ad inferos* (the action extends to the air above the land and the sub-soil beneath it).

2 It can be the land, any part of the land, any structure on the land.

3 It can even be the boundary (*Westripp v Baldock* (1938)).

4 Most underground rights are now under statutory authority.

- Rights can extend under roads to include unlawful use of the road (***Harrison v The Duke of Rutland* (1893)** and ***Hickman v Maisey* (1900)**).
- But cannot extend to adjoining land (*Randall v Tarrant* (1955)).
- But can include the strata underneath the land through which pipelines pass (*Bocardo v Star Energy UK* (2010)).

5 Air space:

a) Overhanging signs have been trespass (***Kelsen v Imperial Tobacco* (1956)** and *Gifford v Dent* (1926)).

b) Wire cables (*Wandsworth Board of Works v United Telephones* (1864)).

c) Cranes (*Woolerton & Wilson v Richard Constain* (1970)).

d) But not balloons flying overhead (*Pickering v Rudd* (1815) and *Saunders v Smith* (1838)).

e) Aircraft are unlikely to amount to a trespass (***Lord Bernstein of Leigh v Skyways General Ltd* (1977)**, where there was no liability in trespass when aerial photographs were taken of Lord Bernstein's estate).

f) Aircraft in any case have free passage under the Civil Aviation Act 1982.

7.2.5 Trespass *ab initio*

1 A common law doctrine – if a person enters land lawfully then does an act inconsistent with his rights, then the entry is deemed unlawful from the beginning despite his original lawful entry.

2 Needed to stop abuses by lawful visitors (*Oxley v Watts* (1785)).

3 It may be ineffective if a lawful purpose remains (***Elias v Pasmore* (1934)**).

4 Possibly the doctrine is no longer in existence according to CA (*Chic Fashions Ltd v Jones* (1968)).

7.2.6 Defences

1 A customary right to enter (*Mercer v Denne* (1905), where the defendant was prevented from building on his beach because fishermen had an ancient right to dry their nets on it).

2 A common law right to enter, which is lost if the person entering goes beyond his legal rights (*Clissold v Cratchley* (1910)).

3 Statutory right to enter, e.g. police under PACEA 1984; meter readers by Rights of Entry (Gas and Electricity Boards) Act 1954.

4 *Volenti non fit injuria* (where visitors are allowed on to land).

5 Necessity, e.g. someone rescuing a child from a burning building (***Rigby v Chief Constable of Northamptonshire* (1985)**).

6 Licences – constantly given e.g. shops etc. – valid only while terms of licence are complied with.

7.2.7 Remedies

1 If claimant is in possession (s)he can sue for damage resulting from infringement and injunction to prevent further trespass. But an injunction cannot be applied generally to any land that the trespass may occur on in the future, only that which is already the subject of a trespass (*Sec of State for the Environment v Meier* (2010)).

2 If defendant is in possession, claimant can sue for ejectment for recovery of land, possibly with mesne profits.

3 Damages may be:

   a) nominal and exemplary;

   b) related to actual deterioration;

   c) related to the cost of repossession.

4 Other remedies:

   a) distress damage feasant – keeping an object causing damage;

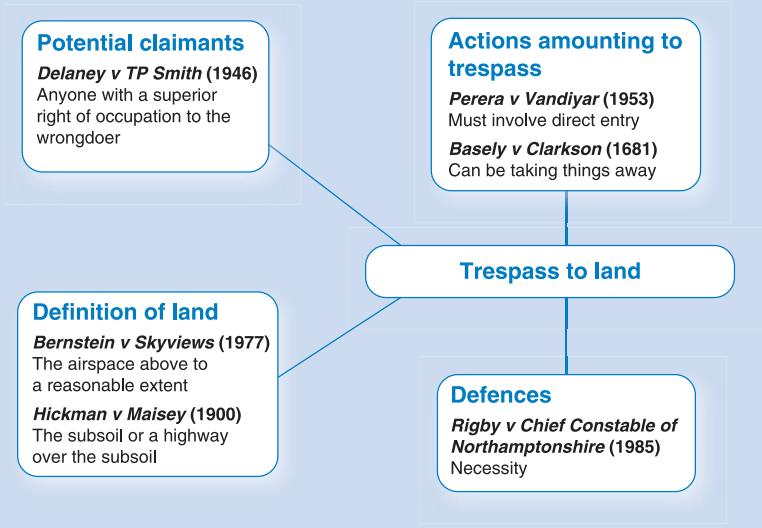
   b) declaration – if rights are uncertain (*Acton BC v Morris* (1953)).

	Private nuisance	Public nuisance	*Rylands v Fletcher*	Trespass to land
Claimants	Person with proprietary interest in land	A member of a class of Her Majesty's citizens	A person harmed by the escape	Person in possession of land
Defendants	Landowner, creator, person adopting nuisance	Person creating nuisance	Person in control of land from which thing escapes	Person carrying out the trespass
Duration of interference	Must be continuous	Single interference is enough	Single escape is enough	A single trespass is enough
Directness of interference	Must be indirect	Could be direct or indirect	Could be direct or indirect	Must be direct
Need to prove fault	Requires unreasonable use of land – which is indirect	Fault need not be proved	*Cambridge Water* says foreseeability required – suggests fault	Actionable *per se* – so no need to prove fault
Locality of interference	Relevant unless damage caused	Could be relevant, e.g. to losing client connection	Could be relevant in deciding what is non-natural	Not relevant
Availability of damages	Physical harm, personal injury to proprietor, economic loss	Physical harm, personal injury, economic loss	Physical loss and personal injury	Any damage related to the trespass – and no need to show damage

Defences	Statutory authority, prescription, consent, act of stranger, public policy, over-sensitivity of claimant	General defences	Consent, common benefit, act of a stranger, or God, statutory authority, contributory negligence	Customary right to enter, common law right, statutory right, consent, necessity, licence
Whether also a crime	No – unless statutory	Yes – can be	No	Yes – possible under some statutes

The similarities and differences between the torts relating to land

Key Cases Checklist



7.2.2.5 *Delaney v T P Smith & Co* [1946] KB 393 CA

Key Facts

By an oral agreement, the claimant was to acquire a tenancy of the defendant's property. Before the lease was executed the claimant secretly entered the premises. The defendant then ejected the claimant, who unsuccessfully sued for trespass.

Key Law

The court held that, since the agreement had not been reduced to writing, the defendant still had superior rights of occupation.

Key Judgment

Tucker LJ said:

'no doubt . . . a plaintiff need only in the first instance allege possession. This is sufficient to support his action against a wrongdoer, but . . . not . . . against the lawful owner'.

7.2.3.2 *Perera v Vandiyar* [1953] 1 WLR 672 CA

Key Facts

The claimant was a tenant in the defendant's property. His gas and electricity meters were situated in the defendant's cellar. When the defendant switched off both supplies and the claimant was left for two days without heat or light, he claimed damages unsuccessfully.

Key Law

The court held on appeal that, while there was a clear interference with the claimant's premises, there was no direct entry, which would be an absolute requirement for trespass.

7.2.3.6 *Basely v Clarkson* (1681) 3 Lev 37

CP

Key Facts

The defendant cut and carried away some grass from his neighbour's strip of land. The claimant alleged trespass.

Key Law

The court held that this was trespass even though it was carried out by mistake. However, the defendant had offered 2 shillings (10p) in full satisfaction, which was accepted as discharging the issue.

7.2.4.5 *Lord Bernstein of Leigh v Skyviews & General Ltd* [1977] QB 479

QBD

Key Facts

A company specialising in aerial photographs flew over the claimant's land, took photographs, and then tried to sell them to him. It was held not to be a trespass.

Key Law

It was held that the claimant did have rights over the airspace above his property but that these should only extend to a height 'reasonably necessary for the enjoyment of the land'.

Key Link

The Civil Aviation Act 1982 confirms this. Aircraft are generally immune from actions for trespass except where things fall from an aircraft or where aircraft make unauthorised landings.

7.2.4.5 *Kelsen v Imperial Tobacco Co Ltd* [1956] 2 QB 334

QBD

Key Facts

The defendant's advertising hoarding overhung the neighbouring land by 8 inches. An injunction to remove the sign succeeded.

Key Law

The court held that there was a trespass because the sign invaded the claimant's airspace.

7.2.4.4 *Harrison v Duke of Rutland* [1893] 1 QB 142 CA

Key Facts

The Duke commonly held grouse shoots on his land. Protesters gathered on the highway next to his land and tried to scare off the grouse. The Duke's action for trespass succeeded.

Key Law

The court held that since the highway ran over the Duke's land it gave him rights over it and the defendants were liable because they used the highway improperly.

Key Link

Bocardo v Star Energy UK [2010] UKSC 35.

7.2.4.4 *Hickman v Maisey* [1900] 1 QB 752 CA

Key Facts

The defendant used the highway to spy on the claimant's race horses in training and find out information on their performance before they entered races. The claimant's action succeeded.

Key Law

The court held that there was a trespass since the defendant was using the adjoining highway for improper purposes. The highway could be freely used but not when it abused a landowner 's rights.

7.2.5.3 *Elias v Pasmore* [1934] 2 KB 164

KB

Key Facts

The police entered premises and seized some documents lawfully under a warrant, but also some not covered by the warrant. The claim for trespass in relation to the documents unlawfully seized was accepted but the claim of trespass *ab initio* failed.

Key Law

The court held that the principle could not apply since it would have made the police liable for breaking the door to carry out the warrant.

7.2.6.5 *Rigby v Chief Constable of Northamptonshire* [1985] 2 All ER 985

QBD

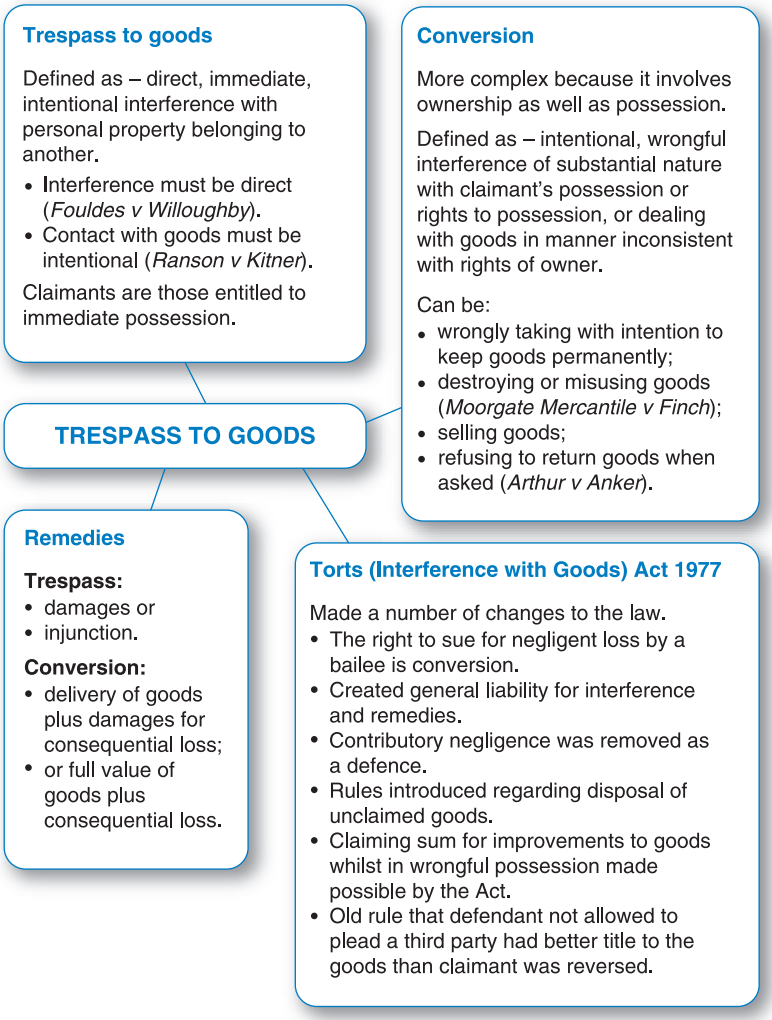
Key Facts

Police officers fired CS gas into the claimant's shop where a dangerous armed psychopath was hiding. This ignited powder and caused the shop to burn down. The police successfully raised a defence of necessity to the claimant's action for trespass.

Key Law

The court accepted that the defence was uncertain in scope but accepted that it applied in relation to the trespass because there was a life-threatening situation. (However, the police were found negligent for not providing effective fire-fighting cover.)

8 Torts concerning goods



8.1 Trespass to goods

8.1.1 Introduction

1 Trespass, meaning interference, is one of the oldest areas of tort.

2 Trespass to goods developed alongside trespass to land and to the person, and was similar but protected personal property.

3 Medieval law became outdated and in need of reform, so updated and clarified in Torts (Interference with Goods) Act 1977, but not entirely, so some common law still remains, adding confusion.

8.1.2 Trespass to goods

1 One of the original two torts to do with goods.

2 Defined as 'direct, immediate interference with personal property belonging to another person'.

3 Claimants are those entitled to immediate possession.

4 Interference must be direct (***Fouldes v Willoughby* (1841)**).

5 The interference must be intentional in the sense that contact with the goods is intentional (*Ranson v Kitner* (1888)).

6 Traditionally actionable *per se* (without proof of damage), but this probably does not survive (*Letang v Cooper* (1965)).

7 Under s 11(1) Torts (Interference with Goods) Act 1977 the defence of contributory negligence is not available.

8 Wheel clamping can be a trespass unless the claimant voluntarily undertook the risk of the clamping (*Vine v Waltham Forest London Borough Council* (2000)), where the claimant had not seen warning signs and did not appreciate the consequences of trespassing.

8.1.3 Conversion

1 Trespass to goods is a fairly simple tort; conversion is complex.

   a) This is because it involves ownership as well as possession.

   b) As it takes many forms it is often said to defy easy definition.

2 Broadly defined as 'intentional, wrongful interference of a substantial nature with the claimant's possession or right to possession of the goods'; or 'dealing with goods in a manner inconsistent with the true owner's rights'. So it might occur even where the defendant has no knowledge that the goods belong to the claimant (*Lewis v Avery* (1972)).

3 There are a number of examples of conversion:
- wrongfully taking the goods with the intention of keeping them permanently, or at least for some time;
- selling the goods or assisting in their disposition (***Parker v British Airways Board* (1982)**);
- destroying or misusing the goods (*Moorgate Mercantile Co v Finch* (1962));
- refusing to return the goods once their return has been demanded (*Arthur v Anker* (1996)) (wheel clamping).

4 Conversion does not cover intangible rights unless those rights are sufficiently connected with a chattel (*OGB v Allan Ltd* (2007)).

5 After the Act a verbal statement denying the claimant's title is not conversion.

6 Again the Act removes contributory negligence as a defence.

8.1.4 Other common law provisions

1 The Act abolished a third common law action (part of conversion).

2 In all three torts there was no remedy for a claimant who did not have possession or an immediate right to possession of the goods.

3 So common law developed an action on the case (as in land) to challenge interference with the claimant's reversionary interest in the goods.

8.1.5 The Torts (Interference with Goods) Act 1977

1 The Act tried to remove overlaps and ambiguities with common law.

2 It did make a number of changes to the law:
- the right to sue for negligent loss by a bailee is conversion;
- created general liability for interference and remedies;
- contributory negligence was removed as a defence;
- rules were introduced regarding disposal of unclaimed goods;
- claiming a sum for improvements made to the goods whilst in wrongful possession was made possible by the Act;
- the old rule that the defendant was not allowed to plead that a third party had better title to the goods than the claimant was reversed.

8.1.6 Remedies

1 In trespass to goods the claimant may recover damages or obtain an injunction.

2 Conversion has been modified by the Act with two possibilities:

- delivery of the goods, plus damages for consequential loss;
- if this is not possible or appropriate the claimant can have the full value of the goods, plus damages for any consequential loss.

8.2 Product liability

8.2.1 Introduction

1 Product liability is only one aspect of consumer protection.

2 Its origins are in contract law:

a) *caveat emptor* traditionally applied;

b) effective consumer protection began with the Sale of Goods Act 1893, which implied terms as to quality of the goods into contracts.

3 Otherwise only limited opportunities existed to sue in tort in respect of dangerous goods.

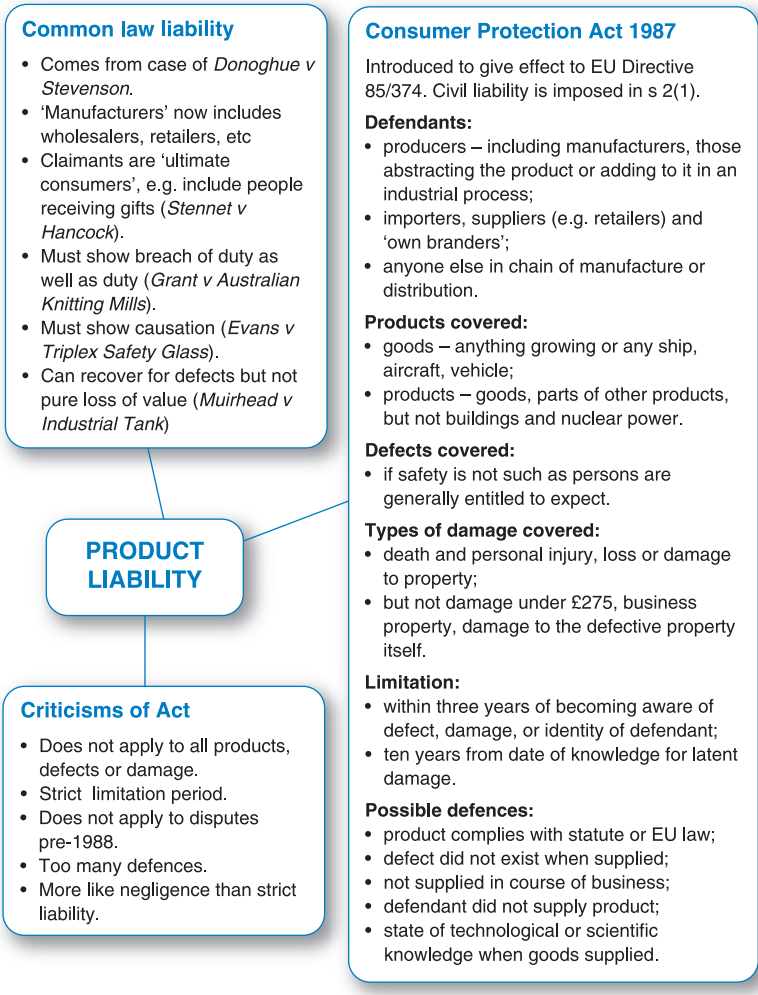
4 Suing in contract had obvious shortcomings:

- remedies were only available to the parties to the contract;
- damages limited to loss of bargain, reliance loss, restitution.

5 So a doctrine of tortious liability for defective goods developed.

8.2.2 Common law liability for defective products in tort

1 Came from Lord Atkin's judgment in *Donoghue v Stevenson* (1932): 'a manufacturer of products . . . he intends to reach the ultimate consumer in the form in which they left him with no reasonable possibility of . . . examination . . . and knowledge that absence of reasonable care . . . will result in an injury to consumer's life or property, owes a duty to the consumer to take reasonable care'.



2 Not concerned with quality of goods, but the damage they cause:

- damage must be physical, not purely economic (*Murphy v Brentwood DC* (1990));
- concerns over quality are contested in contract law.

3 At first applied to foodstuffs only, but later extended to anything manufactured (***Grant v Australian Knitting Mills* (1936)** – liability when underpants still containing a chemical caused dermatitis in the wearer).

4 Potential defendants are 'manufacturers' – a narrow concept, but expanded to include wholesalers, retailers, repairers, hirers, and assemblers (if under a duty to inspect the goods).

5 Potential claimants are any 'ultimate consumers'.

- Again this is a broad concept including anyone who the 'manufacturer' should see as being affected by his/her actions.
- It can be people receiving goods as presents, borrowing goods, or innocent bystanders (*Stennet v Hancock* (1939)).

6 Bringing an action is the same as for negligence:

a) The claimant must show a duty of care, breach, and a causal link with the damage suffered.

b) Breach is, for example, a failure in the production process (*Grant v Australian Knitting Mills* (1936)) – and can include failing to do anything about a known fault (*Walton v British Leyland* (1978)). Detailed knowledge of manufacturing processes is beyond the capability of most consumers, placing a very heavy burden of proof, so the doctrine *res ipsa loquitur* may be appropriate.

c) Causation will also only be proved if:

- there is no other cause for the defects in the product, so the chain of distribution can be a problem for the claimant (*Evans v Triplex Safety Glass* (1936));
- there is no negligent inspection of the goods by claimant which should have revealed the defect (*Griffiths v Arch Engineering Co* (1968)).

d) Can recover for damage caused by defects in goods (*Aswan Engineering Establishment Co v Lupdine Ltd* (1987)).

e) Cannot recover a pure loss of value in the goods themselves (*Muirhead v Industrial Tank Specialities Ltd* (1985)).

7 Clearly the two most important problems of the tort are:

- the difficulty of proving causation;
- the difficulty of establishing fault.
- The Thalidomide cases (settled out of court) are evidence of this.

8.2.3 The Consumer Protection Act 1987

Introduction

1 The Act was the UK's response to EU Directive 85/374 on product liability requiring harmonisation of member states' law.

2 The Act is both criminal and civil in content:

- in the regulatory sense it has been supplemented by the Product Safety Regulations 1994 (again responding to EU law), and criminal sanctions possibly provide more effective control of defective products;
- civil liability in the Act is in s 2(1): 'where any damage is caused wholly or partly by a defect in a product, every person to whom subsection 2 applies shall be liable'.

Who can be sued under the Act?

1 Potential defendants are listed in s 2(2).

a) Producers – defined in s 1(2) and including:

- the manufacturer, ie the manufacturer of the final product; manufacturers and assemblers of component parts; and also producers of raw materials;
- a person who 'wins' or 'abstracts' products, e.g. someone who extracts minerals from the ground;
- a person carrying out an industrial or other process which adds to the essential characteristic of the product, e.g. freezing vegetables.

b) Importers, suppliers and 'own-branders', also defined in s 2(2) and liable to the consumer in certain circumstances:

- importers (by s 2(2)(c) includes anybody who in the course of business imports a product from outside the EU);
- suppliers (retailers or equivalent, usually only liable in contract law, but by s 2(3), where it is impossible to identify a 'producer' or importer, supplier is liable if consumer asked supplier to identify producer, within a reasonable time of the damage suffered, because it is impractical for consumer to identify producer, and supplier has failed to identify or refuses to identify it (so businesses must keep records of their suppliers));
- own-branders (by s 2(2)(b) these are, for example, supermarket chains who, while not producers, hold themselves out as producers by declaring a product as their own brand. They must indicate that someone else is producing the goods for them in order to avoid liability under the Act).

2 Anyone in chain of manufacture and distribution is potentially liable.
   - Liability is joint and several, so consumer can sue the person with the most money or best insurance cover.
   - Liability is strict so fault need not be proved.

Products covered by the Act

1 Product is defined in s 2(1) as 'any goods or electricity and (subject to subsection (3)) includes a product which is comprised in another product, whether by virtue of being a component part, raw material or otherwise'.

2 Goods are defined in s 45(1) as 'substances, growing crops, and things comprised in land by virtue of being attached to it and any ship, aircraft or vehicle'.

3 Certain things are exempted from the scope of the Act:
   - buildings (because they are immovable – though building materials can fall within the Act);
   - nuclear power;
   - agricultural produce which has not undergone an industrial process – the problem being what is an industrial process?, e.g. butchery in the light of the BSE and CJD problems.

Defects covered by the Act

1 Defect is defined in s 3(1) as 'if the safety of the product is not such as persons generally are entitled to expect, taking into account all the circumstances'.

2 Courts take into account various circumstances to define safety:
   - manner in which and purposes for which product has been marketed, its get-up, use of any mark in relation to the product and any instructions, or warnings to do or refrain from doing anything in relation to the product;
   - what can reasonably be expected to be done with the product (***Abouzaid v Mothercare (UK) Ltd* (2001)**);
   - time when product was supplied by its producer to another.

3 Market can be important (e.g. toys and children) as can use of warnings, so the way the consumer uses the product can relieve liability (e.g. fireworks not to be used indoors).

4 Defects in production or design which render the product unsafe will result in liability under the Act, but the consumer may cause the damage by improper use.

5 Time can be another important factor because knowledge is always increasing. So, if knowledge has changed should a producer recall all products sold however long ago in the past?

Types of damage the Act applies to

1 The Act covers death, personal injury, and loss or damage to property caused by unsafe products.

2 Some limitations are put on this, so no damages possible for:

- small property damage under £275, so a consumer would need to use contract law;
- business property, so property must be intended for private use, occupation or consumption;
- loss or damage to the defective product itself.

Limitation

1 Claimant must begin proceedings within three years of becoming aware of the defect, damage or identity of the defendant or, if damage is latent, the date of knowledge of the claimant provided that is within the ten-year period.

2 Court has discretion to override three-year period in personal injury.

3 In all cases there is an absolute cut-off point for claims of ten years from the date that the product was supplied.

Defences

1 Defences are contained in s 4 of the Act, including:

- compliance with statutory or EU obligations, so defect is an inevitable consequence of complying with law, e.g. a chemical ingredient required by law which turns out to be dangerous;
- defect did not exist when supplied by the defendant, including, for example, animal rights campaigners 'doctoring' baby food, or defect arises in subsequent product but was not in component;
- product was not supplied in the course of a business;
- defendant can show (s)he did not actually supply the product;
- state of technical or scientific knowledge at relevant time was not such that defendant could be expected to have discovered the defect (*A v National Blood Authority* (2001), where screening test for infected blood was not available until 1991 but virus known of from 1988). This is controversial and inconsistent with other EU countries, which follow the Directive's wording of when the product was put into circulation.

Some criticisms of the Act

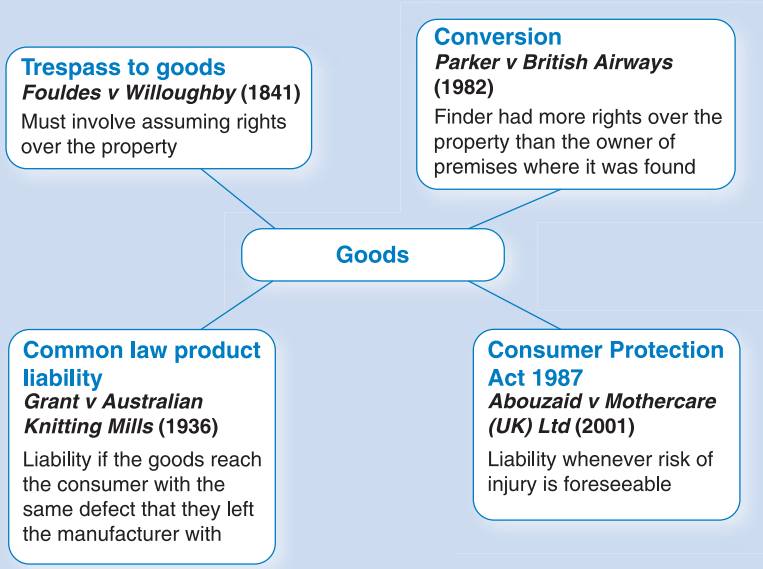
1 The Act is a step forward in a few ways:

- it has put producers on their guard, and increased knowledge of the need for appropriate checking and quality control;
- as a result there is a greater likelihood of product recall;
- it gives consumers more chance of an action because they have a greater range of potential defendants to choose from.

2 However, the Act has several shortcomings:

- it does not apply to all products, or all defects, or all damage;
- the limitation period is very strict;
- the Act does not apply to products supplied before 1988;
- the number of defences make it hard for claimants to succeed;
- causation is still a requirement and the standard of care is very similar to negligence, making it too similar to negligence, and not enough like strict liability which it is supposed to be.

Key Cases Checklist



8.1.2.4 *Fouldes v Willoughby* (1841) 8 M & W 540 CE

Key Facts

The claimant boarded the defendant's ferry with two horses. The claimant was alleged to have behaved improperly and so to induce him to leave the ferry the defendant took hold of the horses and led them ashore. The claimant's action failed.

Key Law

The requirements of the tort were that the interference should be both direct and intentional. The court held that the defendant did not intend to interfere with the rights of the owner of the horses or assume any rights over them himself and so the action failed.

8.1.3.3 *Parker v British Airways Board* [1982] QB 1004 CA

Key Facts

The claimant found a gold bracelet in an airport lounge and handed it in together with his name and address. The true owner could not be found and the defendant air company sold it. The claimant then tried to claim the proceeds but the company refused.

Key Law

The court rejected the argument that the airport should have more right to the property than the finder because the real owner was more likely to make enquiries of them. The fact that the defendant had a procedure for lost property was insufficient to establish rights over things found on its premises and it was liable for conversion and was bound to return the property to the finder.

8.2.2.3 *Grant v Australian Knitting Mills* [1936] All ER Rep 209

PC

Key Facts

The claimant contracted a painful skin disease from chemicals in underpants that he had bought. The chemicals were a part of the manufacturing process and the processes used to remove them had failed to do so.

Key Law

The court applied the basic principle in *Donoghue v Stevenson* (1932) in the claim against the manufacturer in making the defendant liable.

Key Judgment

Lord Wright stated:

'The garments were made by the manufacturers for the purpose of being worn exactly as they were worn . . . in Donoghue . . . the essential point . . . was that the article should reach the consumer or user subject to the same defect as it had when it left the manufacturer. That this was true of the garment is . . . beyond question'.

8.2.3 *Abouzaid v Mothercare (UK) Ltd* [2001] EWCA Civ 348

CA

Key Facts

The claimant was injured in the eye when he was fastening elastic straps to secure a sleeping bag to a pushchair. The plastic slipped through his fingers and the buckle hit him in the eye. He claimed under the Act.

Key Law

The court held that the product was defective within the meaning of the Act because the design meant that the risk of injury was possible without the manufacturers giving any warning that it might occur.

9 Trespass to the person

Assault

- Intentionally and directly causing the victim to fear an imminent battery, so based on impression caused rather than what defendant will actually do.
- Can be threatening behaviour (*Read v Coker*).
- Can be a prevented battery (*Stephens v Myers*).
- Words traditionally insufficient without gestures:
  - i) can disprove assault (*Tuberville v Savage*);
  - ii) words can be duress in contract law (*Barton v Armstrong*);
  - iii) now words are enough for assault in crime (*R v Ireland, R v Burstow*).
- Defences are consent, necessity, and self-defence.

False imprisonment

- Requires total bodily restraint (*Bird v Jones*).
- No action possible if a means of escape exists (*Wright v Wilson*).
- Liability possible where claimant unaware of the restraint (*Meering v Graham White Aviation*).
- No liability merely because claimant must pay to escape (*Robinson v Balmain Ferry*).
- No liability where employer has legitimate expectation that employee will complete shift (*Herd v Weardale Steel, Coal and Coke*).
- Defences include: consent, mistaken arrest, lawful arrest – and rules on arrest apply.

Battery

- Intentional, direct, unlawful physical contact with the claimant's body.
- If contact is not intentional then negligence appropriate (*Letang v Cooper*).
- Requires direct contact, but indirect has been accepted in the past (*Gibbons v Pepper*, *Nash v Sheen*), even where another party makes contact (*Scott v Shepherd*).
- There is some controversy over whether hostility is required – compare *Wilson v Pringle* with *Collins v Wilcock*.
- Medical treatment without consent is battery (*Re F*) but consent need not be informed (*Sidaway v Governors of Bethlem & Maudsley Hospitals*).
- Defences include:
  - i) consent (*Simms v Leigh RFC*);
  - ii) necessity (*Leigh v Gladstone*);
  - iii) self-defence (*Revill v Newbury*);
  - iv) inevitable accident (*Stanley v Powell*);
  - v) lawful arrest.

TRESPASS TO THE PERSON

Harassment

- Action now under s 3 of Protection from Harassment Act 1997.
- Where there is a course of conduct that is unreasonable (*Green v DB Group Services*).

9.1 Assault

9.1.1 Definitions

1 The old view was that assault was an incomplete battery.

2 Modern definition is intentionally and directly causing a person to fear being victim of an imminent battery (*Letang v Cooper* (1965)).

9.1.2 Ingredients of the tort

1 Assault is free-standing, so intention refers to the impression it will produce in claimant, not as to what defendant intends to do. Compare *R v St George* (1840) with *Blake v Barnard* (1840).

2 No harm or contact is required (*I de S et Ux v W de S* (1348)).

3 Requires active behaviour, so merely barring entry is no assault (*Innes v Wylie* (1844)).

4 However, threatening behaviour can be assault (***Read v Coker* (1853)**).

5 An attempt to commit a battery which is thwarted is still an assault (*Stephens v Myers* (1830)) – but there is no assault if it is impossible to carry out a battery since there could be no apprehension of it (***Thomas v National Union of Mineworkers* [1986]**).

6 Traditionally words alone were not an assault:

- but could disprove an assault (***Tuberville v Savage* (1669)**);
- and a threat on its own can be assault (*Read v Coker*);
- and in contract law, words can amount to duress if the threat is sufficiently serious (*Barton v Armstrong* (1969));
- more recently, in crime, words alone and even silence have been accepted as assault (***R v Ireland; R v Burstow* (1998)**).

7 The claimant must be fearful of an impending battery. Compare *Smith v Superintendent of Woking* (1983) with *R v Martin* (1881).

9.1.3 Defences

1 Consent (as in sports).

2 Self-defence (e.g. threatening an attacker).

3 Necessity (frightening people away from possible harm).

9.2 Battery

9.2.1 Definitions

1 There are a number of possible definitions:

- the defendant intentionally and directly applies unlawful force to claimant's body – so cannot include negligent conduct (***Letang v Cooper* [1965]**) – but force is irrelevant in, for example, medicine;
- the defendant, intending the result, does an act which directly and physically affects the claimant, but still implies damage;
- has been said to include the 'ordinary collisions of life', but this is very unlikely (***Wilson v Pringle* (1987)**).

9.2.2 Ingredients of the tort

1 Intention is a fairly recent requirement – without it an action should be brought in negligence (*Fowler v Lanning* (1959)).

2 Traditional distinction was between direct and indirect contact:

- but now between intention and negligence (*Letang v Cooper* (1965));
- although in traditional cases indirect damage was often accepted (*Gibbons v Pepper* (1695));
- often where negligence might have seemed more appropriate (***Nash v Sheen* (1953)**);
- and even where other parties have actually caused the harm (*Scott v Shepherd* (1773)).

3 Usually no liability for omissions in trespass, only positive acts (*Fagan v Metropolitan Police Commissioner* (1969)).

4 Hostility is a recent requirement, with traditional foundations:

- Lord Holt CJ in *Cole v Turner* (1704) suggested that 'the least touching of another in anger is a battery';
- restated in *Wilson v Pringle* (1987);
- but conflicting with Lord Goff's test in ***Collins v Wilcock* (1987)** of whether the contact is acceptable in the conduct of daily life.

5 Medical treatment without consent has always been battery:

- a view reaffirmed by Lord Goff in ***Re F* (1990)** **and** ***Re T* (1992)**;
- and in *T v T* (1988) the court refused to follow *Wilson v Pringle*;

- so where patient has full capacity s(he) can refuse life-sustaining treatment even where it leads to death (*Ms B v An NHS Hospital Trust* (2002));
- so consent is clearly an issue in medical treatment, but it is arguable what level of information is required for consent to be valid (*Sidaway v Governors of Bethlem Royal and Maudsley Hospitals* (1985));
- and patients are more likely to sue in medical negligence than in battery, according to the basic principle in *Bolam v Friern Hospital Management Committee* (1957).

6 The House of Lords in *Wainwright v Home Office* (2003) (where strip searches were not carried out in accordance with Prison Rules) has identified that there is no general tort of invasion of privacy.

9.2.3 Defences

1 *Volenti non fit injuria* – consent:

- in legitimate sporting injuries (*Simms v Leigh RFC* (1969));
- but not if inflicted outside proper rules (***Condon v Basi* (1985)**);
- in medical treatment consent invalid if patient is not broadly aware of type of treatment, etc. (*Chatterton v Gerson* (1981));
- if the patient is informed of the type of treatment but not the true extent of the risk there is no liability since English law has no doctrine of informed consent (*Sidaway v Governors of Bethlem Royal and Maudsley Hospitals* (1985)).

2 Necessity: justified if it is to prevent greater harm, e.g. death (*Leigh v Gladstone* (1909)).

3 Self-defence:

- only if reasonable force used (***Lane v Holloway* (1968)**);
- and it is reasonable to fear imminent attack and reasonable to use force in the circumstances *Ashley v Chief Constable of Sussex Police* (2008);
- a trespasser may defeat the defence where unreasonable force is used against him (*Revill v Newbery* (1996)).

4 Parental chastisement:

- a traditional right of parents to punish their naughty children;
- without reasonable force it may be tortious;
- it may not in any case have survived the Children Act.

5 Inevitable accident: possible if injury is unavoidable and beyond defendant's control (*Stanley v Powell* (1891)).

6 Lawful ejectment of a trespasser: depends on using reasonable force (*Revill v Newbery* (1996)).

7 Lawful arrest:

- by a police officer under s 24 PACE;
- by a citizen subject to the common law rules;
- in either case the arrest must be by reasonable force.

9.3 False imprisonment

9.3.1 Definition and ingredients of the tort

1 This tort is committed where the defendant imposes intentionally and directly a total restraint on the liberty of the claimant.

2 It is usually associated with wrongful arrests in the modern day, either by police or by security guards, store detectives, etc.

3 The restraint must be total (***Bird v Jones* (1845)**).

4 The extent of the restraint could be large, but not, for example, a country.

5 No action if a safe means of escape exists (*Wright v Wilson* (1699)).

6 The restraint must be directly applied, but if it is not an action is still possible in negligence (*Sayers v Harlow UDC* (1958)). A police cordon could be false imprisonment (*Austin v Commissioner of Police for the Metropolis* (2005)).

7 There may even be liability where the claimant is unaware of the restraint (***Meering v Graham White Aviation* (1919)**).

8 Or even if claimant is unconscious (*Murray v MOD* (1988)).

9 Not actionable merely because claimant is obliged to pay to get free, where he is contractually bound by a voluntary arrangement (***Robinson v Balmain New Ferry Co* (1910)**).

10 Not actionable if an employer legitimately expects an employee to stay until end of shift (***Herd v Weardale Steel, Coal and Coke Co* (1915)**).

11 It is an unlawful arrest which is made for a purely civil offence (*Sunbolf v Alford* (1838)).

12 It is false imprisonment to keep a prisoner past the lawful release date (*Cowell v Corrective Services Commissioner* (1989) and *R v Governor of Brockhill Prison ex parte Evans* (2000)) but holding prisoners in their cells for longer than normal because of a prison officers' strike was held to be negligence not trespass *Iqbal v Prison Officers Association* (2009).

13 But less convincingly false imprisonment where prisoners are maintained in a condition at odds with the prison rules. See the debate between CA in *Wheldon v Home Office* (1990) and DC in *R v Deputy Governor of Parkhurst Prison* (1990).

9.3.2 Defences

1 *Volenti non fit injuria* – consent, e.g. lawyer locked in cell with client.

2 Mistaken arrest – available to police only, if they act reasonably.

3 Lawful arrest:

- powers defined in Police and Criminal Evidence Act 1984 (as amended by s 110 Serious Organised Crime and Police Act 2005);
- a police officer can arrest on suspicion;
- private citizens (security guards, store detectives) must be sure an arrestable offence has been or is being committed.

4 There are also common law rules on arrest.

- An arrest must be made using reasonable force (*Treadaway v Chief Constable of the West Midlands* (1994)).
- The arrest must not itself be an actionable trespass (***Hsu v Commissioner of the Police of the Metropolis* (1996)**).
- The person must be informed of reasons for arrest (*Christie v Leachinsky* (1947)).
- In a citizen's arrest the person must be taken to a police station within reasonable time (*John Lewis & Co v Tims* (1952)) (or in arrest by police as soon as is reasonably practicable).
- An unreasonable period of detention can be as little as 15 minutes (*White v WP Brown* (1983)).
- PACE (1984) includes a code of conduct for police.

5 So arrest or detention should not offend the codes of practice or in any way be oppressive.

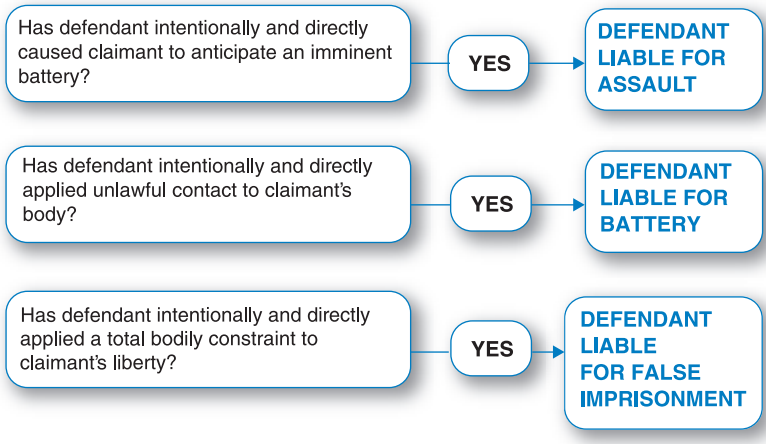
9.4 Intentional indirect harm

1 Originally if trespass was unavailable a novel action was needed.

2 To get over the problem of harm being direct rather than indirect courts accepted other principles:

- a duty not to deliberately cause harm (*Bird v Holbrook* (1828));
- an action for indirect but intentional harm (1828); ***Wilkinson v Downton* (1897)** and *Janvier v Sweeney* (1919).

3 Negligence now applies to most actions not covered by trespass. The House of Lords in ***Wainwright v Home Office* (2003)** has identified that *Wilkinson v Downton* should 'disappear' within negligence except where actual psychiatric injury has been caused.



The different ways of committing trespass to the person

9.5 Harassment

1 Section 3 Protection from Harassment Act 1997 has introduced a statutory tort entitling victims of harassment to compensation (originally aimed at 'stalking').

2 The tort requires a 'course of conduct' – so must be at least two occurrences.

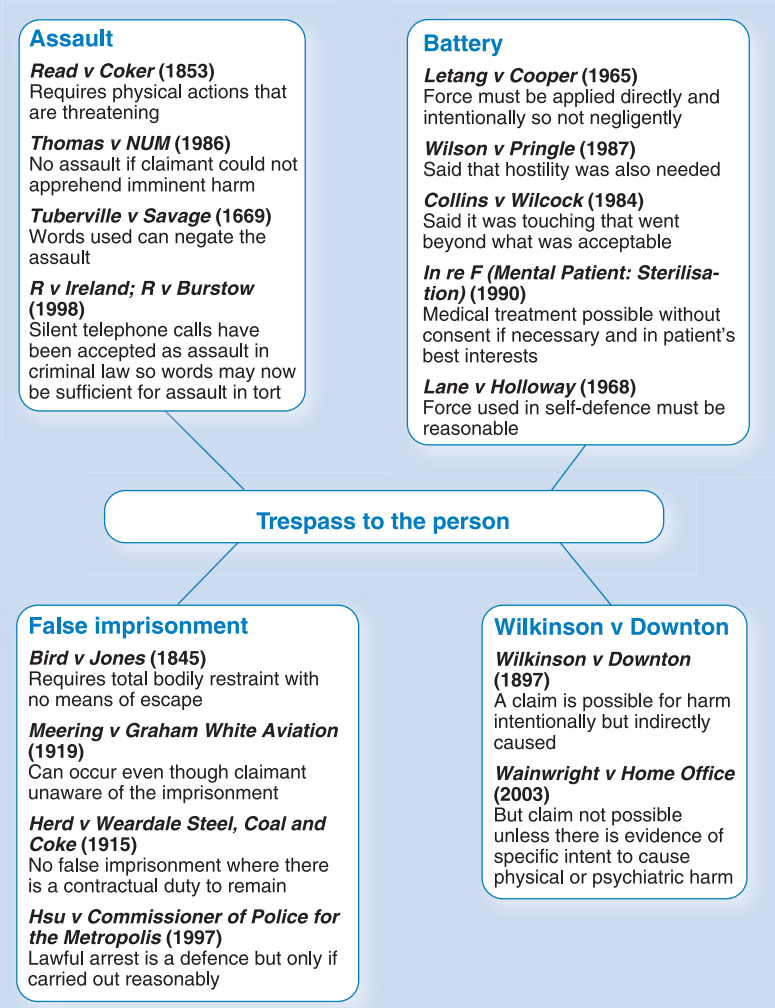
3 Conduct can be anything that a reasonable person would think amounts to harassment (*Howlett v Holding* (2006)).

4 This has now developed in the context of employers' liability for the protection of people who suffer bullying and other abuse in the workplace (*Green v DB Group Services (UK) Ltd* (2006)).

5 The course of conduct must be sufficiently serious for harassment to succeed (***Ferguson v British Gas Trading Ltd* (2009)**).

6 Foreseeability of harm is not an essential element (*Jones v Ruth* (2011)).

Key Cases Checklist



9.1.2.4 *Read v Coker* (1853) 13 CB 850

CP

Key Facts

The claimant owed the defendant rent. When the defendant told the claimant to leave the premises, the claimant refused. The defendant then ordered some employees to escort the claimant from the premises. These men surrounded the claimant, rolled up their sleeves and told him that if he did not leave they would break his neck. Held that there was an assault.

Key Law

The Court of Common Pleas held that there was a threat of violence with an ability to carry out the threat, indicated by the rolling up of sleeves but not by the words alone. This amounted to an actionable assault.

Key Judgment

Byles Serjt. explained that:

'To constitute an assault, there must be something more than a threat of violence . . . There must be some act done denoting a present ability and an intention to assault.'

9.1.2.4 *Thomas v National Union of Mineworkers* [1986] 1 Ch 20

Ch Div

Key Facts

During the miners' strike in 1984–85 working miners suffered abuse from striking miners as they were taken into the colliery in buses. Their claim for an injunction to prevent the picketing failed.

Key Law

The court held that there could be no assault since there was no possibility of the striking miners reaching the working miners as they were in buses at the time of the abuse. As such they could not have been put in any apprehension of an imminent battery.

9.1.2.6 *Tuberville v Savage* (1669) 1 Mod Rep 3 CP

Key Facts

During an argument with the claimant the defendant put his hand on his sword and said: 'If it were not Assize time I would not take such language from you.' The claim of assault failed.

Key Law

The court held that there was no assault because, while words alone cannot amount to an assault, they can make clear that an assault is not intended. The words here showed that the claimant had no intention to harm the claimant at that particular time so the claimant could not fear an impending battery.

9.1.2.6 *R v Ireland; R v Burstow* [1998] AC 147 HL HL

Key Facts

This involved joined criminal appeals on whether silence can amount to assault. In both cases the victim had suffered psychiatric harm and Ireland made numerous silent telephone calls. Burstow was in effect a 'stalker', who engaged in a long campaign of silent telephone calls and anonymous letters to a young woman with whom he had briefly gone out three years previously. The case resulted in successful convictions.

Key Law

The House was first of all prepared to accept the psychiatric injuries as 'actual bodily harm' which was a necessary element of the criminal charges. It also accepted that a person who uses silence in order to produce apprehension of immediate violence in others is guilty of assault.

Key Problem

The case is generally taken now to mean that words alone can amount to assault. However, it is a criminal case and until such time as a tort case develops *Read v Coker* (1853) is still good law.

9.2.1.1 *Letang v Cooper* [1965] 1 QB 232 CA

Key Facts

The claimant was sunbathing in the grounds of a hotel near to where cars were parked. The defendant negligently reversed over her legs, injuring her. The woman claimed three years later, which fell outside the limitation period for negligence, so she claimed in trespass instead but was unsuccessful.

Key Law

The court held that while there was direct harm caused to the woman by the defendant's negligence, there was no intention to harm her and both were required for battery. Lord Denning felt that there was no overlap between trespass and negligence although Lord Diplock felt that there could be.

Key Judgment

Lord Denning explained:

'The plaintiff . . . must also allege that he did it intentionally or negligently. If intentional, it is . . . assault and battery. If negligent and causing damage, it is . . . negligence.'

9.2.1.1 *Wilson v Pringle* [1987] 2 All ER 440 CA

Key Facts

The claimant, a 13-year-old boy, suffered injuries to his hip when a school friend, as a practical joke, pulled his bag off his shoulder causing him to fall. His claim for damages failed.

Key Law

The court referred to the words of Holt CJ in *Cole v Turner* (1704) Holt KB 108 where he stated that 'the least touching of another in anger is a battery', and held that hostility was a necessary element of an actionable battery. Since the harm occurred during ordinary horseplay this element was missing and the claim failed.

Key Problem

This view would appear to narrow the scope of battery dramatically. It would make it impossible for instance to bring battery actions against doctors who engage in treatment without the consent of the patient but who clearly would not be acting with hostility.

Key Link

Collins v Wilcock [1984] 3 All ER 374.

9.2.2.2 *Nash v Sheen* [1953] CLY 3726 QBD

Key Facts

The claimant went to the defendant's hairdressing salon and asked for a 'permanent wave'. Instead she was given a 'tone rinse'. This not only dyed her hair an unpleasant colour but also caused a painful rash all over her body. The defendant was liable in battery.

Key Law

The court held that the defendant had applied the tone rinse to the claimant's scalp without any consent. The essential elements of a direct intentional interference were present so there was liability.

9.2.2.4 *Collins v Wilcock* [1984] 3 All ER 374 DC

Key Facts

A woman police officer was trying to take the name and address of a woman suspected of soliciting. When the suspect went to leave, the officer took hold of her arm but did not arrest her.

Key Law

The court held that, since the woman was not being arrested at the time the officer intentionally restrained her, which may otherwise have made the officer's action lawful, there was a battery.

Key Judgment

Lord Goff said:

'since her action went beyond the generally acceptable conduct of touching a person to engage his or her attention, it must follow . . . that her action constituted a battery'.

Key Comment

Lord Goff's definition of battery appears to be much more sensible and capable of general application than that of the Court of Appeal in *Wilson v Pringle* (1987).

9.2.2.5 *Re T (an adult) (refusal of medical treatment)* [1992] 3 WLR 782

CA

Key Facts

The claimant was injured in a car crash and needed an emergency Caesarean section when she prematurely went into labour. As a result she needed a blood transfusion. She was a Jehovah's Witness, and refused the transfusion on religious grounds but the doctors gave it anyway. Her action in battery failed.

Key Law

The Court of Appeal accepted that in the case the patient was delirious at the time of refusal and was acting under undue influence by her mother, so that there was an emergency situation and the doctors in giving the transfusion had acted in her best interests. The court, however, accepted the absolute right of a competent patient to refuse treatment even to the point of death.

Key Judgment

Lord Donaldson MR stated that:

'An adult patient who . . . suffers from no mental incapacity has an absolute right to choose whether to consent to medical treatment, to refuse it or to choose one rather than another of the treatments being offered.'

9.2.2.5 *In re F (Mental Patient: Sterilisation)* [1990] 2 AC 1

HL

Key Facts

A 30-year-old woman in a mental institution had a mental age of about four or five but had become sexually active with another inmate. It was felt that if she became pregnant this would be disastrous for her. As contraception was inappropriate in the circumstances, the doctors applied to the court for a compulsory sterilisation. The treatment was allowed.

Key Law

The House held that, despite the inability of the claimant to consent, the sterilisation would be allowed because it was in her best interests, and it based its view on the principle of necessity.

Key Comment

The majority of judges in both the House of Lords (now the Supreme Court) and the Court of Appeal felt that the treatment would have been lawful without seeking a declaration from the courts. Nevertheless the issues in medical battery are often complex and it is important that individual cases should be referred to the courts.

Key Link

Re S (Adult: refusal of medical treatment) [1992] 3 WLR 806; *Re C (Adult: refusal of medical treatment)* [1994] 1 WLR 290.

9.2.3.1 *Condon v Basi* [1985] 2 All ER 453

CA

Key Facts

The claimant suffered a broken leg in a football game after a particularly reckless and dangerous tackle by the defendant. His claim in negligence succeeded.

Key Law

The court rejected the defendant's argument that the mere fact of participation in a sport automatically indicated an

acceptance of the risk of harm that would relieve a defendant of any duty of care. The tackle fell out of the normal risks associated with the game and could not come within the defence of *volenti*.

Key Comment

It must be remembered that this is in fact a negligence case. However, the principles on consent are just as appropriate when applied to battery in a sporting context.

9.2.3.3 *Lane v Holloway* [1968] 1 QB 379 CA

Key Facts

A strained relationship existed between some neighbours. When one of them, the defendant, came home drunk and rowdy one night he was told by the woman next door to be quiet. He replied 'Shut up you monkey faced tart'. This then led to a fight between the defendant and the woman's husband. The defendant made a friendly and ineffectual shove at the husband who then beat him in the face so that he required 19 stitches. This attack was out of proportion to the gestures of the drunken man and the defence of self-defence failed.

Key Law

The court held that for the defence to apply, only reasonable force was appropriate. The reaction here was out of proportion to the verbal provocation by the claimant and the defence failed.

Key Link

Ashley v Chief Constable of Sussex Police (2008) UKHL 25.

9.3.1.3 *Bird v Jones* (1845) 7 QB 742 QB

Key Facts

The claimant wanted to cross Hammersmith Bridge. The footpath was closed and cordoned off for people to watch a regatta so he was invited by police officers to return the

way that he had come. He refused and lost his subsequent action for false imprisonment.

Key Law

The court held that for the tort to apply there must be a total bodily restraint. Since there was a way of him getting away there was no unlawful restraint and no actionable trespass.

Key Judgment

Coleridge J suggested:

'it is one part of the definition of freedom to be able to go whither-soever one pleases; but imprisonment is something more than the mere loss of this power; it includes the notion of restraint within some limits defined by a will or power exterior to our own.'

9.3.1.7 *Meering v Graham White Aviation* (1919) 122 LT 44 CA

Key Facts

The claimant was questioned in relation to thefts from his employer. Unknown to him, two men were posted at the door to prevent him from leaving. His claim for false imprisonment succeeded.

Key Law

The court held that knowledge of the imprisonment was not an essential element of the tort and therefore as the claimant had been held without lawful cause there was indeed a false imprisonment.

9.3.1.9 *Robinson v Balmain New Ferry* [1910] AC 295 PC

Key Facts

The claimant had entered an enclosed wharf in order to board the ferry from Sydney to Balmain. Payment of a penny was made on exiting the wharf. The claimant in fact

missed the ferry and as the next ferry was not due for another 20 minutes, he wished to exit. The gate manager would not allow him to exit without paying a penny, which he refused to do. His claim for false imprisonment failed.

Key Law

The court held that there was no false imprisonment because by passing through the turnstiles the claimant had agreed to be bound by the contractual terms.

9.3.1.10

Herd v Weardale Steel, Coal and Coke Co [1915] AC 67

HL

Key Facts

The claimants, who were miners, had entered the mine but towards the start of their shift, decided that they were being asked to do work that was too dangerous so they asked to be returned in the cages to the surface. The employers refused and they were not allowed out until the end of their shift. Their action for false imprisonment failed.

Key Law

The court held that there was no false imprisonment since the men had already contracted to stay down the mine for a specific time and the employer was not obliged to use the lift until then. This was a reasonable condition for release.

9.3.2.4

Hsu v Commissioner of Police of the Metropolis [1997] 3 WLR 402

QBD

Key Facts

The claimant, who was a hairdresser, refused to allow police officers without a warrant to enter his house. He was grabbed, handcuffed, and then thrown into a police van where he was punched, kicked, and verbally abused. He was finally released from custody wearing only his jeans and flip-flops and had to walk two miles home where he found his door open and property stolen. At hospital he was found to have extensive bruising and blood in his urine. His complaint to the Police Complaints Authority succeeded and he sued successfully in trespass to the person.

Key Law

The court found that there was no lawful justification for his detention and the police had not used reasonable force.

9.4.2 *Wilkinson v Downton* [1897] 2 QB 57

QBD

Key Facts

The claimant suffered severe shock after the defendant had told her as a joke that her husband had been seriously injured in an accident. Her claim for damages succeeded.

Key Law

The court held that, since there was no direct interference, an action in trespass was not possible. However, the court found that there was an intentional act that was calculated to cause harm indirectly for which the defendant must be liable, since it was reasonable to assume that the harm was of a type that could be expected of a reasonable person in the circumstances.

9.4.3 *Wainwright v Home Office* [2003] UKHL 53; [2003] 3 WLR 1137

HL

Key Facts

A mother and son, the claimants, visited a prisoner in prison and were subjected to full strip searches, which were not authorised under the prison rules, in order to check for drugs. The mother suffered emotional distress as a consequence but the son suffered post-traumatic stress disorder. The claimants alleged that the searches were an invasion of their privacy and also that the rule in *Wilkinson v Downton* (1897) applied. Their actions for damages failed.

Key Law

The House of Lords (now the Supreme Court) first of all rejected the idea that there was a common law tort of invasion of privacy. Secondly, it held that the rule in *Wilkinson v Downton* (1897) could not apply without proof of a specific intention to cause either physical or psychiatric injury.

Key Comment

Mention was made in the case of the Protection from Harassment Act 1997. This requires a course of action of at least two incidents so the rule in *Wilkinson v Downton* still survives for single incidents that are intentional but cause damage indirectly.

9.5.5 *Ferguson v British Gas Trading Ltd* [2009] EWCA Civ 46

CA

Key Facts

The claimant, a customer of British Gas, changed to a different supplier. British Gas continued to send her bills for gas it had not supplied and later sent several letters threatening to cut off her gas supply, to start legal proceedings against her and to inform a credit rating agency. Despite her contacting the company several times, the sending of the bills and threatening letters continued.

These were generated by a computer rather than an individual. The claimant alleged harassment.

Key Law

The Court of Appeal held that the company's conduct was sufficiently serious to amount to harassment, and there was no policy reason to treat a corporation differently to an individual.

Key Comment

The court held that, although conduct must be serious for a claim under s 3 of the Act, the fact of parallel criminal and civil liability is not significant in determining civil liability.

10 Torts affecting reputation

Classifications

Libel:

- permanent form, e.g. in writing, but also films (*Youssoupoff v MGM Pictures*);
- wax effigy (*Monson v Tussauds*);
- actionable *per se*.

Slander:

- transitory form, e.g. spoken;
- requires proof of damage unless suggesting:
  - i) an offence involving prison;
  - ii) incompetence in a trade, profession or employment

DEFAMATION

Ingredients of the tort:

Publication:

- involves making statement to a third party;
- so includes when defendant knows that someone other than claimant will open a letter (*Theaker v Richardson*);
- and things like graffiti (*Byrne v Deane*);
- but not where claimant shows a letter to a third party (*Hinderer v Cole*);
- nor remarks in a sealed letter (*Huth v Huth*).

Of a defamatory statement:

- judge decides whether statement is capable of being defamatory and jury whether it is in fact;
- must lower esteem of claimant in the minds of right-thinking people (*Sim v Stretch*);
- can be any derogatory remarks (*Cornwell v Daily Mail*);
- or can be by innuendo (*Monson v Tussauds* and *Tolley v Fry*);
- but not if implying honesty (*Byrne v Deane*).

Referring to the claimant:

- false statement must refer to claimant;
- which may even be through a fictional name (*Hulton v Jones*);
- but cannot include a class that is too broad and vague (*Le Fanu v Malcolmson*).

Which causes serious harm to the claiment's reputation –s1 Defamtion Act 2013

Defences

Truth –s2 Defamation Act 2013

- the truth can never be defamatory;
- burden is on defendant to show statement is true (*Archer v The Star*);
- can be complex where general rather than specific allegations made (*Bookbinder v Tebbitt*).

Honest opinion: s5 Defamtion Act 2013

- Statement was matter of honest opinion
- An honest person could have held the opinion
- Which is based on fact

Responsible publication on matters of public interest:

- Must be of public interest ***London Artists v Littler***
- Defendant must have acted responsibly ***Telnikoff v Matusevich***

Absolute privilege:

- applies in Parliament and court and fair reporting of either, and to client.
- applies to memos, references, reports on Parliament not in *Hansard*;
- can be defeated if malice shown.

Unintentional defamation:

- where defendant does not know of defamation – now in ss 2–4 1996 Act.

Innocent dissemination:

- where defamation repeated innocently (*Vizetelly v Mudies Select Library*).

***Volenti*:**

- where defendant has in effect invited publication (*Moore v News of the World*).

10.1 Defamation

10.1.1 The categories of defamation

1 The main tort developed to protect reputation.

2 As such it can be made in a number of ways, but there are two specific categories: libel and slander.

3 The general distinction is between 'permanent' and 'transitory':

- libel has been called a written form and slander a spoken form;
- this view is no longer adequate because of modern technology;
- the difference owes more to origins than real justification;
- it has been discarded by most commonwealth jurisdictions;
- this was recommended in the UK by the Faulkes Report;
- but the Defamation Act 1996 did not address this issue;
- and nor does the Defamation Act 2013.

4 The two categories do have two important distinctions:

a) Libel can be crime as well as tort (*R v Lemon* (1977)).

b) Libel is actionable per se; for slander damage must be shown except in some limited circumstances:

- imputation of an offence involving imprisonment;
- imputation of unfitness or incompetence in a trade, profession, office or calling (and now by Defamation Act 1952 for any employment provided claimant could be harmed as a result);
- imputation of a contagious disease now requires proving special damage under s14 Defamation Act 2013.

5 The difference between permanent and transitory is not always obvious, but there are acknowledged situations:

- a written defamation is obviously libel;
- films are libels (***Youssoupoff v MGM Pictures Ltd* (1934)**);
- radio and television broadcasts are libel under the Defamation Act 1952 and the Broadcasting Act 1990;
- by s 4 Theatres Act 1968 a defamation in a public performance of a play is also libel;
- wax effigy in a museum is libel (***Monson v Tussauds* (1894)**);

- a red light hung outside a woman's house could be libel;
- the spoken word in general is slander;
- gestures in general are slander;
- tapes are probably slander because they can be wiped;
- but other recordings, such as CD and vinyl, whether made in studios or from live performance, are less easy to categorise.

10.1.2 The definition and ingredients of the tort

Definition

1 Defined as 'the publishing of a defamatory statement which refers to the claimant and which has no lawful justification'.

2 Section 1 Defamation Act 2013 adds another element, that the defamation has caused serious harm to the claimant's reputation.

3 Each separate element of the tort must be proved.

Publication

1 This involves communicating the statement to a third party.

2 Each repeat is a fresh publication and therefore actionable, so there can be many defendants to a defamation action.

3 Publication could include:

- a postcard (as it is assumed it will be seen by a third party);
- every sale of a newspaper;
- every lending of a book from a library;
- a letter addressed to the wrong person;
- a letter the defendant knows someone besides the claimant might open (*Pullman v Hill* (1891) and ***Theaker v Richardson* (1962)**);
- graffiti that cannot be removed (***Byrne v Deane* (1937)**);
- making a remark so that it is overheard;
- the defendant can also be liable for the consequences of a defamatory statement that (s)he knows will be repeated (*Slipper v BBC* (1991));
- it is uncertain whether repeating the remark through internal mail amounts to fresh publication.

4 In the following there is generally no publication:

- a statement made only to the claimant who then shows it to a third party (*Hinderer v Cole* (1977));
- communication between spouses only;
- a letter addressed only to the claimant;
- remarks contained in a sealed letter (*Huth v Huth* (1915));
- an 'innocent dissemination' (***Vizetelly v Mudie's Select Library Ltd* (1900)**);
- an internet search engine has been held not to be a publisher *Metropolitan International Schools Ltd v Designtechnica Corp* (2009).

The defamatory statement

1 Defamation trials traditionally involved a jury but there is a presumption against the use of juries in the Defamation Act 2013.

2 The judge must decide whether the words in fact are defamatory: 'a statement which tends to lower the plaintiff in the minds of right-thinking members of society generally, and in particular to cause him to be regarded with feelings of hatred, contempt, ridicule, fear and disesteem' (Lord Atkin in *Sim v Stretch* (1935)).

3 So defamatory remarks depend entirely on context and include:

- vulgar abuse (*Cornwell v Daily Mail* (1989));
- derogatory remarks (*Savalas v Associated Newspapers* (1976) and *Roach v Newsgroup Newspapers Ltd* (1992));
- references to a person's moral character (*Stark v Sunday People* (1988)).

4 Implying honesty is not defamatory (*Byrne v Deane* (1937)); nor are statements that lead to sympathy rather than scorn (*Grappelli v Derek Block Holdings Ltd* (1981)).

5 'Innuendo' can also be defamation:

- so, words can defame because of their juxtaposition with other things (*Monson v Tussauds* (1894) and *Cosmos v BBC* (1976));
- or by containing hidden meaning (***Tolley v Fry & Sons Ltd* (1931)** and ***Cassidy v Daily Mirror* (1929)**);
- although a complaint of such a meaning can bring other evidence into court (*Allsopp v Church of England Newspaper Ltd* (1972)).

Referring to the claimant

1 The claimant must show that the statement referred to him/her:
   - this is easy if (s)he is named:
   - it is sufficient if claimant can show people might think it refers to him/her;
   - this may be shown even if a fictional name is used (***Hulton & Co v Jones* (1910)**);
   - or if two people have the same name (*Newstead v London Express Newspapers Ltd* (1940));
   - or with cartoons (*Tolley*).
2 Vague generalisations about a broad class are difficult to relate to a particular claimant.
   - Class defamation is possible if a claimant can show (s)he is identifiable as a member of the class. Compare ***Knupffer v London Express Newspapers Ltd* (1944)** with *Le Fanu v Malcolmson* (1848).

10.1.3 Defences

Without lawful justification

1 'Without justification' refers to the existence or not of a defence.
2 Traditional common law defences have been added to by statute.
3 Each is complex and usually applies in specific circumstances.

Truth under s 2 Defamation Act 2013

1 Introduced by s 2 Defamation Act 2013 (replacing justification).
2 This is a complete defence, since truth can never be defamatory.
3 It is not straightforward because the burden of proof is on the defendant to show that the allegation was true (*Archer v The Star* (1987)).
4 Problems arise where the defendant makes a general rather than a specific allegation (***Bookbinder v Tebbitt* (1989)**).
5 By s 4 Defamation Act 2013 the defence will not fail merely because every charge is not true.
6 However, there are important exceptions to this principle (*Charleston v Mirror Group* (1996)).
7 Possible on revealing spent conviction if no malice is shown.

Honest opinion

1 Under s 5 Defamation Act 2013 this defence replaced fair comment.

2 Fair comment mainly protected the press in expressing opinions of public interest but honest opinion applies more generally.

3 The basis of honest opinion would be:

- The statement was a matter of honest opinion.
- The statement formed the basis of the opinion.
- An honest person could have held the opinion based on current facts or privileged information.

4 The opinion must be based on facts (***Kemsley v Foot* (1952)**).

Responsible publication on matters of public interest

1 Defence introduced by s 6 Defamation Act 2013.

2 So the statement must involve something of public interest (*London Artists Ltd v Littler* (1969)).

3 The defendant must have acted responsibly in publishing the statement – under the previous defence of fair comment this would have been measured objectively (***Telnikoff v Matusevitch* (1992)**).

4 Acting responsibly would be measured against:

- the nature of the publication and its context;
- the seriousness of the imputation conveyed by the statement;
- the relevance of the imputation conveyed by the statement to the matter of public interest concerned;
- the importance of the matter of public interest concerned;
- the information the defendant had before publishing the statement; and
- what the defendant knew about the reliability of that information;
- whether the defendant sought the claimant's views on the statement before publishing it and whether an account of any views the claimant expressed was published with the statement;
- whether the defendant took any other steps to verify the truth of the imputation conveyed by the statement;
- the timing of the statement's publication.

Absolute privilege

1 In certain situations freedom of speech is essential.

2 These are given absolute protection of the freedom and include:

- statements made in either House of Parliament (Bill of Rights 1688), which can now be waived under s 13 Defamation Act 1996;
- official reports of parliamentary proceedings, i.e. *Hansard*;
- judicial proceedings (which covers judge, jury, lawyers, parties, and witnesses, but not the public) (*Mahon and another v Rahn and others* (2000));
- 'fair, accurate and contemporaneous' reports of judicial proceedings (s 3 Law of Libel Amendment Act 1888 for the press and now s 9(2) Defamation Act 1952 for broadcasters);
- communications between lawyer and client;
- communications between officers of state.

3 And under s 9 Defamation Act 2013 is extended to courts outside of the UK and courts set up by the United Nations.

Qualified privilege

1 This is complex and different from absolute privilege since it concerns the communication itself, rather than the occasion when it is made.

2 So it can be defeated by showing malice. Compare *Horrocks v Lowe* (1974) with *Angel v Bushel Ltd* (1968).

3 But it applies in a number of situations:

- in exercise of a duty, e.g. a comment made in a reference;
- in protecting an interest, e.g. a comment made in internal memos within a business;
- in the fair, accurate and contemporaneous reports of parliamentary proceedings, i.e. not in *Hansard* (***Reynolds v Times Newspapers* (1998)**);
- in fair reporting of judicial proceedings (under the Defamation Act 1996 this includes all court and official proceedings or official proceedings worldwide);
- in fair and accurate reporting of public meetings (*Turkington and others v Times Newspapers* (2000));
- a complex list under s 7 Defamation Act 1952 also includes:
  - i) those privileged without an explanation under Part 1 of the Schedule, e.g. public proceedings in Commonwealth Parliaments;

ii) those privileged subject to an explanation under Part 2 of the Schedule, e.g. fair and accurate reports of trade associations.

4 And under s 9 Defamation Act 2013 is extended to fair and accurate reports of proceedings of courts outside of the UK.

NB in either case if malice is proved it defeats the defence.

Unintentional defamation

1 This applies under s 4 Defamation Act 1952 where a defendant is unaware of the defamatory nature of remarks made.

2 It remedies situations like those in *Hulton* and *Cassidy*.

3 The statement must have been innocently made.

4 Defendant may offer amends by suitable apology, payment into court, supported by affidavit saying why publication was innocent (*Nail v News Group Newspapers* (2005)):

- if accepted there can be no further action;
- if not the defendant may still have a defence if (s)he shows:
  - i) publication was innocent and no negligence in making it;
  - ii) offer of amends was made as soon as possible;
  - iii) the statement was made without malice.

5 The defence was criticised by the Faulkes Committee.

6 Now under ss 2–4 Defamation Act 1996 there is a rebuttable presumption of innocent publication.

Innocent dissemination

1 Protects producers of mechanical reproduction or distribution if they can show that:

- they were innocent of knowledge of the defamation;
- there was nothing to alert them to the defamation;
- their ignorance of the defamation was not negligence.

Volenti non fit injuria

1 Consent to the publication may defeat a claim.

2 It may apply because claimant has passed material on (*Hinderer v Cole*).

3 It may apply because claimant has invited publication (*Moore v News of the World* (1972)).

Accord and satisfaction

1 Applies if the claimant gives up the right to sue in return for a payment and/or apology.

10.1.4 Remedies

Injunctions

1 Interim injunctions are granted to prevent publication/broadcast.

2 However, this is often accused of 'gagging' free speech.

Damages

1 There are three types in defamation actions:

- **nominal:** if case is proven but little or no damage is suffered;
- **contemptuous:** awarded where, even though the claimant wins the case, the jury feel the action should not have been brought (*Dering v Uris* (1964), where damages of $\frac{1}{2}$d were awarded);
- **exemplary:** used to punish defendant, so damages high.

2 Traditionally there were many criticisms concerning damages while defamation actions were heard by juries which also decided on damages:

- that juries awarded them at all;
- that judges in other civil actions (e.g. personal injury) are restrained in the damages they may award;
- that juries were inconsistent in their awards and awarded excessive sums (*Lord Aldington v Tolstoy and Watts* (1989) – £1,500,000); (*Donovan v Face* (1992) – £100,000 damages nearly ruined the magazine);
- overlarge sums could be reduced, e.g. *Sutcliffe v Private Eye* (1989), where damages of £650,000 were reduced to £6,000. But the jury's award were not interfered with unless they exceeded what any jury could have considered reasonable (*Kiam II v MGN Ltd* (2002));
- but all of these problems have been remedied by s 13 Defamation Act 2013, which creates a presumption against the use of juries.

10.1.5 Reform of defamation law

1 The Faulkes Committee in 1975 suggested many reforms:

- ending the distinction between libel and slander;

- altering the defence of justification to one of truth;
- improving the defence of fair comment so it only fails if the comment is not actually a true opinion;
- qualified privilege to be defeated if the maker takes advantage of the privilege rather than only if there is malice;
- simplifying the procedural requirements for unintentional defamation;
- making exemplary damage awards impossible;
- allowing actions for defaming the dead;
- reducing the limitation period to three years;
- making legal aid available;
- giving judges the responsibility for awarding damages.

2 Later suggestions for simplified procedures followed.

3 The Defamation Act 1996 attempted to partly reform the law, but made fairly minimal reforms which included:

- creating a new fast-track system for claims under £10,000 to dispose quickly of small cases;
- introducing a new 'offer of amends' defence for newspapers in the case of unintentional defamation;
- certain cases to be heard by a judge alone;
- reducing the limitation period to one year.

4 The Defamation Act 2013 answers many of the criticisms above and makes more far-reaching changes as indicated in earlier sections.

10.1.6 Justifications and criticisms of the tort

1 Justified because we are each entitled to protect our reputation.

2 However, this right must be balanced with freedom of speech:

- so the truth, however damaging, must not be suppressed;
- but the common criticism of defamation law is that it does so.

3 The UK has been very out of line with human rights principles:

- inconsistent with US law – 1st amendment to the Constitution;
- out of line with Art 10 European Convention on Human Rights:

  'Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive information

and ideas without interference by public authority and regardless of frontiers';

- this was recognised before incorporation by Human Rights Act 1988 (*Rantzen v Mirror Group Newspapers* (1996)). See *Steel and Morris v UK* (2005) for breach of Article 6 and Article 10;
- but the Act should remedy this.

4 It also favours the rich, since legal aid is unavailable.

- this can be avoided by bringing an action under malicious falsehood (*Joyce v Sengupta* (1993));
- costs are very prohibitive (*Taylforth v Metropolitan Commissioner & The Sun Newspaper* (1994));
- as a result actions always seem to involve the press and the famous.

5 The defence of privilege can also cause practical problems, but these can be overcome by claiming negligence instead (*Spring v Guardian Assurance plc* (1994)).

6 The law also fails to protect the dead, whose actions die with them.

10.2 Malicious falsehood and deceit

10.2.1 Deceit

1 In deceit a defendant makes a false statement to the claimant, or a class of people including the claimant, knowing it is false, or being reckless, intending that the claimant will rely on it for his/her conduct, and the claimant does rely on it and suffers damage.

2 A successful claimant can recover for both physical injury and financial loss (*Burrows v Rhodes* (1899)).

3 The tort can also apply to misrepresentations in contract.

10.2.2 The ingredients of deceit

The making of a false statement

1 The false statement must concern a material fact, not a mere opinion (*Bisset v Wilkinson* (1927)).

2 This does not apply if it is based on specialist knowledge (*Esso v Marden* (1976)).

3 It may be a false statement of fact to misrepresent an opinion or knowledge not actually held (*Edgington v Fitzmaurice* (1885)).

4 A false statement includes failing to correct a true statement that becomes false (*With v O'Flanagan* (1936)).

The ingredients of deceit

Defendant makes a false statement:
- so it must be a statement of fact, not opinion (*Bisset v Wilkinson*);
- but can be failing to correct a true statement that becomes false (*With v O'Flanagan*).

Defendant knows that the statement is false:
- so makes the statement deliberately, or without belief in its truth, or reckless as to its truth (*Derry v Peek*);
- and an employer can be vicariously liable for the false statements of his/her employee, or a principal for those of his/her agent.

Defendant intends claimant to act upon the statement:
- which must be by the person defendant intends (*Peek v Gunley*);
- though the statement need not be made to the claimant (*Langridge v Levy*).

The claimant must rely on the false statement:
- and show detriment by acting on it (*Smith v Chadwick*).

Claimant must suffer damage as a result:
- and can claim for direct consequence loss (*Doyle v Olby (Ironmongers)*).

DECEIT AND MALICIOUS FALSEHOOD

The ingredients of malicious falsehood

Defendant makes a false statement about claimant:
- so it must refer to claimant to be actionable (*Cambridge University Press v University Tutorial Press*).

The statement is made to a third party:
- similar requirement to publication in defamation that claimant's reputation harmed.

The statement is made with malice:
- so must involve absence of just cause or belief (*Joyce v Motor Surveys*).

The statement is calculated to cause damage to claimant:
- so requires specific references to claimant (*White v Mellin*).

Claimant suffers damage or loss:
- which can be general, but must be foreseeable, and special damage need not be proved.

Knowledge that the statement is false

1 The test is in ***Derry v Peek* (1889)**, where false statement was made:
   - knowingly; or
   - without belief in its truth; or
   - reckless as to whether it was true or not.
2 If a servant acting in the course of his employment commits deceit then the master is vicariously liable.
3 The same is likely to be true of agents and their principals.
4 And where the misrepresentation is made on behalf of another party if all other elements of the tort are satisfied (*Standard Chartered Bank v Pakistan National Shipping Corporation (Nos 2 and 4)* (2002)).

Intention that the statement should be acted upon

1 The defendant must intend the statement to be acted upon.
2 Only people in the class that the defendant intended to act upon the statement can sue (*Peek v Gurney* (1873)).
3 So the representation need not be made personally to the claimant (*Langridge v Levy* (1837)).
4 The mere fact that it is foreseeable that the claimant may act on the statement is not enough (*Caparo v Dickman* (1990)).

Reliance on the statement

1 The claimant must show detriment caused by acting on the statement (*Smith v Chadwick* (1884)).
2 It need not be the only reason that he acted as he did.

Damage suffered by the claimant

1 The claimant must suffer damage e.g. economic loss, personal injury, property damage, distress (*Archer v Brown* (1984)).
2 Any losses that are a direct consequence of the deceit are recoverable (*Doyle v Olby (Ironmongers) Ltd* (1969)).
3 And damages for loss of a chance are also available in deceit (*4 Eng v Harper* (2008)).

10.2.3 Malicious falsehood

1 Also known as injurious falsehood, a generalisation of specific cases (*Ratcliffe v Evans* (1892)) with origins in slander of title – questioning a person's title to land and making it less saleable.

2 In the 19th century it extended to include slander of goods.

3 It now includes protecting personal business interests (***Kaye v Robertson* (1991)** and *Joyce v Sengupta* (1993)).

4 There must be a false statement about the claimant, made to a third party, and made maliciously, calculated to cause the claimant damage, and actually causing damage to the claimant.

10.2.4 The ingredients of the tort

A false statement about the claimant

1 The statement must be false, so trade puffs are not actionable, but false statements running down competitors' goods may be (*De Beers Abrasive Products Ltd v International General Electric Co of New York* (1975)).

2 A statement not referring to the claimant is not actionable even if it causes damage (*Cambridge University Press v University Tutorial Press* (1928)).

A statement made to a third party

1 A similar requirement to publication in defamation.

2 Third parties must be turned off the claimant before (s)he suffers loss.

Malice

1 Claimant must prove that the statement was made with malice.

2 Malice need not necessarily involve dishonesty.

3 It must involve the absence of just cause or of belief in the statement (*Joyce v Motor Surveys Ltd* (1948)).

Calculated to cause damage to the claimant

1 Calculated means foreseeable.

2 So specific references rather than general ones are necessary. Compare *Lyne v Nicholls* (1906) with *White v Mellin* (1895).

Damage suffered by the claimant

1 The claimant must show actual loss.

2 Loss can be general rather than, for example, loss of a specific customer.

3 Damage can include property damage and financial loss.

4 The test for remoteness is foreseeability.

5 The claimant need not prove special damage:

- if the statement is in written or permanent form and calculated to cause financial loss; or
- calculated to cause the claimant a financial loss in respect of a claimant's office, profession, calling, trade, or business at the time of publication (s 3(i) Defamation Act (1952)).

6 Suing in defamation instead can be advantageous (*Fielding v Variety Incorporated* (1967)).

Key Cases Checklist

Defamation

***Monson v Tussauds* (1894)**
Libel is defamation in permanent form e.g. a waxwork effigy

***Theaker v Richardson* (1962)**
There must be a publication to a third party which could be where someone who might be expected to open mail does so

***Hulton & Co v Jones* (1910)**
The defamation must refer to the claimant but it is sufficient that it is reasonable to suppose that acquaintances might think it refers to him

***Tolley v Fry* (1931)**
Defamation can be by innuendo or by implication

***Byrne v Deane* (1937)**
The statement must lower the estimation of the claimant in the minds of right-thinking people so following the law would not lower that estimation

***Knupffer v London Express Newspapers Ltd* (1944)**
Class actions usually fail unless the claimant is individually recognisable

***Bookbinder v Tebbitt* (1989)**
The truth can never be defamatory

***Kemsley v Foot* (1952)**
Fair comment is a defence where it is genuine opinion based on facts and in the public interest

***Reynolds v Times Newspapers* (2001)**
Qualified privilege defence depends on ten key factors

Torts Affecting Reputation

Deceit

***Derry v Peek* (1889)**
Liability possible where defendant made a false representation knowingly, without belief in its truth, or reckless as to whether it was true or not

Malicious falsehood

***Kaye v Robertson* (1991)**
The false statement must be made maliciously and calculated to cause the claimant financial loss

10.1.1.5 ***Monson v Tussauds Ltd*** **[1894] 1 QB 671** QBD

Key Facts

A man accused of murder was released on a 'not proven' verdict by a Scottish jury. The defendant produced a wax effigy of the man and placed it at the entrance to the Chamber of Horrors.

Key Law

The court held that the effigy on its own did not amount to defamation but its juxtaposition with other tableaux in the Chamber of Horrors indicated that he was in fact guilty and thus did. Libel is defamation in permanent form and the court held that the waxwork was sufficiently permanent to be libel.

10.1.1.5 ***Youssoupoff v MGM Pictures Ltd*** **(1934) 50 TLR 581** CA

Key Facts

A film about the life of Rasputin suggested that he had seduced a Princess Natasha, one of the Russian Royal family, who was recognisable as the claimant.

Key Law

The court held that even though the film did not suggest that the princess was at all responsible for the seduction, the suggestion was still sufficient to damage her social standing. The film was accepted as defamation in permanent form and was thus libel.

Key Comment

Now attitudes have changed and Defomation Act 2013 has repealed the Slander of Woman Act 1891.

10.1.2 *Theaker v Richardson* [1962] 1 WLR 151 CA

Key Facts

A member of a local council wrote a letter to another member of the council in which he called her a 'lying, low down brothel keeping whore and thief'. The claimant's husband opened and read the letter. The claimant's action for libel succeeded.

Key Law

The court identified that there was a publication since it was reasonable to assume that the husband, who was the claimant's election agent, might open it, thinking it was an election address.

10.1.2 *Hulton & Co v Jones* [1910] AC 20 CA

Key Facts

A humorous fictitious article in a newspaper about the London to Dieppe motor rally suggested that the central character called Artemus Jones and described as a church-warden from Peckham had engaged in an affair. The claimant, also called Artemus Jones, who was a barrister from Wales, sued successfully for libel.

Key Law

The court held that it was not necessary to show that the defamation was intended to refer to the claimant, only that people who knew him might easily believe that the article referred to him.

10.1.2 *Tolley v Fry & Sons Ltd* [1931] AC 333 HL

Key Facts

An advertising poster for Fry's chocolate bars included a caricature of a famous amateur golfer of the time with a bar of chocolate sticking out of his back pocket. He sued

successfully in libel because he was disturbed that his amateur status would be compromised because people would think that he had been paid.

Key Law

The court held that the advert was defamation by innuendo; the suggestion of breaching amateur rules was implied.

10.1.2 *Byrne v Deane* [1937] 1 KB 818 CA

Key Facts

After a tip-off from an informer, police had removed an illegal gambling machine from a golf club. Later a poem appeared on the notice board which included the words 'he who gave the game away may he byrne in hell'. The claimant argued that the spelling was an accusation that he was the informer and suggested disloyalty on his part. His claim failed.

Key Law

While there was a publication, the court held that the words were not defamatory since the inference in the poem was that the claimant had done his duty as a law-abiding citizen, which could not lower his estimation in the minds of right-thinking people.

Key Judgment

Greene LJ was of the opinion that *'to say of a man that he has put in motion the proper machinery for suppressing crime is a thing which . . . cannot, on the face of it, be defamatory'.*

10.1.2 *Cassidy v Daily Mirror Newspapers Ltd* [1929] 2 KB 331 CA

Key Facts

Mrs Cassidy sued successfully when a picture was taken of her husband at the races, accompanied by a young woman who was described in the caption as being recently engaged.

Key Law

The court held that by innuendo the photograph implied that the young woman was Mr Cassidy's fiancé and that Mr and Mrs Cassidy were not married, which had caused and could cause her friends to doubt her moral character. It was therefore defamatory.

Key Judgment

Russell LJ explained that:

'Liability for libel does not depend on the intention of the defamer, but on the fact of the defamation.'

Scrutton LJ added:

'If newspapers . . . publish statements which may be defamatory . . . without inquiry as to their truth, in order to make their newspaper more attractive, they must take the consequences if . . . their statements are found to be untrue.'

10.1.2 *Knupffer v London Express Newspapers Ltd* [1944] AC 116

HL

Key Facts

An article about the Young Russian Party described it as unpatriotic and being willing to help Hitler. Knupffer was head of the British branch of the party which had only 24 members. His claim failed.

Key Law

The court held that, since the party was in fact international, no individual could be easily identified in the article and reasonable people would not think that it referred to the claimant in particular.

Key Judgment

Lord Atkin explained:

'The reason why a libel published of a large or indeterminate number of persons described by some general name generally fails to be actionable is the difficulty of establishing that the plaintiff was, in fact, included in the defamatory statement.'

Key Comment

Actions alleging defamation of a class of people will almost always fail unless the class is so small that it is possible to recognise the individual claimant in the class, e.g. 'Footballers are corrupt villains' would fail, but 'The goal-keepers at Badborough United are renowned for taking money to lose matches' might succeed.

10.1.2 *Vizetelly v Mudie's Select Library Ltd* [1900] 2 QB 170

CA

Key Facts

A mobile library failed to prevent circulation of a book containing defamatory material after receiving a warning about its content.

Key Law

The defendants were liable because they had ignored the warnings and had failed to establish that they published innocently. The court accepted, however, that there could be a defence of innocent dissemination which would be available if defendants could show that:

- they were unaware that the book contained defamatory material when they distributed it;
- there was nothing suspicious to alert them to the presence of the defamatory material.

10.1.3 *Bookbinder v Tebbitt* [1989] 1 All ER 1169

CA

Key Facts

During an election campaign the defendant referred to the policies of a local council as 'a damn fool idea'. The policy in question was overprinting stationery with 'Support Nuclear Free Zone'. The defendant was unsuccessful in his defence of justification.

Key Law

The court would not allow the defendant to introduce evidence of the council's overspending, so the words in

context were incapable of supporting the specific allegation made by the defendant.

10.1.3 *Telnikoff v Matusevitch* [1992] 4 All ER 817 HL

Key Facts

In an article in the *Telegraph* the claimant criticised the BBC Russian Service for over-recruiting employees from ethnic minority groups. The defendant then replied in a letter to the paper accusing the claimant of being racist and anti-Semitic. The defendant successfully pleaded fair comment in the claimant's action.

Key Law

The House of Lords (now the Supreme Court) felt that the defendant had to show that he was commenting since many people might not have seen the original article and would not necessarily know to what he was referring. On this basis the defence could only be defeated by the claimant showing malicious intent on the part of the defendant, which he had not done. The claimant had also failed to disprove that the defendant had an honest belief in the view expressed.

10.1.3 *Kemsley v Foot* [1952] AC 345 HL

Key Facts

A former leader of the Labour Party, while a junior MP, wrote an article in response to an article, attacking it as 'one of the foulest pieces of journalism perpetuated in this country for many a long year'. The article itself appeared under the headline 'Lower than Kemsley', a reference to another newspaper. The proprietor of that newspaper argued that in the light of the attack in the article the reference to his paper reflected badly on it and was defamatory.

Key Law

The old defence of fair comment succeeded because the article was genuine comment, supported by factual information, and was in the public interest. The headline was used as a comparison. There was no negligence on their part.

Key Comment

The defence is now replaced by responsible publication of matters of public interest.

10.1.3 *Reynolds v Times Newspapers* [2001] 2 AC 127

HL

Key Facts

The claimant had been leader of the Irish parliament and was trying to promote the Northern Ireland peace process. A political crisis arose so he resigned and withdrew his party from the governing coalition. *The Sunday Times* then published an article which the claimant felt suggested that he had both misled the Irish Parliament and withheld information from it. The newspaper failed to print an apology so he claimed for libel. The newspaper sought to rely on the defence of qualified privilege but was unsuccessful.

Key Law

The Court of Appeal held that qualified privilege can be argued by the press when (i) the paper has a moral, social or legal duty to inform the public of the matter in question; and (ii) the public has a corresponding interest in receiving the information; and (iii) the nature, status and source of the material and the circumstances of the publication are such as to warrant the protection of privilege. On appeal the House of Lords (now the Supreme Court) decided that there was no general category of qualified privilege for political information. Despite arguments based on Art 10 of the European Convention on Human Rights, the standard test of duty to disseminate and duty to receive should be applied. They held that ten matters were critical:

- the seriousness of allegation;
- whether or not it was of public concern;
- the source of the information;
- whether steps were taken to verify it;
- the status of the information;
- the urgency of the issue;
- whether comment was sought from the claimant;

- whether the claimant's comments were included in the article;
- the tone of the article;
- the circumstances and timing of publication.

Since the article here was highly critical and the defendants had never sought the claimant's side of the story they had no privilege.

10.2.2 *Derry v Peek* (1889) 14 App Cas 337 HL

Key Facts

A tram company was licensed by Act of Parliament to operate horse-drawn trams. The Act also allowed use of mechanical power by gaining a certificate from the Board of Trade. The company applied for a certificate and at the same time issued a prospectus to raise further share capital. Honestly believing that the certificate would be granted, the company falsely represented in the prospectus that it was able to use mechanical power. In fact the application was denied and the company fell into liquidation. The claimant had invested on the strength of the representation in the prospectus and lost money. His action for damages failed.

Key Law

The court held that there was insufficient proof of fraud, the allegation of which was simply rebutted by showing an honest belief in the statement. There was no reason for the company to suppose that their application for a certificate would be refused.

Key Judgment

Lord Herschell defined the action as requiring actual proof that the false representation was made:

'. . . knowingly or without belief in its truth or recklessly careless whether it be true or false'.

Key Link

4 Eng v Harper (2008) EWCH 915 which identifies that damages for loss of a chance are also available in deceit.

10.2.3.3 *Kaye v Robertson* [1991] FSR 62

HL

Key Facts

A famous television actor, Gorden Kaye, was injured. Journalists from the *Sunday Sport* entered the actor's room, interviewed him and took photographs, even though he was in no fit state to consent. They then published the photographs and a story about his injuries, falsely stating that the story was produced with the actor's permission. His action for malicious falsehood succeeded although a claim for invasion of privacy failed.

Key Law

The court accepted that the ingredients of the tort were made out. The defendant had made a false statement about the claimant to third parties by publishing the story and photographs. It was malicious in having been done while he was too ill to realise. The loss to the claimant was that it prevented him from marketing the story himself and receiving payment for it.

Key Link

Wainwright v Home Office [2003] UKHL 53; [2003] 3 WLR 1137.

11 Employment-related torts

VICARIOUS LIABILITY

Purpose, criticisms

Justified because:
- employer has some control;
- employer selects employee;
- employer can stand loss;
- employer must have public liability insurance;
- ensure claimant has an action.

Criticised because:
- employer liable for something (s)he did not do;
- ignores fault principle.

Testing employee status

Tortfeaser must be employee for employer to be liable:
- originally based on control test (nature and degree of detailed control) (*Performing Rights Society v Mitchell*);
- then based on integration test – the more integrated into organisation the more likely to be an employee (*Stevenson, Jordan & Harrison v MacDonald & Evans*);
- and finally based on the economic reality test (*Ready Mixed Concrete v Minister of Pensions*):
  - i) agreement to provide skill for wage;
  - ii) employer exercises degree of control;
  - iii) nothing inconsistent with employment and weigh up all factors, e.g. ownership of tools, payment of tax and NI, method of payment, self-description, etc.
- Some workers not so straightforward, e.g. casual workers (*Carmichael v National Power*), outworkers (*Nethermere (St Neots) v Taverna*).

Did tort occur in course of employment?

Employer only liable if tort in course of employment.

In course of employment:
- authorised act (*Poland v Parr*);
- ignore express order (*Limpus v London General Omnibus*);
- carelessly undertakes work (*Century Insurance v Northern Ireland Transport Board*);
- uses unauthorised help (*Rose v Plenty*);
- over-enthusiastic (*Bayley v Manchester, Sheffield & Lincolnshire Railways*).

Not in course of employment:
- act not within scope of employment (*Beard v London General Omnibus*);
- on a frolic (*Hilton v Thomas Burton*);
- giving unauthorised lifts (*Twine v Beans Express*);
- exceeding proper limits of job (*Makanjuola v Metropolitan Police Commissioner*);
- driving to work unless paid to (*Smith v Stages*).

Other liability

Independent contractors, if hired for purpose (*Ellis v Sheffield Gas Consumers*) or non-delegable duty by statute or common law.

Crimes of employees, if part of employment (*Lloyd v Grace Smith*), or sufficient connection between employment and crime (*Lister v Hesley Hall*).

For loaned cars, to give claimant a remedy (*Morgans v Launchbury*).

11.1 Vicarious liability

11.1.1 Origins, purposes and criticisms

1 Not a tort, but imposing liability on someone other than tortfeaser.

2 Originally based on the idea of control, which was appropriate to the 19th-century master and servant laws.

3 Rarely appropriate now other than to employment.

4 Sometimes criticised for being unfair because:

- employer is made liable for something (s)he has not done; and it directly contradicts the fault principle.

5 But there are a number of justifications:

- traditionally an employer did have control;
- the employer is responsible for choice of staff;
- the employer is better able to stand any loss, e.g. from profit;
- employers must in any case insure for public liability;
- it may be impossible to trace the person actually responsible (which may be appropriate, e.g. in medical cases).

6 While vicarious liability has been accepted in sexual harassment (*Brace-bridge Engineering Ltd v Derby* (1990)) and racial harassment (*Jones v Tower Boot Co Ltd* (1997)), it has been rejected in claims against councils for physical abuse by carers (*Trotman v North Yorkshire County Council* (1998)), but accepted in claims against education authorities where staff fail to diagnose and make effective provision for special needs such as dyslexia (*Phelps v Hillingdon LBC* (2000)).

7 Liability is only for a tort by an employee acting in the course of employment, so there are three key questions:

a) Was the person committing the tort an employee?

b) Was the tort committed in the course of employment?

c) Was the act a tort?

11.1.2 Was the tortfeaser an employee?

1 There have been numerous methods of testing employment.

2 The original test was the control test from master/servant law:

a) measured by 'nature and degree of detailed control' (*Performing Rights Society v Mitchell* (1924));

b) four key factors to be considered: selection, wages, control, and dismissal (Lord Thankerton in *Short v Henderson* (1946));

c) it is sometimes almost impossible to apply, e.g. medicine;

d) but it may be appropriate to borrowed workers (***Mersey Docks & Harbour Board v Coggins & Griffiths* (1947)**) or where hirer rather than employer gives detailed instructions (*Hawley v Luminar Leisure plc* (2005)).

3 Lord Denning introduced the 'integration' or 'organisation test' in *Stevenson, Jordan & Harrison v MacDonald & Evans* (1952) (the more the worker is integrated into the organisation the more likely (s)he is employed) (*Whittaker v Minister of Pensions and National Assistance* (1967)).

4 The modern test is that of Mackenna J in ***Ready Mixed Concrete Ltd v Minister of Pensions* (1968)** (the 'economic reality' or 'multiple' test):

- three conditions were identified:
  - i) employee agrees to provide skill in return for a wage;
  - ii) employer exercises a degree of control;
  - iii) nothing in terms inconsistent with employment.
- there are many factors to take into account, but are not definitive: ownership of tools, tax and NI liability, method of payment, self-description, etc.

5 Certain types of worker do not conform easily to any test:

- casual workers (*O'Kelly v Trust House Forte* (1983) and, more recently, *Carmichael v National Power plc* (2000));
- outworkers (*Nethermere (St Neots) v Taverna* (1984)), usually considered self-employed;
- labour-only subcontractor (*Lane v Shire Roofing Co* (1996)), usually seen as self-employed;
- hospital workers – compare *Hillyer v St Bartholomew's Hospital* (1909) with *Cassidy v Minister of Health* (1951).

11.1.3 Was the act in the course of employment

1 Generally a question of fact, but based on policy so inconsistent.

2 If the employee commits the tort in the course of employment then the employer can be vicariously liable.

3 If the tort happens outside of the course of employment or the employee is on a 'frolic of his own' the employer is not liable.

4 There is generally said to be liability for:

i) authorised wrongful acts; and

ii) authorised acts carried out in a wrongful way.

5 Employer is obviously liable for (i) when instructing the employee to act wrongfully, but can also be liable if the employee has implied authority to commit the tort (***Poland v Parr* (1927)**).

6 Authorised acts carried out wrongfully include situations where the employee is engaged in his/her own work, but:

- ignores an express prohibition (*Limpus v London General Omnibus Co* (1862), which involved racing buses against instructions and injuring a third party);
- uses an unauthorised method of work (*LCC v Cattermoles (Garages) Ltd* (1953));
- acts carelessly (***Century Insurance v Northern Ireland Road Transport Board* (1942)**, where an explosion was caused while delivering petrol after lighting a cigarette);
- uses unauthorised help (***Rose v Plenty* (1976)**, where liability arose because the employer was seen to gain a benefit);
- causes the tort by excess of enthusiasm (*Bayley v Manchester, Sheffield, & Lincs. Railway* (1873); *Fennelly v Connex South Eastern Ltd* (2001));
- where individual employee breaches a statutory duty making a claim possible under s 3 Protection from Harassment Act 1997 (*Majrowski v Guy's and St Thomas' NHS Trust* (2006).

7 Acts that are outside of employment or 'frolics' include:

- carrying out an act not within the scope of the employee's work (*Beard v London General Omnibus Co* (1900));
- diverting away from the proper work on 'a frolic' (*Hilton v Thomas Burton (Rhodes) Ltd* (1961));
- giving unauthorised lifts (***Twine v Beans Express* (1946)**);
- acting in excess of the proper bounds of the work (*Makanjuola v Metropolitan Police Commissioner* (1992)).

8 The tests are confusing because cases with apparently similar facts will differ in whether liability is imposed.

9 An employer can be liable purely because (s)he derives a benefit from the employee's wrongful act (*Rose v Plenty* (1976)).

10 Whether an employer is liable for torts of employees travelling to and from work depends on whether the travel is part of the work or paid for (*Smith v Stages* (1989)).

11 An important recent development is that dual vicarious liability is now possible (***Viasystems (Tyneside) Ltd v Thermal Transfer (Northern) Ltd, S & P Darnwell Ltd and CAT Metalwork Services* (2005)**).

11.1.4 Liability for the torts of independent contractors

1 Hirer generally not liable, because of the absence of control.

2 However, there are possible exceptions:

a) if employed for the tort (*Ellis v Sheffield Gas Consumers* (1953));

b) if there is a non-delegable duty by statute, e.g. to provide and ensure wearing of safety equipment;

c) if there is a non-delegable duty under common law (*Honeywill & Stein v Larkin* (1984)).

11.1.5 Liability for the crimes of employees

1 There is not usually liability for crimes which give rise to civil liability also (*Warren v Henleys* (1948)).

2 Liability is possible where the crime is part of the employment:

- as in theft (*Morris v Marten* (1966));
- and fraud (***Lloyd v Grace Smith* (1912)**).

3 The House of Lords in ***Lister v Hesley Hall Ltd* (2001)** has accepted that liability for crimes is possible where there is sufficient connection between the employment and the crime e.g. child abuse by carers, teachers etc. on employer's premises and the 'close connection' test used in *Dubai Aluminium v Salaam* (2003) and *Mattis v Pollock* (2003).

4 The test succeeds where the activity leading to the tort is of a type common to the employment (*Andrew Gravil v Richard Carroll and Redruth Rugby Club* (2008)) and has applied where a Roman

Catholic priest sexually assaults a young person *Maga v Roman Catholic Church* (2010) and *JGE v The Trustees of the Portsmouth Roman Catholic Diocesan Trust* (2012), but there is no vicarious liability where the tortfeaser merely takes advantage of e.g. a uniform out of work time to commit the tort (*N v Chief Constable of Merseyside Police* (2006)).

11.1.6 The employer's indemnity

1 At common law an employer can recover from an employee under the principle of subrogation (***Lister v Romford Ice & Cold Storage Co (1957)***).

2 But this can cause problems so insurance companies usually operate a gentleman's agreement.

11.1.7 Vicarious liability of lenders of cars

1 Vicarious liability can result from the lending of cars (*Britt v Galmoye* (1928)).

2 This can be because the lender gains a benefit (*Ormrod v Crosville Motor Co* (1953)).

3 Or it can simply be to ensure that the injured party has a remedy (***Morgans v Launchbury (1973)***).

11.2 Employers' liability

11.2.1 Origins

1 Employment was traditionally seen as a contractual relationship based on freedom of contract, with no remedies available in tort.

2 In the 19th century there were three major barriers to workers' claims:

- *volenti* – worker was said to consent to the dangers of work;
- contributory negligence – a complete defence at that time;
- 'common employment' – no liability if a 'fellow servant' caused the injury.

3 Most industrial safety law developed in statute.

4 Common law was generally hostile to workers.

5 Eventually the scope of the three defences was reduced:
- after *Smith v Baker* (1891)) *volenti* only available if the claimant freely accepted risk;
- Law Reform (Contributory Negligence) Act 1945 made the defence a partial one, only affecting the amount of damages;
- by *Groves v Lord Wimbourne* (1898) the 'fellow servant' rule was not available to breach of statutory duty, and the Law Reform (Personal Injury) Act 1948 abolished the rule.

6 Other major developments included:

a) employers became liable for defective plant and equipment in the Employer's Liability (Defective Equipment) Act 1969;

b) the Workmen's Compensation Act 1897 introduced an insurance principle; later applied to all employees in the Employment Liability (Compulsory Insurance) Act 1969;

c) ***Wilsons & Clyde Coal v English* (1938)** identified a non-delegable duty of an employer to his employees.

7 Now the area involves common law, statute, and EU law in Directives implemented as 'the six pack' set of Regulations 1992.

Aspects of the non-delegable common law duty

Four key elements:

- Must provide competent fellow employees:
  - i) must be competent to carry out work (*General Cleaning Contractors v Christmas*);
  - ii) and be well behaved (*O'Reilly's case*);
  - iii) and not 'harass' colleagues (s 3 Protection from Harassment Act 1997 and *Majrowski v Guy's & St Thomas' NHS Trust* (2006)).
- Must provide safe plant and equipment:
  - i) must provide it and maintain it (*Smith v Baker*);
  - ii) now superseded by statute and EU law.
- Must provide safe premises, but only need do what is reasonable to make them safe (*Latimer v AEC*).
- Must provide a safe system of work:
  - i) both provide system and ensure it is used safely (*Bux v Slough Metals*);
  - ii) although employees are expected to be aware of dangers associated with their skill (*Roles v Nathan*).

Duty has now extended to cover preventing psychiatric harm (*Walker v Northumberland CC*).

EMPLOYERS' LIABILITY

Defences

***Volenti* (consent):**

- but only if employee accepts actual risk (*Smith v Baker*);
- unavailable if employee had no choice but accept risk (*Baker v T E Hopkins*);
- possible if employee sole cause of own misfortune (*Ginty v Belmont Building Supplies*).

Contributory negligence:

- rare but damages can be reduced if employee contributes to harm (*Jones v Livox Quarries*);
- even for death (*Davies v Swan Motor Co*);
- and 100% is possible (*Jayes v IMI (Kynoch)*).

Character of the duty:

- duty is entirely non-delegable (*Wilson & Clyde Coal v English*); and is to do what is reasonable (*Latimer v AEC*);
- extends to ancillary activities (*Davidson v Handley Page*); but not to property (*Deyong v Shenburn*);
- only reasonable trade practices are acceptable (*Cavanagh v Ulster Weaving*);
- employer must take into account possible extent of injury to employee (*Paris v Stepney BC*);
- and can take into account practicality of any precautions (*Charlton v Forrest Printing Ink*);
- duty is to prevent foreseeable accidents (*Bradford v Robinson Rentals*).

11.2.2 Employers' non-delegable duty

1 The duty includes four key elements, but is an expanding area:

- the duty to provide competent fellow employees;
- the duty to provide safe plant and equipment;
- the duty to provide safe premises;
- the duty to provide a safe system of work.

2 Now the duty also extends to protecting the general health and safety of the employee, including psychiatric health.

The duty to provide competent fellow employees

1 All employees should be competent to carry out their contractual duties (*General Cleaning Contractors Ltd v Christmas* (1953)).

2 An employer should ensure the good behaviour of staff (*Hudson v Ridge Manufacturing Co* (1957)), but is not responsible for unknown characteristics (*O'Reilly v National Rail & Tramway Appliances* (1966)).

3 Actions are rare nowadays because the employer is usually caught by vicarious liability, but it is useful when the employee's act causing injury or damage is outside the scope of employment.

4 Now an employer can be vicariously liable also under the Protection from Harassment Act 1997 (*Majrowski v Guy's & St Thomas' NHS Trust* (2006)).

The duty to provide safe plant and equipment

1 The duty is not only to provide safe equipment but to properly maintain it (*Smith v Baker* (1891)).

2 And the system for using equipment must not damage the health or safety of the employee (*Alexander v Midland Bank* (2000)).

3 An employer can avoid liability if the employee misuses equipment (*Parkinson v Lyle Shipping Co Ltd* (1964)).

4 The duty is now possibly superseded by the Employer's Liability (Defective Equipment) Act 1969, but the Act itself has been subject to conflicting interpretation (*Coltman v Bibby Tankers* (1988) (compare CA and HL) and *Knowles v Liverpool Corporation* (1993)).

The duty to provide safe premises

1 The duty is to do what is reasonably practicable to ensure premises are safe (*Latimer v AEC* (1957)).

2 This may include premises other than the employer's (*Wilson v Tyneside Cleaning Co* (1958)).

3 There may also be liability under the Occupier's Liability Act 1957.

The duty to provide a safe system of work

1 The duty has two key aspects:

- creating a safe system of work in the first place;
- ensuring proper implementation of the system.

2 The duty is to provide an effective system to meet the danger (*General Cleaning Contractors Ltd v Christmas* (1953)), so the employer may be liable for a failure to warn of the danger (*Pape v Cumbria CC* (1992)).

3 There is also a duty to ensure the system is carried out (***Bux v Slough Metals (1974)***).

4 Providing a safe system may include the method of using equipment (*Mughal v Renters* (1993)), so employer may need to:

- train employees to use equipment safely (*Mountenay (Hazzard) v Bernard Matthews* (1993));
- and rotate work properly (*Mitchell v Atco* (1995));
- and guard against foreseeable dangers of the work (*Cook v Bradford Community Health NHS Trust* (2002)).

5 The system should not cause undue stress to the employee (***Walker v Northumberland CC (1994)***).

6 An employer cannot rely on an unsafe practice merely because it is a common practice (*Re Herald of Free Enterprise* (1989)).

7 Employees may be expected to be aware of risks associated with the work they do (*Roles v Nathan* (1963)).

8 Much of the duty here has probably now been superseded by, e.g. the duty to undertake risk assessment under the 'six pack'.

11.2.3 Developments in the common law duty

1 Judges have recently expanded boundaries of duty to include:

- a duty to protect an employee's general health and safety (*Johnstone v Bloomsbury Health Authority* (1991));

- a duty to protect the psychiatric health of the employee (*Walker* following *Petch v Commissioners of Customs and Excise* (1993)), but this depends on the presence of foreseeable harm – extensive guidelines are now in ***Sutherland v Hatton* (2002)** and *Barber v Somerset County Council* (2004) – and merely referring the employee for counselling may be insufficient to discharge the duty (*Daw v Intel Corporation (UK) Ltd* (2007));
- a duty not to negligently prepare references for an employee (*Spring v Guardian Assurance* (1995));
- a duty to protect the employee from harassment (*Majrowski v Guy's & St Thomas' NHS Trust* (2006)).

11.2.4 The character of the duty

1 The duty is entirely personal and non-delegable (*Wilson & Clyde Coal v English* (1938)).

2 The duty is only to do what is reasonable, not to provide a guarantee of safety (*Latimer v AEC* (1953)).

3 The duty extends to all reasonable and ancillary activities (*Davidson v Handley Page Ltd* (1945)).

4 The duty does not extend as far as protecting property (*Deyong v Shenburn* (1946)).

5 An employer can only rely on a trade practice that is reasonable (*Cavanagh v Ulster Weaving Co* (1960)).

6 But an employer should consider the possible extent of the injury (*Paris v Stepney BC* (1951)).

7 An employer may take into account the practicality of any precautions (*Charlton v Forrest Printing Ink Co Ltd* (1978)).

8 The duty is to prevent accidents that are reasonably foreseeable (*Bradford v Robinson Rentals* (1967)), but not unforeseeable (*Doughty v Turner Manufacturing Co Ltd* (1964)).

11.2.5 Defences

1 *Volenti* (consent).

- This only has limited use since *Smith v Baker* (1891).
- But it is possible if employee accepts actual risk (*ICI v Shatwell* (1965)).

- It cannot be claimed where the employee had no choice but to act (***Baker v T E Hopkins* (1959)**).
- By policy unavailable for breach of a statutory duty (*ICI v Shatwell* (1965)).
- But it is possible if a claimant is the sole cause of his/her own misfortune (*Ginty v Belmont Building Supplies Ltd* (1959)).

2 Contributory negligence.

- Can be a defence to any of the duties.
- However, employees are treated more leniently by the courts (*Caswell v Powell Duffryn Collieries* (1940)).
- This is because the duty is to protect employees from their own carelessness (*General Cleaning Contractors v Christmas* (1953)).
- Damages are reduced if employees have contributed to their own injuries (***Jones v Livox Quarries Ltd* (1952)**).
- This applies even if death resulted (*Davies v Swan Motor Co Ltd* (1949)).
- One hundred per cent contributory negligence is possible (*Jayes v IMI Kynoch Ltd* (1985)).

11.3 Breach of a statutory duty

11.3.1 Introduction

1 Many regulatory statutes impose a duty and create civil liability.

2 An action is similar to negligence, but differs in significant ways:

- the standard of care is fixed by the statute;
- the duty can be strict, or the burden of proof may be reversed, either being advantageous to a claimant;
- such statutes are regulatory, so usually impose criminal sanctions, and the existence of civil liability is debatable;
- in America breach of the statutory duty can be proof of negligence, but in England it is treated as a separate tort.

3 As a result both are commonly pleaded at the same time.

4 Civil liability is more obvious where the Act modifies common law.

5 Other Acts are harder to determine, so the area is dependent on statutory interpretation and so is unpredictable.

6 Industrial safety law is the most common example.

7 A number of questions must be considered.

BREACH OF A STATUTORY DUTY

Nature of liability

- Regulatory statutes sometimes create civil liability as well as imposing criminal sanctions.
- Action for breach of statutory duty similar to negligence, though standard is set by statute and duty sometimes strict.
- Often hard to decide whether statute does create civil action so requires statutory interpretation.

Defences

***Volenti* – available only if:**

- claimant's wrongful act puts defendant in breach (*Ginty v Belmont Building Supplies*);
- vicarious liability is an issue (*ICI v Shatwell*).

Contributory negligence:

- reluctantly accepted (*Casswell v Powell Duffryn Collieries*);
- but 100 per cent possible (*Jayes v IMI (Kynoch)*).

Essential elements of liability

Must ask six questions:

Was Act intended to create civil liability?

- Obvious if statute gives guidance, e.g. HASAW 1974.
- But if silent, use test in *Lonrho v Shell Petroleum*:
  - i) Presume if Act creates obligation enforceable in only one manner then no other;
  - ii) unless obligation benefits a particular class, or creates public right and claimant suffers damage different to rest of public.
- Wording vital (*Monk v Warbey* and *Atkinson v Newcastle Waterworks*).

Is claimant owed a duty of care?

- Must show duty owed as individual or as member of class (*Hartley v Mayoh*).
- Must show Parliament intended to create private law rights (*X (Minors) v Bedfordshire County Council*).

Is duty imposed on defendant?

- Must consider precise words of statute (*R v Deputy Governor of Parkhurst Prison ex parte Hague*).
- No duty, no civil liability.

Has defendant breached duty?

- No single standard, so court must construe from words of statute.
- Subject to dictates of policy (*Ex parte Island Records*).
- If specific words used then standard clear (*Chipchase v British Titan Products*).
- 'Must' and 'shall' usually means liability is strict (*John Summers & Sons v Frost*).

Did breach cause damage?

- 'But for' test applies.

Was damage of type contemplated in Act?

- No liability if type of damage not contemplated in statute (*Gorris v Scott*).
- So damage must not be too remote (*Young v Charles Church*).

11.3.2 The essential elements of liability

Is the statute intended to create civil liability?

1 Claimant must show that the Act creates an action for damages.

2 This is straightforward if the Act gives specific guidance, e.g. Health and Safety at Work Act 1974.

3 Problems can occur if the statute is silent on the issue.

4 Courts must always give effect to the intention of Parliament.

5 The modern test is Lord Diplock's in ***Lonrho Ltd v Shell Petroleum Co (1982)***:

   a) court presumes that if Act creates obligation enforceable only in specific manner, then not enforceable in any other manner;

   b) but there are two exceptions:

      - when an obligation is to benefit a particular class;
      - when provision creates public right but claimant suffers particular, direct, and substantial damage different from the rest of the public.

6 This test is criticised because of two problems:

   a) it gives the court discretion in determining class;

   b) there is no set distinction between a statute creating a public right and one just prohibiting what was formerly lawful.

7 Courts consider various factors in determining Parliament's intent:

   - civil action more likely to be possible if wording precise. Compare *Monk v Warbey* (1935) with *Atkinson v Newcastle Waterworks* (1877);
   - failure to mention a specific penalty (*Cutler v Wandsworth Stadium Ltd* (1949));
   - some groups are well-established classes (*Groves v Lord Wimbourne* (1898));
   - action is more likely with an identifiable group (*Thornton v Kirklees MBC* (1979));
   - there must be a direct link with purpose of statute (*McCall v Abelsz* (1976));
   - the purpose must be for the benefit of that class (*R v Deputy Governor of Parkhurst Prison ex parte Hague* (1992)).

Is the claimant owed a duty of care?

1 Action only succeeds if claimant shows he is owed duty as an individual or as a member of a class (*Hartley v Mayoh & Co* (1954)), so an action by a relative might fail (*Hewett v Alf Brown's Transport* (1992)) possibly because the risk is unforeseeable (*Maguire v Harland & Wolff plc* (2005)).

2 There is a wide scope for establishing the existence of a duty (*Garden Cottage Foods v Milk Marketing Board* (1984) and *Atkinson v Croydon Corporation* (1938)).

3 But HL has restated the need to show that Parliament intended to create private law rights *(X (minors) v Bedfordshire County Council; (M (a minor) v Newham London Borough Council; Keating v Bromley LBC* (1995)).

Is a duty imposed on the defendant?

1 Must consider precise words of statute (*Ex Parte Hague* (1992)).

2 If there is no duty on the defendant there can be no civil action.

3 And a civil action is never possible where the court feels that the duty is intended to be enforced by other means (***Cullen v Chief Constable of the Royal Ulster Constabulary* (2003)**).

Has the defendant breached a statutory duty?

1 No single standard of care, so court must construe statute.

2 Has been subject to inconsistency and the dictates of policy – Lord Denning in *Ex Parte Island Records* (1978): 'you might as well toss a coin in order to decide the cases'.

3 If the words are specific, the standard is self-evident (*Chipchase v British Titan Products Co Ltd* (1956)).

4 When words like 'must' or 'shall' are used, liability is likely to be strict (*John Summers & Sons v Frost* (1955)).

5 But the standard is often vaguely stated (*Brown v NCB* (1962)).

Did the breach of duty cause the damage?

1 Tested as negligence by the 'but for' test.

2 So there must be a direct causal link between the breach and the damage (*King v Sussex Ambulance NHS Trust* (2002)).

3 Defendant can be liable if duty also to ensure claimant complies with provision (*Ginty v Belmont Building Supplies Ltd* (1959)).

Was the damage of a type contemplated in the statute?

1 Liability is not possible if the type of damage was not contemplated in the statute (*Gorris v Scott* (1874)).

2 So it must not be too remote (*Young v Charles Church* (1997)).

11.3.3 Defences

1 *Volenti non fit injuria*:

   a) not normally available on policy grounds;

   b) but may be:

      - where the claimant's wrongful act put the defendant in breach (*Ginty* (1959)); or
      - where the claimant tries to claim vicarious liability as an issue (*ICI Ltd v Shatwell* (1965)).

2 Contributory negligence:

   a) only accepted reluctantly as regulations are often meant to protect workers from their own carelessness: 'employees' sense of danger will have been dulled by familiarity, repetition, noise, confusion, fatigue, and preoccupation with work . . .' (*Caswell v Powell Duffryn Collieries* (1940));

   b) but it is possible if claimant is genuinely at fault (*Jayes v IMI (Kynoch)* Ltd (1985)).

Key Cases Checklist

Vicarious liability

***Ready Mixed Concrete v Minister of Pensions and National Insurance* (1968)**
The tortfeaser must be employed according to the 'economic reality' test

***Poland v Parr* (1927)**
The employer is responsible for all authorised acts

***Rose v Plenty* (1976)**
And prohibited acts where the employer gains a benefit

***Twine v Beans Express* (1946)**
Butnot where the employee is on a 'frolic on his own'

***Lister v Hesley Hall* (2001)**
Employer can be liable for employee's crimes where there is a close connection with the employment

***Viasystems (Tyneside) Ltd v Thermal Transfer Ltd* (2005)**
Dual vicarious liability is possible

Employment-related torts

Employer's liability

***Wilsons & Clyde Coal Co Ltd v English* (1938)**
The employer owes a non-delegable duty of care to provide safe colleagues, plant and equipment, premises, and systems of work

***Sutherland v Hatton and others* (2002)**
And now has a duty to protect the employee's psychiatric health if he is aware of the employee's susceptibility to stress

***Baker v T E Hopkins* (1959)**
The employee can only consent to risks he is aware of and freely accepts

***Jones v Livox Quarries* (1952)**
Employer's contributory negligence

Breach of a statutory duty

***Lonrho Ltd v Shell Petroleum Co Ltd (No. 2)* (1982)**
Civil remedy not generally available if the statute provides a different sanction unless provison protects a class of individuals or claimant suffered damage above what the public would expect

11.1.2.2 *Mersey Docks & Harbour Board v Coggins and Griffiths (Liverpool) Ltd* [1947] AC 1

HL

Key Facts

The Harbour Board hired out a crane to stevedores and a driver to operate it for them. In the contract between the Board and the stevedores the Board would still pay the driver and only they had the right to dismiss him, but during the contract he was employed by the stevedores. The crane driver negligently injured a person in the course of his work and the Harbour Board was held liable.

Key Law

The court held that the Harbour Board was the crane driver's employer at the material time since it was in control of him and could not show that liability for his actions had shifted to the stevedores since, although they could tell him what to do, they were not in a position to tell him how to operate the crane.

Key Judgment

Lord Porter explained the control test:

'To ascertain who is the employer at any particular time . . . ask who is entitled to tell the employee the way in which he is to do the work upon which he is engaged . . . it is not enough that the task to be performed should be under his control, he must control the method of performing it.'

11.1.2.4 *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* [1968] 2 QB 497

QBD

Key Facts

Under a new contract drivers were bound to have vehicles in the company colours and logo that they also bought on hire purchase agreements from the company. They also had to maintain the vehicles according to set standards and could only use the lorries on company business. Hours were flexible, however, and pay was subject to an annual minimum rate according to the concrete hauled. The contract also permitted them to hire drivers in their place.

The case concerned who was liable for National Insurance contributions: the company or one of its drivers.

Key Law

The court held that the terms of the contract were inconsistent with a contract of employment and the driver was self-employed.

Key Judgment

McKenna J developed the 'economic reality' test:

'(i) The servant agrees that in consideration of a wage or other remuneration he will provide his own work and skill in the performance of some services . . . (ii) he agrees, expressly or impliedly, that in the performance of that service he will be in the other's control in a sufficient degree to make that other master; (iii) the other provisions of the contract are consistent with it being a contract of service.'

11.1.3.5 *Poland v Parr* [1927] 1 KB 236 CA

Key Facts

The employee was a carter who assaulted a boy in order to stop him from stealing from his employer's wagon. The boy fell under the wagon and was injured as a result.

Key Law

The court held that, while the act was excessive and thus tortious, since the employee was only protecting the employer's property, and by implication he had authority to do so, the employer would be vicariously liable for the employee's act.

Key Judgment

Atkin LJ explained:

'Any servant is, as a general rule, authorised to do acts which are for the protection of his master's property.'

11.1.3.6 *Rose v Plenty* [1976] 1 WLR 141 CA

Key Facts

A milkman used a child helper despite the express instructions of his employer not to allow people to ride on the milk floats. The boy was then injured through the milkman's negligent driving.

Key Law

The court held that the milkman was carrying out his work in an unauthorised manner but was still in the course of his employment because the employer benefited from the work done by the boy.

Key Judgment

Lord Denning explained that:

'An employer's express prohibition . . . is not necessarily such as to exempt the employer from liability, provided that the act is done not for the employee's own purpose, but in the course of his service and for his employer's benefit.'

11.1.3.6 *Century Insurance Co Ltd v Northern Ireland Transport Board* [1942] AC 509 CA

Key Facts

The driver of a petrol tanker was delivering to a petrol station. He lit a cigarette and carelessly threw down the lit match, causing an explosion and extensive damage. The employer was held liable.

Key Law

The court held that the driver was in the course of employment because he was engaged in his primary activity, delivering petrol, and was merely doing his work in a negligent manner.

11.1.3.7 *Twine v Beans Express* [1946] 1 All ER 202 CA

Key Facts

A hitchhiker was injured through the negligence of a driver who was expressly forbidden to give lifts. The employers were not liable.

Key Law

The court held that the driver was doing something outside of his contract in giving free lifts and that the express prohibition was also a limiting factor on the scope of his employment.

11.1.3.11 *Viasystems (Tyneside) Ltd v Thermal Transfer (Northern) Ltd* [2005] EWCA Civ 1151 CA

Key Facts

A fitter's mate who was seconded by his employers to other contractors negligently flooded a factory floor.

Key Law

The court held that, because both employers were both entitled and obliged to control the worker to prevent negligent acts, both could be vicariously liable for his actions.

11.1.5.3 *Lister v Hesley Hall Ltd* [2001] 2 All ER 769 HL

Key Facts

The claimants were residents in a school for children with emotional difficulties. They were all sexually abused over time by the warden who was later convicted of criminal charges. The claimants sought damages against the school on the basis that it had actual or constructive knowledge of the abuse and failed to prevent it.

Key Law

The House of Lords (now the Supreme Court) rejected the test in *Trotman v North Yorkshire County Council* (1999) LGR 584 and held that the appropriate test was whether there was sufficient connection between the employment and the torts carried out by the employee. Here the torts were carried out on the school's premises and at times when the employee should have been caring for the claimants. The court accepted that there was an inherent risk of abuse that the employer should have guarded against so that vicarious liability was appropriate in the circumstances.

Key Comment

Rosalind Coe (in *Lister v Hesley Hall Ltd* (2002) 65 MLE 270) suggests '*Lister* has inevitably raised concerns as to the application of the "close connection" test, provoking comment that . . . Litigants, their advisers and insurers will all be concerned as to the boundaries of the decision and will turn to the judgments of the House for guidance. Unfortunately they will find limited assistance.'

Key Link

Mattis v Pollock [2003] EWCA Civ 887 (involving a nightclub bouncer) and *Gravill v Carroll and Redruth Rugby Club* [2008] EWCA Civ 689 (involving a rugby player) have both applied the Principle and *Maga v Roman Catholic Church* (2010) EWCA Civ 256 and *JGE v The Trustees of the Portsmouth Roman Catholic Diocesan Trust* (2012) EWCA Civ 938 (applied the test in the case of sexual assaults by Roman Catholic priests). *N v Chief Constable of Merseyside Police* [2006] EWHC 3041 (QB) (involving an off-duty police officer still in uniform) did not because he had merely taken advantage of his uniform.

11.1.5.2 *Lloyd v Grace Smith & Co* [1912] AC 716 HL

Key Facts

Solicitors employed an unsupervised conveyancing clerk. The clerk fraudulently induced a client to convey her property over to him.

Key Law

The court identified that the clerk was engaged in the job that he was hired to do and that the fraud occurred because he was given insufficient supervision by his employers, who were thus liable.

11.1.6.1 *Lister v Romford Ice & Cold Storage Ltd* [1957] AC 555

HL

Key Facts

A lorry driver negligently knocked over his father who was acting as his driver's mate. The father claimed compensation from the employers whose insurers on settling the claim exercised their rights of subrogation under the insurance contract by suing the driver.

Key Law

The House of Lords (now the Supreme Court) accepted that this was possible.

Key Problem

The case was very strongly criticised, not least because it destroys the purpose of imposing vicarious liability. Because of this insurers are reluctant to exercise their rights in such an unfair way.

11.1.7.3 *Morgans v Launchbury* [1973] AC 127

HL

Key Facts

A wife let her husband use her car, knowing that he was going out drinking after he promised her that he would not drive while drunk. The husband drank too much, so he let a friend drive him home who was also drunk and uninsured, and who caused an accident. The Court of Appeal imposed vicarious liability on the wife so that a claim could be made against her insurance.

Key Law

Lord Denning held that the fact the wife had given permission to her husband to use the car was enough to make her responsible. The House of Lords (now the Supreme Court) rejected this argument because it was impossible to pinpoint the exact basis on which to fix liability in the circumstances and it was not for judges to interfere with the interrelationship between liability and insurance.

11.2.1.6 *Wilsons & Clyde Coal Co Ltd v English* [1938] AC 57

HL

Key Facts

Colliery owners tried to delegate their responsibilities and liability under various industrial safety laws to their manager by contractually making him entirely responsible for safety. When a miner was injured the owners tried to avoid liability on this basis.

Key Law

The court held the colliers liable on the basis that their personal liability could not be delegated to a third party, who was in any case an employee. The duty of care included: the duty to provide competent working colleagues; safe plant and equipment; a safe place of work; and a safe system of work.

11.2.2 *Bux v Slough Metals* [1974] 1 All ER 262

HL

Key Facts

In compliance with health and safety regulations an employee was provided with safety goggles but would not use them because he claimed that they misted up. The employer knew this. The employee was then injured by a splash of molten metal.

Key Law

The court held the employer liable for failing to ensure that the goggles were worn, identifying that the duty is not just to provide safe working systems but to ensure that they are followed.

Key Link

Pape v Cumbria CC [1992] 3 All ER 211 where there was breach of a duty to warn that not wearing gloves could lead to dermatitis.

11.2.2 *Walker v Northumberland CC* [1995] 1 All ER 737

QBD

Key Facts

A senior social worker had already suffered a nervous breakdown as a result of work-related stress. On returning to work he had been promised that his workload would reduce but was actually faced with a huge backlog of work from his absence. The result was that he suffered a second breakdown causing him to leave work permanently after he was dismissed on sickness grounds. His claim was successful. Leave for an appeal to the Court of Appeal was granted but the case was settled beforehand for £175,000.

Key Law

The court held that the employer was liable because after the first breakdown it was aware of his susceptibility to stress and failed to reduce his workload or the pressure associated with it, and thus placed him under even more stressful conditions.

Key Judgment

Colman J explained the development:

'It is clear law that an employer has a duty to provide his employee with a safe system of work and to take reasonable steps to protect him from risks which are reasonably foreseeable . . . there is no logical reason why risk of psychiatric damage should be excluded from the . . . duty.'

11.2.3.1 *Sutherland v Hatton and others* [2002] EWCA Civ 76

CA

Key Facts

This case was in fact a number of joined appeals on stress-related illnesses at work. Two claimants were teachers; one was a local authority administrator and one was a factory

worker. All were claiming that they were forced to stop work because of stress-related psychiatric illnesses caused by their employers.

Key Law

The appeals were decided on whether the injuries were foreseeable but the court also issued important guidelines on stress claims:

- the basic principles of negligence must apply including the usual principles of employers' liability;
- the critical question for the court to answer is whether the type of harm suffered was foreseeable;
- foreseeability depends on what the reasonable employer knew or ought reasonably to have known;
- an employer can assume that an employee can cope with the normal pressures of the work unless the employer has specific knowledge that an employee has a particular problem;
- the same test should apply whatever the employment;
- the employer should take steps to prevent possible harm when possibility of harm would be obvious to a reasonable employer;
- the employer will be liable if he then fails to take steps that are reasonable in the circumstances to avoid the harm;
- the nature of the employment, the employer's available resources, and the counselling and treatment services provided are all relevant in determining whether the employer has taken effective steps to avoid the harm, and in any case the employer is only expected to take steps that will do some good;
- the employee must show that the employer's breach of duty caused the harm, not merely that the harm is stress-related;
- where there is more than one cause of the harm the employer will only be liable for that portion of damages that relates to the harm actually caused by his breach of duty;
- damages should take account of any pre-existing disorder.

Key Comment

Andrew Collender QC in 'Stress in the work place' *New Law Journal* 22 February, 2003 pp 248 and 250 discusses a problem recognised by the court:

'whilst it is possible to identify some jobs that are intrinsically physically dangerous, it is rather more difficult to identify which jobs are intrinsically so stressful that physical or psychological harm is to be expected more often than in other jobs'.

Key Link

Barber v Somerset CC [2004] UKHL 13: a further appeal to HL from one of the appeals in *Hatton*.

11.2.5.1 *Baker v T E Hopkins* [1959] 3 All ER 225 CA

Key Facts

Workmen were put in danger by being exposed to petrol fumes in a confined space when the fumes overcame the men. A doctor attempted to rescue the men but died himself through exposure to the fumes. The employer tried to claim *volenti* but failed.

Key Law

The court held that the defence could not apply. The doctor had not agreed to the specific risks involved. He was trying to do his best for the unconscious men and did not consent to the risk of death.

Key Judgment

The Court of Appeal explained the application of the defence by referring to the judgment of Cardozo J in an American case, *Wagner v International Railway Co*:

'Danger invites rescue. The law does not ignore these reactions . . . in tracing conduct to its consequences. It recognises them as normal. It places their effects within the range of the natural and the probable.

The wrong that imperils life . . . is a wrong also to the rescuer.'

11.2.5.2 *Jones v Livox Quarries Ltd* [1952] 2 QB 608 CA

Key Facts

An employee was injured in a collision caused by the defendant's negligent driving while he was riding on the towbar of a traxcavator despite the express prohibition of his employer.

Key Law

The court held that the employee had contributed to his own injury by ignoring safety instructions and reduced his damages by 5 per cent.

Key Judgment

Lord Denning said:

'contributory negligence does not depend on a duty of care [it] does depend on foreseeability . . . as . . . negligence requires . . . foreseeability of harm to others . . . contributory negligence requires . . . foreseeability of harm to oneself'.

11.3.2 *Lonrho Ltd v Shell Petroleum Co Ltd (No 2)* [1982] AC 173 HL

Key Facts

The claimant argued that it suffered damage following a breach by the defendant of an Order in Council on trading with an illegal regime, in Southern Rhodesia. The order provided criminal sanctions.

Key Law

The court held that there was no civil liability intended in the order so the claim failed. Lord Diplock also established the modern test for determining whether there is civil liability: it should be presumed that if the Act creates an obligation enforceable in a specific manner then it is not enforceable in any other manner, i.e. the presence of criminal sanctions usually indicates that there is no civil liability. Two exceptions are: where an obligation or prohibition is imposed by the Act to benefit a particular class of individuals; and

where a provision in the Act creates a public right but the claimant suffered substantial damage different from that common to the rest of the public.

Key Problem

It has been argued that this gives the court too much discretion in determining how to define a particular class, and there does not appear to be a particular principle to determine the distinction between a statute creating a public right and one merely prohibiting what was previously lawful.

11.3.2 *Cullen v Chief Constable of the Royal Ulster Constabulary* [2003] 1 WLR 1763

CA

Key Facts

Cullen was arrested then, under s 15 Northern Ireland (Emergency Provisions) Act 1987, was denied the right to see a solicitor. He was later given access to a solicitor and pleaded guilty to criminal charges. He sought damages for the delay in access to a solicitor.

Key Law

The trial judge and the Northern Ireland Court of Appeal held that the police had reasonable grounds to delay access and although they had breached the statutory requirement to give the claimant reasons for this delay at the time this did not give rise to an action in tort. The House of Lords (now the Supreme Court) upheld the decision and also identified that there was no civil law duty because judicial review was available. The House also commented that there was no issue under the Human Rights Act 1998 as there was no breach of Art 5 or Art 6 of the European Convention on Human Rights.

12 Remedies and limitation periods

12.1 Damages

12.1.1 The purpose and character of damages in tort

1 The purpose of damages in tort is to put the claimant in the position (s)he would have been in if the tort had not occurred.

- So at least one element of damages (general damages) is speculative (a prediction of what would have happened).
- The obvious danger is that the claimant is either under-compensated or over-compensated.

2 So tort damages is an artificial remedy in many situations since it is only a monetary award.

3 There are different types of damages with different effects.

12.1.2 Non-compensatory damages

1 **Nominal damages** can be awarded if there is no actual loss, but a tort has been committed, e.g. trespass to land.

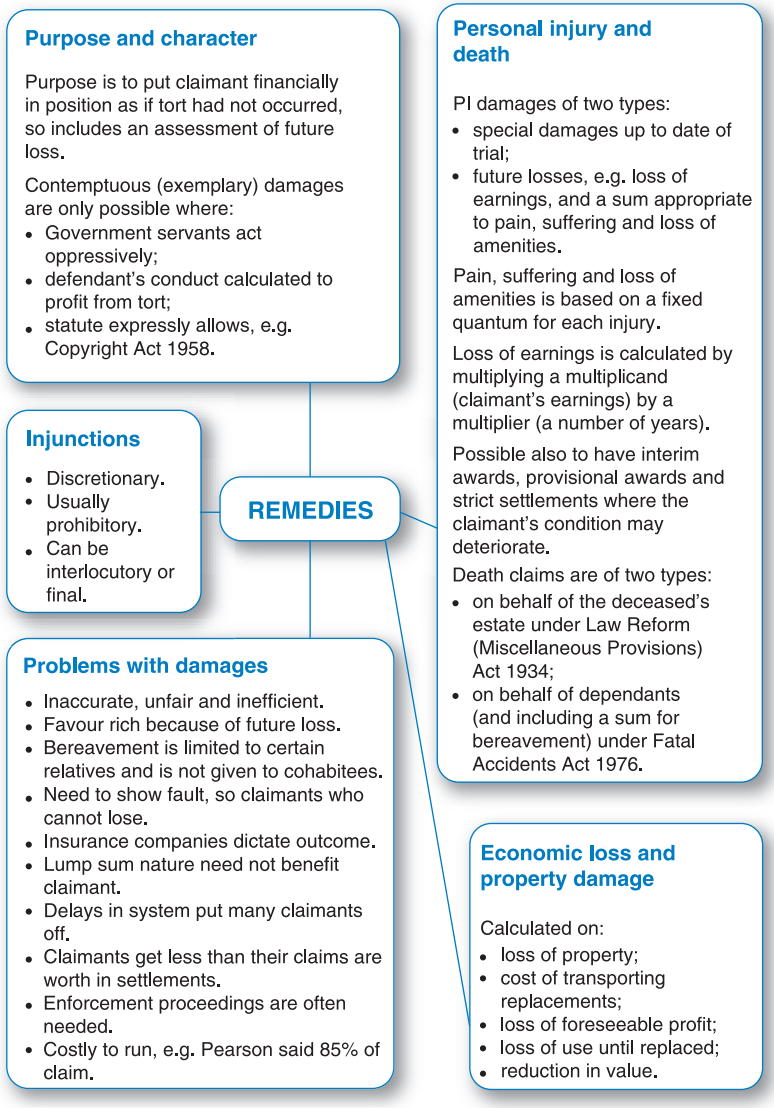
2 **Contemptuous damages** are awarded when the court thinks the action was unnecessary, e.g. with technical defamations.

3 **Exemplary damages** are designed to punish the tortfeasor:

- common elsewhere, e.g. personal injury actions in USA;
- but have restricted use in England and Wales;
- *Rookes v Barnard* (1964) identified three possible categories:
  - i) where government servants act in an oppressive, arbitrary or unconstitutional manner (see House of Lords in *Kuddus v Chief Constable of Leicestershire* (2001)) which may reveal 'malice, fraud, insolence, cruelty or the like' (*Muuse v Sec of State for Home Department* (2010));

ii) where the defendant's conduct is calculated to profit from the tort, e.g. in some libel actions;

iii) where statute expressly allows, e.g. Copyright Act 1958.



12.1.3 Economic loss and damage to property

1 Usually compensated as 'special damages'.

2 Usually little problem in calculating such losses.

3 With an economic loss the claimant must be restored as closely as possible to the position if the tort had not occurred.

4 Property damage is calculated according to:

- loss of the property and its value at the time of loss;
- cost of transporting replacement property if appropriate;
- loss of reasonably foreseeable profit;
- loss of use until the time the property is replaced;
- reduction in value if damaged but not lost, i.e. repair costs.

12.1.4 Damages in personal injury claims

1 This is divided into two groups.

a) Special damages:

- this is pecuniary loss up to the date of trial;
- can include medical care, equipment, loss of earnings, etc.;
- but only such expenses as the court considers reasonable, so private medical care may well be refused.

b) General damages or future damages:

- includes pecuniary losses, e.g. future earnings, medical costs, costs of care and special facilities;
- and also non-pecuniary loss, e.g. pain, suffering and loss of amenities (and in the case of death, bereavement).

2 Non-pecuniary losses are difficult to quantify:

- peculiarities might include, for example, a person in a coma will gain no award for pain and suffering;
- awards are based entirely on arbitrary calculations.

3 Loss of earnings are quantified by multiplying:

- a **multiplicand** – the claimant's annual net loss (any earnings less deductions for, for example, private insurance, sick pay or other benefits etc.); by

- a **multiplier** – notional figure representing the number of years the court feels the award should cover (since the award is made as a lump sum and can be invested, the maximum is 18), less deductions for known illnesses which may cause retirement.

4 Interest to trial is payable on all awards of damages.

5 If it is hard to assess extent of injury, or if claimant's condition may deteriorate, a split trial with interim damages in the case of the first, or provisional damages in the case of the second is possible, or a structured settlement.

12.1.5 The effect of death in tort claims

1 If the claimant dies following the tort, to be fair his action survives.

2 There are two possible actions:

- on behalf of deceased's estate in Law Reform (Miscellaneous Provisions) Act 1934 (similar to a personal injury action);
- on behalf of dependants (a limited group) in Fatal Accidents Act 1976 – includes losses following death, and bereavement.

12.1.6 Problems associated with damages

1 Tort damages are considered inaccurate, unfair and inefficient.

2 They are unfair because the rich receive better compensation than the poor, because their future damages are higher.

3 Certain damages, e.g. bereavement, are available to a restricted range of claimants only, and the level is set low and is arbitrary.

4 Damages discriminates against claimants unable to show fault.

5 Insurance companies can decide the outcome of actions.

6 The lump sum nature of an award can be detrimental to the claimant and only benefits lawyers.

7 Delay caused by procedure often causes claimants to give up, which is what the Woolf reforms tried to address.

8 In out-of-court settlements claimants can be forced to accept much lower sums than they actually deserve.

9 Claimants may still need to use enforcement proceedings where the defendant does not pay up.

10 The system of compensation is inefficient – the cost of administering the tort system prior to Woolf was 85 per cent of damages gained.

12.2 Injunctions

1 This is an equitable remedy.

2 It is therefore at the court's discretion and not easy to obtain.

3 The clear purpose in seeking such a remedy is to prevent continuation of the tort, e.g. appropriate to the economic torts.

4 The most common form is prohibitory, ie the defendant must refrain from doing something (the tort complained of).

5 An injunction in tort is awarded in one of two ways:

- interlocutory – an interim measure sought in advance of trial of the issue, e.g. preventing continued repetition of a libel pending trial;
- final – where all the relief needed is contained in the order itself, e.g. an order against pickets.

12.3 Basic limitation periods

12.3.1 The purpose of limitation periods

1 Unfair on defendant to leave him too long without suing.

2 Difficulty of preserving evidence.

3 Encourages claimant to get on with the case.

12.3.2 Basic periods

1 The general period:

- is contained in s 2 Limitation Act 1980;
- and is six years from the date on which the action accrues.

2 Damages for personal injury and death:

- contained in s 11(4);
- and is three years from the date on which the action accrued or the date of knowledge, whichever is the later;

- in fatal accidents where death occurs within three years of the accrual, personal representatives have a fresh limitation period running from the date of death or knowledge of the death (s 11(5)).

3 Latent damage.

- Here there are different rules under Latent Damage Act 1986.
- The action must arise from damage which has lain dormant.
- The period is six years from the date of accrual or three years from the 'starting date' (date of knowledge), with a 15 years 'longstop bar'.

4 Disabilities.

- If a person suffers a disability in law, e.g. a minor lacking capacity, the disability is taken into account.
- Time runs from ceasing of disability, e.g. a minor time barred at 24.

12.3.3 The date of knowledge in personal injury

1 This is defined in s 14.

2 It means knowledge of certain facts, so is the date when:

- the claimant first knew the injury was significant;
- the claimant knew the injury was attributable in whole or part to the defendant's act or omission;
- the claimant first knew the identity of the defendant;
- the claimant knew facts supporting a claim of vicarious liability.

3 Significant injury is one where the claimant considered it sufficiently serious to justify beginning proceedings against a defendant not disputing liability and who could pay.

4 Knowledge means of facts, not law, which the claimant could discover on his/her own or with the help of experts.

12.3.4 Power to disapply the limitation period

1 It is an important power of court in s 33 in cases of death and personal injury.

2 The court must consider certain factors:

- the length of and reasons for the claimant's delay;
- the effect of delay upon the cogency of evidence;
- the defendant's conduct after the cause of action, e.g. responses to a claimant's reasonable requests for information;
- the duration of any disability of a claimant arising after accrual;
- promptness of claimant once aware of possibility of action;
- steps taken by claimant to gain expert advice, and advice given;
- in *A v Hoare and conjoined appeals* (2008) the House of Lords accepted that the discretion to extend the limitation period could be used in the case of deliberate assaults, in this case sexual abuse.

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