1 BCL

Law of Tort: Tutorial No. 1: The Duty of Care

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THE CASES:

This handout is divided as follows:

Part One: The Historical Development of the Duty of Care

- Donoghue v. Stevenson [1932] All ER 1
- Governors of the Peabody Donation Fund v. Sir Lindsay Parkinson [1984] 3 All ER 529
- Yuen Kun-Yeu v. The Attorney General for Hong Kong [1987] 2 All ER 705
- Caparo Industries v. Dickman [1990] 1 All ER 568
- Glencar Explorations v. Mayo County Council [2002] 1 ILRM 481

Part Two: Duty of Care and Public policy

- H.M.W. v. Ireland [1997] 2 IR 141
- Capital and Counties v. Hampshire [1997] 2 All ER 865
- Osman v. UK (1998) 29 EHRR 245
- Kent v. Griffiths [2002] 2 All ER 474
- Glencar Explorations v. Mayo County Council [2002] 1 ILRM 481 (for the application of the Osman decision in Ireland.)

Part Three: Liability for Omissions and the Acts of Third Parties

- Carmarthenshire County Council v. Lewis [1955] 1 All ER 294
- Home Office v. Dorset Yacht Club [1970] 2 All ER 294

PART ONE: THE HISTORICAL DEVELOPMENT OF THE DUTY OF CARE

Donoghue v. Stevenson

Facts: The plaintiff's friend bought her a ginger beer. The bottle was made out of brown opaque glass, which made it impossible to see the contents. The bottle was also sealed when it was bought. After taking a drink from the bottle, she poured the rest onto her ice cream, and when she did, a decomposing snail came out. She claims she got extremely ill as a result. She sued the manufacturer. The case was appealed to the House of Lords.

What did she want? She wanted the court to hold that the manufacturer of a product intended for human consumption and contained in a package which prevented inspection, owed a duty to her as a consumer of the product, to take care that there

was nothing poisonous in the product. She claimed that the manufacturer had neglected this duty and that he was therefore liable to her for damages in negligence.

Did she win? Yes. She won by a 3:2 Majority. In other words, three of the judges ruled in her favour (Lord Atkin, Lord Thankerton and Lord MacMillan), and two judges ruled against her (Lord Buckmaster and Lord Tomlin). A judge is said to 'dissent' when he makes a decision, which disagrees with the majority opinion. Therefore, Lord Buckmaster and Lord Tomlin were the 'dissenting judges' in this case.

Why did Lord Buckmaster dissent? He cited the case of *Winterbottom v. Wright* as authority for denying the plaintiff recovery in this case.

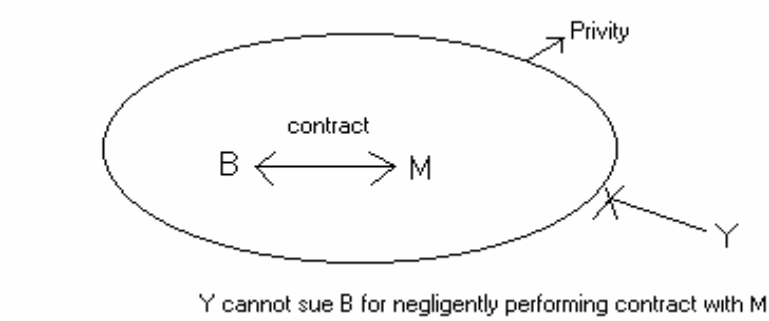
In *Winterbottom*, the plaintiff was an employee of a post office. The post office had a contract with the defendants for the supply of carts for delivering the mail. The defendants negligently manufactured one of the carts supplied. The plaintiff was injured when a wheel broke on the cart he was driving. The plaintiff was not a party to the contract between his employer and the defendant; therefore he had no right of recovery under the law of contract. Under the old law of negligence there was no general duty of care. Instead, the plaintiff had to confine the duty owed to the particular facts of his case. The plaintiff therefore argued that the defendant negligently performed his contract with the post office by supplying a faulty cart. He failed because of privity of contract. There were only two very narrow exceptions:

> *"The breach of the defendant's contract with A to use care and skill in and about the manufacture or repair of an article does not of itself give any cause of action to B when he injured by reason of the article proving to be defective. From this general rule there are two well-known exceptions: (i) in the case of an article dangerous in itself, and (ii) where the article, not in itself dangerous, is in fact dangerous on account of some defect and this is known to the manufacturer."*

In *Donoghue v. Stevenson*, the contract was between the plaintiff's friend and the retailer. Under the old law she could only have recovery if the ginger beer was an article dangerous in itself. It was not: "*In the present case no one can suggest that the ginger beer was an article dangerous in itself*." The manufacturer was not actually aware of the snail in the bottle because the bottle was brown and opaque. Lord Buckmaster could see no sense in owing a duty to every person who would lawfully use the product to ensure that it was carefully constructed.

> *"There can be no special duty attaching to the manufacture of food apart from those implied by contract or imposed by statute. If such a duty exists it seems to me it must cover the construction of article and I can see no reason why it should not apply to the construction of a house. If one step why not fifty?"*

Privity of Contract:



Y cannot sue B for negligently performing contract with M

Let's take the following example: There is a contract between B and M. Once the contract is formed, a shield or barrier forms around them in law, which is called privity. What that means is that no one other than B and M (the parties to the contract) can sue on the basis of that contract. Let's say M has bought a product from B. When M goes home, Y uses the product. The product turns out to be defective and ends up seriously injuring Y. Under the law prior to Donoghue v. Stevenson, whom could Y sue? He had no contractual rights against B because he was not a party to that contract. In negligence he could only escape the privity of contract doctrine if the product was dangerous in itself or if the manufacturer actually knew of the defect. Let's say he used an IPOD which exploded and caused Y to go deaf. Under the old law he would have had to sue M. M would then have sued B. There would have been a chain of liability before the ultimate wrongdoer would have been held liable. The problem was that the chain inevitably failed. Let's say M was bankrupt. Y then had no remedy and B was never held liable for his negligence.

What did Lord Atkin think about the old law? Lord Atkin wanted to move away from the excessive categorisation in the law of tort because it inevitably led to an injustice when you could not squeeze within one of the narrow bands of liability.

> *"The courts are concerned with the particular relations which come before them ... The result is that the courts have been engaged upon an elaborate classification of duties as they exist in respect of property ... and distinctions based on the particular relations of the one side to the other ... In this way it can be ascertained at any time whether the law recognises a duty, but only where the case can be referred to some particular species which has been examined and classified."*

Lord Atkin preferred that the duty of care be assessed by a general principle which would apply in all situations regardless of the individual circumstances, thereby avoiding the injustices which arose under the old law. This general principle is now known as the 'neighbour principle' or duty of care:

> *"The rule that you are to love your neighbour becomes in law: You must not injure your neighbour ... You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who then in law is my neighbour? The answer seems to be persons who are so closely and directly affected by my act that*

> *I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called into question."*

Speaking about the *Winterbottom* rule of product liability and application of the privity principle to tort actions, Lord Atkin said:

> *"I do not think so ill of our jurisprudence as to suppose that its principles are so remote from the ordinary needs of civilised society and the ordinary claims which it makes upon our members as to deny a legal remedy where there is so obviously a social wrong."*

Applying his new general principle, and keeping in mind the public interest that a duty should be owed in this case, Lord Atkin held that the defendant manufacturer owed a duty to take care. The ratio of the decision was that:

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

What is the privity of contract fallacy?

As previously explained, the law prior to this case, as applied by Lord Buckmaster, used the privity of contract doctrine to deny a remedy in the law of negligence. Lord MacMillan said that:

> *"On the one hand, there is a well established principle that no one other than a party to a contract can complain of a breach of that contract. On the other hand there is an equally well established doctrine that negligence ... gives a right of action to the party injured by that negligence ... The fact that there is a contractual relationship between the parties which may give rise to an action for breach of contract does not exclude the co-existence of a right of action founded on negligence as between the same parties independently of the contract though arising out of the relationship in fact brought about by the contract."*

Therefore, according to Lord MacMillan, the privity of contract fallacy is that the existence of a contract between the defendant and a third party does not prevent the defendant owing a duty to the plaintiff in tort in relation to the performance of that contract.

What are the necessary elements to establish a duty of care?

There are two elements to this first formulation of the duty of care.

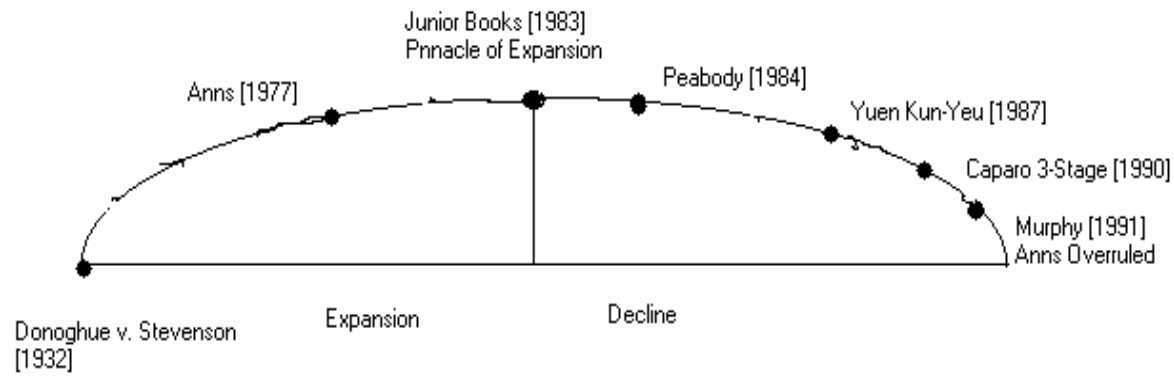
1. The injury must be a consequence, which a reasonable person would anticipate was a possible result of the defendant's conduct. The 'reasonable person' is measured objectively. It is based on the general standards of the community and the average person in that community. It does not take into account the individual perspective of the defendant.
2. There must be proximity. This is what Lord Atkin meant by 'neighbour'. There must be some sort of close connection or relationship between the parties before a duty will be established. There is no duty *ad infinitum* (to an indefinite extent). You do not owe a duty to the world at large.

Although not specifically part of the 'test' at this stage, it was clear that Lord MacMillan was also taking policy into account in imposing a duty of care when, after he gave the baker and poisoned bread analogy, he said:

> *"I cannot believe, and I do not believe, that ... there is no redress for this case. The state of facts I have figured might well give rise to a criminal charge, and the civil consequences of such carelessness can scarcely be less wide than its criminal consequences ... yet [the court of first instance here decided that] a manufacturer of food products ... does not ... even owe a duty to take care that he does not poison them."*

In the early days of the new test for a duty of care in negligence, the judges did not specifically acknowledge that they were taking policy into account when deciding whether a duty of care was owed. Therefore, you will not see specific reference to public policy until much later.

Judicial Development of the Duty of Care Concept:



Thus the modern duty of care concept was born. It went through numerous developments throughout the twentieth century. For the first half of the century, up until the late 1980's, the law of negligence was said to be in a state of expansion. The law was expanding to create a duty of care in new and novel situations that had not

been considered before. However, after a decision of the House of Lords, which allowed recovery for pure economic loss[1], the courts in England decided that the duty of care had expanded too far, and so they began to reel it back in. The courts became increasingly conservative, and we entered into a period of decline, which is marked by the introduction of the three-stage test and incremental approach, in *Caparo*.[2] The result is that it is now much harder to establish a duty of care in novel situations, or scenarios that have not come up before.

Lord Wilberforce/Anns Two-Stage Test:

> *"... [1] the position has now been reached that in order to establish that a duty of care arises in a particular situation, it is not necessary to bring the facts of that situation within those of previous situations in which a duty of care had been held to exist. Rather the question has to be approached in two stages. [2] First one had to ask whether as between the alleged wrongdoer and the person who has suffered damage there is a sufficient relationship of proximity or neighbourhood such that, in the reasonable contemplation of [the wrongdoer], carelessness on his part may be likely to cause damage to the [proximate person], in which case* ***a prima facie duty of care arises****. [3] Secondly, if the first question is answered affirmatively, it is necessary to consider whether there are any considerations which ought to negative, or to reduce or limit the scope of the duty or class of person to whom it is owed or the damages to which a breach of it may give rise."*[3]

- In part [1] of the quote Lord Wilberforce is saying that in order to find a duty of care, it is no longer necessary to find earlier case law to support your proposition. He then goes on to talk about the two stage inquiry which courts have to use to establish a duty of care.
- Part [2] of the quote is the first stage of the inquiry. You establish that the wrongdoer could reasonably foresee that his carelessness will cause damage to a person with whom he has a proximate relationship. Was the damage a reasonable consequence of his actions? If it was, then a prima facie duty of care arises. In other words, a presumption of a duty of care arises.
- Part [3] of the quote refers to the second stage of the inquiry. The prima facie duty of care is established. The court must then ask themselves if there are any overwhelming reasons of public policy which should override that presumption. Is it in the public interest that a duty of care not be imposed?

Lord Wilberforce's approach –taken literally- effectively recognised a presumption of liability in every case where injury to the claimant was reasonably foreseeable, and put on the defendant's the onus of identifying reasons of public policy which militated

[1] *Junior Books v. Veitchi* [1983] 1 AC 520
[2] *Caparo Industries v. Dickman* [1990] 2 AC 605
[3] This was originally formulated in the case of *Anns v. Merton London Borough* [1977] 2 All ER 492 at 498, but it is quoted by Lord Keith of Kinkel in *Governors of Peabody Donation Fund v. Sir Lindsay Parkinson & Co Ltd* [1984] 3 All ER 529. I have divided the quote into three parts and added emphasis to facilitate an explanation.

against the imposition of such a duty. The Anns approach was interpreted for a brief period in the late 70's and early 80's as giving the courts a licence to overturn long established authorities denying the existence of a duty (e.g. in the area of pure economic loss and psychiatric injury) on the basis that the mere foreseeability of injury gave rise to a prima facie duty of care. Eventually, there arose concern amongst the members of the higher judiciary that:

> *"... a too literal application of the well known observation of Lord Wilberforce in Anns ... may be productive of a failure to have regard to, and to analyse and weigh, all the relevant considerations in considering whether it is appropriate that a duty of care should be imposed."*[4]

The High water mark of the development of the duty of care concept came in the case of *Junior Books v. Veitchi Co.*[5] , where the House of Lords was said to have expanded the Anns formulation one step too far. They explicitly allowed in wide dicta a claim in negligence for financial expenditure. The terms in which they allowed the claim gave substantial encouragement to claims for financial loss. Because of the explicit nature of the expansion of the duty, a reaction against it set in almost immediately. There were two main criticisms. First was the fear of indeterminate liability, or the prospect of releasing a large number of unmeritorious and potentially oppressive claims for compensation. Second, the courts were concerned that the traditional relationship between tort and contract was being disturbed, with adverse consequences for legal and commercial certainty. Because Junior Books had used the Anns test to justify this expansion, criticism of Junior Books thus began to affect Anns itself.

Governors of the Peabody Donation Fund v. Sir Lindsay Parkinson

This decision of Lord Keith came one year after the Junior Books decision and was the first tentative step towards the eventual abandonment of the *Anns* two-stage test by the English courts. When speaking about the Anns test, Lord Keith said:

> *"There has been a tendency in some recent cases to treat [the Anns test] as being themselves of a definitive character. This is a temptation which should be resisted."*

Lord Keith emphasised the proximity requirement. He also indicated that a prima facie duty of care which could only be rebutted by a policy or public interest was no longer good law. Instead, before a duty can be established, the court must decide whether it was "*just and reasonable that it should be so."*

[4] *Rowling v. Takaro Properties* [1988] AC 473 at 501.
[5] *Junior Books v. Veitchi Co.* [1983] AC 520

Yuen Kun-yeu v Attorney General of Hong Kong

This was the beginning of the end for the expansive *Anns* test. The Privy Council indicated that:

> *"In view of the direction in which the law has since been developing, their Lordships consider that for the future it should be recognised that the two-stage test in Anns is not to be regarded as in all circumstances a suitable guide to the existence of a duty of care."*

They criticised the way in which the two-stage test had been interpreted, especially the way in which the courts had stressed foreseeability of harm rather than proximity:

> *"Foreseeability of harm is a necessary ingredient ... but it is not the only one. Otherwise there would be liability in negligence on the part of one who sees another about to walk over a cliff with his head in the air, and forbears to shout a warning."*

Caparo Industries v. Dickman

In this case, Lord Bridge and Lord Oliver reformulated the concept of the duty of care and indicated the new judicial attitude to establishing a duty of care in novel situations:

> *"What emerges is that, in addition to the foreseeability of damage, necessary ingredients in any situation giving rise to a duty of care that there should exist between the party owing the duty and the party to whom it is owed a relationship characterised by the law as one of proximity or neighbourhood and that the situation should be one in which the court considers it fair just and reasonable that the law should impose a duty of a given scope on the one party for the benefit of the other ... I think the law has now moved in the direction of attaching greater significance to the more traditional categorisation of distinct and recognisable situations as guides to the existence, the scope and the limits of the varied duties of care which the law imposes. We must now, I think, recognise the wisdom of the words of Brennan J in the High Court of Australia in Sutherland Shire Council v. Heyman ... where he said:*
>
> > *'It is preferable in my view, that the law should develop novel categories of negligence incrementally and by analogy with established categories, rather than by a massive extension of a prima facie duty of care restrained only by indefinable "considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed".'*

Lord Oliver was also critical of the search for a universal theory of everything, which would explain when a duty of care would be owed in any situation:

> *"I think that it has to be recognised that to search for any single formula which will serve as a general test of liability is to pursue a will o' the wisp. The fact is that once one discards ... the concept of foreseeability of harm as the single exclusive test ... of the existence of the duty of care, the attempt to state some general principle which will determine liability in an infinite variety of circumstances, serves not to clarify the law, but merely to bedevil its development in a way which corresponds with practicality and common sense ..."*

The new test for the impositions of a duty of care consists of three elements:

- There must be foreseeability of damage
- There must be proximity i.e. a close relationship between the parties.
- It must be fair just and reasonable to impose the duty.

There is also an indication by the court of a new judicial attitude when considering the imposition of a duty of care in novel situations. It is a return to the pre Donaghue v. Stevenson attitude that the law should only expand in baby steps and that it should only be expanded if it falls within a category of established case law.

Difference between Caparo and Anns?

In the *Anns* test, a prima facie duty will arise if there was reasonable foreseeability of injury to a person in a proximate relationship. This presumption would only be overturned by very strong public policy considerations. In *Caparo*, there is no automatic presumption of a duty when there is foreseeability and proximity. Instead, it must also be demonstrated that it was just and reasonable to impose the duty i.e. that it was in the public interest to impose the duty. Therefore, instead of rebutting a prima facie duty of care, the policy question is now asked before the duty is imposed in order to determine if the duty should be recognised.

What does this mean for you?

This decision makes no difference when you are trying to establish a duty of care in areas where there has been little or no controversy i.e. physical injuries, car accidents. This decision affects the areas of negligence that are said to be on the frontiers of liability i.e. nervous shock, economic loss resulting from negligent misstatements, pure relational economic loss.[6] In these controversial areas, it is now increasingly difficult to establish a duty of care. The duty of care in Nervous shock is now in a state of decline in England. The courts are making distinctions between primary and secondary victims thus making recovery more difficult. In the Caparo decision itself, the court also reformulated the *Hedley Byrne* duty of care for negligent misstatements, making it much stricter and setting a higher threshold before recovery would be allowed.

[6] Economic loss suffered by the plaintiff which results because of physical damage to a third party or his property.

All may not be a grey as it first appears however. The general test of negligence did lead to uncertainty as to the breadth of the duty of care. This made it incredibly difficult for businesses in forward planning and assessing how much insurance cover they needed. The return to establishing a duty by reference to decided case law and categorisation leads to greater commercial certainty. Is the retrenchment of the duty of care really that bad?

Ireland:

What is surprising in Ireland is that we have not (until recently) embraced the criticisms of the Anns test. Indeed, McCarthy J in *Ward v. McMaster*[7], after considering the criticisms that had been levelled against Anns in England, adopted the two stage test in Ireland. He altered it however, to take into account the criticisms about lack of proximity. Therefore, until recently, in order to establish a duty of care in Ireland, you had to show:

- Foreseeability of damage and proximity. If you established both of these factors then a prima facie duty of care would arise.
- There must be an absence of any compelling exemption based on public poly. The public policy exemption must be a very powerful one in order to deny an injured party his right to redress.

The benefit of the McCarthy formulation was that it isolated proximity from foreseeability. It was therefore impervious to the criticisms laid against the Wilberforce two stage test.

Glencar Explorations v. Mayo County Council

The facts of this case are unimportant for the present tutorial. The most important judgment is that of Keane CJ, and in his judgment, we are only interested in what he has to say about the duty of care. His discussion starts on page 502 of the case, under heading (3), '*Negligence*'. He then goes on to discuss the development of the duty of care in England and Ireland. What is important about this judgment is that he says that in Ireland, we will now apply the Caparo three-stage test and incremental approach. Therefore, the current formulation of the duty of care in Ireland is as follows:

1. There must be foreseeability of damage.
2. There must be proximity between the parties.
3. The situation should be one in which the court considers it fair just and reasonable to impose the duty. In other words, is it good as a matter of public policy that the court should impose a duty of care?
4. The law should only develop novel categories of negligence in small steps, by reference to previous case law.

What this means for Ireland is that we are now starting on the same retrenchment of the duty of care. We have traditionally been much more generous in allowing recovery for nervous shock, and have not made the distinctions between victims that the English courts now favour. In the third tutorial, we will be reading the Fletcher

[7] *Ward v. McMaster*[1988] IR 337

case, which is a nervous shock case that was decided after Glencar. We will see what effect if any this new attitude to the duty of care will have.

Asif Tufal

THE TORT OF NEGLIGENCE

DEFINITION - 1

The breach of a legal duty to take care, resulting in damage to the claimant which was not desired by the defendant: L.B. Curzon, *Dictionary of Law*.

DEFINITION - 2

"Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do." Per Alderson B., *Blyth v Birmingham Waterworks Co.* (1856)

1. DUTY OF CARE

A duty of care was originally established by applying Lord Atkin's "Neighbour" Test from: *Donoghue v Stevenson* (1932).

The modern three-stage test was laid down by the HL in: *Caparo Industries v Dickman* (1990). The court must now consider:

(A) Whether the consequences of the defendant's act were reasonably foreseeable.

For example, damage or harm was held to be reasonably foreseeable in:

Kent v Griffiths (2000); and *Jolley v Sutton LBC* (2000).

But not in:

Bourhill v Young (1943); or *Topp v London Country Bus Ltd* (1993)

(B) Whether there is a relationship of proximity between the parties, ie a legal relationship or physical closeness.

For example, there was proximity in:

Home Office v Dorset Yacht Club (1970).

But not in:

Caparo v Dickman (1990).

(C) Whether in all the circumstances it would be fair, just and reasonable that the law should impose a duty.

It was held not to be fair, just and reasonable to impose a duty on the police in:

Hill v C.C. of W. Yorkshire (1988).

However, a duty was imposed on the fire brigade in:

Capital v Hampshire County Council (1997).

2. BREACH OF DUTY

The Standard Expected

Negligence is falling below the standard of the ordinary reasonable person. Specific rules apply if the defendant is a child, a learner or a professional:

* For children, see: *Mullin v Richards* (1998);
* For experts: *Bolam v Friern Barnet Hospital* (1957);
* For learners: *Nettleship v Weston* (1971), and *Wilsher v Essex Health Authority* (1986).

In all other cases, the court will consider the following four factors in deciding if there has been a breach of duty:

(A) The degree of risk involved.

Here the court will consider the likelihood of harm occurring.

There was either no known risk or a low risk in:
Roe v Minister of Health (1954)
Bolton v Stone (1951).

There was a known risk in:
Haley v London Electricity Board (1964).

(C) The seriousness of harm.

Sometimes, the risk of harm may be low but this will be counter-balanced by the gravity of harm to a particularly vulnerable claimant. See, for example:

Paris v Stepney Borough Council (1951).

(B) The practicability of taking precautions.

The courts expect people to take only reasonable precautions in guarding against harm to others. See, for example:

Latimer v AEC Ltd (1952).

(D) The social importance of the risky activity.

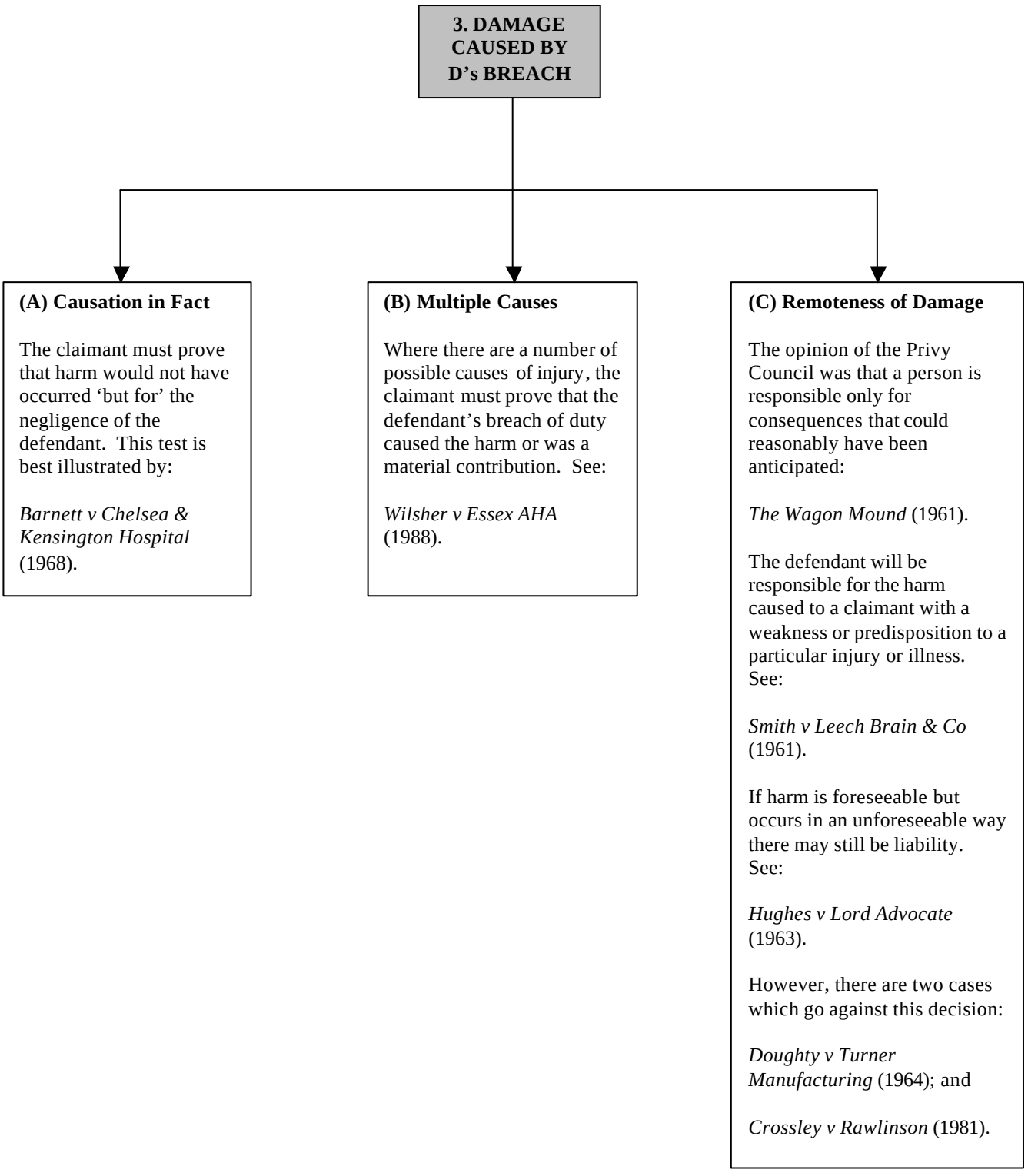
If the defendant's actions served a socially useful purpose then he may have been justified in taking greater risks. See, for example:

Watt v Hertfordshire County Council (1954).

PROOF OF BREACH

The claimant must produce evidence which infers a lack of reasonable care on the part of the defendant. However, if no such evidence can be found, the necessary inference may be raised by using the maxim *res ipsa loquitur*, ie the thing speaks for itself. See:

Scott v London & St Katherine Dock Co (1865)


3. DAMAGE CAUSED BY D's BREACH
(A) Causation in Fact
The claimant must prove that harm would not have occurred 'but for' the negligence of the defendant. This test is best illustrated by:
Barnett v Chelsea & Kensington Hospital (1968).
(B) Multiple Causes
Where there are a number of possible causes of injury, the claimant must prove that the defendant's breach of duty caused the harm or was a material contribution. See:
Wilsher v Essex AHA (1988).
(C) Remoteness of Damage
The opinion of the Privy Council was that a person is responsible only for consequences that could reasonably have been anticipated:
The Wagon Mound (1961).
The defendant will be responsible for the harm caused to a claimant with a weakness or predisposition to a particular injury or illness. See:
Smith v Leech Brain & Co (1961).
If harm is foreseeable but occurs in an unforeseeable way there may still be liability. See:
Hughes v Lord Advocate (1963).
However, there are two cases which go against this decision:
Doughty v Turner Manufacturing (1964); and
Crossley v Rawlinson (1981).

PART TWO: PUBLIC POLICY

Policy has always been a major consideration in determining liability in negligence. The court must decide not simply whether there is or is not a duty, but whether there should or should not be one. As previously stated, in the early part of the twentieth century, the courts did not specifically acknowledge that policy formed part of their decision making process, even though it played a pivotal role in establishing a duty of care. It wasn't until the reformulation of the test for negligence in the latter part of the century that the courts began to openly admit to using policy as a determining factor for a duty of care.

But what do I mean when I say public policy? When we say a judge decided the case on a matter of public policy, we are actually saying that he made a value judgment to determine which competing public interest should attract greater protection under the law. In making this value judgment, the judge takes into account a number of factors:

- Loss allocation: Judges are more likely to impose a duty on a party who is able to stand the loss.
- Practical considerations
- Moral considerations
- Protection of professionals: Lord Denning in particular was concerned that professionals should not be prevented from working because of restrictive court rulings.
- The floodgates argument: Judges are reluctant to impose liability where to do so might encourage large numbers of claims on the same issue. This consideration has particularly hampered the development of liability for nervous shock.
- The beneficial effects of imposing a duty for future conduct.

The reality of the situation in negligence is that a duty of care will arise when it ought to arise, and that the courts use policy as a filtering process. Thus in the case of *Mortensen v. Laing* Cooke P said:

> "*There is no escape from the truth, that whatever formula be used, the outcome in a grey area case has to be determined by judicial judgment. Formula help organise thinking, but cannot provide answers."*

W v. Ireland (No. 2)

Facts: The Plaintiff was the victim of sexual offences committed by Father Brendan Smith in Northern Ireland. The accused was residing in the Republic. The Attorney General for Northern Ireland sought the extradition of the offender from the Republic. Before the Attorney General in the Republic did anything on foot of the warrant, his office was informed in December that Father Brendan Smith intended to return to the North voluntarily. He returned in January and was convicted. The plaintiff then sued the A.G. in the Republic.

What did she want? She claimed that he was under a duty to consider extradition requests speedily and process them quickly. She claimed that because the AG had delayed in considering the extradition warrants she had suffered enormous shock and stress and psychiatric problems.

Did she win? No.

Why not? The court used the test for a duty of care laid down by the Supreme Court in *Ward v. McMaster*, which was an endorsement of the two-stage test formulated by Lord Wilberforce in *Anns v. Merton Borough Council*. The first stage of this test was whether or not there was proximity between the parties and if so, if it was reasonably foreseeable that the defendant could have caused the damage to the plaintiff if he was careless. If these criteria were satisfied then there was a prima facie duty of care, which could only be rebutted if there was a serious question of public policy, which would limit the scope of the duty owed.[1]

The court held that there was no proximity/neighbourhood between the victim and the defendant.[2] The court held that the Extradition statute imposed a function on the Attorney General, not a duty. In the performance of that function he was not under any duty to take into account the circumstances of the victims of crimes. There was no relationship between the AG and the victims of the crimes referred to in the extradition warrants he was considering. Therefore there was no proximity and no duty of care. The plaintiff failed on the first limb of the test.

The court then went on to talk about public policy. However, all of this discussion was obiter dictum because the case had already been decided. The court said that only in exceptional cases would a court deny a right of action to a person who has suffered a loss on public policy grounds. When considering public policy, the court is engaged in a balancing exercise. They must balance the hardship to individuals which the rule would produce versus the disadvantage to the public interest if no such rule existed.[3]

The court then went on to say that had there been proximity in this case, considerations of public policy would have meant that no duty of care would have arisen.

The first argument of policy was based on the Attorney General performing his public function effectively. He plays an important role in the extradition process. He must weigh all the information available, and if that information is inadequate he should be able to request more. If he were required to exercise his statutory function in light of a duty to act quickly, a conflict would arise which might result in the improper exercise of his statutory function.

The second argument was based on a floodgates consideration. If the Attorney General owed a duty of care in extradition requests, then why wouldn't he owe a duty in the exercise of his powers in other situations, for example, in his prosecutorial functions. The court considered that it was contrary to the public interest that he owes a duty of care at common law.

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[1] Page 16, bottom right hand paragraph: "*In his judgment McCarthy J referred in detail … the damage to which a breach of it may give rise."* And Page 17, bottom left hand paragraph: " *…applying the test approved by McCarthy … reduce or limit the scope of the common law duty of the Attorney General*."

[2] Page 19 and 20, the section entitled 'Conclusion', half way down, right hand side of page 19.

[3] Page 20, last paragraph, left hand side: "*The principles in Ward v. McMaster … if no such rule existed*."

Capital and Counties v. Hampshire

On appeal, the court combined three separate cases and considered them together because they concerned similar liability and similar issues.

Facts:
Capital Hampshire: The defendant fire brigade attended a fire on the plaintiff's premises. The fire officer in charge ordered that the plaintiff's sprinkler system be turned off. This resulted in the fire burning out of control and destroying the plaintiff's premises. The Lower court held that the fire officer had committed a positive act of negligence, which had an adverse effect on the firefight and exacerbated the situation leading to the destruction of the building. He held that the fire brigade were liable in negligence for the damage caused. The Defendant fire brigade appealed.
London Fire Brigade: There was an explosion on a nearby wasteland. Flaming debris landed on the plaintiff's premises. The fire brigade inspected the wasteland, but left without checking the plaintiff's premises. A fire broke out and damaged the plaintiff's land. They sued, but lost in the lower court. The plaintiffs appealed claiming the fire brigade owed them a duty of care.
West Yorkshire: The plaintiffs in this case were the owners of a chapel, which burned down. There were 7 fire hydrants around the chapel, the first four failed, and by the time the fire brigade found the fifth one, the fire was too far-gone. The plaintiffs sued for negligence, but lost in the lower court. The plaintiffs appealed claiming that the fire brigade owed them a duty of care.

First Issue: Was there a duty to answer emergency calls? The court said that on the basis of proximity, there was no duty on either fire brigades or police to answer emergency calls. He decided this by analogy using the case of *Alexandrou v. Oxford*.[4] In that case it was held that there could be no duty of care to answer a 999 call. The police had to answer a 999 call from any member of the public, not just the plaintiff. Therefore, there was no special relationship/proximity between the plaintiff and the police. You cannot owe a duty of care ad infinitum or to the world at large.

Second Issue: Did the fire brigade owe a duty of care once they arrived at the scene?
Hampshire Case: In this case the court held that there was liability in negligence for the actions of the fire brigade at the scene, but this was because of the special facts of the case. The court said that: "*where the rescuer/protective service itself by negligence creates the danger which caused the plaintiff's injury there is no doubt in our judgment that the plaintiff can recover."* The cases allowed recovery because a new or different danger was created apart from that which the protective service was seeking to guard against. There was some positive negligent act by the rescuer/protective service, which substantially increased the risk and thereby created a fresh danger. The court held that by negligently turning off the sprinklers at the stage when they were in fact containing the fire, was a positive act of negligence, which exacerbated the fire so that it spread rapidly. They therefore dismissed the appeal of the fire brigade in that case, and upheld the original ruling of negligence.

[4] *Alexandrou v. Oxford* [1993] 4 All ER 328

London Fire Brigade Case and the Yorkshire Case: These plaintiffs tried to argue that where someone with a special skill, applies that skill for the assistance of another, who relies on that skill, then there is proximity. There must be direct and substantial reliance on that skill. They claimed that under the Fire Act, the fire fighters assume control of a fire once they arrive at the scene. Therefore there was reliance on their skill by the owner of the building to put out the fire, and therefore, a duty of care arose. The court rejected this argument. They said that the statute imposed this duty to take control for the benefit of the public at large. There was no specific voluntary assumption of responsibility to the owner of the premises of a fire therefore no proximity. The court said:

> *"In our judgment, a fire brigade does not enter into a sufficiently proximate relationship with the owner or occupier of premises to some under a duty of care merely by attending at the fire ground and fighting the fire; this is so, even though the senior officer actually assumes control of the fire-fighting operation."*

Policy: The court then went on to talk obiter about the issue of public policy. The court said that the primary consideration of the law is that wrongs should be remedied. Therefore, there must be extremely potent counter considerations in order to override this judicial attitude. They therefore set a very high threshold for public policy. The court then gave three examples of where public policy will intervene:

1. Where the duty of care would be inconsistent with some wider object of the law.
2. Where the imposition of a duty of care would interfere with the careful performance of a public or professional function.
3. Where the duty would be open to abuse by those bearing grudges.

The court then went on to say that had there been sufficient proximity in this case, the policy arguments raised by the defendants in the lower courts would not have been sufficient to deny a duty of care.

Osman v. UK

Facts: In this case, a schoolteacher became obsessed with one of his sixteen-year-old pupils and proceeded to launch a campaign of harassment against him and his family for a period of ten months. Numerous reports were made to the police about the behaviour of the teacher and alleged threats he had made to the family and friends, but the police never arrested him. Finally, one night the teacher broke into the Osman's house, killed the father and serious injured the son Ahmet. He then went to the headmaster's house, where he injured the headmaster and killed his son. The family sued the police for negligence. The police took an action in the court claiming that the family's case should be dismissed. They argued that the Hill case had established an immunity for the Police when investigating crimes and that as a matter of policy, they owed no duty of care. The Court of Appeal agreed and dismissed the Osman's case. The Osman family appealed to the European Court of Human Rights.

Argument: They said that by dismissing their case on the basis of the Hill immunity, the Court of Appeal had violated their right of access to the courts under Article 6 of the European Convention on Human Rights. Article 6 provides that in the determination of one's civil rights and obligations "*everyone is entitled ... to a hearing by a tribunal*."

Held: The Court held that the applicant's case never proceeded to trial; therefore there was never a determination of the merits of their case. They were therefore denied access to the courts for the determination of their civil suit.

The Court then went on to examine the Hill immunity for police investigations. They said that although the aim of the immunity was legitimate, it was not proportionate. They said that a blanket immunity was an unjustifiable restriction of the applicant's rights under Article 6. The courts when applying the policy element of the duty of care should instead examine the merits and individual facts of each case. They should take into account whether there has been grave negligence or the failure to protect the life of a child. There should not be an automatic exclusion.

Problem with Osman

The problem with Osman is that it has obviously resulted from a misunderstanding of how the common law of negligence operated. The idea that the individual circumstances of each case should be considered is not something, which the law of negligence contemplates. Particularly illustrative of this point is the case of *Palmer v. Tess Health Authority* where the court said:

> *"Once rules are established, it is not open to the courts to extend the accepted principles of proximity simply because the facts of a given case are particularly horrifying or heart-rending. Nor should the principles be extended by some notion of proportionality based on the gravity of the negligence proved. There are no gradations of negligence. The notion of gross negligence is not recognised in English law."*

In the cases that came after Osman, the British appellate courts in anticipation of a new jurisprudence showed a discernible willingness to take a considerably softer approach towards blanket immunities from a duty of care on the basis of public policy. The case of *Kent v. Griffiths* is a prime example of this softly softly approach to the immunity issue.

It should be noted that in light of the recent case of *Z v. UK* Osman is now not really good law anymore. In that case, the European Court of Human Rights backtracked significantly from the Osman decision but did not actually overrule it. It is however, tantamount to an admission by the court that they got it wrong in Osman. Without getting into too much detail, the upshot of Z is that Article 6 is now of only very limited use in attacking the immunity of public bodies from a duty of care. Where claims are rejected on the basis of substantive grounds like a lack of proximity, there will be no infringement of Article 6.

Kent v. Griffiths

Facts: The claimant had an asthma attack at her home. She telephoned for an ambulance and the call was accepted. However, the ambulance took 40 minutes to travel the 6.5 miles to the claimant's house. While they were transporting her to the hospital she went into respiratory arrest and suffered permanent brain damage due to lack of oxygen. She sued the ambulance service for failing to answer her emergency call with sufficient haste.

Did she win? Yes. The plaintiff won despite the staggering amount of authority that had previously established that there was no duty to answer an emergency call because of a lack of proximity.

Why? What is obvious in this case is that the judge was heavily influenced by the Osman decision. He went to great lengths to distinguish and distort the previous authority so that the plaintiff could recover in this case.

He distinguished the previous authorities because he said that the police and the fire brigade were under a duty to the public at large to perform their function. The duty in their case was not owed to an individual. If they failed to perform their duty, it affected society as a whole. When the police stop a crime, they are not just protecting the individual victim, they are "*performing their more general role of maintaining public order and reducing crime*." Likewise, when the fire brigade are putting out a fire, they are not only concerned with protecting the particular property where the fire breaks out, but also to prevent the fire from spreading. There was therefore no special relationship, which could give rise to proximity in the case of the police or the fire brigade.

In the present case however, the court held that an ambulance service was a health service. The only member of the public who is adversely affected by the ambulance not doing its job is the person who called the ambulance. In this case it was for the claimant alone for whom the ambulance had been called. The court held therefore that:

> *"The fact that it was a person who foreseeably would suffer further injuries by a delay in providing an ambulance, when there was no reason why it should not be provided, is important in establishing the necessary proximity and thus the duty of care in this case ... The acceptance of the call in this case established the duty of care."*

Glencar v. Mayo County Council

Again, the facts of this case are unimportant. What is important is what Keane CJ and Fennelly J say about the application of Osman in Ireland. They commented on the fact that in the Z case, the court had acknowledged that Osman had to be reviewed. They did not apply Osman, nor did they seem particularly impressed by it. It is therefore safe to say that it is unlikely to be persuasive in Irish Courts in the foreseeable future.

Asif Tufal

PUBLIC BODIES AND POLICY

According to the ILEx Part 2 syllabus, candidates need to be aware of the continuing trend to restrict liability particularly for public bodies eg *X v Bedfordshire County Council* and *Stovin v Wise*. Candidates are also to be aware of cases which appear to reverse this trend eg *White v Jones* and *Spring v Guardian Assurance plc.*

The various public authorities dealt with in this handout are as follows:

PROFESSIONAL SOCIETIES

Case	Facts	Decision	Reason
Marc Rich v Bishop Rock Marine (1995) (HL)	Ship developed a crack in the hull while at sea. Surveyor acting for the vessel's classification society recommended permanent repairs but the owners effected temporary repairs having persuaded the surveyor to change his recommendation. The vessel sank a week later.	The ship classification society did not owe a duty of care to cargo owners.	1. They were independent, non-profit making entities 2. Cost of insurance would be passed on to shipowners 3. Extra layer of insurance for litigation and arbitration 4. Society would adopt a more defensive role
Watson v British Boxing Board of Control (1999) (QBD)	During a professional boxing contest, the claimant suffered a sub-dural haemorrhage resulting in irreversible brain damage which left him with, among other things, a left-sided partial paralysis. Claimant contended that defendant owed him a duty of care to provide appropriate medical assistance at ringside.	The BBBC was liable for not providing a system of appropriate medical assistance at the ringside.	1. Boxers unlikely to have well informed concern about safety 2. Board had special knowledge and knew that boxers would rely on their advice 3. Standard response to sub-dural bleeding agreed since 1980 but not introduced by the Board

ADVOCATES

Case	Facts	Decision	Reason
Arthur Hall v Simons (2000) (HL)	In three separate cases, clients brought claims for negligence against their former solicitors. The solicitors relied on the immunity of advocates from suits for negligence, and claims were struck out. The CA later held that the claims fell outside the scope of the immunity and that they should not have been struck out. The HL considered the immunity.	Advocates no longer enjoyed immunity from suit in respect of their conduct of civil and criminal proceedings. It was no longer in the public interest to maintain the immunity in favour of advocates.	1. Immunity not needed to deal with collateral attacks on criminal and civil decisions 2. Immunity not needed to ensure that advocates would respect their duty to the court 3. Benefits would be gained from ending the immunity 4. Abolition of the immunity would strengthen the legal system by exposing isolated acts of incompetence at the Bar

LOCAL AUTHORITIES

Case	Facts	Decision	Reason
X v Bedfordshire CC *M v Newham LBC* *E v Dorset CC* (1995) (HL)	Abuse cases: (a) Psychiatrist and social worker interviewed a child suspected of having been sexually abused and wrongly assumed from the name given by the child that the abuser was the mother's current boyfriend, who had the same first name (rather than a cousin). The child was removed from the mother's care. (b) Local authority took no action for almost five years to place the plaintiff children on the Child Protection Register despite reports from relatives, neighbours, the police, the family's GP, a head teacher, the NSPCC, a social worker and a health visitor that the children were at risk (including risk of sexual abuse) while living with their parents, that their living conditions were appalling and unfit and that the children were dirty and hungry. Education cases: (a) Plaintiff alleged that his local education authority had failed to ascertain that he suffered from a learning disorder which required special educational provision, that it had wrongly advised his parents and that even when pursuant to the Education Act 1981 it later acknowledged his special needs, it had wrongly decided that the school he was then attending was appropriate to meet his needs. (b) Plaintiff alleged that the headmaster of the primary school which he attended had failed to refer him either to the local education authority for formal assessment of his learning difficulties, which were consistent with dyslexia, or to an educational psychologist for diagnosis, that the teachers'	1. Categories of claims against public authorities for damages. 2. In actions for breach of statutory duty simpliciter a breach of statutory duty was not by itself sufficient to give rise to any private law cause of action. A private law cause of action only arose if it could be shown, as a matter of construction of the statute, that the statutory duty was imposed for the protection of a limited class of the public and that Parliament intended to confer on members of that class a private right of action for breach of the duty. 3. The mere assertion of the careless exercise of a statutory power or duty was not sufficient in itself to give rise to a private law cause of action. The plaintiff also had to show that the circumstances were such as to raise a duty of care at common law. In determining whether such a duty of care was owed by a public authority, the manner in which a statutory discretion was or was not exercised (ie the decision whether or not to exercise the discretion) had to be distinguished from the manner in which the statutory duty was implemented in practice. Since it was for the authority, not for the courts, to exercise a statutory discretion conferred on it by Parliament, nothing the authority did within the ambit of the discretion could be actionable at common law, but if the decision was so unreasonable that it fell outside the ambit of the discretion conferred on the authority that could give rise to common law liability. Furthermore … 4. In the abuse cases, the claims based on breach of statutory duty had been rightly	6. In respect of the claims for breach of duty of care in both the abuse and education cases, assuming that a local authority's duty to take reasonable care in relation to the protection and education of children did not involve unjusticiable policy questions or decisions which were not within the ambit of the local authority's statutory discretion, it would nevertheless not be just and reasonable to impose a common law duty of care on the authority in all the circumstances. Courts should be extremely reluctant to impose a common law duty of care in the exercise of discretionary powers or duties conferred by Parliament for social welfare purposes. In the abuse cases a common law duty of care would be contrary to the whole statutory system set up for the protection of children at risk, which required the joint involvement of many other agencies and persons connected with the child, as well as the local authority, and would impinge on the delicate nature of the decisions which had to be made in child abuse cases and, in the education cases, administrative failures were best dealt with by the statutory appeals procedure rather than by litigation. 7(a). A local authority was not vicariously liable for the actions of social workers and psychiatrists instructed by it to report on children who were suspected of being sexually abused because it would not be just and reasonable to impose a duty of care on the local authority or it would be contrary to public policy to do so. The social workers and psychiatrists themselves were retained by the local authority to advise the local authority, not the plaintiffs and by accepting the instructions of the local authority did not

	advisory centre to which he was later referred had also failed to identify his difficulty and that such failure to assess his condition (which would have improved with appropriate treatment) had severely limited his educational attainment and prospects of employment. (c) Plaintiff alleged that although he did not have any serious disability and was of at least average ability the local education authority had either placed him in special schools which were not appropriate to his educational needs or had failed to provide any schooling for him at all with the result that his personal and intellectual development had been impaired and he had been placed at a disadvantage in seeking employment	struck out. The purpose of child care legislation was to establish an administrative system designed to promote the social welfare of the community and within that system very difficult decisions had to be taken, often on the basis of inadequate and disputed facts, whether to split the family in order to protect the child. In that context and having regard to the fact that the discharge of the statutory duty depended on the subjective judgment of the local authority, the legislation was inconsistent with any parliamentary intention to create a private cause of action against those responsible for carrying out the difficult functions under the legislation if, on subsequent investigation with the benefit of hindsight, it was shown that they had reached an erroneous conclusion and therefore failed to discharge their statutory duties. 5. In the education cases, the claims based on breach of statutory duty had also rightly been struck out. A local education authority's obligation under the Education Act 1944 to provide sufficient schools for pupils within its area could not give rise to a claim for breach of statutory duty based on a failure to provide any or any proper schooling since the Act did not impose any obligation on a local education authority to accept a child for education in one of its schools, and the fact that breaches of duties under the Education Acts might give rise to successful public law claims for a declaration or an injunction did not show that there was a corresponding private law right to damages for breach of statutory duty. In the case of children with special educational needs, although they were members of a limited class for whose protection the statutory provisions were enacted, there was nothing in the Acts which demonstrated a parliamentary intention to give that class a statutory right of action for	assume any general professional duty of care to the plaintiff children. Their duty was to advise the local authority in relation to the well-being of the plaintiffs but not to advise or treat the plaintiffs and, furthermore, it would not be just and reasonable to impose a common law duty of care on them. (b). However, in the education cases a local authority was under a duty of care in respect of the service in the form of psychological advice which was offered to the public since, by offering such a service, it was under a duty of care to those using the service to exercise care in its conduct. Likewise, educational psychologists and other members of the staff of an education authority, including teachers, owed a duty to use reasonable professional skill and care in the assessment and determination of a child's educational needs and the authority was vicariously liable for any breach of such duties by their employees. 8. It followed that the plaintiffs in the abuse cases had no private law claim in damages. Their appeals would therefore be dismissed. In the education cases the authorities were under no liability at common law for the negligent exercise of the statutory discretions conferred on them by the Education Acts but could be liable, both directly and vicariously, for negligent advice given by their professional employees. The education authorities' appeals would therefore be allowed in part.

		damages. The duty imposed on a local education authority to 'have regard' to the need for securing special treatment for children in need of such treatment left too much to be decided by the authority to indicate that parliament intended to confer a private right of action and the involvement of parents at every stage of the decision-making process under the 1981 Act and their rights of appeal against the authority's decisions showed that Parliament did not intend, in addition, to confer a right to sue for damages.	
Stovin v Wise (Norfolk CC, third party) (1996) (HL)	Highway authority did not take any action to remove an earth bank on railway land which obstructed a motorcyclist's view, leading to an accident	Public authority liable for a negligent omission to exercise a statutory power only if authority was under a public law duty to consider the exercise of the power and also under a private law duty to act, which gave rise to a compensation claim for failure to do so. On the facts, not irrational for the highway authority to decide not to take any action; the public law duty did not give rise to an action in damages.	It was impossible to discern a legislative intent that there should be a duty of care in respect of the use of the power giving rise to a liability to compensate persons injured by the failure to use it. The distinction between policy and operations is an inadequate tool with which to discover whether it is appropriate to impose a duty of care or not, because (i) the distinction is often elusive; and (ii) even if the distinction is clear cut, it does not follow that there should be a common law duty of care.
H v Norfolk CC (1996) (CA)	Plaintiff had been sexually abused by his foster father	Council did not owe a duty of care to plaintiff	For the five public policy considerations enumerated by the trial judge: 1. the interdisciplinary nature of the system for protection of children at risk and the difficulties that might arise in disentangling the liability of the various agents concerned; 2. the very delicate nature of the task of the local authority in dealing with children at risk and their parents; 3. the risk of a more defensive and cautious approach by the local authority if a common duty of care were to exist; 4. the potential conflict between social worker and parents; and 5. the existence of alternative remedies under s76 of the Child Care Act 1980 and the powers of investigation of the local authority ombudsman.

Barrett v Enfield LBC (1999) (HL)	Plaintiff alleged negligent treatment while in local authority care	Plaintiff's claim, struck out by the trial judge and CA, would be restored	While a decision to take a child into care pursuant to a statutory power was not justiciable, it did not follow that, having taken a child into care, a local authority could not be liable for what it or its employees did in relation to the child. The importance of this distinction required, except in the clearest cases, an investigation of the facts, and whether it was just and reasonable to impose liability for negligence had to be decided on the basis of what was proved.
W v Essex CC (2000) (HL)	Plaintiff parents sought the recovery of damages for alleged psychiatric illness suffered by them on discovering that their children had been sexually abused by a boy who had been placed with them by the council for fostering	Claim struck out by trial judge and CA, would be restored.	The parents could be primary victims or secondary victims. Nor was it unarguable that the local authority had owed a duty of care to the parents.
Phelps v Hillingdon LBC *Anderton v Clwyd CC* *Gower v Bromley LBC* *Jarvis v Hamshpire CC* (2000) (HL)		A local authority could be vicariously liable for breaches by those whom it employed, including educational psychologists and teachers, of their duties of care towards pupils. Breaches could include failure to diagnose dyslexic pupils and to provide appropriate education for pupils with specia l educational needs.	1. It was well established that persons exercising a particular skill or profession might owe a duty of care in the performance to people who it could be foreseen would be injured if due skill and care were not exercised and if injury or damage could be shown to have been caused by the lack of care. An educational psychologist or psychiatrist or a teacher, including a special needs teacher, was such a person. So might be an education officer performing the authority's functions with regard to children with special educational needs. There was no justification for a blanket immunity in their cases. 2. It was obviously important that those engaged in the provision of educational services under the Educational Acts should not be hampered by the imposition of such a vicarious liability. Lord Slynn did not, however, see that to recognise the existence of the duties necessarily led or was likely to lead to that result. The recognition of the duty of care did not of itself impose unreasonably high standards.

Bradford-Smart v West Sussex CC (2000)	School bullying	Local Education Authority not liable	Serious bullying was outside school grounds

POLICE

Case	Facts	Decision	Reason
Knightley v Johns (1982) (CA)	The first defendant caused a road accident in a one-way tunnel, which had a sharp bend in the middle thus obscuring the exit. Police inspector ordered two police officers on motorcycles, in breach of regulations, to go back and close the tunnel; one injured by oncoming traffic	The police inspector in charge at the scene (and Chief Constable) was liable in negligence	The inspector was negligent in not closing the tunnel before he gave orders for that to be done and also in ordering or allowing his subordinates, including the plaintiff, to carry out the dangerous manoeuvre of riding back along the tunnel contrary to the standing orders for road accidents in the tunnel.
Marshall v Osmond (1983) (CA)	The plaintiff was a passenger in a stolen car being pursued by the police. The plaintiff tried to escape in order to avoid arrest. He was struck and injured when the police car hit the stolen car	The police officer was not liable.	Although a police officer was entitled to use such force in effecting a suspected criminal's arrest as was reasonable in all the circumstances, the duty owed by the police officer to the suspect was in all other respects the standard duty of care to anyone else, namely to exercise such care and skill as was reasonable in all the circumstances. On the facts, the police officer had made an error of judgment, but the evidence did not show that he had been negligent.
Rigby v CC of Northamptonshire (1985) (QBD)	The plaintiff's shop was burnt out when police fired a canister of CS gas into the building in an effort to flush out a dangerous psychopath who had broken into it. At the time there was no fire-fighting equipment to hand, as a fire engine which had been standing by had been called away. The plaintiff brought an action alleging, inter alia, negligence, and contending that the defendant ought to have purchased and had available a new CS gas device, rather than the CS gas canister, since the new device involved no fire risk	The plaintiff was entitled to damages only in negligence.	1. In deciding not to acquire the new CS gas device the defendant had made a policy decision pursuant to his discretion under the statutory powers relating to the purchase of police equipment and since that decision had been made bona fide it could not be impugned. Furthermore, on the evidence, there was no reason for the defendant to have had the new device in 1977, and he was not negligent in not having it at that date. 2. In regard to the action in negligence, since there was a real and substantial fire risk involved in firing the gas canister into the building and since that risk was only acceptable if there was equipment available to put out a potential fire at an early stage, the defendant had been negligent in firing the gas canister when no fire-fighting equipment was

			in attendance.
Hill v CC of West Yorkshire (1988) (HL)	Police failed to detect the 'Yorkshire Ripper' before he murdered the plaintiff's daughter	The Chief Constable could not be liable in damages for negligence	1. In the absence of any special characteristic or ingredient over and above reasonable foreseeability of likely harm which would establish proximity of relationship between the victim of a crime and the police, the police did not owe a general duty of care to individual members of the public to identify and apprehend an unknown criminal, even though it was reasonably foreseeable that harm was likely to be caused to a member of the public if the criminal was not detected and apprehended. 2. Even if such a duty did exist public policy required that the police should not be liable in such circumstances. (see *Waters v MPC* (2000) below)
Osman v Ferguson (1993) (CA)	A schoolteacher harassed a pupil. The police were aware of this and the teacher told a police officer that the loss of his job was distressing and there was a danger that he would do something criminally insane. He rammed a vehicle in which the boy was a passenger. The police laid an information against the teacher for driving without due care and attention but it was not served. The teacher shot and severely injured the boy and killed his father.	Action against the Metropolitan Police Commissioner alleging negligence would be dismissed	As the second plaintiff and his family had been exposed to a risk from the teacher over and above that of the public there was an arguable case that there was a very close degree of proximity amounting to a special relationship between the plaintiffs' family and the investigating police officers. However, the existence of a general duty on the police to suppress crime did not carry with it liability to individuals for damage caused to them by criminals whom the police had failed to apprehend when it was possible to do so. It would be against public policy to impose such a duty as it would not promote the observance of a higher standard of care by the police and would result in the significant diversion of police resources from the investigation and suppression of crime.
Ancell v McDermot (1993) (CA)	Diesel fuel spillage on motorway noticed by police patrolmen and reported to highways department. Car skidded on road and plaintiff's wife killed and plaintiff and passengers injured	The police were under no duty of care to protect road users from, or to warn them of, hazards discovered by the police while going about their duties on the highway, and there was in the circumstances no special relationship between the plaintiffs and the police giving rise to an exceptional duty to prevent harm from dangers created by	The extreme width and scope of such a duty of care would impose on a police force potential liability of almost unlimited scope, and it would be against public policy because it would divert extensive police resources and manpower from, and hamper the performance of, ordinary police duties.

		another.	
Alexandrou v Oxford (1993) (CA)	Police called out by burglar alarm at plaintiff's shop, failed to inspect rear of shop where burglars were hiding, who then removed goods.	A plaintiff alleging that a defendant owed a duty to take reasonable care to prevent loss to him caused by the activities of another person had to prove not merely that it was foreseeable that loss would result if the defendant did not exercise reasonable care but also that he stood in a special relationship to the defendant from which the duty of care would arise. On the facts, there was no such special relationship between the plaintiff and the police because the communication with the police was by way of an emergency call which in no material way differed from such a call by an ordinary member of the public and if a duty of care owed to the plaintiff were to be imposed on the police that same duty would be owed to all members of the public who informed the police of a crime being committed or about to be committed against them or their property.	Furthermore, it would not be in the public interest to impose such a duty of care on the police as it would not promote the observance of a higher standard of care by the police, but would result in a significant diversion of resources from the suppression of crime.
Swinney v CC of Northumbria (1996) (CA)	Details of the plaintiff police informant were stolen from an unattended police vehicle, who was then threatened with violence and arson and suffered psychiatric damage	It was at least arguable that a special relationship existed between the police and an informant who passed on information in confidence implicating a person known to be violent which distinguished the information from the general public as being particularly at risk and gave rise to a duty of care on the police to keep such information secure.	Moreover, while the police were generally immune from suit on grounds of public policy in relation to their activities in the investigation or suppression of crime, that immunity had to be weighed against other considerations of public policy, including the need to protect informers and to encourage them to come forward without undue fear of the risk that their identity would subsequently become known to the person implicated. On the facts as pleaded in the statement of claim, it was arguable that a special relationship existed which rendered the plaintiffs particularly at risk, that the police had in fact assumed a responsibility of confidentiality to the plaintiffs and, considering all relevant public policy factors in the round, that prosecution of the plaintiffs' claim was not precluded by the principle of immunity.
Osman v UK (1998) (ECHR)	See *Osman v Ferguson* (1993) above	The application of the exclusionary rule formulated by the House of Lords in *Hill v CC of West Yorkshire* (1989) as a watertight	The aim of such a rule might be accepted as legitimate in terms of the Convention, as being directed to the maintenance of the

		defence to a civil action against the police, constituted a disproportionate restriction on their right of access to a court in breach of article 6.1 of the European Convention on Human Rights.	effectiveness of the police service and hence to the prevention of disorder or crime, in turning to the issue of proportionality, the court must have particular regard to its scope and especially its application in the case at issue. It appeared to the Court that in the instant case the Court of Appeal proceeded on the basis that the rule provided a watertight defence to the police. It further observed that the application of the rule in that manner without further inquiry into the existence of competing public interest considerations only served to confer a blanket immunity on the police for their acts and omissions during the investigation and suppression of crime and amounted to an unjustifiable restriction on an applicant's right to have a determination on the merits of his or her claim against the police in deserving cases. In its view, it must be open to a domestic court to have regard to the presence of other public interest considerations which pull in the opposite direction to the application of the rule. Failing that, there will be no distinction made between degrees of negligence or of harm suffered or any consideration of the justice of a particular case.
Costello v CC of Northumbria (1999) (CA)	Plaintiff police woman attacked by prisoner in a cell; police inspector standing nearby did not help	Appeal against judgment for the plaintiff dismissed	A police officer who assumed a responsibility to another police officer owed a duty of care to comply with his police duty where failure to do so would expose that other police officer to unnecessary risk of injury. In the instant case, the inspector had acknowledged his police duty to help the plaintiff and had assumed responsibility, yet he did not even try to do so. It followed that the inspector had been in breach of duty in law in not trying to help the plaintiff, and the chief constable, although not personally in breach, was vicariously liable therefore.

Gibson v CC of Strathclyde (1999) (Court of Session, Scotland)		A chief constable owed road users a duty of care where his officers had taken control of a hazardous road traffic situation, in this case a collapsed bridge, but later left the hazard unattended and without having put up cones, barriers or other signs.	Once a constable had taken charge of a road traffic situation which, without control by him, presented a grave and immediate risk of death or serious injury to road users likely to be affected by the particular hazard, it seemed consistent with the underlying principle of neighbourhood for the law to regard him as being in such a relationship with road users as to satisfy the requisite element of proximity. In *Hill* the observations were made in the context of criminal investigation. There was no close analogy between the exercise by the police of their function of investigating and suppressing crime and the exercise by them of their function of performing tasks concerned with safety on the roads. It would be fair, just and reasonable to hold that a duty was owed.
Barrett v Enfield LBC (1999) (HL)		Obiter statement on *Osman v UK*, per Lord Browne-Wilkinson.	
Reeves v Commissioner of Police (1999) (HL)	A person in police custody, a known suicide risk, committed suicide	The police owed a duty of care to the plaintiff and had admitted breach. However, the plaintiff's deliberate and intentional act in causing injury to himself constituted 'fault' as defined in the Law Reform (Contributory Negligence) Act 1945. Damages would be reduced by 50 per cent	Where the law imposed a duty on a person to guard against loss by the deliberate and informed act of another, the occurrence of the very act which ought to have been prevented could not negative causation between the breach of duty and the loss. That was so not only where the deliberate act was that of a third party, but also when it was the act of the plaintiff himself, and whether or not he was of sound mind.
Kinsella v CC of Nottinghamshire (1999) (QBD)	Claimant alleged, among other things, that during a search of her house the police had negligently caused damage to her property	This part of the statement of case would be struck out	The general rule in *Hill* did not provide blanket immunity in all cases, but in each case a balancing exercise had to be carried out. Where it was apparent to the court that the general rule of immunity was not outweighed by other policy considerations, such as the protection of informers, the immunity continued to exist. In some cases the material for carrying out the balancing exercise was not provided by the pleadings, and the exercise fell to be performed by the trial judge after hearing the

			evidence. In other cases there would be sufficient material evidence available on the pleadings to enable a decision to be taken at a pre-trial hearing. In the present case there were no public policy considerations countervailing against immunity, nor had the police assumed any special duty of care towards the claimant, nor could it be disputed that the police were acting in the course of investigating a crime, so matters did not need to be left to the trial judge to decide.
Waters v Commissioner of Police (2000) (HL)	Claimant police officer raped by fellow officer whilst off duty. She alleged, among other things, that the police had negligently failed to deal properly with her complaint but allowed her to be victimised by fellow officers	The claim against the Commissioner for breach of personal duty (although the acts were done by those engaged in performing his duty) should not be struck out	The Courts have recognised the need for an employer to take care of his employees quite apart from statutory requirements. Lord Slynn did not find it possible to say that this was a plain and obvious case that (a) no duty analogous to an employer's duty can exist; (b) that the injury to the plaintiff was not foreseeable in the circumstances alleged and (c) that the acts alleged could not be the cause of the damage. Could it be said that it was not fair, just and reasonable to recognise a duty of care? Despite reference to *Hill* and *Calveley*, Lord Slynn did not consider that either of these cases was conclusive against the claimant in the present case. Here there was a need to investigate detailed allegations of fact.

CROWN PROSECUTION SERVICE

Case	Facts	Decision	Reason
Welsh v CC of Merseyside (1993) (QBD)	Plaintiff brought an action for the negligent failure of the police and CPS to ensure that the magistrates' court was informed that offences for which he had been bailed had later been taken into consideration by the Crown Court	The Crown Proceedings Act 1947 directed immunity to judicial, not administrative, functions	The CPS had a general administrative responsibility as prosecutor to keep a court informed as to the state of an adjourned case or had in practice assumed such a responsibility and had done so in the plaintiff's case, the relationship between the plaintiff and the CPS was sufficiently

			proximate for the CPS to owe a duty of care to the plaintiff. It was fair, just and reasonable for such a duty to exist and there were no public policy grounds to exclude the existence of such a duty.
Elguzouli-Daf v Commissioner of Police *McBearty v Ministry of Defence* (1995) (CA)	Two prosecutions discontinued after plaintiffs detained for 85 and 22 days in custody	A defendant in criminal proceedings did not have a private law remedy in damages for negligence against the CPS, since, save in those cases where it assumed by conduct a responsibility to a particular defendant, the CPS owed no duty of care to those it was prosecuting	The CPS was a public law enforcement agency which was autonomous and independent and acted in the public interest by reviewing police decisions to prosecute and conducting prosecutions on behalf of the crown and, as such, there were compelling policy considerations rooted in the welfare of the community as a whole which outweighed the dictates of individualised justice and precluded the recognition of a duty of care to private individuals and others aggrieved by careless decisions of the CPS. It was clear that such a duty would tend to inhibit the CPS's discharge of its central function of prosecuting crime and, in some cases, would lead to a defensive approach by prosecutors to their multifarious duties. If the CPS were to be constantly enmeshed in interlocutory civil proceedings and civil trials that would have a deleterious effect on its efficiency and the quality of the criminal justice system.

FIRE BRIGADE

Case	Facts	Decision	Reason
Capital and Counties plc; Digital Equipment Ltd v Hampshire CC *John Monroe Ltd v London Fire Authority* *Church of Jesus Christ v West Yorkshire Fire Authority* (1997) (CA)	(1) Fire in building; fire officer ordered sprinkler system to be turned off; fire spread and entire building destroyed; (2) Explosion on wasteland; fire brigade did not inspect nearby property showered with flaming debris; property severely damaged; and (3) Fire in church classroom; four water hydrants failed to work and remaining three not located in time	(1) Fire brigade liable for negligence; (2) and (3) There was insufficient proximity to establish a duty of care, with the result that the defendants were not liable for negligence in respect of the fire damage.	(1) A fire brigade did not enter into a sufficiently proximate relationship with the owner or occupier of premises so as to come under a duty of care merely by attending at the fire ground and fighting the fire. However, where the fire brigade, by their own actions, had increased the risk of the danger which caused damage to the plaintiff, they would be liable for negligence in respect of that damage, unless they could show that the damage would have occurred in any event.

			The decision to turn off the sprinkler system had increased the risk of the fire spreading and, since the defendant could not establish that the building would have been destroyed in any event, it was liable for negligence and there was no ground for granting public policy immunity. (2) Decision of trial judge affirmed: there was not sufficient proximity between the parties such as to impose a duty of care on the fire brigade and that the fire brigade did not assume responsibility or bring themselves within the necessary degree of proximity merely by electing to respond to calls for assistance. (3) On its true construction, the requirement in s13 of the Fire Services Act 1947 that a fire brigade should take all reasonable measures to ensure the provision of an adequate supply of water available for use in case of fire was not intended to confer a right of private action on a member of the public. The s13 duty was more in the nature of a general administrative function of procurement placed on the fire authority in relation to the supply of water for fire-fighting generally. Accordingly, no action lay for breach of statutory duty under s13.

COASTGUARD

Case	Facts	Decision	Reason
OLL Ltd v Secretary of State for Transport (1997) (QBD)	Group of 11 got into difficulties at sea. Plaintiffs alleged coastguard failed to respond promptly; miscoordinated rescue attempts; misdirected a lifeboat to the wrong area; misdirected a Royal Navy helicopter and failed to mobilise another. All members of the party were rescued but four children later dies and others suffered severe hypothermia and shock.	The coastguard were under no enforceable private law duty to respond to an emergency call, nor, if they did respond, would they be liable if their response was negligent, unless their negligence amounted to a positive act which directly caused greater injury than would have occurred if they had not intervened at all. Moreover, the coastguard did not owe any duty of care in cases where they misdirected other rescuers outside their own service.	There was no obvious distinction between the fire brigade responding to a fire where lives were at risk and the coastguard responding to an emergency at sea.

AMBULANCE SERVICE

Case	Facts	Decision	Reason
Kent v Griffiths (2000) (CA)	Plaintiff suffered an asthma attack. Doctor called an ambulance which did not arrive for 40 minutes, although a record prepared by a member of the crew indicated that it arrived after 22 minutes. The judge found that the record of the ambulance's arrival had been falsified, that no satisfactory reason had been given for the delay and that in those circumstances the delay was culpable.	In appropriate circumstances, an ambulance service could owe a duty of care to a member of the public on whose behalf a 999 call was made if, due to carelessness, it failed to arrive within a reasonable time.	Such a service was part of the health service, and its care function included transporting patients to and from hospital when it was desirable to use an ambulance for that purpose. It was therefore appropriate to regard the ambulance service as providing services of the category provided by hospitals rather than services equivalent to those rendered by the police or fire service whose primary obligation was to protect the public generally. Although situations could arise where there was a conflict between the interests of a particular individual and the public at large, there was no such conflict in the instant case since the plaintiff was the only member of the public who could have been adversely affected. Similarly, although different considerations could apply in a case where the allocation of resources was being attacked, in the instant case there was no question of an ambulance not being available or of a conflict of priorities. In those

			circumstances, the ambulance service, having decided to provide an ambulance, was required to justify a failure to attend within a reasonable time. Moreover, since there were no circumstances which made it unfair or unreasonable or unjust that liability should exist, there was no reason why there should not be liability if the arrival of the ambulance was delayed without good reason. The acceptance of the call established the duty of care, and the delay caused the further injuries.

CASES WHICH APPEAR TO REVERSE THIS TREND

Case	Facts	Decision	Reason
Spring v Guardian Assurance (1994) (HL)	Plaintiff's prospective employer received such a bad reference from the defendant that it refused to have anything to do with him. Applications to two other companies were also rejected. Plaintiff claimed for the loss caused to him by the reference.	Applying the principle that where the defendant assumed or undertook responsibility towards the plaintiff in the conduct of his affairs and the plaintiff relied on the defendant to exercise due skill and care in respect of such conduct, the defendant was liable for any failure to use reasonable skill and care, an employer who provided a reference in respect of an employee, whether past or present, to a prospective future employer ordinarily owed a duty of care to the employee in respect of the preparation of the reference and was liable in damages to the employee in respect of economic loss suffered by him by reason of the reference being prepared negligently.	In the employer/employee relationship, where economic loss in the form of failure to obtain employment was clearly foreseeable if a careless reference was given and there was an obvious proximity of relationship, it was fair, just and reasonable that the law should impose a duty of care on the employer not to act unreasonably and carelessly in providing a reference about his employee or ex-employee. The duty was to avoid making untrue statements negligently or expressing unfounded opinions even if honestly believed to be true or honestly held. Furthermore, public policy was in favour of not depriving an employee of a remedy to recover the damages to which he would otherwise be entitled as a result of being the victim of a negligent reference and even if the number of references given was reduced it was in the public interest that the quality and value would be greater.
White v Jones (1995) (HL)	A testator executed a will cutting his two daughters (plaintiffs) out of his estate. The testator became reconciled with them and sent a letter to his solicitors giving instructions	Where a solicitor accepted instructions to draw up a will and as the result of his negligence an intended beneficiary under the will was reasonably foreseeably deprived of a	1. The assumption of responsibility by a solicitor towards his client should be extended in law to an intended beneficiary who was reasonably foreseeably deprived of

	that a new will be prepared including gifts of £9,000 each to the plaintiffs. Testator died almost two months later before the new dispositions to the plaintiffs were put into effect. Plaintiffs brought an action against solicitors for damages for negligence.	legacy the solicitor was liable for the loss of the legacy.	his intended legacy as a result of the solicitor's negligence in circumstances in which there was no confidential or fiduciary relationship and neither the testator nor his estate had a remedy against the solicitor, since otherwise an injustice would occur because of a lacuna in the law and there would be no remedy for the loss caused by the solicitor's negligence unless the intended beneficiary could claim. 2. Adopting the incremental approach by analogy with established categories of relationships giving rise to a duty of care, the principle of assumption of responsibility should be extended to a solicitor who accepted instructions to draw up a will so that he was held to be in a special relationship with those intended to benefit under it, in consequence of which he owed a duty to the intended beneficiary to act with due expedition and care in relation to the task on which he had entered
Gorham v BT plc (2000) (CA)	Plaintiff brought an action for breach of duty of care in giving negligent pension advice to her husband, now deceased. Defendant conceded that it owed Gorham a duty of care and was in breach of duty in failing to advise him that his employers' scheme might be superior to a personal pension plan.	An insurance company which owed a duty of care to its customer when giving advice in relation to insurance provision for pension and life cover owed an additional duty of care to the customer's dependants where it was clear that the customer intended thereby to create a benefit for them. However, that plaintiff could not claim for loss arising after the negligent advice had been corrected (in this case, in November 1992).	The principle in *White v Jones* covered the present situation. It was fundamental to the giving and receiving of advice upon a scheme for pension provision and life assurance that the interest of the customer's dependants would arise for consideration. Practical justice required that disappointed beneficiaries should have a remedy against an insurance company in circumstances like the present. The financial adviser could have been in no doubt about his customer's concern for the plaintiffs and the advice was given on the assumption that their interests were involved. The duty was a limited duty to the dependants not to give negligent advice to the customer which adversely affected their interests as he intended them to be.

PART THREE: LIABILITY FOR OMISSIONS AND THE ACTS OF THIRD PARTIES

The intervention of a third party in the chain of events raises particular difficulties in ascribing legal responsibility for damage. The deliberate intervention of a third party generally breaks the chain of causation, and a grossly negligent intervening act will often do so as well. Nevertheless, the law does impose liability for the acts of third parties in certain exceptional situations. The causation difficulty is met by recognising a special type of duty – a duty to control a third party – which allows for the compensation of injuries where there is a weaker form of causal connection than is usually required. The defendant's liability is not for causing the harm, but for occasioning it.[1]

Carmarthenshire County Council v. Lewis

Facts: A lorry driver was killed when he swerved to avoid a four year old child and hit a lamp post. The child was attending a nursing school which was maintained by the defendant local authority. The teacher had been about to take the child for a walk, but another child was injured, so she left the boy on his own while she attended to the others injury for 10 minutes. During her absence, David made his way out of the classroom, and through an unlocked gate onto the main road. The deceased's widow brought an action in negligence.

Did she win? Yes. The House of Lords held that although the teacher had not been negligent, the education authority had been negligent in not ensuring that the gate was locked or otherwise made more difficult to open by a young child.

What was the basis of the House of Lords decision that the school authorities had a duty to prevent the child posing a danger to others? Their Lordships engaged in little or no analysis of this question and seemed in fact to rest their decision upon a general principle of liability for foreseeable harm which was applicable unless special considerations necessitated a restrictive approach. This was entirely typical of the tort of negligence in its early days following Donoghue v. Stevenson, but in more recent case there is a tendency to emphasise limitations on liability for foreseeable harm by reference to proximity and policy considerations. It is probably best to regard the case as resting on the school authority's assumption of responsibility for controlling the child. This created a relationship of proximity with those who were foreseeably endangered by him. The defendant authority were found to be at fault for having failed to install a more effective gate to keep young children inside during school hours. The scope of this duty will clearly vary according to the age of the children in question and to the particular risk which they are likely to pose.

[1] Lunney and Oliphant, '*Tort Law: Text and Materials*', 2nd Edition, Page 441 - 451

Home Office v. Dorset Yacht Co

Facts: A group of borstal boys were working on Brownsea Island under the supervision and control of three officers. Seven of the trainees escaped and boarded a yacht. They collided with the respondent's yacht, which they then boarded and damaged. The officers had gone to bed leaving the trainees to their own devices. They should have known of the attempted escape because of the criminal records and previous escape attempts.

Held: The Home Office were liable for the loss suffered.

Why? Lord Reid relied upon considerations of foreseeability or probability as the key to the existence of a duty. He stressed that although there was an intervening act, the intervening act was a likely and reasonably foreseeable consequence of the officer's carelessness.
Lord Pearson and Lord Diplock on the other hand, although coming to the same conclusion, said the essential feature of the case was not the escape, but the interference with the boats. They emphasised considerations of proximity as the mechanism for limiting the scope of the defendant's liability in an appropriate case. The duty was owed only to those persons whom they could reasonably foresee had property in proximity which was likely to be used in the escape. Here, there was an island. The only means of escape was by boat. Therefore, boat owners were owed a duty of care. The borstal boys were under the control of the Home Office Officers, and control imported responsibility.

Would the Home Office have been liable for loss occasioned by a burglary committed by a trainee on parole?
Lord Reid thought that there were two reasons why in the vast majority of cases there would be no liability in a case like this:

> *In the first place it would have to be shown that the decision to allow any such release was so unreasonable that it could not be regarded as a real exercise of discretion by the responsible officer who authorised the release. And secondly, it would have to be shown that the commission of the offence was the natural and probable, as distinct from merely foreseeable, result of the release."*