3. ACTIONABLE DAMAGE

In terms of the interests that negligence protects, a **hierarchy** can be seen in the scope for recovery and how keen the Courts are to assist. Personal injury > property loss > *pure* economic loss.

Personal injury and property damage are always actionable and further personal injury / property damage / economic loss consequential on D's breach are recoverable subject to remoteness rules. However, pure economic loss and psychiatric injury are subject to significant restrictions.

PHYSICAL INJURY

Only actual physical injury / illness is recoverable in negligence. An increased risk of suffering an illness in the future is not itself actionable damage; C will not have a claim unless and until the risk materialises and C contracts the illness.

- ***Rothwell v Chemical Insulating Co* [2007]:** Cs sued their employer who had negligently exposed them to asbestos. Cs had developed pleural plaques, which were evidence they were at risk of developing asbestos related diseases. **HL:** Cs could not recover for either the pleural plaques (no evidence they were harmful on their own) nor the risk of developing a disease in the future. **Lord Rodger:** "*Neither the risk of developing those other diseases caused by asbestos fibres in the lungs nor anxiety about the possibility of that risk materialising could amount to damage for the purposes of creating a cause of action in tort.*"

PSYCHIATRIC INJURY

Psychiatric injury consequential on physical injury: C can claim for it without recourse to the below rules (confirmed in ***Alcock***) — no need to show a recognised physical illness, can claim for 'pain and suffering'.

Psychiatric injury consequential on property damage: C can claim if she can show causation and reasonable foreseeability: ***Attia v British Gas* [1987]:** D (heating engineers) negligently installed a central heating system which burned down C's house. **CA**: accepted C's claim for nervous shock.

***White v CC South Yorks* [1999]** Lord Steyn articulated the **main reasons for limits on recovery** for **freestanding mental injury**:

- **The nature of the damage:** It can be difficult to distinguish 'acute grief' from genuine 'psychiatric illness'. Drawing the line would require expert evidence, adding to the time/cost of litigation if it was actionable in the same way as physical injury.
  - **Criticism:** expense of litigation isn't a valid reason to deny recovery to deserving Cs. It will often be clear that C is suffering from a recognised illness (e.g. PTSD) particularly with modern improvements in the treatment / diagnosis of the mentally ill.
- **Allowing recovery can be *"an unconscious disincentive to rehabilitation."***
  - **Criticism:** this doesn't seem to be based on evidence.
- **Allowing recovery would 'open floodgates'.** Two limbs:
  - Indeterminable number of Cs: if there is a bus crash how do you determine number of Cs? Those involved? Watches by roadside? Watches on TV? Related concern is recovery will impose a disproportionate burden on D compared to the magnitude of his negligence.
  - Indeterminable extent of injury: While physical injury has a clear, tangible impact, psychiatric injury is to some extent immeasurable. It has no natural limit.

1. C's condition must be a recognised medical condition

As Lord Oliver noted in ***Alcock v CC South Yorks*** **[1992]:** grief, sorrow, and anxiety alone are 'a necessary part of life' which must be accepted and are not recoverable as psychiatric harm. Recognised types of psychiatric harm include PTSD and depression. Once it is established that C is suffering from a recognised psychiatric condition, the rules on recovery turn on whether C is a primary or secondary victim — distinction drawn in *Alcock,* and *Page*.

2. Primary victims

General rule: Where C is in the physical sphere of harm / directly involved and it is foreseeable that he will suffer a physical injury, he can claim if the injury that in fact results is psychiatric.

- ***Page v Smith*** **[1996]:** C suffered permeant exhaustion as the result of a car crash caused by D's negligence. **Lord Lloyd:** the question is *"whether the foreseeable injury is physical… Once it is established that D is under a duty of care to avoid causing personal injury to C, it matters not whether the injury in fact sustained is physical, psychiatric or both."*
    - Floodgates concern does not apply in primary victim cases. It's limited by foreseeability of physical injury.
    - D must take C as he finds him: will not escape liability just because C is more prone to psychiatric injury than an ordinary person of reasonable fortitude.

Rescuers are only 'primary' victims where they are within the range of foreseeable physical injury / objectively exposed themselves to danger.

- ***White v CC South Yorks*** **[1999]:** Could police officers who attended the Hillsborough Stadium disaster claim against their employer for psychiatric damage? **HL:** they could only claim under the normal *Alcock / Page* rule: i.e. if the employer had breached his duty of care in protecting employees from physical harm. Here that was not satisfied.
    - **Hoffmann:** rescuers should not be *""given special treatment as primary victims when they were not within the range of foreseeable physical injury and their psychiatric injury was caused by witnessing or participating in the aftermath."* This is because:
        - **Definitional problems:** if rescuers fell into their own category, it would present serious problems in terms of defining 'rescuer'.
        - **Distributive justice:** *"unacceptable to the ordinary person"* for rescuers to be able to recover for psychiatric injury automatically because it would be *"unfair between one class of Cs and another."* I.e. the relatives of Hillsborough families were subject to restrictive rules in *Alcock,* so police had to be treated the same way.
    - **Steyn:** "*to contain the concept of rescuer in reasonable bounds for the purposes of… compensation for pure psychiatric harm, C must at least satisfy the threshold requirement that he objectively exposed himself to danger or reasonably believed that he was doing so."*
- ***McFarlane v EE Caledonia*** **[1994]** C was on a support vessel near an oil rig which exploded. C witnessed the destruction of the rig and the death of 164 people, although the closest he came was 100m. **Stuart-Smith LJ:** C could claim as a primary victim. This category extends to *"C who is not actually in danger, but because of the sudden and unexpected nature of the event … reasonably thinks that he is."* However, the key test is whether D ought reasonably to have foreseen that such a person in the position of C might be killed / physically injured.

Page **applied narrowly in** ***Rothwell***: Seems the psychiatric illness be caused directly from the exposure to a sudden risk of physical injury, not the later apprehension that harm may occur:

- ***Rothwell* [2007]:** C sued for depression / psychiatric illness caused by his fear of developing an asbestos related disease since the pleural plaques meant he was at a higher risk. **HL (Lord Hoffmann):** *Page* did not apply to allow C to recover as a primary victim — his injury was caused by worry about what might occur: *"it would be an unwarranted extension of the principle in **Page v Smith** to apply it to psychiatric illness caused by apprehension of the possibility of an unfavourable event which had not actually happened*".
    - **Criticism:** not clear why C could not recover. In both *Page* and *Rothwell* it was foreseeable C would come to physical harm, but C instead suffered psychiatric illness. Seems in *Page* the psychiatric injury flowed from C being in a position of real physical danger at the time of breach, but in *Rothwell,* C's psychiatric injury was caused by the later realisation he was at risk — he was never in 'danger' in the sense of fearing for his immediate safety (as in *Page*).

Involuntary participants in D's harm to another? In ***Alcock*** Lord Oliver suggested C may be a primary victim where D's conduct causes C to be an involuntary participant in an incident causing physical harm to another and C suffers psychiatric injury as a result. This was developed (although not conclusively, concerned pre-trial hearings on legitimacy of the claim) in:

- ***W v Essex* [2001]:** Cs were foster parents. D Council assured Cs that no child would be placed with them who was a known sex abuser. D placed a boy who was a known sex abuser and D abused C's children. C suffered psychiatric damage from the associated guilt. **Lord Slynn:** suggests *"the law regarding psychiatric injury is still developing and the categories of primary victim is not closed."* It is arguable that Cs may be primary victims based on being an unwitting participation in bringing the abuser into their home.
    - **Reassessing 'immediate aftermath':** *"the concept of "the immediate aftermath" of the incident has to be assessed in the particular factual situation."* Here, he did not think it necessary that *"the parents must come across the abuser or the abused "immediately" after the sexual incident has terminated."*

Hunter can be contrasted to *W v Essex* — both the parents and C here were 'unwitting agents of misfortune' but C here could not claim, whereas the parents in *Essex* potentially could.

- ***Hunter v British Coal Corporation* [1998]** C accidently struck a water hydrant at his place of work (a coal mine), causing a water leak. He left the scene in order to deal with the leak, but while he was away he heard the hydrant burst and was told that it looked like a colleague had died. He suffered a psychiatric illness as a result. **CA:** C was not entitled to damages as he was not a primary victim, he only reacted to what he had been told.

3. Secondary Victims

A secondary victim is a person who suffers psychiatric injury as a result of witnessing / being informed about an accident, but who was not in the zone of danger. The rules were developed in:

***Alcock v CC South Yorks* [1992]**

- **Facts:** Cs were family members / friends of victims of the Hillsborough disaster who had seen live pictures of the incident on TV. Cs suffered shock and resulting psychiatric illness. Claimed against the local authority responsible for policing the disaster.
- **HL:** they could not recover for these illnesses as secondary victims. The requirements are:
    1. **Reasonable foreseeability:** It must be reasonably foreseeable that a person of reasonable fortitude would suffer psychiatric injury as a result of D's negligence:
    2. **Close ties of love and affection:** this is tied up with concerns about foreseeability.
        - Rebuttable presumption where C is in a close familial relationship with V (parent/ child; husband/wife; engaged couple).

- Other relationships: (siblings, grandparents, friends): C must prove a close tie of love and affection exists.

3. **C must be proximate in time and space:** one C visited a relative killed in the crush eight hours after the incident — this was too long to satisfy the requirement of proximity
4. **The psychiatric injury must flow from shock as a result of directly experiencing the incident / aftermath.** Lord Ackner: Shock means *"the sudden appreciation by sight or sound of a horrifying event which violently agitates the mind"*. Seeing TV images is insufficient, at least where the footage does not show identifiable individuals (here just a crowd). This means injury sustained as a result of caring for an injured relative would not qualify.

***McLoughlin v O'Brian* [1983]** C was sufficiently proximate when she saw her dead child / injured family in hospital after a car crash. She arrived after two hours, it having taken a while for the news to reach her. Thus C may be temporally and spatially removed at the time of the accident and still be sufficiently proximate. [note that treatment by commentators suggest this case is at the edge].

- **Minority judgments**: **foreseeability alone should be the sole criterion of liability**: if it was foreseeable that C would suffer psychiatric injury as a result of D's negligence, then why shouldn't C recover? Foreseeability is enough to contain floodgates risks, which do not materialise often in practice anyway.

W v Essex: in addition to considering that the parents of molested children may be primary victims, **Lord Slynn** took a flexible approach to the proximity requirement — although the parents only learned of the molestation later on and did not have direct oral / visual perception of the incidents, this could be enough.

White v CC South Yorks: Police could not recover as secondary victims because they lacked a close tie of love and affection with any of the Hillsborough victims whose injuries they witnessed

C cannot claim for psychiatric damage suffered as a secondary victim consequent on harm to D.

- ***Greatorex v Greatorex* [2000]**: C fire-officer was called to the scene of a car accident in which, by pure coincident, his son had been injured through his own negligence. He sued his son for damages for the PTSD he consequently sustained (knowing any award would be covered by his son's insurance). **Cazelet J** D who imperilled or injured himself owed no duty to those suffering psychiatric injury as a result. In his view, the policy arguments in favour of a duty of care were outweighed by those that ran against it.

4. Stress in employment situations

***Barber v Somerset CC* [2004]** C, a schoolteacher, sued his employer for depression suffered as a result of stressful working conditions. **HL (Lord Rodger):** the liability issue in employment cases where C suffers long-term stress is determined by asking whether the employer has fulfilled the general duty (which is a matter of contract as well as tort) which he owes not to injure his workers. The employer must take account of individual weaknesses where these ought to be known to him.

Debate over the rules for psychiatric harm

Criticisms of current law:

- The restrictions on recovery for psychiatric injury in secondary victim cases are seriously flawed in that they treat psychiatric injury as something inherently different from physical

personal injury; this is contrary to medical knowledge and reinforces the stigma and misunderstanding surrounding mental illness.

- **Minority in *McLoughlin***: floodgates concerns are often seriously overstated and do not materialise in practice. E.g. floodgates concerns were raised over the decision to abolish CN as an absolute defence to liability and these concerns did not eventuate. Floodgates concerns are speculative so should not alone justify denying liability to deserving victims of psychiatric injury. A requirement of foreseeability alone would avert much of the floodgates risk.
  - Despite arguing against a foreseeability-only approach, **Wilberforce noted many of the arguments against it were capable of answer:** *"fraudulent claims can be contained by the courts, who, also, can cope with evidentiary difficulties. The scarcity of cases which have occurred in the past, and the modest sums recovered, give some indication that fears of a flood of litigation may be exaggerated - experience in other fields suggests that such fears usually are. If some increase does occur, that may only reveal the existence of a genuine social need: that legislation has been found necessary in Australia may indicate the same thing."*
- **Teff** floodgates concerns can be avoided by imposing two requirements in secondary victim cases: (i) recognised medical condition; (ii) reasonable foreseeability of psychiatric injury, evidenced by a close relationship between C and the injured person or by other means e.g. a particularly horrific incident. The other requirements are arbitrary and unnecessary.
- **Criticisms of *Page*:**
  - In ***White v CC South Yorks***, Lord Goff (dissenting) stated *Page* "*constituted a remarkable departure from … generally accepted principles*." In particular, it "*dethroned foreseeability of psychiatric injury from its central position as the unifying feature of this branch of the law*" by making a distinction between primary and secondary victims. Only for secondary victims was it still necessary for the claimant to establish the foreseeability of psychiatric injury; the primary victim had only to show the foreseeability of injury, whether physical or psychiatric.
    - **Goff's Alternative:** Goff suggests instead that the approach taken in the *Wagon Mound (No. 1)* should have been followed — here, fire was distinguished from other types of damage to property for the purpose of deciding what D could reasonably have foreseen — "*on exactly the same grounds, a particular type of personal injury, viz. psychiatric injury, may, for the like purpose, properly be differentiated from other types of personal injury*." Further this approach is consistent with *"scientific advances revealing that psychiatric illnesses may have a physical base or that psychiatric injury should be regarded as another form of personal injury*."

Arguments in favour of the current law:

- **Wilberforce in *McLoughlin*:** Argued foreseeability alone should not be enough (although note he thought some of these arguments could be answered — see above).
  - Would lead to a proliferation of claims / fraudulent claims in road traffic / factory accidents.
  - Would be unfair to Ds to impose damages out of all proportion to negligent conduct. In so far as Ds are insured, a large burden will be placed on insurers, and ultimately onto persons injured.
  - To extend liability would lengthen litigation / lead to evidentiary difficulties.
  - An extension of the scope of liability ought only to be made by the legislature, after careful research. This is the approach taken in Australia.
- **Floodgates argument:** can subdivided into two distinct concerns: (i) the fear of a proliferation of claims from a single event (probably the argument's central force) and (ii) the possibility of a mass of claims from a mass of separate events. Such a proliferation of claims

would clog the court system and divert too many of society's resources into compensating the victims of psychiatric illness at the expense of other equally or more deserving Cs.

Why should those in the 'sphere of danger' be treated differently?

- **Argument for 1: prevents arbitrary line excluding those who narrowly avoid physical injury:** In *Page* Lord Lloyd asked whether it can be the law that the fortuitous absence of actual physical injury means that a different test has to be used. I.e. if C was actually injured he could claim for consequential psychiatric damage, why should the psychiatric damage have to be itself foreseeable if C narrowly misses physical harm.
  - Equally arbitrary line is drawn by treating as different C who happens to be within / without the area of physical danger. **Trindale:** *"what is so magical about being within the range of foreseeable physical injury, except perhaps the mistaken view that the number of potential Cs will be limited by the nature of the case."* The arbitrariness of this line is illustrated by
    - ***Young v Charles Church* [1997]:** C saw his colleague die when he touched an overhead electric cable. C claimed against his employer for psychiatric injury. **CA:** D was liable because C was a primary victim within the area of physical danger (even though C's injury was caused by witnessing his colleague's death, not his own proximity to harm).
- **Argument for 2:** Fear of proliferation of claims stemming from a single event is reduced if Cs are limited to those who are in physical danger.
- **How wide is the zone of danger? Trindale**: e.g. if a crashing plane went low over a city before impacting a building, could all those who thought the plane might come down on them be regarded as primary victims? Unless the courts narrowly define it there could be a very large number of claims in such cases.
- **Categories of primary victims closed?** In ***W v Essex***, Lord Slynn commented "*the categorisation of those claiming to be included as primary or secondary victims is not as I read the cases finally closed. It is a concept still to be developed in different factual situations*." **L+O:** such statements risk increasing confusion. Further, if the category of primary victims is enlarged, this may well undermine the proximity requirements currently applied in secondary-victim cases.
- **Would the broad *Alcock* classification be better?** Here the test was those who 'participate' in the negligent event — this would catch rescuers etc. The advantage is that *"the main objection to the narrow classification is overcome: the broad classification supports the idea that recovery for psychiatric illness exists as a distinct harm, as worthy of support as physical injury… it has a validity of its own independent of any physical injury or risk of physical injury."*
  - Difficulty with this is that it provides little guidance as to where to draw the line between primary and secondary victims. What amounts to 'direct involvement' and what is the 'event'?
- **Law Commission**: *"we consider the distinction to be more of a hindrance than a help."* They note that the courts have struggled to draw the line with precision — i.e. in *Hegarty v EE Caledonia* a rescuer had to show he feared for his personal safety, but this was not the case in *Frost* [1997] — the courts should *"abandon attaching practical significance to whether C may be described as a primary or secondary victim."* [**EP:** although they do recommend drawing a line between cases where the person 'killed/injured/imperilled' is not C, and where C himself is killed/injured/imperilled' — in these cases 'special restrictions' over and above a foreseeability test would apply].

Law Commission recommendations on secondary victims:

- **Key recommendations:** C's proximity to the scene of the "*accident*", and the manner by which he or she learns of it, should not be used as criteria to restrict the claim. Further, recommend that the requirement that psychiatric illness be induced by a shock should be abandoned. Law pertaining to primary victims should stay the same.
- **Reject a straightforward reasonable foreseeability test:** A simple foreseeability test could result in a significant and unacceptable increase in the number of claims. This in turn might lead the courts to make use of policy considerations, concealed beneath the foreseeability test, in an attempt to restrict the number of successful claims. Such confusion could only result in an increased volume of litigation. Special limitations over and above reasonable foreseeability should continue to be applied to 'secondary' victim cases.
- **Should *Alcock* proximity requirements be maintained?** The imposition of all three proximity requirements is unduly restrictive, and that it is the last two limitations that have resulted in the most arbitrary decisions. How many hours after the accident the mother of an injured child manages to reach the hospital should not be the decisive factor in deciding whether D may be liable for the mother's consequential psychiatric illness. The most acceptable method is to restrict Cs by reference to their connection with the immediate victim. Provided that the requirement for a close tie of love and affection between C and the immediate victim is retained, the main floodgates objection of the possibility of many claims arising from a single event is limited.

Lunney and Oliphant analysis:
- Is the public is willing to pay extra for its motor insurance / products which are increased in price as a result of higher employer's liability insurance premiums, just in order to finance an increase in the scope of tort liability for psychiatric illness?
- Law Comm also endorsed the idea of laying down a statutory list of relationships of love and affection (including homosexual ones) though without prejudice to the court's ability to recognise that other relationships satisfied this requirement on the facts of individual cases.

PURE ECONOMIC LOSS

PEL is economic loss caused by D's negligence which does not flow from damage to the person / property of C. **It is not true that tort law does not protect economic loss:**
1. The economic torts are specifically designed to recover for PEL.
2. Negligence is based on recovery for consequential economic loss (flowing from damage to person / property) subject to rules on remoteness of damage.

The distinction between pure and consequential economic loss can be seen in ***Spartan Steel* [1973]:** D damaged an electric line powering C's factory. The factory lost power and C claimed for both the loss of the product lost in the furnace (consequential economic loss) and future profits from the use of the furnace (pure economic loss). **CA:** only the former was recoverable.

There are, however, four categories in which PEL is recoverable: (i) negligent misstatements and negligence in professional services; (ii) the acquisition of defective products / premises; (iii) damage to property of a third party which causes economic loss to C; (iv) wrongful life conception cases.

Reasons why pure economic loss is generally not recoverable:
- Economic loss is the domain of the law of contract and the intentional economic torts.
- **Stapleton**: restrictions are based on policy concerns, particularly the floodgates argument:
  - Indeterminate number of potential claimants
  - Indeterminate extent of liability to a particular claimant.

The floodgates arguments are based on the ripple effect of economic loss: loss of profits to one business may cause financial loss to its suppliers, customers and other organisations or businesses in which it would have invested.

- **The rights view (Stevens)**: tort law is about protecting rights; we don't have a right against the whole world not to have economic loss brought upon us. Such a right can only arise against an individual person based on an assumption of responsibility. A general right that others do not cause us economic loss would make business impossible.
- **Witting**: our interest in wealth is less important than our interest in our health or property because our health and property are part of our identity but wealth is not.
- Imposing liability for PEL is a much greater burden and limitation on defendants' freedom because there is a much greater range of things which will cause PEL compared to things which will cause personal injury or damage to property.
- **Atiyah**: loss spreading: numerous small economic losses suffered by victims of D's negligence is better/more efficient than one large loss to D.

Negligent Misstatements and Professional Services

Recovery under this head is useful where D gratuitously makes a negligent misstatement which C relies upon in entering a contract with X.

- If D's misrepresentation induces C to enter a contract with D, C can sue D in contract under the Misrepresentation Act 1967.
- If D supplied C with incorrect information under a contract with C, then C can sue D in contract.

Liability for negligent misstatement was first recognised in *Hedley Byrne*:

- ***Hedley Byrne* [1964]**: D bank provided C with a credit reference regarding X. C relied on this reference to enter an advertising services contract with X. X went bankrupt. **HL:** in principle C could sue D in negligence, although here C could not because of a disclaimer made by D.

Although the HL's judgments were not entirely consistent, **the requirements seem to be**:

1. **D's voluntary assumption of responsibility to provide skills / expertise** (duty of care)
2. **D knew / ought to have known that the advice would be relied upon** (foreseeability)
    - Relevant factors here are: (i) D's skill; (ii) C's skill — it will be less foreseeable to D that C will rely on his advice without independent inquiry if C also has special skill (***Smith v Bush***); (iii) the nature of the occasion — *Hedley Byrne* can only be relied upon where information is given in a business, rather than social, contest.
3. **The advice was in fact reasonably relied upon to C's detriment** (materiality):

Hedley Byrne was a wo party case: D provided information to C. More difficult are cases where D supplies advice to a third party and C then relies on this advice (e.g. *Smith* and *Caparo*).

In *Smith,* the court doubted whether a 'voluntary assumption of responsibility' was a meaningful element, deeming foresight of 'reasonable reliance' the key element:

- ***Smith v Bush* [1990]:** C applied for a mortgage. The bank instructed D to survey the house. D negligently reported no essential repairs were needed. C relied on this report and purchased the house / entered the mortgage agreement. A chimney collapsed. C sued D. **HL:** D owned C a duty of care in respect to C's PEL caused by the chimney collapse (PEL because D's negligence did not cause the chimney to collapse).
    - **Touchstone of liability is reasonable reliance:** decision was heavily based on the fact that it was reasonably foreseeable to D that C would rely on his report. **Lord Griffiths**

criticised the 'voluntary assumption of responsibility' test in *Hedley Byrne* for being 'an empty phrase' and not a real test — it actually means "*the circumstances in which the law will deem the maker of the statement to have assumed responsibility*".

The focus on reasonable reliance in *Smith* leaves the potential for a very broad test of recovery for PEL. **Stapleton** criticises this approach on the grounds that reliance is so common in our society that it's an unhelpful limit on liability. A narrower approach was adopted in *Caparo*:

- ***Caparo v Dickman* [1990]:** C made a bid to take over a company on the basis of false information in the company's accounts. C sued D, the auditor who prepared the accounts for PEL. **HL:** C's claim failed — C and D were not in the requisite *"special relationship"*. This relationship is required to constitute the 'proximity' limb of the tripartite *Caparo* test.
  - **Test for the required proximate relationship:** (i) The purpose of D's statement: (ii) the identity of C, *"either as an individual or as a member of an identifiable class"* to whom D's information will be communicated; (iii) the fact that D's advice will be communicated to C; (iv) the fact C is very likely to rely on D's advice in deciding whether to enter into the transaction.
    - The second and third requirements of the "*special relationship*" will be particularly important in three party cases, but will always be satisfied in two party cases.
  - **This case:** C failed on the second element — C was a member of the public at large, D had no knowledge of C as a person to whom his advice would be communicated.

Caparo pulled back significantly from ***Smith v Bush*** in that foreseeable reasonable reliance alone will not give rise to a duty of care for PEL, but only where there is the necessary 'special relationship'. These requirements will be easier to satisfy in a two party cases than a three party case.

- **Reconciling *Smith* and *Caparo***: L+O suggest it comes down to the pre-eminence role given by the HL to the purpose of the statement — in *Caparo* the auditors were employed so the company could comply with its statutory duty to provide shareholders with performance information, not to give potential investors information with which to make decisions; in *Smith* the statement pertained to the integrity of a specific building in relation to a specific transaction. This distinction may not be entirely convincing, since in *Smith* the primary purpose of the survey was to allow the building society to decide whether to make a loan. In effect the court deemed the survey to have an additional purpose — i.e. to allow a purchaser to decide whether to purchase the property.
  - In reality policy factors meant that a broad test for liability and recovery was justified in the circumstances of *Smith v Bush* but not in the circumstances of *Caparo*.

The voluntary assumption of responsibility test subsequently came back into vogue and has been used to extend the application of *Hedley Byrne* in the following cases:

***Spring v Guardian Assurance* [1995]:** D negligently supplied an unfavourable reference for a former employee (C) — as a result C lost an employment opportunity. **HL:** C could claim PEL.

- **Lord Goff:** used VAR: *"Where C entrusts D with the conduct of his affairs, in general or in particular, D may be held to have assumed responsibility to C and C to have relied on D to exercise due skill and care in respect of such conduct"*.
- **Lords Slynn and Woolf:** used the *Caparo* test to find the necessary relationship of proximity

Spring extended the Hedley Byrne duty of care for PEL: (i) case concerned the provision of a service, not information; (ii) C did not rely on the reference in the sense of using it to decide how to act; (iii) D did not exercise a special skill. Lord Goff was content that 'special knowledge' was enough.

The VAR test, as used in *Spring*, allows claims where C entrusts his affairs to D, relying on D to exercise his best efforts on C's behalf

Henderson v Merrett Syndicates **[1995]:** investors in an insurance syndicate ('Names') brought a claim against the managers of the syndicate for PEL (some names had contracts with the managers, some did not). **HL (Lord Goff):** the contracts did not prevent the Names suing (although the content of a contract can shape the duty of care in tort).

- **Key elements of duty of care for PEL:** (i) assumption of responsibility by D to C; (ii) D exercising a special skill / knowledge; (iii) C's reasonable/foreseeable reliance on D.
- Once this test is satisfied, there is no need to proceed to the FJR limb of *Caparo*.

The reasoning in *Spring* was extended in *Henderson*. **Goff**: liability under HB applies to the performance of services.

It is clear from *Henderson* that assumption of responsibility may be implied from the relationship between the parties — in this case there was no explicit entrustment of affairs on the part of C. It seems VAR is a bit like 'proximity' under *Caparo* — the court can import policy concerns about whether D should be under a duty to C in the circumstances.

White v Jones **[1995]** X instructed D, his solicitor, to draw up a will leaving money to Cs. D negligently failed to do so before X died. Cs sued D for the money that should have been left to them. **Lord Browne-Wilkinson**: D owed a duty of care to Cs in respect of PEL based on a *deemed* assumption of responsibility:

- Assumption of responsibility is the key test for liability for PEL. It is clear a solicitor always assumes responsibility to his client, but not to Bs under a will. Bs may not even know their position is affected by the will, so hard to find reliance. However, denying D's liability would have left a lacuna in the law so D's assumption of responsibility should *"be held in law to extend to his intended beneficiary."*

White is a further extension of the principle in *HB* because: (i) it is hard to see a VAR between solicitor and Bs; (ii) it is hard to see where the Bs have acted in reliance on D's service. **B-W found for Bs on the basis of practical justice.**

Here the court 'deems' there to be a VAR between D and Bs. **Lord Mustill** dissented on the ground that there was no reliance from B: "*the purpose of the courts when recognising tortious acts and their consequences is to compensate those Cs who suffer actionable breaches of duty, not to act as second-line disciplinary tribunals imposing punishment in the shape of damages."* Rule of law concerns underpin his dissent. Court shouldn't do what is right in the circumstances, with no regard to principle.

In the following, Lord Steyn considered the justifications for the extended *HB* principle and confirmed that *VAR* is the correct test for duty of care

- ***Williams v Natural Life Health Foods*** **[1998]**: C entered a franchise agreement with a company based on information provided in brochure. The company was insolvent, so C brought a *HB* claim against their MD. **Lord Steyn:** no liability here because the MD had not assumed responsibility for C's affairs. Finding VAR is a question of fact: *"The inquiry must be whether D, or anybody on his behalf [three party cases], conveyed directly or indirectly to C that D assumed a personal responsibility towards C."*
    - **Justification for *HB:*** Lord Steyn notes that **Barker** and **Hepple** have criticised *"the principle of assumption of responsibility as often resting on a fiction used to justify a*

conclusion that a duty of care exists" and that they use *Smith* and *White* as key examples of this fiction being used to extend liability under *HB*. However, *"criticism is overstated. Coherence must sometimes yield to practical justice." HB* liability is justified by the restrictive effect of consideration / privity of contract — the law of tort *"has to fulfil an essential gap-filling role"*

Current leading case

***Customs and Excise Commissioners v Barclays Bank* [2006]**.

- **Facts:** C obtained a 'freezing order' against the assets of two companies (to protect VAT payments they were owned). These orders should have alerted D bank not to allow the companies to withdraw money; D negligently allowed companies to withdraw money.
- **HL:** hard to find a *HB* relationship here — D did not 'voluntarily' assume responsibility for C's affairs, rather the freezing order was thrust upon D. Further, C did not rely on D to comply with the order in the sense that they would have acted differently. They apply the *Caparo* test: (i) foreseeability is present; (ii) proximity is doubtful; (iii) it would not be FJR to impose liability for vast sums on a bank who made a small mistake.
    - **Lord Bingham:** considered the 'assumption of responsibility' test and the *Caparo* test:
        - **VAR:** this test will be suitable in some, maybe most, cases, but it is not '*the'* test for duty of care in PEL cases. VAR is a "*sufficient but not a necessary condition of liability*". If it can be established, it can "*obviate the need for further inquiry*".
            - Note **Mance** and **Hoffmann** did emphasize the central role of the VAR test for PEL
        - ***Caparo*:** Where there is no assumption of responsibility can C still argue a duty of care might be found under *Caparo?* Clear in *Barclays* that the failure to establish an assumption of responsibility, should not necessarily be decisive and that a duty of care for PEL can be found using the *Caparo* test.

L+O: this won't make much difference in many *HB* cases as in such cases there will not be sufficient proximity / it won't be FJR to impose liability. Indeed, in *Henderson* and *White* — i.e. the exended *HB* cases — it could be argued the *Caparo* test is a preferable explanation for the results of cases which were reached by applying a very wide concept of AOR. **NB:** post-*Barclays* cases have tended to treat both tests as capable of generating a duty of care if satisfied.

Scope of the Duty

- ***SAAMCO* [1996]**: damages only reflect loss consequential on information being inaccurate, not all loss flowing from entering into the transaction. E.g. if C buys a property based on D's negligent valuation, C can only claim for the difference in value between D's representation and the true value; not a further reduction in value based on a fall in the market (even though, but for D's breach, C would not have purchased the property at all).

Academic Commentary on Assumption of Responsibility

- **Barker**: assumption of responsibility is an inadequate test for PEL because it is defined too broadly and abstractly to mean anything and fails to explain the case law. The phrase "*assumption of responsibility*" is used to shroud the policy concerns which really decide PEL cases. These policy concerns are legitimate and should be openly discussed in their own terms.
- **Hepple** argues that "*assumption of responsibility*" is a "*legal fiction*" used by the courts to avoid discussion of the problems of interaction between tort and contract in the area of PEL. Tort liability for PEL has been used to overcome the inadequacies of contract law. The interaction problems could be resolved by removing the consideration requirement from

contract law: then gratuitous provision of information/professional services cases could be resolved through contract law rather than tort.

Defective Premises

Defective products /premises which cause personal injury or damage to C's *other* property are actionable as consequential economic loss. However, where the defect makes the premises less valuable / costs money to rectify, PEL questions arise. Two types of defect

1. **Latent defects**: defects which are discovered before they cause damage to other property / personal injury. Cost of cure / fall in value of property are PEL and not recoverable.
2. **Defects which materialise:** consequential economic loss is recoverable, but cost of cure / fall in value of property is not.

Latent defects

Basic position: no liability for defective premise. Any cost expended by C in rectifying the damage / fall in value of property is PEL. Established in *Murphy* and *D&F Estates*.

- ***D & F Estates* [1989]** D carried out building work on X's block of flats. X leased a flat to C. The plasterwork in the flat was defective and C sued for the cost of remedying the defect. **Lord Bridge:** rejected C's claim. Damages are only recoverable if the defect remains hidden until it causes damage to other property / personal injury. Other loss is PEL and unrecoverable.
  - **Justification:** If D were liable for cost of cure / fall in value, it would *"impose upon him for the benefit of those with whom he has no contractual relationship the obligations of one who warranted the quality*" of the building. I.e. it would effectively impose a non-contractual warranty of fitness, which follows the premises.
- ***Murphy v Brentwood DC* [1991]**C purchased a house from X. The council had negligently approved X's building plans. Defective foundations meant the house was beyond repair. C sold the land and sued the council for the loss of value. **HL**: where a 'latent' defect is discovered before any injury / damage to other property, the expense incurred / loss in value of the property is PEL.
  - **Overruled *Anns v Merton* [1977]** — that case held D could be liable in negligence for a defect which presented *"present or imminent danger"* to C's person / other property, even though the defect had not in fact materialised and caused damage. Rejected:
    - Inefficient: if an owner discovers a danger which is not currently dangerous, but will become so, he is incentivised to wait until it is dangerous / more expensive to fix.
  - **Defective Premises Act 1972:** Parliament has ruled on when liability should be imposed in defective premises cases; the CL should not interfere with / go beyond this.
  - ***Junior Books* exception:** In ***Junior Books* [1983]** the HL allowed a factory owner to sue a subcontractor (no contractual relationship between the two) who had laid a defective floor both for the cost of replacement and loss of profits flowing from the damage. **Lord Bridge** effectively restricted the case to its facts in *Murphy,* finding that there was a 'relationship akin to contract' between the parties. Going forward, there is a chance that if there is an exceptional proximity between C and D, then D may be liable for C's PEL caused by the defect.

Defects Which Materialise

The key issue here is determining what constitutes 'other property'

- **Complex structure theory:** In ***D&F Estates*** Lord Bridge argued that one element of a house could be regarded as distinct from another element — e.g. if a defect in the foundations

damaged the walls, damage to the walls could be damage to 'other property' and so recoverable.

- **Rejected:** This would have allowed recovery on the facts of ***Murphy***, but was instead rejected as 'artificial' — only damage to other property will suffice. **Lord Jauncy:** drew the line at defects to integral parts of the structure — were the defect is to a distinct item (e.g. a boiler which explodes), damage to the rest of the structure is considered consequential property damage. He thought a good indicator would be whether a different contractor had been used.

Limitation clauses: Even where damage is to other property, there are significant limits on recovery:

- ***Pirelli v Oscar Faber*** **[1983]** D (engineers) designed a chimney for C's factory. It was defective and developed cracks. Although *Anns* was the law at the time (so C could recover for the defect as it was dangerous), C was time barred from doing so under the Limitation Act 1980 — must claim within 6 years of the defect occurs (not being discovered). Here the damage occurred in 1970, but was discovered in 1972, so when C brought a claim in 1978 he was time barred.
- The law is now governed by the **Latent Damage Act 1986:**
  - **s.3:** if: (i) defective property is transferred from X to C; (ii) the defect has occurred; (iii) but it has not yet been discovered, then C has six years from the date he acquires his interest in the damaged property to bring a claim. E.g. defect occurs in Jan 2013, but it is undiscovered and C acquires the property in Jan 2014, then C can claim until Jan 2020, not Jan 2019.

C can still recover where he knew about the defect before it materialised and caused damage, as long as his conduct in relation to the defect was reasonable:

- ***Targett v Torfaen BC*** **[1992]**: C rented a house built by D. Access to the front door was by steps with no handrail. C reported the defect to D, but nothing was done about it. C fell and was injured. **CA:** D was liable to C for C's injury even though C was aware of the defect; the result would have been different if C's conduct in relation to the defect was unreasonable.
- ***Nitrigin v Inco*** **[1992]**: D supplied Cs with steel piping for C's factory. C found the piping had cracked and made repairs. The following year, the pipe burst, causing an explosion which damaged C's factory and caused it to shut down. **CA:** the damage to C's other property was recoverable.

Hedley Byrne and Defective Premises

It is anomalous that following *Murphy,* a builder is immune from liability for the cost of repairing a defect / loss in value of property, but an architect / engineer can be liable under *Hedley Byrne* for negligently designing a defective building and surveyors will be liable for failing to discover a defect under *Smith v Bush*

Statutory Rules

Defective Premises Act 1972 in respect of *domestic premises only: "dwellings"*, excludes factories, shops etc.

- **s.1(1)** imposes a duty on builders / those *"taking on work"* on a domestic premises to ensure that work is done in a *"workmanlike"* or *"professional manner*" so that the dwelling is *"fit for habitation"* when complete. The duty is owned to *"every person who acquires an interest in the dwelling."*

- This is a strict liability duty, not a fault-based duty of care. It cannot be contracted out of. If D is in breach C can claim for cost of cure / fall in value of property.

- **s.1(2)** D can discharge this duty where he is contracted by another person (X) and completes the work in line with their instructions.
- **s.1(5)**: the cause of action accrues from the point the dwelling is completed — i.e. it only lasts for 6 years from the date the dwelling was completed.
  - The six-year limitation period from date of completion of the premises is very short, not many subsequent purchasers will be able to sue; the more generous limitation period under the **Latent Damage Act 1986** does not apply to an action under **s1(1)**.
- **s.3** where a landlord / vendor of property undertakes "*work of construction, repair, maintenance or demolition or any other work*" on his premises he owes a duty of care to "*persons who might reasonably be expected to be affected by defects in the state of the premises created by the doing of the work*." This duty persists after the property is sold.
- **s.4** landlords have a duty to *"all persons who might reasonably be expected to be affected by defects in the state of the premises*" to take reasonable care to see that such persons are safe from personal injury / damage to their property caused by a relevant defect. This applies if the landlord knew / should have known about the defect.
  - **s.4** effectively means that a landlord is liable for defects which arise out of his failure to perform his obligations to maintain and repair the property. This duty extends to visitors etc.

Negligent Damage to Property

If D's negligence causes damage to the property of a third party in which C has no proprietary interest, C cannot recover for economic loss which he suffers as a consequence.

- ***Weller v Foot & Mouth Research Institute* [1966]**: D carried out experimental work on foot and mouth disease. Cattle owned by X became infected and two local cattle markets were closed as a result of the outbreak. Cs (auctioneers at the markets) sued for loss of profit resulting from D's negligent damage to X's cattle. **High Court:** no recovery.
  - The fact that X had contracted with C to sell cattle at the auction did not give him a sufficient interest in X's property to claim for loss of profits consequent on damage to that property. C must have a proprietary interest or be in possession to damaged property in order to claim.
  - **Justification for limited rules:** *"The world of commerce would come to a halt and ordinary life would become intolerable if the law imposed a duty on all persons at all times to refrain from any conduct which might foreseeably cause detriment to another."*
- ***Spartan Steel* [1973]:** D damaged an electric line powering C's factory. The factory lost power and C claimed for both the loss of the product lost in the furnace (consequential economic loss) and future profits from the use of the furnace (pure economic loss). **CA:** only the former was recoverable.
  - **Lord Denning** the question of recovery of PEL is a question of "*policy*", should not be resolved by applying "*elusive*" legal tests. Policy militates against recovery here: the cutting off of electricity is a risk that everyone takes, it must be ensured not compensated for; floodgates arguments (see above); the loss caused by D's negligence should be spread through many small losses to the whole community rather than the entire loss falling on D's shoulders.
- ***The Aliakmon* [1986]**C bought cargo from X. It was to be transported using D's ship. Under the contract, C bore the risk of loss of cargo during shipping. D damaged the cargo. **HL (Lord Brandon)** C could not claim for damage to property / loss flowing from that property because C did not yet have legal ownership / possessory title over the property at a time when the damage occurred. C having contractual rights over the property is not enough — C could

have bargained for contractual protection from D. Denying liability prevents floodgates and promotes certainty.

- **Lord Goff in the CA:** attempted to introduce a doctrine of "*transferred loss*" to allow a buyer of goods who has suffered loss because risk of loss had passed to him under the contract of sale to sue for the loss even though title to the goods had not passed to him. **This was rejected by the HL, but has much to commend it.**

An exception to the rule was identified in ***Shell v Total Oil*** **[2010]:** D damaged a pipeline which X held on trust for C. **CA:** C could claim as the beneficial owner by joining the legal owner in proceedings. C could recover his own consequential economic loss, despite not being the legal owner of the property / in possession of it.

- **Low criticises this case:** The beneficiary of trust property only has rights against the trustee's rights; no direct rights over the trust property itself. The decision in this case was driven by an impulse for practical justice but was decided incorrectly in legal terms. The same just result could have been better achieved by relaxing the bar against recovery for PEL (particularly as floodgates is not such a major concern in property damage cases), rather than relying on beneficial ownership as an exception to the bar on recovery of PEL.

The rule in ***Spartan Steel*** and ***The Aliakmon*** can also be evaded by defining physical damage broadly.

- ***D Pride & Partners v Institute for Animal Health*** **[2009]**: Cs (farmers) sued F for negligently allowing foot and mouth disease to spread. C's livestock was not infected, but they sued for economic loses flowing from their inability to move their livestock freely while measures were taken to contain the spread. **High Court**: although C's claims were struck out, the judge accepted that 'physical damage' could extend to *"the effects of less tangible 'external factors' such as a delay in taking particular action which causes the produce or livestock to become too fat (or thin), or too ripe."* I.e. C's livestock would become older / less marketable by the time they reached market.

Wrongful Birth:

A fourth PEL issue arises when medical negligence leads to a child being born who would not have been born but for the medical negligence. Can the parents sue for the PEL of bringing up the child?

Wrongful Life: A child who is born disabled cannot sue because her parents were not offered an abortion:

- ***McKay v Essex Area Health Authority*** **[1982]:** C was born disabled as the result of its mother's illness during pregnancy. C sued the NHS for failing to offer her mother an abortion. **Stephenson LJ:** rejected the claim: imposing such a duty would "*make a further inroad on the sanctity of human life which would be contrary to public policy. It would mean regarding the life of a handicapped child as not only less valuable than the life of a normal child, but so much less valuable that it was not worth preserving."*

Wrongful birth

- Parents cannot sue for the costs of raising a healthy child, which was only born due to D's negligent performance of a contraceptive procedure:
  - ***McFarlane v Tayside*** **[2000]** H's vasectomy was performed negligently. W became pregnant and had a healthy child. C's sued for the financial costs of raising the child. **HL:** rejected the claim: Under *Caparo* it was not FJR to impose liability because: (i) a healthy child is generally regarded as a blessing; (ii) valuing the costs of raising a child is

impossible; (iii) morally offensive to regard a child as more trouble / expense than it is worth and could harm the child if she discovers her parents successfully sued for the costs of her upbringing.

- **Lord Steyn**: *Caparo* test hides the real reason for the decision, which is that to find otherwise would be offensive to distributive justice. An ordinary person would reject liability based on morality and social justice factors, so there should be no duty of care.

- However, if the child is born with disabilities, the parents can sue for the additional costs associated for raising a disabled child:
  - ***Parkinson v St James*** **[2001]**: C's sterilisation operation was performed negligently and as a result she gave birth to a severely disabled child. **Brooke LJ:** C could recover, but only for the extra costs of bringing up a child with a significant disability compared to a healthy child. Distributive justice points towards liability here, unlike in *McFarlane*, because ordinary people would consider it fair to award damages to cover the extra expenses of a child's significant disability.
- In the following the parent was disabled, but gave birth to a healthy child — she could not claim for the costs of raising the child, but was awarded £15,000 in damages for being prevented from living the life she chose. This seems to strike an appropriate balance.
  - ***Rees v Darlington Memorial Hospital*** **[2003]:** C was almost blind and had a sterilisation operation as she believed she would be unable to care for a child. Due to D's negligence she gave birth to a healthy child. C sued for the costs of raising the child. **HL:** rejected C's claim as it would not be FJR / would offend distributive justice. However, they did award damages of £15,000 for being prevented from living her life as she chose.
    - **Minority** the case was analogous to *Parkinson* not *McFarlane*: in the same way that it is more expensive to raise a disabled child than a healthy child, it will cost more for a disabled parent to raise a child than a healthy parent so the disabled parent should be able to recover those extra costs.

Hoyano It is artificial to use such concerns for 'distributive justice' to distort tort law principles which should not be based unarticulated statements of morality. 'Distributive justice' is an empty label which does not explain or justify the decisions in these cases.

- In *McFarlane* the costs of the child's upbringing should have been recoverable as consequential economic loss — consequent on W's unwanted pregnancy as an actionable physical injury.
- *Parkinson* is inconsistent with *McFarlane* because the existence of a duty of care should not be determined by the extent of loss suffered — the loss in these cases was of the same type, so the degree of loss suffered should have been irrelevant to finding a duty in *Parkinson.*

Academic discussion on PEL

Stapleton criticises the law on PEL:

- Liability for PEL is currently based on pockets of case law defined by reference to how the PEL is caused (misstatement/professional services under Hedley Byrne, defective premises etc), and this is ineffective.
- Liability should be determined by reference to the key policy issues in this area rather than by factual similarities as to how the PEL is caused. There should be four policy-based criteria which must be satisfied for PEL to be recoverable:
  - No floodgates concern: e.g. defective premises cases.
  - No adequate protection available to C outside the law of tort (e.g. no contractual relationship between C and D)

- A tortious duty of care would not invade an area which Parliament has exhaustively dealt with, or which should be left to Parliament to deal with.
- A tortious duty of care would not allow C to circumvent a contractual bargain with D, particularly an agreement on risk allocation.

2. BREACH OF DUTY

Two questions:

- **Question of law:** what was the appropriate standard of care? How ought D have behaved in the circumstances?
- **Question of fact:** Did D reach that standard?

What was the appropriate standard of care?

The standard of care is that of the **reasonable man** which is construed **objectively.** Clear from:

- ***Nettleship* [1971]:** learner driver crashed and injured her instructor. **HL:** the standard of care owned by a learner driver is the same objective standard owed by every driver. This is so regardless of the learner's inexperience or the instructor's knowledge of that experience.

However, in some cases, the objective standard will be modified:

1. Children: the test is what degree of care and foresight can reasonably be expected of a child of D's age

- ***Mullin v Richards* [1998]:** C, 15, was injured at school while 'fencing' with D using rulers. C lost her sight in one eye. **Hutchinson LJ:** the standard is objective, but the question is whether an *"ordinarily prudent and reasonable 15-year old schoolgirl in D's situation would have realised as much."* On the evidence the risk would not have been obvious to D, so she did fall below the standard of care required. Hutchinson accepts that age and experience are relevant factors in varying the standard of care, but questions whether a child's intelligence can be taken into account.

2. Illness: the extent to which D can be responsible for actions influenced by his physical illness, depend on the extent of his awareness and whether action can be controlled.

- ***Mansfield v Weetabix* [1998]:** C's shop was damaged when D crashed his lorry. D, unknown to him, was in a hypoglycemic state. **Leggatt LJ:** D did not fall below the standard required because he did not know / could not have known of his infirmity. He would have been at fault had he known of his condition and kept driving.

3. Skill: if D is performing skilled task, the standard varies according to context / how he presents himself. The standard required is that of a reasonable person of D's profession.

- ***Bolam* [1957]:** C suffered fractures on the pelvis while undergoing electro-convulsive therapy. Bone fracture was a known, but slight risk. C claimed D (doctor) was negligent in that he did not use a muscle relaxant. **McNair J: "***In the case of a medical man, negligence means failure to act in accordance with the standards of reasonably competent medical men at the time ... a doctor is not guilty of negligence if he has acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art."* I.e. if there is an established body of opinion in support, it is reasonable. Here, D could adduce expert evidence to support the method he used, so did not fall below the standard of care required.
- **Bolitho [1998]:** child died in hospital as a result of D's failure to attend the child and intubate it to relieve respiratory difficulties. D was able to adduce expert evidence that even had he attended to the child, he would not have intubated. **Lord Browne-Wilkinson:** In applying the *Bolam* test, the court must be satisfied that the basis of the body of medical opinion relied upon is 'logical'. Thus, in a 'rare case' where the medical evidence was *"incapable of withstanding logical analysis"* the judge is entitled to hold that it could not provide the benchmark against which the doctor's conduct fell to be assessed. This was not such a rare

case. *"I emphasise… it will very seldom be right for a judge to reach the conclusion that views genuinely held by a competent medical expert are unreasonable."*
    - ***Bolitho*** was a response to concerns that the courts were overly relying on professionals to decide cases and that the court should have more jurisdiction to intervene.
    - **Keown:** "*Bolitho is good as far as it goes, but it does not go as far as it should. For one thing, it is not always clear whether medical opinion may be disregarded only if it is illogical. What if the logic is flawless, but the premise unsound or unpersuasive?"*
    - **Teff**: *"the measured approach now endorsed by the House of Lords in Bolitho should reduce the risk of legitimizing the lowest common denominator of accepted practice*."
- **Medical negligence: duty to inform: Sidaway [1985]:** C suffered paraplegia as the result of a spinal cord procedure. The neurosurgeon failed to tell C of the 1% risk of such an occurrence when obtaining consent to the procedure. **HL (Lord Bridge):** the duty to inform is to be decided by the *Bolam* test. Under that test, there was no breach. However, there may be cases involving *"a substantial risk of grave consequences"* in which a judge could conclude that *"notwithstanding any practice to the contrary accepted as proper by a responsible body of medical opinion"* a *"patient's right to decide whether to consent to the treatment was so obvious that no prudent medical man could fail to warn of the risk save … some sound clinical reason for non-disclosure.'*
- **Professional standards (other than medical):** The *Bolam* test with the *Bolam* gloss has been used in respect of other professions — in ***Paratus v Countrywide Surveyors*** **[2011]** the High Court applied both to a mortgage lender. However, in other professional contexts — e.g. solicitor's conduct in ***Edward Wong*** **[1984]** — the courts seem more prepared and competent to judge conduct themselves.

Did D breach the standard?

This is essentially a balancing exercise between:

- **Magnitude of the risk:** this is comprised of the likelihood (or foreseeability) of injury occurring, plus the severity of the injury should it occur.
    - ***Paris v Stepney Borough Council*** **[1951]**: C was employed by the Council at a garage. C had one eye, which was put out by a chip of metal. C argued D was negligent in not providing him with safety goggles. **HL (Lord Normand):** there was a breach of duty. Although it was not common practice to issue normal employees with goggles, the magnitude of risk to C was greater
- **The importance of the activity undertaken by D** and the **practicability of taking precautions against the risk.**

For example,

- ***Bolton v Stone*** **[1951]:** C, a pedestrian, was hit by a cricket ball. **HL (Lord Reid):** there was no breach; the small likelihood of this happening, the minor risk of future injury, and the cost of raising the fence, meant there had been no breach. "*the test to be applied here is whether the risk of damage to a person on the road was so small that a reasonable man in the position of D … would have thought it right to refrain from taking steps to prevent the danger.*
- ***The Wagon Mound (No. 2)*** **[1967]:** D's ship leaked oil during refuelling which was ignited by C's labourers performing maintenance C's vessels in Sydney Harbour. C sued for damage to his ships. **Privy Council:** D breached his duty. Although the risk of fire was small, D should be liable because: (i) the oil leak could easily/cheaply have been prevented; (ii) the leak served no benefit, unlike the playing of cricket in *Bolton.*
    - **Lord Reid:** it does not follow from *Bolton* that all slight risks can be justifiably discounted; rather it means that a reasonable mad can *"neglect such a risk if he had some valid reason for doing so, e.g. that it would involve considerable expense to eliminate the risk."*

Standard judged by what was reasonable *at the time*:

- ***Roe v Minister of Health*** **[1954] :** C received a spinal anesthetic. The anesthetic had been stored in glass vials immersed with phenol solution (standard practice at the time). C suffered paralysis as a result of contamination with phenol. By the time of the trial it was known that such contamination could take place through molecular flaws in the glass. **Denning LJ:** D was labile. *"He did not know that there could be un-detectable cracks, but it was not negligent for him not to know it at that time. We must not look at the 1947 accident with 1954 spectacles."*
- ***Baker v Quantum Clothing Group*** **[2011]**: Cs (employees in various textile factories) brought claims against several D employers for hearing loss for exposure to noise the 85-90dB range. A 1972 industry safety guide indicated that a noise of up to 90dB was acceptable, this was revised down in 1990 by an EU regulation. **SC:** Employers could rely upon a recognised and established practice unless that practice was clearly bad or they had acquired greater than average knowledge of the risks.
  - **D1:** no breach of duty in respect of damage which occurred before 1990.
  - **D2:** had special knowledge of the risks of noise exposure from 1985, so could be liable for damage from that time.

Winfield and Jolowicz: comment on Baker: D's compliance with general practice in a given line of work is not always *sufficient* to meet the standard of care. As Mance noted in ***Baker*****:** "*Respectable general practice is no more than a factor, having more or less weight according to the circumstances, which may guide the court when determining whether D complied with the standard of a reasonable person*." Thus the courts have sometimes held that following a general practice amounts to negligence. That said, if it is shown D complied with widely accepted professional standards, the court is likely to find for D.

Games and horseplay

- ***Blake v Galloway*** **[2004]**: D and C were part of a group of children playing a game involving throwing bark/twigs at one another. C suffered serious injury to his eye. **Dyson LJ:** "*In a sport which inevitably involves the risk of some physical contact, the participants are taken impliedly to consent to those contacts C which can reasonably be expected to occur in the course of the game, and to assume the risk of injury from such contacts*." As such, no breach of duty here.

4.1 CAUSATION (CAUSE IN FACT)

Causation links actionable damage and breach of duty. It is predicated on a **corrective justice** model; D's interference with the life of C resulted in loss. **Causation justifies the use of negligence at all** — otherwise we might as well use a social justice model.

- **Honore**: *"to insist on a causal connection between conduct and harm ensures that in general we impose liability only on those who, by intervening in the world, have changed the course of events for the worse."*

It is based on the **balance of probability,** splitting the risk of error between C and D. Once D is proved as a 50%+ cause, this is treated as legal certainty (i.e. it does not make deductions in the damage recoverable because there was only a 51% likelihood that D's act caused C's harm) . Thus causation is invariably a question of probability, not certainty.

BUT FOR CAUSATION

The orthodox model is **'but for' causation** — but for the actions of D, the injury that C suffered would not have occurred.

- ***Barnett v Chelsea Hospital* [1969]**: Doctor negligently told C (poisoned by arsenic) to go home. C died, but D was not liable because C would have died anyway, even if D had examined him property, but for D's negligence, C would still have died.

Bolitho gloss: D cannot argue that his negligence was not a 'but for' cause because, even if he had taken the correct course of action, he would have committed another subsequent breach.

- ***Bolitho* [1997]** D (doctor) failed to respond to a call to attend to C. D argued that, even if he had attended, he would have committed a further breach (failing to intubate), so C's harm would have occurred anyway. **HL:** rejected his argument. He could be held liable.

Note that D is not necessarily liable for all loss flowing from his actions if a 'but for' cause is established — remoteness rules still apply (see *SAMMCO*).

D CAUSED PART OF C'S INJURY

This can only be applied where the injury can be **divided** between separate factors.

- Not a part contribution to a single injury, but causing a separate injury (part of overall injury).

The test here is still 'but for' — need to establish, on the balance of probabilities, that injury would not have occurred but for the tort.

- ***Performance Cars v Abraham* [1962]:** C's car was involved in two collisions. First collision damaged the underside of the car and C had been unable recover. Second collision: D damaged the front wing. **QB:** D only liable for the damage he had caused, not for the damage sustained in the first collision — D was not a 'but for' cause of the damage to the underside.

To apply *Performance Cars,* need to work out if the injury/damage is divisible.

- **Divisible:** an injury which exists on a spectrum and can get worse over time (e.g. deafness — more exposure to noise can make C deafer; if D1 exposes C for 5 years and D2 for 10 years, each will be liable for their 'but for' contribution — D1 1/3 and D2 2/3.)
- **Indivisible:** a binary injury — e.g. death / coma; everyone who has the condition is the same. If there is a mild / serious form of injury, then it is divisible and *Performance Cars* applies.

CONSECUTIVE / SUPERVENING INJURIES

These rules concern a contribution to a single indivisible injury. E.g. C suffers one injury from D1 (e.g. wound to a leg), but a supervening injury from D2 (e.g. loss of the same leg) occurs.
Separate and unconnected torts: where C suffers two consecutive separate tortious injuries, and D1 is before the court but D2 is not, then D1 will be liable for the damages caused by him as if the second tort had not occurred — his liability will not be reduced by the supervening harm of the second tort.

- ***Baker v Willoughby* [1970]**:C was hit by D1s car, leaving his left leg useless. D2 (a robber) shot C in the left leg, causing the leg to be amputated. C sued D1 (could not locate the robber). **HL:** D1 was liable to pay damages for the fact that C was unable to use his left leg for the rest of his life. D1's argument that he should only be liable up until the time C lost his leg was rejected. D1 should not receive a windfall merely because C was unlucky in sustaining further injury.
- **Lord Pearson:** *"The original accident… produced a general reduction of C's capacity to do things, to earn money and to enjoy life. For that devaluation D1 should be and remain responsible to the full extent*" unless before damages are assessed, something happens which "*diminishes the devaluation (e.g. if there is an unexpected recovery)."* If the "*supervening event is a tort, D2 should be responsible for the additional devaluation caused by him."*

L+O: if D1's argument was followed, there would be a gap in damages — D1 would pay for the injury up until the time of the subsequent tort, but D2 would only be liable for the additional damage caused (in *Baker* this would not have been substantial, not much difference between no leg and a useless leg). I.e. C would get no compensation for the effects of the original injury after second tort.

NB: *Baker* only applies where D2 is not before the court — if D2 had been before the court, *Performance Cars* would have applied. D would only have been liable for the injury up to the robbery, the robber would have been liable for the rest.

Second injury is not tortious: where the second injury is not tortious (e.g. a naturally occurring misfortune) then D will only be liable for the injury until it was overtaken by the supervening injury.

- ***Jobling v Associated Dairies* [1982]:** D's negligence caused C an injury to his back. Before trial, C independently developed another back injury (not connected to the injury). **HL:** D was only liable for the back injury up until the time of the supervening non-tortious harm.

Reasoning is based on the 'vicissitudes principle': damages should not place C in a better position than she would have been in if D's tort had not occurred. When assessing damages, the court will speculate on the effects of injury and make reductions based on the likelihood that an illness would eventually cause the same effect anyway (e.g. if injury prevents C working, but a medical condition would likely force her to stop in 10 years anyway, a reduction will be made). Where a vicissitude is known to the court before trial, there is no need to speculate — the court can make an exact deduction.

The vicissitudes principle only applies to innocent/non-tortious hypothetical or actual subsequent harms, hence the distinction between *Jobling* and *Baker*.[1]

PART CAUSING A SINGLE INJURY

[1] **Summary:** Two independent torts and both Ds before the court ***Performance Cars*** (if injury is divisible); Two independent torts and only D1 before the court ***Baker***; Two independent injuries one tortious and the other non-tortious: ***Jobling***.

While *Performance Cars* is about causing part of a divisible injury, this is about a contribution to a single, indivisible injury.

If an injury is necessarily indivisible and causes cannot be divided between spate factors because those factors operate cumulatively and interdependently, then apply *Bonnington*:

- ***Bonnington Castings v Wardlaw* [1956]:** employee was exposed to silicon dust from two sources, but only one source was attributable to D's negligence. C developed a lung condition that gradually developed over time. **Lord Keith*:*** exposure to 'innocent' and 'guilty' sources were simultaneous, so could not be divided into chronological chunks. The condition wouldn't have happened (or wouldn't have occurred when it did) 'but for' the exposure to guilty dust, so D was liable for C's injury.

Lord Phillips in *Sienkiewicz* on the difference between *Bonnington* and *Performance Cars*: ***"****Where the disease is indivisible, such as lung cancer, D who has tortiously contributed to the cause of the disease will be liable in full. Where the disease is divisible, such as asbestosis, the tortfeasor will be liable in respect of the share of the disease for which he is responsible."*

There is a question as to whether *Bonnington* is an orthodox application of causation principles. **Green** argues that it is, just used where there is a difficult factual situation — i.e. in *Bonnington,* D is a 'but for' cause because without D the injury wouldn't have occurred (or wouldn't have occurred when it did). This was the approach taken by the Privy Council in *Williams*.

***Williams v Bermuda Hospitals Board* [2016]**

- **Facts:** C was admitted to hospital with appendicitis. The hospital was negligent in failing to diagnose the appendicitis and took more than 10hrs to operate. As a result, pus leaking from the appendix caused sepsis to set in and injury to C's heart and lungs. Issue: some of the leakage was non-negligent (would have occurred anyway) and some was the result of the hospital's negligence (in not operating fast enough).
- **Lord Toulson (PC):** C's injuries were indivisible (not greater / smaller depending on the amount of leakage). As such, *Bonnington* applied: "*where D has been found to have caused or contributed to an indivisible injury, she will be held fully liable for it, even though there may well have been other contributing causes."* The hospital was liable for the full injury.

McBride:

- **Different rule:** Lord Toulson followed Sarah Green's approach that *Bonnington* is a straightforward application of 'but for causation'. However, McBride disagrees — it is a different rule because it does not ask if D's conduct is a but for cause, it asks 'did D's negligence make a material contribution to the state of affairs that resulted in C suffering an indivisible injury'?
- ***Bonnington* not solid authority:** the PC note pneumoconiosis is a divisible disease, so *Bonnington* may just be a *Performance Cars* case where the HL went wrong in holding D liable for the whole injury, rather than just a part (i.e. he was a part cause on straightforward 'but for' causation). It may not be solid authority for a subversive rule now embedded in English law.
    - The PC should have been more cautious in light of *Fairchild* —*"the courts depart from the 'but for' test for causation at their peril*" it is therefore surprising that the PC were *"so happy to depart from the 'but for' test in such a casual manner."*

Stapleton and Steel. critical of the result in *Williams*, but endorse the rule in *Bonnington*

- **Endorsement of *Bonnington*:** "*to the extent that the rule is asserted as a general principle for cases of indivisible injury it is correct and must be understood as employing a causal concept which is broader than but-for causation*" E.g. where D1, D2, and D3 all independently poison C's tea — two drops are sufficient to kill, one drop is not — C drinks the tea and dies. *'Is the law to say that since no one was a necessary, but-for, cause of the death no one is responsible?'*
- **Criticism:** they argue that where there is an indivisible injury, there should be two stages: (i) did D make a material contribution to an indivisible injury; (ii) *"if the mechanism for an indivisible injury would have been complete absent the contribution due to wrongful conduct, no compensatory liability should be imposed even though the contribution should be recognised as a cause."* The PC only ask the first question, with the result that the D in *Williams* is liable, but if they asked the second question he might be absolved if he could show that prompt treatment would not have prevented sepsis. They're trying to refine the scope of the exception.

A good example of damage falling into this category is mental illness — it is considered an 'indivisible injury', so once C shows D is a 'but for' material cause, D is liable for the whole injury:

- ***Dickins v O2 plc* [2008]** C worked for O2 and suffered from stress on the job. She repeatedly expressed her concerns to her employer. C eventually suffered a breakdown. **CA:** O2 was liable for stress related personal injury.
    - **Foreseeability:** Previous case ***Walker v Northumberland CC* [1995]** which stated that an employer would not be liable for an employee's first breakdown (as it was not foreseeable) was overruled. Here, it was enough that C had previously complained about stress on the job and had communicated symptoms she was suffering. As such it was foreseeable.
    - **Breach:** even though O2 referred C to internal counselling, this was not enough to discharge their duty. Because D was complaining of severe stress, O2 should have used 'managerial intervention' — i.e. to investigate C's case.
    - **Causation:** there were a number of factors contributing to C's breakdown — many of which were not related to the employer (e.g. stress in her home life). Here, the court found O2 made a *"material contribution"* to C's breakdown and *"tipped her over the edge."* I.e. this is an application of *Bonnington* — mental illness is an indivisible injury and because D was a material 'but for' cause, D was liable for the whole injury.

MATERIAL INCREASE IN RISK

This is an **exceptional test** and is not actually about a material contribution to risk, but about increasing risk of injury which then eventuated. It can only operate where there is an **evidentiary gap**

Need to prove:

- **Indivisible injury:** single risk which has eventuated in an injury (*Rothwell* — cannot claim where it has not eventuated), but different sources of risk.
- **Single agent**
- **Evidentiary gap:** 'but for' causation is impossible to prove in principle — not where theoretically possible to prove, but where the evidence is not available. Know that one D caused the injury, not sure which one. There must be a *"rock of uncertainty."*

The *Fairchild* principle allows C to recover for her illness despite the evidentiary gap on the basis that each D materially increased the risk of C suffering the illness. C only needs to prove that D materially increased the risk she would suffer the illness, not that D was a 'but for' cause.

Principle first laid out in ***McGhee v National Coal Board*** **[1972]:** C contracted dermatitis as a result of negligent and non-negligent exposure to brick dust by D; due to evidentiary gap it was impossible for C to show if the negligent dust was a 'but for' cause, but he was allowed to claim by the HL:

- **Lord Wilberforce's Justification: "***if one asks which of the parties, the workman or the employers, should suffer from this inherent evidential difficulty, the answer as a matter of policy or justice should be that it is the creator of the risk … who should bear its consequences".*

Rational behind *Fairchild*: as a matter of policy, the disadvantage caused by the medical evidentiary gap should be borne by the negligent D, rather than innocent C. Further, if Ds were not liable it would allow employers to ignore some of their health and safety obligations with impunity.

Fairchild **[2003]**:

- **Facts:** C contracted mesothelioma as a consequence of exposure to asbestos due to various employers' negligence. C's meso must have been caused by at least one D, but it was medically impossible to prove which (even if all the evidence in the world was known) on a balance of probabilities.
- **HL:** D could recover if three requirements were satisfied: (i) there were multiple potential sources (negligent exposure to asbestos by each D) of a single risk (meso); (ii) single agent (asbestos); and (iii) there was an evidentiary gap. **Bingham:** *"there is no way of identifying… the source of fibre or fibres which … culminated in the malignant tumour."*
  - **Exceptional:** the material increase in risk principle can only apply in exceptional circumstances where an evidentiary gap prevents C from proving 'but for' causation. This is a departure from the ordinary rules of causation on policy grounds.
  - **Lord Bingham:** "*The overall object of tort law is to define cases in which the law may justly hold one party liable to compensate the other*". The conventional 'but for' test must be adapted, such that it does not yield unfair results. Although it may be unfair to impose liability on an employer who only employed C for a short period of time, when C cannot prove he contributed to C's meso, this is justified in that policy militates in favour of compensating those who have suffered grave harm at the expense of their employers who fail to protect them from that harm.
  - **Lord Nicholls**: rejecting Cs' claims here would be "*deeply offensive to instinctive notions of what justice requires and fairness demands*".

Development of the *Fairchild* principle

Unlike *Fairchild, Barker* involved C who had also exposed himself to risk during self-employment:

Barker **[2006]:** the HL accepted that the *Fairchild* principle applies to any situation where D increases the risk that C might contract mesothelioma, irrespective of the fact that other possible sources of risk were non-tortious, or even due to C's own contributory negligence in exposing himself to risk.

- **Joint and several liability?** In *Fairchild* it was held that each employer was joint and severally liable — C could pick which employer to sue and they were liable for the full amount. However, ***Barker*** **reversed this approach; each D is only liable to pay for the**

proportion of the total risk he exposed C to. Lord Hoffmann: this *"smoothed the rough justice"* of *Fairchild.*

However, the *Barker* judgment on apportionment was almost immediately reversed by Parliament in **s.3 Compensation Act 2006:** if the conditions for imposing liability in *Fairchild* are met, the 'responsible person' is liable joint and severally irrespective of the existence of other sources of exposure from other negligent Ds, other non-tortious exposure, or C own actions (although a deduction for CN is possible and if one D is held liable, he can claim contributions from other Ds.

The extension of *Fairchild* in ***Sienkiewicz*** is particularly problematic — *Fairchild* was found to apply where it can be proven that D's negligent exposure only made a small increase to the risk to C.

- ***Sienkiewicz* [2011]:** D negligently exposed C to asbestos she was at school and C subsequently contracted meso. It was accepted that D's negligent exposure increased C's risk of contracting meso by 18%; the remaining 82% risk was attributable to non-negligent background exposure. **HL** D was liable for the whole of C's meso, despite proof they had only increased risk by 18%.
    - **Lord Phillips**: felt compelled to apply *Fairchild* (since the criteria were met) but felt the *Fairchild* principle coupled with joint and several liabilities under **s3** was "*draconian*" for defendants.

Green: *Fairchild* should not have applied in *Sienkiewicz* — the justification in *F* was policy, but in *S,* the same policy concerns do not apply.

- **Same policy concerns don't apply:** There were not multiple Ds who had all breached their duties of care and at least one must have caused C's meso, nor was it the case that, absent liability, employers could expose employees to asbestos with impunity.
- **Corrective justice doesn't militate toward an exception to the general causation rules:** In *S* most of the exposure came from non-tortious background exposure, so imposing liability seems to violate the fundamental principle that negligence liability is based on corrective justice — it is not there to compensate people for misfortune.
- ***Fairchild* extended:** Under *S* it seems possible for D to be liable for 100% of C's meso, even if it were proven that he only increased C's risk by 1%. This is a big extension of *F.*

Laleng points out that *S* does not Q well with *Hotson* denying recovery for loss of a chance. Loss of a chance of recovery and increased risk of contracting an illness are essentially the same thing, but the latter can be recovered under *S* whereas the former cannot under *Hotson*.

S (coupled with the Compensation Act) is problematic in two other ways:

- It is unjust against a D who expose C to a small risk (one week), but bears the whole loss because other Ds (who exposed D to asbestos for 10 years) have gone insolvent.
- It is unfair on those who take longer to contract meso — joint and several liability results in huge compensation claims, causing employers (and insurance companies) to become insolvent. So those who contract the disease later will have no one to sue. Apportionment may have been better.

NB: Compensation Act only applies to mesothelioma — in other cases where there is a similar 'rock of uncertainty' *Barker* will apply to apportion damages. E.g. *Fairchild* also applies where lung cancer (not mesothelioma) is caused by asbestos fibres, but damages are apportioned under *Baker.*

- ***Heneghan v Manchester Dry Dock* [2016]**: C had been exposed to asbestos fibres by six employers, leading to lung cancer. On a balance of probabilities, it was agreed that he would

not have developed lung cancer if he had not been exposed to asbestos. His working exposure to asbestos (from all six) accounted for 35% of his total exposure. **CA:** Once it is established on a balance of probabilities that lung cancer was caused by asbestos, a similar 'rock of uncertainty' exists so *Fairchild* should apply and D does not have to show that an employer who negligently exposed him to asbestos was a 'but for' cause.

- The proof of causation test for other occupational cancers remains as that set out by Swift LJ in ***Jones v SS for Energy*** [2012] — namely that occupational exposure must be held to have "*doubled the risk",* compared background reasons.

Interestingly, Ds argued *Fairchild/Baker* should apply so they would be liable only for apportionment damages — C argued there was no evidentiary difficulty and *Bonnington* should apply (i.e. Ds made a material contribution to the disease and so C could claim for the whole damage). *Bonnington* could not apply because asbestos exposure is not proportionate the severity of the disease — unlike silica dust, the builds up of which is proportion to the severity of the condition.

Limits on *Fairchild*

Fairchild only applies where risk to C was created by multiple exposures to a single agent.

- ***Wilsher*** **[1988]:** C was born blind, which could have been the result of five medical conditions C suffered from — four naturally occurring, one due to D hospital's negligence in exposing C to excess oxygen during incubation. It was impossible for C to prove which condition was the cause of blindness. **HL:** D not liable; C could not prove 'but for' D's negligence he wouldn't be blind

D in *Wilsher* added a new separate risk to a number of pre-existing different risks, whereas Ds in *Fairchild* made a contribution to the single ongoing risk by increasing Cs' exposure to asbestos.

In *Fairchild* the HL noted that D in *Wilsher* should not be liable on policy grounds because this would lead to a massive increase in the NHS's tort liability; any time the NHS added a new risk to a C's pre-existing risks of contracting an illness the NHS would be liable.

Wilsher would apply where, for example, C contracted cancer as a result of: (i) employer negligently exposing him to radiation; (ii) C's smoking. This would be a multiple agent case.

C can only recover under *Fairchild* where he actually develops mesothelioma

- ***Rothwell*** **[2008]:** C's developed pleural plaques as a result of asbestos exposure. The presence of pleural plaques is not harmful, but they indicated an increased risk of developing meso. **HL:** rejected the argument that *Fairchild* allowed recovery for an increase of risk alone — the actionable damage is the mesothelioma, not the increase in risk itself. D is not liable for increasing the risk of an injury which has not yet eventuated.

Disadvantage of *Rothwell:* C cannot access damages for meso at a time when she can actually use them; in many cases it will be her estate that collects the damages after her death. **Advantage:** the risk may never eventuate — if the court compensates C for the mere risk, this may constitute a windfall (if C never develops meso) or C may get inadequate damages (where she develops meso, but the court gives reduced damages as they only compensate for increased risk).

Stapleton argues against the decision in ***Rothwell***: the requirement of actual personal injury should be dropped in relation to latent illness cases — the gist of the damage should be the creation of a latent bodily condition which is certain to produce future physical changes. [**RH:** this does not deal with the fact that pleural placques do not definitely mean C will get meso].

Fairchild, insurers, and uncertainty in the law

***IEG v Zurich* [2015]:** IEG were liable for £250,000 to an employee for exposing him to asbestos for 27 years. He ultimately developed mesothelioma. IEG sought to pass on the cost to their insurers — they were covered by two companies during this time. Zurich, one of the insurers, argued it was only liable for a proportion of IEG's liability as it only covered IEG for 6 of the 27 years (22%) **SC:**

- **Question 1: was the *Barker* rule still good at common law in Guernsey, where the Compensation Act did not apply?** Yes. Lord Mance: *"if Barker remains good law, then IEG's liability in respect of the six years of Zurich cover was and is for a proportionate part (22%) of the full compensation which IEG in fact paid."*
- **Question 2: (obiter) what would have been the position in English Law, where the Compensation Act applies?** By a 4:3 majority held that where an employer has insurance for only part of a period of tortious exposure, he can claim against the insurer for the full liability. However, the insurer can seek a contribution from any other insurers who covered the employer during the period of exposure and, where the employer is uninsured for a period, he is treated as an insurer for these purposes (i.e. will have to make a contribution).

Goudcamp case note:

- **Fairchild case produced uncertainty:** The majority in *Zurich* thought it was permissible to relax orthodox principles within the *Fairchild* enclave — e.g. co-insurers who are at risk at different times may be liable to pay a contribution despite not normally having to co-ordinate liabilities. One question therefore is what other conventional principles might have to be relaxed within this enclave? **Stapleton**: uncertainty is the inevitable result of developing the common law. However, **Goudcamp** thinks some uncertainty may be necessary but "*it all depends on the magnitude of the uncertainty created and the length of time for which it is likely to persist."* In the case of *Fairchild,* the uncertainty has been protracted.
- **Judicial reallocation:** legacy of *Fairchild* has been the judicial reallocation of money on a "*staggeringly large scale from shareholders of insurance companies to mesothelioma victims*."
- **Lord Hoffmann**, one of the architects of the *Fairchild* rule has extra-judicially doubted whether the HL did the right thing — it might have been better not to forge an exception which has created a great deal of uncertainty; doing so would have *"left the legislature to grapple with it."* He noted it was *"inconsistent with the judicial function to develop arbitrary rules"* — which the HL (now SC) have seemed to do in trying to erect a fence around the *Fairchild* enclave.

In ***Wilsher*** Lord Bridge noted "*whether we like it or not, the law, which only Parliament can change, requires proof of fault causing damage as the basis of liability in tort. We should do nothing but disservice if we made the forensic process still more unpredictable and hazardous by distorting the law to accommodate the exigencies of what may seem hard cases*." **Tony Weir** observed the HL *Fairchild* must have disagreed with this position.

LOSS OF A CHANCE

Loss of a chance is actionable itself in the financial context but not in the medical context

If D's negligence causes C to lose a chance of financial gain, C can claim damages assessed on the probability of the chance materialising: ***Allied Maples***. If D causes C to lose a chance of being physically better off but, prior to D's negligence, C's chance of recovery was less than 50%, C cannot get damages for the lost chance: ***Hotson, Gregg v Scott***. If C's chance of being physical better off was greater than 50%, then C can get damages for the whole of the ultimate injury.

C can recover for loss of a chance of financial gain

- ***Allied Maples* [1995]:** C instructed D solicitors to act for them in a merger. As a result of D's negligence, C lost the opportunity to bargain for a reduction in liabilities under the merger agreement. These liabilities arose to C's detriment. C sued D for the loss of a chance. **CA:** C did not have to prove it was more than 50% likely they would have succeeded in negotiations for an indemnity against liability but for D's negligence, they just had to show that successfully negotiating the indemnity with X *"was a real or substantial chance as opposed to a speculative one."* Damages were assessed based on the likelihood the chance would have materialised. **The actionable damage was the loss of the chance, not C's actual loss flowing from the liability.**

C cannot sue for a reduction in chance of recovery, where always less than 49% — this is because C can only claim for the lack of recovery itself, not the loss of a chance of recovery

- ***Hotson* [1987]:** C fell out of a tree and injured his hip. The hospital negligently delayed a procedure for five days; the operation was unsuccessful and D's hip was paralysed. When C went to hospital he only had a 25% chance of avoiding paralysis. **HL:** C's claim failed as he could not show, on a balance of probabilities, that but for D's negligence, he would have recovered. They reject his argument that the loss of the 25% chance was itself actionable.
- ***Gregg v Scott* [2005]:** D (doctor) negligently diagnosed C resulting in delayed cancer treatment. If D had diagnosed C immediately, C would have had a 40% chance of recovery from the cancer. As a result of the delay, C's chance of recovery was 25% (but he did in fact go on to survive). **HL:** rejected C's claim for a loss of a chance (affirmed *Hotson*).
  - **Lord Hoffmann:** It would be contrary to previous authority to decide otherwise *"a wholesale adoption of possible rather than probable causation as the criterion of liability would be so radical a change in our law as to amount to a legislative act*." Further, *"It would have enormous consequences for insurance companies and the NHS*"
  - **Lord Phillips:** to decide otherwise would be too uncertain: "*awarding damages for the reduction of the prospect of a cure, when the long term result of treatment is still uncertain, is not a satisfactory exercise*"
  - **Baroness Hale:** It would lead to far more complex medical evidence, making trials more difficult/expensive, and making the outcomes of trials less predictable for insurance purposes.
  - **Lord Nicholls (dissent):** effectively differentiating between patients who start with a 49% of recovery (cannot claim against D) and those with a 51% of recovery (can claim) is "*irrational and indefensible*." This makes a doctor's duty of care to a patient with a 49% chance of recovery *"hollow and empty."* The all or nothing approach is too crude; the courts should award damages based on the chance of recovery C lost rather than outcome as it does in cases of economic loss of a chance (*Allied Maples*).
  - **Lord Hope**: A patient values his chances of survival even if they are less than 50%, so a patient should be able to recover for loss of a chance of survival even if that chance was always less than 50%.

Distinguishing financial and medical loss of a chance

Two valid justifications:

1. Hypothetical gain lost in *Allied Maples* is measurable in a way that physical injury is not. In injury cases there is no evidence of what would have happened to C if the doctor's negligence had not occurred — there's a better than 50% chance C would have been no better off. Damages will always be either over inclusive (C beats odds and recovers as in *Gregg*) or under inclusive (C would have recovered but for D's negligence and has not just lost a chance, but actual recovery).
2. **Hill:** in medical cases statistics are general, not personal. In *Allied Maples,* C could show what financial gain they specifically could have made had they not been denied the chance of negotiating for it. As **Croom-Johnson LJ** points out in *Hotson*, a medical 25% chance of recovery means 25/100 people in C's position will recover — C cannot show whether he is one of the lucky 25, so he cannot show that D's negligence made a difference to the outcome. Thus, the statistical 'chance' is not really a 'chance' at all. In *Allied Maples,* it is not the case that the outcome was pre-determined but C cannot prove what the outcome was (as in *Hotson* / *Gregg*); C could have had a chance at a different outcome but for D's negligence.

Stapleton criticises ***Hotson***:

- The result in ***Hotson*** means D can ignore his duty of care with impunity if his patient has a less than 50% chance of recovery to start with. Further, the HL dealt with the issue using principles of causation — they treated the gist of the damage as C's paralysis, rather than a loss of a chance of avoiding paralysis. If they'd have recognised the loss of a chance as actionable damage, no causation principles need distorting — C must prove on the balance of probabilities that but for D's breach he wouldn't have lost his chance of recovery. C must prove causation in relation to the lost chance rather than the eventual injury as the gist damage.
- The damages would reflect the 'gist' — only a portion of the total damages recoverable if the gist were the injury itself. E.g. a loss of a 40% chance would result in 40% of the damages for the actual injury. This doesn't violate causation, but does reflect the true value of the loss which D has caused C to suffer. It is a compromise that ensures justice for both C and D.
    - **Hill**: Stapleton's argument ignores the statistical nature of medical data — the individual C was *always* in the unlucky/lucky number, there is just no way to prove which. If C was in the unlucky number, he has lost no chance, so it's hard to see how the chance can form the gist as **Stapleton** argues. A statistical chance has no compensable value.

Scott: under *Hotson,* the line between 49% / 50% patients is unjustifiable. To solve this, bands of recovery should be used — if C had a likelihood of recovery but for D's negligence he should get 10% damages for the eventual injury etc. This would avoid the need for mathematical precision making cases long, complex, expensive and uncertain as identified in ***Hotson***. **NB: this was the approach taken by the trial judge in *Hotson.***

Thought: difference between cases best explained by the fact that there is no third party in *Hotson* – chance itself, rather than the access to the chance as in *Allied Maples*.

Green: the HL didn't slam the door in *Gregg* so might go a different way in a more amenable case.

FAILURE TO WARN

Chester allowed recovery for a failure to warn of a 1-2% risk during a back surgery, as long as C can show she would have delayed the surgery if warned.

Chester v Afshar **[2004]**: D (surgeon) failed to warn C of a l-2% risk of paralysis during a back surgery. D carried out the surgery non-negligently, but the risk materialised and C was disabled. C admitted that if she had been warned, she would have had the surgery, but at a later date. **HL:** D was liable for his failure to warn.

- **Majority:** accepted this was a departure from normal 'but for' causation on policy grounds — i.e. to uphold a doctors' duty to warn patients of surgical risk.
  - **Lord Steyn:** *"her right of autonomy and dignity can and ought to be vindicated by a narrow and modest departure from traditional causation principles*". But for the failure to warn, C would have had the surgery, but on a different day, when she would have only been exposed to a 1-2% risk of injury. Thus D caused the injury.
  - **Lord Hope:** sufficient for C to prove that she would not have consented to the operation at the time it was performed; not that she would never have had the operation. "*The issue of causation cannot be separated from issues about policy*" and D should be liable as a matter of policy — otherwise doctors' could fail to warn with impunity, particularly where Cs are honest and say they would still have had the operation. *"The function of the law is to enable rights to be vindicated and to provide remedies when duties have been breached."*
- **Minority: Lord Hoffmann** dissented on causation principles: if C would have had the surgery anyway, then the failure to warn did not cause her disability — her chances of suffering the disability are the same whether or not D warned her of it.
  - **Majority misunderstand statistics:** Saying there should be liability in this case is the same as saying that, if you go into a casino and find out your chances of a particular number coming up and do not like the odds, you go to a different casino and expect different odds. Absolutely nothing had changed in terms of the risk – same patient/ surgeon/equipment/nurses/place. The timing is absolutely irrelevant to this **risk**.
    - A similar Australian case involves C noting that, if aware of the risk, would have searched out the most experienced surgeon – this would be fine, as the risk itself has actually changed. The failure to warn thus made a tangible difference to the risk here, but not in the main case.

Stapleton the "but for" test for causation is over-exclusionary in cases where policy dictates C should be able to recover damages, which has led the courts to create complex, incoherent ad-hoc exceptions to it. The law of negligence should adopt a wider test of causation than 'but for'.

4.2 REMOTENESS OF DAMAGE (CAUSE IN LAW)

Once factual causation is established, remoteness rules apply — this is a **legal** normative enquiry into whether the factual cause is one which the law has an interest in protecting.

Intentional torts: Ds are liable for everything flowing from the breach of duty ***Re Polemis.*** This applies to fraud and economic torts. Other remoteness rules apply to non-intentional torts.

Reasonable foreseeability

Wagon Mound (No. 1) **[1961]:** due to D's negligence oil was spilled from a ship, which caught fire, damaging C's property. **HL:** D was not liable for C's loss because the fire / consequent losses were not reasonably foreseeable to D at the time of his breach of duty. **To be recoverable, damage must be of a reasonably foreseeable TYPE.**

Hughes v Lord Advocate **[1963]:** D left a manhole uncovered, protected by a tent / warning lamp. C climbed into the hole, knocked over one of the lamps, and caused an explosion, injuring

C. **HL:** D was liable — it is **not relevant *how* the damage comes about, only that the eventual result is that of a foreseeable type**. Here, it was foreseeable that C might be burned, so it did not matter than the manner in which the burning occurred was of a much greater extent than was foreseeable D *"can only escape liability if the damage can be regarded as different in kind from what was foreseeable*".

- **L+O:** the courts have adopted a definition of type / kind of damage favourable to C.

The courts have significant discretion in defining the 'type' of harm which was reasonably foreseeable. Where C suffers property damage, they will frame the 'type' more narrowly than in cases of personal injury. The following two cases show the broad approach in personal injury cases:

- ***Jolley v Sutton LBC* [2000]** a boat rotten was abandoned on D's land. D was aware of the boat but did not remove it. C tried to repair the boat, but was crushed when the boat collapsed and suffered serious spinal injuries. **Lord Steyn**: D was liable for C's injuries under the OLA 1957. It was foreseeable that children would 'meddle with the boat at the risk of some physical injury' — C (a child) repairing the boat and suffering injury was not a different type of damage.
- ***Corr v IBC* [2008]**: C suffered severe head injuries caused by D's negligence. As a result, C suffered from psychiatric conditions and committed suicide. **HL:** held that D was liable for C's suicide. **Lord Bingham**: It was reasonably foreseeable that C would suffer personal injury as a result of D's negligence, suicide is a type of personal injury, so D is liable for it, C does not need to prove that suicide specifically was reasonably foreseeable.

Contrast ***Wagon Mound (No. 1)*** damage was to property and the 'type' was framed narrowly so as to find D not liable.

The Thin Skull Rule: if harm to C was a reasonably foreseeable consequence of D's negligence, D will be liable for the full extent of that harm, even though the harm is much more serious due to C's inherent vulnerability.

- ***Smith v Leech Brain* [1962]**: C was burned on the lip by hot molten metal as a result of D's negligence. C was unusually vulnerable to cancer; the burn induced cancer and C died. **CA:** D was liable for C's death; "*a tortfeasor takes his victim as he finds him*". The cancer and death may not have been reasonably foreseeable but D only needs to foresee the type of injury which C suffered (personal injury), not the full extent of that foreseeable type of injury.

However, ***SAAMCO*** is inconsistent with the thin-skull rule.

- Negligent misevaluation of property led to a bank lending more than necessary. In the meantime, a massive drop in the property market, so worth significantly less than would have been, even if the negligent valuation had not occurred.
- Despite this fiscal loss all being of a foreseeable type, the Court held that D was only liable for the difference between the negligent and non-negligent valuations.
    - **This seems based on an 'assumption of responsibility model'** – contracting out of the standard remoteness rules on what can be reasonably expected for D to undertake.

NB: the occurrence does not have to be likely, only reasonably foreseeable (***The Heron II***).

Psychiatric Harm – Primary Victims: *Page v Smith* is an exception to the *Wagon Mound* requirement that the type of harm suffered by C must be reasonably foreseeable — primary victims can claim for psychiatric injury when physical injury was foreseeable. Lord Goff in *White* criticised this departure. However, if psychiatric injury is one form of personal injury (along with physical injury) then it is consistent with the broad framing of 'type' in *Hughes.*

Novus Actus Inteveniens: If D can show C's harm was caused by a third party / C's own actions, D will not be liable.

Acts of the Claimant

- ***McKew v Holland* [1969]:** C's leg was weakened as a result of D's negligence. C's leg gave out when descending stairs and he jumped to the bottom, sustaining further injury. **HL:** C could not recover for the further injuries sustained on the stairs — C's conduct in descending the stairs too quickly / without assistance / jumping to the bottom was unreasonable and so was a *novus actus* which broke the chain of causation. If C had taken all reasonable care, but had sustained further injury, D would be liable for it.
  - Even if C's unreasonable actions were foreseeable to D, D will not be liable: "*it does not follow D is liable for every consequence which a reasonable man could foresee*".
- ***Spencer v Wincanton Holdings* [2009]:** D's negligence caused an accident which meant C had to have his leg amputated. C tried to fill his car with petrol, without using prosthesis / walking stick. He tripped, fell, and suffered further injury. **Sedley LJ:** C could claim for further injury — there was no *novus actus. "A succession of consequences which in fact and in logic is infinite will be halted by the law when it becomes unfair to let it continue."* For personal injury, this line is draw where *"it is in substance brought about by C and not D."* Fairness is key to remoteness on rules on *novus actus.*
- ***Corr v IBC:*** C's suicide was not a *novus actus*. Lord Bingham: although self-inflicted injury will generally be *novus actus,* C's suicide was not because he was not fully responsible for his actions. The rationale behind *novus actus* is D should not be liable for an independent supervening act for which D was not responsible. C's suicide was "*not a voluntary, informed decision taken by him as an adult of sound mind*"

Acts of Third Parties: D is only liable for X where he had control over X / had assumed responsibility for C. Otherwise X's act will be a *novus actus* and will break the chain of causation.

- ***Knightly v Johns* [1982]:** D1 caused a car crash in a tunnel. D2 (police) forgot to close the tunnel and ordered C police officer to ride his motorcycle against the flow of the traffic to go back and close it. C was injured in carrying out this instruction. **CA:** D1 was not liable for C's injury; D2's negligent instruction of C was a *novus actus* — it was "*not a concurrent cause running with [D1's] negligence, but a new cause disturbing the sequence of events*".

- ***Lamb v Camden* [1981]** D caused C's house to flood and C's tenant had to move out. Squatters moved in and caused extensive damage to the house. C sued D for that damage. **CA:** D was not liable for the damage caused by the squatters. The judges gave different reasoning on the test:
  - **Lord Denning MR**: The decision of whether D should be liable for X's act or whether it is a *novus actus* is a question of policy for the judge to decide. Here, as a matter of policy, D should not be liable — it was C's responsibility to protect her property from squatters, not D's. Further, C's insurance would likely cover the damage.
  - **Oliver LJ:** D should only be liable for X's acts which are reasonably foreseeable as *very likely* to result from D's negligence. A "*stringent*" approach to reasonable foreseeability and likelihood should be adopted in third party cases.
  - **Watkins LJ**: Adding words such as "likely" to the reasonable foreseeability test makes it confusing — the basic foreseeability test should be used as a first hurdle, then other considerations should be applied — e.g. nature of X's act; time and place it occurred; identity of X; intentions of X; matters of policy. Here, it failed on the first hurdle — squatters actions not foreseeable.

The courts take into account a range of factors: (i) degree to which the intervening act was a foreseeable consequence of D's negligence; (ii) whether the intervening act was reasonable; (iii) whether it would be fair to hold D liable for the intervening act.

- Fairness was particularly emphasised by Denning and Watkins in *Lamb v Camden*, Bingham in *Corr v IBC*, and Sedley LJ in *Spencer v Wincanton Holdings*. The reasonableness of the intervening act was particularly emphasised in *McKew* and *Knightly v Johns*.

5. DEFENCES

VOLENTI NON FIT INJURIA

The voluntary assumption of risk is a complete defence to the tort of negligence. It applies where C knew of the risk and freely accepted it; although the courts tend to prefer the flexibility of CN.

Basic requirements:

1. **C knew of the risk:** this must be actual knowledge, imposing a **subjective test** on C
   - ***Dann v Hamilton* [1939]:** C chose to travel in D's car, knowing D was drunk. D crashed, injuring C. *Volenti* requires *"complete knowledge of the danger"* and proof of consent to it. Although knowledge of the danger can be evidence of consent to it. D must have been 'obviously and extremely drunk' for *volenti* to apply. (Although note, now, the RTA 1988).
   - ***Morris v Murray* [1991]:** C and D were drinking together then went in a flight in a small aeroplane, flown by D. D crashed and injured C. **Fox LJ:** D could rely on *volenti.* Knowledge can be inferred from the facts. Danger here was so great, C must have known D was incapable of discharging his duty of care, so in embarking on the flight, C *"implicitly waived his rights in the event of injury."* For *voleniti "the wild irresponsibility of the venture is such that the law should not intervene to award damages and should leave the loss to lie where it falls."*
2. **C voluntarily agreed to incur the risk:**
   - **Narrow approach in: *Nettleship v Weston* [1971]**: C supervised D in learning to drive. D crashed and C was injured. D could not rely on *volenti*. **Lord Denning**: "*Knowledge of the risk of injury is not enough. Nor is a willingness to take the risk of injury. Nothing will suffice short of an agreement to waive any claim for negligence*."
   - **Broader approach in subsequent case law:** defence is not confined to an agreement to waive a future claim — e.g. *Dann v Hamilton* and *Morris v Murry.*
     - ***ICI v Shatwell* [1965]:** C and X were employed in D's quarry. They made an agreement to breach one of the safety requirements imposed by D; C was injured by X's negligence. C sued D based on vicarious liability. **HL:** D could rely on *volenti.* Although *volenti* rarely succeeds in employment cases (because employee's consent is normally based on social/economic pressure), here the parties made *"a genuine, full agreement, free from any kind of pressure, to assume the risk of loss",* even if they thought that risk to be very remote.

***Volenti* will not apply:**

1. **Road traffic: Road Traffic Act 1988 s.149(3)** a driver cannot argue his passenger willingly accepts the risk of his negligent driving to escape liability. No *volenti* defence for drivers in claims by passengers.
2. **Employers:** will not apply where the employer breaches his statutory duty of care
3. **Rescuers:** the defence does not *usually* apply against rescuers: ***Baker v TE Hopkins* [1959]:** C went down a well to rescue a colleague who had become trapped. C was injured and sued his employer in negligence. D claimed C had assented to the risk when he attempted to rescue X. **Morris LJ:** D was liable. However, *"If a rescuer acts with a wanton disregard of his own safety… it might be held that any injury to him was not the result of the negligence that caused the situation of danger."*
4. **Self-harm:** no defence where C does the exact thing D had a duty of care to prevent him from doing: ***Reeves* [2000]:** The police could not rely on the volenti defence in respect of C's suicide because they were under a specific duty to protect him from suicide (he was on watch). Allowing *volenti* would effectively negative the effect of the police's duty of care.

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Volenti would have applied if the police's duty was narrower in scope (i.e. C wasn't on watch).

EXCLUSION OF LIABILITY

It is *possible to expressly exclude liability by contract between the parties.*

The Unfair Contract Terms Act 1977:

- The general rule allowing exclusion is subject to significant exceptions from the Act, mainly **s.2**.
  - It is of vital importance that this only applies to **business liability** (**s.1(3)**), which means (i) liability arising from things gone in the course of business, (ii) occupation of a premises used for business purposes.
  - Where done on private premises, must be done so **reasonably.**
- **s.2(1):**
  - Cannot contract out of death or personal injury resulting from negligence.
- **s.2(2):**
  - For other loss or damage, the contract term/notice must satisfy the **s.11** requirement of **reasonableness.**
  - Contract terms – **s.11(1):**
    - '*The term shall have been a fair and reasonable one to be included having regard to the circumstances which were, or ought reasonably have been, known to or in the contemplation of the parties when the contract was made*.'
  - Notices – **s.11(3):**
    - '[*The notice] should be fair and reasonable to allow reliance on it, having regard to all the circumstances obtaining when the liability arose or (but for the notice) would have arisen*.'
- **s.2(3):**
  - Agreement to/awareness of a contract term or notice does not itself indicate voluntary assumption of risk.

In ***Smith v Bush***, the express exclusion by the surveyors was held unreasonable. Lord Griffiths suggested four factors by which to gauge unreasonableness

1. Unequal bargaining power;
2. Whether practicable to expect C to obtain independent advice;
3. Complexity of the task;
4. Practical consequences of striking down the disclaimer.

CONTRIBUTORY NEGLIGENCE

Contributory negligence is a **partial defence** and is a failure by C to take reasonable care for his own safety, which contributes to the damage complained of.

- It results in the apportionment of C's damages, reduced to such an extent as the court thinks is 'just' and 'equitable', having regard to the parties' respective share of responsibility for loss suffered.
  - Any fault must be **causally related** to the damage which C eventually suffers — i.e. a defence available when the injury sustained was within the scope of the risk created by the CN.

Law Reform (Contributory Negligence) Act 1945 introduced a system of apportionment of damages and abolished the rule that any CN voided the claim all together.

- **s.1 "***damages recoverable in respect thereof shall be reduced to such extent as the court thinks just and equitable having regard to [C's] share in the responsibility for the damage"*
- **s.4** CN by C does not have to satisfy the requirements of negligence.

1. Causation C's fault in taking care of his own safety must be an operative cause of his harm

- ***Jones v Livox Quarries* [1952]:** C worked at a quarry owned by D. C rode on the back of a vehicle, despite being told not to. C was injured. **Denning LJ:** C's negligence must be "*so mixed up with his injury that it cannot be dismissed as mere history*" for contributory negligence to be established, causation test. Apportionment under CN is based on causation — "*what faults were there which caused the damage? Was [C's] fault one of them?*"
- ***Stapley v Gypsum Mines* [1953]:** C died when a roof at a mine collapsed. He had been instructed not to work under the structure until it was removed. **Lord Reid:** reduced his claim against D (employer) by 50%. C's act must be "*so much mixed up in the state of things*" that it must have contributed to the injury. *"It is enough… if there is a sufficiently high degree of probabilities that the accident would have been prevented*" if C had not acted as he did. In applying this test, the court should have regard to the "*blame-worthiness*" and the "*causal potency*" of C's act.
- ***Froom v Butcher* [1976]:** D crashed into C's car; C wasn't wearing a seatbelt. **Lord Denning:** C's negligence must be a part of cause of C's *damage* not the accident which led to the damage. C's damages were reduced by 20%.
- ***St George v Home Office* [2008]**: C was in prison; informed prison staff he suffered from withdrawal seizures; prison was negligent in managing C's conidition and C suffered injury as a result. **Dyson LJ:** no reduction for CN: although C's fault in becoming addicted were a 'but for' cause of his injuries, his addiction was *"too remote in time, place and circumstance and was not sufficiently connected with the negligence of the prison staff… to be properly regarded as a cause of the injury*". C's fault was "*no more than part of the history*".

2. Fault s.4 fault: "*negligence, breach of statutory duty or other act or omission which gives rise to liability in tort or would, apart from this Act [i.e. under the old law pre-1945], give rise to the defence of contributory negligence*."

- Lord Denning in ***Jones v Livox*** and ***Froom v Butcher***: emphasised there is no need for a breach of duty — rather need to ask whether **C acted as a reasonable person in looking after his own safety**.
- ***Reeves* [2000]:** although the police were liable for C's suicide in their care, his claim was reduced by 50% for CN. **Lord Hoffmann:** suicide could come within the definition of 'fault' — the statutory definition can encompass non-negligent acts of C.

3. Apportionment

- ***Jones v Livox***: apportionment is based on causation: the degree to which C's fault contributed to his damage.
- ***Froom v Butcher*** the court must have regard to both the "causal potency" and the "blameworthiness" of C's act, at least in some cases. Although, Lord Denning noted that blameworthiness will be "*hotly disputed*", so in straightforward cases a detailed, expensive inquiry into blameworthiness should not take place. It will *"suffice to assess a share of responsibility which will be just and equitable in the great majority of cases"*.
- ***Reeves***, Lord Hoffmann: apportionment should be based on the "*responsibility*" of each party for C's harm, and so the court should take account of the "*policy of the rule… by which [D's] liability is imposed*", i.e. the purpose and content of D's duty of care to C.

- ***St George v Home Office*** – Even if C's fault was not too remote a cause of his injury, it would not be just and equitable to reduce damages here because C had told the prison of his condition, the prison had assumed responsibility for C's welfare.
- ***Murray v Jackson* [2015]:** Apportionment comes down to a *"rough and ready"* approximation of who caused which bit of C's harm. Here a 50% reduction in damages were made when a schoolgirl carelessly stepped into the road in front of D's car (who should have slowed).

4. The Scope of Contributory Negligence — ***Co-Op Group v Pritchard*** — CN does not apply to the intentional torts. D attempted to rely on contributory negligence as a defence to the torts of assault and battery.

ILLEGALITY

C cannot rely on an illegal act to bring a tort claim. The illegality defence is a rule of public policy, aimed at preserving the integrity and consistency of the legal system by preventing C from profiting from his own wrong.

***Hall v Herbert* [1993]** McLachlin J in the **Canadian Supreme Court**: the defence should only apply in very limited circumstances based on the courts' duty to preserve the integrity of the legal system — e.g. where C is attempting to profit from his illegal act / to circumvent a criminal penalty. It did not apply here (a drink driving case) because C was not seeking to profit from his illegal conduct / circumventing the criminal law. His damages were, however, reduced by 50% for CN.

Old tests for the application of the illegality defence were based on the moral turpitude of C's offence or whether allowing C to recover would be an affront to the public conscience.

These tests were rejected in ***Tinsley v Milligan*** as being too uncertain — **Lord Browne-Wilkinson** instead thought the rule to be *"not substantive but procedural"* and that the test was one of reliance — C is barred from recovery if he must rely on his illegality in order to bring a claim.

- ***Tinsley v Milligan* [1994]:** C and D were lesbian life partners. They purchased a house together, but it was conveyed into D's sole name. This arrangement allowed C to keep collecting benefits. C later wanted to show that D held the property on trust for her. **HL**: allowed C's claim — although the court would not assist an owner to recover the property if he had to rely on his own illegality to prove his title, C did not have to do so here; she could show common intention / contribution to purchase price.

In ***Revill v Newberry*** the CA noted the approach in ***Hall v Herbert*** to give the defence a narrow scope:

- ***Revill v Newberry* [1996]:** C was attempting to break in to D's shed. D shot C. **CA:** D was liable; he could not rely on the illegality defence even though C had been convicted of burglary. The illegality defence is underpinned by the principle that *"there is a public interest which requires that the wrongdoer should not benefit from his crime."* If the court found C was barred by illegality, no trespasser could ever claim — an outcome not envisaged by the **OLA 1984**
  - This case shows elements of the balancing/proportionality approach in ***Hounga v Allen***.

Modern causation based approach

Modern test is based on causation — the key issue is the extent to which C's illegal act caused his harm.

- ***Gray v Thames Train* [2009]**: D's negligence caused C to suffer PTSD. C killed a man and was detained in a secure hospital. C sued D for his loss of liberty. **SC:** D could rely on the illegality defence. **Lord Hoffmann**: there are two rules within the illegality defence, both justified on policy:
  - **Wide:** "*In its wider form it says that you cannot recover compensation for loss which you have suffered in consequence of your own criminal act*." **Justified because** "***it is offensive to public notions of fair distribution of resources that a claimant should be compensated… for the consequences of his own criminal conduct".*** Applying this rule is a question of causation — was the damage caused by C's illegal act, even though it would not have happened but for D's tort. Distinction is between *"causing something and merely proving the occasion for someone else to cause something."*
  - **Narrow:** *"in its narrower and more specific form, it is that you cannot recover for damage which flows from… lawful punishment"* imposed as a consequence of your unlawful act. In such a case the law causes the 'damage' as a *"matter of penal policy"* and it would be inconsistent with the law for C to be compensated. **Justified by the need for consistency in the legal system**

The *Thames Trains* approach was followed and developed in ***Delaney*** and ***Joyce*** — C's act must be the 'immediate cause' of C's injury and foreseeability is important in applying the defence:

- ***Delaney v Pickett* [2011]:** C was a passenger in D's car. D crashed, injuring C. They were carrying cannabis in the car and were convicted of possession with intent to supply. **CA:** D could not rely on the defence — no causation. Key test is *"Was the injury truly a consequence of C's unlawful act or was it a consequence of the unlawful act only in the sense that it would not have happened if he had not been committing an unlawful act"*. Here, C's criminal act only *"gave occasion"* for D's tort, but the *"immediate cause"* of C's injury was D's driving.
- ***Joyce v O'Brien* [2013]**. C suffered a head injury when he fell from a van driven by D. C and D were involved in a joint criminal enterprise. C sued D. **Elias LJ:** D was not liable, because the illegality defence was engaged. It was key that it was foreseeable that the joint criminal enterprise would involve *"increased risks of harm in consequence of the activities of the parties in pursuance of their criminal enterprise."* Given that risk materialised, it could *"properly be said to be caused by the criminal act of C."*

Illegality, Public Policy and Proportionality

***Hounga v Allen* [2014]** – C (14) had been trafficked to the UK from Africa. C was employed as a cleaner by D in conditions of modern slavery. Eventually C claimed against D for racial discrimination (a statutory tort, so illegality applied). **CA:** illegality doctrine barred C's claim; C's claim was 'bound up' with her working illegally — she had to rely on her illegality to bring her claim. **SC** overturned the CA:

- **Lord Wilson:** a 'balancing approach' should be adopted to the illegality defence — the public policy factors for/against applying the defence on the facts of the case should be balanced.
  - The illegality defence rests on the foundation of public policy — it exists to preserve the integrity of the legal system and prevent Cs from profiting from their own wrongs. Neither of these concerns are operative here. Giving C compensation would not allow her to profit from her wrong in entering the employment contract. Whereas applying the defence would compromise the integrity of the legal system by making it appear that people in D's position could make discriminatory employment contracts with impunity.

- **Public policy might sometimes *countervail* against the denial of tort claims on the basis of illegality.** Public policy which militates against applying the illegality defence here: D was guilty of human trafficking, applying the defence would run counter to the prominent public policy against human trafficking and in favour of protection of its victims.

- **Lord Hughes and Carnwath:** took a narrower approach and did not endorse a balancing exercise of public policy factors. They applied the inextricable link test to find that C's claim was not inextricably linked to her illegality, so the defence did not apply.

Issues arising from *Hounga*

- **Inextricable link v causation:** *Hounga* adopted the old 'inextricable link' test not the causation test in *Gray.* Lord Wilson doubted whether the causation test in *Gray* works better.
- **Lord Wilson's balancing approach:** this is radical — no court has ever before acknowledged there are public policy reasons against applying the illegality defence to the facts of a particular case. **Bogg and Green** suggest Lord Wilson's judgment should be read broadly — the illegality defence should be capable of being disapplied where the tort in question offers specific protection to fundamental human rights. They go on to argue for an even broader application — e.g. policy factors behind statutory rights (e.g. as an employee) could be used to militate against the defence applying.

The public policy/proportionality approach in *Hounga* is flatly contradicted by the SC in ***Les Laboratoires Servier*** decided just three months later.

- ***Les Laboratoires Servier v Apotex* [2014]:** should the illegality defence apply where C's illegal act was breaching a patent.
  - **Lord Sumption:**
    - **Implicitly rejected *Hounga* without referring to it:** the defence *"is a rule of law and not a mere discretionary power"* — it is based on policy *"not on the perceived balance of merits between the parties to any particular dispute."* A proportionality based approach would lead to uncertainty and unpredictability.
    - **Can only apply where C's unlawful act is criminal / quasi-criminal:** it can't apply where the act is a tort / breach of contract / breach of patent / strict liability offence. This is because it is *"concerned with claims founded on acts which are contrary to the public law of the state and engage with the public interest."*
  - **Lord Toulson** dissented on the first point — *"it is right to proceed carefully on a case by case basis, considering the policies which underlie the broad principle*". ***Hounga*** requires the court to ask: (i) what is the public policy which founds the defence; (ii) is there another aspect of policy to which the application of the defence would run counter.

RH: ***Apotex*** is correctly decided on its facts and it's correct that only criminal acts should engage the defence. However, rejecting the proportionality approach was obiter and minimal weight can be attached to it since Sumption didn't mention *Hounga.* In many cases, the non-discretionary approach in *Apotex* will be appropriate, but in other cases where the tort in question protects the fundamental rights of C, the *Hounga* approach should apply — e.g. a claim against a public body that its negligence caused C's death, as this would involve Art 2 considerations.

***Patel v Mirza* [2016]:**

- **Facts:** C transferred £620k to the D (a trader), so D could use the money to bet on share price movements based on inside information (a crime). The information was not forthcoming, so the agreement was not carried out. C sought restitution of the money on the grounds that D had been unjustly enriched at his expense (ground of restitution was that the basis of the transfer had failed totally). D refused, claiming C was barred by illegality.

- **SC:** C's claim succeeded (unanimously) — *"an order for restitution would not give effect to the illegal act or to any right derived from it."* All agreed he basis of the defence is preserving the integrity of the legal system. However, there was disagreement over whether the defence should be flexible and context dependent or certain and principled. 6:3 majority adopted the flexible approach:
  - **Lord Toulson:** in determining whether a claim would harm the integrity of the legal system, need to consider: (i) the "*underlying purpose of the prohibition transgressed*"; (ii) *"any other relevant public policies which may be rendered ineffective / less effective by denial of the claim"*; and (iii) *"the possibility of overkill unless the law is applied with a due sense of proportionality."*
    - **Uncertainty:** cknowledged the trio of considerations might result in uncertainty, but considered the existing law was already uncertain and certainty was not a relevant consideration when dealing with people who were contemplating unlawful activity.
    - **Proportionality:** Factors to be taken into account under proportionality include: (i) seriousness of the conduct; (ii) its centrality to any contract; (iii) whether there was a marked disparity in the parties' respective culpability.
  - **Lord Sumption**: majority reasoning *"far too vague and potentially far too wide to serve as the basis on which a person may be denied his legal rights. It converts a legal principle into an exercise of judicial discretion, in the process exhibiting all the vices of 'complexity, uncertainty, arbitrariness and lack of transparency' which Lord Toulson attributes to the present law."*
    - **Minority approach:** Sumption noted that although the defence is *"governed by rules of law, a considerable measure of flexibility is inherent in those rules."* They are, in particular, qualified by *"principled exceptions for (i) cases in which the parties to the illegal act are not on the same legal footing and (ii) cases in which an overriding statutory policy requires that C should have a remedy notwithstanding his participation in the illegal act."*

Criticisms of this approach:

- **Uncertainty:** noted above as a concern from Lord Sumption. Also uncertainty as to how the conditions are to be applied — how should the court determine the 'reasons why conduct was made illegal' and which 'policies would be affected by denying the claim'. **Virgo:** *"there is a significant danger that when applied by a judge they will not provide the guidance to judicial decision-making that is required of a legal principle."*
  - **What room for other approaches?** *Mirza* concerned unjust enrichment; not negligence — in negligence the *Gray* causation test has been used, rather than the *Tinsley* reliance test (which has presided in trusts etc.). Has *Gray* been overruled as a matter of tort law? **Goudkamp** — Toulson's reasons leave little reason to suggest that his approach is confined to the law of unjust enrichment, but the lack of explicit denouncement may mean the causal analysis will continue to be employed in negligence *"perhaps with the policy-based test being used as a cross-check."*
- **Indeed, it is unclear how the considerations were applied on the facts of *Mirza* itself.** The majority did not identify policy behind insider dealing, nor policy reasons that would have been affected had the claim been denied, nor (explicitly) proportionality. **Virgo:** if these factors *"collapse into an arbitrary choice without principled guidance"* then we may have gone full circle in the development of the law and returned to something like the public conscience test.
- **Requires the court to weigh incommensurable factors:** policy factors militating each way may be impossible to weigh — just because the judges can offer *an* answer in cases such as *Hounga,* does not make the task any more coherent.

- **Minority approach is to be preferred:** it is essentially rule-based (applying where a claim is 'tainted by illegality') but with principled exceptions — both of which have been previously recognised.
- **Why did the court only believe two options were open to it?** They only considered the *Tinsely* reliance approach and the policy-based approach (the two options taken by the court in *Apotex*) — why did they not consider a third option — e.g. the Canadian rule in *Herbert v Hall.*
- **Does not respect parliamentary sovereignty:** *Mirza* in effect gives effect to the proposals that the LC advanced in its report, on which Parliament did not act. This makes the SC decision controversial.

Support for this approach:

- **Against the minority 'reliance' approach:** why should it matter that C relied on his / her illegality? To assert that C cannot do so, is merely to restate the test. Further, **Goudkamp** notes that whether C needs to rely on illegality to make their claim is often a matter of luck (i.e. whether it relates to an element of their cause of action or not).
- **Uncertainty may have some merit in this context:** Lord Toulson pointed out that certainty may not be an overriding concern when considering those who are engaged in illegal conduct. **Goudkamp:** indeed, some criminal law theorists (discussing immunity defences to criminal law) think ambiguity is an asset, because it **"***may serve the useful purpose of deterring undesirable conduct by persons who in fact qualify for them … A chilling effect may have beneficial consequences".* One response to this argument is that it may provoke litigation, which has its own costs.
- **Uncertainty may not cause litigation:** in *Jackson v Murray* [2015] the SC made clear that where discretion is left to a first instance judge in making a decision, appellate courts must *"recognise that different judges may legitimately take different views"* and *"those differing views should be respected, within the limits of reasonable disagreement."* An appellate court should only intervene when the decision reached was *"not one which was reasonably open to it."* Since the policy-based test gives judges considerable freedom to decide which factors are material, the test is highly discretionary; so may be largely impervious to appellate review.

Volenti would have applied if the police's duty was narrower in scope (i.e. C wasn't on watch).

EXCLUSION OF LIABILITY

It is *possible to expressly exclude liability by contract between the parties.*

The Unfair Contract Terms Act 1977:

- The general rule allowing exclusion is subject to significant exceptions from the Act, mainly **s.2**.
  - It is of vital importance that this only applies to **business liability** (**s.1(3)**), which means (i) liability arising from things gone in the course of business, (ii) occupation of a premises used for business purposes.
  - Where done on private premises, must be done so **reasonably.**
- **s.2(1):**
  - Cannot contract out of death or personal injury resulting from negligence.
- **s.2(2):**
  - For other loss or damage, the contract term/notice must satisfy the **s.11** requirement of **reasonableness.**
  - Contract terms – **s.11(1):**
    - '*The term shall have been a fair and reasonable one to be included having regard to the circumstances which were, or ought reasonably have been, known to or in the contemplation of the parties when the contract was made*.'
  - Notices – **s.11(3):**
    - '[*The notice] should be fair and reasonable to allow reliance on it, having regard to all the circumstances obtaining when the liability arose or (but for the notice) would have arisen*.'
- **s.2(3):**
  - Agreement to/awareness of a contract term or notice does not itself indicate voluntary assumption of risk.

In ***Smith v Bush***, the express exclusion by the surveyors was held unreasonable. Lord Griffiths suggested four factors by which to gauge unreasonableness

1. Unequal bargaining power;
2. Whether practicable to expect C to obtain independent advice;
3. Complexity of the task;
4. Practical consequences of striking down the disclaimer.

CONTRIBUTORY NEGLIGENCE

Contributory negligence is a **partial defence** and is a failure by C to take reasonable care for his own safety, which contributes to the damage complained of.

- It results in the apportionment of C's damages, reduced to such an extent as the court thinks is 'just' and 'equitable', having regard to the parties' respective share of responsibility for loss suffered.
  - Any fault must be **causally related** to the damage which C eventually suffers — i.e. a defence available when the injury sustained was within the scope of the risk created by the CN.

Law Reform (Contributory Negligence) Act 1945 introduced a system of apportionment of damages and abolished the rule that any CN voided the claim all together.

- **s.1 "***damages recoverable in respect thereof shall be reduced to such extent as the court thinks just and equitable having regard to [C's] share in the responsibility for the damage"*
- **s.4** CN by C does not have to satisfy the requirements of negligence.

1. Causation C's fault in taking care of his own safety must be an operative cause of his harm

- ***Jones v Livox Quarries* [1952]:** C worked at a quarry owned by D. C rode on the back of a vehicle, despite being told not to. C was injured. **Denning LJ:** C's negligence must be "*so mixed up with his injury that it cannot be dismissed as mere history*" for contributory negligence to be established, causation test. Apportionment under CN is based on causation — "*what faults were there which caused the damage? Was [C's] fault one of them?*"
- ***Stapley v Gypsum Mines* [1953]:** C died when a roof at a mine collapsed. He had been instructed not to work under the structure until it was removed. **Lord Reid:** reduced his claim against D (employer) by 50%. C's act must be "*so much mixed up in the state of things*" that it must have contributed to the injury. *"It is enough… if there is a sufficiently high degree of probabilities that the accident would have been prevented*" if C had not acted as he did. In applying this test, the court should have regard to the "*blame-worthiness*" and the "*causal potency*" of C's act.
- ***Froom v Butcher* [1976]:** D crashed into C's car; C wasn't wearing a seatbelt. **Lord Denning:** C's negligence must be a part of cause of C's *damage* not the accident which led to the damage. C's damages were reduced by 20%.
- ***St George v Home Office* [2008]**: C was in prison; informed prison staff he suffered from withdrawal seizures; prison was negligent in managing C's conidition and C suffered injury as a result. **Dyson LJ:** no reduction for CN: although C's fault in becoming addicted were a 'but for' cause of his injuries, his addiction was *"too remote in time, place and circumstance and was not sufficiently connected with the negligence of the prison staff… to be properly regarded as a cause of the injury*". C's fault was "*no more than part of the history*".

2. Fault s.4 fault: "*negligence, breach of statutory duty or other act or omission which gives rise to liability in tort or would, apart from this Act [i.e. under the old law pre-1945], give rise to the defence of contributory negligence*."

- Lord Denning in ***Jones v Livox*** and ***Froom v Butcher***: emphasised there is no need for a breach of duty — rather need to ask whether **C acted as a reasonable person in looking after his own safety**.
- ***Reeves* [2000]:** although the police were liable for C's suicide in their care, his claim was reduced by 50% for CN. **Lord Hoffmann:** suicide could come within the definition of 'fault' — the statutory definition can encompass non-negligent acts of C.

3. Apportionment

- ***Jones v Livox***: apportionment is based on causation: the degree to which C's fault contributed to his damage.
- ***Froom v Butcher*** the court must have regard to both the "causal potency" and the "blameworthiness" of C's act, at least in some cases. Although, Lord Denning noted that blameworthiness will be "*hotly disputed*", so in straightforward cases a detailed, expensive inquiry into blameworthiness should not take place. It will *"suffice to assess a share of responsibility which will be just and equitable in the great majority of cases"*.
- ***Reeves***, Lord Hoffmann: apportionment should be based on the "*responsibility*" of each party for C's harm, and so the court should take account of the "*policy of the rule… by which [D's] liability is imposed*", i.e. the purpose and content of D's duty of care to C.

- ***St George v Home Office*** – Even if C's fault was not too remote a cause of his injury, it would not be just and equitable to reduce damages here because C had told the prison of his condition, the prison had assumed responsibility for C's welfare.
- ***Murray v Jackson* [2015]:** Apportionment comes down to a *"rough and ready"* approximation of who caused which bit of C's harm. Here a 50% reduction in damages were made when a schoolgirl carelessly stepped into the road in front of D's car (who should have slowed).

4. The Scope of Contributory Negligence — ***Co-Op Group v Pritchard*** — CN does not apply to the intentional torts. D attempted to rely on contributory negligence as a defence to the torts of assault and battery.

ILLEGALITY

C cannot rely on an illegal act to bring a tort claim. The illegality defence is a rule of public policy, aimed at preserving the integrity and consistency of the legal system by preventing C from profiting from his own wrong.

***Hall v Herbert* [1993]** McLachlin J in the **Canadian Supreme Court**: the defence should only apply in very limited circumstances based on the courts' duty to preserve the integrity of the legal system — e.g. where C is attempting to profit from his illegal act / to circumvent a criminal penalty. It did not apply here (a drink driving case) because C was not seeking to profit from his illegal conduct / circumventing the criminal law. His damages were, however, reduced by 50% for CN.

Old tests for the application of the illegality defence were based on the moral turpitude of C's offence or whether allowing C to recover would be an affront to the public conscience.

These tests were rejected in ***Tinsley v Milligan*** as being too uncertain — **Lord Browne-Wilkinson** instead thought the rule to be *"not substantive but procedural"* and that the test was one of reliance — C is barred from recovery if he must rely on his illegality in order to bring a claim.

- ***Tinsley v Milligan* [1994]:** C and D were lesbian life partners. They purchased a house together, but it was conveyed into D's sole name. This arrangement allowed C to keep collecting benefits. C later wanted to show that D held the property on trust for her. **HL**: allowed C's claim — although the court would not assist an owner to recover the property if he had to rely on his own illegality to prove his title, C did not have to do so here; she could show common intention / contribution to purchase price.

In ***Revill v Newberry*** the CA noted the approach in ***Hall v Herbert*** to give the defence a narrow scope:

- ***Revill v Newberry* [1996]:** C was attempting to break in to D's shed. D shot C. **CA:** D was liable; he could not rely on the illegality defence even though C had been convicted of burglary. The illegality defence is underpinned by the principle that *"there is a public interest which requires that the wrongdoer should not benefit from his crime."* If the court found C was barred by illegality, no trespasser could ever claim — an outcome not envisaged by the **OLA 1984**
  - This case shows elements of the balancing/proportionality approach in ***Hounga v Allen***.

Modern causation based approach

Modern test is based on causation — the key issue is the extent to which C's illegal act caused his harm.

- ***Gray v Thames Train* [2009]**: D's negligence caused C to suffer PTSD. C killed a man and was detained in a secure hospital. C sued D for his loss of liberty. **SC:** D could rely on the illegality defence. **Lord Hoffmann**: there are two rules within the illegality defence, both justified on policy:
  - **Wide:** "*In its wider form it says that you cannot recover compensation for loss which you have suffered in consequence of your own criminal act*." **Justified because** "***it is offensive to public notions of fair distribution of resources that a claimant should be compensated… for the consequences of his own criminal conduct".*** Applying this rule is a question of causation — was the damage caused by C's illegal act, even though it would not have happened but for D's tort. Distinction is between *"causing something and merely proving the occasion for someone else to cause something."*
  - **Narrow:** *"in its narrower and more specific form, it is that you cannot recover for damage which flows from… lawful punishment"* imposed as a consequence of your unlawful act. In such a case the law causes the 'damage' as a *"matter of penal policy"* and it would be inconsistent with the law for C to be compensated. **Justified by the need for consistency in the legal system**

The *Thames Trains* approach was followed and developed in ***Delaney*** and ***Joyce*** — C's act must be the 'immediate cause' of C's injury and foreseeability is important in applying the defence:

- ***Delaney v Pickett* [2011]:** C was a passenger in D's car. D crashed, injuring C. They were carrying cannabis in the car and were convicted of possession with intent to supply. **CA:** D could not rely on the defence — no causation. Key test is *"Was the injury truly a consequence of C's unlawful act or was it a consequence of the unlawful act only in the sense that it would not have happened if he had not been committing an unlawful act"*. Here, C's criminal act only *"gave occasion"* for D's tort, but the *"immediate cause"* of C's injury was D's driving.
- ***Joyce v O'Brien* [2013]**. C suffered a head injury when he fell from a van driven by D. C and D were involved in a joint criminal enterprise. C sued D. **Elias LJ:** D was not liable, because the illegality defence was engaged. It was key that it was foreseeable that the joint criminal enterprise would involve *"increased risks of harm in consequence of the activities of the parties in pursuance of their criminal enterprise."* Given that risk materialised, it could *"properly be said to be caused by the criminal act of C."*

Illegality, Public Policy and Proportionality

***Hounga v Allen* [2014]** – C (14) had been trafficked to the UK from Africa. C was employed as a cleaner by D in conditions of modern slavery. Eventually C claimed against D for racial discrimination (a statutory tort, so illegality applied). **CA:** illegality doctrine barred C's claim; C's claim was 'bound up' with her working illegally — she had to rely on her illegality to bring her claim. **SC** overturned the CA:

- **Lord Wilson:** a 'balancing approach' should be adopted to the illegality defence — the public policy factors for/against applying the defence on the facts of the case should be balanced.
  - The illegality defence rests on the foundation of public policy — it exists to preserve the integrity of the legal system and prevent Cs from profiting from their own wrongs. Neither of these concerns are operative here. Giving C compensation would not allow her to profit from her wrong in entering the employment contract. Whereas applying the defence would compromise the integrity of the legal system by making it appear that people in D's position could make discriminatory employment contracts with impunity.

- **Public policy might sometimes *countervail* against the denial of tort claims on the basis of illegality.** Public policy which militates against applying the illegality defence here: D was guilty of human trafficking, applying the defence would run counter to the prominent public policy against human trafficking and in favour of protection of its victims.

- **Lord Hughes and Carnwath:** took a narrower approach and did not endorse a balancing exercise of public policy factors. They applied the inextricable link test to find that C's claim was not inextricably linked to her illegality, so the defence did not apply.

Issues arising from *Hounga*

- **Inextricable link v causation:** *Hounga* adopted the old 'inextricable link' test not the causation test in *Gray.* Lord Wilson doubted whether the causation test in *Gray* works better.
- **Lord Wilson's balancing approach:** this is radical — no court has ever before acknowledged there are public policy reasons against applying the illegality defence to the facts of a particular case. **Bogg and Green** suggest Lord Wilson's judgment should be read broadly — the illegality defence should be capable of being disapplied where the tort in question offers specific protection to fundamental human rights. They go on to argue for an even broader application — e.g. policy factors behind statutory rights (e.g. as an employee) could be used to militate against the defence applying.

The public policy/proportionality approach in *Hounga* is flatly contradicted by the SC in ***Les Laboratoires Servier*** decided just three months later.

- ***Les Laboratoires Servier v Apotex* [2014]:** should the illegality defence apply where C's illegal act was breaching a patent.
  - **Lord Sumption:**
    - **Implicitly rejected *Hounga* without referring to it:** the defence *"is a rule of law and not a mere discretionary power"* — it is based on policy *"not on the perceived balance of merits between the parties to any particular dispute."* A proportionality based approach would lead to uncertainty and unpredictability.
    - **Can only apply where C's unlawful act is criminal / quasi-criminal:** it can't apply where the act is a tort / breach of contract / breach of patent / strict liability offence. This is because it is *"concerned with claims founded on acts which are contrary to the public law of the state and engage with the public interest."*
  - **Lord Toulson** dissented on the first point — *"it is right to proceed carefully on a case by case basis, considering the policies which underlie the broad principle*". ***Hounga*** requires the court to ask: (i) what is the public policy which founds the defence; (ii) is there another aspect of policy to which the application of the defence would run counter.

RH: ***Apotex*** is correctly decided on its facts and it's correct that only criminal acts should engage the defence. However, rejecting the proportionality approach was obiter and minimal weight can be attached to it since Sumption didn't mention *Hounga.* In many cases, the non-discretionary approach in *Apotex* will be appropriate, but in other cases where the tort in question protects the fundamental rights of C, the *Hounga* approach should apply — e.g. a claim against a public body that its negligence caused C's death, as this would involve Art 2 considerations.

***Patel v Mirza* [2016]:**

- **Facts:** C transferred £620k to the D (a trader), so D could use the money to bet on share price movements based on inside information (a crime). The information was not forthcoming, so the agreement was not carried out. C sought restitution of the money on the grounds that D had been unjustly enriched at his expense (ground of restitution was that the basis of the transfer had failed totally). D refused, claiming C was barred by illegality.

- **SC:** C's claim succeeded (unanimously) — *"an order for restitution would not give effect to the illegal act or to any right derived from it."* All agreed he basis of the defence is preserving the integrity of the legal system. However, there was disagreement over whether the defence should be flexible and context dependent or certain and principled. 6:3 majority adopted the flexible approach:
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- **Uncertainty:** noted above as a concern from Lord Sumption. Also uncertainty as to how the conditions are to be applied — how should the court determine the 'reasons why conduct was made illegal' and which 'policies would be affected by denying the claim'. **Virgo:** *"there is a significant danger that when applied by a judge they will not provide the guidance to judicial decision-making that is required of a legal principle."*
  - **What room for other approaches?** *Mirza* concerned unjust enrichment; not negligence — in negligence the *Gray* causation test has been used, rather than the *Tinsley* reliance test (which has presided in trusts etc.). Has *Gray* been overruled as a matter of tort law? **Goudkamp** — Toulson's reasons leave little reason to suggest that his approach is confined to the law of unjust enrichment, but the lack of explicit denouncement may mean the causal analysis will continue to be employed in negligence *"perhaps with the policy-based test being used as a cross-check."*
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1. DUTY OF CARE

A duty of care will be assumed to exist in most cases where D's act causes injury / property damage to C. It will be readily established by the existence of particular relationships — e.g. doctor/patient, patient/child, driver/accident victim, employer/employee.

CAPARO TEST

In novel cases, **the *Caparo* [1990] test** will be used to determine whether a duty of care exists:

1. **The damage must be reasonably foreseeable**
   - This is an objective test — merely whether it as foreseeable that someone might come into the sphere of harm of D's actions
   - ***Haley v London Electric* [1965]:** duty extended to all persons reasonably to be expected to walk along, including blind men (not unforeseeable because they are a small number of the population).

2. **There must be proximity in the relationship between D and C.**
   - Related to the factual nexus between parties and whether D ought to have had C in mind.
   - ***Sutrahdar v Natural Environment Research Council* [2006]:** Lord Hoffmann set out a test for proximity: *"there must be proximity in the sense of a measure of control over and responsibility for the potentially dangerous situation."*
   - ***Michael* [2015]** Lord Kerr: in determining whether there is a relationship of proximity, it is necessary to balance C's moral claim to compensation for unavoidable harm with D's moral claim to protection from unduly burdensome legal duties.
   - ***Goodwill v BPAS* [1996]:** doctor performing a vasectomy failed to warn of small risk of spontaneous reversal. Pregnancy resulted. D not liable to pregnant woman.

3. **It must be fair, just, and reasonable for the court to impose a duty of care.**
   - This stage allows the court to bring policy considerations into the analysis:
   - ***Phelps v Hillingdon* [2000]:** court held this stage includes consideration of public policy reasons for / against the imposition of a duty of care — e.g. floodgates, would liability lead to defensive conduct by public authorities.
   - ***Marc Rich v Marine Bishop* [1996]:** duty of care not imposed since it might lead to surveyors refusing to survey high risk ships.

Lord Diplock was clear in *Caparo* that these are ***"convenient labels"* rather than precise tests** — the law should expand by analogy with decided cases in which a duty of care has been recognised rather than based on general principles.

LIABILITY FOR OMISSIONS

English law draws a strong line between **acts** and **omissions,** only the former generally attract liability

Nolan defines an omission as D failing to confer a benefit on C; D fails to make C better off but neither does D make anything worse.

Lord Goff in ***Smith v Littlewoods* [1987]** set out the exceptional circumstances in which a duty of care for omissions could exist:

1. **There is a <u>relationship between the parties which creates an assumption of responsibility on behalf of D for the safety of C.</u>**
    - ***Barrett v MOD* [1995]:** no general duty to prevent MOD employee's excessive drinking; however, once the deceased had fallen ill and a senior officer ordered a junior officer to look after him, they had assumed responsibility and were liable when the employee did not receive appropriate supervision and died.

2. **There is a <u>relationship of control between D and a third party who causes damage</u>**
    - ***Carmathenshire CC v Lewis* [1955]:** teacher owed a duty of care to a driver who crashed when swerving to avoid a young child who had wandered into the road from a school. School should have prevented the child from entering the road.
    - ***Home Office v Dorset Yacht* [1970]:** boys escaped from a borstal on an island, damaging C's yacht. D was liable for the harm for two reasons: (i) the boys were under D's control and *"control imports responsibility"*; and (ii) D had a relationship of proximity to C; C was one of few parties whose property could foreseeably have been damaged by an escape.

3. **D <u>creates / permits a source of danger to be created, which is interfered with by third parties</u>**
    - ***Smith v Littlewoods*:** children repeatedly broke into D's cinema. On one occasion they lit a fire, which damaged C's adjacent property. D owed no duty to C in respect of the fire damage. While there is no general duty to prevent third parties causing damage (e.g. no duty to put out a fire), a duty can be found where D negligently causes / permits a source of danger to be created <u>and it is reasonably foreseeable that X will interfere with it.</u>

Everett shows that <u>liability of acts of third parties cases will be resolved using the ***Caparo*** test</u>, and that, even where a duty of care is imposed, it will often be of a narrow scope and not impose a very onerous standard of care.

- ***Everett v Comojo* [2011]:** C was a guest in D's members-only nightclub and suffered injuries in a knife-attack by another guest. **CA:** Although there was a duty of care to protect patrons from the acts of other guests, D was not in breach of this duty. The members only nature of the club meant the risk of violence was low and D did not have to search bags / have security. He had taken appropriate steps to protect guests. The FJR limb of *Caparo* meant the standard of care imposed by the duty was low / the scope was narrow.

<u>Justifications for the lack of omissions liability:</u>

- **Honore**: C's interests are more seriously threatened by D causing her harm than failing to help her. D's positive acts threaten C's security, whereas omissions threaten C's expectation of improvement.
- "*Why pick on me*"? The law should not single out a particular D for failing to act when there were many others in the same position.
- Requiring D to confer a benefit on C is a much greater burden on D than requiring him to act carefully, so liability for omissions would threaten D's autonomy.
- **Stevens:** Tort liability is concerned with the infringement of primary rights; C does not have a right against the whole world that others confer benefits on him.

LIABILITY OF PUBLIC AUTHORITIES

NB: in addition to negligence, a public body can also be liable under the <u>separate tort of 'Breach of Statutory Duty</u>' where they fail to comply with a statutory duty.

Courts are reluctant to impose liability on public authorities, and (generally) there is no liability for a public authority failing to confer a benefit in exercising its statutory responsibilities. This was justified in ***Gorringe v Calverdale*:**

- Substantial claims for compensation will lead to the taxpayers' money being diverted away from general expenditure on public services.
- Policy issues are not justiciable; courts are not equipped to adjudicate on public bodies' policy decisions to provide one service instead of another. This led to **policy/operations distinction**
- The danger of liability will lead to "defensive" practices; they may be over-cautious / not act for public benefit in order to minimise the risk of tort liability.
- Maladministration by public bodies can be remedied in other ways e.g. breach of statutory duty claims, complaints to the Parliamentary Ombudsman etc.

The Policy/Operations Distinction

Public body will have a duty of care (which can extend to omissions) in carrying out their day-to-day operations, but not in the broad formulation of their policy. E.g. ***Dorset Yacht*:** the authority was liable in negligence for allowing boys to escape (an operational failure), but could never have been liable for policy of allowing borstal boys to work on the island.

Rejected?

- In ***Stovin v Wise* [1996]** Lord Hoffmann held *"the distinction between policy and operations is an inadequate tool with which to discover whether it is inappropriate to impose a duty of care"* because the distinction is often illusive in practice.
- The distinction was subsequently revived by the HL in ***Barrett v Enfield* [1999].** Lord Slynn: "*The greater the element of policy involved, the wider the area of discretion accorded, the more likely it is that the matter is not justifiable so no action in negligence can be brought*".
- **Craig:** The distinction now plays a relatively minor role in deciding whether a public authority owes a duty of care. It is just one factor in deciding whether a decision is justiciable. It is now more common to limit public authority liability on the basis of other factors — e.g. *Caparo* test.

It is clear authorities owe a duty of care in relation to their positive operational acts: e.g. ***Rigby v Chief Constable* [1985]:** police driver owned duty of care in relation to other road users / pedestrians.

Caparo test and public bodies

Gorringe**:* authorities are subject to the same test for a duty of care as private bodies (Caparo*);** the mere existence of a statutory power/duty to act cannot give rise to a duty of care in negligence.

- ***Gorringe v Calverdale* [2004]** C crashed and was seriously injured; claimed the council had breached its duty of care by failing to paint a 'slow' sign before a sharp crest in the road. **HL:** D was not liable for this failure. **Lord Steyn:** in considering whether a public body has failed to exercise a statutory power, the court should just consider the private law duty of care test; on this test D could not be liable for its failure to paint a slow sign.

Where the authority has assumed responsibility for C's safety, they will generally be liable for omissions (foreseeability / proximity under ***Caparo*** are satisfied), but the court will still consider FJR:

- ***Barrett v Enfield*** **[1999]:** C was in the care of D council from the age of 10 months to 17 years. C sued in negligence for a number of omissions by D (e.g. failure to arrange adoption / monitor his placements / arrange psychiatric treatment) leading to C suffering psychiatric damage. **HL:** issue: should claim proceed to trial. Yes.
  - **Lord Slynn**: D had assumed responsibility for C in that D took C into care. Was it FJR to find a duty of care? Need to balance factors: (i) effective functioning of social services demands liability should not be easily found; (ii) the need to provide a remedy for C. He thought the operational/policy distinction might be helpful in determining whether a duty of care was FJR, in this case, the significant mix of policy / operation issues meant that a duty of care could not be ruled out.
  - **Lord Hutton**: "*It is only where the decision involves the weighing of competing public interests or is dictated by considerations which the courts are not fitted to assess that the courts will hold that the issue is non-justiciable*".
- ***D v E. Berks NHS Trust*** **[2005]** Cs (parents) sued the NHS for psychiatric harm caused by unfounded allegations of child abuse against them. **HL:** there was no duty of care here because: (i) no proximity; (ii) not FJR.
  - **Lord Nicholls:** FJR required balancing important social interests: (i) protecting children from abuse; (ii) protecting parents from interference with their private lives (under Art. 8 ECHR). There should be no DoC because social services should be free to focus on best interests of the child.
  - **Lord Rodger**: insufficient proximity between Ds and the parents to impose a duty of care here: duty of care was owed by Ds to the children but not to the parents.
  - **Lord Bingham (dissent)**: although child abuse is a delicate matter there was no reason it was not FJR to impose a DC to exercise reasonable skill/care. The relationship was proximate, given the parent's responsibility for the children.

The difference in view between the majority and Bingham in *E Berks* over the application of the proximity requirement illustrates the vagueness / difficulties with the *Caparo* test.

Failure to warn, failure to rescue, and emergency services

Are authorities under a duty to protect C from harm caused by a third party? Two key cases: (i) police failing to prevent X harming C; (ii) an ambulance failing to save C who was injured previously by X.

There appears to be a distinction between the cases — police are generally not liable for X harming C, whereas an ambulance comes under a duty to help C and will be liable for failing to aid:

- ***Kent v Griffiths*** **[2002]:** C suffered an asthma attack. Ambulance took 40mins to arrive; C suffered brain damage. **CA:** ambulance owned C a duty of care. An ambulance is not the same as a private rescuer (e.g. off-duty doctor who is only under a duty not to make things worse), they come under a private law duty to help C, meaning they must arrive within a reasonable time.
  - **Police/fire:** police and fire are not under the same duty — they serve the public at large and it isn't FJR to impose a duty (it would encourage defensive policing etc.) By contrast, an ambulance is called for the benefit of an individual C rather than the public at large.

Is this distinction defensible? Yes. The key issue is assumption of responsibility. By answering a 999 call, the ambulance assumes responsibility toward the injured person. Further, it is FJR

because it will encourage the ambulance service to properly perform their core service — no 'defensive ambulance service' issue.

The police and other public bodies will generally not be under a duty of care to take positive action to protect C from injury by X, unless they have: (i) clearly assumed responsibility to C in respect of her safety (requires more than a 999 call); (ii) have assumed control over X and should have **foreseen** X would cause harm to persons in close **proximity.**

Michael v Chief Constable of South Wales **[2015]**:

- **Facts:** C made a 999 call stating her ex-boyfriend was going to return any minute and kill her. Police arrived too late to protect C, who had already been murdered.
- **SC:** no duty of care. The police do not enjoy a special immunity from tort liability, but they will only be liable where a private part would be liable — they do not come under a special duty of care to protect C from harm by a third party. D Authority will only come under a duty where:
  1. D assumes positive responsibility to safeguard C (e.g. ***Barrett v Enfield***);
  2. Where D is in a position of control over a third party and should have foreseen the likelihood of a third party causing damage to someone in close proximity if D failed to take reasonable care in exercising their control over X (***Dorset Yacht***).
     - There must be a relationship of control between D and X, and a relationship of proximity between D and C.
  - Here, there was no assumption of responsibility — the police's answer to a 999 call was insufficient, but it may have been sufficient if they told C to remain where she was and that they would rescue her — and there was neither of the required relationships (no control over X, no proximity with C).
  - **Lord Kerr/Baroness Hale (dissent)**: **Proximity** is of central importance – the relationship between C and the police force must transcend the ordinary contract of an individual. As such, he introduced the following test: there will be a duty when there is: (i) an **imminent threat** to a **particular** individual; (ii) D must have the **means** to prevent the threat / protect the individual concerned. Considered too arbitrary by the majority.

Majority is trying to treat everyone the same, making it incredibly harm to establish a duty; minority is trying to establish certain, limited exceptions.

The general position is that a DC can't be imposed because there is insufficient proximity / not FJR:

- ***Mitchell v Glasgow CC*** **[2009]**: X threatened to kill C on numerous occasions. D (council) met with X, without telling C, telling him that he would be evicted from council accommodation unless he ceased various anti-social conduct. As a result of this meeting, X attacked and killed C. **HL (Lord Nicholls):** D was under no positive duty to take any steps (e.g. warning C) to protect C from X.
  - **No proximity** between C and D here. C and D were in a landlord-tenant relationship; D did not assume a responsibility in respect of protecting C from X. *"As a general rule… a duty to warn another person that he is at risk of loss, injury or damage as the result of a criminal act of a third party will arise only where the person who is said to be under that duty has… assumed responsibility for the safety of the person who is at risk".*
  - **Not FJR**: (i) finding a duty would impose the same duty on all social landlords / workers, which would deter them from intervening to prevent anti-social behaviour; (ii) meeting with X was a *"perfectly proper action… for the general good of the community"* and such behaviour should not be deterred.

    - If D had assumed a responsibility to protect C from X, both the proximity and fair, just and reasonable requirements would have been satisfied so a duty of care could be imposed.
- ***Hill v Chief Constable* [1987]:** there was no duty of care owed to a victim of the Yorkshire Ripper — insufficiently proximate relationship between the police conduct and potential victims. The police only knew a broad class of people would be effected by the failure to catch the killer, no nexus to a specific victim. Further it was not FJR because liability may have a chilling effect on police.

However, it was at least arguable that it was FJR to impose a duty in the following:
***Smith v MOD* [2013]:** soldiers sued MOD over war in Iraq, arguing their vehicles / equipment were inadequate and this was a breach of duty. **Lord Hope:** the claim should proceed to trial — a DC was arguable. MOD argued it was not FJR because the MOD should not make warfare decisions based on legal liability (could have a chilling effect on military operations / tactics). Hope accepted this concern, but did not think it amounted to an immunity from negligence liability and has less weight when applied to pre-combat decisions. Hope thought the standard of any duty imposed would be low.

ECONOMIC TORTS

My argument on coherence: we should not see all of the economic torts as specie of a genus tort — as **Bagshaw** argues, each tort sets different compromises between protection and liberty for different economic interests. This approach draws strength from the following: (i) we could adopt **Deakin and Randall's** 'functional' approach for some torts but not others (I think it works well for causing loss by unlawful means) but, as **Bagshaw and McBride** suggest, there is a good argument for allowing the *Lumley* tort to operate other than where economic interests are associated with trade / business / commerce; (ii) it recognises the clear difference in structure between causing loss by unlawful means / unlawful means conspiracy and the *Lumley* tort; (iii) it has benefits for understanding aspects like the justification defence, which probably doesn't apply to the tort of causing loss by unlawful means (since it's arguably never justifiable to commit a civil wrong against another in order to target C); (iv) it allows us to better understand the rationale's behind each of the torts — this links in with point (i) above.

GENERAL NOTES

Bagshaw - torts as compromises between protecting valuable interests and not overly inhibiting liberty (separate torts for separate compromises).

Why are there multiple torts, rather than just one.

1. It may be appropriate to set different compromises between protection and liberty for different economic interests
2. If there are concerns about the effect of such torts on liberty, we may want to restrict different types of behaviour to different extents (e.g. threats, carrots, misleading mimic-products).
   - Both reasons 1 and 2 supported by the fact that a tort of procuring breach of contract (only protects contractual entitlements) is separate from a tort of interference with trade by unlawful means (protects more than contractual entitlements — also economic prospects)
   - Reason 2 is supported by the fact that different torts respond to different behaviour: tort of intimidation (behaviour = unlawful threats); torts of deceit and injurious falsehood (behaviour = lying); torts of conspiracy (behaviour = ganging up); Misfeasance in public office (behaviour = abuse of public power)

Clear preference toward narrowing the torts and seeing them as separate in *OBG v Allen*:

- Perhaps the Courts have realised that there is no underlying principle and, as such, are not overly concerned with finding a unified principle – useless if not connected in some way.
  - Inconsistency not, in itself, negative.
  - Can only really be grouped together under a broad notion of protecting commerce, but even this has been doubted:
    - Although **Deakin and Randall** suggest that they should be confined to protecting only economic interests associated with trade, business, or because the primary role of the torts is to *"maintain the integrity of the competitive process"* and, consequently, that the courts should focus on designing torts to achieve this goal, without the distraction of protecting interests that are not associated with it.
    - **Bagshaw and McBride** argue D+R don't provide much evidence to support their suggestion that problems in delineating the scope of the torts has been caused by a failure to focus on issued raised by policing competitive markets — difficult questions regarding mental states are not easy to answer, even in cases that obviously involve business competition. Further, courts would have to define '*trade and business and employment*'.

Attempt at synthesis:

- **Genus tort:**
  - As **Carty** notes, ***Allen v Flood*** was important in two ways:
    - Made clear that, in the absence of an unlawful element, causing intentional harm to another's trade is not tortious — note that this not the route all jurisdictions took, for

example, US State of MN (***Tuttle v Buck***) went the other way, making it tortious to maliciously harm C's business interests without justification. **Finnis argues this is the right approach.**

- **Made clear that inducing breach of contract and causing loss by unlawful means are separate torts.** Former is based on secondary liability and second is based on primary liability, but under both heads liability flows from acts which are **independently** unlawful.

- **However, Lord Diplock in *Mekur*, based on Lord Lindley's statements in *Quinn v Leatham*, claimed that the unlawful means tort was a 'genus' tort, with other torts best seen as species of it.**
  - **Carty:** although it is defensible to see the torts of **interference with contractual relations** as part of this tort (now confirmed in ***OBG v Allan***), it's not possible to bring all economic torts under this umbrella. For example, lawful means conspiracy is clearly not covered, but more significantly, neither is inducing breach of contract. Unlike *Lumley* the unlawful means tort allows C, though indirectly attacked via a third party, to sue on his own behalf, based on the wrong done to that third party. Further, ***Total Network*** determined that liability for unlawful means conspiracy is not to be incorporated into this tort.
  - **Davies:** assimilation of *Lumley* within a larger species of liability was extremely awkward — not clear what constituted the unlawful means because, as in *Lumley* itself, the inducement of offering Lumley a higher fee was not in itself unlawful, it was the accessory role in the breach of contract that constituted the wrong. The genus tort directs attention to the wrong thing, namely the inducement, when we try to fit *Lumley* within it. **Further, *Lumley* does not require D to intend to injure C. This again differentiates *L* from the other economic torts.**

Benefits of *OBG*

- **Rejection of the genus tort and the hybrid tort of interference with contractual relations (recognised by Denning in *Torquay Hotel*):** Lord Hoffmann confirmed that inducing breach of contract can't be subsumed into the tort of causing loss by unlawful means because *"it makes no sense to say that the breach of contract itself has been caused by unlawful means."* Rather, the former is a tort based on *"viewing contractual rights as a species of property which deserves special protection."* By contrast, causing loss by unlawful means is *'designed only to enforce basic standards of civilised behaviour in economic competition."* **Benefits:**
  - **Carty:** the decision restored a clear framework for all the economic torts: intimidation can be seen as a variant of causing loss by unlawful means and unlawful means conspiracy fits into the category of secondary liability, given its strong similarity with joint tortfeasance. **Only lawful means conspiracy is an outlier.**
  - **Economic torts have to strike a balance between allowing competition and preventing the use of undesirable business practices; a link with unlawful conduct is a useful point of delineation for this balance and provides clarity for commercial entities in trying to determine which actions are acceptable and which are not.**

Problems with *Total Network*

- HL decided that crimes could count as 'unlawful means' for the purposes of 'unlawful means conspiracy'. Crucially this was a two-party case and not a three-party case, giving them space to give a different definition of unlawful means than used by the majority in *OBG*.
- **Justification:** they **identified the tort of unlawful means conspiracy as being closely related to lawful means conspiracy**. **Bagshaw:** on this analysis, both torts require: (i) A to agree with other parties that action should be taken with the intention of causing loss to B; and (ii) an **additional element**. In the tort of lawful means conspiracy, the additional element is the absence of a just cause or excuse for the action taken. In unlawful means conspiracy, the 'unlawful means' is just an

alternative additional element. **Both torts are therefore free-standing rather than accessorial** and are based on the fact that, as Neuberger put it, the law takes a particularly censorious view where conspiracy is involved.

- **Consequence of this judgment is to affect a fracturing of the framework of the economic torts developed in *OBG.* Following *OBG,* lawful means conspiracy could be viewed as an anomaly in that there was no connection with unlawful conduct — i.e. D in such cases has neither procured an unlawful act, nor have they committed one against a third party.**
- Following *Total*, unlawful means conspiracy can no longer be seen as an accessorial form of causing harm by unlawful means, rather the emphasis is removed from the unlawful act itself and the placed onto the conspiratorial aspect. Further, in stretching the definition of 'unlawful means' in this area, the House of Lords has further undermined the common thread throughout the economic torts established in *OBG* that liability arises from civil wrong 'done to others'. If a similarly restricted view of unlawful means had been found in ***Total*** then the two-party versions of economic torts become largely unnecessary, such cases could instead by dealt with on the basis of the civil wrong done by the defendant to the claimant. It is submitted that this is a situation in which a hard case has produced bad law — there was no doubt that Total's actions were reprehensible, but the economic torts have been stretched undesirably so as to compensate HMRC.

Problems with the mental element

- **Position prior to OBG: 'targeted at test'**. Justification is based on two grounds: (i) need to keep liability within acceptable bounds, given that, in the arena of economic activity, C is likely to be part of a spider web of commercial and economic links; (ii) a high degree of blameworthiness is called for, because intention serves as the factor which justifies imposing liability on D for loss caused by a wrong not otherwise actionable by C against D.
  - **Carty**: **The notion of 'target' requires that D must aim at C through an intermediary** — D's motive is irrelevant, but unless he targets through an intermediary, there will be no liability. Simply gaining a competitive advantage, even via the use of unlawful means is not sufficient on this approach.
- ***OBG:*** because Hoffmann adopted the ends/means test precisely because the target approach was too restrictive — *"placing too much of a strain on the concept of intention"* — Cs will seek to argue that **inevitable harm is sufficient to attract liability on the *OBG* approach**. This would expand the scope of the economic torts.
- **Carty:** suggests the *OBG* definition of intention should be ignored. Rather, a test that reflects the fact that the economic torts involve '*principles of liability for the act of another'*. **Traditional test, properly applied, is an effective mechanism to ensure that these torts do not expand to cover protection against what are in essence allegations of harmful economic behaviour or misappropriation by using an unlawful act.** Thus, this test would not impose liability on the facts of ***Douglas***. *"Any movement away from the target test of intention carries with it the danger of uncertainty and the potential for a broader application of the general economic torts."*
- **Note:** problems with intention generally as a tool in the economic context — C is always going to be intending loss, so can we really distinguish between intending to cause loss/to cause gain? Right to limit, but not really in this way.
- **Deakin and Randall:**
  - Hoffmann places undue stress on D's mental state for liability in *L v G*. The effect of the decision is that *"absent a finding of recklessness* [in the shut-eye sense] *a defendant will be protected from liability by his own ignorance."* — e.g. ***Mainstream Properties*** shows the significance of the requirement that C must prove D acted knowingly in addition to acting intentionally. "*The requirement of 'actual realisation', coupled with the removal of the presumption of knowledge of the reasonable consequences of acts, leaves potential claimants facing an extremely high evidential burden. L v G, whilst not over-ruled, is in practice very considerably restricted.*

- *It would perhaps have been better for the HL to have focused more on the nature of the interest at stake, and on the need for 'targeting' of the claimant. As things stand, the tort survives and will undoubtedly give rise to future litigation. However, the outcomes of claims will be highly uncertain, as they will turn on the attribution of 'mental states' many months or even years after the relevant events, at least in cases going to a final hearing, as opposed to applications for interim injunctions (where a reasonably arguable case generally suffices).*

My thoughts: mental element therefore might be at the same time too inclusive and too restrictive. Too inclusive because the tort can catch those cases (e.g. *Douglas*) where what D was really aiming at was his own gain and not any loss by D (in fact, Hello could have cared less whether OK lost business as a result as long as its own sales increased). Too restrictive because it can't deal with cases like *Mainstream Properties* where D may escape because of his own ignorance. **This points us, perhaps, toward keeping them apart — 'flip side of the coin' knowledge may be enough for contractual rights, but shouldn't be enough for causing loss by unlawful means.**

Difference between unlawful means tort and the *L v G* tort: former is based on **policing the defendant's wrong** the latter is based on **protecting C's right.** This is supported by Lord Hoffmann in *OBG* — contract rights are *"a species of property deserving of special protection"* whereas the unlawful means tort is concerned with *"policing economic competition."*

NOTES ON THE LUMLEY TORT

Elements of the tort:

1. what constitutes 'procuring'? It's clear, post ***OBG*** that merely interfering with the performance of a contract so as to prevent contractual performance, without unlawful means, is not enough (rejecting Lord Denning's approach in ***Torquay Hotel***). This is a positive development because: (i) it leaves space for arms-length commercial dealing; (ii) it is consistent with the HL's approach in *Allen v Flood* that lawfully done actions do not become unlawful merely because they are targeted at causing loss to another.

- **Some debate now over whether 'facilitating' is enough?** i.e. merely making available some opportunity to the defendant. **Hoffmann seemed to suggest that facilitating would not be enough, but there is prior authority (*Salvadori*) that it will suffice. EP: facilitating should not be enough — persuasion should be seen as the key requirement.** We don't want to penalise competitors presenting attractive opportunities; such activity should be seen as a feature of the marketplace.

2. *OBG* mental element for *Lumley*: (i) knowledge that actions are inducing breach of contract and actually realise that actions will have that effect; (ii) intention to procure breach of contract.

- **Knowledge of a contract is necessary, but not of its precise terms — *Emerald Construction*.**
- **Knowledge of consequences not enough, but 'other side of the coin' will count:** not enough if breach is neither an end in itself, nor a means to an end, but merely a foreseeable consequence,
- **Not enough if D procures breach without realising it — *Mainstream Construction*.**

3. Lawful justification defence:

- Defence of an equal or superior legal right — e.g. ***Edwin Hill v First National Finance*.**
- **Matter of moral necessity:** ***OBG*** supported the existence of the defence, but did not give a test — ***Brimelow v Casson*:** C drastically underpaid his singers. Persuading theatre owners to cancel contracts with C was justified.

Why does tort protect contracts against third parties?

- **Moral rationale**:
  - Is responsibility equal between X (who breaches the contract) and D (who convinces X to do so)? ***Glamorgan Coal Co*:** *'it would be idle to sue the workmen, the individual wrong-doers, even if it were practicable to do so. Their counsellors and protectors, the real authority of the mischief* [the union] *would be safe from legal proceedings'.* **Sometimes D is more culpable than X.**
- **Practical aspects of the remedy**:
  - Often beneficial for C (especially if an employer dealing with the consequences of industrial action) to be able to claim compensation from a third party inducer (union) rather than individual employees, because: (i) only need to pursue one claim; (ii) union will have more resources; (iii) C may not want to claim against X in order to preserve future commercial relationship.
  - On the other hand, breaking contracts is often more economically efficient in a capitalist market than fulfilling the obligations under it.
- **Contract theory impacts justification:** Justification turns on the nature of contractual promises: efficient breach theory does not sit comfortably alongside the tort, but promissory theory does — if we see contracts as conferring moral obligations to perform, then it is easier to justify a tortious duty not to induce breach (i.e. interfere with this relationship). Problems if we adopt efficient breach:
  - **Howarth:** *"contract law is about commerce, not holiness"* — it is a fallacy that breaches of contract are so wrong that the law should do everything possible to discourage them; those who enter into obligations simply suffer the consequences which they agreed to.
  - Contract is a reallocation of risk according to the interests of the two parties and the risk of an induced (or any other) breach has already been taken by the parties.
  - Tort insults the autonomy of the contract-breaker; individuals should bear the consequences of their actions, even if there is nothing they can do about it — they agreed to the risk in the contract.
  - However, note **Economic rationale for inducing breach of contract**: To make the inducer pay gives him an incentive to go to the promisee and bargain with him rather than seducing or browbeating the promisor. This saves transaction costs (which I think means money wasted on lawyers)
- **Alternate solution:** Concerns about contract not being enough should be dealt with at the level of damages, not by over-expanding tort liability.
- **Special types of value:** most of the valuable things we gain through our lives are via contracts.
  - But we can't protect this absolutely, or this would overly infringe liberty. Parties already have protection in contract law and, particularly if contracting for the purchase of land (most valuable/ unique thing most people purchase) already have additional protecting in equity against third party interference (i.e. *"equity treats as done that which ought to be done"* — ***Walsh v Lonsdale***.)

Why protect contracts separately from other economic interests?

- **Bagshaw: Contracts are *similar* to private property**: argues that an analogy can be drawn with private property, such that we should allow some degree of protection against third parties. Giving contractual rights some protection against third parties allows for: (i) an increase in freedom because

parties can contract with certainty; (ii) permit efficient trade and exchange, allowing for maximum wealth; (iii) reward productive endeavours (e.g. training young footballers).

- Bagshaw's view isn't popular and has been criticized; contractual rights are *personal* rights not *property* rights, an analogy suggesting they should impose duties on third parties is not helpful.
- In ***OBG*** **Lord Hoffmann:** The tort "*treats contractual rights as a species of property which deserve special protection, not only by giving a right of action against the party who breaks his contract but by imposing secondary liability on a person who procures him to do so*."
  - This perhaps goes too far; he's saying they are a species of property right, whereas Bagshaw only says they are analogous to property rights. If contract rights were property rights then we should allow claims for negligent interference (even without breach). Note that Hoffmann's conclusion doesn't match his reasoning: he sees the *LvG* tort as a secondary wrong parasitical on the primary wrong of breach of contract.
- **Against Bagshaw's assertion that protecting contracts against third party interference is beneficial:** (i) doesn't necessarily boost efficient trade/exchange because a breach may be more economically efficient; (ii) extra certainty isn't always a positive — the tort creates additional costs and ignores the dynamics of the market.

- **Paul Davis:** *"liability under Lumley should not be crammed under the umbrella of the economic torts.* ***It is better considered to be an example of the general law of accessory liability.****"* Davies suggests we should see the tort as a species of tortious accessorial liability — which normally bites where D assists/authorities/procures another's tort — but this can't straightforwardly apply here because X never commits a tort (just breach of contract). Davies argues in favor of developing a principle in parallel to accessory liability for breach of trust.

Is it accessorial?

- Lord Hoffmann claimed it was in ***OBG***, but there are problems with this approach — **accessory liability involves a single wrong, with a perpetrator and those that aid and abet.** Here there are two separate wrongs, a contractual breach and a tort, just because one is contingent on the other does not mean that liability is accessory liability.
- **Carty:** suggests we should understand the tort by **analogy to joint tortfeasance** (although it's not the same given that there is no central tort for which D is jointly liable) rather it shares the same structure. Recognising this structure will ensure we keep the tort on track: *"demanding a procurement and a civil wrong by the claimant's contract partner."* **Problem with calling it accessory liability** is that it leads us towards **Sales'** view that we should recognise the existence of a latent overarching doctrine of secondary liability, with the unsettling consequence that whenever a person assists another in the commission of a civil wrong he will be liable as a secondary party — **a move which would greatly expand the coverage of the civil law and undermine the limits on economic tort liability. Seeing it as joint tortfeasance points us away from the view that 'facilitation' should be enough.**
- Could see it, as **Stevens** suggests as contracts having the effect of imposing rights on the whole world against certain forms of interference. **EP:** problems with this are that it's easy to slip into expanding the nature of this right towards freedom from contractual interference and it doesn't really tell us why we should rule out facilitation.

NOTES ON THE UNLAWFUL MEANS TORT

Elements: (i) loss; (ii) wrongful interference; (iii) with the actions of a third party in which C has an economic interest; (iv) intention to cause loss.

1. Mental element: same as the *Lumley* tort — this means intention to cause loss **either as an end in itself or as a means to an end.**

- ***Douglas v Hello (No. 3)*:** loss was necessarily intended because reduced sales of *OK!* were the flipside of *Hello!*'s increased sales. Wrong here was taking unauthorised photographs of the Douglas – Zeta Jones wedding.
- **Lord Nicholls:** at one point stated the need to *"intend the very harm that was actually caused."* This isn't mentioned anywhere else in *OBG* — so it's either a slip of the scope of the tort is even narrower.

2. Which means are unlawful means:

- ***OBG*:** 'unlawful means' must be **an actionable civil wrong** to X, or an act that would be an actionable civil wrong, but for the fact that X has suffered no loss. **Criminal wrongs do not count.**
  - **Hoffmann:** *"acts against X count as unlawful means only if they are actionable by X* [or if]*… the only reason that they are not actionable is because X has suffered no loss."*
  - **Lord Nicholls dissent:** thought Hoffmann's judgment was *"an unjustified and unfortunate curtailment of the scope of this tort*" and the tort should also encompass *"all acts D is not permitted to do, whether by the civil law or the criminal law"* because *"in these three-party situations, the function of the tort is to provide a remedy where C is harmed through the instrumentality of a third-party."* The rationale of the tort is to "*curb clearly excessive conduct*".

Unlawful means must interfere with the freedom of a third party (limits scope of protected interests)

- **Hoffmann** in ***OBG*:** the tort encompasses unlawful acts intended to cause loss to C "***by interfering with the freedom of X"***. It does not include acts which, although unlawful against X, *"do not affect his freedom to deal with C"* i.e. which merely reduce the value to C of his relationship with X:
  - ***RCA Corp.* v *Pollard* [1983]** C had exclusive rights to sell Elvis records; D sold 'bootleg' recordings. **CA:** D's act reduced the value of C's right, but did not interfere with the freedom of Elvis' estate to perform its contract with C.

Should criminal acts count? E.g. D attempts to corner the market in pizza delivery, by letting it be known that his delivery drivers will also sell drugs to those ordering pizza. Should this count? Criminal laws prohibiting the supply of drugs were not designed to regulate competition between businesses, or to define the extent to which a business's interest in retaining its customers should be protected against competition.

- **Elias & Tettenborn:** criminal wrongs should count: "*a criminal provision should ground liability ... unless there are clear reasons of policy or in its interpretation why it should not.*"
- **Unlawful means take a different meaning in the conspiracy torts:** In ***Total Network* [2008],** Lord Hope considered that "*criminal conduct at common law or by stature can constitute unlawful means in unlawful means conspiracy"* and claimed that there can be a broader definition in conspiracy.
  - **Carty**: '*the **Total** decision has arguably undermined the prospect for clarity that **OBG** represented, and thrown the economic torts back into the mess in which they were before **OBG**.'*
  - Hoffmann's test **concerned with three party situations**: Nicholls in *OBG*: '*I am far from satisfied that, in a two-party situation, the courts would decline to give relief to C whose economic interests had been deliberately injured by a crime committed against him by D.'*

CONSPIRACY TORTS

Lawful Means Conspiracy This has absolute no basis and should be abolished – no change in interest/ right just because collectively interfered with. Noted as anomalous, but too well-established in ***Lonhro***.

- Requirements (***Crofter Tweed v Veitch*****):** (i) combination; (ii) illegitimate purpose — **following *Veitch* must be the 'predominant purpose' to cause loss / injury (not malice);** (iii) loss.
- **Hohfeld** criticizes ***Quinn v Leathem*** as it presumes C has a right to conduct his business without interference with third parties. C was at liberty to conduct his business how he wished, but this does not create a duty to constrain X from industrial action (no claim right).

Unlawful Means Conspiracy

- **Requirements:** (i) combination (***Rookes v Barnard*****);** (ii) intention to injure (need not be predominant purpose) — ***Lonhro v Fayed*****;** (iii) unlawful means (not independently actionable, ***Total Network SL***); (iv) loss.
- **Unlawful Means** Unlike ***OBG***, Walker in ***Total Network*** does not consider the means to need to be independently actionable, as long as 'indeed the means'. Reasoning in the case:
- Would be strange for unlawful means conspiracy to be narrower in this sense than the lawful version. But, lawful version has no basis.
- ***OBG*** restricted to two-party cases, so different. Different relationship nexus? **Deakin and Randall's** '*aimed towards'* seems better. No accessory liability here, since not needed – would just be liable as a joint tortfeasor.

Neither intention, nor unlawful means can unify and, if have to stay, **focus on the interests protected**.

- Inducing a breach of contract much be limited to actual breach (if protected at all).
- Different interest to causing loss by unlawful means (unlawful means conspiracy just the collective version, so could be subsumed). 'Aiming at' to cover different nexus/closeness.
- Definitely get rid of lawful means conspiracy.

NUISANCE AND RYLANDS V FLETCHER

TRESSPASS TO LAND

Any direct interference with land in the possession of another is trespass and is actionable per se (without proof the trespass caused damage to C). Interference must be direct and immediate.

- ***League Against Cruel Sports v Scott* [1985]:** C used land as a sanctuary for wild animals and prohibited hunting. D's hunt trespassed on C's land on several occasions and C sued for trespass. The court held that D was liable for trespass. This case established two key points: (i) D's act of moving onto C's land can be negligent (D need not know he is trespassing / intend to trespass); (ii) if D has control over something which trespasses onto C's land (e.g. dogs here), D can be liable.

One issue is airspace:

- ***Anchor Brewhouse Developments v Berkley House* [1987]:** D's crane over-sailed C's land, but did not interfere with C's normal use of land. C sought an injunction. **Scott J** cranes constituted a trespass.
- ***Bernstein v Sky Views* [1977]:** D flew over C's land to take an aerial photo of C's house (which he would then attempt to sell to C). **Griffiths J:** no trespass. An owner has rights to the airspace above his land (e.g. removing overhanging branches) but C's rights do not extend to an unlimited height. Balance between rights of the owner to enjoy land and rights of public to use airspace is best struck by drawing line at any incursion which may "*interfere with the ordinary use and enjoyment*" of land.

NUISANCE

Distinguishing public and private nuisance (NB: same incident can be both):

- **Private nuisance:** an unlawful interference with use / enjoyment of land; or a right relating to land.
- **Public nuisance:** a crime covering interferences with rights of the public at large. To claim in tort, an individual must prove he has suffered more damage than the rest of the community. Can be, but does not have to be, connected with use / enjoyment of land.

PRIVATE NUISANCE

Definition unreasonable non-trespassory interference with use/enjoyment of land, or right relating to land.

1. Non-trespassory

Distinguishing between trespassory / non-trespassory interference:

- **Direct interference:** if a person / physical object crosses onto C's land, it is trespass.
- **Indirect interference:** no person / physical object crosses onto C's land (e.g. a noise/smell), this is nuisance. NB: a physical object crossing will be indirect where C does not have sufficient control.

2. Actionable interference with land

There are four types of **non-actionable interference**:

- **Interference with C's view**: ***Aldred's Case*** **[1610]:** although smells from a pigsty could constitute nuisance, the obstruction of light could not. Light is *"a matter only of delight, and not of necessity"* and *"the law does not give an action for such things of delight."*
- **Interference with TV reception:** ***Hunter v Canary Wharf*** **[1997]: Lord Goff**: D is entitled to build on his land, so the fact that a building stops something reaching C's land is not enough to constitute a nuisance. Left open the question of whether an activity on D's land which prevents a signal from reaching C (as opposed to obstruction of a signal by a building) could be a nuisance.
- **Diversion of percolating water:** an occupier has an absolute right to appropriate/divert percolating water (i.e. flowing through undefined underground channels). This does not apply where water is a defined stream / channel. D's purpose for diverting the water is irrelevant (even if D is malicious).
    - ***Bradford Corp v Pickles*** **[1895]:** D owned land which supplied water to C's dams. D diverted water feeding the spring. **HL:** D was entitled to do so, even though his purpose was to force C to pay him to stop: "if it was a lawful act, however ill the motive might be, he had a right to do it."
- **Interference with privacy:** ***Victoria Park Racing v Taylor*** **[1937]: Aus HC:** C built a tower on his land, so he could see over a fence surrounding a dog track, and report on the racing (breaking D's monopoly). D was refused an injunction. No right not to have land overlooked.

Three broad types of **actionable interference** (categories listed by Lord Lloyd in ***Hunter***):
- **Encroachment:** e.g. branches/roots of a tree encroaching C's land. ***Smith v Giddy*** **[1904]:** D allowed tree branches to overhang the boundary with C's land. **KB:** D liable in nuisance.
- **Direct physical damage to C's land / fixtures:** e.g. flooding, damage to buildings/trees/crops. Key distinction is between fixtures (damage is actionable) and chattels (damage is not actionable).
    - ***St Helen's Smelting Co. v Tipping*** **[1865]:** vapours from D's factory damaged trees on C's land. Physical damage must be 'material' rather than trivial. Here damage was actionable.
- **Interference with C's comfort/convenience in quiet enjoyment of his land:** e.g. noise/smells.
    - ***Halsey v Esso Petroleum*** **[1961]:** C lived in a residential area; D owned an oil factory on a neighbouring industrial development. D's factory emitted unpleasant smells/noise day and night; and acid smuts built up on C's car in the street. **QBD:** D was liable in public nuisance for the noise emitted by trucks driving at night and acid smuts on C's car. D was liable in private nuisance for noise emitted from his boilers at night and for acid damage to C's property.

2(a) Unreasonable interference: physical damage cases:

Where the interference physically damages C's land / fixtures, unreasonable interference will be established without reference to other factors discussed below:
- ***St Helen's Smelting v Tipping*** **[1865]:** D's extensive copper smelting caused damage to C's trees; the area was one in which there was a history of smelting. **HL:** there is a distinction between nuisance causing 'material injury' to C's property and nuisance causing inconvenience/discomfort. For the former, no balancing exercise is necessary; D's argument that this was a neighbourhood where smelting took place was therefore not relevant where there was material injury to the property.

2(b) Unreasonable interference: comfort and convenience cases:

Need to balance interests of C and D: ***Halsey v Esso*****:** "*the law must strike a fair and reasonable balance between the right of C… to the undisturbed enjoyment of his property, and the right of D… to use his property for his own lawful enjoyment*".

The test is claimant focused — what can C reasonably be expected to put up with? Although there is a need to weigh the interests of C and D; if D's interference with C's enjoyment of land is intolerable, it will be nuisance, no matter social utility of D's conduct. However, social utility / reasonableness of D's conduct is relevant when asking what C can reasonably be expected to tolerate.

- ***Barr v Biffa Waste Services*** **[2012]:** Smells from Ds landfill site affected C's quiet enjoyment of land. **HL:** 'reasonableness' asks: did interference *"create an amount of discomfort in excess of that which an ordinary person could reasonably be expected to put up with."* Here, where the area had a history of tipping / waste disposal, question was whether the discomfort was in excess of what ordinary person could reasonably be expected to put up with. Remitted to trial judge.

Ordinary use of residential premises is not actionable: ***Southwark LBC v Mills*** **[1999]** C was disturbed by noise from upstairs tenants. **HL:** noise was part of the ordinary use of the premises and "*occupiers of low cost, high density housing must be expected to tolerate higher levels of noise from their neighbours than others in more substantial and spacious premises*"

Hypersensitivity not taken into account: interference with C's comfort/convenience is assessed objectively — no 'egg shell skull' rule that requires Ds to take Cs as they find them. Follows from fact that harm in such cases is D's lessening the utility of the land, not discomfort to people on it:

- ***Robinson v Kilvert*** **[1889]**: C traded in sensitive paper, stored above D's premises. Heat from D's premises damaged C's paper. **CA:** this was not nuisance; the heat would not have been 'substantial interference' with a reasonable person's use of C's premises and the fact C did not use her property in a normal way did not make D's normally reasonable behaviour unreasonable.

Nature and extent of the interference — must be substantial

- ***Halsey v Esso Petroleum*** **[1961]:** if interference is noise or smell *"it is always a question of degree"* whether it constitutes nuisance. Factors include: (i) character of the noise/smell; (ii) intensity of the smell / volume of noise; (ii) duration and frequency; (iii) timing of the interference. Last factor is important: in *Halsey* factor noise was permissible during the day, but not at night.

Nature of the locality: character of the neighbourhood will be taken into account; an interference may be unreasonable in the city, but not the countryside. ***Halsey v Esso*****:** standard is that of *"the ordinary, reasonable, and responsible person who lives in this particular area."* Further, "*The character of the neighbourhood is very relevant and* ***all the relevant circumstances have to be taken into account***."

- **Can D's own activities be taken into account in determining nature of locality:**
  - ***Coventry v Lawrence*** **[2014]:** In 2006 C bought a house adjacent to a speedway racetrack, which had been there since the 1970s. C claimed in nuisance for noise from stadium. Could the court take into account D's own activities in running the track?
    - **Lord Neuberger**: court can take into account D's activity in assessing the nature of the locality as long as that activity does not itself amount to a nuisance. "*In my view, to the extent that activities are a nuisance to C, they should be left out of account when assessing the character of the locality*." Here, D could rely on its running the

race track to establish that such activities were part of the nature of the locality, but could only do so insofar as those activities were not a nuisance to C.
        - Neuberger acknowledged that this involves an element of circularity, but was concerned that if all D's activities could be taken into account then Ds *"could invoke their own wrong against C in order to justify their continuing to commit that very wrong"* and, as a result, it would become very hard for C to ever establish a nuisance claim.
- **Relevance of planning permission: *Wheeler v JJ Saunders* [1996]:** (planning permission for pig sties) and ***Barr v Biffa Waste*** (planning permission for a dump) held planning permission will only change the nature of the locality if it is large scale *"a strategic planning decision affected by considerations of public interest"* (e.g. a housing estate). This was rejected in *Coventry*
    - ***Coventry v Lawrence*:** was planning permission for the stadium relevant?
        - **Relevance of planning permission:** grant won't chance nature of locality
            - **Lord Neuberger:** "*The mere fact that the activity… has the benefit of a planning permission is normally of no assistance to D in a claim brought by a neighbour who contends that the activity causes a nuisance to her land in the form of noise or other loss of amenity".* This is because planning decisions are made in the public interest and public interest cannot trump private rights. However, it may have relevance at the remedy stage; where D's activity is sanctioned by planning permission, damages will normally be granted instead of an injunction.
            - **Lord Sumption**: "*It may at best provide some evidence of the reasonableness of the particular use of land in question*."
        - **Relevance of D's compliance with terms of planning permission:**
            - **Lord Neuberger** terms *may* be used to assess whether D's use of his land was reasonable. E.g. if planning permission stipulates limits as to the frequency/ intensity of noise, D's compliance with such terms may be relevant in assisting C's action;
- **How broad is a 'neighbourhood'? *Adams v Ursall* [1913]:** shows that 'neighbourhood' can be defined in fine terms — here D's fish shop was a nuisance because, although the residents of one street *"for the most part, belonged to the working classes … C's house and others near it were of a much better character."* Thus, operating the shop at C's end of the street was a nuisance, but it would not have been at the other (poor) end of the street. **EP:** following *Halsey* need to look at *"all the circumstances"* — so can consider the neighbourhood in both a granular and broad fashion.

Nature of D's conduct:

- **Ordinary use of property:** As above, D's ordinary use of residential property is not a nuisance.
- **Malice:** Case law is inconsistent; however, it is likely that malice can turn an otherwise reasonable activity into an unreasonable one (cases are distinguishable as *Bradford* concerns emanations).
    - ***Bradford v Pickles*:** "*if it was a lawful act, however ill the motive might be, he had a right to do it."* Malice can't turn something that is not a nuisance into a nuisance.
    - ***Hollywood Silver Fox Farm v Emmett* [1936]:** D maliciously discharged guns near the boundary with C's land in order to prevent his foxes from breeding. **KB:** D was liable. Malice rendered the discharge of the firearm an unreasonable use of land.
        - Without malice, this would have been reasonable; following *Robinson v Kilvert,* C was engaging in a 'sensitive activity' on his land and damage to foxes wouldn't amount to nuisance

- **Social utility of D's activity:** general rule is public benefits of D's activity are irrelevant. However, it can be considered to have influenced certain decisions and is significant at remedy stage
  - ***Andreae v Selfridge* [1938]:** disruption caused by D's temporary building work is not actionable if D takes all reasonable precautions to minimise the interference with C's comfort / convenience.
  - ***Miller v Jackson* [1977]:** C complained of balls hit into her garden from a neighbouring cricket ground. **CA:** the cricket balls were a nuisance. **Lord Denning dissented:** here *"the public interest should prevail over the private interest."* Note, damages rather than injunction granted as remedy.
  - ***Dennis v MOD* [2003]**: C complained of noise from military aircraft. **Buckley J:** found for C, but public interest was reflected in the remedy: damages, not injunction, so socially valuable military training could continue. Social value should only be considered at the remedy stage, not liability stage: "*If the public interest is considered at the remedy stage and since the court has a discretion, the nuisance may continue but the public, in one way or another, pays for its own benefit."*
- **Relevance of Negligence:** standard of liability in nuisance is strict; not fault based — if D's activity constitutes an unreasonable interference with C's land, D's reasonable care is irrelevant.
  - ***Transco v Stockport MBC* [2003]: Lord Hoffmann:** "*Liability in nuisance is strict in the sense that one has no right to carry on an activity which unreasonably interferes with a neighbour's use of land merely because one is doing it with all reasonable care."*
  - ***Cambridge Water* [1994]**: D's reasonable precautions to eliminate an interference to C may be a relevant factor in determining wither the interference is one C can be expected to put up with because C will not be expected to put up with interferences D could reasonably prevent / reduce.

Standard of Liability: Foreseeability and Remoteness

Issues of foreseeability/remoteness will not normally arise as D will know what is going on / impact his activities are having (claiming an injunction will put D on notice): Issues arise where: (i) C seeks damages for interference caused by a one-off event; (ii) C seeks damages caused by D's ongoing interference.

Cambridge Water* [1994]**: pollution from D's factory made water in C's well (1.3 miles away) unfit for human consumption. The interference did not become apparent until years later. **Lord Goff:** adopted the *Wagon Mound (No. 2)* test for reasonable foreseeability — for D to be liable in nuisance the **type of interference suffered by C must have been foreseeable by D at the time D *"created the conditions which have ultimately led to the present state of affairs."

- "*Foreseeability of harm is… a prerequisite of recovery of damages in nuisance*". In most cases this will not be an issue as D will know exactly what he is doing and what impact this is having on C, but here pollution was not foreseeable to D.
- Further, where C seeks an injunction to restrain D from continuing an activity, D will be made aware by the fact of the injunction that his activity is causing an interference with C's land — so the foreseeability requirement will always be satisfied in such cases.

Who can sue in Nuisance?

Only those with **an interest in land** can sue. Thus C must have a property right (not a contractual licence, unless coupled with exclusive possession — *Street v Mountford.*).

- ***Hunter v Canary Wharf* [1997]:** C sued D in nuisance for D's large building blocking TV signals. **Lord Goff:** (i) blocking TV signals was not actionable in nuisance; (ii) nuisance is a tort against land, so "*a person who has no right in the land cannot sue in private nuisance*."
    - **Lord Hoffmann**: even in comfort/convenience cases, an interest in land is necessary as: "*the action is not for causing discomfort to the person but, as in the case of the first category, for causing injury to land*." In comfort/convenience cases, C is suing for loss off utility of land.

Lodgers, live-in employees, students, children living in parents' home, and husbands/wives living in a home owned entirely by their spouse cannot claim in nuisance.

Who Can Be Sued in Nuisance?

Creators: a person who creates nuisance is always liable, even if he is not the owner/occupier of land from which the nuisance is coming. ***Halsey v Esso*:** noise caused by D's lorries on public highways was actionable in nuisance, even though D did not own/occupy the highway.

Authorisers: Anyone who authorises another person to create a nuisance will be liable for it.

- **Landlord may have authorised use of land constituting the nuisance: *Coventry v Lawrence***: landlord cannot be liable for his tenant's nuisance merely because he is aware of the nuisance and takes no steps to prevent it. Must "*either participate directly in the commission of the nuisance, or they must be taken to have authorised it by letting the property*". There must be "*a very high degree of probability*" that the letting will result in a nuisance by the tenants — this was not the case in *Coventry* because the tenants could have operated the race track without causing a nuisance.

Occupiers: if an occupier did not authorise / create a **passive nuisance** he can be liable for a nuisance emanating from his land if he **adopted or continued** a state of affairs giving rise to the nuisance**.** A passive nuisance is one that is either **naturally occurring** or **created by a third party trespasser.**

- **Manmade:**
    - ***Sedleigh Dentfield v O'Callaghan* [1940]:** X (local authority, trespassing) placed a pipe for carrying off rainwater in a ditch on D's land, without D's knowledge / consent. D became aware of the pipe and used it for draining his fields. The pipe overflowed and flooded C's land. **HL:** D was liable in nuisance having continued / adopted the interference caused by the pipe. In such cases C must prove D continued or adopted the nuisance:
        - **Continuation:** after occupier knew / should reasonably have known of the nuisance, he fails to take reasonable steps to remove / reduce it.
        - **Adoption:** occupier uses state of affairs giving rise to the nuisance for his own purposes.
    - ***Lipiatt v South Gloucestershire Council* [1999]** D was liable for a nuisance caused by travellers who frequently camped on a strip of D's land without permission. **Evans LJ:** D had adopted the nuisance by failing to move the travellers on.
- **Naturally occurring: *Leakey v National Trust* [1980]:** dirt repeatedly fell off a mound owned by the NT onto C's house. NT knew of the erosion and did nothing. A large crack opened and part of the mound fell on C's house. **CA:** C entitled to damages and an injunction for NT to take action.
    - **C had to take 'reasonable steps in circumstances'**, these included: (i) C's knowledge of the hazard; (ii) the extent of the risk; (iii) practicability of preventing / minimising

injury or damage; (iv) time available for doing so; (v) cost of the work / relative financial resources of parties.
    - **Duty may be discharged** if (circumstance dependant): (i) C is invited to do the work themselves; (ii) an offer to share the cost of risk-preventing work is made.
- **This is omissions liability:** noted in ***Goldman v Hargrave* [1967]**[1] that passive nuisance cases involve liability for an omission. This means the duties imposed in passive nuisance cases are not as onerous. **Lord Wilberforce:** *"the law must take account for the fact that the occupier has had this hazard thrust upon him through no seeking or fault of his own."* Reduced standard apparent in three ways:
    - **Nuisance must be patent not latent:** liability can be imposed if D saw / should have seen nuisance on his land, but cannot be imposed where the threat to C could have only been discovered through an investigation by D.
        - ***Holbeck Hotel v Scarborough* [2000]:** massive landslip caused the collapse of part of C's hotel. Cs argued the council (who owned the cliff) should have taken measures to prevent the damage. **CA:** no liability for failing to prevent erosion, was a latent danger.
    - **Duty is to do what is reasonable in D's *individual* circumstances:**
        - **Lord Wilberforce** in ***Goldman*:** "*The standard ought to be to require of an occupier what it is reasonable to expect of him in his individual circumstances. Thus, less must be expected of the infirm than on the able bodied.*"
        - **Smith LJ** in ***Holbeck Hotel*:** D's resources *"whether physical or material"* may be taken into account in determining steps D had to take. A rule requiring D to make *"a physical effort of which he is not capable, or an excessive expenditure of money, would be unenforceable or unjust."*
    - **Foreseeability rules modified in favour of D:** C must show both the type (as normal) and extent of damage were foreseeable to D. **Smith LJ** in ***Holbeck*:** "*D should not be held liable for damage which, albeit of the same type, was vastly more extensive than that which was foreseen or could have been foreseen.*"

Defences

1. Consent: If C consents to D's activity which causes the nuisance, D cannot be liable. However, permission to carry out an activity is not permission to carry it out in a way that constitutes a nuisance (unless the activity would inevitably be a nuisance): —

- ***Pwllback Colliery v Woodman* [1915]:** Agreement allowing carrying on the trade of mining did not authorise excessive coal dust, unless it could be proven that the trade could not otherwise be continued.

2. Acquired rights / prescription: The right to commit a nuisance can be acquired as an easement over time — D must have **20 years of uninterrupted enjoyment of a nuisance.**

- ***Coventry v Lawrence*:** Not found on the facts: race track had been operating from 1970-2006, but had only been a nuisance for 16 years: *"a person must show at least 20 years uninterrupted enjoyment as of right, that is not by force, nor stealth, not with licence of the owner."* Need acquiescence from C.
    - Time only starts once the interference becomes an actionable nuisance: illustrated by
        - ***Sturges v Bridgman* [1879]**: for over 20 years D (a confectioner) used noisy kitchen equipment. C (doctor) built a consulting room next door and D's noise interfered with his work. D argued he had acquired the right to use noisy equipment by prescription.

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[1] PC held D liable when he attempted to put out a fire on his land (caused by lightening) but did not do so successfully and it reignited, causing damage to C.

CA: prior to C's erection of the consulting room, C's noise did not constitute an actionable nuisance. "*Until the noise… became an actionable nuisance, which it did not at any time before the consulting room was built, the basis of the presumption of consent … was never present".*

- Nuisance must be of the same kind and reasonably continuous for 20 years. Lord Neuberger: "*the greater the gaps in which there was no nuisance, the harder it will be for D to establish that he has acquired the right to commit the nuisance by prescription*."

3. Statutory authority: when a statue authorises an activity that would otherwise be actionable in nuisance, that activity will not be actionable (statute will normally compensate those affected). *Gulf Oil* illustrates the rules applying to the defence:

- ***Allen v Gulf Oil* [1981]**: statute authorised D to purchase to build an oil refinery. Statute did not expressly say D was authorised to operate the refinery. C claimed odours/noise/vibrations from the factory were a nuisance. **Lord Wilberforce:** D not liable, could rely on statutory authority defence.
  - **Authorisation can be express/implied:** "*Where Parliament by express direction or by necessary implication has authorised the construction and use of an undertaking or works, that carries with it an authority to do what is authorised with immunity from any action based on nuisance*".
  - Nuisance will only be excused if it is ***"an inevitable consequence of the authorised activity."***
  - D can only rely on the defence if he carries out the activity "*with all reasonable regard and care for the interests of other persons*," **i.e. if he is negligent in doing so, cannot rely on defence.**

4. Coming to the nuisance: generally, not a defence.

- Where C moves to a property which is already affected by a nuisance, he does not lose his right to claim for that nuisance, even if he was aware of it when he moved (upheld in *Coventry*, where C moved into a house in 2006, but the race track had been operating since 1970).
- **Limited exception:** In ***Coventry***, Neuberger suggested the defence may apply where the only reason the activity is a nuisance is because C changed the use of their land. Requirements: (i) nuisance is to the comfort/convenience of C's use of land, not physical damage; (ii) not a nuisance before C's change of use of land; (iii) D's action is *"a reasonable and otherwise lawful"* use of land; (iv) activity is carried out in a reasonable way.

Remedies for nuisance:

1. Injunction: Starting point is that C is entitled to an injunction to **limit or prevent** D carrying out the activity causing the nuisance (though this is at the discretion of the court). The court can limit (rather than prevent) D's activity, so it is no longer a nuisance. E.g. ***Kennaway v Thompson* [1980]:** motorboat racing was limited by an injunction so D could only hold a certain number of races per year, rather than banned.

2. Damages in lieu of an injunction: these are prospective rather than retrospective, compensating C for future interferences arising from D's activity.

- ***Shelfer* [1985]:** established traditional criteria: (i) injury to C's legal rights is small; (ii) it is capable of being estimated in money; (iii) can be adequately compensated in money; (iv) it would be oppressive to grant D an injunction.

- ***Coventry v Lawrence*:** more flexible approach: ***Shelfer*** criteria are significant, but the court may award damages in lieu of an injunction even where they are not satisfied. Public interest of D's activity is always relevant to this determination. **Sumption and Neuberger:** remedy should be granted more frequently in the future; Sumption thought damages would normally be an adequate remedy.

3. Compensatory damages: basic measure is for reduction/diminution in value of land.

- **Physical damage cases:** normally cost of repairing the damage.
- **Comfort/convenience cases:** reduction in the utility of land, not the discomfort / convenience to C — clear from ***Hunter v Canary Wharf.*** Quantum of damages is assessed according to reduction in value of land — it is irrelevant how many people occupy the land, or if anyone lives there.
    - ***Khatun v UK (ECHR)* [1998]** "*damages would be calculated by assessing a notional market rental value for each property without the presence of the environmental nuisance, assessing the reduction in such rental value caused by the presence of the nuisance and multiplying this reduction by the duration of the nuisance.*"
- **Damages for personal injury are not recoverable in nuisance, only in negligence**: ***Hunter***.
- **Consequential loss**: ***Hunter*** made it clear that C is generally entitled to recover for any reasonably foreseeable consequential loss flowing from D's nuisance in addition to compensatory damages for the diminution in value of land — e.g. if C cannot use his land for the purposes of his business due to D's nuisance; or if D's chattels are damaged in consequence of damage to his land (e.g. by a flood).
    - ***Andreae v Selfridge*:** C could recover profits lost from her hotel business as a result of noise / dust from D's building site. Note C cannot recover for PEL, only losses flowing from injury to land.
- **Account of D's profits:** i.e. *Wrotham Park* type damages. In *Coventry,* Neuberger and Carnwath did not think damages were available; Lord Clarke thought it arguable that they were.

4. Abatement: self-help remedy: allows C to lawfully take steps to bring nuisance to an end. E.g. by cutting branches of D's tree.

- ***Sedleigh*:** indicates abatement action is not encouraged and C can only take action if: (i) it is clear there is a nuisance; (ii) action must be necessary to stop the nuisance; (iii) C cannot go beyond what is necessary. If C does go beyond what is necessary, he may be liable in trespass / negligence.
- **Loses incurred in conducting remedial action are recoverable:**
    - ***Delaware Mansions v Westminster CC* [2001]** C owned a block of flats; foundations were being damaged by D's tree. C spent £500k to stabilise foundations. **HL:** D should pay for C's remedial expenses. **Lord Cooke**: C cannot get double recovery (i.e. damages for remedial expenditure and diminution in value). Key principles are reasonableness on C's part and reasonable foreseeability. C must give D notice and reasonable period to abate before taking action.

THE RULE IN *RYLANDS V FLETCHER*

A strict liability tort for the escape of a dangerous thing from D's land. **Extremely limited in scope**:

- D must have brought of kept on his land an **exceptionally dangerous** thing (which he recognised / ought to have recognised as exceptionally dangerous).
- In extraordinary (**non-natural)** circumstances.

- The thing **escaped**
- The escape caused **reasonably foreseeable damage** to C's land.

Rylands v Fletcher **[1866]:** water from D's reservoir flooded C's mine. **Lord Cairns:** D was liable despite the absence of fault; D had put the land to a *"non-natural use"* (i.e. the reservoir) and harm had result, so should be liable. Upehld dicta of **Blackburn J**: if D brings something onto his land which was not naturally there and which "*he knows will be mischievous if it gets on his neighbour's land*", he will be liable if it escapes and damages C's property.

1. Dangerousness of the thing

Transco v Stockport MBC **[2003]:** council used a three-inch water pipe to supply water to a block of flats. A large quantity of water leaked from that pipe and caused a flood, subsidence and a landslip, which washed away part of C's gas main. **HL:** D not liable under *Rylands* as: (i) there had been no 'escape' from D's land to C's; (ii) D had not engaged in a non-natural usage of land.

- **Lord Bingham:** *"the mischief or danger test should not be at all easily satisfied. It must be shown that D has done something which he recognised, or ... he ought reasonably to have recognised as giving rise to an* ***exceptionally high risk of danger*** *or mischief if there should be an escape."*

2. Non-natural use of land

Transco**:**

- **Bingham:** *"the question is whether D has done something which he recognises or ought to recognise, as being quite out of the ordinary in the place and at the time when he does it."* Here, the pipe was not a non-natural use of land.
- **Walker/Hoffmann:** focused on risk posed by the use of land to determine whether it was ordinary. Hoffmann thought insurance was a useful test — if C could reasonably be expected to insure against the risk, it was likely to be a natural usage (here, people regularly insure against leakage from domestic water supply, so it was a natural usage.

The result of the emphasis on extraordinary or unusual use is that *Rylands* will now only apply to activities such as blasting in quarries and transportation of large quantities of water. This is based on reciprocal risk: if D carries on a normal activity it creates normal risks which everyone undertakes.

- ***Transco*** the court will take into account all the circumstances including the time and place.
- ***Cambridge Water*** chemicals seeping into the ground water from D's factory contaminated C's well 1.3 miles away. **HL:** D not liable under *Rylands* as damage was not reasonably foreseeable. The fact that D's use of his land is of benefit to the community is not a relevant consideration in deciding if the use is natural/ordinary.

3. Escape The dangerous thing must escape from D's land to C's land, causing damage.

- ***Stannard v Gore*** **[2012]**: a large number of tyres on D's premises caught fire and spread to C's property. **CA:** D not liable under *Rylands* — D accumulated tyres, not fire, and the tyres themselves would have had to have escaped (not caught fire) for D to be liable.

4. Actionable damage

- **Damage to land:** Damage caused to C's land and fixtures is clearly recoverable.
- **Personal injury:** ***Transco*****:** personal injury / death is not recoverable

- **Damage to chattels:** traditionally been recoverable, but in nuisance damage to chattels is only recoverable when it is consequential on damage to C's land, so this may be a restriction in *Rylands*.
- **Economic loss:** recoverable if consequential on damage to C's land or is reasonably incurred in protecting C's land to prevent the thing escaping (***Transco*:** C had spent a lot of money making the exposed gas line safe; this would have been recoverable if D had been liable).

5. Remoteness of damage:

- ***Transco*** and ***Cambridge Water*:** harm which results from escape must be of a reasonably foreseeable type, but the escape itself need not be reasonably foreseeable.

6. Who Can Sue?

- The same persons as can sue in private nuisance. Traditionally, no proprietary interest was needed, but ***Transco*** indicates that the nuisance requirements apply.

7. Who can be liable:

- The person who brings, keeps, or collects the dangerous thing on the land and occupies the land at the time of the escape, even if that person does not have a proprietary interest in the property.
- A person who authorises the accumulation of the dangerous thing.
- The person who is *the immediate cause of the escape*, but did not accumulate the thing? Unlikely.

8. Defences:

- **Act of God:** ***Transco*** "*An accident which D can show is due to natural causes, directly and exclusively, without human intervention and could not have been prevented by any amount of foresight, pains and care reasonably to be expected of him".* Essentially denying causation. High threshold.
- **Act of a stranger:** D has a defence where the escape was caused by an act of a third party which D could not reasonably have anticipated and guarded against. Certainly applies where a person commits a malicious act over whom D has no control and could not have reasonably have anticipated.
- **Fault of the claimant:** If C is the sole cause of damage to self.
- **Consent:** where C expressly / impliedly consents to the accumulation by D of the thing which causes the escape (can be implied where the storage of the thing was for the mutual benefit of C and D).
- **Statutory authority:** If the risk is an inevitable consequence.

PUBLIC NUISANCE

Public nuisance is a crime for conduct which detrimentally affects the public in general — e.g. obstruction of a highway, large scale environmental disruption. For example:

- ***Attorney General v PYA Quarries* [1957]**: D operated a quarry involved blasting; stones and vibrations were emitted. AG sought an injunction in public nuisance. **Denning LJ**: found for AG. **Definition**: "*a nuisance which is so widespread in its range or so indiscriminate in its effect that it would not be reasonable to expect one person to take proceedings on his own responsibility to put a stop to it, but that it should be taken on the responsibility of the public at large."*

There must be: (i) unreasonable interference with a **specific public right;** or (ii) unreasonable interference with safety, property, comfort/convenience (i.e. a **general public right**).

Specific public rights: e.g. reasonable interference with the right to free passage along a public highway.

General public rights: must sufficiently affect the public, which depends on two factors:

- How many people were affected? **Denning LJ** in ***PYA Quarries***: *"so widespread in its range or so indiscriminate in its effect"* 30 people was considered sufficient.
- Was there a common interference? Must be shared. ***R v Rimmington*** **[2005]** HL held 540 racially abusive letters sent to different people was not a public nuisance; each was an isolated case.

Special damage: Individuals can claim for damage beyond that suffered by the public at large.

- ***Tate & Lyle v GLC*** **[1983]** Ds built ferry terminals in the Thames, causing the river bed to become clogged with silt. Cs owned a jetty which became unusable by large vessels as a result of the silt. **HL:** costs incurred de-silting the riverbed were sufficient to represent a special damage in public nuisance.
- ***Corby Group Litigation v Corby BC*** **[2008]** Cs were born with deformities as a result of Council's exposing their pregnant mothers to toxic materials (during a development of land). **CA:** damages for personal injury are recoverable. **Dyson LJ:** "*A public nuisance is simply an unlawful act or omission which endangers the life, safety, health, property, or comfort of the public."*

Who can be sued?

- **Creators and Authorisers**
- **Owners:** if they fail in their duty of repair or adopt / continue the acts of a third party.
    - ***Wringe v Cohen*** **[1940]**: wall of D's premises collapsed and damaged C's shop. **CA:** allowed claim in public nuisance. **Atkinson J**: "*if, owing to want of repair, premises on a highway become dangerous and, therefore, a nuisance, and a passer-by or an adjoining owner suffers damage by their collapse, the occupier, or the owner if he has undertaken the duty of repair, is answerable whether he knew or ought to have known of the danger or not."* But he will not be liable *"if the nuisance is created by the act of a trespasser or a secret and unobservable operation of nature"* unless he *"allowed the danger to continue with knowledge, or with means of knowing."*

OCCUPIER'S LIABILITY

Injury due to state of the premises vs injury due to activities on the premises

Can C claim in negligence as well as under the Occupiers' Liability Acts 1957 and 1984?

- **Injury due to the state of D's premises:** no — the Acts replace the CL duty of care in negligence.
- **Injury due to D's activities on D's premises:** Some disagreement here:
  - **s.1(1) (both Acts):** states the Act replaces the CL duty with respect to *"dangers due to the state of the premises or to things done or omitted to be done on them."* This lead Lord Keith in ***Ferguson v Welsh*** to suggest that activities came within the scope of the Acts.
  - **s.1(2) (both Acts):** wording suggests the OLA does not apply to activities. This lead Lord Goff in ***Ferguson*** and The CA in ***Fairchild*** **[2001]** to suggest occupiers could only be liable in negligence for activities conducted on their land.
    - ***Fairchild*** **: Brooke LJ:** considered the judgments of Lord Keith and Lord Goff in ***Ferguson*** and felt there was nothing in Lord Keith's judgement to prevent him concluding that the Acts are *"confined an occupier's duties to the dangerous condition of his premises, whereas* [in *Fairchild*] *C's injuries were the result of activities being conducted on the premises."*

Prevailing view: D will only be liable under the Acts for dangers arising from the state of the premises; but D will only be liable in negligence, not the Acts, for activities conducted on his land.

Duties in this area

1. Visitors — OLA 1957:

- An occupier will own his visitors, and others lawfully on his land (though not by virtue of using a right of way over his land) a duty to take reasonable steps to see that they are reasonably safe for the purposes for which they are on the land.

2. Non-Visitors — Occupiers' Liability Act 1984:

- An occupier will owe trespassers on his land (and those using a right of way over the land) a duty to take reasonable steps to protect them against dangerous features of his land, when:
  - He knows or ought to know about the dangerous feature;
  - He knows our ought to know a trespasser might come into the vicinity of that dangerous feature.
  - He can reasonably be expected to offer some protection against that danger.

3. General law of negligence:

- An occupier will own a CL duty to take reasonable care to prevent others from suffering foreseeable harm caused by activities conducted on his property. Normal negligence rules apply.

4. Landlords — Defective Premises Act 1972:

- **s.3:** vendors and landlords owe a statutory duty of care to ensure *"all persons who might reasonably be expected to be affected"* by defects in *"work of construction, repair, maintenance"* on premises. This persists after the property is sold.

- **s.4:** Landlords have a duty to *"all persons who might reasonably be expected to be affected"* by *"defects in the state of the premises."* This imposes liability where landlords breach their obligations to maintain / repair property.

OCCUPIERS' LIABILITY ACT 1957

Who is an occupier?

s.1(2): *"a duty imposed by law in consequence of person's occupation or **control** of the premises."* The Act does not *"alter the rules of the common law as to the persons on whom a duty is imposed."*

- ***Harris v Birkenhead* [1976]:** C (4) entered a derelict house and was injured. The property had been the subject of a compulsory purchase order by the council, but they were not in possession. **CA:** a person does not have to be in physical possession of property to be an occupier.
- ***Wheat v Lacon* [1966]:** D owned a pub, managed by X. X lived above the pub. C, a paying guest, was killed as a result of the dangerous condition of the stairs. **Lord Denning:** both D and C were occupiers — an occupier *"is a person who had **a significant degree of control** over the premises to put himself under a duty of care to those who came lawfully into the premises."* Two key points:
  - Occupancy is about **control** not exclusive possession.
  - Multiple people can be occupiers — C will want to choose D with most money (here D was a brewery and X a (relatively) poor landlord.

Who is a visitor?

A visitor is someone who has express / implied permission to be on the land.

- **s.2(6):** those who enter the premises *"for any purpose in the exercise of a right conferred by law*" are visitors, regardless of actual permission conferred by D (e.g. those entering pursuant to a contract).

Implied permission:

- ***Phipps v Rochester* [1955]:** C (5) walked across a large area of grassland, part of a building site being developed by D. C fell into a deep trench, which would have been obvious to an adult. **Devlin J:** children were in the habit of using the land to play and D had taken no steps to prevent them from doing so; as a result, C was impliedly licensed to enter the grassland.
  - However, C's claim was unsuccessful because D was entitled *"to assume that parents will not normally allow their little children to go out unaccompanied, he can decide what he should do and consider what warnings are necessary on that basis.*" D only had to provide warnings that would be sufficient to alert adults accompanying their children to the danger.
- ***Harvey v Plymouth CC*:** the terms of an implied licence can regulate when C will be a visitor and when he will be a non-visitor; can be a visitor for some activities/purposes but not for others.

Authorisation by an employee / subcontractor of D

- ***Ferguson v Welsh* [1987]:** D contracted B to demolish buildings. B could employ subcontractors with D's consent. B employed a subcontractor (C) without D's consent and C was injured. **HL:** C was a visitor in relation to B, his immediate employer, but trespassers to the owner of the property (D).

Ceasing to be a visitor

- ***Tomlinson v Congleton BC* [2004]:** D occupied a country park containing a lake, in which swimming was prohibited. C dived into the lake, hit his head on the bottom and was injured. **HL:** once C had exceeded his permission (jumped into a lake) he ceased to be a visitor and became a non-visitor.
- ***Harvey v Plymouth CC* [2010]:** D owned land regularly used by members of the public for recreation. C was drunk and ran over D's land to escape from a taxi without paying and was injured. **CA:** C was not a visitor — C had an implied licence, created by D's conduct in allowing the land to be used for recreation. However, the licence was for general recreational activity and extended to normal activities carrying normal risks. The licence did not extend to reckless activities such as running around in the dark whilst drunk; C was not a visitor at the time of the accident.
- It follows that if D expressly/impliedly consents to C entering premises at a particular time, or D limits permission to access a certain part of his premises, then C be a trespasser if he stays longer / access a different part of the property.

Rights of way

- ***McGeown* [1995]** C using a public right of way is not a visitor; D doesn't owe a duty of care to keep the right of way in a safe condition. Such a duty would be an "*impossible burden*" on landowners.

What are premises? any fixed or moveable structure (**s.1(3)**). Thus ships/aircraft/cars count.

What duty of care is owed?

s.2(2): "*common duty of care is a duty to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which he is invited or permitted by the occupier to be there."*

- Note: the duty is not to ensure the premises is safe — not all premises are safe, nor would it be desirable for this to be the case — it is about enabling visitors to be safe.
- The duty extends to omissions to make the premises safe (i.e. allowing it to descend into disrepair).

s.1(3)(b): occupiers owe a duty in respect to visitors' property this includes *"property of persons who are not themselves his visitors"* (i.e. covers C who borrowed X's jacket, which is ruined by D).

Breach of duty: what standard of care is owed?

Regard to all the circumstances

- **s.2(4)** in determining whether D discharged his duty, "*regard is to be had to all the circumstances*".
    - 'Circumstances' include (not listed in Act, just factors which weigh in standard of care in negligence): (i) likelihood risk will materialise and cause harm; (ii) the seriousness of the injury which could result if the risk materialises; (iii) cost of preventing the risk; (iv) ***Tomlinson*** noted the social value of the danger giving rise to the risk.

Implied contractual duty no higher than that required by s.2(2)

- **s.5:** if C enters D's premises in exercise of a contractual right, the s.2(2) duty of care may be an implied term of the contract. However, court cannot imply a term requiring a stricter contractual duty.

- ***Maguire v Sefton* [2006]:** C was injured using gym equipment. X (contractor employed by D to install/inspect equipment) had failed properly to inspect gym equipment. C entered the gym under a contractual licence with D. **Rix LJ:** rejected trial judge's finding the contract contained an implied duty stricter than s.2(2). **s.5** means "*the content of a contractually implied term, in the absence of contrary agreement, is exactly the same as the duty for which* ***s2*** *provided*".

Children visitors:

- **s.2(3)(a):** standard of care depends on *"degree of care, and want of care, which would ordinarily be looked for in such a visitor."* Occupiers *"must be prepared for children to be less careful than adults."*
- As such, an occupier must do more to protect children from danger on his land than to protect adults.
  - ***Glasgow Corp v Taylor* [1922]:** child ate poisonous berries from shrubs that had not been fenced off in a public park. **HL:** extra steps needed to be taken — the berries were both dangerous and an allurement to children. Glasgow Corp were aware of the danger and of children in the park.
  - ***Jolly v Sutton* [2000]:** D was liable when children entered his land to attempt to fix a rotten wooden boat. **HL:** the boat was an allurement to children and it was foreseeable that they might enter his land to play on it and it suffer injury.
  - ***Phipps v Rochester*** While the CL duty of care increases with children, where it can be expected that children will be accompanied by adults, the standard of care returns to that of an adult. The courts are unwilling to take responsibility for the child away from parents.

Skilled visitors:

- **s.2(3)(b):** An occupier is entitled to expect that a skilled visitor will appreciate / guard against any special risks which ordinarily occur in his trade. Risks must be *"risks ordinarily incident to"* the trade.
  - ***Roles v Nathan* [1963]:** D employed Cs, expert chimney sweeps, to clean his boiler. D discovered the boiler was dangerous and warned Cs not to enter, but Cs did so anyway and died. **CA:** it was reasonable to expect chimney sweeps to guard against the risk of carbon monoxide poisoning.
    - **Denning:** "*when a householder calls in a specialist to deal with a defective installation on his premises, he can reasonably expect the specialist to appreciate and guard against dangers arising from the defect. The householder is not bound to watch over him to see that he comes to no harm."*
  - ***Salmon v Seafarer Restaurants* [1983]:** D started a fire at his fish and chip shop. C, a firefighter, was injured. **QBD:** D was liable, notwithstanding s.2(3)(b). **NB:** hard decision to accommodate.

Defences / discharge of duty

Accepted risks:

- **s.2(5):** duty of care does not require D to guard against *"risks willingly accepted as his by the visitor."* This means that were a risk is plainly obvious, or such a risk is inherent to the type of activity undertaken, the risk shall be considered to be accepted:
  - ***Portsmouth Youth Activities v Poppleton* [2008]:** C used a climbing wall operated by D. C did not read the rules, fell and was seriously injured. **CA:** D was not liable — C had engaged in an inherently risky activity and "*suffered his injury because he chose to indulge in activity which had inherent dangers, not because the premises were in a*

dangerous state." The OLA imposed no duty on D to train / supervise adults using the wall.
    - **May LJ:** duty to protect C from obvious risk / self-inflicted harm would only arise where C made no genuine/informed choice to take the risk, or where D assumed responsibility for C's safety.
  - ***Darby v National Trust* [2001]:** C drowned in a lake. **CA:** lake was no different from other lakes and adults know the risks of swimming. This was so even though NT had taken no precautions to prevent swimming, but had done so at other lakes. No duty to warn of an obvious risk.
  - ***Bunker v Charles Brand* [1969]:** C (employee) was conducting risky tunnelling work, which is inherently unsafe. C knew about the risk. **QBD:** D (employer) was an occupier and was liable because he could have done more. Just knowing about a risk is not enough to assume it.
  - ***White v Blackmore* [1972]:** C killed at a motor racing event due to defective barriers; D organiser displayed notices warning the public of danger. Although C entered premises in knowledge he might be harmed in a particular way, he will not be held to have willingly taken the risk of other types of harm. Note, D was still not liable here as he had effectively excluded liability.

Independent contractors

- **s.2(4)(b):** Where harm to C is caused by *"the faulty execution of any work of construction, maintenance or repair by an independent contractor,"* the occupier will not be liable if: (i) occupier *"acted reasonably in entrusting the work to an independent contractor";* (ii) occupier took the steps he *"reasonably ought"* to ensure *"the* ***contractor was competent****";* (iii) occupier took the steps he *"reasonably ought"* to ensure *"the* ***work had been properly done****."*
  - **Interpretation:** section is interpreted broadly — it covered demolition work in *Ferguson* and was applied (although it was not engaged directly) to the running of a 'splat wall' in *Gwilliam*.
  - **Insurance:** ***Gwilliam v NHS* [2002]:** D contracted with X, an independent contractor, to provide a 'splat wall' for visitors at D's fete. X's insurance expired just before the fete. C was injured because X negligently set up the wall. **CA:** D was not liable as it had not breached its duty of care. s.2(4)(b) meant that an occupiers duty extended to inquiring into whether or not the contractor had adequate liability insurance — but this meant **asking** not actually checking. Here D had asked X, but had not seen documentation.
    - **Sedley LJ's dissent:** D was not under a duty to check X's insurance position — the OLA imposes a duty to protect visitors from harm, so D is under a duty to check contractors are competent not that the contractor is worth suing if he proves to be incompetent (this is a different category of risk, not covered by the Act). His dissenting position has been preferred since: ***Naylor v Payling* [2004]** — CA: no general requirement to check on the insurance position of an independent contractor; ***Glaister v Appelby-in-Westmoreland Town Council* [2009]:** CA expressed a preference for Sedley's reasoning.
  - ***Maguire***: the council was not liable as, under s.2(4)(b) they had exercised their duty in entrusting maintenance of gym equipment to a competent independent contractor.
  - ***Ferguson v Welsh***: (see above) also considered whether s.2(4)(b) operated so as to impose a duty on D to supervise a contractor's system of work. **s.2(4)(b):** is designed to protect an occupier from an independent contractor who has performed work in a faulty manner. An occupier is not normally required to supervise a contractor whom he has reasonable grounds for regarding as competent. D will only lose the protection of s.2(4)

(b) if he has actual knowledge / reason to suspect that B has a history of unsafe employment practices — then he might have to supervise X's system of work.

- **Lord Goff (minority)**: **OLA 1957** was not engaged because C's injury resulted from X's activities on D's land (X's unsafe system of work), not from the state of D's premises. This approach was affirmed in ***Fairchild***, see above.

Warnings

- **s.2(4)(a):** warning a visitor of danger is not enough, *"unless in all the circumstances it was enough to enable the visitor to be reasonably safe*."
  - This is a **subjective** test — in line with the fact that the duty is to keep the individual visitor safe, not the premises.
  - Where a visitor has no choice but to run the risk, a warning of the risk is not adequate; giving an alternative would be adequate.
  - It is important to distinguish warnings/exclusions of liability/restriction of entry.

Exclusion of liability

- **s.2(1):** occupier may *"restrict, modify, or exclude his duty to any visitor by agreement or otherwise."*
  - Distinguish between discharge of duty and exclusion of liability; duty will not arise if discharged.
    - Some warnings will do both ('do not cross the bridge' and 'not responsible for any damage).
  - ***White v Blackmore*:** notices at entrance of the field were sufficient (non-contractual notice).
- **Unfair Contract Terms Act 1977:** has greatly restricted the ability to exclude liability:
  - **Premises used for business purposes:**
    - **s.1(3)** liability must be incurred *"from the occupation of premises used for business purposes of the occupier"* or where D incurs liability *"in the course of a business."*
    - **Recreational purposes exception:** However, where the breach of duty is towards *"a person obtaining access to the premises for recreational or educational purposes",* this is not a business liability unless "g*ranting that person such access for the purposes concerned falls within the business purposes of the occupier."*
    - **s.2(1): occupier can't exclude liability for death / personal injury.**
    - **All other exclusions must satisfy the reasonableness test in s.11(3):** *"it should be fair and reasonable to allow reliance on it, having regard to all the circumstances."*
    - **s.2(3):** agreement / awareness of notice is not itself indicative of acceptance of risk.
    - **s.13**: it also applies to duty-defining terms (e.g. occupier has no duty in respect of death).
  - **Premises used for private purposes:** occupiers can exclude liability (even death/ injury).
- **Consumer Rights Act 2015:** governs trader to consumer contracts:
  - **Definitions:** a trader is a person acting for *"purposes relating to their trade"* and a consumer is a person acting for *"**purposes** that are **wholly or mainly outsider that trade"***
    - **Note that this has been applied broadly by the ECJ in *Brusse v Jahani* 2013 — important thing is there is an inequality of bargaining power.**
  - **Application to notices** where they (**s.61**): (i) relate to rights and obligations between T and C; (ii) purport to exclude / restrict T's liability to C.
  - **Effect: (s.62(2)): an unfair consumer notice is not binding on the consumer.**
  - **Unfairness test (s.62(4))** notice will be unfair where contrary to good faith requirement it causes a significant imbalance in the parties' rights and obligations to the detriment of the consumer.

- **s.62(7):** test will take into account: (i) subject matter of the notice; (ii) all the circumstances.

- **s.65 Can't exclude or restrict liability for death or personal injury resulting from negligence:** this includes Occupier's liability and CL duty of care.
  - **s.65(2):** C won't be taken to have accepted a risk just because he knew about a notice.
- **s.66(4) recreational exception:** s.65 does not apply where: (i) C suffers loss / damage because of the dangerous state of the premises; (ii) T allows C into the premises for purposes other than his trade.

For all exclusion clauses, reasonable steps must have been brought to visitor's attention, although actual knowledge of the clause is not required — *Ashdown v Williams & Sons.*

THE OCCUPIERS' LIABILITY ACT 1984

CL duty of care to trespassers recognised in ***Herrington v British Railway Board* [1972]:** child trespassed onto a railway line and was injured. **Lord Diplock (HL)** No duty to trespassers could arise unless an occupier had actual knowledge of: (i) the dangerous condition of his land; and (ii) the likely presence of trespassers. No duty to make enquires as to the condition of the land for the benefit of trespassers.

Lord Hoffmann in ***Tomlinson*** noted the difference between the Acts: for lawful visitors "*one starts from the assumption that there is a duty,"* for trespassers "*one starts from the assumption that there is none*".

Who is classed as a non-visitor?

s.1(1)(a): anyone *"other than visitors*." Includes **those using rights of way** (***McGeown***) and **trespassers**

- ***Tomlinson v Congleton*:** C was a visitor in the park, but a non-visitor once he jumped in lake.

When is a duty of care owed?

s.1(3): a duty is owed if:

(a) Occupier is "***aware of the danger*** *or has reasonable grounds to believe that it exists"*

(b) Occupier "*knows or has reasonable grounds to believe that the* ***other is in the vicinity*** *of the danger concerned or that he may come into the vicinity of the danger*"

- **Requires actual knowledge:** ***Swain v Nati Ram Puri* [1996]:** C (child) was seriously injured after scaling a wall to a roof, then falling through a skylight. **CA:** rejected an argument that occupiers reasonably should have known that children would be attracted to an abandoned warehouse adjacent to a council estate. **Evans LJ:** what is required is *"actual knowledge including 'shut-eye' knowledge either of the actual risk or primary facts"* from which the court might draw the necessary inference. Shut-eye knowledge is "*knowledge equivalent to actual knowledge as a matter of law, and it may be equated … with an element of wilfulness though not with negligence alone*." Constructive knowledge is not enough.

(c) The "***risk*** *is one against which, in all the circumstances of the case, he may reasonably be expected to* ***offer the other some protection****."*

- ***Tomlinson*:** D became a trespasser once he entered the lake, but the council did not owe a duty of care to C under the **OLA 1984** because **s1(3)(c)** would not be satisfied.

        - **Factors in assessing if risk was one against D could be expected to offer protection:** (i) likelihood of injury; (ii) seriousness of possible injury; (iii) social value of activity giving rise to the risk; (iv) cost of preventative measures (won't be given much weight).
        - **Lord Hobhouse:** *"It is not, and never should be, the policy of the law to require the protection of the reckless few to deprive the enjoyment by the remainder of society of the liberties and amenities to which they are rightfully entitled".*
        - Where the danger would have been obvious to any adult, it will not be reasonable under s.1(3)(c) to expect the occupier to offer C protection from it. Diving into shallow water was an obvious danger. **Lord Hoffmann:** "I *think it will be extremely rare for an occupier of land to be under a duty to prevent people from taking risks which are inherent in the activities they freely chose to undertake. A duty to protect against obvious risks or self-inflicted harm exists only in cases in which there is no genuine and informed choice*".
    - ***Keown v Coventry NHS* [2006]:** C (11) climbed a fire escape on the side of D's hospital. C fell and was injured. **CA:** D was not liable. Although D knew of the risk (s. 1(3)(a)) and knew children played in its vicinity (s.1(3)(b)) it wasn't reasonable to expect D to offer protection from such a risk (s.1(3)(c))
        - C recognised the risk posed by the staircase and chose to indulge in it, so C's injury was caused by C's own activity, not by a danger arising from "*the state of the premises or things done or omitted to be done on them*", so C's claim fails under **s1(1)(a)**.
        - However, the court recognised there may be cases where the occupier is under a duty to protect against an obvious risk, because a child may be incapable of recognising an obvious risk so as to make a *"genuine and informed choice"* to take the risk.
        - Considered the resources of the NHS were better spent treating patients than protecting against this kind of risk.

s.1(8): the duty only extends to personal injury — no duty to prevent property damage.

Breach of duty: what standard of care is owed?

s.1(4) *"the duty is to take such care as is reasonable in all the circumstances of the case to see that C does not suffer injury on the premises by reason of the danger concerned."*

***Keown*: Lewison J:** content of **s1(4)** duty may be more onerous where foreseeable trespasser is a child.

S1(1)(a): if C's injury was caused by his activity on D's premises, rather than a danger arising from "*the state of the premises or things done or omitted to be done on them*", as in ***Tomlinson*** and ***Keown***, then D cannot be liable under the **OLA 1984**. However, ***Tomlinson*** interpreted *'things done'* to mean D's may be liable for his own *"activities or lack of precautions which cause risk"* — e.g. D is shooting on his land.

Defences

Warnings: s.1(5) duty of care may "*be discharged by taking such steps as are reasonable in all the circumstances of the case to give warning of the danger concerned or to discourage persons from incurring the risk".*

Accepted risk: s.1(6) no duty of care "*in respect of risks willingly accepted.*"

Exclusion:

- the Act is silent on whether an occupier can exclude / restrict liability to non-visitors; most commentators assume that occupiers can exclude liability (as liability to visitors can be excluded and visitors are given stronger protection than trespassers).
- **s.1 UCTA 1977:** does not include s.1(4) of the OLA 1984 in its definition of negligence (but does include the 1984 Act). It appears therefore that business occupiers can exclude liability for death / personal injury. However, it is arguable that this is defective drafting — courts may (if this is tested) find that it creates a lacuna in the law which could make OLA 1984 pointless.

Main differences between this Act and 1957 Act:

- **Cannot claim for property damage;**
- **UCTA does not apply;**
- **Must tick the three boxes in Section 1(3).**

PRODUCT LIABILITY

There are two ways of claiming in tort against a manufacturer for product liability:

1. **Common law of negligence (*Donoghue v Stevenson*);**
2. Under the **Consumer Protection Act 1987:** manufacturers have strict liability for defects.

Statutory claim is limited to damage exceeding £275. Better to claim via CPA, as no fault requirement.

CLAIMS IN NEGLIGENCE

Narrow rule in *Donoghue:*

- ***Donoghue v Stevenson* [1932]:** C claimed against D (manufacturer) for injuries suffered after consuming ginger beer containing the remains of a snail. **Lord Atkinson:** manufacturers who sell products in the form in which they will reach the ultimate consumer (i.e. which aren't altered by a third party before consumption) *"with the knowledge that the absence of reasonable care in the preparation of the product will result in an injury to the consumer … owes a duty to the consumer to take reasonable care."*
    - **Rule:** the **ultimate user** can sue a manufacturer if: (i) the product was sold in the form in which it is designed to reach the consumer; (ii) there is no reasonable possibility of intermediate examination; (iii) knowledge that absence of reasonable care will injure the consumer.
- ***Grant v Australian Knitting Mills* [1936]:** C claimed against D manufacturer, when trousers caused a rash rendering him bed-ridden for 17 weeks, in hospital for three months, and nearly killed him. **PC:** manufacturers were liable in negligence — the presence of a chemical in the garment was a latent defect and there had been no intermediate inspection / alteration.

Negligence protects **safety** of products, rather than the **value** or **quality** which are protected in contract.

Later decisions have made it clear that a manufacturer also owes a duty to anyone injured by the product (bystanders injured by another's use).

Duty of Care: extends not only to the product, but also to the container/packaging and labels/ directions/ instructions that accompany it.

- ***Watson v Buckley* [1940]:** manufacturer of hair dye was liable for promoting a product as safe when they had not in fact tested it.

Breach of duty: although in theory this is fault-based liability and the burden is on C to prove a breach, in practice, the presence of a defect infers negligence. In ***Grant*** the manufacturer had an exceptional record of health/safety — shipped 4.7m other products with no similar injuries. The standard is so high that it may be asked whether this is in fact strict liability.

Intermediate examination/interference:

- Although a requirement in ***Grant*** and ***Donogue***, there is no separate requirement that the defect couldn't have been reasonably discovered by an intermediate third party; it seems the question of an intermediate inspection goes to the question of causation (rather than existence of duty).
- Use of a product by C for a purpose different from that for which D designed it / reasonably could have contemplated it would be used will defeat the claim — this is clear from ***Grant*** (see below).

Actionable damage: personal damage, loss to other property, and consequential loss can all be claimed. No liability for pure economic loss, unless manufacturer has assumed responsibility under *HB*:

- ***Muirhead v Industrial Tank Specialities* [1986]:** C wished to hoard lobsters and sell them at times of high demand. He purchased tanks for this purpose. The tanks failed and the lobsters died. C sued ITS (the company he purchased the tanks from was insolvent) for: (i) loss of the lobsters; (iii) loss of profits. **CA:** C could claim for the lobsters and consequential losses but could not claim for PEL — PEL could only be recovered under *HB* where there was an assumption of responsibility. **No such assumption of responsibility will be found where goods are supplied from manufacturer → distributor → purchaser under a normal chain of contracts.**
- ***Hamble Fisheries v Gardner* [1999]:** C purchased an engine for a fishing vessel from D through an intermediary boat builder. D received reports the engines had suffered failures. C suffered such a failure while at sea and claimed for economic loss (no injury / other property damage). **CA:** no economic loss was recoverable as D had not assumed responsibility for C's affairs (under *HB*). Recognised, in principle, a manufacturer could be liable for a failure to warn of a known defect.
- **No recovery when the only damage suffered is harm to the defective product itself (although C will usually have a claim in contract).**

Causation / volenti / CN: There must be a causal link, in *Grant* Lord Wright held: *"the man who consumes or uses a thing which he knows to be noxious cannot complain in respect of whatever mischief follows because it follows from his conscious volition in choosing to incur the risk or certainty of mischance."* Although on such facts, the D would have a defence of volenti. There may also be circumstances where, contributory negligence is appropriate.

Circumstances where claims are only available in negligence:

1. Those not classified as 'producers' under the terms of the CPA 1987;
2. Kinds of loss which are not remediable under the CPA (the Act only accounts for harm to persons and damage to private property);
3. Damage to property not intended for private use;
4. Expiration of special limitation period under the Act.

CONSUMER PROTECTION ACT 1987

Enacted as implementation of the EC 'Product Liability' Directive, which was intended to prevent producers in countries where product liability rules are less strict from having a competitive advantage.

- This goal failed because: (i) it is only concerned with damage done to persons / property by a product 'intended for private use or consumption' — does not touch commercial property; (ii) Member States had latitude as to which bits were implemented; (ii) did nothing to harmonise remedies.

Who can be liable under the Act?

There is a hierarchy of possible defendants under the Act

- **s.2(2)(a) Producer:** this is defined as:
  - **s.1(2)(a) manufacturer:**

        - **s.1(2)** in cases where a product causes damage as a result of a failure of a component part, the manufacturer of that part and the assembler of the whole can be treated as 'producers'
            - **s.1(3):** a person who supplies a product comprising other products shall not be treated as the producer of those components merely because he supplied the whole.
        - **s.2(5):** where multiple persons are liable under the Act, liability in joint and several.
    - **s.1(2)(b) person who won or abstracted the product:** this covers mining / raw materials.
    - **s.1(2)(c): Essential characteristics attributable to an industrial or other process having been carried out** — e.g. agricultural produce is covered.
- **s.2(2)(b) Person who has held himself out to be the producer:** E.g. by putting his name on the product (think own-brand supermarket products). Here D must appear as being the producer.
- **s.2(2)(c): Importer of product into Member State from a place outside the EU in order to supply it to other persons:** this goes some way toward relieving Cs of problems of suing a foreign producer.
    - **s.2(3)**: if the importer fails to identify a producer, then that supplier will be liable.
- **s.2(3) Supplier:** Non-tortious suppliers avoid liability by naming the person who supplied the goods to them under s.2(3) to allow C to follow the chain of parties until the manufacturer is found.
    - **s.2(3)(b)** request to identify must be made by C within a reasonable time of the damage occurring.
    - **s.2(3)(c):** if the supplier fails to identify within a reasonable time then the supplier will be liable.

What is a product?

- **s.1(2):** a product is any good / electricity and includes a product which is comprised in another product
- **s.45:** goods include: movable objects, substances, growing crops, ships, aircrafts, vehicles etc.

What is a defect?

s.3: a product is defective if the safety of the product is not such as persons are generally entitled to expect.

- **s.3(2)(a-c):** 'safety' covers: (i) the manner in which / purposes for which the product has been marketed, *"including any instructions for, or warnings with respect to, doing or refraining from doing anything with or in relation to the product";* (ii) what might reasonably be expected to be done with it / to it; (iii) the time when the product was supplied by its producer to another
    - This last factor means a product will be judged according to standards at the time it was put into circulation — it will not be defective merely because a later product is more safe).

Warnings / instructions: a standard product may be perfectly safe if used properly, but unsafe if used improperly / for an improper purpose. Products will not be defective for reasons of improper use. Where risk is **not obvious,** the product may be defective if not accompanied by adequate warnings / instructions.

Standard of safety public is *entitled* to expect:

- ***A v National Blood Authority* [2001]:** Cs were infected with Hepatitis C after receiving blood transfusions — at the time, there was no way of detecting whether the blood was infected. **Burton J:** found for Cs:
  - The relevant question is what the public's legitimate expectations were, rather than what they in fact expected. Rejects D's argument that the public don't expect blood to be 100% clean, their legitimate expectation is not that tests will have been carried out, rather that the blood *is* safe.
  - **Avoidability is not a circumstance to be taken into account in determining public expectation — if it were, it would let fault in through the back door**
  - **Distinction between standard and non-standard products:** The defective blood bags were non-standard products and so the question is whether the risk that some products might be defective is expected by the public at large.

The standard may be higher / lower than what people actually expect:

- Higher — e.g. ***A v National Blood Authority* [2001]:** Even if the public is aware that some products will turn out defective, the question is whether the public is entitled to expect them to be perfect.
- Lower — e.g. ***Tesco Stores v Pollard* [2006]:** public expectations may be unreasonably high, especially in an increasingly litigious society.

Non-standard products: *"products which are different from the norm"* — (i) the harmful defect is not present in the standard product produced by the manufacturer; (ii) the unique defect caused injury/damage. The following is taken from Burton J in ***National Blood*:**

- The circumstances specified in s.3(2) will be relevant. However, **the primary issue is whether the public at large accepted the non-standard nature of the product** — i.e. whether they accepted that a proportion of the products would be defective. This is to be measured in terms of legitimate expectation — the court can decide if the actual expectation is too high / low.
- Avoidability / cost of precautions / impracticality / benefit to society **are all irrelevant**

Standard products: the defect is inherent in *all* examples of a product, likely due to an error in design.

- **Burton J in *National Blood*:** "*the sole question will be safety for the foreseeable use*". It might be useful to consider: (i) comparisons with other products on the market; (ii) price, when determining public expectations of safety. The fault of the producer is again irrelevant.
- ***Abouzaid v Mothercare* [2000]:** a buckle broke on a pushchair, causing the elastic to hit the user in the eye. **CA:** no liability in negligence, because the damage was not foreseeable (elastic is commonly used and doesn't normally fail in children's products). D was liable under the CPA because the public could expect more in terms of the prevention of accidents *"the existence of a defect was to be judged by the expectation of the public at large as determined by the court."* The defect was standard because no user could position themselves so, if the elastic snapped, their eyes wouldn't be in the line of recoil.
- ***Tesco Stores v Pollard* [2006]:** C (13 months) ingested dishwasher powder. C claimed the cap was defective in that it was easier to detach than it should have been. D (Tesco) was sued as an own-brander. **Laws LJ:** found for D. Whether the product reached a published technical standard was not decisive — although the cap did not meet the British standard, it met the expectations of consumers that a child-resistant screw top would be more difficult to open than a normal one.
  - ***Tesco* can be criticised**: (i) the pro-consumer policy of the Act is not evident in this decision; (ii) Laws LJ focused on the actual expectations of consumers and not on the legal test of what consumers are entitled to expect.

NB: must also prove that the defect caused the injury on a standard 'but for' test.

Who can recover under the Act?

s.5(1) General rule is anyone who suffers personal injury / property damage caused by the defective product can claim the full damages against the producer. **Not just the consumer, but also a bystander.**

Restrictions on when a producer cannot be sued:

- **s.5(2):** when only the defective product itself has been damaged.
  - Claims here are left to contract; consistent with rules on PEL.
- **s.5(3):** can only sue for damages when the item is *"ordinarily intended for private use."*
- **s.5(4):** can only sue for damages over £275.

Defences:

These are listed in **s.4(1):**

(a) The defect was attributable to compliance with legal requirements.
(b) D did not supply the product to another — this applies to stolen/counterfeit goods.
(c) D did not supply the product in the course of business.
(d) Defect did not exist in the product at the time it was supplied — prevents against wear-and-tear claims.
(e) **'Development risks' defence** – D must prove the state of scientific/technical knowledge was such that the defect was unknown and unforeseeable when the product was circulated.
(f) The manufacturer of component parts is not liable for a defect in the finished product which is wholly attributable to the design of the finished product or to compliance with the instructions given by the manufacturer of the finished product.

Sch. 1 Para 4: A claim must be brought within **three years** of: (i) cause of action; (ii) date of knowledge of injury / damage — whichever is later.

- **Sch. 1 Para 3:** C cannot sue if 10 years have elapsed since the defective product was first supplied.

Development risks defence (s4(1)(e)):

"*The state of scientific and technical knowledge at the relevant time was not such that a producer of products of the same description as the product in question might be expected to have discovered the defect if it has existed in his products while they were under his control.*'

- **Not a subjective / reasonableness test:** In ***Commission v UK (1997)*** the EU Commission challenged the UK's implementation of the directive, claiming s.4(1)(e) was more lenient to producers. ECJ found for the UK because (i) the wording of the defence does not depend on the subjective knowledge of a producer as the Commission alleged; (ii) the UK courts have an EU law obligation to construe the defence as consistent with the directive.
  - **Art. 7 directive**: "*the state of scientific and technical knowledge at the time when he put the product into circulation was not such as to enable the existence of the defect to be discovered."*
- **What constitutes 'the state of scientific and technical knowledge':** AG Tesauro in *Commission* suggested the information must be accessible 'to an expert in the sector' — the information includes the most advanced level of scientific and technical knowledge that's

accessible (even if other experts disagree). This is because, at that time, the risk becomes foreseeable.
    - **Manchurian exception?** Tesauro suggested that work published in Manchuria might not be accessible. But in ***National Blood***, Burton thought that the 'Manchurian exception' should be limited to an unpublished document or unpublished research.
- **If scientific knowledge of a defect exists, D cannot rely on the defence even if it is impossible to identify the defect**. ***National Blood*****:** Though the risk of infection was known, the risk was unavoidable. Liable as a known risk had existed — could not evade responsibility by arguing that he had not been able to identify the products in which the defects occur.
- ***Abouziad v Mothercare***: D claimed that the scientific knowledge of elastic causing damage to eyesight, in the form of accident reports, were not present at the time of the accident. **CA:** the defence was to deal with technical advances and not simply problems nobody had thought about — a simple practical test could have demonstrated the problem at the relevant time.

It should be noted that there is no exclusion of liability (**s7**), which invalidates any limitation or exclusion 'by any contract term, by any notice or by any other provision'.

Justification: without defence, it would be hard to obtain insurance, thus hindering research/ development. Product liability is a tort based on allocation of risk, this balances out some of the heavy burden on producers.

Justifying strict liability:
- Prevents issues of proof.
- **Fletcher:** strict liability is justifiable when D's actions expose C to a non-reciprocal risk of harm. Strict liability returns the risk to D.
- **Keating:** strict liability is not such a burden if liability is predictable, since insurance can be purchased
    - Strict liability strikes a better balance between the competing demands of: (i) security (there is a remedy), and (ii) freedom (can go about business without being liable to anyone).
- **Deterrence**: encourages manufacturers to improve the safety of their products.
    - Arguably, could cause the reverse – take risk and use insurance to cover.
    - **EP:** point is surely that it encourages an *optimum* level of protection — i.e. manufacturer's will take all *efficient* precaution, leaving the rest to insurance.
- **Makes externalities internal:**
    - Only products where the benefit outweighs the cost should be given a market;
    - Best way to ensure a market is to ensure that the price of products reflects its real cost;
    - If people are willing to pay more than the real cost, then it is clearly beneficial;
    - However, the price often does not reflect the cost. Strict liability is a way of ensuring that some of the externalities associated with the production of a particular product are brought home to the manufacturer, so that the price of the product will more closely reflects its real cost.
- **Stapleton: Enterprise liability.** Allocation of losses to those that create a risk by providing a product on the market. Ideally, eventually borne by those who benefit directly or indirectly from D's activities, such as shareholders, employees, and customers.

VICARIOUS LIABILITY AND NON-DELEGABLE DUTIES

D = employer; X = employee

VICARIOUS LIABILITY

Vicarious liability is where an employer is liable for the actions of their employee. There are three requirements: (i) a tort; (ii) committed by D's employee; (iii) in the course of his employment.

Element 1: Employer / employee relationship

Standard contracts of employment:

- **Traditional test:** for an employment relationship is one of control: did the D control both **what** X did and **how** she did it — ***Cassidy v Ministry of Health*** **[1951]**
  - The strict control test is no longer relevant — inappropriate for highly skilled employees (e.g. an employer couldn't tell a doctor what to do). Now one of a number of factors.
- **Composite test:** set out in ***Market Investigations*** **[1969]** involves taking an overview of a number of different aspects of the relationship: **Cooke J:** a woman who did time-to-time surveys was an employee: "***fundamental test to be applied is this****: 'Is the person who has engaged himself to perform these services performing them as a person in business on his own account?'. If the answer is 'Yes', then the contract is a contract for services. If the answer is 'No', then the contract is a contract of service*"
  - **Factors common to an employee:** (i) integrated into the business; (ii) paid a regular wage; (iii) has tax and benefit provisions; (iv) supplied with tools, uniform, vehicle; (v) works at a regular time / place.
  - **Factors common to an independent contractor:** (i) has no 'interest' in the 'employer's business'; (ii) is paid by the job done; (iii) does not have tax / benefit provision; (iv) supplies his own tools, uniform / vehicle; (v) works at a regular time / place.
- **Residual control test:** ***E v Lady of Charity*****: Ward LJ: "***the question of control should be viewed in a wider sense than merely inquiring whether the employer has the legal power to control how the employee carries out his work. It should be viewed more in terms of whether the employee is accountable to his superior for the way he does the work so as to enable the employer to supervise and effect improvements in performance and eliminate risks of harm to others.***"**

No contract, but relationship is 'akin to employment':

- ***E v The English Province of Our Lady of Charity*** **[2012]:** Priest was said to have abused a young girl — was an employee, independent contractor? **Ward LJ:** although there was no contract of employment, the relationship was *"akin to employment"*
  - **In establishing such a relationship need to look to**: (i) control by the D of X; (ii) control by the X of himself; (iii) how central was the X's activity to the business; (iv) whether the activity was integrated into the organisational structure of the enterprise; and (v) whether X was in business on his own account.
  - **Fairness** was a factor here — it was fair to find the priest an employee because it struck the proper balance between unfairness to the employer in imposing strict liability and unfairness to C, who would be otherwise left without a full remedy for the harm caused.
- ***Various Claimants v Catholic Child Welfare Society*** **[2012]** Brothers of a catholic order lived a communal life, followed a hierarchical structure, and renounced salaries payable for

their teaching work. In return the institute met all the brothers' needs. Was the diocese liable for over 200 claims of sexual abuse by brothers. **SC:** yes — *"the relationship ... had all the essential elements of the relationship between employer and employees."*

- **Lord Phillips:** vicarious liability will be imposed where it is FJR to do so, based on the following policy factors: (i) D is more likely to be insured / able to compensate C than X; (ii) the tort has been committed as the result of X's activities on behalf of D; (iii) X's activity is part of D's business activity; (iv) D's employment of X to conduct an activity increased the risk of the tort being committed by X; (v) X will have (to a residual extent) been under D's control.

- ***Cox v Ministry of Justice* [2016]:** C (catering manager in a prison) was injured by the negligence of a prisoner in the course of a 'prison job' (X dropped a bag of rice on C's back). Was the MOJ vicariously liable for C's injury. **SC:** approved Lord Phillips test in *Various Claimants* to find X was an employee — Lord Reed noted the essential factors were: (i) tort committed as a result of an activity undertaken by X on behalf of D; (ii) activity was integral to D's business activities; (iii) D, by employing X to carry out the activity, had created the risk of the tort being committed by X.
  - These criteria generally ensure that liability is imposed where it is FJR to do so, but a further fairness enquiry might be necessary where the test is applied to novel facts.
  - *"The general approach which Lord Phillips described ... is intended to provide a basis for identifying the circumstances in which vicarious liability may in principle be imposed outside relationships of employment."* It recognises that, in modern work places, *"workers may in reality be part of the workforce of an organisation without having a contract of employment with it."*

Borrowed employees: X is technically employed by D1 but works for D2 on a day-to-day basis in practice. Both D1 and D2 can be vicariously liable:

- ***Viasystems* [2005]:** Viasystems claimed damages for a flood, caused when Thermal Ltd l installed air conditioning in their factory. Via a chain of subcontracts, the work was conducted by X who caused the flood.**CA:** thermal Ltd were liable. The burden of showing vicarious liability has shifted from D1 to D2 is 'heavy' and falls on D1. It was possible, as here, for there to be dual and equal liability, but this will be unlikely to occur where one employer is at fault for X's tort. **Rix LJ:** need to ask whether X was "*so much a part of the work, business or organisation of both employers that it is just to make both employers answer for his negligence*?"

Element 2: was the tort committed in the course of employment?

Obvious where X's tort was committed as part of an act authorised by D. Key issue is in relation to prohibited / unauthorised acts.

Close connection test:

- ***Bazley v Curry* [1999] (SC Canada):** vicarious liability will be appropriate where there is a close connection between the creation / enhancement of the risk of harm by an employer and the wrong that flows from that risk, even if the wrong is entirely unconnected to D's purposes / desires (as in the child abuse cases).
- This test was applied in ***Lister v Hesley Hall* [2001]** X, a warden at a boarding house for troubled teens, sexually abused boys in his care. **HL:** Lord Steyn noted the following principles: (i) in considering the scope of employment, a broad approach should be adopted; (ii) the time / place at which the acts occurred will always be relevant, but may not be conclusive; (iii) the opportunity employment provides X in being in a particular time / place does not mean the act is necessarily within the scope of employment. The key issue is

creation of risk: was the risk of the wrongful act one which was inherent in the nature of the employer's business?

- ***Various Claimants***: vicarious liability is imposed where D has employed X in a "*manner which has created or significantly enhanced the risk that C would suffer the relevant abuse*". The close connection test requires a "*strong causative link*" between D's creation or enhancement of the risk of wrongdoing and the wrongdoing which in fact occurred.
- ***Weddal v Barchester* [2012]** close connection test applied to two conjoined appeals:
  - D1 on day off, called in to work, goes in and beats up C1 – not in the course of employment.
  - D2 receives criticism on work by C2, subsequent fight injures C2; in course of employment.

NON-DELEGABLE DUTIES

Employers are generally not liable for negligent acts of independent contractors. However, certain duties are **non-delegable** and so the employer will still be liable.

***Woodland v Swimming Teachers Association* [2013]:** C was injured in a swimming lesson organised by her school with an independent organisation. Could C sue her school? **SC:** yes, the school owed a non-delegable duty to C. **Lord Sumption:** two broad categories where D will owe C a non-delegable duty:

1. **Ultra-hazardous activities:** where D is engaged in an ultra-hazardous activity and owes C a dut of care in engaging in that activity to see C is not harmed by it.
2. **Relationship between C and D:** with the following features:
   - C is a patient or child, or for some other reason is especially vulnerable / dependant on the protection of D against the risk of injury.
   - Relationship between C and D which *"places C in the actual custody, charge, or care of D"* and *"from which it is possible to impute to D the assumption of a positive duty to protect C from harm."*
   - C *"has no control over how D chooses to perform"* that positive duty *"whether personally or through employees or through third parties."*
   - D must have delegated to a third party a function which is an integral part of its positive duty to C, which requires the third party to exercise D's custody, care or control over C.
   - Third party must have been negligent in performance of the very duty assumed by D toward C.