

Negligence and Nuisance

Why does it matter?

Torts law is particularly relevant to businesses as they need to be aware of the extent of their potential liabilities to workers, visitors to business premises, other businesses, and to the general public. This extends to ensuring safe systems of work exist and appropriate insurance is maintained. Further, businesses need to be in a position where they can ensure they can exclude liability for advice provided in the course of their business. The chapters in this part of the book demonstrate the potentially significant sums involved in tort actions, and the potential costs involved in not taking adequate steps in their prevention.

Learning outcomes

Following reading this chapter you should be in a position to:

- understand the meaning of the term 'tort' (13.1–13.5)
- differentiate between liability in contract and liability in tort (13.5)
- explain the three tests to establish liability in negligence (13.6–13.6.3.2)
- explain the facts and the court's reasoning in *Donoghue v Stevenson* (13.6.1)
- identify the defences to a negligence claim (13.7–13.7.4)
- identify the remedies available in claims of tortious liability (13.8)
- assess where a business or individual may commit an act of nuisance and available defences to such actions (13.9–13.9.2.3).

Key terms

These terms will be used in the chapter and it may be helpful to be aware of what they mean or refer back to them when reading through the chapter.

Duty of care

The rule that places an obligation to take reasonable care not to injure your 'neighbour' or damage property.

Nuisance

This is an unlawful interference that prevents an owner/occupier's enjoyment of his/her land.

Proximity

The close relationship between the parties to a negligence action which is essential to establish a duty of care.

Tortfeasor

The party who has committed the tort.

Volenti non fit injuria

The Latin phrase relating to a voluntary assumption of risk where a person engages in an event and agrees to and accepts the inherent risks. If injured, he/she is prevented from bringing a claim.

13.1 Introduction

This is the second topic on the subject of obligations. Whilst the civil law places obligations on those parties who wish to undertake duties freely and agree to be legally bound via contracts, torts law imposes the obligation without, necessarily, prior agreement. The duty is to take reasonable care and not intentionally or negligently cause harm or damage. 'Torts' derives from the French word 'wrong' and is essentially a civil wrong that entitles the injured party to the remedy of compensation. This remedy has the aim of placing the victim back into the position he/she was (as far as money can) before the tort was committed.

One of the most important torts is negligence (which may be commonly seen in instances of personal injury) and this tort is considered first in the chapter before acts of private and public nuisance are addressed.¹

13.2 Fault liability

The law imposes a duty to take reasonable care to not negligently or intentionally cause damage. Many claims of negligence involve fault liability: someone is at fault and this enables the injured party to seek compensation for the resultant loss/injury. As such, situations of damage that are determined 'acts of God' will generally not be compensatable as there is no party from which to claim. This is in contrast to liability in contract that is strict (for example, the retailer is responsible for goods not being of a satisfactory quality despite the fact that, often, he/she would have no way of knowing this or have been personally responsible for the (lack of) quality).

¹ It is known as torts law because there are many torts. For example, personal injury is linked with the tort of negligence; a wrongful interference with a person's ownership and quiet enjoyment of his/her property may constitute one of the torts of nuisance and trespass; damage to reputation may be actionable through the tort of defamation; a wrongful interference with commercial interests may result in the tort of passing off; physically assaulting someone may lead to a claim under the tort of assault and battery; and there exists a tort of inducing a breach of contract.

² Students who would like to extend their understanding of the topic of torts law are advised to refer to Steele, J. (2007) 'Tort Law: Text, Cases, and Materials' Oxford University Press: Oxford.

Note also that in other situations relevant to this topic, tortious liability may be imposed in the absence of fault. Under the doctrine of vicarious liability, one person may be held liable for the torts of another (such as an employer being held liable for the torts of his/her employees; or the principal being liable for torts of his/her agent). Fault is also removed in claims under the Consumer Protection Act 1987 where the liability is strict.³

13.3 Fault liability and the compensation culture

Business Link

There has been much recent debate regarding the increasing ‘compensation culture’ in the UK, with scare stories of people suing others for seemingly trivial matters, and this has been exacerbated through the ‘no win, no fee’ services offered by law firms (often referred to as ‘ambulance chasers’). Despite the excessive manner of these reports, it is arguable that the UK has not developed a compensation culture, and this has been acknowledged and fears allayed through legislative action, but businesses should continue to take steps to minimize their staff and customers’ exposure to potential torts.

News reports in the recent past have suggested that the UK is heading towards a compensation culture where claims for compensation, usually through tort actions, have been brought against individuals, employers, and local authorities where a person(s) has suffered injury or loss (and this is increasingly moving towards claims in the education sector). Reports from the BBC highlighted cases including a woman who was awarded £195,000 in compensation due to her employers ‘wrecking her job prospects’ through their refusal to provide a reference; a woman who sued the company Durex for £120,000 when she became pregnant after using a faulty condom; and another claimant who sued⁴ the holiday company Airtours following injuries she received when on holiday in the Dominican Republic after a coconut fell on her chest when she was reclining under a palm tree.⁵ There have been several reasons attributed⁶ for the rise in persons seeking compensation, but the two most prominent reasons forwarded have been the introduction of conditional fee arrangements (the so called ‘no win, no fee’ claims), whereby lawyers representing claimants do not charge the client unless the claimant ‘wins’ the case (and these fees are generally added to the compensation claimed so the client obtains 100 per cent of the compensation); and secondly, the removal of the restrictions on lawyers being able to advertise (hence allowing firms to be very aggressive in obtaining clients—just look at the advertisements currently on television and even in doctors’ surgeries and hospitals⁷

³ Note that these examples do not constitute an exhaustive list.

⁴ The claim was eventually settled out of court with a payment of £1,700.

⁵ BBC News 24 ‘Compensation Culture: Who’s to Blame?’ 15 November 2000.

⁶ Including those examples listed, there has been the introduction of ‘class action’ claims, where several claimants can join their cases and be heard at the same time, rather than requiring each claimant to raise their case individually.

⁷ Somewhat amusingly, the BBC News 24 website on 28 May 2004 reported that advertisements for claims management companies regarding medical negligence had been printed on the back of hospital appointments cards (‘Compensation Culture “Urban Myth”’).

regarding clinical negligence). However, it has also been stated that the compensation culture is a fabrication or ‘urban myth’, and does not exist⁸ and most people would not bring frivolous claims, nor do they feel in any heightened fear of litigation.⁹

However, this has not removed all fears of being sued, and research by an insurance broking and risk management firm Aon in 2004 demonstrated that 70 per cent of the 500 businesses surveyed considered the compensation culture was placing an unsustainable burden on industry and that 96 per cent of the respondents blamed the Government for failing to take action.¹⁰ In response to growing concerns within and outside of British business, the Compensation Act 2006 was passed to codify existing common law and to inform the courts of matters that should be taken into account when determining if a breach of duty to take reasonable care had taken place. This was to be assessed in relation to whether the defendant had taken steps to meet the standard of care required; and having taken these steps, might these prevent a desirable activity from being undertaken or discourage persons from undertaking functions in connection with a desirable activity.¹¹ As such, the Act was created to prevent situations where an otherwise desirable activity would be stopped due to the fear of litigation. For example, school trips for pupils involve an element of risk but it also provides an educational benefit that could outweigh the risks. As such, the Compensation Act 2006 was designed to make explicit the rules establishing liability to give greater confidence in what would lead to a breach of a **duty of care**. The Act identifies that an apology, an offer of treatment, or other redress, will not of itself amount to an admission of negligence or breach of a statutory duty;¹² and it also applies to claims involving a disease relating to exposure to asbestos (mesothelioma).¹³ The Act, further, provides for regulation of those involved in claims management services¹⁴ and the enforcement of the regulation codes.¹⁵

? Thinking Point

Do you believe the law has moved in the right direction by enabling people to initiate tort actions, or do you think the law has developed to enable claims to proceed that would previously have failed to reach a settlement/hearing? Justify your answer.

13.4 Time limits

There exists a limitation period in which claims of negligence must be brought against the perpetrator of the tort (the **tortfeasor**). Under the Limitation Act 1980 s. 2, actions in tort must be brought within six years of the date giving rise to the right of action. Claims for personal injury, however, must be brought within three years of either the date on which the tort was committed, or from when the injury attributable to the tortfeasor became known.¹⁶

⁸ The House of Commons Constitutional Affairs Committee (2006) Third Report, Session 2005–06, 14 February.

⁹ See also Steele, J. (2007) ‘Tort Law: Text, Cases, and Materials’.

¹⁰ See Judge, E. (2004) ‘Compensation Culture Hitting Competitiveness of UK PLC’ *The Times*, 26 July.

¹¹ Section 1.

¹² Section 2.

¹³ Section 3.

¹⁴ Section 4.

¹⁵ Section 7.

¹⁶ Section 11.

In the case of a death, where the deceased person's representatives wish to bring an action on his/her behalf, the claim must be brought within three years of the date of the death, or three years from the date on which he/she obtained this knowledge (ss. 11(5) and 12).¹⁷

Protection is also afforded to minors (under the age of 18), and the time limits above do not apply until the claimant becomes 18. There is also protection to claimants who are suffering a mental disorder, as provided for in the Mental Capacity Act 2005, and who are incapable of managing their affairs. In such a situation the time limits do not apply.

13.5 The distinction between contractual and tortious liability

Tortious liability differs from contractual liability in that the obligations undertaken in contracts are entirely voluntary. No one can be forced into a contract against his/her will and consequently the parties have the ability to be aware of the extent of their liability, and the possible consequences in the event of breach. In contrast to this, tortious liability is imposed on persons and organizations (sometimes) without their knowledge or the awareness of the potential extent of this liability.¹⁸ The law sometimes requires compulsory insurance to protect against claims of liability in negligence or other torts,¹⁹ but it may be prudent for businesses to carry insurance for their property and possessions in the event of claims against them. Do remember that there may be several claims involving the same scenario, such as a breach of contract claim *and* a negligence action (for example, in *Grant v Australian Knitting Mills*);²⁰ and the scenario may involve a criminal action and a tort claim (such as an employee in a factory being injured through the use of dangerous and faulty equipment). Where the claimant has suffered a loss and injury, as in *Grant*, it is for the claimant to elect to pursue each element of his/her claim.

13.6 Negligence

Business Link

The law requires that those who are deemed to owe others a duty of care act responsibly and take necessary precautions to avoid injury and loss to others. The remedy

¹⁷ Note that the House of Lords held that this time limit, for personal injury claims, can be extended where it would be equitable to do so (*Horton v Sadler* [2006] UKHL 27).

¹⁸ For an in-depth consideration and theoretical discussion of how contract and tort liabilities affect individuals see Collins, L. (1967) 'Interaction between Contract and Tort in the Conflict of Laws' *International and Comparative Law Quarterly*, Vol. 16, p. 103.

¹⁹ Employers are required to hold liability insurance to insure against liability for injury or disease to their employees under the Employers' Liability (Compulsory Insurance) Act 1969; it is also advisable for other types of liability to be protected against as through Public Liability Insurance for those organizations which allow visitors onto their property or who deal with the public.

²⁰ [1936] AC 85.

primarily provided by the law is a damages payment to put the injured party back in the position he/she was before the tort had taken place—this can prove very expensive for businesses. Fundamentally to those in business, knowledge of the law and of responsibilities enable positive steps to be made to minimize the risk of negligence claims. When reading through the cases and judgments that follow, consider whether you would have acted as the business did, and whether you would have considered that liability would be imposed by the courts.

A definition of negligence is the breach of a duty to take care, owed in law by the defendant to the claimant, causing the claimant damage.²¹ In order to establish a successful claim in negligence, three tests must be satisfied. Each of these will be discussed in turn (Figure 13.1).

13.6.1 The duty of care

Before proceeding to identify each of the ‘three tests’ necessary to establish a duty of care, it should be noted that these are separated, somewhat artificially, to demonstrate how they appear in the facts of the case and are identified by the courts. To establish liability in negligence, it must first be determined that the respondent owed the claimant a duty to take reasonable care. How this works in practice can be seen in the case of *Donoghue v Stevenson*:

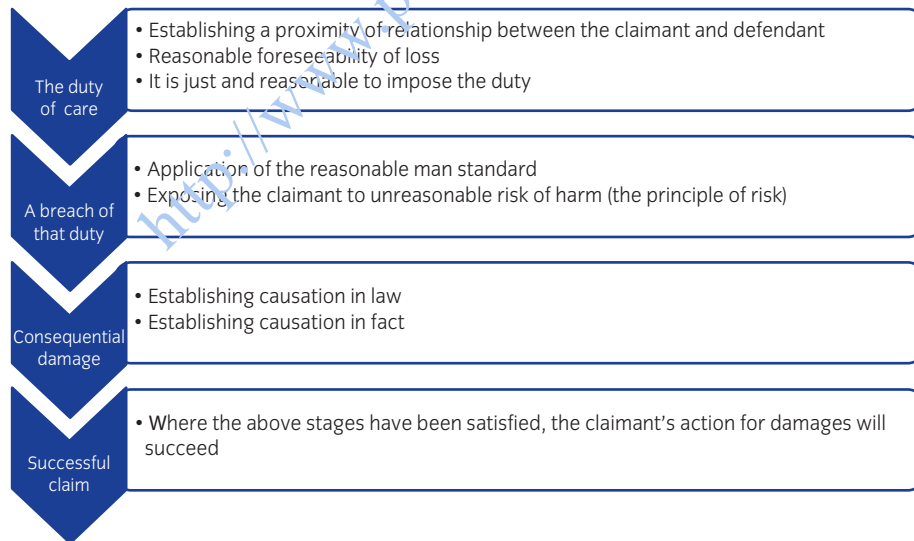


Figure 13.1 Establishing a Successful Claim in Negligence

²¹ Although note from Lord Macmillan in *Donoghue v Stevenson* that ‘... the categories of negligence are never closed’.

*Donoghue v Stevenson*²²**Facts:**

A friend and Mrs Donoghue visited a café in Paisley, Glasgow on 26 August 1928, where the friend purchased a bottle of ginger beer for Mrs Donoghue. The drink was served in a dark, stone, opaque bottle and, unknown to the purchaser, the retailer, or Mrs Donoghue, contained the remains of a snail. This only became apparent when the greater part of the contents of the bottle had been consumed and the remainder was poured into a glass. At the sight of the snail, Mrs Donoghue claimed she suffered from shock and severe gastro-enteritis. On the basis of this illness Mrs Donoghue brought her action for damages against the manufacturer of the ginger beer (David Stevenson). Mrs Donoghue contended that the claim should be made against the manufacturer as the ginger beer was bottled by Stevenson, labelled by him, and he sealed the bottle with a metal cap.

A key element in establishing negligence is the proximity²³ between the parties, which led Lord Atkin to state: 'You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be—persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.'

Authority for:

In establishing that the defendant owes the claimant a duty to take care, there must be proximity of relationship between them. This is identified through Lord Atkin's 'neighbour principle'.

Donoghue v Stevenson is the seminal case in the establishment of the tort of negligence. The House of Lords determined that the claimant must establish that the defendant owes the claimant a duty of care, and in establishing this there must be proximity between the parties. **Proximity** is the closeness of relationship between the parties that creates the duty to take care. Here, the manufacturer of a product was held liable for damage sustained by anyone who could have used, and consumed, its product. The case established that proximity is not restricted to a close physical 'closeness' but can be extended to anyone who may reasonably be seen as being likely to be affected by the defendant's actions. Following *Donoghue*, proximity has been demonstrated in cases involving inadequate warning signs which led to injury,²⁴ and has also been used in defeating claims, as in the following case:

*Bourhill v Young*²⁵**Facts:**

Mr Young had been riding his motorbike and collided with a motorcar on 11 October 1938, in which accident he died. Mrs Bourhill (a 'pregnant fishwife') was a passenger on a tram. At

²² [1932] AC 562.

²³ *Heaven v Pender* [1883] 11 QBD 503. 'If one man is near to another, or is near to the property of another, a duty lies upon him not to do that which may cause a personal injury to that other, or may injure his property.'

²⁴ See *Haley v London Electricity Board* [1965] AC 778.

²⁵ [1943] AC 92.

the stop she alighted and was in the process of removing her fish-basket when the accident occurred. It was discovered that Mr Young had been travelling at an excessive speed and was thrown onto the street as a result of the collision, where he died. Mrs Bourhill did not witness the crash (her view being obstructed by the tram), but became aware of it on hearing the noise of the impact (she was some 45–50 feet away). Mr Young's body had been removed from the scene, and when Mrs Bourhill approached the point of the crash she observed the blood left on the roadway. In her evidence she claimed to suffer damage to her back and 'very severe shock to her nervous system', although she acknowledged that she did not fear for her own personal safety. The House of Lords held that a motorcyclist owed a duty of care to other road users and those he could reasonably foresee might be injured by his failure to take reasonable care, but Mrs Bourhill did not fall into this category as she was not in any area of potential danger. Mr Young did not owe her a duty of care as it was not foreseeable that she may be injured in the incident, and there was a lack of proximity between the parties.

Authority for:

For a duty of care to be established, the defendant must have reasonably foreseen that his/her actions may cause injury or loss to the claimant.

The case demonstrated how the courts will deal with the issue of proximity of relationship and the link with foreseeability.²⁶ As the courts find one single definition of 'proximity' unrealistic (as noted by the Lords in *Caparo*) the examples provided in these cases enable common features to be drawn and considered for application in similar scenarios. Having established the test of proximity in identifying where a duty of care existed, the test was extended in a case involving economic loss. *Caparo v Dickman* established the threefold test of proximity, foreseeability, and whether it was fair, just, and reasonable to impose a duty of care (albeit that this case was largely decided on its facts rather than a 'true' application of legal principle).

*Caparo Industries Plc v Dickman and Others*²⁷

Facts:

Caparo had accomplished a takeover of Fidelity Plc and it began an action against the directors of that company (Steven and Robert Dickman) claiming a fraudulent misrepresentation, and an action against its auditors (Touche Ross & Co.) claiming it was negligent in carrying out an audit of the company.²⁸ The basis of Caparo's claim was that it began purchasing shares in Fidelity a few days before the annual accounts had been published and made available to the shareholders. In reliance on these accounts, it made further purchases of the shares in order to take over the company, and claimed the auditors owed a duty of care to the shareholders and any potential investors. The audit had projected Fidelity's profits unrealistically high, which Fidelity should have realized; and the share price had fallen significantly, causing substantial financial loss to Caparo. The House of Lords had to consider whether the auditors did in fact owe Caparo a duty of care. The Lords held that this case involved a negligent misstatement, but protection in such cases was limited to those who had obtained specific

²⁶ *Bourhill v Young* is also used when considering the issue of 'primary' and 'secondary' victims (see 14.4.1 and 14.4.2).

²⁷ [1990] 2 AC 605.

²⁸ PLCs were required to have an audit as part of their obligations under ss. 236 and 237 of the Companies Act 1985.

advice and used it for a reason made known to the provider of the information. The audit was a requirement of the Companies Act 1985 and therefore did not impose a duty of care on the auditors to the shareholders or potential investors. Consequently, Caparo's claim failed as there was a lack of proximity between the auditors and Caparo.

Authority for:

The imposition of liability for negligence should only take place where it is 'just and reasonable' to do so. Importantly, as this was a novel case, the law should develop liability in such cases incrementally and restrict/limit the imposition of to whom a duty is owed.

The issue of proximity has been addressed in *Donoghue*; foreseeability has been demonstrated in *Caparo* as a similar test to that used in contract of whether it should have been foreseeable to the defendant what the consequences of his/her action would be and the possible results; and 'fair, just, and reasonable'²⁹ is an argument based on public policy.³⁰ It enables the court the discretion to consider the wider implications of establishing liability and has been referred to as the 'floodgates' argument. If establishing liability would 'open the floodgates' to numerous claims, then the court may decide that the liability should not be imposed. The courts also use this requirement to protect potential defendants such as public bodies (the emergency services, local authorities providing education services and so on) from excessive claims and a diminution of public funds.³¹

The House of Lords later held in *Marc Rich & Co. v Bishop Rock Marine*³² that the requirement of establishing this 'threefold' test would be applicable to novel claims (such as in *Caparo*). However, where an accepted duty that had been previously held to exist (such as the duty imposed on drivers to other road users from carelessly causing injury), it was unnecessary to subject these claims to the *Caparo* threefold test when the question of duty has already been determined.

13.6.2 Breach of the duty

Having established that the defendant owed the claimant a duty of care, the next step in determining liability is to establish the defendant's breach of this duty. Essentially, this means that the defendant fell below the standard required by law. The tests outlined below, like the tests to prove the existence of a duty of care, are guidelines that have been developed through the courts, rather than an attempt to establish a single set of criteria that will or will not establish a breach of the defendant's duty of care. They will often overlap and each draws on elements of the other, but they are used to demonstrate the issues the courts will consider in attributing liability.

²⁹ For example, in *McFarlane and Another v Tayside Health Board* [2000] 2 AC 59 the House of Lords held that it would not be just and reasonable to hold the Health Board or the doctor responsible for the costs of raising a child following a failed vasectomy operation. However, damages may be awarded for the pain and losses attributed to the pregnancy. See also the imposition of an award for the 'legal wrong' committed in similar situations (*Rees v Darlington Memorial Hospital* [2003] UKHL 52).

³⁰ The Lords accepted the arguments presented by auditor's legal team that: 'three elements are needed for a duty of care to exist: there must be reasonable foreseeability, a close and direct relationship of "proximity" between the parties and it must be fair, just and reasonable to impose liability'.

³¹ Although compare the judgments in *John Munroe (Acrylics) Ltd v London Fire Brigade & Civil Defence Authority* [1996] 3 WLR 988 and *Kent v Griffiths and Others* (1998) *The Times*, 23 December.

³² [1995] 3 All ER 3307.

13.6.2.1 *The 'reasonable man' standard*

Breach of the defendant's duty of care will often follow his/her failure under the 'reasonable man' test. In *Blyth v Birmingham Waterworks Co.*,³³ Alderson B commented that 'Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do.' In extracting principles from the statement, the following factors will be considered by the courts:

13.6.2.2 *Exposure to risk of harm*

The claimant, in asserting that the defendant has breached his/her duty of care, will, as a general rule, have to demonstrate to the court's satisfaction that the defendant committed the breach. This places the burden of proof on the claimant.

- 1 *The principle of exposing the claimant to unreasonable risk of harm:* Essentially, the more likely it would be that the defendant's action would lead to injury or loss, the more likely it would be that he/she had breached his/her duty to take reasonable care. In *Brett v University of Reading*³⁴ Mr Brett died as the result of contracting mesothelioma, attributed to working with asbestos. A claim was brought against one of his former employers, as during his employment as a clerk of works, he oversaw the demolition of the old library, which it was considered in evidence, probably caused asbestos to be released, despite the University hiring competent contractors to undertake the works. The claimant could not demonstrate that the University was negligent in the hiring of the contractors or that the University had breached any statutory duty. Further, the Court of Appeal held that it could not be proved that this employer, rather than others, had led to Mr Brett contracting the disease, and as it had taken reasonable precautions to ensure his safety, the claim for damages had to fail.

Risk is accepted as part of most day-to-day activities (such as merely getting up in the morning and travelling to work), but it is the unreasonable exposure to risk that will establish a potential breach.³⁵

- 2 *The social utility and desirability of the defendant's actions:* Of course when considering the risk the claimant was exposed to, the courts have to perform a balancing act between this risk and any benefit or valuable objective that the defendant was attempting to achieve.

*Watt v Hertfordshire County Council*³⁶ identified that if an action is desirable and of social importance, the risks that correspond with the actions may be acceptable, whereas in other situations it would have led to unreasonable levels of risk (and damages in negligence). In the case, a fireman was injured by a jack that was not correctly secured in the lorry that was used to transport it to the scene of an emergency. The lorry had not been designed to carry such a large piece of equipment. However, the jack was required as it was used to save the life of a woman who had been trapped following an incident with a motor vehicle. Per Denning LJ: 'It is well settled that in measuring due care you must balance the risk against the measures necessary to eliminate the risk. To that proposition there ought to be added this: you must balance the risk against the end to be achieved.' Consequently, the Court of Appeal held that there was no finding of liability on the Council because of the wider implications of the risk undertaken.

³³ [1856] 11 Ex Ch 781. ³⁴ [2007] EWCA Civ 88.

³⁵ See *Paris v Stepney Borough Council* [1951] AC 367.

³⁶ [1954] 1 WLR 835.

- 3 *The cost and practicality of measures to minimize the risk of harm:* Likewise in point 2 above, the courts will assess the risk faced by the claimant in terms of the defendant's actions in light of the costs involved in attempting to minimize or remove these altogether.
- 4 In *Latimer v AEC Ltd*³⁷ a factory had suffered flooding following a period of heavy rain with the consequent mixing of the water with oil that was present on the factory's floor. In response, the owners of the factory (AEC) spread sawdust on the floor. However, Mr Latimer slipped on a patch of oil that had not been covered and sustained injury. Mr Latimer claimed damages under negligence for his injuries but the claim failed as AEC had taken all reasonable precautions to minimize the risk of injury. Mr Latimer had argued that the floor was unsafe and AEC should have closed the factory down until it could be made safe. However, the House of Lords felt this would have been disproportionate to the risk. In *Bolton v Stone*, a woman, standing outside her house, was struck by a cricket ball hit from an adjourning cricket club. She sought to recover damages for her injuries but the House of Lords held that the club had reasonably minimized the risk of harm through erecting a fence some 17 feet high at the perimeter of the ground. The fact that balls had only ever been struck over the fence six times in 28 years led to the judgment that the claimant had not been exposed to an unreasonable risk of harm.
- 5 The case reflected on the main elements to consider when assessing a breach of duty of care. Those are:
- the 'reasonable man' standard;
 - the principle of risk (exposure to unreasonable risk of harm);
 - the social utility and desirability of the defendant's actions; and
 - the cost/practicality of the measures to reduce the risk of harm.

The case is useful when identifying if a breach of the duty of care has occurred. It is important to note that the courts will apply the 'reasonable man' test objectively, there is no allowance to be made for lack of experience/intelligence. In *Nettleship v Weston*³⁸ Mr Nettleship gave driving lessons to Miss Weston, who was a careful learner. However, on the third lesson Miss Weston failed to straighten following a left turn and drove into a street lamp, which led to Mr Nettleship breaking his kneecap. Miss Weston was convicted of driving without due care and attention, and Mr Nettleship brought an action for negligence due to his injuries. The Court of Appeal held that the fact that the driver was a learner was no defence to the negligence action; the test applied to a learner was the same, objective test, as applied to a careful driver.

The shortcomings of others must be taken into account by the defendant;³⁹ and there is an obligation to display appropriate levels of skill. In *Bolam v Friern Hospital Management Committee*,⁴⁰ Mr Bolam sustained fractures of the acetabula during the course of electro-convulsive therapy treatment administered whilst he was a voluntary patient at the defendants' hospital. Mr Bolam initiated a damages action against the hospital alleging that the defendants were negligent in failing to administer any relaxant

³⁷ [1953] 3 WLR 259.

³⁸ [1971] 3 WLR 370.

³⁹ A practical example would be when driving a car in a residential area during school holidays. Appropriate speed would have to be maintained, even if this was slower than the legal speed limit, as children may be playing in the street, they may run out from behind parked vehicles, and they may not appreciate the danger of traffic on the road as a driver should.

⁴⁰ [1957] 1 WLR 582.

drug prior to the passing of the current through his brain, and they had failed to warn him of the risks involved in the treatment. The hospital produced expert witnesses who each agreed that there was a firm body of medical opinion opposed to the use of relaxant drugs. Further, it was the practice of the defendants' doctors not to warn their patients of the risks of the treatment (which they believed to be small) unless asked. The High Court held that even if a warning as to the result of the treatment was provided, this would not have affected the outcome of the case, and the hospital had complied with professional standards. Therefore, the claim failed and the hospital was not negligent.

The failure of Miss Stone to establish a breach of duty that prevented her successful claim can be compared with the case of *Miller v Jackson*.⁴¹ This case also involved a cricket ground (the Lintz Cricket Club) in County Durham, whose Chairman, Mr Jackson, was sued for negligence (and another tort action under **nuisance**) by Mr and Mrs Miller. Mr Miller had bought his house in the summer of 1972, and the garden was only 102 feet from the centre of the cricket ground. Mr Miller claimed that cricket balls were struck from the club into his garden which had caused damage to his property, and were so intrusive that he and his wife spent time away from the property during matches, and would not enter the garden for fear of being hit by stray cricket balls. This was despite a six-foot concrete wall at the end of the garden, and the cricket ground erecting a fence of 14 feet nine inches (the fence could not be made higher due to stability problems). In 1975, six balls went over the fence into the neighbouring houses; in 1976 nine balls went over the fence and therefore in the first case the court held that there had been a breach of the cricket club's duty to take reasonable care.

Situations also exist where the most likely explanation for an accident/injury to the claimant is that the defendant must have been negligent. Here, the burden of proof is reversed and the onus is on the defendant to demonstrate that he/she was not negligent. This is known as *res ipsa loquitur*⁴² and it will apply where the event that had caused the claimant loss was within the control of the defendant; and the event would not have occurred had the defendant exercised proper care and attention.⁴³ In *Drake v Harbour*,⁴⁴ the claimant sought damages for the alleged negligent rewiring of her property that had led to fire damage. Albeit that the claimant did not have positive or scientific proof that the poor rewiring had led to the fire, the Court of Appeal held that what was required was a matter of judgement in each case having considered all of the available evidence. The evidence provided by the defendant, on the balance of probabilities, regarding alternative causes of the fire were improbable and where, as in this case, it was demonstrated that the defendant was negligent and the loss sustained was consistent with such negligence, it was not necessary for the claimant to positively prove the exact and technical reason. The court is entitled to infer the loss as caused by the proven negligence.

A private duty to take reasonable care is not, however, derived from a wider, statutory duty. In *Gorringe v Calderdale MBC*,⁴⁵ the Council had a statutory obligation to maintain the roads and ensure safety under the Highways Act 1980. The claimant in the case had caused an accident whilst driving along a country road by driving too fast towards the brow of a hill and when she could not navigate the turn, colliding with a bus, as a consequence suffering severe injuries. The claimant's argument was that the Council had the responsibility for protecting the users of the highway and in this respect, it should have highlighted the danger of the particular road through signage such as marking

⁴¹ [1977] 3 WLR 20.

⁴² Translated as 'the facts speak for themselves'.

⁴³ *Ward v Tesco Stores* [1976] 1 WLR 810.

⁴⁴ [2008] EWCA Civ 25.

⁴⁵ [2004] UKHL 15.

the word 'SLOW' on the road before the hill. As such, the claimant contended that this public duty created a private duty to the users of the road, enabling her claim to succeed. The court held that this did not impose such a duty on a local authority, as a private duty could not in this sense 'emerge' from a wider public duty. The Council had not taken any positive action in the accident and hence the claim failed.

As noted in section 13.3, the enactment of the Compensation Act 2006 has had the effect of restraining the 'compensation culture'⁴⁶ that was alleged to have crept into the English legal system. The courts would expect claimants to have been vigilant in protecting themselves and to appreciate obvious risks. This is not to say that it removes the legal obligations imposed on the defendant, but it has, particularly since the Compensation Act 2006, attempted to introduce a balance between the ability of claimants to seek damages for losses, and protection of those involved in providing desirable activities.

13.6.3 Consequential damage

An essential component for a successful negligence claim is that the claimant has suffered loss; this loss must be of a type recognized by the law; and there must be a causal link between the breach and the loss suffered (consequential loss). For example, where an out-of-town shopping mall is built, the effects of this may be to cause economic damage to shops in the local town (as occurred when the Meadowhall development was built in Sheffield). However, despite this damage to their business through lost profits, the law does not allow the injured shop owners to bring a claim for damages against the developer of the shopping mall/ the shopkeepers for any financial losses. Other torts exist that may enable a claim where the claimant has not suffered any damage. In claims of trespass, for example, the court will often award nominal damages even where no losses have been sustained.

13.6.3.1 Causation in fact

The court will examine the facts of the case and ascertain whether the defendant had caused or contributed to the claimant's injury or suffering. A test developed by the Court of Appeal in the case of *Cork v Kirby Maclean*⁴⁷ is the 'but for' test. This test was defined in the following way: 'If the damage would not have happened but for a particular fault, then that fault is the cause of the damage— if it would have happened just the same, fault or not fault, the fault is not the cause of damage.' This can be demonstrated in the later case of *Barnett v Chelsea and Kensington Hospital Management Committee*,⁴⁸ where three watchmen sought medical attention following a bout of vomiting. The on-duty nurse consulted a doctor, who advised the watchman to go home and seek advice from his own doctor the following morning. However, later in the day the man died, which was attributed to arsenic poisoning. A claim was brought against the hospital for the negligence of the doctor in failing to examine the watchman, but this failed. The watchman had such a high concentration of arsenic in his system that he would have died regardless of any intervention, such as administering an antidote, even if his condition had been diagnosed in a doctor's examination. Therefore, there was a duty to take care, and this had been breached, but as no consequential damage was present the claim failed.

⁴⁶ See Mullender, R. (2006) 'Negligence Law and Blame Culture: A Critical Response to a Possible Problem' *Professional Negligence*, Vol. 22, p. 2; and Herbert, R. (2006) 'The Compensation Act 2006' *Journal of Personal Injury Law*, Vol. 4, p. 337.

⁴⁷ [1952] 2 All ER 402.

⁴⁸ [1969] 1 QB 428.

13.6.3.2 Causation in law

The defendant is not liable for every consequence of his/her wrong. If there is some intervening act that causes the damage to the claimant then the (first) defendant will not be held responsible in negligence. If the damage sustained was too remote, then it would be unreasonable to hold the defendant responsible.

- *Remoteness of damage*: Remoteness of damage involves the test of reasonable foreseeability. If the reasonable man could not foresee the consequences of the action, then the claim will be defeated. The case of *Overseas Tankships (UK) Ltd v Morts Dock & Engineering Co. Ltd (The Wagon Mound)*⁴⁹ is important in demonstrating the effect of this rule. Here the defendants were the owners of a ship named *The Wagon Mound* and had been negligent in allowing oil to spill from the ship into Sydney Harbour. There was welding taking place in the harbour at the time, and the oil had spread into the wharf owned by the claimant. The claimants stopped the welding, due to the potential risk of a fire, and sought clarification as to the danger, but were informed it was safe to continue their welding activities. Floating in the harbour at the time was refuse, including cotton, onto which the molten metal from the welding fell and which caught fire causing the oil on the water to ignite. This fire quickly spread, resulting in substantial damage to the claimant's property, and led to the action against the owners of *The Wagon Mound*. The Privy Council held that the defendants were only liable for the oil that had spilled into the harbour and not the fire that had been caused. It could not be reasonably foreseen that the oil would have caught fire due to its high ignition point.⁵⁰

When the claim involves the negligence of the tortfeasor, the causal link is vital to impose liability. This link (or chain of events) may be broken by a new act (a *novus actus interveniens*). If a new act, independent of the defendant's action, occurs and is sufficiently independent, it may stop the imposition of liability on the (first) defendant. If, however, the action occurs as a consequence of the initial breach by the defendant, and the actionable event was foreseeable, the defendant will still be liable. Foreseeability can be seen in the case of *Lamb v Camden London Borough Council*,⁵¹ where the Council had caused damage to the water main that had led to Lamb's house being flooded. The house was uninhabitable and was vacated by Lamb whilst remedial work was carried out. When the house was left empty, squatters moved in and caused damage. Lamb brought an action against the Council for its negligence that resulted in this increased damage. The Court of Appeal held that the Council was not liable as it was not foreseeable that the damage would have occurred, and the Council was under no obligation to secure the property whilst the repairs were being undertaken.

Attempts to mitigate losses will not, in most cases, result in the chain of causation being broken. In *Corr v IBC Vehicles Ltd*⁵² the claimant was the wife of a man who had committed suicide following injuries sustained during an accident at work in a factory. The employer had agreed that it had breached its duty of care (and statutory duty) towards the employee, and the employee had suffered post-traumatic stress and depression, leading to his suicide six years after the accident. The Court of Appeal held that the depression suffered by the employee was foreseeable, and that it was further foreseeable that severe depression may result in suicide. Therefore, the claim was successful as the employee's

⁴⁹ [1961] 2 WLR 126.

⁵⁰ Compare this decision with *Hughes v Lord Advocate* [1963] 2 WLR 779.

⁵¹ [1981] 2 WLR 1038.

⁵² [2006] EWCA Civ 331.

suicide did not break the chain of causation between the defendant's negligence and the consequences of the suicide. The House of Lords subsequently upheld this decision.⁵³

- *The eggshell skull rule*: There exists an obligation to take appropriate care to avoid causing damage that may lead to a negligence claim. However, there is also an obligation to 'take your victim as you find them'. This principle is known as the 'eggshell skull' rule and means that if the victim has a pre-existing condition that is exacerbated by the act of negligence, insofar as the damage is one which the law recognizes, there is no defence to claim that another person would not have been so badly injured. This can be seen in the case of *Smith v Leech Brain & Co.*,⁵⁴ where a workman employed by Leech Brain had been hit on his lip by molten metal whilst welding work was taking place. He suffered a relatively minor burn, which was expected and clearly foreseeable. However he had a pre-cancerous skin condition. This was not known to anyone but was triggered by the burn he received, and he died three years later of the cancer. Smith's widow claimed against the employer, and even though the burn would not have caused the death of most victims, the eggshell skull rule was invoked and consequently Leech Brain were held liable in negligence.

The concept has also been applied to cases of psychiatric injuries.⁵⁵ If the reasonable man would have suffered nervous shock, and the claimant's disposition exacerbates the injury he/she has actually suffered, then he/she will be able to claim for this greater injury, and not be reduced to the injury that would have been suffered by the reasonable man. Lane, J in *Malcolm v Broadhurst*⁵⁶ described it as the 'eggshell personality'.

13.7 Defences to a claim of negligence

Business Link

In the event of a claim of negligence being made against a business, the business may wish to mount a defence. Defences to negligence claims may be complete defences whereby the business asserts it has no liability at all, or they may be partial defences where the business accepts some liability for what occurred, but asserts that the claimant was also partially responsible (the defendant will still have to pay a percentage of the award). Avoiding negligence actions in the first instance appears to be the best solution.

In order to avoid the legal responsibility that a successful negligence claim may provide, the defendant may attempt to raise a defence, the choice of which depends on the nature of the action.⁵⁷ The most common forms of defence are:

- 1 illegality;
- 2 consent;⁵⁸
- 3 contributory negligence; and
- 4 necessity.

⁵³ [2008] UKHL 13. ⁵⁴ [1962] 2 WLR 148.

⁵⁵ See 14.4. ⁵⁶ [1970] 3 All ER 508.

⁵⁷ Such as mistake; and 'privilege' in cases involving defamation.

⁵⁸ In the Latin: *volenti non fit injuria* (no actionable injury/no injury is done to a consenting party).

13.7.1 Illegality

Where the claimant has committed an illegal act he/she may be prevented from raising a negligence action (this is specific to the circumstances of the case). In *Ashton v Turner*⁵⁹ the claimant was unsuccessful in seeking damages against the co-participant who drove the getaway car following a burglary. The car crashed and the claimant was seriously injured. It was held that public policy would not allow the perpetrator of a crime to claim compensation against a co-participant for any injuries sustained in the course of the criminal activities.

However, illegality is a difficult defence to successfully rely upon, especially when involving companies rather than individuals. In *Moore Stephens (a firm) v Stone & Rolls Ltd (in liquidation)*⁶⁰ the House of Lords, in a split 3 to 2 majority, agreed with the Court of Appeal's decision to strike out a claim for damages and accepted an illegality defence. This was due to the effective use of the illegality defence by the defendant. Here a company's liquidator alleged that its auditors had been negligent in failing to identify that the company had been used to perpetrate a fraud. The claim failed, and was struck out by the court, as it was being made by the company itself (through the liquidator) and was relying on its own illegal act when seeking damages. This was, in part at least, because the fraudulent director was the 'controlling mind and will' of the company and hence it would be unfair to allow a claim to succeed where a fraudster would benefit by claiming against auditors who failed to detect his/her own deception.

The decision in *Moore Stephens* may be compared with *Robert Matthew Griffin v UHY Hacker Young & Partners (a firm)*⁶¹ where the High Court refused to strike out a claim brought by Griffin for professional negligence against the defendant accountancy firm. Here the illegality defence failed. Griffin alleged the defendant negligently failed to advise him of an illegal act when a company that he operated went into creditors' voluntary liquidation. Griffin had instructed the accountancy firm to advise him on the winding-up of the company. Following the liquidation, Griffin formed a new company which took over selling a product previously sold by the former company. Such an action contravened the Insolvency Act 1986 s. 216⁶² and Griffin was convicted of a strict liability offence and fined £1,000. As a consequence of this conviction, Griffin sustained various financial losses and he sought damages to compensate him for the firm's negligence. Griffin argued that the firm should have informed him of the illegality of his actions. Due to the complexity of the illegality defence, and its requirement of culpability being demonstrated, a full trial was necessary (particularly here where the offence was of strict liability). This would allow these issues to be fully explored before any conclusion could be drawn as to the likelihood of the success of Griffin defeating the illegality defence.

13.7.2 Consent

Consent is a complete defence to an action in tort but is closely linked with the partial defence of contributory negligence. The defence is available where there has been an express agreement

⁵⁹ [1980] 3 All ER 870.

⁶⁰ [2009] UKHL 39.

⁶¹ [2010] EWHC 146 (Ch).

⁶² This section protected against 'phoenix companies' whereby a director of a company put into insolvent liquidation was prohibited from becoming a director of a new company using the same name without giving notice to the creditors or obtaining the court's permission.

to the particular risk of damage or it may be implied from the conduct of the claimant due to the actions of volunteering (such as acting as a rescuer) or by accepting entering into a situation involving risk (*Morris v Murray*).⁶³ Examples of express and implied consent may be seen where a patient is undergoing surgery and he/she signs a consent form. This express agreement allows the surgery team to perform the procedure without committing the tort of trespass to the person. Express agreement may defeat a claim for damages but these would be subject to the Unfair Contract Terms Act 1977.⁶⁴

Implied consent may be demonstrated in the context of sporting pursuits such as playing contact sports like rugby,⁶⁵ or photographing sporting events in close proximity with the participants. *Blake v Galloway*⁶⁶ involved horseplay between four teenage friends and led to the claimant suffering injury when a piece of bark struck his eye when the friends were throwing twigs at one another. It was held by the Court of Appeal that for the defendant to breach his/her duty of care in unregulated horseplay the defendant's conduct must amount to recklessness or sufficient carelessness or error of judgement.

The defence of consent is not available simply because a party (typically, in a business context, an employee) is aware of the risk of injury at the workplace, and continues to carry out his/her duties.⁶⁷ The courts will not imply consent in such circumstances but will require an outward sign of consent in relation to the inherent risk. The defence is also unlikely to be successful in situations where the claimant has taken action to prevent harm or perform a rescue⁶⁸ and has been injured in the process. This requires the claimant to have acted reasonably in the circumstances.⁶⁹

Volenti may be a defence in employment situations where a deliberate act has been undertaken against the express orders of the employer. In *ICI v Shewell*⁷⁰ the claimant and a colleague, qualified shot-firers, made a test of an electrical circuit for firing explosives without taking the appropriate cover. They were injured and a claim was made for damages. The House of Lords held that this enabled a complete defence by the employer, on both vicarious liability by one claimant and breach of a statutory duty by the other, as they had agreed to take this action knowing the danger. The action was contrary to the employer's instructions and statutory regulations, therefore the claim had to fail.

13.7.3 Contributory negligence

Section 1(1) of the Law Reform (Contributory Negligence) Act 1945 provides:

Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage.

⁶³ [1990] 3 All ER 801.

⁶⁴ See 11.5.

⁶⁵ Note, however, that merely participating in a regulated, physical sport such as rugby does not necessarily mean that the participant agrees to suffer injury and not seek a remedy. See *Condon v Basi* [1985] 1 WLR 866 (a person injured whilst playing football) and *Caldwell v Fitzgerald* [2001] EWCA Civ 1054 (a jockey unseated by a rival).

⁶⁶ [2004] EWCA Civ 814.

⁶⁷ See the House of Lords decision in *Smith v Baker & Sons* [1891] AC 325.

⁶⁸ Particularly when this involves some psychiatric injury—see *Chadwick v BRB* [1967] 1 WLR 912.

⁶⁹ *Haynes v Harwood* [1935] 1 KB 146.

⁷⁰ [1964] 3 WLR 329.

Contributory negligence is a partial defence⁷¹ to a claim where injury has been caused and the claimant seeks damages. It is not only applicable to claims of negligence but is applicable where there is 'fault'⁷² (with the exception to the torts of conversion and deceit). Contributory negligence is only applicable where the claimant was (at least in some part) responsible for his/her damage. A most common example of the defence of contributory negligence is where a person has been involved in an accident whilst driving, and he/she was not wearing a seat belt, or had failed to secure a crash helmet whilst riding a motorcycle.⁷³ In the event that the courts hold the damage was the other driver's fault, the injured party who has suffered substantial injury, when he/she would not have sustained such a level of injury had he/she been wearing a seat belt, will have contributed to his/her own injury. This provides the court with an option to determine at what level of contribution the claimant was responsible, and can reduce any damages awarded. Guidance was provided in *Froom v Butcher*.⁷⁴ Where injuries would have been altogether prevented by wearing the seat belt, the damages should be reduced by 25 per cent. Where the injuries sustained would have been 'a good deal less severe' the reduction should be 15 per cent.

In contributory negligence, the claimant is referred to as having 'contributed to his/her own misfortune' and if he/she has been at fault in any activities that have led to his/her injury, then the court will reflect this in the damages awarded. The Court of Appeal has also held that the claimant may even be entitled to succeed in an action for damages where he/she is 60 per cent liable for his/her injuries.⁷⁵

13.7.4 Necessity

A defence may be available to an action for negligence where the tortfeasor had acted in a way so as to prevent a greater harm occurring. To be successful the defendant must demonstrate that there was imminent danger to a person or to property and the actions taken were reasonable in the circumstances. These are subjective tests that will be assessed by the court (see *Esso Petroleum Co. Ltd v Southport Corporation*).⁷⁶

13.8 Remedies

The remedies that may be awarded for successful claims of tortious conduct include damages and injunctions. The aim of damages is to place the injured party, as far as money can, in the position he/she was before the tort was committed (i.e. compensatory). Damages for personal injury suffered may incorporate any direct losses incurred such as loss of earnings, medical expenses, travel expenses (such as not being able to drive and having to make alternative travel arrangements) and so on. Further losses that may be compensatable include damages for pain and suffering, loss of amenity and so on. These damages are not subject to taxation.

⁷¹ Following the enactment of the Law Reform (Contributory Negligence) Act 1945 (before this contributory negligence was a full defence).

⁷² The Law Reform (Contributory Negligence) Act 1945 s. 4.

⁷³ *Capps v Miller* [1989] 1 WLR 839, where the claimant's damages were reduced by 10 per cent by the Court of Appeal.

⁷⁴ [1975] 3 WLR 379.

⁷⁵ *Green v Bannister* [2003] EWCA Civ 1819.

⁷⁶ [1955] AC 218; [1956] 2 WLR 81.

Where the tortious act involves no real loss to the claimant (such as in trespass to land where no loss or damage has occurred) the court may award nominal damages.

Where the injured party has died as a result of the tort the claim for damages is different from those above.⁷⁷ If the deceased had been financially supporting his/her family, then the dependants may claim for the lost earnings. The claim will also incorporate the funeral expenses. Further, the Fatal Accidents Act 1976 provides that spouses, and the parents of a deceased minor, may make a statutory claim of £11,800.⁷⁸

In terms of damage to property, the damages awarded will be to compensate the claimant for loss, and this will involve the cost of restoration and may involve an element of compensation where a replacement of the goods/property was difficult to achieve. Awards of damages are subject to a requirement for the injured party to mitigate his/her losses where this is reasonable (even where the mitigation leads to an increase in the losses sustained).

Injunctions may be awarded at the discretion of the court and will involve a court order requiring the subject to stop committing the tort. There are a number of tools to provide injunctive relief, which will be awarded depending upon the requirement of the particular tortious act. A prohibitory injunction requires that the defendant ceases the action that is causing the tort; and a mandatory injunction requires the defendant to act to prevent the tort being committed. The claimant may also wish to obtain an interim injunction to prevent a tort being committed and any (further) damage being sustained until the case comes to court. The power of injunctions, as was outlined in the contract chapters, is that it is a court order, and failure to comply constitutes a contempt of court that may lead to a fine or imprisonment.

13.9 Nuisance

When a person unlawfully interferes with another's land, or the quiet enjoyment of the land, then the innocent party may have a claim under the tort of nuisance. In this respect, the claim is of private nuisance as it is concerned with private parties. The reason why this is important for businesses is because the nature of the offence is in creating a nuisance to those affected by it. By way of example, a business may have a manufacturing plant that produces rubber tyres. The business is not unlawful, the activity of producing rubber tyres is not unlawful, but if it makes unreasonable noise, smoke, vibrations and so on, then these may be considered unlawful as they could affect another's use of his/her land. In order to bring a successful claim of nuisance the following features must be present:

- The interference affects the enjoyment of land/premises and this action may be brought by a person with an equitable interest in it; a tenant;⁷⁹ or a person with exclusive possession of land but with no title to it.⁸⁰
- There must be an element of damage associated with the nuisance. The term 'damage' in this area of law is not restricted to physical loss or damage, but can amount to the claimant losing his/her enjoyment of the premises.⁸¹ The law has to balance competing interests

⁷⁷ See the Law Reform (Miscellaneous Provisions) Act 1934.

⁷⁸ Section 1A(3).

⁷⁹ *Hunter v Canary Wharf* [1997] AC 655.

⁸⁰ *Foster v Warblington UDC* [1906] 1 KB 648.

⁸¹ *Leeman v Montagu* [1936] 2 All ER 1677.

when dealing with claims of nuisance, the right for the owner/occupier of land to quiet enjoyment of the property, and the business that has to make some noise/disruption in the processing of the product. The courts will attempt to strike this balance by looking at the unreasonableness of the defendant's behaviour, taking into account such factors as the position of the premises that is causing the nuisance, when it is being conducted, for what duration the nuisance is caused, and what steps have been taken to minimize the disruption. For this reason, many such businesses have located themselves in industrial estates where their activities are unlikely to cause a nuisance in the same way that they would do in a residential area or in the centre of a busy city.

- It must be noted that the motives of the defendant are often relevant considerations in assessing nuisance, and as such, where the defendant has deliberately acted to cause a disturbance, the court will be more likely to hold this action as a nuisance.⁸²
- The court will look towards the reasonable foreseeability of the defendant's action in determining whether a nuisance has been committed. In *Cambridge Water Co. v Eastern Counties Leather*⁸³ the House of Lords held that exercising all reasonable care not to cause a nuisance may not, of itself, remove liability from the defendant. However, they continued that defendants would only be liable for damage that could have been reasonably foreseen.
- Unusually sensitive (hypersensitive) claimants will not generally succeed in an action for nuisance where another person would not have been adversely affected.

? Thinking Point

How does the doctrine of nuisance, and the sensitivity of the claimant, reconcile with the eggshell rule in liability in negligence and for psychiatric injury? What justifications can you make for the differences in approach between nuisance and negligence in this respect?

13.9.1 Defences to a nuisance claim

Defences exist where: a claimant has alleged a nuisance and the defendant can point to a statutory authority, the consent of the claimant, or where the act has continued for over 20 years.

13.9.1.1 Statutory authority

Where a statute authorizes an act that is then subject to a claim of nuisance, the courts will assess whether the claim of nuisance is able to proceed. However, simply because a statute gives a right to perform some action, does not remove potential liability of the defendant. In *Allen v Gulf Oil Refining Ltd*⁸⁴ a statute was passed to build an oil refinery on land to ensure a supply of oil was available, and this was in the public interest. In the building of the refinery, and its operation, local residents complained of the noise and smell of the activities. The House of Lords held that no nuisance had been caused as the statute required that the

⁸² *Christie v Davey* [1893] 1 Ch 316.

⁸³ [1994] 2 AC 264.

⁸⁴ [1981] AC 1001.

oil refinery be built and operated, rather than merely giving the right for the erection and operation of such a venture.

13.9.1.2 Consent

If a party consents to a nuisance, then he/she is unlikely to succeed in an action. This is a complete defence if the defendant can establish that the injured party had accepted the danger of the noise, smell, vibration, or other nuisance, having been aware of its existence. This is a grey area, as merely occupying land in the knowledge of a nuisance will not establish an effective defence of consent. It is the willingness to accept the possibility of the nuisance that is the key element.

13.9.1.3 Prescription

Here, a defence is available where the nuisance has been committed for over 20 years without complaint. It is important that the nuisance has been committed for 20 years, rather than simply the carrying out of that activity for the period of time.⁸⁵

13.9.2 Remedies in nuisance

The main remedies provided in claims of nuisance are a damages action, and an injunction to prevent the nuisance being committed in the future.

13.9.2.1 Damages

The claim in nuisance, as opposed to negligence where damage/loss has been sustained, may not have actually caused any physical loss. As such, the claim is generally concerned with the loss of the enjoyment of the land that the claimant has suffered, or in terms of any devaluation of the land. That is not to say that there will be no claim for physical loss, and indeed in *Cambridge Water Co. v Eastern Counties Leather*, the defendant had used solvents that had spilled onto the floor, seeped through the ground, and contaminated the claimant's water in a borehole. Therefore, as long as the damage is of a type recognized in law, and it was foreseeable, then damages may be awarded for losses suffered.

13.9.2.2 Injunctions

These are a particularly effective mechanism to prevent the defendant from continuing the nuisance. Injunctions are equitable remedies, used at the discretion of the courts, and in cases of nuisance, may be used in addition to, or instead of, a damages award. When an injunction is granted, it is usually suspended to provide the defendant with an opportunity to refrain from further acts of nuisance.

13.9.2.3 Abatement

This is an (exceptional) remedy enabling the injured party to take action to stop the nuisance. It is allowed where to initiate a legal action may be inappropriate, or where immediate action is required. This is commonly seen where an owner of land lops the trees on a neighbour's property. As long as the injured party does not have to go onto the neighbour's land, and he/she, in this example, cut only the trees interfering with his/her land, and returns the trees that have been cut, then this will be an acceptable remedy.

⁸⁵ *Sturges v Bridgman* [1879] 11 ChD 852.



Conclusion

The chapter has considered the torts of negligence and nuisance. Claims of negligence involve the three tests of duty of care; breach of that duty; and consequential damage. Having established these, the courts will then consider the level of damages to be awarded, having taken into account any defences asserted, and the vulnerability of the victim. Nuisance protects the claimant from unlawful interference with his/her property and is a significant factor for businesses running manufacturing/industrial processes. The next chapter discusses equally relevant and important torts to businesses (that can involve very significant claims),⁸⁶ including liability for economic loss in negligence; negligent misstatements; and the liability for psychiatric losses.



Summary of main points

Tortious liability

- Liability is imposed through the civil law and requires, in certain circumstances, for the party to take reasonable care not to negligently or intentionally cause harm.
- Many torts involve establishing 'fault' liability (blame) in order for a claim to proceed. Exceptions to this general rule include vicarious liability and claims under the Consumer Protection Act 1987.
- The Limitation Act 1980 outlines the time limits within which actions must be initiated. Generally, tort actions must be brought within six years of the date giving rise to the action and personal injury claims must be made within three years. The time limits do not begin until a minor reaches the age of majority (18), and further protection is given to those suffering mental disorders.

Negligence

- Negligence involves a breach of a duty to take care, owed in law by the defendant to the claimant, causing the claimant damage.
- The three elements to substantiate a claim consist of a duty of care; breach of that duty; and consequential damage.
- Where a duty of care has previously been held to exist, the threefold test from *Caparo* is unnecessary. In other circumstances, the three sub-tests establishing a duty include: proximity of relationship between the parties; foreseeability of loss; and whether it is fair, just, and reasonable to impose the duty.
- A breach of duty involves falling below the 'reasonable man' standard and exposing the claimant to unreasonable risk of harm.
- The third element in establishing negligence is assessing the consequential damage suffered by the claimant.

⁸⁶ Such as *ADT v Binder Hamlyn* [1996] BCC 808, where ADT claimed damages arising from their acquisition of Britannia Securities Group Plc on the basis of the negligent audit prepared by Binder Hamlyn. The High Court agreed and the sum awarded was £65 million; an even larger claim arose in *NRG v Ernst and Young* [1995] 2 Lloyd's Rep 404 where, whilst the claim for negligence ultimately failed, the damages action was for £400 million.

- There must exist a causal link between the injury suffered and the breach of duty.
- The damage suffered must be one that is recognized by law.
- Not all claimants have to demonstrate loss/damage. Claims under trespass, for example, will often involve the award of nominal damages as no 'real' loss has been sustained.
- To assess causation of damage, the courts will use the 'but for' test—if the damage would not have occurred but for the actions of the defendant, then his/her action is the cause of the damage.
- Not every consequence of a defendant's wrongful action will lead to liability. Intervening acts may remove responsibility if the damage is too remote.
- The 'eggshell skull' rule provides that the defendant must take the claimant as he/she finds them. Hence if the claimant had a pre-existing condition exacerbated by the defendant's actions, the defendant cannot escape liability by asserting that another person so affected would not have experienced the same level of damage.

Defences

- The most common defences to tort actions are illegality; consent; contributory negligence; and necessity.
- Illegality may prevent a claim of negligence where the claimant suffered loss or damage during the course of performing an illegal act.
- Consent provides a complete defence where the injured party has consented to a risk, either expressly or through implication.
- Contributory negligence is a partial defence where the claimant who has been partially at fault for his/her injury (with the defendant being partly at fault) will have any award of damages reduced according to his/her level of responsibility.
- Necessity may provide a defence where the tortfeasor acted to prevent a greater harm, insofar as there was imminent danger and his/her actions were reasonable in the circumstances.

Remedies

- Remedies include damages and injunctions.
- Damages awarded for personal injury include compensation for direct and indirect losses. The aim is to place the injury party in the position he/she was before the tort had been committed (insofar as money can).
- Injunctions are used to prevent the commission of a tort (available at the discretion of the courts). Injunctions are issued on the basis of the particular tort and the injunction may be prohibitory; mandatory; or interim.

Nuisance

- Private nuisance involves unlawful interference with another person's enjoyment of his/her land/property.
- The claimant must have suffered some form of loss/damage due to the nuisance.
- Where the defendant intended to cause the disturbance, the courts will be more inclined to hold that action as nuisance.

- It must have been reasonably foreseeable that loss/damage would have been the result of the defendant's action to enable a damages claim.
- There are several defences to a nuisance action including statutory authority, consent, and prescription.
- The remedies available are damages, injunction, and abatement.

? Summary Questions

Essay Question

1. Cases such as *Bolton v Stone* and *Miller v Jackson* provide examples of the different approaches taken by the judiciary in relation to determining whether a defendant has breached his/her duty to take reasonable care. Describe the tests used to establish the negligence of a defendant and explain how the law has developed to make the exercise of these tests more relevant in the modern era.
2. Critically assess the defences available to a claim of nuisance. Do you feel they are fair or at least adequate and what suggestions could you make for improvements? Justify your answer through a critique of the case law.

Problem Questions

1. All Bright Consumables (ABC) Ltd has recently diversified its business into supplying and fitting quality kitchens and bathrooms. Part of this business involves the company manufacturing its own tiles and furniture to offer the full bespoke service that it believes customers want. Dora is employed by ABC Ltd as a wood machinist operating a bench mounted circular saw. Today, while operating the circular saw Dora caught her right (dominant) hand in the saw's blade, severed four fingers and sliced the top off her thumb. On the day in question, she had worked a 12-hour shift and for the last six hours of her shift, her supervisor, Abe, asked her to lend her push stick (which she had been told she should use for feeding small pieces of wood into the machine) to a colleague. At the time of the accident, she was working on an urgent job which had to be completed that day for fitting by ABC's bathroom firm the next day. Dora admitted that while working she had been distracted and had been chatting animatedly to another colleague.

Consider the negligence liability (if any) of ABC Ltd.

2. Julie is a teacher at a school under the control of Redmount Borough Council. Her duties include preparing classes, administering examinations and assessments, and she has to provide pastoral care to the pupils and care for the pupils when involved in various extra-curricular activities. Recently a new headmistress was appointed to the school. The headmistress has put into effect a new regime whereby each of the members of staff are to be appraised and offered 'guidance' on how to meet the minimum standards required by the new head.

As part of the process Julie was informed that her academic performance could be stronger and was required to undertake more reading of academic journals. She was required to prepare at least two staff seminars each academic year where she would present papers based on her research or critical reflection. Julie has also been told that she will have to cover for any sick colleagues and therefore must prepare outline materials in an additional three subject areas in readiness for such an eventuality, and her responsibilities for the extra-curricular activities are to be increased. All of these

requirements have been imposed on her with little or no negotiation and she will not receive any additional pay or gain promotion. They are required if Julie wishes to continue her employment at the school.

Julie attempts to perform these duties but is struggling to cope with the demands. She has been working 65 hours per week to accommodate the additional responsibilities (her contract of employment only requires 38 hours per week) and she is showing obvious physical signs of stress. Julie raises the issue of stress, and that she feels bullied, with colleagues and the headmistress, but is told that she must successfully complete the work set or her contract will be terminated. Two weeks later Julie was hospitalized due to the stress and was away from work for one month.

Upon her return to work, the headmistress had promised to reduce the workload of Julie but this did not happen. Three weeks later Julie suffered a nervous breakdown.

Advise Julie as to any claim of tortious liability against the school.



Further Reading

Moran, M. (2003) 'Rethinking the Reasonable Person: An Egalitarian Reconstruction of the Objective Standard' Oxford University Press: Oxford.

Morgan, J. (2006) 'The Rise and Fall of the General Duty of Care' *Professional Negligence*, Vol. 22, No. 4, p. 206.

Neyers, J. W., Chamberlain, E., Stephen, G. A., and Pitel, S. G. A. (Eds.) (2007) 'Emerging Issues in Tort Law' Hart Publishing: Oxford.

Patten, K. (2006) 'Limitation Periods in Personal Injury Claims—Justice Obstructed?' *Civil Justice Quarterly*, Vol. 25, July, p. 349.



Online Resource Centre

www.oxfordtextbooks.co.uk/orc/marson2e/

Why not visit the Online Resource Centre and try the multiple choice questions associated with this chapter to test your understanding of the topic. You will also find any relevant updates to the law.

