White v Chief Constable of South Yorkshire Police 1999 HL → **Nervous shock/secondary victim, rescuer principle**

The police officers involved in the Hillsborough tragedy tried to gain compensation for the nervous shock they sustained as a result of helping people during the course of the tragedy. Page v Smith solidified the architecture of primary victims vs. secondary victims, so here the police officers would be limited by the control mechanisms in Alcock, unless something in their position as police officers distinguishes them from ordinary bystanders.

Can the police officers sue for nervous shock despite being restricted by the *Alcock* control mechanisms?

Architecture of the law?

- The police officers did not fit the rigid architecture set out in *Page v Smith* for primary victims (as were not actually in risk of physical danger due to being on the other side of the pens, weren't at risk of dying in the human crush)
- Therefore would be secondary victims: but then limited by the *McLoughlin v O'Brian* control mechanisms (relationship proximity)
- **Do not meet criteria for secondary victims**: if allowed, it would expand the circumstances to claim compensation for psychiatric harm too far (e.g. to doctors etc), and also because the court was "uncomfortably aware" that the relatives in *Alcock* were denied compensation (doesn't seem fair to award compensation to police)

Employee/rescuer exception application to police officers?

- **Employees:**
    - **Steyn:** employers do owe a DOC, but this is determined by what they are obliged to provide under tort law. Under tort law, compensation for psychiatric harm is only given in relation to physical danger (*McLoughlin v O'Brian)*. Therefore they could not recover.
- **Rescuer principle:**
    - **Steyn:** The threshold of the rescuer principle is that they have to objectively expose themselves to danger (essentially **no rescuer principle, as this would make a rescuer a primary victim**). E.g. *Chadwick*
        - Police officers were not in physical danger, so cannot recover
    - **Goff (dissent):** *Chadwick* allowed compensation, what was important in that case (man helped after train crash) wasn't the danger of physical harm but the "horror of the whole experience". Seems arbitrary to erect an artificial barrier against recovery here (what if there were two brothers rescuing people on train, and one part of the train was more unsafe than the other?). Therefore, this danger shouldn't matter.

Held for defendant: did not allow compensation for police officers due to not meeting the requirements under the control mechanisms.

Policy considerations:

Steyn comments on how messy and unfair the law around nervous shock is becoming: it seems really unfair that the bereaved relatives didn't get compensated in *Alcock,* and really sad that the police officers here couldn't get compensation.

- Steyn says two things can be done: either to wipe it out all together or abolish all the control mechanisms: **attempts to direct Parliament's attention to law reform**

Lord Goff (dissenting)

- **Goff disagrees with employer argument:** the point of law is determining who has a particular right of recovery.
    - *McLoughlin v O'Brian* stretched the law to allow cover for extra people, whereas *Alcock* attempted to stop liability to restrict claims made by the general public.
    - While it makes sense to limit for the general public; the police officers are distinct from the general public; and we shouldn't need the same control mechanisms for employees (as not same problems of limiting liability) i.e. the illogicalities exist for a purpose.

The police officers were denied compensation for claims of nervous shock, as they did not meet the proximity in relationship requirements needed for secondary victims. There are no exceptions for employees or rescuers. Here, the exception for employee was not accepted as it opened up liability too greatly, and the rescuer exception was not given as the police officers were not in foreseeable danger.

Ultimately, the court was limited by the tight architecture of the law for nervous shock. Goff's dissent attempted to allow compensation for both employees and rescuers. In terms of employees, the policy concerns should not matter as they are a distinct group from the general public. In terms of rescuer, it was too arbitrary to draw a line saying danger is needed.

Toomey v ACC 2017 DC → **Nervous shock/secondary victim, rescuer principle, ACC**

During the Christchurch earthquake, Toomey used his building skills to be of assistance at the PCG building. As Toomey was not employed when he was volunteering his building skills, he was not able to be covered under ACC for his subsequent mental injury sustained for being involved with the experience.

Can Toomey be covered for mental injury under ACC, given that he was volunteering rather than being in employment?

ACC legislation:

- 1992 removed cover for mental injury except in three limited situations:

1. Mental injury caused by physical injury to the person
2. Work-related mental injury 21 (b)
3. Caused by certain criminal offending s 21

Section 21B: Work-related mental injury

(1): Must be a) In New Zealand b) A single event of the kind described in ss (2)

(2): Must be a) directly experienced in circumstances described in s (28) (1)

Section 28 (1): "at any place for the purposes of his or her employment"

- Here, Toomey fails as he was **volunteering**
    - Seems unfair, considering the civil defence workers he was working alongside were able to recover and he was not, also that he was paying his own employee for the time spent at the PCG building and this employee would be able to cover

Held for Toomey

- He was requested to assist by the Fire Service, so at this time he became an agent of the Fire Service (co-opted as a builder rather than a random volunteer)
- He was also a shareholder of his own business: he didn't pay for his own time, but paid for the time of his employee (he was receiving dividends etc.)
    - Not necessary to establish pecuniary gain for purpose of employment e.g. branding exercise can bring in profit without physical building work happening
- Intent of legislation is not to deprive Toomey

Purpose of ACC

- Shouls be to allow Toomey to recover: treat like people alike
    - "Generous, unniggardy approach" favoured by Elias CJ to uphold the integrity of the scheme
    - As seen in Davies, Allenby, Harrild
- We also *want* someone like Toomey to recover, it shouldn't be a disincentive for someone to cooperate in times of emergency
- ***Counter-argument:*** Parliament specifically chose these words, cannot read something into or out of the statute
    - Argument that ACC was to cover employees providing assistance as part of being 'on call' (we don't consider a builder as being on call)

A builder who volunteered during the Christchurch Earthquake was able to recover work-related mental injury as he was at the PCG building for the purposes of his employment. In order to recover as a volunteer, it is necessary to be using employment skills, such as Toomey using his building skills.

Elias CJ's favoured "integrity approach" was favoured here, allowed a wider interpretation of s 28 (1) in order to allow a volunteer to recover.

Queenstown Lakes District Council v Palmer 1999 COA → **Nervous shock/secondary victim, whether barred by ACC**

Mr and Mrs Palmer were visiting NZ from the US and took a rafting trip. The raft capsized, and Mrs Palmer died. Mr Palmer suffered serious mental injuries as a result and sued for compensatory and exemplary damages. The 1992 Act reduced the cover for mental injury, and now the question is whether claims for pure nervous shock can be brought.

Could Mr Palmer sue for compensatory damages, or would this be barred by ACC?

1992 legislation reduced cover for mental injury in order to create a "fairer scheme". The push-pull effect is that when cover is reduced for compensation, it also reduces the cover of the statutory bar.

Palmer's argument:

- Proposition was that Mr Palmer did not receive any compensation from ACC and therefore should be able to sue
    - Anomalies would arise if he was not allowed to recover (e.g. not allowed compensation under ACC or damages at common law; if his wife was merely injured he could sue for damages but not if she died – old doctrine of tort damages dying with the person; and would be able to bring a common law claim if it was his own experience)
    - Would be able to recover in a common law jurisdiction (e.g. meets the Alcock control mechanisms for secondary victims)

Held for Palmer, not covered by ACC

- Palmer not covered by compensation because his condition is purely mental injury
- Thomas J: Parliament has the right to change parts of the common law, including the right to sue (which is a fundamental right)
    - However, they have to use express language if they want to do so: cannot be done through creative interpretation etc.
- Therefore, as express language was not used that made clear that Palmer fell into the scheme for his pure mental injury, he is not barred from bringing a common law suit.

Conflict with integrity approach

- Elias CJ favours stretching the act for coherence and treating people alike
- Thomas J interprets in a way more concerned with Parliamentary intent and that Parliament would have expressed their intent explicitly and clearly
- Could be interpreted as a breach of the overall social contract
    - Inconsistent with Allenby (wide and generous interpretation of pregnancy being a gradual process disease), expanding the meaning to uphold the integrity of the scheme, stops people from suing doctors
        - Integrity approach could have been to say that this arose "indirectly" out of the wife's personal injury and thus he would have been covered by the scheme

Created an incoherency in the law: we allow suits in pure mental injury, but do not allow suits in personal injury. Thomas J's interpretation shows us that you need express language to take away rights. Difficult for new Parliamentarians to alter the law if express language must be used all the time. (Conflicts with Allenby).

Sivasubramaniam v Yarrall 2005 HC → **Nervous shock/primary victim, ACC, apportionment**

Plaintiff was in a car accident caused by Yarrall, suffered severe physical injuries, an abortion and significant mental harm as a result. Doctor was unable to separate all the factors that resulted in her PTSD (also involved factors not relating directly to the physical injuries sustained in the accident).

Can Sivasubramaniam sustain a common law claim for mental harm as not all factors of this harm was caused directly by physical injury i.e. covered by ACC?

ACC legislation:

Section 26 (1) (c): Personal injury means the mental injury suffered by a person because of physical injuries suffered by the person

- Here, it also included other factors (the trauma of the unborn child dying, the death of her mother, the breakup of her marriage after the accident etc.)

1992 legislation: reduced cover for mental injuries

- Palmer: allowed people to sue for mental injury where not directly related to any physical injuries (not covered by ACC)
- Brownlie endorsed an 'apportionment' approach

Held for plaintiff:

- Can continue her common law claims from the causes other than the physical injury and the death of the unborn child)
- Apportionment approach: allows separation of some factors which are covered, and some which are not

Strong criticism of Yarrall

- Factors discussed:
    1. Death of unborn child: *Harrild*, cannot sue for death of unborn child as is treated as personal injury to the mother
    2. Physical injuries: covered by ACC
    3. Subsequent loss of financial stability post loss of marriage: Sceptical as to whether this is a legal claim?
    4. Trauma of knowing accident was about to happen: Very hard to distinguish between this trauma and the overall trauma of the accident (as a result of physical injuries), allowing apportionment would open to the floodgates to a number of claims
    5. Death of mother: possibly, would put plaintiff in a position of a secondary victim suing
- Is it possible to use an apportionment approach?
    - Integrity approach: should treat as all one accident, should not be a primary victim in some factors and a secondary victim in others (inconsistency)
    - People that are not injured (e.g. *Palmer*) may be able to get more compensation, seems an arbitrary distinction
    - Only possible to resolve through statute: which seems really complicated, easier to take an integrity approach and interpret as one

Brownlie: where the pathology slides were misread, and patients tried to sue for undue stress of thinking they had cancer. Misdiagnosis covered under ACC, but the women hadn't actually suffered from cancer

- i.e. not a recognisable psychiatric illness, would not be allowed in another common law jurisdiction
- Yarrall now tells us that potential ability to bring one of these claims:
    - Though *Rothwell* (stress not enough), *Page v Smith* (triggering of Chronic Fatigue Syndrome)
- Primary victims need to establish something outside of the normal prohibition on worry, upset, stress or grief

Yarrall held for the plaintiff, adopting an apportionment approach where the factors of the mental harm covered by ACC were barred by s 317 (physical injuries of the accident, death of unborn child), but the factors outside the scheme could be the subject of a common law claim.

Strong criticism of Yarrall as opposing the integrity approach by arbitrarily distinguishing between different factors of mental harm, potentially opening up the floodgates to many similar claims.

Van Soest v Residual Health Management 2000 CA → **Nervous shock/secondary victim, control mechanism application to NZ**

A number of patients died due to the negligence of a surgeon. Palmer and Yarrall established that any mental injury not covered by ACC is open to common law claims. The relatives pursuing a common law claim for the mental harm suffered as result. The question in the case is whether the Alcock control mechanisms will be applied in a New Zealand context.

Can the plaintiffs successfully recover for nervous shock as secondary victims?

***Control mechanisms*:**

1. Nature of mental suffering
2. Physical proximity
3. Relational proximity

- New Zealand follows *Alcock* in applying this categorical test: but **adopts with some flexibility**
    - e.g. in relation to physical proximity: *McLoughlin* said that a secondary victim had to either be at the accident of in the "immediate aftermath": here, the aftermath did not matter as much
        - Kirby P argument that foreseeability and proximity were sufficient, else would be "hopelessly out of contact with the modern world of telecommunications): hearing by telephone or skype could be just as foreseeably shocking, direct emotional involvement just as important as physical presence at the scene or in the aftermath
    - Relational proximity: *Alcock* had strict relational proximity requirements (had to prove that the relationships were of a close and intimate level, e.g. Brian Harrison not being able to prove closeness with his brothers)
        - Here, Blanchard J goes slightly easier on this, as long as the relationship is close and loving
    - Need to prove that they suffered a **recognisable psychiatric illness:** suffering more than expected to suffer in this life (ordinary phlegm argument)
        - Consistency with ACC

Held for defendant as plaintiffs were not able to show that there suffering and grief was a recognisable psychiatric illness, adds this as an extra control mechanism to the *Alcock* tests for NZ courts.

Blyth v The Company of Proprietors of the Birmingham Waterworks 1856 Ex Ch→ **Reasonable person standard**

Birmingham suffered an unprecedented frost, which caused a pipe in Mr Blyth's house to burst and which flooded the house. The pipes were not of sufficient calibre or quality to deal with a frost of that severity.

Was the Waterworks guilty of negligence in laying the pipes?

The reasonable person standard

Negligence: the omission to do something that the reasonable person would do

- Reasonable person: takes account of all the reasonable steps expected of them
  - Not ultra-cautious, just normal
- The reasonable person would have acted in reference to the temperature in ordinary years
  - The pipes that caused the flooding were laid taking account of ordinary frost and adequate precautions were taken in relation to this
- **Only need to take account of reasonable risks**
  - Not negligent just because they didn't take account of an extraordinary weather condition that could not have been expected

Why have the reasonable person standard?

- Avoids imposition of strict liability on defendants:
  - Especially in situations where unprecedented events occur
  - Can create technicalities
  - Raises price for consumers (as manufacturers etc. have to account for *all* risks rather than just *reasonable* risks)
  - Can seem morally wrong to impose liability in some situations

Held for the defendant. Under the reasonable person standard, a person is only negligent if they fail to account and take precautions of the reasonable risks faced.

United States v Carroll Towing Co Inc 1947 F 2d→ **Negligence/HAND FORMULA**

Unattended barge sank after the defendant failed to retie it after they had moved it. The bargee in charge had left the boat unattended, question of whether he was guilty of contributory negligence in breaching his duty of care.

Learned Hand formula:
B < PL = negligent
B: the burden of taking adequate precautions
P: the probability that something bad will happen
L: the gravity of the resulting injury

- **Here, P** was the likelihood that the boat would break from its fasts, **L** would be the injury/damage done: **PL** would vary with the place and time e.g. whether the harbour was crowded or a storm was brewing etc.
- This influences **B**: whether the bargee should go ashore or not

In this situation, **P** was exacerbated given it was war-time and the harbour was busy, so it was likely that boats would be moved or affected as a result. **L** was the ship floating away. The **burden** of being aboard was heightened to reasonable daylight hours, though temporary leave would be acceptable.

- The bargee was away for 21 hours: therefore negligent (B < PL)

Is this result just?

- Perhaps works for property, question of whether it can or should apply to people
- Humans are invaluable, should be hesitant to put a value on them

Watt v Hertfordshire County Council 1954 CA→ **Reasonable person/ human life**

Plaintiff was a firefighter, received an emergency call that a woman was stuck under a car 200 – 300 yards away. In order to rescue her, they required a jack but this required a tender which only one of the station's vehicles was fitted with. This vehicle was not available at the time, and usual protocol would be to ring a nearby station who did have an appropriate tender. The officer in charge instructed them to carry the jack without the tender on another vehicle. On the way, the driver hit the brakes suddenly and caused the jack to become unstable and harmed the plaintiff.

Duty of care

- Alleged that the duty of the defendant was to have a vehicle fitted to carry a jack at all times; or otherwise should have called a nearby station
- In this situation, calling the nearby station would have added an additional 10 minutes to an emergency situation
  - Officer did the reasonable thing: no duty to have a car fitted at all times or not to use the jack for a short journey of 200 – 300 yards
  - *Resource allocation issue, station could not afford multiple tenders*

Denning LJ: must balance the risk against the measures necessary to eliminate the risk

- Saving a woman justifies taking considerable risk

Hand formula

B: woman dies or loses limb

P: they were only driving a short distance, so less likely to be an accident

- Therefore, judge's believe the risk is worth running given it could save a life

Issues in application

- Fireman's life is more valuable than the cost of an additional lorry
- This was an unnecessary risk, shouldn't expose firefighters to risk due to having improper equipment
  - Taking advantage of heroic personalities
- Uncomfortable idea that firefighters are the ones that pay the price
  - Under ACC, would be covered

Held for the defendant. The risk of the woman losing a limb or dying justified running the risk of driving the jack without a tender, as it was for a short distance.

Bolton v Stone 1951 HL→ **Reasonable person/reasonable risk**

A cricket ball was hit out of the grounds and hit the plaintiff, who was walking on the pavement outside the pitch. The plaintiff then attempted to sue for a breach of their duty of care.

Hand formula
L: someone getting injured by a cricket ball, potentially very dangerous
P: low probability of occurring, some 6 injuries in 30 years. In order for the L to occur, the ball would have to bit hit out of the pitch, and someone would have to be walking past at that exact moment.
B: in order to avoid this, the defendants would either have to build a very large fence around the pitch and add to it each time a person is injured, or stop playing cricket at the pitch all together.

- i.e. **B > PL, no liability**

Held for the defendant:

- People are allowed to take small risks
  - It is inescapable that even the most careful person creates and accepts some risks
  - Playing cricket created a small risk, and the plaintiff has to accept that as a part of life

Avoids strict liability

- Seems unfair to the plaintiff, but what happened was an extraordinary experience
  - Would be more unfair to hold the defendants to account for it by stopping any cricket from being played in future to account for it in light of how small the risk is for a serious injury occurring

The probability of someone being hit by a cricket ball was very unlikely. The burden of adequate precautions to stop this risk from occurring was quite significant (stopping cricket from being played at the pitch), and the low likelihood of an injury occurring did not justify this.

Small risks are an inescapable part of life that people have to accept.

Overseas Tankship (UK) Ltd v The Miller Steamship Co Pty (The Wagon Mound) (No 2) 1967 PC→
Reasonable person standard

The Wagon Mound a ship, onboard which engineers had been careless resulting in a spillage of oil onto the surface of surrounding water. The wharf owners were doing work on the respondent's boat (Overseas Tankship) but there was a low probability that the embers from this welding would alight the oil due to the open conditions. In Wagon Moun (No 1) (ship vs. wharf owners), it was found that the engineers on Wagon mound could not have reasonably expected that the oil would catch afire.

Bolton v Stone precedent

- Established that really small risks are part of life
  - But this doesn't mean you can automatically disregard a risk if it is small, **you can only ignore a risk if it involves considerable expense to eliminate it in relation to its size**
  - E.g. Bolton v Stone: stopping cricket at the pitch would have have involved significant cost; in comparison to the low risk of someone being injured
- Here, the reasonable engineer would have realised that there was a real risk of the oil catching afire and that would have caused serious damage to the wharf
  - Given how significant this risk was, they should have taken steps to stop it

Additions to the reasonable man standard

- If there is a real risk, the reasonable man would take steps to eliminate it
  - Even if that risk is small, the reasonable person would not just dismiss it, they would attempt to take some action (especially if it is easy to prevent the risk)

Held for the defendant, as a reasonable person would have known that there was a real risk of the oil on the water catching fire in some way and would have taken steps to prevent that. The Chief Engineer aboard the Wagon Mound failed to do so, and thus breached his duty of care.

Consistency with Bolton v Stone

Wagon Mound questions why a reasonable person would neglect small risks if eliminating them presented no difficulties or expense. Therefore, **Bolton v Stone does not establish a principle that small risks can be ignored, but rather that the risks must be balanced against the defendant's purpose in carrying on its activities and the practicability and cost of taking precautions.**

Goldman v Hargrave 1967 PC→ **Reasonable person standard**

During an electrical storm, a tree on the appellant's property caught fire. The appellant called for a tree feller but took measures to stop the fire spreading until the feller arrived. The tree was cut down but was still burning, so the appellant decided to let it burn out instead of using water. A few days later, the fire revived and spread onto the respondent's property,

Was the appellant negligent because the action needed to put the fire out properly was within the resources and capacity of the appellant, and the reasonable person would have put the fire out with water?

Applying precedent

- Carroll Towing: The burden of putting the fire out was relatively small (water on tree) in comparison to the large injury of damage to the properties, and the likelihood of that occurring given the changes in weather. Therefore B < PL, which would find the appellant liable.
- Blyth: to account for reasonable risks, reasonable that the fire may have caught alight and therefore the appellant should have put it out completely

Addition to law

- Must also give consideration to whether the appellant had the resources or capacity to put out the fire
  - A person is not liable unless it is clearly proven that they could have done more according to their own individual circumstances

Held for the respondents, as the appellant should have put the fire out completely given the significance of the likely damage to the property and because putting the fire out properly was within his resources and capacity.

Tomlinson (FC) v Congleton Borough Council Ambros 2007 CA→ **Reasonable person**

Tomlinson dived into a mere and suffered a terrible neck injury. He then tried to sue the Council for not preventing him from diving into the pond, given it was Council land. Question of given that there was a foreseeable risk of foreseeable injury of people diving into the mere and hurting themselves, whether the Council was under a duty to prevent that from happening.

Finding liability depends on assessing the likelihood of injury and also of the social value of the activity which gives risk to the risk and cost of preventative measures.

- E.g. Bolton v Stone: cricket club was found not liable for injuring someone, but this contrasted to Wagon Mound where they were carrying on a lawful and socially useful activity (and would have had to stop playing cricket)

Hand formula

P: Risk of drowning, injuries sustained etc. in the water

B: Cost of preventing said to be £5000 (seems small)

- Small burden is misleading: does not include the social value of prohibiting these activities to eliminate all risk, Council would have to fix every place where this was a risk (e.g. all ponds and beaches)
- Social burden: the Council does not have the jurisdiction to decide all the risks that people take
  - People have to accept responsibility for the risks they choose to run
  - E.g. Tomlinson freely and voluntarily undertook the diving despite it involving some degree of risk
- Consideration of freedom is critical here: if they found liability for the Council, then the Council may have to take drastic action to close all meres/beaches etc. Lord Hoffman gave the example of parents and children enjoying access to beaches, and that this freedom shouldn't be restricted due to some irresponsible people

Held that the Council did not breach a duty of care because there is a social value in allowing people to do as they want. Making the Council liable would be restricting on the free will of other people who do not take such risks such as diving. i.e. the reasonable person would run this risk as the alternative would be to close all ponds and beaches.

Shows the wisdom of Woodhouse: under ACC, we accept responsibility for things going wrong, and find a way to care for "unlucky" ones such as Tomlinson under a no-fault scheme.

Bolam v Friern Hospital Management Committee 1957 QB→ **Reasonable professional**

Bolam was undergoing ECT shock treatment for depression, and suffered a fracture as a result of a muscle convulsion during treatment. He sued the hospital, saying that he should have been given a muscle relaxant or been more fully restrained.

Reasonable person standard

Used in situations involving an ordinary person with no special skills or competencies

- Different for a professional (e.g. Doctor)

Reasonable professional test

Is the decision supported by a reasonable body of professionals at the time?

- ECT shock treatment backed by medical opinion
- Restraining: two schools of thought re restraining, but still medical backing for the Dr's preferred treatment

Yes, held for defendant as the reasonable professional would have taken the same course of action

Issues with test

- Even if there is a respectable group of people holding an opinion, it can still be wrong
  - Doctors can hold wrong views
  - Leaves it up to the profession to determine what the standards and law is: delegates the decision whether an act or omission is negligent to the defendant's profession rather than judges
  - *ter Neuzen confronts this issue*

Bolam distinguished between the reasonable person test and a new test for the reasonable professional. This recognises the additional skills, knowledge and expertise that a reasonable professional has, and solves the issue of imposing the test of an ordinary person without these skills. The test for the reasonable professional is whether the decision is supported by a reasonable body of professionals at the time.

However, this leaves the decision of negligence and thus the law up to the profession rather than judges.

ter Neuzen v Korn 1995 SCR→ **Reasonable professional, modification**

The appellant became infected by HIV as the result of an artificial insemination procedure by the respondent physician. The respondent had a screening process for semen donors involving asking their sexuality and conducting blood tests (but not for HIV). Closer questioning and follow-up interviews with donors may have revealed that the donor was bisexual, and in a high risk category relating to the transmission of STDs (which HIV was considered to be at the time). The issue here is whether the courts could find the standard of professionals was too low.

Reasonable professional test

Is the decision supported by a reasonable body of professionals at the time? (*Bolam*)

- **Issue:** under what circumstances will a professional standard be judged negligent?
  - Where the practice does not conform with basic care
  - Cannot be for circumstances where specialised and technical knowledge is needed (out of the scope of the court)

Modifies the Bolam test: allows courts to question the practice accepted by the professional body, and judge whether this standard is too low or negligent

Held for the appellant, allowed a follow up trial for the jury to judge the professional standards for negligence.

Must judge defendant by standards of time the case was heard

- Lord Denning: "must not look at a 1947 accident with 1954 spectacles
  - Should not judge doctors too harshly with hindsight analysis for acting in accordance with the medical knowledge and standards of the time
  - i.e. here doctor was not negligent for not knowing that HIV could be contracted for AI as no-one knew at the time

Barnett v Chelsea and Kensington Hospital Management Committee 1969 QB→ **Damages/causation**

Three men were suffering from arsenic poisoning in their tea. Came to hospital and told the nurse that they'd been vomiting for 3 hours. The nurse phoned the duty doctor who recommended that the patients go home and phone their own doctors. The men later died.

Was the doctor negligent in not diagnosing/treating their condition?

Duty of care

- A doctor owes a DOC to take reasonable action for a patient that has come to the hospital with severe vomiting symptoms

Breach of duty of care

- Doctor did not take reasonable care expected, the reasonable body of professionals would have done something in these circumstances (*Bolam, ter Neuzen*)

Damages

- Question of causation?
  - 'But for' test: but for the negligence, the patients would have died anyway; no reasonable prospect of being given the antidote in time

Held for the defendant. In order to establish negligence, the defendant needs to show that there is direct causation between an injury and the defendant's action. Here, despite the doctor being grossly negligent by not seeing the patients, he did not cause the arsenic poisoning and but for his negligence, the deaths would have occurred anyway.

Overseas Tankship (UK) Ltd v Morts Dock & Engineering Co Ltd (Wagon Mound No 1) 1961 PC→ **Damages/remoteness**

Through the careless of the appellant, oil was allowed to spill into the harbour. The oil caught fire nd damaged the respondents nearby wharf.

Were they negligent in allowing the oil to spill into the harbour, and therefore liable for the damage caused in the boat being harmed?

Duty of care and breach of duty of care were satisfied; came down to a question of damages.

Damages

- Law prior to Wagon Mound did not require the foreseeability of harm; only that the loss is a direct consequence of the action
  - *Polemis:* stevedores dropped a plank, which caused a spark, which then ignited petrol vapour, and led to the ship exploding. It was reasonably foreseeable that there would be damage to the ship after dropping a plank, but not the igniting of a spark.
  - *Precedent* set was that if a person is found guilty of negligence, then they are guilty of all the consequences of that negligence (regardless of whether they are foreseeable or not), as long as the consequences are a **direct result of negligence.**
- Wagon Mound No 1 **changes this law**
  - Doesn't make sense that any small act of negligence may mean is liable for not only small foreseeable consequences, but also really serious and unforeseeable consequences: merely because it can be established that they are direct. Too harsh.

Damages - new test of remoteness: must be foreseeable harm

- **Some kinds of damage are simply too remote, and not linked enough to the action/omission**
- *Polemis:* it would have been foreseeable that harm would be caused by dropping a plank, but not foreseeable that this would cause a ship to explode.
- Here, dropping oil in the ocean would foreseeably cause some harm (i.e. pollution) but not foreseeable that this would destroy an entire wharf.

Defendant was not liable for negligence, as the damages to the wharf were too remote from the negligence of allowing the oil to spill into the harbour. It was not reasonably foreseeable that allowing this oil to spill would then cause the entire wharf to be destroyed.

Introducing the concept of remoteness limits liability based on a person's knowledge; or foreseeability. If a person does not have knowledge that something will happen as a result of their actions, or it is not reasonably foreseeable, then they cannot be held liable.

Hughes v Lord Advocate 1963 HL→ **Damages/remoteness**

A paraffin lamp had been set up to warn pedestrians of a nearby manhole. Some boys had been playing with the paraffin lamp, and knocked it over. This caused the paraffin vapour to ignite with the flame and caused an explosion resulting in the boys being injured. Argument that the explosion was not a reasonably foreseeable result of the lamp being set up (following Wagon Mound) so would allow defendant to escape liability.

Is it reasonably foreseeable that the defendant setting up a paraffin lamp would lead to an explosion? (i.e. is damage too remote from the negligence of the defendant?)

Duty of care

- Must take appropriate care if it is reasonably foreseeable that someone could be harmed (*Donoghue v Stevenson)*
  - It was reasonably foreseeable that someone could fall into the man-hole and be injured, thus the paraffin lamps were put out to warn people
- Specific DOC to children
  - Presence of children should have been anticipated given it was a Saturday and the lamps were lit on a public street
  - Reasonably foreseeable that children would be allured to the light of and would play with them lamps, and they could be in danger of causing harm to themselves, potential danger of burning accidents

= Satisfied the tests for establishing DOC

Breach of duty of care

- Did the actions of the defendant create an unreasonable risk of harm?
- What would the reasonable person do (*Carroll Towing, Hand formula)*
  - The social cost/value of the children's lives was very high, and it was likely that they could play with the lamps and cause harm to themselves. Therefore, the defendant should have taken more caution to prevent this happening. i.e. B < PL.

= Satisfied the tests for establishing a breach of DOC

Damages

- Causation
  - But for test: but for playing with the lamp, the children would not have been injured
- Remoteness
  - The extent of the injury and the way it occurred (explosion) was not foreseeable
    - But burning injuries generally were foreseeable
  - It is not necessary for the precise details of an accident to be reasonably foreseeable, just the overall accident
    - It was reasonably foreseeable that the light would allure children to play with the lamp and that it may tip over, the paraffin could spill and be ignited by flame causing burning injuries
    - The explosion itself was just one way that burning could have been caused
- **Just need to foresee the kind of damages (burning injuries) rather than the actual damage (explosion)**
  - Kind of injury rather than extent of injury

= Satisfied the tests for the damages

Held for the appellant as though the actual explosion was not foreseeable, it was foreseeable that burning injuries generally could occur as a result of leaving the paraffin lamp out. The defendant was liable for this negligence.

.

Wagon Mound established that liability can only be imposed for damages which are reasonably foreseeable as a result of a breach of a duty. Hughes v Lord Advocate establish that it is the *kind* of things which are reasonably foreseeable rather than *actual* things. (Easier to recover).

Stephenson v Waite Tileman Ltd 1973 NZCA→ **Damages/remoteness/eggshell skull**

The plaintiff was employed by the defendant. He was working with a rusty wire rope, and cut his hand. He then became very ill and dehabilitated, as the cut had become infected and led to brain damage. He then sued the defendant for negligence.

Does it make a difference for the remoteness of damages if a plaintiff had a pre-existing condition that led to the outcome?

Damages

- Question of remoteness:
  - The cut on the hand was an injury of a kind that was reasonably foreseeable
- But what happens if the plaintiff has a pre-existing condition leading to the outcome? Seems to conflict with the type of harm having to be reasonably foreseeable?
  - Question of eggshell skull cases: Wagon Mound comes in conflict with the long-standing principle that you take a victim as you find them
- *Smith v Leech Brain*
  - Plaintiff was injured by molten metal and contracted cancer as a result. The employer was negligent in not providing adequate protection for working with molten metal. The plaintiff's lip was in a pre-malignant condition that made him more susceptible to cancer.
    - However, the burn and subsequent cancer was the kind of damage that was foreseeable. That his lip was pre-malignant was irrelevant, as this impacted on the extent of the injury (perhaps being more severe) than the injury itself.
    - Therefore, not inconsistent with the eggshell skull principle, as the cancer resulted from the initial injury rather than any prior increased susceptibility.
    - Though the cancer was unforeseeable, the defendant was still liable as related to the kind of damage and extent of the damage (as opposed to the eggshell skull principle).
- *Tremain v Pike*
  - Plaintiff contracted a rare disease which the defendant was not made liable for
    - However, not inconsistent with *Smith v Leech Brain*: as the way they contracted the disease was impossible to have foreseen

Held for the defendant. The test of foreseeability is limited to the kind of injury rather than the extent of an injury. The defendant was only liable for the kind of injury which was reasonably foreseeable from working with a rusty rope, which would be the cut rather than the brain damage (related to the extent of the damage).

This test of reasonable foreseeability for the remoteness of damages as stated in Wagon Mound laid out that liability can be limited when the defendant did not have knowledge of the harm. This seems to conflict the thin skull principle as stated in Wilkinson of taking a wrongdoer taking a victim as you find them. Here, the judge finds that the consequences of an injury can be covered if they are defined as falling within the kind of injury.

Mustapha v Culligan of Canada Ltd 2008 SCR→ **Remoteness/ordinary fortitude**

Mustapha saw dead flies in a bottle of water, which caused him to become obsessed with this and the implications for the health of his family, who had been consuming this brand of water for 15 years. He developed a depressive disorder with related phobia and anxiety; and sued the defendant for the psychiatric injury caused.

Duty of care

- Does the defendant owe the plaintiff a DOC?
  - *Donoghue v Stevenson*: relationship must be close enough that one may reasonably be said to owe the other a duty to take care not to injure the other (neighbour principle)
  - Very analogous to *Donoghue*, consumer and manufacturer relationship
  - Distinct: opportunities for intermediate inspection (opaque ginger beer bottle vs. clear drink bottle), also Mustapha **didn't drink the water, was impacted from the horror from drinking the water previously**

= **DOC was owed to Mustapha (consumer and manufacturer relationship)**

Breach of duty of care

- Did the defendant's behaviour create an unreasonable risk of harm?
  - Reasonable burden test, Carroll Towing/Hand formula
  - Here, the supplier did not take reasonable care to ensure the water was not contaminated

= **DOC was breached**

Damage

- Plaintiff did sustain damage
  - No distinction between physical and mental injury
  - Personal injury at law connotes serious trauma or injury; minor and transient upsets do not constitute personal injury and do not amount to damage
- Mustapha had developed a major depressive disorder which was debilitating and impacted his life significantly

= **Sustained damage**

Was the damage caused by the defendant's breach?

- Causation test:
  - But for the flies in the bottle, Mustapha would not have suffered damage
- Remoteness:
  - *Wagon Mound:* must be reasonably foreseeable harm
  - Assumes that the person is also of "ordinary fortitude": unusual or extreme reactions to events caused by negligence are imaginable but not reasonably foreseeable
    - But not to be confused with the "eggshell skull" situation, where the damage inflicted due to a breach of a DOC proves to be more serious than expected: once a plaintiff must establish foreseeability that a mental injury would occur in a person of ordinary fortitude, the defendant must take the plaintiff as they find them.
  - **Exception: where the defendant had actual knowledge of a plaintiff's particular sensibilities (*Wagon Mound, knowledge)***
  - Test: **can you foresee the kind of injury that has occurred?**
    - This mental harm as a result was not reasonably foreseeable, expectation that people are of an "ordinary fortitude"
    - No evidence that a person of ordinary fortitude would have suffered injury from seeing the flies

= **Harm is too remote to be related to breach of DOC**

Held for the defendant. In order to establish negligence, the harm needs to be a reasonably foreseeable result of the breach of the DOC. The plaintiff needs to be considered objectively, in that the harm of a particular sort must be foreseeable. Here, it was not foreseeable that seeing a dead fly in the water bottle would cause the particular sort of mental injury (i.e. the trauma of thinking of all the water he had drank from the company before). As it is unforeseeable, he cannot recover.

Mustapha adds to the test of remoteness that when assessing foreseeability, it must be for a person or ordinary fortitude. Therefore, the test must be objective rather than subjective. McLaughlin CJ concerned with the nature of tort law: it having an obligation to impose liability for any harm done on a basis of reasonable foresight, *not* as insurance. Liability must be fair to both the plaintiff and defendant, and therefore is also an exercise of line-drawing at reasonable foreseeability.

Fairchild v Glenhave Funeral Services 2003 UKHL → **Damages/causation**

The plaintiff suffered from mesothelioma caused from negligence from two potential defendants. The plaintiff worked for both defendants at different times and both defendants were negligent in failing to prevent the plaintiff from inhaling asbestos dust. It is unable to find whether the mesothelioma was the result of inhaling asbestos dust at either places of employment.

Were the employers liable for the contraction of mesothelioma given that it was not possible to determine which employer caused it?

Causation

- **'But for' test**
  - does not work here: couldn't say "but for" for one of the defendant's actions, as may not have occurred due to the negligence of the other defendant
    - Limits of science, unable to say which defendant actually caused the mesothelioma
- New exception: can base the claim in a way that would allow these men to succeed:
  - i.e. not scientifically possible to determine which asbestos particle caused the mesothelioma
  - **So both employers were jointly and severally liable as both materially contributed to the risk of contraction**
- **Pragmatic resolution contrary to the traditional view of legal causation: the employers enhanced the risk of contracting mesothelioma and therefore liable.**

Held for the plaintiff. Though the asbestos exposure could have occurred at either workplaces which violates the traditional causation principle, it was not scientifically possible to determine which exposure lead to the contraction of mesothelioma. As both employers were negligent and had equal chances of causing the mesothelioma, they were held jointly liable.

Rothwell v Chemical and Insulating Company Limited 2007 UKHL→ **Treatment Injury/CAUSATION**

Rothwell had been exposed to asbestos in the course of his employment, developed pleural plaques on his lungs as a result. The plaques were not threatening, but a signal that asbestos fibres were in the lungs which may independently cause mesothelioma. Rothwell became anxious and clinically depressed as a result for worrying about contracting one of these diseases.

Ambros 2007 CA→ **Treatment Injury/CAUSATION**

Mrs Ambros suffered heart attacks, dying as a result, could have been avoided with sooner medical intervention. Mr Ambros sought cover under ACC. Cover depended on proving a causal nexus between personal injury suffered and alleged medical error.

Question relies on **causation**, whether the treatment injury actually caused the heart attacks.
Test to prove causal nexus between personal injury and medical error:

1. **Injury or death resulted in close proximity to medical failures**
2. **And there is no evidence that death or injury was inevitable, OR**
3. **No supervening cause which resulted in injury/death.**

Problematic → ***Post hoc ergo prompter hoc*** **–** correlation does not equal causation.

CoA, Glazebrook J

- Normal causation test is to be proved on the balance of probabilities.
- **The tactical burden** (because it *shifts based on who is winning* unlike traditional burdens).
  - Raising evidence of causation that the Corporation must then disprove.
  - Court must be able to draw a robust inference based on facts and not on the basis of supposition or conjecture.

Where it is difficult to prove that the treatment caused the injury, the 'losing' claimant can introduce evidence that the treatment must have caused the death.
In this case, such evidence is = Mrs Ambros had a 51% chance of survival, as she had survived for 6 days after the initial cardiac attack = her chance of survival arguably even higher.

The tactical burden analysis that Glazebrook J adopts in Ambros, is applied specifically to the ACC context because claimants are often not equipped with expert knowledge and the balance of probabilities can be difficult for claimant.

Result = A claimant must establish that the source of the personal injury (in this case inadequate medical treatment but could be employment [*Lukken*]) causally contributed to the injury.
Develop a **tactical burden** whereby the claimant can introduce facts/research/statistics as evidence to prove that this caused the resulting injury/death.

Before you are covered under ACC in regards to a treatment injury (s 32(1)) you must prove that there is a causal link between the personal injury suffered and the alleged medical error. To make up for lack of expert knowledge of claimants, Glazebrook J stipulated a tactical evidential burden.

- Attempt to use loss of chance analysis from Fairchild a
- There was a chance that Mrs Mabros had a very rare condition that led to here death, but nothing to actually indicate his. Loss of chance to say that there was a chance she could have been saved.

- But Glazebrook doesn't like that: formal burden lies with claimant to establish link, if they establish enough, it might suffest there is a link - tactical burden - defence might need to come back with evidence that defeats this

- Big issue: debate in ACC - relationship between injuries and degenerative conditions
  - Things going wrong naturally and things going wrong from being inflicted onto your body = this is the future debate; how do you go about proving that something is natural and something is happening
  - Ambros presumption may offer some gleaning towards it?

Candler v Crane, Christmas & Co 1951 CA→ **Negligent misstatement/reasonable professional**

Accountant prepared accounts of a company, but overstated its value. The plaintiff invested in this company on the basis of these accounts. Plaintiff sued to for compensatory damages of both his original investment and subsequent investment.

Did the accountant owe a duty of care to the plaintiff?

Result: no liability, but overturned in Hedley Byrne and Denning LJ was endorsed.

Denning LJ (dissenting)

- The "bold spirit"
    - Attempts to improve the law from older laws; as the world has changed and thus the way we think about the law has also changed
    - This followed from Donoghue v Stevenson, where contracts were no longer needed to recover – but **foreseeability**
    - Though dissenting, endorsed by Hedley Byrne

Duty of care

- The accountants knew that the plaintiff would be guided by the accounts in making the investment, therefore owed a DOC

Test: duty to use care in statement can be established
Test of reasonable foreseeability; also need to know who is going to use the information and for what purpose i.e. Person + purpose test

- This DOC extended to **only the transactions for which the accountants knew the accounts were required**
    - Otherwise indeterminate liability
- Professionals with special knowledge and skill now liable under this rule
- **But limited:** need to know that the accounts will be used for a particular purpose
    - Cannot be held liable for things that they did not know about
- ***Le Livre:*** Surveyor prepared certificates for business owner so he could know how much to pay a builder. Owner showed certificates to mortgagees who used the information to advance money of them. Mortgagees then said the owner's surveyors owed a duty of care to them.
    - **Denning LJ:** no duty existed in this because the surveyor did not know that the information was going to be given to the mortgagees, only to the business owners; and the information was produced for a different purpose (for the building owner to work out how much to pay the builder, not for the mortgagees purpose)
    - For accountants, they know that the accounts will likely be shown to a third person while they are preparing them, so the accountants owe a DOC

COUNTER-ARGUMENT: Asquith LJ (majority)

- The "timid soul": Follows precedent, like cases decided alike, only way to prove liability is through a contract
- Issue with imposing liability for words = opens up to too much liability
- Disagrees with Denning on this point of proximity (i.e. being able to identify the person you owe a DOC to)
    - Donoghue v Stevenson: didn't actually know the ultimate consumer of the ginger beer, but this did not protect the defendant from liability
    - If apply Denning LJ, then opens up to too much liability:
        - The Queen Mary and Cartographer example: should a cartographer liable to all ship captains in map-making, even if they are not identifiable end-users?

Candler v Crane held for the defendant, as it was thought that imposing liability for mere words would open up too much liability. However, this was overturned in Hedley Byrne and the dissenting view of Denning LJ endorsed. This view would impose liability for negligent misstatement, as the accountants knew that the plaintiffs would be guided by the accounts in making their decision. Test from Candler v Crane: can establish DOC for negligent misstatement if can identify the person and purpose.

Hedley Byrne & Co Ltd v Heller & Partners Ltd 1964 UKHL→ **Negligent misstatement/special relationship**

Advertising firm asked bank about a company's financial stability, as they were set to do a deal that would make them personally liable to pay for advertising offers. The bank gave a favourable credit reference with a disclaimer avoiding responsibility. This credit rating proved to be wrong, and the appellant lost $ and sued for negligent misstated. The issue was that no contract existed between the parties, due to no direct link in privity nor no consideration given.

Was the bank liable for negligent misstatement?

Lord Reid:

Tort law approach

Endorses Denning LJ in *Candler v Crane*: Proximity argument of identifying person/purpose

- Donoghue v Stevenson dealt with negligent action
- There is a difference between negligent actions and negligent misstatement, and thus a difference in the law:
    - Difference in the care people take in what they say depending on the circumstances (e.g. social vs business environment)
    - Also how far words can spread

Test of DOC: when they provided the information was it reasonably foreseeable that Hedley Byrne would act on it to its detriment?

- Yes; but this wasn't enough – concern over **indeterminate liability**

Must be *more* than misstatement on the facts:

- **Person must have undertaken some responsibility, or been in a "special relationship"**
    - Any relationship where the party seeking information is trusting the other to exercise a DOC, where it was reasonable for the person to do that, and also knew/ought to have known that the information would be relied on e.g. fiduciary relationship
    - **Modifies Candler v Crane:** the bank did not know the trade creditors **but knew the class of people relying on it, this was sufficient**
        - The banker was a professional, and the advertising agency was relying upon it to prepare information they would rely on
- Reasonable person standard: if person knows information will be relied upon, has three options
    - **Say nothing**
    - **Give answer with a disclaimer**
    - **Just answer**
        - If they just answer, then this is an acceptance of responsibility
- Because the bank made the disclaimer, they cannot be held liable

Lord Morris

In any situation where a person has a special skill and that is relied upon, a duty of care can arise

- Anywhere where a judgement is made based on skill or knowledge, and a person takes it upon themselves to tell another, and knows that this other person will rely on that information
    - Bank disclaimer: they were safe as they only provided the information on the basis that there was no expectation that it would be solely relied upon

Lord Devlin

Focused on the nature of the overall dealings

- Distinction between physical injury and financial loss is stupid, should be able to recover for both

Special relationship:

- Value of Donoghue v Stevenson: does the relationship between the parties give rise to a special duty?
    - Special relationships not limited to contractual or fiduciary relationships
    - No contract law could apply here as no consideration was given, bank provided information without being paid
    - But a "special relationship" can also include those "**equivalent to contract"**

- Have to consider whether relationships are professional or social; whether they are of contractual character; whether an indirect reward is being given; whether it is general or particular
    - General: banker and customer, solicitor and client = assumed duty
    - Particular: more dependant on facts

Again, the bank disclaimer meant that they were exempt from responsibility

Result: a duty of care could have been established due to it being reasonably foreseeable that Hedley Byrne would be relying on the information, the bank knew of the class of people using the information, and a special relationship could be thought to have existed given the bank was acting as a professional body dealing with a client. However, due to the disclaimer, this meant that the bank was exempt from responsibility as they only provided the information on the basis that they would not be held liable if it was relied upon.

Test now to establish DOC:
1. Was it reasonably foreseeable?
2. Did the expert know the person using the information/purposes of using the information: not as important, can know be knowledge of the class/type of person relying on the information
3. Did a "special relationship" exist: fiduciary, "equivalent to contract", consider whether social/professional etc.

Scott Group Ltd v McFarlane and Others 1978 NZCA→ **Negligent misstatement/NZ**

Auditors prepared accounts negligently – understated liabilities and overstated profit. The Scott Group relied on these accounts for a takeover bid; and didn't make as much money as they expected to off it. The accounts had been audited for governance purposes. Following the Candler v Crane precedent, no liability would be found as the auditors could not identify who would rely on the accounts or that the information would be used for the purposes of a takeover bid.

Could the defendant be held liable for negligent misstatement in New Zealand when they did not meet the Candler v Crane person/purpose test?

1. Richmond J (dissenting on issue of duty):

Duty of care

- Essentially follows Candler v Crane: the information was not prepared for the purposes that Scott Group relied on it for
- Highest threshold/narrow view of a DOC: requiring special relationship
    - Basically does a certain relationship warrant some form of responsibility over statements
    - This relationship only exists where a person is aware of a person/class of persons and purpose: *i.e. Candler v Crane + Hedley Byrne modifier*
- Purpose: have to allow a person to prepare information with a particular purpose in mind
    - An annual report has too many purposes or people using it; would be going too far to find liability, too general, relationship wouldn't be special
    - No specific evidence of the takeover bid purpose (was likely, but not certain)
- Limited exception if it was for an honest mistake = no liability
- Dismisses appeal: no duty found, therefore **no damages**

Richmond J took the narrowest view of finding a duty of care, following the precedent of *Candler v Crane* that finding a duty requires both foreseeability and knowing who is going to use the information and for what purpose. Here, as the auditors prepared the annual reports for a governance purpose and did not know it would be used for a takeover bid, and therefore they could not be held liable.

2. Woodhouse J

Duty of care

Test: foreseeability + other factors

- Reasonably foreseeable for people to rely on the advice of experts

Other factors:

A. Professional body: auditors provide expert advice and get paid for it; intention that audited accounts would be relied upon

B. Within the reasonable contemplation of an auditor that there will be reliance on their accounts: duty not only to shareholders but to all people reasonably foreseeable to be relying on the accounts

C. No opportunity for intermediate examination of accounts

D. Knew that accounts would be public record: so anyone concerned could access

- Imposition of liability wouldn't necessarily lead to indeterminate liability
    - Reasonable foreseeability and causation requirement (that a person actually relied on information and it was this that caused loss) act as a sufficient limitation

Damages

- There was a causal connection between the negligence and damage suffered
    - Allowed for $24,500 in damages to account for the lost income (i.e. what they *thought* they would have earned)

Woodhouse took the widest view of finding a DOC, requiring only foreseeability that someone would rely on the advice of experts. This was influenced by four factors, that the auditor was a professional body, that is was within their reasonable contemplation that there would be reliance on the accounts, that Scott Group had no opportunity for intermediate examination of the accounts, and that the accounts would be part of the public record so extra care should have been taken.

3. Cooke J

Duty of care

- No disclaimer: dispels argument of undue hardship; though notes that a disclaimer doesn't necessarily exempt a person

Was there a duty?

- The company was "rich in assets but unimpressive in earnings", and it was a virtual certainty that a takeover bid would be attempted
- Reasonable foreseeability that the accounts would be used and relied upon for the takeover purpose
    - Plain virtual certainty
    - **i.e. similar to Candler v Crane, building up the type of knowledge you would have to have – not knowing actual details, but more the kind of knowledge**
- Indeterminate liability fear: takeover more direct than just random shareholders purchasing shares in a business, therefore sufficient relationship to warrant a DOC
- Consider tort of negligence as a whole, whether something is "fair and reasonable" (**Dorset Yacht)**
    - Fair and reasonable that professional auditors accept the consequences of negligent misstatement

Damages

Cooke J did not believe that Scott Group had actually suffered damage at tort law.

- Contract law would allow $24,500 as being the expected difference of the benefits under the contract
- **But they had not actually lost anything: just merely not as well off as they could have been under a contract**
    - Tort law only about recompensing things actually lost
    - No damages awarded

Cooke J took a view between that of Richmond P and Woodhouse J. He found a DOC, as it was reasonably foreseeable, but there also needs to be something more on the facts (similar to *Candler v Crane*, not knowing actual details but rather the *kind* of knowledge you need to have). Cooke J found that it was a plain virtual certainty that a takeover bid would be attempted, and thus there was a high likelihood of reliance on the accounts for this purpose.

Result: Found duty, but no damages rewarded

Caparo Industries v Dickman 1990 UKHL → **Negligent misstatement/special relationship**

The accountant negligently prepared the accounts of a business. From preparing the accounts, the accountant knew or ought to have known that takeover bids were likely for the company and that the accounts would be relied upon for this purpose. Caparo Industries made a takeover bid on the basis of the position shown in the accounts, but found that the business was in a worse state than the accounts led to believe. Caparo then sued Dickman for negligence in preparing the accounts. Caparo disregards Scott Group law, and follows precedent set by Candler v Crane.

Law as it stands
1. Reasonable foreseeability
2. Special relationship (have to know person and purpose)

Lord Oliver → Special relationship test

- Following *Hedley Byrne,* the person/purpose test is now not as important
    - As but for the bank disclaimer, liability would have been found (despite not knowing who was using the information or the purpose of a credit reference)

A "**necessary special relationship"** between the expert and person must exist where:

- Advice is required for a purpose which is made known to the expert
- Expert knows that the advice will be communicated to the person for that purpose
- Advice will be acted on without independent inquiry
- Advice is acted on to the detriment of the person

- Special relationship factors:
    - Whether they paid for information
    - Whether there are any statutory requirements governing behaviour

Nothing in policy or principle should extend liability beyond Hedley Byrne

- E.g. no special relationship just because of the nature of a takeover bid (*Scott Group approach criticised)*

- Here, no relationship of proximity and no duty of care between auditors and the investing public generally
    - Owes a DOC to shareholders collectively as a group, but not as individuals
    - Relationship between auditor and shareholder group is almost contractual, there was a duty to report a true and fair view of the F/S
    - The annual report can be used for a number of purposes: if the audited accounts were to serve the basis for investment purposes then the accountant could be found liable
        - But here, the purpose of the audit was for the shareholder group to reflect on the governance of the business and **not** for individual speculation

Indeterminate liability

- It is reasonably foreseeable that a person could change their mind depending on information, and that this information could be communicated to more people than the intended recipient
    - But need more than reasonable foreseeability to determine liability; otherwise opens it up to this indeterminate liability or "uninsurable risk"
    - Strongly criticises Woodhouse's approach in *Scott Group* as only requiring foreseeability
- **Limits liability by "justice and fairness"**
    - Not just or fair to impose liability on auditors for doing their jobs for the purposes of governance, should not be liable for people relying upon them for investment purposes.
    - Way of mitigating foreseeability and as a stop-gate for indeterminate liability
    - *Scott Group* dealt with indeterminate liability as a matter of policy; questioning whether it was a good idea to find a person liable
        - But *Caparo* solution is to build it into the test for negligent misstatement, which is good as it stops from policy making occurring in the courts

Held for the defendant. The auditor did have a special relationship with the shareholder group and prepared the accounts for the governance purposes of the group. However, the shareholders individually did not meet the relational proximity requirements to establish a DOC, nor did the auditor prepare the accounts for the basis of any individual investing decisions. Therefore, the auditor could not be held liable and a duty could not exist.

Open question of what the state of NZ law is post-Caparo. Caparo reaffirms the strict special relationship test (persons intended and purposes intended) with the limitation of "justice and fairness".

Boyd Knight v Purdue 1999 NZCA → **Negligent misstatement/reasonable reliance**

The accountant negligently prepared the accounts for a failed financial company. He admitted that if reasonable care had been taken, then he would have discovered significant fraud within the business and the audit report/prospectus would not have been issued.

Duty of care

- Common law duty and statutory requirements would find a DOC: i.e. the giving of an audit certificate/audit report confirms the accuracy of the financial statements

Caparo precedent

- Key fact in *Caparo* was that the information was used for **governing purposes** whereas here the information was prepared for **investors**
    - Likely would meet the test of foreseeability + special relationship (knew the class of people relying on the information and the purpose) and could be considered just and fair to be held liable

Breach of duty of care

- Reasonable care was not taken

Damages

- Suffered economic loss as a result

Causation

- The auditor is not called upon to judge the state of a company, there is no duty to assess a company for potential investors (job is to **inform not advise**)
    - The shareholders must have read and analysed the F/Ss for themselves; they cannot rely on them generally simply because they have been audited
- Shareholders must be able to show that specific numbers/accounts have been relied on in making their decisions, the auditor can not be liable for inaccuracies in information if it was not utilised by an investor (**indeterminate liability**)

The plaintiff had to show reliance on a particular item in the accounts and apply the 'but for' test of causation. i.e. 'But for' that one error, then they would have not invested in the business. As the plaintiff could not prove that, held for the defendant and no liability could be found.

Boyd Knight can be heavily criticised for the causation test imposed by Blanchard J as not being credible. If the auditor had done their job properly, the audit report would not have been issued in the first place. This arguably was a stronger argument that Blanchard J saying that audited information cannot be trusted; implies that ordinary New Zealanders should not be investing based on publically traded information as they do not have the skills to utilise information and should do all investing through experts.

Invercargill City Council v Hamlin 1994 NZCA → **Negligent misstatement/ DOC, NZ building inspections**

Hamlin sued the City Council for negligently inspecting his house in 1972 and failing to notice that the foundations had been negligently constructed (not in line with Council by-laws). Cracks began to appear and doors jamming and the fault found in 1989, which is when the court proceedings began. Following UK precedent, the decision would have been that Hamlin should have bought a different house.

Duty of care

UK precedent: followed *Ann v Merton London Borough Council* where it was found that you could rely on building inspections provided by local authorities

- This position was overruled in *Murphy*, said the harm suffered was not "physical harm" but economic loss, and the issue was that the house was not worth what it was thought to be worth when they purchased. However, this type of loss is not recoverable in tort law (things that are done to a property), more contract law

Cooke P refuses to follow the *Murphy* precedent:

- Home-owners in New Zealand traditionally rely on local authorities to exercise reasonable care not to allow unstable houses to be built that breach by-laws
- The distinction between physical and economic loss was an impossible one and the law should not make such distinctions
    - i.e. **in New Zealand this does not make a difference**
        - Interesting point: the distinction may seem to hurt consumers on a prima facie level; but in the UK the distinction meant that more people had to take out insurance against negligent inspections or bad workmanships, and made insurers more active in the regulation of building inspections (no disadvantage)

Cooke P says that the formulae and doctrines do not provide an answer to finding a DOC, this is a matter of judicial judgement

- i.e. NZ should not take the UK common law as a starting point, instead has to be based on the particular NZ context
- Criticism: being an independent country **is not the same** as being an independent legal system. New Zealand's legal system is **based** on the English legal tradition. New Zealand does not have all the case law to solve all legal issues, if judges do not accept UK common law then it is merely made more uncertain. Common law should not be a doctrinal auction where judges pick and choose options as suits, it is a legal *tradition*.)

Richardson J then discusses what this NZ context was: (*and thus, justifies rule in Hamlin of why things are different in New Zealand than the UK)*

- 1970s – 1980s housing market: many people were living in the houses they bought, most construction was small-scale for this purpose, there was lots of government and local body support for home ownership and building, and it was not common practice to commission an engineer or expert to conduct a survey of the building.
- Finding a DOC should be considered against this context:
    - These circumstances did find a DOC for local authorities in issuing building permits/inspecting houses
- Again, criticised: New Zealand is really not that different from any other advanced capitalist society; that New Zealander's are encouraged to buy property by the government is not a credible argument?)

Policy arguments – indeterminate liability?

Any changes to come from Parliament:

- Changing tort law would impact on communities, change insurance practices and fees (people would have to now obtain their own engineering surveys or insurance protection etc).

Result: held for the defendant, and the appeal overturned. The Council was found negligent in their building inspection, and owed a duty of care to Hamlin.

New Zealand distinguished itself from the UK decisions in *Anns* and *Murphy*, and opened up a question of indeterminate liability as there is no distinction between commercial and non-commercial investments, with no rational policy solution.

Carter v Attorney-General 2003 NZCA → **Negligent misstatement/assumed responsibility and reliance**

Plaintiffs acquired a boat from Fijian owners. MOT advised that based on documentation the boat would be fine, subject to an inspection. The plaintiffs paid a deposit on the boat and it was sailed back to New Zealand. The boat was then inspected and issued a safety certificate. The boat then suffered from a series of defects, and the plaintiffs attempted to negotiate down the purchase price ($200,000). This was unsuccessful, and the plaintiffs were put into liquidation the following year. The boat was seized and sold for a scrap value of $500.

Applying Candler v Crane: Reasonably foreseeable + purpose/person test

- Information was provided for the safety of the people on board
- Yet impacted owners due to economic loss, and as established in *Hamlin*, we allow for the recovery of economic loss in buildings; may be able to recover for boats?

Was the MOT liable for the economic loss suffered as the purchase was based on the certificates issued?

Duty of care

- Looks at whether it is "fair, just and reasonable" (*Caparo*) to impose liability. This is addressed in terms of:
    - Proximity: nature of the relationship between parties, focus on the assumption of responsibility, foreseeability and reasonable reliance
    - Policy: wider legal/other issues in deciding a duty of care
- Note: "fair, just and reasonable" can be considered as 'anti-law'; implies that law is dependent on independent judgement rather than consequential of the analytics applied. (i.e. prefer foreseeability + tests/control mechanism as developed in common law)

1. Proximity - Assumed responsibility:
    - Creates proximity (subject to policy considerations) and will be fair, just and reasonable to make a person liable
    - Reliance helps to determine assumption of responsibility (as it is mostly **non-voluntary**)
        - I.e. circumstances where it is reasonable and foreseeable that the plaintiff will rely on the defendant
    - If the defendant foresees/ought to foresee that the plaintiff will place reliance on what they have to say, there can be said to be assumed responsibility
        - Depends on the purpose that a statement is made for, and the purpose that a plaintiff relies on it for (must be the same)
        - Must be the same person/class of person that the defendant makes communication to
        - *Candler v Crane, person + purpose test*

Was it reasonable for the defendant to foresee that the plaintiff would place reliance on the certificates?

- **Purpose:** The legislative purpose was for **safety** therefore it is not reasonable for the plaintiff to rely on it in order to protect their economic interests.
    - i.e. **not reasonable that the defendant assumed responsibility to the plaintiffs to take care in issuing the certificates not to harm the plaintiff's economic interests.**
    - Therefore, no necessary proximity
- **People:** plaintiff was not in the class of people that could rely on the safety certificates
    - They were made to protect the passengers on the vessel, the crew etc.

The defendant could not have foreseen that the plaintiff would have placed reliance on their communication due to insufficient proximity in terms of purpose and people, therefore no assumed responsibility of the defendant and no DOC.

2. Policy
    - Can look at legislative duty: terms/purpose of legislation will impact policy

The legislative purpose was to regulate the safety of shipping

- Would want to avoid a chilling effect on the MOT
    - i.e. the threat of legal action could place undue pressure whilst they are performing inspections, which would be to the detriment of the public
- *Hamlin:* allows for Council building inspectors to be held liable for inspections
    - Calls these cases "suis generis" i.e. in a class of their own

No duty because of policy considerations.

Conflicts with *Hamlin*. Tipping J says that building inspector cases a suis generis. This is a bad approach to the law, as like cases *should be treated alike.* Tipping J should have approached this differently: i.e. in *Hamlin*, Richardson J's approach was to look at *what was different about New Zealand* in justifying why *Murphy* wouldn't apply. Tipping J should have taken this approach, seeing that *Carter* falls into a new context. As Richardson J discussed, the government was trying to encourage home ownership whereas this was an economic venture. (Potential rebuttal point that homes are often the main investment made).

Home Office v Dorset Yacht Co Ltd 1970 UKHL → **Third party liability**

Party of Borstal trainees were working on an island under the control of 3 officers. 7 trainees escaped and went aboard a yacht in the harbour, and crashed into another yacht. The yacht owners then sued the Home Office for this damage.

Did the officers owe a DOC to the yacht owners for the conduct of the boys?

Duty of care
Reasonable foreseeability + whether it is "fair, just and reasonable" (proximity + policy)

Reasonable foreseeability
- Boys were sent on a training exercise, under the custody and control of the officers. The officers went to bed and left the trainees to their own devices. Most had criminal records and records of attempted escapes.
    - It was therefore reasonably foreseeable that the trainees would attempt to escape, and given they were on an island, they would steal a vessel in order to escape and that they would cause damage as a result.
    - Therefore, likely that damage would result as a breach of this duty

Policy
Argument that the officers should not owe a DOC as:

1. No authority for it
- Buckmaster: shouldn't add to the law of torts (*Donoghue v Stevenson)*
- Lord Atkin's neighbour principle should be applied however
    - i.e. owe a DOC to anyone it is reasonably foreseeable you may harm
    - Here, the carelessness resulting in damage **of this kind** was foreseeable
        - Taking trainees with a history of escaping to an island, knowing they could not sail, likely they would attempt to escape and cause damage as a result

2. No person should be held liable for wrong-doing of another person
- Finding liability would make the officers responsible for the actions of other people
    - English common law only requires **that you do not do the harm yourself**, there is no obligation to help others (i.e. does not compel positive action)
- Found liable due to:
    - The boys were taken to the island by the parole officers; therefore responsible for the resulting damage: would not normally responsible, but here **they themselves created the issue** (by being negligent in the course of their duties), and had a duty to stop it
    - It was reasonably foreseeable that this would occur: there is always variation in human action (and can stop a chain of causation) but this was a very likely outcome. The boys were on an island, it was likely that they would steal a yacht in an escape attempt.

3. Policy of the legislation
- **Public interest of protecting neighbours vs. the public interest in promoting rehabilitation**
- No liability if the discretion in this balance is exercised with due care, however here it was not
    - The reason the boys escaped was because the guards were not doing their jobs. Though exercising a function which is inherently discretionary; they did not act with due care.

Vicarious liability
- Comparison to the US, where the State is not held liable as there is a concern that public servants will be dissuaded from doing their duties etc.
- Reid dismisses this concern, with the expectation that "Her Majesty's servants are made from sterner stuff."

Result: held for the plaintiff. The Home Office was found liable for the negligence of the officers as it was reasonably foreseeable that an escape attempt via yacht would occur, and the officers effectively created this danger through not exercising due care in their duties. Though there is a public interest in promoting rehabilitation which is inherently discretionary, this must be exercised with due care. State made liable.

Lamb v Camden London Borough Council 1981 UKCA → **Dorset Yacht Club/causation, remoteness**

The plaintiff's house was flooded due to contractor's breaching a water main on the street. The plaintiff moved out and left the house unoccupied as it awaited repair. Squatters then moved in and caused substantial damage before being evicted.

The law as it stood from *Dorset Yacht* was that the law can impose liability in certain situations when you contribute to causing harm. **Lord Reid test in *Dorset Yacht*:** when human action forms one of the links in a chain of causation of negligence and resultant damage suffered, the human action must have been very likely.

Can Lamb recover the damages from the Council for negligence resulting in the squatter's actions?

Lord Denning

- Issues with Lord Reid's test:
  - What if a Borstal prisoner had escaped from a working party due to negligence, stole a car, drove away, broke into a house to steal clothes, and stole another car to continue driving? (*Dorset Yacht* – this would have been very likely)
  - Using Lord Reid's test, all here who suffered damage could have recovered damages from the Home Office: **extends liability beyond reason**
- Duty/remoteness/causation are all ways in which the courts attempt to limit liability; but ultimately it is a question of policy
- **Policy: whether an action should be covered or not**
  - Whose job was it to keep out squatters? Mrs Lamb as the owner of the house, **not** the Council.
    - E.g. *Dorset Yacht*, it was the officer's job to protect the boys
  - Criminal acts such as this covered by insurance: policy of not wanting the cost of negligence to fall heavily on one pair of shoulders; if it is covered by insurance then this cost is spread through the community

Lord Oliver

- Lord Reid's test:
  - Cannot be said that you cannot foresee the possibility of people doing stupid/criminal things; Reid said that these must be very likely to a reasonable person in the tortfeasor's shoes
- But issue of remoteness:
  - Same as *Wagon Mound No 1*: (if it was the contractors), would the contractors owe a duty not to break a water pipe so as not to cause squatters to move in and cause damage? **Too remote**
- **Therefore, adapt Lord Reid's test as requiring a degree of likelihood**
  - If a defendant will be found responsible for the actions of a third party over whom he has no control; it requires a degree of likelihood of their actions as being equivalent to inevitability

Lord Watkins

- Gut instinct that the damage was too remote
  - *Criticism: weaker argument, though honest*

Result: held for the defendant. Despite the *Dorset Yacht* test for inclusion of human action in a chain of causation as having to be very likely, the Council could not be held liable for the actions of a third party due to policy considerations. It was not the Council's job to keep squatters out of Mrs Lamb's house and therefore this damage can be considered too remote to the initial negligence.

***Lamb* shows the difficulties of applying the *Dorset Yacht Club* tests. To apply the test would be extending liability too broadly.**

Smith and Others v Littlewoods Org Ltd 1987 UKHL → **Third parties/categories of liability**
Youths set fire to the defendant's disused cinema, causing damage to neighbouring properties.

Were the Littlewoods liable for the neighbouring parties for the damage caused by a fire started by a third party without the Littlewoods' knowledge?

Lord Mackay of Clashfern: approach following *Donoghue v Stevenson*

Duty of care
A reasonable man has to foresee the probable consequences of his own negligence, regardless of whether a third party played a part (*Donoghue v Stevenson* principle)

- Human conduct is particularly unpredictable (*Lamb)*: so third party actions must be **reasonably foreseeable** in order to be **"very likely"** (Reid test, *Dorset Yacht*),
- **The third party action being a mere possibility is not sufficient**

- E.g. *Dorset Yacht*: highly probable that the boys would steal the boat as a result of the guard's negligence, this was more certain than possible
- This test is contextual: a question of fact
  - *Stamsbie v Troman*: *a decorator left a house unlocked, and in his absence a thief entered and stole goods. The plaintiff recovered damages off the decorator.* ***The area was known for many thefts to occur.***
  - The reasonable person would have locked the door to prevent the foreseeable theft. (Contrast to *Perl*, where the theft was not reasonably foreseeable as a direct result of not hiring additional security).

- *Perl: the plaintiffs were tenants of the defendants and stored garments in the defendant's basement. An intruder bore a hole in the wall of the defendant's basement in order to steal the plaintiff's goods. The plaintiff's claim of negligence failed.*
  - Though the theft was a foreseeability possibility, it was not reasonably foreseeable that the natural/probable consequence of not hiring additional security guards was for a third party to bore a hole in the wall to steal the plaintiff's goods.
  - Lord Goff: person is liable where the actions of the third party would not have occurred **but for** the negligence of the person. In the absence of any special relationship, the defendant was not liable for preventing a third party from wrongfully causing damage to the plaintiff.

Lord Goff of Chievely: more analytical approach, sees "very likely" as a conclusion rather than a reason

Littlewoods under a duty to take reasonable care for the safety of their neighbours, but there is no general duty to prevent third parties from causing damage

- Law does not impose liability for pure omissions (*Dorset*), and there are limits on the steps required to be taken by a person under affirmative action to prevent harm caused which is not that person's fault

Person should not be held responsible for the wrongdoing of others, except where there has been a breach of duty to guard against deliberate wrongdoing to others.

Circumstances where liability would be imposed:

1. **Defender negligently causes or permits a source of danger and it is reasonable foreseeable that a third party will interfere with it**
   - *Haynes v Harwood*: defendant left horse unattended, child threw rock at horse, horse bolted and injured people. Defendant caused this source of danger.
   - Here, it was predictable that the boys would break in but not predictable that they would ensue to start a fire

2. **Where the defendant has knowledge or means of knowledge that a third party has created a risk of hazard and failed to take steps reasonably open to him (assumed responsibility)**
   - *Goldman v Hargrave*: prevent fire from spreading, depends on the means of the defendant: but warning people of the hazard etc.

- If the Littlewoods knew about the danger, they were under an obligation to do something about it: here, they had no knowledge that the young people were entering the cinema (so means of knowledge)

Held for Littlewoods. Littlewoods was not liable as the empty cinema was not an unusual danger for a fire hazard. Mere foreseeability is not enough to impose liability for the actions of a third party. While it was likely that the young people may enter the cinema, it was not reasonably foreseeable that as a result of entering they would start a fire. If Littlewoods had hired security, this may have prevented this fire but would have been an intolerable burden to impose. There is no general duty to prevent third parties from causing damage to others even with a high degree of foresight that it may occur.

There is no general duty of care to prevent others from suffering loss or damage caused by the deliberate wrongdoing of third parties. There are certain circumstances where a duty will be found, that being the presence of a special relationship, assumption of responsibility, where the defendant is in control of a third party that causes the damage; or where the defendant is in control of the land or dangerous thing.

Couch v Attorney-General (No 1) 2008 NZSC → **Third parties/special risk**

William Bell was on parole for aggravated robbery. He was placed at an RSA for work experience, and robbed it - seriously injured Susan Couch, and killing three people. The RSA did not know he was hired. Couch claimed for exemplary damages against the Attorney-General for vicarious liability of the probation officer. She claimed that the probation officer was grossly negligent in the supervision of Bell.

Was the Attorney-General liable for the damages caused by a third party, when the third party was under the control of the defendant?

Elias CJ & Anderson J:

Approach: should not arbitrarily restrict finding a duty of care (i.e. disregard the categories); and instead impose it when the circumstances demand.

- Issues with this approach: law is about applying an analytical method to the facts of a particular case. This approach suggests it is more of a "factual matrix" and that we should impose liability when the facts justify it.
    - Difficulty with this is it is unclear when *the facts do justify it*

Duty of care

- Looks at whether the circumstances give rise to a duty
    - This differs from **Tipping J**: as he says that a duty only arises where the plaintiff is known to the defendant to be at risk due to a particular vulnerability (may introduce undesirable relational rigidity)
- Despite the direct cause of injury to Couch being through Bell, the probation officer can still be liable (*Dorset Yacht proximity*).
- Two circumstantial factors:
    1. Statutory obligations of supervision/control of probation officer
        - The probation officer was a professional and had a duty to act with reasonable care
    2. Knowledge of the risk and the means available to avoid this risk
        - Special conditions on Bell's parole had been imposed to protect the public. A psychological assessment of Bell showed that he had a high risk of re-offending, and a condition was to undertake counselling which he did not do (and the parole officer did not follow this up).
        - Given the knowledge of this risk of re-offending, the parole officer should have taken steps to mitigate the steps.

Tipping J

Approach: similar to Goff in *Smith v Littlewood* (analytical approach) by working out the rules and categories that govern particular cases that involve third parties.

- Tipping J conflicts with Elias CJ: duty is not found by the 'factual matrix'; but instead whether *Couch* fits into the category of 'special risk' that govern similar negligence cases.

Duty of care

- Proximity: a necessary and distinct risk being created; liability can be found for when this risk is created due to a breach in duty (*Dorset Yacht)*
- No general foreseeability, must be a special risk being created that would mean a DOC is owed (i.e. a 'kind of special risk') (*Smith v Littlewood)*
    - Counsel (Mr Henry) argued this was satisfied: the initial crime related to violent crime and robbery, he was addicted to alcohol and he was put to work in the RSA.
    - Tipping J said that this was not enough to show a special or distinct risk:
        - The physical proximity of seeing the RSA people everyday was not enough. That there was cash and alcohol at the premises was not enough – this did not distinguish it from many other places in Auckland. His previous aggravated robbery was in a petrol station, not a bar.
    - Under this approach, Tipping allows leeway for people to be rehabilitated. Under this analysis, Couch was no distinct from any other member of the general public and could not prove any special risk, so therefore not owed a DOC.
    - Tipping J suggests that they reformulate this claim:

- During the aggravated robbery, he showed tendencies of violence. The physical proximity of Couch as working at the RSA would have meant she was exposed to this violence if he was to re-offend. The particular place of employment was not different from the petrol station; and that he worked here would have allowed him to know more about the security arrangements (may have given the encouragement to rob it). Therefore, special risk to Couch could be proven.

Held? Two very different approaches to finding a duty. Elias CJ's analysis seems to suggest that a duty could be found; whereas Tipping J suggests that the claim needed to be reformulated in order to show a "special risk" that would allow for liability to be found. The claim for strike-out in both was denied however, so *Couch* permitted to proceed to see whether a duty could be found.

Policy: Protection of public vs. rehabilitation of offenders: parole involves risk (taking offenders out of prison before the sentence is complete) for rehabilitation purposes. (*Dorset Yacht*). Tipping J took a wider approach in terms of respecting this; saying that it was necessary to find a "special risk" to the plaintiff. Perhaps in New Zealand we can take a broader view with this, given that we have ACC and there was already some compensation given regardless of this "special risk". (Comparison to the UK, where no compensation is given at all e.g. *Michael*).

Mitchell v Glasgow City Council 2009 UKHL → **Third parties/special risk**

Mitchell and Drummond both lived in council houses, Mitchell had been harassed by Drummond. Mitchell complained to the local authority, and Drummond met with the Council who informed him that he would be evicted. Mitchell was then attacked by Drummond and died.

Did the Council owe a DOC to warn Mitchell about the meeting, as it was reasonably foreseeable that harm would flow on a result?

Duty of care

- Foreseeability of harm not enough for DOC (*Smith v Littlewood)*
- No positive duty recognised in law to protect others (*Smith v Littlewood*)
- No duty to protect someone based on foreseeability (*Smith v Littlewood*)

Exceptions:

- Where defendant creates danger
  - E.g. *Harwood*
- Where third party under control/supervision of defendant
  - *Dorset Yacht*
- Where defendant has assumed responsibility

Policy: Implications of finding a duty to warn people

- Floodgates opened for every landlord, large number of people to warn
- If they have to warn = becomes a really onerous job, may stop them from getting involved at all
  - Desirable that they do involve themselves to address behavioural problems
- Unnecessary warnings: could cause undue alarm or telling people information that should be confidential
- Would have been different if the Council assumed responsibility to tell a person or induced the deceased to rely on them
  - Relationship of proximity AND duty within this scope

Held: for the defendant. It was not "fair, just and reasonable" (*Caparo*) *to* say that the Council had a duty to warn people. The general rule is that a person does not owe any duty to protect another from the actions of a third party, except where they fit into the categories of exception. Here, the Council would only have had to warn Mitchell when they had assumed responsibility by Drummond.

Michael & Ors v Chief Constable of South Wales Police & Anor 2015 UKSC → **Third parties/theoretical integrity of law**

Mrs Michael was attacked by her former partner. She called the police as he said that he was going to kill her. The police phone operators mistakenly categorised the call and did not put it on immediate response. By the time the police arrived, Mrs Michael had been murdered.

Was the Attorney-General liable for the damages caused by a third party, when the third party was under the control of the defendant?

Applying *Couch*: would find a DOC

- **Elias CJ:** Based on the 'factual matrix', here the police have a duty of care to stop violent crime. Michael had been told that her partner would kill her. Therefore, police had a duty to stop this.
- **Tipping J:** "Special risk"? Yes, Michael was not part of the general public here, she was a particular individual that phoned with a graphic description of the altercation with the former partner. The police had records of domestic violence. Therefore, this builds up a case of "special risk" specific to Mrs Michael that the police had a duty to prevent.

Duty of care

Lady Hale: dissenting judgement, thought there should obviously be a duty based on the facts

Majority judgement: no duty found, based on theory of law

No liability for damage caused by third parties (*Smith v Littlewoods,* Goff – no liability for pure omissions)

Exceptions:

1. Where defendant is in a position of control/supervision over the third party (*Dorset Yacht, Couch v Attorney-General*)
    - Murderer was not under control of the police
2. Where defendant assumes positive responsibility to safeguard the claimant (*Hedley Byrne),* relationships with a duty of positive action, can also apply to public bodies (*Mitchell*), but mere foreseeability not enough (*Smith v Littlewoods*)

- Police immunity? There was a long raft of English cases where police officers failed to prevent crime; traditionally did not want to impose liability as didn't want to interfere with how police did their jobs. **Question of whether the police owed a duty to individual citizens or to the community as a whole.**

To recognise a DOC here would be **adding** to the law

- They choose to not add to the law: the only time to impose tort liability when there is a pre-existing private law right
- **Only can recognise liability if it fits in the categories of exemption or has a private right being taken away**
    - Police owed duty to whole community, not to individuals
    - Categories of exemption: whether you had the knowledge of the event and failed to take reasonable steps to prevent it, or assumed responsibility. (*Smith v Littlewoods) Here*, the police would not have fitted into either.

Implications: women have a responsibility to do something further in order to protect themselves.

- **Obviously this seems a disgraceful result: but result of balancing the awful fact situation against maintaining the integrity of the private law system**
    - **Seems like it is Buckmaster's 'timorous souls' vs. Atkin's 'bold spirits'**
    - **Arguably adopting Elias CJ's approach (dependant on fact rubric) would have led to a different outcome**
    - **Law as an analytical structure (Goff), therefore the values of the legal system are different to our moral values**
    - **But ultimate question: was this the outcome we really wanted? From sticking to the analytics: no pre-existing relationship led to no importation of a DOC; was this *really* the result we wanted?**

Donselaar v Donselaar 1982 NZCA → **Exemplary damages, conduct**

There was family feud between Andrew and John Donselaar. Andrew attacked John and knocked him unconscious, causing him to be badly concussed.

Can Donselaar sue Donselaar for exemplary damages despite s 317 of the ACC Act?

ACC Legislation:

- S 317 bars proceedings arising directly or indirectly out of personal injury.
- Here, compensation is sought because of the **conduct** of the person as opposed to the actual injury.

Cooke J

- Purpose of ACC is not *punitive*: it remedied the mischief of uneven compensation for personal injury
    - Leaves claims for exemplary damages open, as these are about mischief in relation to intentional wrongs/conduct of the person
    - **Claims can arise if a person is the victim of reprehensible conduct: have to link the defendant's conduct with the plaintiff**
- NZ society growing more fractured
    - Springbok Tour: Battle of Molesworth Street outside Parliament, example of policemen wearing full riot gear and smashing protesters (Argument that both sides were undertaking illegal actions)
    - Therefore, we need some way of adjudicating what is right and what is wrong in terms of **conduct**: hearing cases on exemplary damages can help to decide appropriate conduct
    - Does not necessarily solve societal issues (sanctions against oppressive use of power, remedy for trespass/assault) but courts should not give up this "useful weapon in the legal armoury"

Issues with exemplary damages

- Offenders are already punished through criminal law: exemplary damages are a civil remedy as opposed to a criminal remedy
    - Principle of double jeopardy: cannot be tried twice
- What happens with non-intentional negligence? *Botrill*: where conduct was negligent, but not intentionally

Result: No exemplary damages awarded in this situation, but open to exemplary damages being awarded in the future despite being covered under ACC. The offence must be outrageous and deserving of punishment. Here, it was a family dispute and though one brother hit the other; the brother had been a major irritant and cause of the behaviour.

A v Botrill 2003 NZ/UKPC → **Exemplary damages, intention/negligence**

Botrill was doing cervical smears on women in Gisborne. A claimed that Botrill misread four smears, so by the time she found out she had cancer, the treatment was more invasive and she was not able to have children. A received compensatory damages from ACC, but attempted to sue Botrill for exemplary damages on account of his negligence.

Was Botrill liable for exemplary damages for his negligence?

Lord Nicholls

- Botrill's actions needed to invoke a sense of outrage: being aware of the risks but proceeding regardless with "reckless indifference"
- When considering exemplary damages, we have to consider their conduct as being **objectively reckless**
    - **Only appropriate to award exemplary damages when wrongdoing is intentional or consciously reckless**
- Here, Botrill was not deserving of punishment through exemplary damages: as though he was doing a bad job, it was not intentional.

Held for Botrill. In order to be liable for exemplary damages, it must be proved that conduct was objectively reckless. Botrill was negligent, but not intentionally so and therefore not liable.

PC raised question of what to do when someone did not have intent to harm but still acted negligently. The answer was a "never say never" approach (akin to saying that they did not know).

Couch v Attorney-General (No 2) 2010 NZSC → **Exemplary damages/ subjective recklessness**

William Bell was on parole for aggravated robbery. He was placed at an RSA for work experience, and robbed it - seriously injured Susan Couch, and killing three people. The RSA did not know he was hired. Couch claimed for exemplary damages against the Attorney-General for vicarious liability of the probation officer. She claimed that the probation officer was grossly negligent in the supervision of Bell.

Procedural history:
The judges were all overruled in *Botrill* by the Privy Council, and this allowed for a "re-do" of the initial decision.

Can only sue for exemplary damages if you were not killed by the person (i.e. *Queenstown Lakes v Palmer*). Tort action must be **personal** for exemplary damages.

- i.e. so this case initially started as *Hobson* as the husband of one of the deceased, but due to this he could not sue as administrator of her estate (and could not sue for his own nervous shock as could not prove his grief was a recognisable psychiatric illness)

Tipping J: four options for exemplary damages

1. Award exemplary damages only for intentional wrong-doing

2. Award exemplary damages for any negligence
- i.e. any time a duty of care is breached, exemplary damages could be imposed

3. Award for subjective recklessness
- i.e. needed to know that there was a significant risk at the time and ran the risk regardless (*Botrill* – needed to realise that you were not doing the appropriate practice).

4. Award for objective recklessness
- i.e. **should** have realised the risk (*Botrill* – **should** have realised that his was not appropriate practice).

Tipping J opts for 3: subjective risk-running:

- Exemplary damages are a form of punishment for reprehensible conduct, so the person must have subjectively done something wrong.
- Cites Oliver Wendell Holmes and 'The Common Law': where punishment requires blame; and therefore we only punish people who have deliberately caused harm.
- On the facts of Couch, they may have needed to know more to justify exemplary damages: i.e. did they need to know a particular risk of violence? (Unclear as never dealt with at trial)

Elias CJ:
Considers the *Botrill* test of 'outrageouness' as is consistent with her duty of care approach (the factual matrix)

Which approach to take?

- Point of tort law (similar to *Michael*: do we stick to the analytics/uphold integrity of the private law **or** do we make new law?)
- **Elias CJ - We want to make inadvertent people advertent:** i.e. deterrence, educator factor of tort law
  - Botrill **ought** to have know that his negligent practice would have caused harm; to find exemplary damages and punishment would be to improve this behaviour
- **Tipping J:** rejects this argument, that exemplary damages are simply about punishment (we should not be as concerned about effecting people through deterrence).

NZ should attempt to stop what happened in *Botrill* and in *Couch*: the victims desire to stop this from ever happening again (i.e. improve screening programs for cancer detection; improve parole practices)

- **But question of whether punishing people will actually improve things: may actually be better for Parliament to fix the issue, rather than through tort law/law suits**