

# Torts

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## Actionable damage in negligence

As a matter of common law principle, a duty of care normally is owed where a person by negligence causes personal injury to another.<sup>1</sup> Indeed, the primary function of the negligence action overseas is to provide compensation to victims in personal injury cases, but in New Zealand, of course, these claims are nearly always barred and the victim's remedy is to make a claim for accident compensation. But accident compensation cover for mental injury is limited, and the common law remains applicable in this case. As for claims for financial loss, the law is a good deal more uncertain, and whether a duty ought to be imposed frequently arouses controversy.

### *Physical injury*

Sometimes a question can arise as to whether personal injury by way of actual physical injury has been suffered. A leading authority is *Rothwell v Chemical & Insulating Co Ltd*.<sup>2</sup> The claimants were negligently exposed by their employers to asbestos dust, putting them at risk of developing one or more long-term asbestos related diseases. They had not in fact contracted such diseases, but their exposure had caused them to develop pleural plaques - localised areas of pleural thickening. These plaques had no adverse effect on any bodily function and did not themselves have the propensity to develop into an asbestos related disease, but the claimants argued that physical changes to the body coupled with the risk of future injury from exposure to asbestos which caused consequent anxiety could found a claim for negligence. However, the House of Lords rejected their argument. Lord Hoffmann said the important point was that, save in the most exceptional case, the plaques would never cause any symptoms, did not increase the susceptibility of the claimants to other diseases and did not shorten their expectation of life. They had no effect on their health at all. So they were not damage. This being so, his Lordship asked whether they became damage when aggregated with the risk which they evidenced or the anxiety which that risk caused. Yet neither head was independently actionable, and they could not be relied on to create a cause of action which would not otherwise exist.

A recent instance applying the *Rothwell* principle is *Greenway v Johnson Matthey plc*.<sup>3</sup> In this case the claimants were employed by the defendants at chemical plants where they were negligently exposed to platinum salts and sensitised to a full blown platinum allergy. The Court of Appeal held that they could not claim in respect of personal injury in circumstances where no allergy had developed and their condition was and would remain symptomless. Platinum sensitisation was no more than a physiological change and was not harmful in itself. It was not a hidden impairment with the potential to give rise to detrimental physical effects in ordinary life. The claimants simply had to avoid further exposure to platinum.

### *Economic injury*

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<sup>1</sup> An example where it may not be a claim for negligence in respect of acts and omissions on the part of those engaged in armed combat: *Shaw Savill & Albion Co Ltd v Commonwealth* (1940) 66 CLR 344; *Mulcahy v Ministry of Defence* [1966] QB 732; *Multiple Claimants v The Ministry of Defence* [2003] EWHC 1134; but compare *Smith v Ministry of Defence* [2013] UKSC 41, [2014] AC 52.

<sup>2</sup> *Rothwell v Chemical & Insulating Co Ltd* [2007] UKHL 39, [2008] 1 AC 281.

<sup>3</sup> *Greenway v Johnson Matthey plc* [2016] EWCA Civ 408, [2016] 1 WLR 4487

However, some employees had been redeployed, dismissed or resigned, and they alleged that the defendants were liable for breach of contract, breach of statutory duty and negligence in causing them to lose relatively well-paid employment. On this question the court held that the classic formulation of duty focused on protection from physical injury, not economic harm. There could be no implied term protecting the employees against economic harm, and no contractual duty protecting them against the financial consequences of losing their jobs beyond their ordinary rights under their contracts. The nexus between the parties was founded on contract, and this was the primary source for their rights and obligations. A duty of care might run in parallel with the defendants' contractual duties, but the principles of tort would not impose on the defendants a more extensive obligation. So the defendants were under no duty to protect the claimants in relation to their financial losses.

So far as New Zealand is concerned, the claimants seemingly would not have suffered "personal injury" for the purposes of the ACA 2001, defined in s 26(1) as meaning, inter alia, "physical injuries to the person". Blanchard J has said that physical injuries are injuries suffered by the claimant which have some appreciable and not wholly transitory impact on the person but which are not necessarily long-lasting or ones that caused serious bodily harm.<sup>4</sup> So any action in respect of platinum sensitisation at common law would not be barred, but would likely fail for the same reason as in *Greenway*, that it did not constitute an actionable injury. That leaves the question as to the loss in relation to the claimants' employment, and Sales LJ ventured some general observations about recovering financial losses in negligence claims.<sup>5</sup> His Lordship said that the appellants could be said to be just on the wrong side of a reasonably "bright line" rule according to which the threshold for liability was the infliction of physical injury. It was in the nature of bright line rules that some marginal cases fell close to the dividing line created by the rule yet failed to satisfy it. This did not lead to the conclusion in the present case that the existing clear rule should be modified. That would tend to undermine the virtue of having a bright line rule in the first place, whereby people could have a reasonably clear idea of how things stood when they planned their affairs and also a reasonably clear idea whether to embark on litigation and what their prospects of success might be. The law did not furnish a remedy for every harm suffered by an individual, and in particular did not do so where the infliction of the harm in question did not constitute a "wrong" in the contemplation of the law.

Cases where economic loss standing alone is recoverable are those falling within the *Hedley Byrne* rule,<sup>6</sup> and those where the courts have accepted that the circumstances are such that good considerations of policy support the claim.<sup>7</sup> *Playboy Club London Ltd v Banca Nazionale del Lavoro SpA*<sup>8</sup> is a recent decision declining to extend the ambit of the *Hedley Byrne* principle. The first claimant (a casino) wanted a financial reference from the defendant bank in respect of a customer. A request for the reference was made by the third claimant on the first claimant's behalf, this to preserve customer confidentiality. The bank provided the reference to the third claimant, without

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<sup>4</sup> *Allenby v H* [2012] NZSC 33, [2012] 3 NZLR 425 at [56].

<sup>5</sup> Above n 3, at [55].

<sup>6</sup> *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465.

<sup>7</sup> A leading example involving the weighing of competing considerations of policy is *Customs and Excise Commissioners v Barclays Bank plc* [2006] UKHL 28, [2007] 1 AC 181.

<sup>8</sup> *Playboy Club London Ltd v Banca Nazionale del Lavoro SpA* [2016] EWCA Civ 457, [2016] 1 WLR 3169.

knowing its purpose, stating that the customer was financially healthy. In reality the customer was in the process of opening an account with the bank in which there were never any funds. The reference was reviewed by second claimant, which owned the first and third, after which a cheque cashing facility was made available to the customer. The first claimant subsequently made losses as a result of accepting the customer's counterfeit cheques. The Court of Appeal held that since the party requesting the reference had been identified as the third claimant, and its true purpose had not been disclosed, the bank had not assumed a responsibility to the first claimant or been in a special relationship with that claimant. It was not fair, just and reasonable to impose a duty when the first claimant had deliberately concealed its own interest.

The decision is another illustration of the tendency of the courts to caution in financial loss cases. More particularly, it shows the readiness of the courts to limit the *Hedley Byrne* duty strictly to cases where negligent information or advice is given by a defendant to a known claimant for a known purpose to be used for that purpose without independent inquiry. These requirements were indeed spelled out by Lord Oliver in *Caparo Industries plc v Dickman*,<sup>9</sup> and represent core controls on the ambit of the *Hedley Byrne* rule.

### *Mental injury*

Leading decisions in the United Kingdom, Australia and New Zealand have seen claims for damages for mental injury as tending to raise a concern about opening the floodgates to litigation, although the courts' determinations as to the seriousness of that concern and how it ought to be resolved have differed. In particular, in the UK the House of Lords has drawn a distinction between "primary" and "secondary" victims,<sup>10</sup> and as regards the latter has adopted a multi-faceted proximity analysis for determining the duty issue, taking account of the causal, temporal and geographical proximity between the claimant and the happening of the accident and of the emotional proximity between the claimant and the primary victim.<sup>11</sup> In New Zealand, a formal primary/secondary distinction has not been discussed or adopted, and as regards secondary victims the need for emotional proximity has been accepted but whether there is a need for temporal and geographical proximity has been left open.<sup>12</sup> In Australia, the High Court has declined to adopt the approach taken in the UK cases, but nonetheless has recognised the reality of the floodgates concern in mental injury cases.<sup>13</sup> Indeed, in all three countries an important control before liability can be imposed in such cases is a requirement that the plaintiff be shown to be suffering from a medically identifiable psychiatric illness or injury.<sup>14</sup> In practice this means that a plaintiff's injury needs to fall within a psychiatric diagnostic category found in medical literature, notably the *American Diagnostic and Statistical*

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<sup>9</sup> *Caparo Industries plc v Dickman* [1990] 2 AC 605 at 638 per Lord Oliver.

<sup>10</sup> *Page v Smith (No 1)* [1996] 1 AC 155.

<sup>11</sup> *McLoughlin v O'Brian* [1983] 1 AC 410; *Alcock v Chief Constable of the South Yorkshire Police* [1992] 1 AC 310

<sup>12</sup> *van Soest v Residual Health Management Unit* [2000] 1 NZLR 179.

<sup>13</sup> *Tame v New South Wales: Annetts v Australian Stations Pty Ltd* [2002] HCA 35, (2002) 211 CLR 317 at [5]-[7].

<sup>14</sup> *McLoughlin v O'Brian*, above n 11 at 418; *van Soest v Residual Health Management Unit*, above n 12 at [65]; *Tame v New South Wales: Annetts v Australian Stations Pty Ltd*, above n 13 at [192]-[194]. In the UK at least, and maybe elsewhere, it seems the rule applies even where the harm is intentionally inflicted. In *Wainwright v Home Office* [2003] UKHL 53, [2004] AC 406 Lord Hoffmann reserved his opinion but showed little support for relaxing the rule, and in *Rhodes v OPO* [2015] UKSC 32, [2015] 2 WLR 1373 neither party sought to question the orthodox requirement.

*Manual of Mental Disorders (DSM-5)*<sup>15</sup> and in the *International Classification of Diseases and Related Health Problems (ICD-10)*.<sup>16</sup>

In *Saadati v Moorhead*<sup>17</sup> the Supreme Court of Canada declined to join the overseas consensus. Saadati (S) was driving a vehicle which was struck by a vehicle driven by Moorhead (M). S sued M in negligence, seeking damages for non-pecuniary loss and past income loss arising from the accident. The trial judge held that the claim succeeded, finding that the accident caused S psychological injuries, including personality change and cognitive difficulties. This finding did not rest on an identified medical cause or expert evidence, but was based on the testimony of S's friends and family to the effect that S's personality had changed for the worse after the accident. The Court of Appeal allowed M's appeal, on the ground that S had not demonstrated by expert evidence a medically recognised psychiatric or psychological injury. But the Supreme Court allowed S's further appeal and restored the decision of the trial judge.

Brown J delivered the judgment of the Court. His Honour noted that the Supreme Court had not adopted either the primary/secondary victim analysis or the disaggregated proximity analysis propounded in the UK cases. Rather, he affirmed that recovery for mental injury in negligence law depended upon the claimant satisfying the criteria applicable to any successful action in negligence: a duty of care, a breach, damage, and a legal and factual causal relationship between the breach and the damage.<sup>18</sup> Canadian negligence law recognised that a duty existed at common law to take reasonable care to avoid causing foreseeable mental injury, and that this cause of action protected a person's right to be free from negligent interference with mental health. The ordinary duty of care analysis was, therefore, to be applied to claims for negligently caused mental injury. In particular, liability for mental injury should be confined to claims which satisfied the proximity analysis within the duty of care framework and the remoteness inquiry. Each of the ordinary elements to liability could pose a significant hurdle: not all claimants alleging mental injury would be in a relationship of proximity with defendants necessary to ground a duty of care; not all conduct resulting in mental harm would breach the standard of care; not all mental disturbances would amount to true "damage" qualifying as mental injury, which was "serious and prolonged" and rose above the ordinary emotional disturbances that would occasionally afflict any member of civil society without violating his or her right to be free of negligently caused mental injury; and not all mental injury was caused, in fact or in law, by the defendant's negligent conduct.

These being the core principles, his Honour turned to consider the state of the law which the Court was now asked to evaluate — the law developed by Canadian lower courts requiring claimants alleging mental injury to show that such injury had manifested itself to an expert in psychiatry in the form of a clinically diagnosed, recognisable psychiatric illness.<sup>19</sup> This had, therefore, placed the

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<sup>15</sup> American Psychiatric Association *American Diagnostic and Statistical Manual of Mental Disorders* (5th ed, 2013).

<sup>16</sup> World Health Organization *International Classification of Diseases and Related Health Problems* (10th revision, Geneva, 1993).

<sup>17</sup> *Saadati v Moorhead* [2017] SCC 28.

<sup>18</sup> Above n 17 at [19], citing *Mustapha v Culligan of Canada Ltd* 2008 SCC 27, [2008] 2 SCR 114.

<sup>19</sup> For example, *Vanek v Great Atlantic and Pacific Co of Canada* (1999) 48 OR (3d) 228, at [65]-[67]; *Young v Borzoni* 2007 BCCA 16, 277 DLR (4<sup>th</sup>) 685; *Healey v Lakeridge Health Corporation* 2011 ONCA 55, 103 OR (3d)

categories of mental and emotional harm for which damages might be recovered in the hands of psychiatry. “Whatever that discipline chooses to identify and name as a psychiatric illness becomes the law’s boundaries for damages in this area”.<sup>20</sup> Yet confining compensable mental injury to conditions that were identifiable with reference to the medical profession’s diagnostic tools was inherently suspect as a matter of legal methodology.<sup>21</sup> While, for treatment purposes, an accurate diagnosis was obviously important, a trier of fact adjudicating a claim of mental injury was not concerned with diagnosis, but with symptoms and their effects. Put simply, there was no necessary relationship between reasonably foreseeable mental injury and a diagnostic classification scheme. A negligent defendant need only be shown to have foreseen *injury*, and not *a particular psychiatric illness* that came with its own label. In other words, the trier of fact’s inquiry should be directed to the level of harm that the claimant’s particular symptoms represented, not to whether a label could be attached to them. Downloading the task of assessing legally recoverable mental injury to the DSM and ICD therefore imported an arbitrary control mechanism upon recovery for mental injury, conditioning recovery not upon any legally principled basis directed to the alleged *injury*, but upon conformity with a legally irrelevant classification scheme designed to facilitate identification of *particular conditions*.

Brown J affirmed that none of this was to suggest that mental injury was always as readily demonstrable as physical injury.<sup>22</sup> While allegations of injury to muscular tissue might sometimes pose challenges to triers of fact, many physical conditions such as lacerations and broken bones were objectively verifiable. Mental injury, however, would often not be as readily apparent. Further, mental *injury* was not proven by the existence of mere psychological *upset*. While tort law protected people from negligent interference with their mental health, there was no legally cognizable right to happiness. Claimants had to show much more — that the disturbance was serious and prolonged and rose above the ordinary annoyances, anxieties and fears that came with living in civil society.<sup>23</sup> This did not denote distinct legal treatment of mental injury relative to physical injury; rather, it went to the prior legal question of what constituted “mental injury”. Ultimately, the claimant’s task in establishing a mental injury was to show the requisite degree of disturbance, not to show its classification as a recognised psychiatric illness.

Brown J affirmed also that the Court was not suggesting that expert evidence could not assist in determining whether or not a mental injury had been shown.<sup>24</sup> In assessing whether a claimant had succeeded, it would often be important to consider, for example, how seriously the claimant’s cognitive functions and participation in daily activities had been impaired, the length of such impairment and the nature and effect of any treatment.<sup>25</sup> To the extent that claimants did not adduce relevant expert evidence to assist triers of fact in applying these and any other relevant

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<sup>20</sup> Citing *van Soest*, above n 12 at [100], per Thomas J, dissenting.

<sup>21</sup> Above n 17 at [31]-[36].

<sup>22</sup> Above n 17 at [37].

<sup>23</sup> Citing *Mustapha* above n 18 at [9] on this point.

<sup>24</sup> Above n 17 at [38].

<sup>25</sup> Citing Mulheron, “Rewriting the Requirement for a ‘Recognised Psychiatric Injury’ in Negligence Claims” (2012) 32 *Oxf J Leg Stud* 77 at 109.

considerations, they ran a risk of being found to have fallen short. Courts could be informed by the expert opinion of modern medical knowledge without needing to address the question whether the mental suffering was a recognisable psychiatric illness or not.<sup>26</sup> However, while relevant expert evidence would often be helpful in determining whether a claimant had proven a mental injury, it was not required as a matter of law.

As recognised above, the unanimous decision of the Supreme Court of Canada draws upon, and is entirely consistent with, the dissenting judgment of Thomas J in *van Soest v Residual Health Management Unit*.<sup>27</sup> In this case Blanchard J, speaking for the majority in the Court of Appeal, accepted that the need to show a medically recognisable psychiatric injury was the law in New Zealand, and the plaintiffs not having claimed to have suffered actual psychiatric injury their actions had to fail. Thomas J would have relaxed the requirement. His Honour suggested a test of mental suffering which, although not commanding a psychiatric label, is plainly outside the range of ordinary human experience. Perhaps the decision in *Saadati* presages the abandonment of the majority view and the acceptance of Thomas J's dissent. Thomas J noted that the restriction placed the categories of mental harm for which damages could be recovered in the hands of psychiatry. Yet there was no necessary relationship between the concept of reasonable foreseeability and psychiatry's classification of psychiatric illness. A negligent wrongdoer might be able to foresee mental harm to a person but not a particular or any psychiatric illness. The restriction was simply an arbitrary way of limiting the number of claimants. Further, the courts could be informed by the expert opinion of modern medical knowledge. Doctors could speak with a great deal of precision without needing to address the question whether the mental suffering was a recognisable psychiatric illness or not. Even so, his Honour recognised that, whatever its shortcomings, the restriction provided a convenient handle. He did not advocate that it be abandoned altogether but considered that it should not be applied in absolute terms. Plaintiffs as a general rule would still seek to prove a recognisable psychiatric illness. But this could be subject to a qualification which recognised a claim for mental suffering which, although not commanding a psychiatric label, was plainly outside the range of ordinary human experience. That would be subject to expert evidence, and would be no different in kind or difficulty than any number of questions that were regularly resolved in the courts. His Honour foreshadowed that eventually the question might be whether a plaintiff could show that his or her grief or sorrow was more than the grief or sorrow that was part of the ordinary vicissitudes of life.

In *van Soest* Blanchard J was not persuaded that this would be a workable test. Again, in *Tame v New South Wales; Annetts v Australian Stations Pty Ltd* the High Court of Australia saw the need to show actual psychiatric injury as a useful control. Gummow and Kirby JJ maintained that many of the concerns underlying recovery for psychiatric injury tended to recede if full force was given to the distinction between emotional distress and a recognisable psychiatric illness. It reduced the scope for indeterminate liability or increased litigation, restricted recovery to those disorders capable of objective determination, and posited a distinction grounded in principle rather than pragmatism that was illuminated by professional medical opinion rather than fixed by purely idiosyncratic judicial

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<sup>26</sup> Citing Thomas J in *van Soest* above n 12 at [103].

<sup>27</sup> Above n 12 at [78]-[120].

perception.<sup>28</sup> Even so, reliance on psychiatry may provide no superior solution, for psychiatric diagnosis is an uncertain and sometimes unreliable science. The point is graphically illustrated by the fact that until quite recent times homosexuality was categorised as a mental disorder, being removed from the DSM in 1974 and from the ICD only in 1993.<sup>29</sup> On any view diagnosis may require psychiatrists to make judgments of degree. Thomas J's and the SCC's views may simply change the qualifying threshold without making the law any more uncertain. As for whether this would open the floodgates, it may be that the fear is overstated. Relaxation of the rules of liability has often led to floodgates fears which have not eventuated. And finally there is the question of legal principle. Very arguably, the courts rather than psychiatrists should have the final word.

### **Actions arising from birth**

Actions arising from birth tend to give rise to vexing policy questions involving, broadly, whether the life of a child or some feature of that life should be regarded in law as actionable damage. A doctor or other medical professional may have negligently performed a sterilisation operation, or given negligent advice as to its efficacy. If the patient later conceives an unplanned child, the question arises whether the doctor can be liable to the patient and/or his or her partner for the costs of bringing up the child. This is a question concerning so-called "wrongful conception", with decisions overseas taking differing views. In England, in *McFarlane v Tayside Health Board*,<sup>30</sup> the House of Lords held that a mother who became pregnant following her husband's failed vasectomy could claim general damages for the pain, suffering and inconvenience of pregnancy and childbirth and for associated expenses, but that the parents could not recover the costs of bringing up their child. However, in a case where the child was born with disabilities, the English Court of Appeal allowed a claim for extra expenses attributable to the disability.<sup>31</sup> Then in *Rees v Darlington Memorial Hospital NHS Trust*<sup>32</sup> the House of Lords put a "gloss" on *McFarlane* by holding that in all failed sterilisation cases the courts should make a conventional lump sum award of £15,000, in order to mark the legal wrong suffered by the mother in losing the opportunity to live her life in the way that she wished and planned. In contrast to these decisions, in *Cattanach v Melchior*,<sup>33</sup> the High Court of Australia held in a four to three majority decision that a doctor who negligently failed to sterilise a patient was liable for upbringing costs on the application of ordinary principles of negligence. And should the child be disabled it is apparent that those costs would include the disability costs. But suppose the claim is brought not by the parents but by the disabled child, alleging negligence by the medical advisers of his or her mother or father in failing to diagnose or warn about the disability or risk of disability. In *Harriton v Stephens*<sup>34</sup> the High Court of Australia rejected such a claim, for had the defendant not been negligent the mother would have opted to undergo an abortion and the plaintiff

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<sup>28</sup> Above n 13 at [194].

<sup>29</sup> This was pointed out by Brown J in *Saadati*, above n 17 at [32].

<sup>30</sup> *McFarlane v Tayside Health Board* [2000] 2 AC 59.

<sup>31</sup> *Parkinson v St James and Seacroft University Hospital NHS Trust* [2002] QB 266; and see *Whitehead v Searle* [2009] 1 WLR 549; *Farraj v King's Healthcare NHS Trust* [2009] EWCA Civ 1203, [2010] 1 WLR 2139.

<sup>32</sup> *Rees v Darlington Memorial Hospital NHS Trust* [2003] UKHL 52, [2004] 1 AC 309.

<sup>33</sup> *Cattanach v Melchior* [2003] HCA 38, (2003) 215 CLR 1.

<sup>34</sup> *Harriton v Stephens* [2006] HCA 15, (2006) 226 CLR 52; and see also *Waller v James* [2006] HCA 16, (2006) 226 CLR 136.

would never have been born. It was a claim for so-called “wrongful life”, and, as Crennan J stated, life with disabilities, like life, was not actionable.

Recent litigation in the Netherlands and in Singapore has involved new and highly controversial types of claim arising out of the “wrongful” birth of a child. In the Netherlands case, twelve people who were conceived with sperm from a Dutch fertility centre brought claims against the centre, asserting that its longtime director (a Dr Jan Karbaat) was their biological father, and that over several decades he swapped donors’ sperm with his own. These, then, are “wrongful life” claims. Ten mothers who suspected that their children were conceived using Dr Karbaat’s sperm also brought actions, asking the court to give them access to Dr Karbaat’s DNA (who by then had died at the age of 89).<sup>35</sup> The court ruled in this case that DNA tests could be carried out, but held also that the results should remain sealed until another judge ruled whether or not the results could be compared with the DNA of a group of children born via in vitro fertilisation (IVF).<sup>36</sup> So, at the time of writing, the litigation was in its early stages, certainly with many difficult questions remaining to be resolved.

We can find possible answers to some of the difficulties in the decision of the Singapore Court of Appeal in *ACB v Thomson Medical Pte Ltd*.<sup>37</sup> The plaintiff and her husband sought to conceive a child through IVF, but due to the defendant’s negligence the plaintiff’s ovum was fertilised using the sperm of an unknown third party. The plaintiff gave birth to a healthy child without knowing about this error, but on discovering what had happened she sought damages from the defendant in respect of her pregnancy, the cost of bringing up the child and the loss of autonomy involved in conceiving the child by the sperm of a stranger rather than by that of her husband. Andrew Phang Boon Leong JA, delivering the judgment of the court, allowed the claim for a small amount of damages for pain and suffering arising from the pregnancy, denied the plaintiff’s claim in respect of the upkeep of the child, denied the claim for loss of autonomy, but recognised that the plaintiff had suffered a loss of “genetic affinity”, and that this should be an actionable head of damage. The first two findings were based on the law in the UK as laid down in *McFarlane’s case*,<sup>38</sup> and no more will be said about them here.<sup>39</sup> Our focus will be on the latter two findings.

The claim for loss of autonomy was founded upon the decision of the House of Lords in *Rees*.<sup>40</sup> Andrew Phang Boon Leong JA recognised that it was an inadequate response for the court to concentrate only on upkeep costs, and that giving damages for a loss of autonomy avoided certain policy objections to the upkeep claim. This was because the claim looked not to the cost of the child measured by its care liabilities but to the independent interests of the parents.<sup>41</sup> But a difficulty with the decision was that there was no clear consensus in the House of Lords on the nature of injury that had been suffered and whether the lump sum award was intended to be vindicatory or

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<sup>35</sup> See <https://www.nytimes.com/2017/05/15/world/europe/dutch-fertility-doctor-swapped-donors-sperm-with-his-lawsuit-claims.html?mcubz=0>.

<sup>36</sup> See <https://www.theguardian.com/world/2017/jun/02/dutch-court-allows-posthumous-dna-tests-on-doctor-in-ivf-scandal>.

<sup>37</sup> *ACB v Thomson Medical Pte Ltd* [2017] SGCA 20.

<sup>38</sup> Above n 30

<sup>39</sup> These heads of claim are discussed in Todd, *The Law of Torts in New Zealand* (7<sup>th</sup> ed, 2016), at [6.9.03].

<sup>40</sup> Above n 32.

<sup>41</sup> Above n 37 at [108].

compensatory.<sup>42</sup> His Honour noted also that the concept of a loss of autonomy was further considered in the House of Lords decision in *Chester v Afshar*,<sup>43</sup> a case about the creation of a narrow exception to the traditional principles of causation in the context of a doctor-patient relationship,<sup>44</sup> where three of the Law Lords identified the plaintiff's autonomy as an important consideration that the law should recognise. For example, Lord Steyn observed that a patient's right to be warned about the risks of an operation ought normatively to be regarded as an important right, and that it was grounded in, amongst other things, the need to ensure that due respect was given to the autonomy and dignity of each patient.<sup>45</sup>

After reviewing these decisions, and a "veritable mountain" of material written on the subject, Andrew Phang Boon Leong JA concluded that the court should not take the step of recognising a loss of autonomy (without more) as an actionable injury in its own right. Such a development would, he thought, pose significant problems of legal coherence and would be contrary to well-established principles on the recovery of damages. First, there was the "conceptual objection". This was that autonomy was too nebulous and too contested a concept to ground a claim. It was the subject of theoretical and conceptual disagreement which turned on fundamental questions of political and moral philosophy. Without a workable concept of autonomy, it was impossible to say that autonomy could, in and of itself, be the subject matter of legal protection.<sup>46</sup> Second, the notion of a loss of autonomy did not comport with the concept of damage in the tort of negligence. This was the "coherence objection". The common law had traditionally understood "damage" in terms of objective detriment: in order to make out a cause of action, claimants had to demonstrate that they were more than minimally worse off than they would otherwise have been. However, the difficulty was that most interferences with autonomy would fall far short of this standard. Any paternalistic act, such as that of forcing someone to belt up while in a motor vehicle, would technically constitute an interference with autonomy, *even if* it made the person *better off*. It would be difficult, in those circumstances, to identify precisely what it was that the claimant should be compensated for. The notion of an action for loss of autonomy was more compatible with a rights-based vindicatory model of tort law. But the common law was less interested in rights and more interested in remedies for harms.<sup>47</sup> Third, the recognition of such a head of damage would undermine existing control mechanisms which kept recovery in the tort of negligence within sensible bounds. This was the "over-inclusiveness objection". The problem was that any form of damage could, with some ingenuity, be reconceptualised in terms of a damage to autonomy, such as, for example, loss of autonomy in *Rothwell*.<sup>48</sup> It would allow the requirement of actionable damage to be side-stepped almost at will.<sup>49</sup>

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<sup>42</sup> Above n 37 at [111]. For the views of their Lordships on the question, see above n 30 per Lord Bingham at [8], Lord Nicholls at [17], Lord Millett at [123], Lord Scott at [148].

<sup>43</sup> *Chester v Afshar* [2004] UKHL 41, [2005] 1 AC 134.

<sup>44</sup> Todd, above n 39 at [20.2.05].

<sup>45</sup> Above n 43 at [17], [18], [24]. See also Lord Hoffmann at [33]-[34], Lord Hope at [87].

<sup>46</sup> Above n 37 at [116]-[119].

<sup>47</sup> Above n 37 at [120]-[122].

<sup>48</sup> Above n 2.

<sup>49</sup> Above n 37 at [123]-[124].

Accordingly, his Honour was not disposed to recognise the loss of autonomy as a recoverable head of damage in its own right. However, this was not to say that the court did not recognise the relevance of autonomy as *an important background consideration*. In the instant case the appellant had suffered a severe dislocation of her reproductive plans that was constituted principally by the fracture of biological parenthood, and to say simply that she had suffered a “loss of autonomy” was only correct at the highest level of generality. Her loss could not be understood without a more developed and substantive (as well as nuanced) notion of “autonomy” that took into account existing family building practices, kinship arrangements, and the socially-constituted value of genetic relatedness. The true loss which she had suffered in this case, which could and should be considered a distinct and recognisable head of damage, was a loss of genetic affinity.

The desire for genetic affinity was complex and multi-faceted. It was, at its core, a desire for identity bounded in consanguinity. The ordinary human experience was that parents and children were bound by ties of blood and share physical traits. This fact of biological experience – heredity – carried deep socio-cultural significance. It was affinity which distinguished familial ties from ties of friendship. Persons who *consciously chose* to undergo IVF did so because of a deep desire to experience, as far as it was possible, the ordinary experience and incidents of parenthood. And when, as in the present case, a person had been denied this experience due to the negligence of others then she had lost something of profound significance and has suffered a serious wrong. The appellant’s interest in maintaining the integrity of her reproductive plans in this very specific sense – where she had made a conscious decision to have a child *with her husband* to maintain an intergenerational genetic link and to preserve “affinity” – was one which the law should recognise and protect.<sup>50</sup>

Turning to the question of quantification of damages, Andrew Phang Boon Leong JA recognised that awarding a conventional fixed sum, as in *Rees*, would have the virtues of consistency, uniformity, expedience, and fairness to commend it. However, he did not consider it to be appropriate in the instant case, for two reasons. First, it would be contrary to the value of individual autonomy, which lay at the heart of the current award. The award of a uniform sum presupposed that all parents were identically situated and would be impacted in the same way by the disruption of their reproductive plans. If the objective was to compensate the *particular* plaintiff for the *particular* types of harm which had been inflicted, then the award should be tailored to the facts and circumstances of each case.

Another approach was to award a conventional sum (not to be confused with a “conventional award”, since it was not fixed across all cases, but was instead tailored to the unique facts of each case) for the non-pecuniary loss suffered in the particular case. It was vital to take into account the unique types of harm suffered by a person when his or her reproductive plans were disrupted in deciding on an appropriate award. These types of harm would vary depending on the particular reasons fertility treatment was sought, the precise manner in which the negligence took place, and the personal circumstances of the plaintiff (such as the presence of other children or the familial and/or cultural histories particular to him or her). So the court should benchmark the eventual award as a percentage of the financial costs of raising the child. Although this was not an

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<sup>50</sup> Above n 37 at [125]-[136].

appropriate case in which to award upkeep costs as such to the appellant, the financial costs of raising the child were not wholly irrelevant as, absent such costs, there would be no other criterion or standard by which to assess the quantum of damages that ought to be awarded. This approach would have several advantages. First, to the extent that one of the purposes behind the grant of damages for non-pecuniary loss was to provide solace to the claimant, an award which was benchmarked against upkeep costs would achieve this purpose. Second, any such award would not be derisory but would instead produce a substantial award that offered reasonable compensation. Whilst it was perhaps not theoretically elegant, the approach of benchmarking the present award against upkeep costs was practical, and it prevented the court from having to pluck a figure out of thin air, so to speak.<sup>51</sup>

The award of full upkeep costs would amount to giving the appellant an indemnity for the costs of raising the baby. This would not be appropriate compensation for the loss which had been suffered. However, it was also neither logical nor desirable to award the appellant a merely nominal sum, because to do so would be to make a mockery of the value of the interest at stake. It was clear that the damages to be awarded should therefore lie somewhere between these two extremes. On the issue of precisely where along the spectrum it should fall, the facts and circumstances were of the first importance. It was clear that substantial damages ought to be awarded. Whilst the appellant and her husband had accepted the child as their own, the reality of the situation and the anguish, stigma, disconcertment, and embarrassment suffered by the appellant and her family could not be denied. The appellant should be awarded 30% of the financial costs of raising the child as compensation, which was an amount that properly reflected sufficiently the seriousness of the appellant's loss and was just, equitable, and proportionate in the circumstances of the case.<sup>52</sup>

In reaching this conclusion, the Singapore Court of Appeal took account of the decision of the Northern Ireland Court of Appeal in *A & B v A Health and Social Services Trust*.<sup>53</sup> In this case the plaintiffs, who were twins, were children born as a result of IVF treatment provided by the defendant to the plaintiffs' mother. The parents of the plaintiffs were white, and they requested that any children born as a result of IVF treatment should have the same skin colour. The defendants used the wrong sperm, and as a result the plaintiffs were obviously darker in complexion than their parents. They sought damages from the defendant alleging personal injuries, loss and damage, but the court held that their claim had to fail. Girvan LJ said that it would be perverse and objectionable to suggest that children born with a different skin colour to their parents were in some way damaged, disabled or injured. The fact that they were subjected to intolerant and offensive remarks did not mean that they were damaged by the factors which led the intolerant to make the comments. However, the decision differs from that in *ACB* in two critical respects. First, there could be no loss of genetic affinity in *A & B*, as the sperm to be used was always going to be that of a donor rather than that of the husband. Secondly, the claim was brought by *the children*: it was, therefore, a claim for their "wrongful life". If the mother had been inseminated with the "correct" sperm, any children born as a consequence would have been a different colour, but they also would have been different persons. They could only exist in this world as a result of what had actually happened.

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<sup>51</sup> Above n 37 at [137]-[149].

<sup>52</sup> Above n 37 at [150].

<sup>53</sup> *A & B v A Health and Social Services Trust* [2011] NICA 28.

Andrew Phang Boon Leong JA said that the court respectfully agreed with the decision in *A & B*, but there were matters there which gave pause for thought. A perceptive commentator had explained that the approach taken by the court reduced the alleged harm to irrelevant physical variation and failed to give voice to the *true harm* that was suffered.<sup>54</sup> One could not assess the case without a proper appreciation of the social context, which was that Northern Ireland, where the appellants lived, was overwhelmingly white and there was a history of racially-motivated bullying of children. This was simply to recognise that race as a social concept could lie at the root of real and significant harms, including unkind questions as to a wife's fidelity and the paternity of children. His Honour drew attention to these points, because they represented the social reality that the present court had to confront, even if it did not support it.

Returning, then, to the present case, by awarding damages for loss of genetic affinity the court in *ACB* appears to have recognised a wholly new head of claim in "wrongful birth" litigation. Perhaps, however, it is not so very different in principle from the decision in *Rees*. The approach taken to the quantification of the claim certainly differs, but fairly clearly *Rees* does not purport to decide that "loss of autonomy" without more is an actionable head of claim. Rather, the decision is essentially about loss of *reproductive* autonomy. The different kinds of claim that have come before the courts are all variations on that theme, and they all give rise to unique questions. One of the arguments advanced by the majority in *Cattanach v Melchior*,<sup>55</sup> a wrongful conception case, was that the claim for upbringing was an ordinary medical injury claim, for financial loss consequent upon physical injury to the mother (the unwanted pregnancy). But whether one supports this kind of claim or not, treating the cost of a child as a "loss" and giving damages for upbringing certainly is not an "ordinary" claim. As one commentator has remarked, the view that judges do not make law and that "legal principle" can tell us whether Dr Cattanach should have been held responsible for the cost of rearing Jordan Melchior might be called a fairy tale.<sup>56</sup> *Rees* provides an alternative to giving upbringing damages and is one possible solution to the question. Whether a claim for loss of genetic affinity ought to be accepted and, if it should, how such a claim ought to be quantified similarly raises acute policy questions (just as does a claim for the costs of bringing up an unplanned child). The decision in *ACB*, allowing the recovery of damages, very arguably is founded on good and persuasive considerations of policy.

### **The negligent building owner**

*Invercargill City Council v Southland Indoor Leisure Centre Charitable Trust*<sup>57</sup> is a defective building case with an unusual twist. The Southland Trust owned a sports stadium in Invercargill. During construction the roof sagged due to negligence by the Trust's consulting engineer (M). The Trust arranged for remedial work, which was competently designed by an independent engineer (H). The Invercargill City Council insisted that the Trust seek a building consent for the remedial work, requiring of the Trust that M should

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<sup>54</sup> Citing Sheldon, "Only Skin Deep? The Harm of Being Born a Different Colour to One's Parents" (2011) 19 Med L Rev 657.

<sup>55</sup> Above n 33.

<sup>56</sup> Cane, "The Doctor, the Stork and the Court: A Modern Morality Play" (2004) 120 LQR 23 at 26.

<sup>57</sup> *Invercargill City Council v Southland Indoor Leisure Centre Charitable Trust* [2017] NZCA 68, [2017] 2 NZLR 650.

certify that the work met specifications set by H. But the work did not meet those specifications and M did not inspect the work and nor did the Council, which relied on M. The Council then issued a Code Compliance Certificate (CCC). Subsequently the Trust took advice about the roof from H, who recommended an inspection, but the Trust did not follow this advice. Four years later the roof collapsed following a heavy snowfall. Any claim for alleged negligent inspection was time-barred, but the Trust claimed that the Council was liable in negligence and for negligent misstatement for issuing the CCC.

Miller J, delivering the first judgment, drew attention to the fact that the Trust was a commissioning owner; it commissioned the building, contracting the architect, the engineer and the builder. This was a potential point of distinction from the decisions of the Supreme Court in *Sunset Terraces*<sup>58</sup> and *Spencer on Byron*,<sup>59</sup> where duties had been imposed. The instant claim rested on the negligent issue of the CCC and not on earlier acts or omissions, such as inspections, and it was, therefore, a negligent misstatement case. A duty thus required (a) proximity or a “special relationship”; (b) policy reasons not excluding a duty; (c) whether, in the above light, a duty was “fair, just and reasonable”; (d) specific reliance and loss. His Honour observed that reliance arose at two points in this framework: the defendant's expectation of reliance formed an element of the duty and the plaintiff's actual reliance affected causation.<sup>60</sup>

Starting with proximity, Miller J recognised that the Council knew of the CCC's purpose and audience. It chose to assume a degree of responsibility, having insisted the Trust seek consent for the remedial work. The Council expected that the Trust would have the work inspected for code compliance by an independent engineer, but should be taken to have known that the Trust expected it to insist on M supplying a producer statement confirming that the work was code-compliant. Next, as between it and the Council, the Trust was not vulnerable. It was realistic to expect the Trust, with the assistance of its advisers, to identify and manage the risk that the work might be badly designed or executed. Further, it was the commissioning owner, and used its position to assert control over the remedial work. And it relied on the producer statement tendered by M in circumstances where it was made clear that the local authority would not inspect the work itself but would rely on the statement. Turning to wider policy concerns, the commissioning owner's responsibility for code compliance was not in itself a defence for a local authority, although it might sound in contributory negligence. But an efficiency factor was that, as between the Council and a commissioning owner, the owner ought to be able to avoid the risk by imposing quality control mechanisms in its contracts with the builders, architects and engineers. Subsequent owners lacked the same opportunity. In summary, on the question whether a duty was fair and reasonable in light of these factors, his Honour determined that the Council should not be taken to have assumed a duty to inspect the work itself, but that it had assumed a different and lesser responsibility, that of checking that an appropriately qualified person had supplied adequate evidence that the consent conditions had been met. There was nothing unfair or unreasonable about the imposition of a duty to do that much.<sup>61</sup>

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<sup>58</sup> *North Shore City Council v Body Corporate 188529 (Sunset Terraces)* [2010] NZSC 158, [2011] 2 NZLR 28.

<sup>59</sup> *Body Corporate No 207624 v North Shore City Council (Spencer on Byron)* [2012] NZSC 83, [2013] 2 NZLR 297.

<sup>60</sup> Above n 57, especially at [69], [85].

<sup>61</sup> Above n 57 at [[87]-[98]].

Miller J said that it was not disputed that the Council was negligent in issuing a CCC for the remedial work before receiving the producer statement, for it had no way of knowing that the work was in fact code-compliant. But it denied that the Trust ever relied on the CCC. This being a misstatement claim, specific reliance had to be proved, and the evidence indicated that the Trust did not rely on the CCC at any relevant time for assurance that the work complied with the building code. It relied rather on its own agents. So the claim should have failed at trial for want of causation.<sup>62</sup> But he said that if he was wrong and the Council was liable, then he would fix the Trust's contributory negligence at 50%.<sup>63</sup>

Harrison and Cooper JJ, in a joint judgment, also held that the claim failed. They said that it was a case of an owner of a building whose contractors were alone responsible for creating defects which caused it loss seeking to recover the full amount of that loss from another party. In *Governors of the Peabody Donation Fund v Sir Lindsay Parkinson & Co Ltd*<sup>64</sup> the House of Lords attributed an architect's negligence in failing to ensure compliance with drainage regulations to an owner, saying it was incumbent on the owner to ensure compliance with the relevant provisions. Again, in *The Grange*<sup>65</sup> Blanchard J accepted that in the building and related fields a duty of care did not extend to protecting a person who brought about his own loss by negligence. Here the Trust through its building contractors, engineer and architect breached a similar duty in failing to carry out the remedial work in accordance with the building consent and then in advising the Council incorrectly that the work had been properly completed. The consequences of the agents' fault should be attributed to the Trust, which could not assert that the Council owed it a separate duty of care to protect it against the same negligence and indemnify it against the same loss.<sup>66</sup>

The same result was independently justified by applying settled principles on claims for negligent misstatement. The relationship should be of such a nature that (a) the Council knew inferentially that the Trust would use the certificate for the purpose of satisfying itself that the stadium complied with the code; (b) the certificate would likely be acted upon without independent inquiry; and (c) the Trust must have acted in that way. The purpose of a CCC was a notice to all interested parties – including the owner – of the Council's reasonable satisfaction that the building had been constructed in accordance with the building code. But its rationale did not extend to protecting the economic interests of a commissioning owner which had chosen to protect itself by engaging professional advisers and contractors. By engaging these third parties the owner had assumed direct control over the design and construction functions and relied on those parties. It was objectively unreasonable for the Trust to rely on the CCC for the purpose it now sought. There was no special relationship which was sufficiently proximate to justify imposition of a duty.<sup>67</sup>

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<sup>62</sup> Above n 57, especially at [100], [108], [116], [133].

<sup>63</sup> Above n 57 at [136]-[140].

<sup>64</sup> *Governors of the Peabody Donation Fund v Sir Lindsay Parkinson & Co Ltd* [1985] AC 210.

<sup>65</sup> *North Shore City Council v Attorney-General (The Grange)* [2012] NZSC 49, [2012] 3 NZLR 341, at [182].

<sup>66</sup> Above n 57 at [173]-[185].

<sup>67</sup> Above n 57 at [186]-[198].

Further, the evidence did not show specific reliance by the Trust on the CCC. The Trust was indifferent to whether a final certificate was issued or not, and elected to open the stadium without obtaining a CCC for the remedial work. Rather, sole reliance was placed on its own experts.<sup>68</sup>

Finally, in the event that the Council was held to owe a duty of care to the Trust, it would have been entitled to argue that the Trust contributed substantially to its own damage. Their Honours agreed with Miller J that, in that event, the damages should be reduced by 50% for contributory negligence.<sup>69</sup>

It is apparent that the heart of this decision lies in the court's finding that the plaintiff was a "negligent building owner" who had commissioned the work and to whom no duty was owed. However, as a general rule, the fact that independent experts acting for a plaintiff may have been negligent does not operate to deny a duty of care which normally is owed to that plaintiff by other defendants. So we need to pin down when this principle will apply. Harrison and Cooper JJ affirmed that the question turned on whether the rules of attribution – the law's treatment of one party's acts or omissions as those of another – should apply. They recognised that normally the Trust would not be attributed with the negligent conduct of its independent contractors, but different considerations prevailed where a claimant, whose loss was directly caused by those contracted experts, asserted that a territorial authority nevertheless owed it a duty when performing its statutory functions to protect it against the same loss. One critical factor was the degree of integration of the acts or omissions of a formally independent contractor into the construction project, particularly if they involved the sort of work which would otherwise be carried out by an employee. The statutory language and policy all assumed importance in this respect. And their Honours ultimately saw no difficulty in attributing their experts' acts or omissions to the Trust. Within a policy inquiry, a negligent act or omission by a building professional engaged by the commissioning owner to carry out its own statutory requirement ought to be attributable to that owner.<sup>70</sup>

This appears to be a special rule of attribution, as contemplated by the decision of the Privy Council in *Meridian Global Funds Management Asia Ltd v Securities Commission*<sup>71</sup> A company is personally liable where the tortious conduct of a director, servant or agent is attributed to the company. Lord Hoffmann said that the acts and knowledge of a company are necessarily those of individuals, and so the true issue is whether such acts and knowledge can be attributed to the company. The primary rules of attribution are to be found in the company's constitution, but these can be supplemented by general rules that apply to individuals, such as agency and estoppel. Furthermore, in an exceptional case, where application of those principles would defeat the intended application of a particular provision to companies, it would be necessary to devise a special rule of attribution to determine whose acts or knowledge or state of mind was for the purpose of that provision to be attributed to the company. So here the Trust (not a natural person) has been attributed with the conduct of third parties. Attribution often concerns the conduct of company officers and the question is whether the conduct of the particular individual should be treated as that of the company. The *Southland* case has gone further in applying the principle to independent contractors, in circumstances where the contractors were integrated into the building

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<sup>68</sup> Above n 57 at [199]-[200].

<sup>69</sup> Above n 57 at [208]-[209].

<sup>70</sup> Above n 57 at [179]-[181].

<sup>71</sup> *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 2 AC 500.

project and the Trust itself was obliged to comply with the statutory requirements imposed on a commissioning building owner.

It is clear that, in the absence of such attributed conduct, negligence by an owner's experts will not bar the owner's claim. If a duty is owed, the question then is one of causation and contributory negligence. This was the view taken in *Riddell v Porteous*,<sup>72</sup> where the Court of Appeal recognised that sometimes the effective cause of the loss would be the conduct of the council, sometimes responsibility should be laid at the door of the owners, and sometimes there should be an apportionment between them. In the instant case an owner had employed a building contractor who had deliberately departed from the plans, after which the council had negligently failed to make a proper inspection. In these circumstances the owner was held free of any blame. Again, in *Ingles v Tutkaluk Construction Ltd*<sup>73</sup> the Supreme Court of Canada affirmed that an owner-builder's negligence does not remove him or her from the scope of a municipality's duty of care. Rather, in very rare circumstances it can be considered as a complete defence to a finding of negligence on the part of municipal inspectors.

An appeal from the decision of the Court of Appeal has been heard by the Supreme Court, but at the date of writing (October 2017) no judgment had been delivered. The decision is perhaps vulnerable to the argument that it has the capacity to exclude claims by commissioning owners in cases where it has been commonly imposed, in particular those involving private owners who commission the building of their house. It is unlikely that the Supreme Court would contemplate such a result.

One final point of clarification. While *Southland* bars a negligent commissioning owner, it does not suggest that subsequent owners cannot sue either. On the contrary, as Harrison and Cooper JJ noted, a CCC gives notice to all interested parties of the Council's reasonable satisfaction that the building has been constructed in accordance with the building code. Its primary objective is to protect the health and safety of those who use the certified building, and it also exists for the secondary purpose of protecting financial interests, particularly subsequent and prospective owners.<sup>74</sup> Certainly the Council owes a duty of care in such a case.

### **Scope of the duty of care**

Courts frequently say that defendants can only be liable for loss which is within the scope of their duty to take care.<sup>75</sup> While that observation applies generally, a common instance where its implications must be taken into account is where a person relies upon information or advice provided by another and suffers loss which is exacerbated by some intervening external factor. In three consolidated appeals in the House of Lords, reported as *South Australia Asset Management Corporation v York Montague Ltd (SAAMCO)*,<sup>76</sup> the question at issue was the extent of liability of valuers who made negligent over-valuations of property offered as security for a loan in respect of loss associated with

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<sup>72</sup> *Riddell v Porteous* [1999] 1 NZLR 1.

<sup>73</sup> *Ingles v Tutkaluk Construction Ltd* 2000 SCC 12, [2000] 1 SCR 298; and see *Rothfield v Manolagos* [1989] 2 SCR 1259.

<sup>74</sup> Above n 57 at [189].

<sup>75</sup> See, for example, *Kuwait Airways Corp v Iraqi Airways Co (Nos 4 and 5)* [2002] UKHL 19, [2002] 2 AC 883 at [71]; *Modbury Triangle Shopping Centre Pty Ltd v Anzil* [2000] HCA 61, (2000) 205 CLR 254 at [38]–[40]; *Sherwin Chan & Walshe Ltd (in liq) v Jones* [2012] NZCA 474, [2013] 1 NZLR 166 at [36]–[38].

<sup>76</sup> *South Australia Asset Management Corporation v York Montague Ltd* [1997] AC 191, [1996] 3 All ER 365.

a subsequent fall in the property market. The Court of Appeal had held that the valuers were liable for the whole loss in all three cases, on the ground that a fall in the market was foreseeable and, but for the valuers' negligence, the lenders would not have entered the transactions at all. In the House of Lords a different test was applied, and the valuers were held liable only for the foreseeable consequences of the information being wrong. What this means in practice is that a valuer's liability is subject to a ceiling represented by the difference between the valuation given and the actual value at the date of the valuation. So loss which is equal to or less than that difference is recoverable, but any greater loss is borne by the lender. The operation of the principle is often known as the *SAAMCO* cap, although the explanation in law is that the greater loss is outside the scope of the defendant's duty.

What exactly the *SAAMCO* case decided and how it should be understood was addressed by the UK Supreme Court in *Hughes-Holland v BPE Solicitors*.<sup>77</sup> The claimant agreed with a builder and developer to lend the sum of £200,000 in the mistaken belief that the money was intended for developing a disused building into office premises. However, the builder had different plans for the site, which would have been unacceptable to the claimant had he known about them. The defendant solicitors were instructed to draw up a facility letter and a charge over the building, and in doing so they used a template from another transaction which stated that the loan was for a contribution to the costs of the development. This unintentionally confirmed the claimant's mistaken understanding of the builder's plans, and the claimant advanced the loan. The transaction was a failure and the claimant sued the builder, alleging fraud and negligence, and the solicitors, alleging dishonest assistance and negligence. The trial judge dismissed all the claims save that of negligence against the solicitors, and awarded the claimant his entire loss. The Court of Appeal allowed the solicitors' appeal and held the whole loss was attributable to the claimant's misjudgements. The claimant appealed to the Supreme Court.

Lord Sumption, delivering a judgment with which all of their Lordships agreed, said that while it was generally a necessary condition for the recovery of a loss that it would not have been suffered but for the breach of a duty, it was not always a sufficient condition. The law was concerned with assigning responsibility for the consequences of the breach, and a defendant was not necessarily responsible for everything that followed from his act, even if it was wrongful. The relevant filters were not limited to those which could be analysed in terms of causation, and all depended ultimately on a developed judicial instinct about the nature or extent of the duty which the wrongdoer had broken. So where a defendant supplied information which was only one of the factors relevant to the decision whether to proceed with a transaction, the claimant could only recover that part of his loss which was within the scope of the defendant's duty of care and would have been avoided had the defendant not breached that duty. If the defendant's contribution had been to supply material which the defendant would take into account in making his own decision based upon a broader assessment of the risks, the defendant had no legal responsibility for the client's decision.<sup>78</sup> On the facts the defendant had not assumed responsibility for the claimant's decision to lend the money, their instructions having been only to draft the documentation, so they were only responsible for confirming the claimant's assumption about one of a number of factors in his assessment of the project. No loss had resulted from that incorrect assessment, since the

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<sup>77</sup> *Hughes-Holland v BPE Solicitors* [2017] UKSC 21, [2017] 2 WLR 1029.

<sup>78</sup> Above n 77, especially at [20], [31]-[35].

claimant would have lost his money anyway. The development would have been left incomplete, the loan unpaid and the property substantially worthless when it came to be sold. The loss was not within the scope of the solicitors' duty but had arisen from commercial misjudgements which were not their concern.

In reaching this conclusion Lord Sumption drew attention to the essential distinction drawn by Lord Hoffmann in his leading speech in *SAAMCO*, underlying the whole of his analysis, between the assessment of the loss caused by the breach of duty and the extent of the defendant's duty to protect the claimant against it. The question it posed was whether the loss flowed from the particular feature of the defendant's conduct which made it wrongful, and only at the second stage was the court concerned with identifying the consequences which flowed from the breach. The question was sometimes sought to be resolved in terms of a distinction between "advice" and "information", but this had given rise to confusion because of the descriptive inadequacy of the labels. In the case of the former, the adviser's duty was to consider all relevant matters and not only specific factors in the decision. If one matter critical to the decision was negligently misjudged, the client would in principle be entitled to recover the full loss from entering the transaction. His responsibility would extend to the decision itself. By comparison, in the "information" category, the process of identifying the relevant considerations and the overall assessment of the commercial merits of the transaction were matters for the client. The defendant's legal responsibility did not extend to the decision itself. The fact that the material contributed by the defendant was known to be critical to the client's decision whether to enter the transaction did not turn it into an "advice" case. Otherwise, all "no transaction" cases would give rise to liability for the entire foreseeable loss, the very proposition rejected in *SAAMCO*.<sup>79</sup>

Lord Sumption recognised that the *SAAMCO* principle had been criticised as incoherent because it did not systematically exclude loss arising from collateral risks with which the defendant was not concerned.<sup>80</sup> In *SAAMCO* itself, where the defendant valued at £15m a property worth £5m, damages were limited to £10m. This exceeded the whole of the loss flowing from the transaction, including the loss flowing from the fall in the market, and the whole of that loss was awarded. However, the principle depended for its application on the award of loss which was within the scope of the defendant's duty, not the exclusion of loss that was outside it. In a simple case this might amount to the same thing. For example, it might be possible to strip out the effect of a fall in the market if that was the only extraneous source of loss. But where the loss arose from a variety of commercial factors which it was for the court to identify and assess, it would commonly be difficult or impossible to quantify and strip out the effect of each of them. In *SAAMCO* £10m was the maximum measure of the increased risk to which the valuer exposed the lender by getting the valuation wrong, and that sum provided the limit to what was recoverable by way of damages. As a tool for relating the recoverable damages to the scope of the duty the *SAAMCO* cap might be mathematically imprecise, but mathematical precision was not always attainable in the law of damages.<sup>81</sup>

Lord Sumption drew attention to the decision of the House of Lords in *Aneco Reinsurance Underwriting Ltd v Johnson & Higgins Ltd*<sup>82</sup> as falling on the other side of the line. In this case Lord

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<sup>79</sup> Above n 77 at [54]-[55].

<sup>80</sup> Stapleton, "Negligent Valuers and Falls in the Property Market" (1997) 113 LQR 1; Murdoch, "Negligent Valuers, Falling Markets and Risk Allocation" [2000] 8 Tort Law Review 183.

<sup>81</sup> Above n 77 at [45]-[46].

<sup>82</sup> *Aneco Reinsurance Underwriting Ltd v Johnson & Higgins Ltd* [2002] 1 Lloyd's Rep 157.

Lloyd, giving the majority view, held that brokers (and others) could be liable in contract for the foreseeable consequences of their negligence, including the adverse consequences of entering into a transaction with a third party, provided such consequences could fairly be held to fall within the scope of the defendant's duty of care. *SAAMCO* was an example of a special class of case — typically that of a valuer, but not confined to valuers — where the scope of the defendant's duty was confined to the giving of specific information. But in the instant case the brokers had undertaken a duty to advise the plaintiffs on the availability of reinsurance cover and to obtain the cover, and were liable for the whole transaction loss rather than simply the loss flowing from the failure to obtain the reinsurance. So, as Lord Sumption observed, the critical feature of the *Aneco* case was that the broker's representation was found to extend to the entire transaction, including the writing of the reinsurance itself. But his Lordship doubted whether it was helpful to describe either of Lord Hoffmann's categories as "normal" or "special". Every case was likely to depend on the range of matters for which the defendant assumed responsibility, and no more exact rule could be stated.

Decisions in New Zealand, consistently with the approach taken in *SAAMCO*, determine whether a negligent defendant is liable in law for a full transaction loss by asking whether the consequences were of a kind which were within the risk created by the defendant's breach of duty. *Bank of New Zealand v New Zealand Guardian Trust Co Ltd*<sup>83</sup> provides an example. The defendant, a trustee under a deed charged with overseeing advances by the plaintiff bank to a property investment company, failed to detect irregular payments by the company to its subsidiaries. Subsequently there was a fall in the property market and the company went into receivership. The bank sought to recover its lost advances from the defendant, but the Court of Appeal held that the defendant was not liable. In cases of contract, tort or equitable duties the correct approach was to consider the scope of the defendant's duty and the risks against which there was a duty to protect the plaintiff. It was not enough that the defendant's breach created or preserved the circumstances in which the loss could be incurred. Here the failure to inform left the bank continuing as a lender on a false basis (that there were no unsecured loans), but even if true the bank's loss would have been the same. The defendant's duty was only to protect the plaintiff against loss through causes which were connected with the irregular advances which the defendant failed to detect.

### **Deceitful misrepresentations**

*Zurich Insurance Co Ltd v Hayward*<sup>84</sup> considers the issues of inducement and causation in claims for deceit. The defendant was injured at work and claimed substantial damages against his employer. The employer's insurers suspected the defendant was exaggerating the extent of his injuries, but could not find sufficient evidence to prove this in court. They then reached an agreement to pay less than one third of the amount claimed in full and final settlement of the claim. The insurers later received proof that the defendant had in fact recovered from his injuries a year before the settlement, and sought to rescind the agreement and repayment of the sums paid under it. The trial judge held that the insurers could rescind the agreement, and assessed the quantum of damages payable to the defendant at less than one ninth of the sum he had received under the agreement. The Court of Appeal allowed the defendant's appeal on the ground, inter alia, that the insurers had not relied on the misrepresentation when they had reached the settlement agreement. The insurers

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<sup>83</sup> *Bank of New Zealand v New Zealand Guardian Trust Co Ltd* [1999] 1 NZLR 664.

<sup>84</sup> *Zurich Insurance Co Ltd v Hayward* [2016] UKSC 48, [2016] 3 WLR 637.

appealed to the Supreme Court on the questions whether the defrauded representee had to prove that it was induced into settlement because it believed that the misrepresentations were true, or whether it sufficed to establish that the fact of the misrepresentations was a material cause in entering into the settlement.

Lord Clarke, delivering a judgment with which Lord Neuberger, Lady Hale and Lord Reed agreed, affirmed that it was not necessary, as a matter of law, to prove that a representee believed that the representation was true. But that was not to say that the representee's state of mind might not be relevant to the issue of inducement. For example, if the representee did not believe that the representation was true, he might have serious difficulty in establishing that he was induced to enter into the contract or that he had suffered loss as a result. But the question in a case like the one before the court, involving a person in the position of the employer or its insurer who had suspicions as to whether the representation was true, or even was strongly of the view that it was not true, was not what view the employer or its insurer took but what view the court might take in due course. The employer and its advisers had to take into account the possibility that the defendant would be believed by the judge at the trial, because the views of the judge would determine the amount of damages awarded.<sup>85</sup>

Here the amount of the settlement was very much greater than it would have been but for the fraudulent misrepresentations made by the defendant. The small amount ultimately awarded by the judge showed the extent of the dishonest nature of the claim. The importance of encouraging settlement, which was considerable, was not sufficient to allow Mr Hayward to retain moneys which he only obtained by fraud. His Lordship accordingly would accept the submissions made on behalf of Zurich in support of the proposition that belief was not required as an independent ingredient of the tort. It might however be relevant as part of the court's consideration of the questions whether there was inducement and, if so, whether causation had been established.<sup>86</sup>

Lord Clarke also accepted Zurich's argument that, just as belief in the misrepresentation was not required, so also belief in other inducing causes was irrelevant. He noted that the textbooks strongly supported the proposition that it was sufficient for the misrepresentation to be an inducing cause and it was not necessary for it to be the sole cause. Indeed, there was a presumption of inducement where there was an intention to induce by means of fraud. While this was not a presumption of law but an inference of fact, it was a presumption that was very difficult to rebut. As Lord Chelmsford LC had observed, "can it be permitted to a party who has practised a deception, with a view to a particular end, which has been attained by it, to speculate upon what might have been the result if there had been a full communication of the truth?"<sup>87</sup> In particular, the presumption should not be rebutted merely because the representee was sceptical. Otherwise, the doubting representee would be placed in a worse position than the gullible or trusting one. And there was no duty upon the defrauded representee to exercise "due diligence" to determine whether there were reasonable grounds to believe the representations made. Zurich did as much as it reasonably could to investigate the accuracy and ramifications of Mr Hayward's representations before entering into any

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<sup>85</sup> Above n 84 at [18]-[19].

<sup>86</sup> Above n 84 at [22], [25].

<sup>87</sup> *Smith v Kay* (1859) 7 HLC 750 at 759.

settlement.<sup>88</sup>

As to the representee's knowledge of the falsity, Zurich submitted that whereas proof that the representee had knowledge (or 'blind eye knowledge') of the falsity sufficed, nothing short of that availed the misrepresentor. Lord Clarke said that since Zurich did not have full knowledge, it was not necessary to express a final view. But he thought there might be circumstances in which a representee might know that the representation was false but nevertheless might be held to rely upon the misrepresentation as a matter of fact. The very case could be an example. The trial judge had recognised that sometimes (a staged road traffic 'accident' for example) the other party might actually be certain from his own direct knowledge that the statement was a deliberate lie. But even then he and his advisers could not choose to ignore it; they had still to take into account the risk that it would be believed by the judge at trial. The situation was quite different from a proposed purchase, where if in doubt one could simply walk away.<sup>89</sup>

Lord Toulson, giving a concurring judgment, recognised that Mr Hayward's deceitful conduct was intended to influence the mind of the insurers, not necessarily by causing them to believe him, but by causing them to value his litigation claim more highly than it was worth if the true facts had been disclosed, because the value of a claim for insurers' purposes is that which the court is likely put on it. He achieved his dishonest purpose and thereby induced them to act to their detriment by paying almost ten times more than they would have paid but for his dishonesty. It did not lie in his mouth in those circumstances to say that they should have taken the case to trial, and it would not accord with justice or public policy for the law to put the insurers in a worse position as regards setting aside the settlement than they would have been in, if the case had proceeded to trial and had been decided in accordance with the corrupted medical evidence as it then was.<sup>90</sup>

*Zurich* illustrates the stringency of the rules governing deceit as compared to those governing negligence. It confirms that the plaintiff must have been influenced by the misrepresentation, but it need not have been the sole cause. There is no question as to the scope of the defendant's duty, and the issue is simply one of causation. Did the defendant's misrepresentation in fact induce entry into an agreement? If the answer is yes, the question of remoteness of damage can arise. In cases governed by the former s 6 of the Contractual Remedies Act 1979, now s 35 of the Contract and Commercial Law Act 2017, concerning statements inducing a contract between the representor and the representee, the contract test laid down in *Hadley v Baxendale* applies, and this requires, broadly, that the loss should arise in the usual course of things or should be such as may reasonably be supposed to have been within the contemplation of the parties as the probable result of the breach.<sup>91</sup> However, in an action for deceit, *Smith New Court Securities v Scrimgeour Vickers (Asset Management) Ltd*<sup>92</sup> held that the test is whether the damage flows directly from the fraudulent inducement. This is a stringent test which allows for greater recovery than in negligence. In *Smith New Court Securities* itself the House of Lords affirmed that a plaintiff who had been induced to

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<sup>88</sup> Above n 84 at [33]-[40].

<sup>89</sup> Above n 84 at [43]-[45].

<sup>90</sup> Above n 84 at [71].

<sup>91</sup> *Hadley v Baxendale* (1854) 9 Exch 341 at 354.

<sup>92</sup> *Smith New Court Securities v Scrimgeour Vickers (Asset Management) Ltd* [1997] AC 254.

purchase property by fraud had to give credit for any benefits he or she had received as a result of the transaction, that the general rule was that the benefits included the market value of the property as at the date of acquisition, but that such general rule was not to be inflexibly applied where to do so would prevent the plaintiff from obtaining full compensation for the wrong suffered. Accordingly damages for fraudulently inducing the purchase of shares were assessed not by reference to the shares' current market value at the time of acquisition, but by taking into account an unconnected and then undiscovered fraud which, if known about, would have considerably reduced their value.

### **The malicious institution of civil proceedings**

Should a person who maliciously institutes civil proceedings without any reasonable and probable cause be held liable in the same way as the malicious prosecutor in criminal proceedings? Early case law in England is equivocal, but the decision of the House of Lords in *Gregory v Portsmouth City Council*<sup>93</sup> in 2000 specifically rejected it. However, in *Crawford Adjusters v Sagicor General Insurance (Cayman) Ltd*<sup>94</sup> the Privy Council, in a three to two majority decision,<sup>95</sup> upheld the action. Then in *Willers v Joyce*<sup>96</sup> the same question arose for determination by the United Kingdom Supreme Court, and, this time by a five to four majority, it was again resolved in favour of allowing the action.

The claimant was employed by the defendant for over 20 years until he was dismissed in 2009. The claimant was a director of a company (L Ltd) which had brought and abandoned a claim against another company, and L Ltd had then sued the claimant for alleged breaches of duty causing it to incur the costs in pursuing the earlier claim. The claimant defended the action, which was discontinued before trial, and L Ltd was ordered to pay the claimant's costs. The claimant then sued the defendant for malicious institution of proceedings, alleging that L Ltd was controlled by the defendant, that it had brought the earlier claim on the defendant's instructions, and that L Ltd's claim against him had been brought without reasonable cause, had been determined in his favour, had been actuated by malice and had caused him to suffer loss. The ingredients of the action, if it existed, not being in dispute, the question for the Court was whether the malicious prosecution of civil proceedings was a tort known to English law.

Lord Toulson (with whom Lady Hale, Lord Kerr, Lord Wilson and Lord Clarke agreed<sup>97</sup>) recognised that the early case law was capable of more than one respectable interpretation, and it might be that there never was a time when there was a general understanding precisely where the boundaries of the tort lay.<sup>98</sup> Accordingly, turning to policy, he found it instinctively unjust for a person to suffer injury as a result of the malicious institution of proceedings for which there was no reasonable ground and yet not be entitled to compensation for the injury intentionally caused by the person responsible for it. The question then was whether any possible counter-arguments ought to prevail. His Lordship set out a number of contentions to this effect, but felt able to reject them all.

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<sup>93</sup> *Gregory v Portsmouth City Council* [2000] 1 AC 419.

<sup>94</sup> *Crawford Adjusters v Sagicor General Insurance (Cayman) Ltd* [2013] UKPC 17, [2014] AC 366.

<sup>95</sup> Lord Wilson, Lady Hale and Lord Kerr, Lord Sumption and Lord Neuberger dissenting.

<sup>96</sup> *Willers v Joyce* [2016] UKSC 43, [2016] 3 WLR 477.

<sup>97</sup> Lord Clarke also delivered a separate judgment.

<sup>98</sup> Above n 96 at [16].

First, the floodgates argument, that a good claim should not be allowed because it might lead to someone else pursuing a bad one, was not generally attractive. Second, the suggestion that the tort might deter those with valid civil claims from pursuing them through fear of a vindictive claim against them had been rejected in the case of criminal proceedings,<sup>99</sup> and had no greater merit here. Third, there was a public interest in avoiding unnecessary satellite litigation, whether in criminal or civil matters, but, again, that had not been a sufficient reason for disallowing claims for the malicious prosecution of criminal proceedings. Further, the action did not amount to a collateral attack on the outcome of the first proceedings (save for a point about a claim for costs, discussed below). Fourth, there was no duplication of remedies, and *Crawford* and the present case showed that injustices arising from groundless and damaging civil proceedings could not be addressed by way of other torts. Fifth, the action was not inconsistent with witness immunity from civil liability. An action against a defendant for damages for malicious prosecution after giving false evidence was not brought on or in respect of the evidence but in respect of the prosecution. Sixth, there was no inconsistency between the absence of a duty of care owed by a litigant to towards the opposing party and imposing a liability for maliciously instituting proceedings with reasonable cause. The distinction between careless and intentional conduct was a familiar feature of parts of the common law. Seventh, the tort should not be confined to persons exercising the coercive power of the state. Malicious prosecution was not a public law tort, and it would be incorrect to see it as having any of the characteristics of a public law remedy. Eighth, there was a question whether for reasons of reciprocity there should be an action for a maliciously instituted defence, which raised other and wider considerations.<sup>100</sup> There was an obvious distinction between the initiation of the legal process itself and later steps which might involve bad faith (for which the court was able to impose sanctions) but did not go to the root of the institution of legal process. Last, it was suggested that there was uncertainty as to the meaning of malice. However, the critical feature which had to be proved was that the proceedings were not a bona fide use of the court's process. Accordingly, all things considered, his Lordship considered that the suggested countervailing considerations were not sufficient to outweigh the argument that simple justice dictated a remedy for the claimant.<sup>101</sup>

A further point made by Lord Toulson concerned costs. The notion that a costs order had made good the injury caused by the prosecution of a malicious claim was almost certainly a fiction, and the court should try if possible to avoid fictions, especially where they resulted in substantial injustice. So his Lordship did not regard the claim in the instant case to recover excess costs as an abuse of process.<sup>102</sup>

The four dissentients - Lord Mance, Lord Neuberger, Lord Sumption and Lord Reed - each delivered a judgment. As regards the authorities, their Lordships were satisfied that they did not support the wider action.<sup>103</sup> As regards policy, Lord Neuberger conveniently summarised a substantial number of concerns, and came to opposite conclusions from those favoured by Lord Toulson. In particular, his Lordship thought that the new tort would be inconsistent with the general rule that a litigant owes no duty to an opponent in the conduct of civil litigation, and also with the rule that even a perjuring

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<sup>99</sup> *Savile v Roberts* (1698) 5 Mod 405, 12 Mod 208, 1 Ld Raymond 374.

<sup>100</sup> Such an action was recognised in *Aranson v Schroder* (1995) 671 A 2d 1023.

<sup>101</sup> Above n 96 at [43]-[57].

<sup>102</sup> Above n 96 at [58].

<sup>103</sup> See especially per Lord Mance, above, n 96 at [95]-[129].

witness in court proceedings was absolutely immune from civil liability. Next, the original justification for the tort in the criminal context, that it was a tool for constraining the arbitrary exercise of the powers of public prosecuting authorities or private persons exercising corresponding functions, did not apply in the ordinary civil context. In the non-criminal context this was limited to cases where the court was invited by the potential defendant to exercise *ex parte* or interlocutory powers which resulted in the claimant losing his liberty or property without the prior opportunity properly to defend himself. That was no basis for extending it to civil proceedings generally. Further, the precise ambit of the tort would be both uncertain and very wide, potentially extending to a malicious defence and malicious applications or allegations in proceedings which would otherwise not be malicious. Other concerns included the risks of satellite litigation and unanticipated knock-on effects, problems related to defendants wishing to invoke a right to privilege in relation to any document in connection with the allegedly malicious proceedings, a possible chilling effect on the bringing or defending of civil proceedings, and real problems involved both in identifying what constituted malice and in deciding what types of loss and damage should be recoverable in connection with claims based on the proposed tort. So his Lordship would have held that a tort such as that argued for by the appellants should not be recognised in the courts of England and Wales.<sup>104</sup>

Let us consider how the decision in *Willers* compares to relevant decisions elsewhere. By far the most extensive consideration of the issue is found in decisions of the courts of the United States. A leading academic text starts its discussion with the statement that “Wrongful institution of a civil action is actionable under rules similar to those for malicious prosecution of a criminal proceeding”.<sup>105</sup> However, the position is more nuanced than is apparent from that bald statement, as is made clear by the explanation of the rule and the exceptions and limitations that apply to it that are found in the following paragraphs of the text. In the *Crawford Adjusters* case in the Privy Council Lord Neuberger, in his dissenting judgment, undertook a close analysis of the United States experience and noted significant differences between the position in the United States and in England. His Lordship recognised that in England, as a general rule, the loser paid the winner’s costs and that this was a deterrent to groundless actions. By contrast, in the United States, there was no such general power, and this absence had played a part in the extension of the tort of malicious prosecution to all civil proceedings. Further, the American rule required that the previous proceedings should have caused “special injury”, being something more than the expense, distress and reputational loss that was ordinarily suffered as a result of wrongful litigation.<sup>106</sup> In his Lordship’s opinion, the various established exceptions to the rule that the tort of malicious prosecution did not extend to civil proceedings - the action for maliciously presenting a winding up petition,<sup>107</sup> procuring a search warrant without reasonable cause<sup>108</sup> or a bench warrant of arrest,<sup>109</sup> maliciously setting in train a process of execution against property,<sup>110</sup> maliciously procuring the

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<sup>104</sup> Above, n 96 at [156]-[173].

<sup>105</sup> Dobbs, Hayden and Bublick, *The Law of Torts* West Publishers, 2<sup>nd</sup> ed, 2011, at §592. The American Law Institute, *Restatement of the Law, Torts, 2d* (1977), at §674 likewise recognises the availability of the action.

<sup>106</sup> Dobbs, Hayden and Bublick, above, n 105 at §593.

<sup>107</sup> *Quartz Hill Consolidated Gold Mining Co v Eyre* (1883) 11 QBD 674.

<sup>108</sup> *Gibbs v Rea* [1998] AC 786.

<sup>109</sup> *Roy v Prior* [1971] AC 470.

<sup>110</sup> *Clissold v Cratchley* [1910] 2 KB 244.

arrest of a ship<sup>111</sup> - were satisfactorily explained and justified by this requirement. They all involved ex parte or interlocutory orders improperly procured by the person initiating the proceedings, in circumstances where in the nature of things there would never be a final order. So any loss would be “special injury” which was not part of the normal detriment caused by litigation.<sup>112</sup>

After reviewing the cases Lord Neuberger had no doubt that there was support both for maintaining the English rule in *Gregory* and also for adopting the American rule in the United States jurisprudence. However, he considered that there were four specific reasons why the United States experience supported a denial of the action. First, even in a jurisdiction where successful defendants rarely could expect to recover their costs, there seemed to be as strong judicial support for the English Rule as for the American Rule. Secondly, it was clear that departing from the English Rule would have the disadvantage of potentially confusing the law, causing unnecessary uncertainty. Thirdly, and more marginally, the United States jurisprudence, with its “special injury” requirement in the English Rule, justified on a principled basis what would otherwise appear to be anomalous exceptions to the principle that a claim in malicious prosecution could not be based on civil proceedings. Fourthly, the United States jurisprudence provided a reminder that wrongful civil litigation should not be viewed in isolation. The courts had procedural mechanisms at their disposal to preserve and strengthen the civil litigation process, and to target proceedings brought wrongfully or mistakenly.<sup>113</sup>

In New Zealand there has been a degree of support for the action, although no final decision in favour. In *New Zealand Social Credit Political League Inc v O’Brien*,<sup>114</sup> Cooke J favoured recognising an action in respect of maliciously instituted civil proceedings, although the question did not need to be decided in that case. Again, in *Rawlinson v Purnell, Jenkinson & Roscoe*<sup>115</sup> Hammond J accepted that New Zealand law might recognise the tort, although he considered that the question could only be finally resolved by a higher court.<sup>116</sup> Its elements, by analogy to malicious prosecution, were that the defendant had advanced a civil cause against the plaintiff, the cause had been resolved in the plaintiff’s favour, the defendant had no reasonable and probable cause for bringing the proceedings, the defendant acted maliciously in instituting or continuing the proceedings, and damage of a kind for which the law would allow recompense had been caused. However, his Honour held that the instant claim had to fail, because the jury had decided that the defendant had acted incompetently but not maliciously. Further, and most recently, in *Robinson v Whangarei Heads Enterprises Ltd* Heath J held, in the light of *Crawford Adjusters*, that a claim for malicious prosecution of civil proceedings should be permitted to proceed,<sup>117</sup> and at the trial itself Gilbert J held that the claim

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<sup>111</sup> *The Walter D Wallet* [1893] P 202.

<sup>112</sup> Above n 94 at [165]-[190].

<sup>113</sup> Above n 94 at [191]-[196].

<sup>114</sup> *New Zealand Social Credit Political League Inc v O’Brien* [1984] 1 NZLR 84.

<sup>115</sup> *Rawlinson v Purnell Jenkinson & Roscoe* [1999] 1 NZLR 479.

<sup>116</sup> See also *Official Assignee v Menzies (No 4)* HC Auckland CIV-2009-404-3391, 4 May 2011 at [41]; *Deliu v Hong* [2013] NZHC 735, at [76]-[88].

<sup>117</sup> *Robinson v Whangarei Heads Enterprises Ltd* [2013] NZHC 2247.

should indeed be recognised as alleging a tort.<sup>118</sup> However, it failed on the facts as the plaintiff could not prove that the defendant had acted with malice.

It is apparent from this brief overview that relevant authorities point in different directions and are susceptible to differing interpretation. But ultimately the determination of the question at stake in *Willers* depends on an assessment of the strength of the competing requirements of policy. The background to the question in the early cases provides no conclusive answer, and in any event the decision needs to meet the demands of good policy today. The choice is finely balanced, as the split of opinion in both *Crawford Adjusters* and *Willers* well indicates. However, some of the objections of the dissentients - the deterrence of good actions, the risk of satellite litigation, the impact on witness immunity - seemingly could be levelled at the established action for the malicious prosecution of criminal proceedings, and others - excessive uncertainty, unanticipated knock-on effects - may prove to be largely unfounded or at least manageable. The difficulty is that the impact of the identified dangers must to some extent be speculative, and the majority view that justice demanded a remedy for the claimant certainly carries resonance. So the majority view, by a narrow margin, deserves to carry the day.

### **Developments in the law of vicarious liability**

A spate of decisions in common law courts around the world concerning the law of vicarious liability shows no signs of coming to an end. In *Various Claimants v The Catholic Child Welfare Society*<sup>119</sup> (hereafter *Christian Brothers*) the UK Supreme Court accepted and endorsed earlier decisions of the Supreme Court of Canada, notably *Bazley v Curry*,<sup>120</sup> in holding (i) a relationship “analogous to employment” between the wrongdoer and the defendant, and (ii) a “close connection” between the wrongdoing and the relationship, could found the imposition of liability. Both of these elements have been scrutinised further in recent cases.

#### *Relationships analogous to employment*

In *Christian Brothers* the question was whether the Institute of the Brothers of the Christian Schools (the Institute), founded by Jean-Baptiste De La Salle in 1680, was responsible for sexual and physical abuse of children committed by its brothers at a residential institute for boys (St William’s) who were in need of care and protection. The Institute did not employ the brothers at St William’s but it sent its brothers to teach there. The Supreme Court held that the relationship between the Institute and the brothers had the same incidents as that of a contract of employment and could properly give rise to vicarious liability, on the ground that it was “akin to that between an employer and an employee”.<sup>121</sup> Then in *Cox v Ministry of Justice*,<sup>122</sup> a later decision of the UK Supreme Court applying the principle, the UK Ministry of Justice was held vicariously liable for the negligence of a prisoner assisting with work in the prison kitchen who dropped a heavy bag of rice onto the prison catering manager and injured her. The prisoner was not an employee of the prison authority, but when prisoners worked in the prison their activities formed part of the operation of the prison and were of

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<sup>118</sup> *Robinson v Whangarei Heads Enterprises Ltd* [2015] NZHC 1147, [2015] 3 NZLR 734, at [49].

<sup>119</sup> *The Catholic Child Welfare Society v Various Claimants* [2012] UKSC 56, [2013] 2 AC 1.

<sup>120</sup> *Bazley v Curry* [1999] 2 SCR 534.

<sup>121</sup> Above n 119 at [47].

<sup>122</sup> *Cox v Ministry of Justice* [2016] UKSC 10, [2016] AC 660.

direct and immediate benefit to the prison service itself. The relationship accordingly was analogous to an employment relationship.<sup>123</sup>

The recent decision at first instance in England in *Various Claimants v Barclays Bank plc*<sup>124</sup> well illustrates how the ambit of the qualifying relationship is expanding. In this case 126 claimants sought damages against Barclays Bank (“the Bank”) in respect of alleged sexual assaults to which they were subjected by a Dr Gordon Bates. At the time of the alleged assaults the majority of the claimants were applicants for employment with the Bank, and a small number were existing employees. Each claimant was required to attend the home of Dr Bates, where he had a consulting room and where he carried out medical assessments. Dr Bates was alleged to have sexually assaulted each of the claimants in the course of carrying out such assessments on behalf of the Bank. The claimants argued that the Bank was vicariously liable for Dr Bates’ sexual assaults, on the basis that the relationship between the Bank and Dr Bates was akin to a relationship of employment and that there was a close connection between the conduct and the relationship. The Bank argued that Dr Bates (who had died 8 years earlier) was an independent contractor.

Nicola Davies J upheld the claims. At stage 1 of the inquiry, her Ladyship sought to determine whether the relevant relationship was one of employment or “akin to employment”, by applying the five criteria identified by Lord Phillips in *Christian Brothers*.<sup>125</sup> They are:

- (i) The employer is more likely to have the means to compensate the victim than the employee and can be expected to have insured against that liability;
- (ii) The tort will have been committed as a result of activity being taken by the employee on behalf of the employer;
- (iii) The employee’s activity is likely to be part of the business activity of the employer;
- (iv) The employer, by employing the employee to carry on the activity will have created the risk of the tort committed by the employee;
- (v) The employee will, to a greater or lesser degree, have been under the control of the employer.

Her Ladyship considered that these factors all pointed towards the imposition of liability on the Bank. (i) The claimants’ only legal recourse was against the Bank, and it or its insurers had the means to meet the claims. (ii) The medical examinations were required by the Bank, with no choice as to the examining doctor being given to an applicant. The Bank made the necessary arrangements and paid for the examinations. The work was done for benefit of the Bank and on its behalf. (iii) The purpose of the pre-employment medical examination emanated solely from the Bank, enabling it to satisfy itself that an employee was physically suitable for the work which they were employed to do. It was of no health benefit to the individual concerned. In providing the assessment Dr Bates was an integral part of the business activities of bank. (iv) Many of the claimants were young girls, who were directed by the Bank to be seen and physically examined by a doctor they did not know at that doctor’s home. In these circumstances the Bank created the risk of the tortious conduct which was allegedly committed by Dr Bates; (v) The Bank was directional in identifying the questions to be asked and the examinations to be carried out. The control was of a higher level of prescription than might usually be found in the context of an examination required to be performed by a doctor. Control also was manifested in the claimants being directed to the particular doctor without any

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<sup>123</sup> See further Todd, “Tort” [2016] NZ Law Review 829 at 868-871.

<sup>124</sup> *Various Claimants v Barclays Bank plc* [2017] EWHC 1929.

<sup>125</sup> Above n 119, at [35].

choice in the matter. In light of all these factors her Ladyship was satisfied that the relevant criteria were met.<sup>126</sup>

At stage 2, the question was whether the tort was sufficiently closely connected with the employment or quasi-employment (the nature of which question is examined further below). Nicola Davies J thought that it was difficult to see how it could sensibly be argued that Dr Bates' acts did not fall within the activity tasked to him. He was a doctor who was likely to be viewed by young women as being in authority, not least because he was the doctor chosen by the claimants' employer or prospective employer to carry out a medical examination relating to their employment. The abuse took place when the doctor was engaged in the duties at the time and place required by the Bank. On these facts her Ladyship found that the abuse was inextricably interwoven with Dr Bates' duties, and the requirement of a close connection with the employment or engagement was satisfied.<sup>127</sup>

The decision in *Barclays Bank* makes another inroad into the orthodox rule that an employer is not vicariously liable for the tort of an independent contractor. Nicola Davies J makes no specific finding as to Dr Bates' status, referring only to his "employment or quasi-employment". Of course, if Dr Bates was the bank's employee the problem disappears, but in that case there would be no need to apply the criteria laid down in *Christian Brothers*. But if, as seems clear, he was an independent contractor, the orthodox rule has to be qualified by the significant possibility that the relationship may nonetheless be analogous to one of employment. This throws into doubt much orthodox law identifying and applying the distinction between employees and independent contractors. In *Christian Brothers* and similar cases the wrongdoer at least held a position which was functionally analogous to employment, for example as regards the wrongdoer's accountability to the relevant organisation, integration into its structure, and performance of duties aimed at pursuing its fundamental aims and objectives on its behalf. Dr Bates carried on his own business as a general medical practitioner, and it is hard to see his position as regards the bank as analogous.

An alternative argument, not advanced in *Barclays Bank*, is that the bank could have been held to be under a non-delegable duty to take care. It would need to be established, applying *Woodland v Essex County Council*,<sup>128</sup> that the bank had assumed an antecedent protective relationship with the victims of the abuse, which perhaps was possible on the facts of the particular case.

#### *A close connection between the relationship and the wrongdoing*

In *Christian Brothers* the UK Supreme Court affirmed the view taken by the House of Lords in *Lister v Hesley Hall Ltd*,<sup>129</sup> an earlier sexual abuse case, that a test asking whether there was a "close connection" between the relationship and the abuse should be applied. The Court also took a further step and held, adopting the approach taken in *Bazley v Curry*,<sup>130</sup> that there needed to be proof that the defendant caused a material increase in the risk that abuse would occur. By

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<sup>126</sup> Above n 124 at [45].

<sup>127</sup> Above n 124 at [46].

<sup>128</sup> *Woodland v Essex County Council* [2013] UKSC 66, [2014] AC 537.

<sup>129</sup> *Lister v Hesley Hall Ltd* [2001] UKHL 22, [2002] 1 AC 215.

<sup>130</sup> Above n 120 at 559–560 per McLachlin J.

comparison, the decision of the High Court of Australia in *New South Wales v Lepore*<sup>131</sup> was out of step with these developments. In this case Gleeson CJ and Kirby J, relying on *Bazley* and *Lister*, were prepared to accept that an institution might be held vicariously liable for sexual abuse committed by a teacher. However, the other members of the court took different and contrasting views. Gaudron J considered that the only principled basis upon which vicarious liability could be imposed for deliberate criminal conduct was that the defendant was estopped from asserting that the person whose acts were in question was not acting as his or her servant, agent or representative when the acts occurred. Gummow and Hayne JJ, in a joint judgment, considered that recovery against the employer in the case of an intentional tort should be limited to where the conduct was done in the intended pursuit of the employer's interests or the apparent execution of the authority which the employer held out the employee as having, and there was not the slightest semblance of proper authority to sexually assault a pupil. Callinan J thought that claims of abuse had to fail because deliberate criminal misconduct lay outside, and usually far outside, the scope or course of an employed teacher's duty. However, an alternative analysis favoured by McHugh J was that sexual abuse by a teacher of a child amounted to a breach of a non-delegable duty owed by the institution to the child.

In *Prince Alfred College Inc v ADC*<sup>132</sup> the High Court of Australia recognised that, as a result of the differing views expressed in *Lepore*, there was a need to look at the question again and to provide some guidance to lower courts. French CJ, Kiefel, Bell, Keane and Nettle JJ, in a joint judgment,<sup>133</sup> noted that the decisions in Canada and the United Kingdom had developed tests which had regard to the connection between the wrongful act concerned and the employment and, in the United Kingdom, to what a judge determined to be fair and just. These new tests of connection were devised not only to provide an explanation for cases of the kind to which they were initially addressed – involving the sexual abuse of children in educational, residential or care facilities by employees having special positions with respect to the children – but also to serve as a basis for vicarious liability which might apply more generally. But general principle of that kind depended upon policy choices and the allocation of risk, which were matters upon which minds might differ. An acceptable general basis for liability had eluded the common law of Australia, and it was well for the present to continue with the orthodox route of considering whether the approach taken in decided cases furnished a solution to further cases as they arose. This had the advantage of consistency in what might, at some time in the future, develop into principle. And it had the advantage of being likely to identify factors which pointed toward liability and by that means provided explanation and guidance for future litigation.<sup>134</sup>

On this approach, their Honours considered that the key was to be found in the words of Dixon J in *Deatons Pty Ltd v Flew*,<sup>135</sup> that vicarious liability might arise where the employment provided the "occasion" for the wrongful act. The fact that a wrongful act was a criminal offence did not preclude the possibility of vicarious liability. It was possible for a criminal offence to be an act for which the apparent performance of employment provided the occasion. Conversely, the fact that employment

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<sup>131</sup> *New South Wales v Lepore* [2003] HCA 4, (2003) 212 CLR 511.

<sup>132</sup> *Prince Alfred College Inc v ADC* [2016] HCA 37

<sup>133</sup> Gageler and Gordon JJ delivered a brief concurring judgment.

<sup>134</sup> Above n 132 at [10], [38]-[46].

<sup>135</sup> *Deatons Pty Ltd v Flew* (1949) 79 CLR 370 at 381.

afforded an opportunity for the commission of the act was not of itself a sufficient reason to attract vicarious liability. Even so, the role given to the employee and the nature of the employee's responsibilities might justify the conclusion that the employment not only provided an opportunity but also was the occasion for the commission of the wrongful act. By way of example, it might be sufficient to hold an employer vicariously liable for a criminal act committed by an employee where, in the commission of that act, the employee used or took advantage of the position in which the employment placed the employee vis-à-vis the victim.<sup>136</sup>

Consequently, in cases of this kind, the court should consider any special role that the employer had assigned to the employee and the position in which the employee was thereby placed vis-à-vis the victim. In determining whether the apparent performance of such a role might be said to give the "occasion" for the wrongful act, particular features might be taken into account. They included authority, power, trust, control and the ability to achieve intimacy with the victim. The latter feature might be especially important. Where, in such circumstances, the employee took advantage of his or her position with respect to the victim, that might suffice to determine that the wrongful act should be regarded as committed in the course or scope of employment and as such render the employer vicariously liable.<sup>137</sup>

The instant case concerned a claim by a former pupil at the Prince Alfred College (PAC) in respect of the sexual abuse he suffered at the hands of a housemaster, one Bain, employed by PAC. The abuse had happened many years earlier, and after it came to light the claimant accepted a settlement of money offered by PAC. But after his psychiatric condition worsened and his financial situation became desperate he changed his mind and sought to have the limitation period for bringing an action extended. The High Court held that permission should not be granted, and also that no finding on liability could or should have been made due to deficiencies in the available evidence. The relevant approach required a careful examination of the role the PAC actually assigned to housemasters and the position in which Bain was placed vis-à-vis the claimant and the other children. Much of the evidence necessary to a determination had been lost, and the PAC would be prejudiced in various ways if it were required to defend an action at this late juncture.<sup>138</sup>

Whether the distinction drawn by the High Court between the employment providing the "occasion" for and the "opportunity" for the abuse is a real one is doubtful. The words can be, and are, used interchangeably. The idea of a close connection based upon the creation of a risk is preferable, for it is clear that the nature of the abuser's job and the tasks he is given or authorised to carry out are pivotal in determining whether the test is satisfied. Yet the High Court certainly recognised that such employment-created risk was the focus of the inquiry, apparently seeing this as inherent in its favoured test. However, while the test to be applied in Australia is at least similar, the High Court disagreed with the decision of the UK Supreme Court in *Mohamud v WM Morrison Supermarkets plc*<sup>139</sup> on how it ought to be applied on the facts of that case.

In *Mohamud* the defendant employer was held to be vicariously liable for the conduct of its employee, a petrol pump attendant, who had abused the claimant, a Somali man who had come into the petrol

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<sup>136</sup> Above n 132 at [74]-[80].

<sup>137</sup> Above n 132 at [81].

<sup>138</sup> Above n 132 at [84]-[85].

<sup>139</sup> *Mohamud v WM Morrison Supermarkets plc* [2016] UKSC 11, [2016] AC 677.

station kiosk to make an inquiry, using foul, racist and threatening language and then subjecting him to a violent assault. Their Lordships upheld the claim, reasoning that it was the employee's job to attend to customers and to respond to their inquiries. His conduct in answering the claimant's request in a foul mouthed way and ordering him to leave was inexcusable, but it was within the "field of activities" assigned to him. The assault that followed was all part of a seamless episode. The employee grossly abused his position, but his conduct was in connection with the business in which he was employed to serve customers. His employers entrusted him with that position and it was just that as between them and the claimant, they should be held responsible for their employee's abuse of it.<sup>140</sup>

In essence, then, the Supreme Court took the view that the employment or task of the employee created the risk of the abusive conduct, because the employment involved dealing with customers and the assault occurred as part of that dealing. However, in *Prince Alfred* the High Court of Australia rejected the decision, because the role assigned to the employee in that case did not provide the occasion for the wrongful acts which the employee committed outside the kiosk on the forecourt of the petrol station. What occurred after the victim left the kiosk was relevantly unconnected with the employee's employment.<sup>141</sup>

We can perhaps agree with the High Court on this point. It is hard to see the racist assault as being connected with the wrongdoer's employment. The Supreme Court emphasised that what occurred was a "seamless" series of events, but the whole episode, including the initial encounter in the kiosk, very arguably was attributable simply to the employee's racism, not his employment. Let us change the facts and suppose the employee saw a Somali man passing in the street and ran out and assaulted him for racist reasons. The result seemingly would have been different, yet there does not appear to be any substantive difference as regards the connection with his employment. As it stands the decision in *Mohamud* seems apt, or at least has the potential, to render an employer liable for anything an employee may do at work and on the employer's premises.

#### *Vicarious liability and non-delegable duties*

In its latest decision the UK Supreme Court in *Armes v Nottinghamshire County Council*<sup>142</sup> has considered both the ambit of the doctrine of vicarious liability and the circumstances giving rise to the imposition of a non-delegable duty to take care. In this case the defendant local authority had taken the claimant into care when she was aged seven and had placed her with foster parents. The claimant initially was physically and emotionally abused by the foster mother, and when she was placed with second foster parents she was sexually abused by the foster father. At the trial of the action Males J held that the local authority was not responsible for the tortious conduct of the foster parents, either on the basis of vicarious liability or on the basis of a non-delegable duty of care,<sup>143</sup> and this decision was affirmed in the Court of Appeal.<sup>144</sup> The claimant appealed from this decision to the Supreme Court, which affirmed that the authority did not owe a non-delegable duty to take care

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<sup>140</sup> See further Todd, above n 123 at 871-874.

<sup>141</sup> Above n 132 at [83].

<sup>142</sup> *Armes v Nottinghamshire County Council* [2017] UKSC 60.

<sup>143</sup> *NA v Nottinghamshire County Council* [2014] EWHC 4005.

<sup>144</sup> *NA v Nottinghamshire County Council* [2015] EWCA Civ 1139, [2016] 2 WLR 1455; see further Todd, above n 123 at 877.

but, by a majority, allowed the appeal on the ground that the authority was vicariously liable for the foster parents' abuse.

Lord Reed, delivering a judgment with which Lady Hale, Lord Kerr and Lord Clarke agreed, said that there could not be any rationale for imposing vicarious liability on a defendant where he was directly liable for the harm caused by the third party. It therefore made sense to consider the scope of the defendant's own duties before considering whether vicarious liability might exist. Tortious liabilities based not on personal fault but on a duty to ensure that care was taken were exceptional, and had to be kept within reasonable limits. The non-delegable duties owed by employers to employees and schools to pupils were well-known examples, and the question which arose in the present case was whether local authorities had an analogous duty to ensure that care was taken, in the upbringing of children in their care, to protect their safety.<sup>145</sup>

In answering this question, Lord Reed referred first to *Woodland v Essex County Council*,<sup>146</sup> where, as already noted, Lord Sumption identified the assumption by the defendant of an antecedent protective relationship with the claimant as giving rise to the duty. Its characteristic features included the assumption by the defendant of a positive duty to protect the claimant from harm, and the delegation by the defendant to a third party of some function which was an integral part of the positive duty which he had assumed towards the claimant. Lord Reed regarded Lord Sumption's criteria as being intended to identify circumstances in which the imposition of a non-delegable duty was fair, just and reasonable. Like other judicial statements, the relevant criteria might need to be re-considered, and possibly refined, in particular contexts. That did not, however, mean that it was routinely necessary for the judge to determine what would be fair and just as a second stage of the analysis. In relation to vicarious liability, having recourse to a separate inquiry into what was fair, just and reasonable was not only unnecessarily duplicative, but was also apt to give rise to uncertainty and inconsistency. The critical question in the present case was whether the function of providing the child with day-to-day care, in the course of which the abuse occurred, was one which the local authority were themselves under a duty to perform with care for the safety of the child, or was one which they were merely bound to arrange to have performed, subject to a duty to take care in making and supervising those arrangements.

In the instant case, section 10 of the Child Care Act 1980 (UK) conferred or imposed upon a local authority, in relation to a child in their care, the powers and duties which a parent or guardian would have by virtue of their relationship to a child of which they were the parent or guardian: that is to say, the powers and duties which they had by reason of their status. Those powers and duties, which were many and various, included the general duty to safeguard and promote the child's health, development and welfare, and the right to direct, control or guide the child's upbringing. Should these parental powers and duties be construed as imposing a tortious duty not merely to take care for the safety of the child, but to ensure that care was taken? There was ample authority that the duty of a parent, or of a person exercising temporary care of a child in loco parentis, was a duty to take reasonable care.<sup>147</sup> But there were no authorities suggesting that parents, or persons with analogous responsibilities, were required not merely to take personal care for their children's safety,

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<sup>145</sup> Above n 142 at [30]-[32].

<sup>146</sup> Above n 128 at [7], [23].

<sup>147</sup> *Carmarthenshire County Council v Lewis* [1955] AC 549 at 566; *Harris v Perry* [2008] EWCA Civ 907, [2009] 1 WLR 19 at [19]; *Surtees v Royal Borough of Kingston upon Thames* [1991] 2 FLR 559.

but to ensure that reasonable care was taken by anyone else to whom the safety of the children might be entrusted. There were good reasons for adopting that approach in a domestic setting. If, notwithstanding the exercise of reasonable care by the parents, the law of tort were to hold them liable if their child were injured because of a lack of care on the part of the nanny or the babysitter, or if the child were abused by a friend or a grandparent, that would be liable to interfere with ordinary aspects of family life which were often in the best interests of children themselves.<sup>148</sup>

Although there were differences between the position of local authorities and that of parents, children in care had the same needs as other children. If, however, local authorities which reasonably decided that it was in the best interests of children in care to allow them to stay with their families or friends were to be held strictly liable for any want of due care on the part of those persons, the law of tort would risk creating a conflict between the local authority's statutory duties to give first consideration to the need to safeguard and promote the welfare of children under s 18 of the 1980 Act and their interests in avoiding exposure to such liability. And since a non-delegable duty would render the local authority strictly liable for the tortious acts of the child's own parents or relatives, the effect of a care order, followed by the placement of the child with his or her family, would be a form of state insurance for the actions of the child's family members, friends, relatives and babysitters. Furthermore, s 21 of the Act required the local authority to "discharge" their duty to provide accommodation and maintenance for a child in their care in whichever of certain specified ways they thought fit, or by making such other arrangements as seemed appropriate. The implication of the word "discharge" was that the placement of the child constituted the performance of the local authority's duty to provide accommodation and maintenance. It followed that the local authority did not delegate performance of that duty to the persons with whom the child was placed. This was difficult to reconcile with the idea that, when the foster parents provided daily care to the child placed with them, they were performing a function which remained incumbent on the local authority. It suggested that the duty of the local authority was not to perform the function in the course of which the claimant was abused (namely, the provision of daily care), but rather to arrange for, and then monitor, its performance.<sup>149</sup>

For these various reasons Lord Reed concluded that the proposition that a local authority was under a duty to ensure that reasonable care was taken for the safety of children in care, while they were in the care and control of foster parents, was too broad, and that the responsibility with which it fixed local authorities was too demanding. He therefore reached the same conclusion as the Court of Appeal on this aspect of the case, although for somewhat different reasons. His Lordship added that he was unable to agree with Burnett LJ's view, that if there was no vicarious liability for an assault upon a child in care, then the common law should not impose liability via the route of a non-delegable duty.<sup>150</sup> That was to conflate two distinct legal doctrines with different incidents and different rationales, and to misunderstand the relationship between them. As explained earlier, it

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<sup>148</sup> Above n 142 at [39]-[42].

<sup>149</sup> Above n 142 at [43]-[47]. Lord Reed advanced a similar argument (at [48]) concerning the implication of s 22, providing that the continuing responsibility of the local authority was discharged in relation to the boarding out of children by means of the prior approval of the households in which they were placed.

<sup>150</sup> Above n 144 at [29]-[42].

was the imposition of vicarious liability which was implicitly premised on the absence of direct liability.<sup>151</sup>

Turning to the question of vicarious liability, Lord Reed recognised that *Christian Brothers*<sup>152</sup> and *Cox*<sup>153</sup> held that the doctrine could apply where a relationship had certain incidents similar to those found in employment, subject to there being a sufficient connection between that relationship and the commission of the tort in question.<sup>154</sup> His Lordship accordingly sought to apply that approach to the circumstances of the instant case.

Considering first the relationship between the activity of the foster parents and that of the local authority, the relevant activity of the authority was the care of children who had been committed to their care, whereas the foster parents could not be regarded as carrying on an independent business of their own. The picture presented was not without complexity but, considered as a whole, it pointed towards the conclusion that the foster parents provided care to the child as an integral part of the local authority's organisation of its child care services. If one stood back from the minutiae of daily life and considered the local authority's statutory responsibilities and the manner in which they were discharged, it was impossible to draw a sharp line between the activity of the local authority, who were responsible for the care of the child and the promotion of her welfare, and that of the foster parents, whom they recruited and trained, and with whom they placed the child, in order for her to receive care in the setting which they considered would best promote her welfare. In these circumstances, it could properly be said that the torts committed against the claimant were committed by the foster parents in the course of an activity carried on for the benefit of the local authority.<sup>155</sup>

Considering next the issue of risk creation, the local authority's placement of children in their care with foster parents created a relationship of authority and trust between the foster parents and the children, in circumstances where close control could not be exercised by the local authority, and so rendered the children particularly vulnerable to abuse. If public bodies responsible for decision-making in relation to children in care considered it advantageous to place them in foster care, notwithstanding the inherent risk that some children might be abused, it could be considered fair that they should compensate the unfortunate children for whom that risk materialised, particularly bearing in mind that the children had no control over the decision regarding their placement. In that way, the burden of a risk borne in the general interest was shared, rather than being borne solely by the victims.<sup>156</sup>

So far as the issue of control was concerned, while the foster parents controlled the organisation and management of their household to the extent permitted by the relevant law and practice, and dealt with most aspects of the daily care of the children without immediate supervision, it would be mistaken to regard them as being in much the same position as ordinary parents. The local authority exercised powers of approval, inspection, supervision and removal without any parallel in ordinary family life. By virtue of those powers, the local authority exercised a significant degree of control

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<sup>151</sup> Above n 142 at [49]-[51].

<sup>152</sup> Above n 119.

<sup>153</sup> Above n 122.

<sup>154</sup> As to which see above n 125 and accompanying text.

<sup>155</sup> Above n 142 at [59]- [60].

<sup>156</sup> Above n 142 at [61].

over both what the foster parents did and how they did it, in order to ensure that the children's needs were met.<sup>157</sup>

In relation to the remaining issue, that of the ability to satisfy an award of damages, vicarious liability was only of practical relevance in situations where (1) the principal tortfeasor could not be found or was not worth suing, and (2) the person sought to be made vicariously liable was able to compensate the victim of the tort. Those conditions were satisfied in the present context. Most foster parents had insufficient means to be able to meet a substantial award of damages, and were unlikely to have (or to be able to obtain) insurance against their own propensity to criminal behaviour. The local authorities which engaged them could more easily compensate the victims of injuries which were often serious and long-lasting.<sup>158</sup>

Lord Reed was, therefore, satisfied that consideration of these various factors pointed towards vicarious liability of the local authority for the torts committed by the foster parents in the circumstances of the case. The claimant's appeal accordingly should be allowed.

Lord Hughes, in a dissenting judgment, respectfully agreed with Lord Reed as to the possibility of the local authority being under a non-delegable duty of care, but found the debate about vicarious liability a good deal more difficult. His Lordship considered that foster parents could not sensibly be described as akin to employees: they looked, if the business model was to be used, a great deal more like independent contractors, carefully selected and supervised as many a panel of such contractors was. The five *Christian Brothers* factors could not be applied mechanically, and an overall view of the justice, fairness and reasonableness of imposing vicarious liability might still be necessary. In the present case, the third factor (business activity) did not apply. The first (deep pockets or insurance) could not by itself be a principled ground for vicarious liability and tended to be circular. The fourth (creation of risk) would in practice apply to virtually all situations in which A asked or authorised B to deal in some manner with C. The principally relevant factors would seem to be factors 2 (integration), and 5 (control). While a focus on these factors could be seen as pointing towards vicarious liability, when one looked in greater detail at the legal and practical shape of fostering, the position became much less clear.<sup>159</sup>

Lord Hughes recognised that there was a spectrum of situations in which the children's services of a local authority might concern themselves with the welfare of children and families in their area, and in particular with where the children should live. Children could be placed for accommodation pursuant to various statutory provisions with, amongst others, foster carers or parents, natural parents, and relatives and friends. It followed that if vicarious liability applied to "ordinary" foster parents, on the basis that they were doing the local authority's business, then it should apply also to placements with parents, family and friends. Yet what the local authority did, in all cases, whether involving family and friends or strangers, was to take responsibility for making decisions about where the children should live, and then monitoring the progress with a view to changing the arrangements if they did not benefit the children. This was much the more realistic way of looking at the functions of the local authority and the relationship between it and foster parents. The detailed controls which the authority exercised, and which were apt at first sight to suggest analogy to employment, were in reality decisions about where the children should live. Once the decision to place had been made, the care of the children was in practice committed to the foster parents. The

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<sup>157</sup> Above n 142 at [62].

<sup>158</sup> Above n 142 at [63]

<sup>159</sup> Above n 142 at [75]-[78]

daily lives of the children were not thereafter managed by the authority, as they were if they were accommodated in a children's home, and the practice of the foster parents in relation to their own and the fostered children was for them. The foster carers did not do what the authority would otherwise do for itself; they did something different, by providing an upbringing as part of a family. The children lived in a family; a family life was not consistent with the kind of organisation which the enterprise test of vicarious liability contemplated.<sup>160</sup>

Furthermore, while the instant case arose in the context of deliberate wrongdoing or abuse, vicarious liability was more likely to be generated by complaints of acts or omissions said to have been negligent. It was an additional indication against the imposition of vicarious liability that it was likely to result in the litigation of family activity which it was undesirable should be ventilated in the courts.<sup>161</sup>

Lord Hughes concluded his judgment by observing that vicarious liability was strict liability, imposed on a party which had been in no sense at fault. It was necessary, and fair and just, when it applied to fix liability on someone who undertook an activity, especially a commercial activity, by getting someone else integrated into his organisation to do it for him. Employment was the classic example, but other situations might be analogous. But the extension of strict liability needed careful justification. Once one examined the nature of fostering, its extension to that activity did not seem to be either called for or justified, but, rather, fraught with difficulty and contra-indicated.<sup>162</sup>

What should we make of these various arguments? The unanimous view taken in *Armes* rejecting the imposition of a non-delegable duty in the case of a child placed by the local authority with foster parents certainly is supportable, notwithstanding that the relationship between the authority and the child can be characterised as one where the authority has assumed a responsibility to protect the child and that an antecedent protective relationship between the defendant and the claimant of the kind contemplated by Lord Sumption in *Woodland* appears to exist. This is because their Lordships were satisfied that the imposition of any such duty was necessarily excluded by the terms of the statute governing the duties of local authorities towards children in care. It is well established that courts will not impose duties of care that tend to operate inconsistently with the requirements of statute,<sup>163</sup> which principle clearly can cover the question whether a non-delegable duty ought to be recognised.

A question as to the relationship between the imposition of a non-delegable duty and the imposition of vicarious liability arguably is raised by Lord Reed's remark that there could not be any rationale for imposing vicarious liability on a defendant where he was directly liable for the harm caused by the third party. This might be read as meaning the one excludes the other, but that does not seem to be right. In principle the two surely can co-exist where the necessary elements to liability under each head both exist on the facts of a particular case.<sup>164</sup> Perhaps Lord Reed meant only that there was no point in going on to examine vicarious liability if the defendant was directly liable.

What *Armes* went on to decide about vicarious liability marks a further step in the seemingly relentless expansion of the scope of such liability, at least in English law. Particular criticism can be

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<sup>160</sup> Above n 142 at [80]-[88].

<sup>161</sup> Above n 142 at [90].

<sup>162</sup> Above n 142 at [91].

<sup>163</sup> See, for example, *Sullivan v Moody* [2001] HCA 59, (2001) 207 CLR 562; *B v Attorney-General* [2003] UKPC 61, [2004] 3 NZLR 145; *D v East Berkshire Community Health NHS Trust* [2005] UKHL 23, [2005] 2 AC 373.

<sup>164</sup> See above n 123 at 877.

levelled at the emphasis placed by the majority on the ability of the defendant to pay damages and the relevance of insurance. In *Cox* Lord Reed himself recognised that neither factor was a principled justification: the mere possession of wealth was not in itself any ground for imposing liability, and employers insured themselves because they were liable rather than the other way round.<sup>165</sup> While his Lordship did not totally rule them out, in *Armes* he presented both as routine factors which the court should take into account. Such arguments seem to lead to nowhere save the depth of the defendant's pocket.

As for the application of the other factors drawn from *Christian Brothers*, the approach taken by Lord Hughes is convincing. One of his Lordship's concerns was that logically there would be vicarious liability imposed for torts committed by parents and other family members with whom a child was placed. Lord Reed denied this, saying that the parents would not have stood in the same relationship with the authority. They would have been carrying on an activity (raising their own child) which was much more clearly distinguishable from, and independent of, the child care services carried on by the local authority than the care of unrelated children by foster parents recruited for that purpose. Yet, even assuming that it is appropriate to impose vicarious liability for foster parents but not real parents, his Lordship's answer does not address Lord Hughes' core argument that, outside residential homes, a local authority does not bring up children. Foster parents, by contrast, do not perform the tasks of a local authority but they do bring up children. On this view there is no basis for any imposition of vicarious liability. So the decision of the Supreme Court of Canada in *KLB v British Columbia*,<sup>166</sup> denying that a local authority could be vicariously liable for the torts of foster parents, is more persuasive than the decision of the New Zealand Court of Appeal in *S v Attorney-General*,<sup>167</sup> recognising such liability.

More generally, the decision in *Armes* very arguably deprives the test of whether a relationship is "akin to employment" of real or substantial content. Standing back a little from the detail of the case, it is rather hard to understand how a relationship based on a local authority appointing foster parents to carry out all the parental activities involved in raising children, which activities the local authority does not itself perform, can be seen to qualify in any realistic sense. We can at least expect a continuing flow of litigation exploring other situations where some kind of line will be drawn. The decided cases have not yet managed to draw it.

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<sup>165</sup> Above n 122 at [20].

<sup>166</sup> *KLB v British Columbia* [2003] 2 SCR 403

<sup>167</sup> *S v Attorney-General* [2003] NZCA 149, [2003] 3 NZLR 450.