The annual increase in the number of accidental injuries to life, limb and property as a result of the impact of modern civilisation, has become a major problem for exploration and study by lawyers, judges, politicians, economists and social workers all over the world. During World War II there were more casualties among human beings from accidents on the home front, than there were deaths and wounds inflicted on the battlefields. According to the estimates in USA alone, the number of infantry units killed was 313,000 but 386,082 civilians were killed in accidents during the same period. Although statistics on similar lines aren’t available in our own country.\(^1\)

**Economic Effects**

It’ll be observed that death and personal injury involve economic loss through loss of wages, loss of support, and payment of funeral and medical expenses. If the injury is permanent or fatal the economic loss is very severe; it may fall not only on the injured person and his family, but on his hospital, physician, tradesman, landlords, friends and the community at large. As most persons are members of a family group, the economic shock of an accident falls on the family which carries the injured person along as best as it can. If the injured person is sole bread-earner, the entire family group may face a severe crisis.

**Accidental Claims and Scarcity**

Despite this high toll of accidents and the resulting loss to individuals and society, it isn’t a matter for gratification to figure out that very few claims for compensation or damages are made and tried in the domestic courts of underdeveloped nations. In our own law research, both official and non-official cases on Torts, more so on negligence, are few and far between. Negligence as a basis of liability for death or personal injuries has scarcely arisen for discussion before our Courts, except perhaps where negligence was alleged against Railways in transportation of goods.

There are several reasons for lack of this class of litigation. In the first place, the public in developing civilisations are generally unaware of their civil rights in the matters of making claims for compensation in respect of personal injuries, and victims of accidents through ignorance of their rights fail to prefer claims. It is true that potential claims are settled out of court for small sums, but even such instances are rare. Another deterrent factor is the heavy court-fees which a litigant has to pay on money claims in our courts. Yet another factor is the lack of liberal outlook on the part of our average mofussil Judge in awarding compensation in personal injury actions. The logical consequence of the inability or failure to get liberal compensation in such cases, is a great loss to the community.

**Foundation of Tortious Liability**

There has been an age-long conflict of theories of tortious liability, centring round two basic, but opposing interests of individuals, viz., the interest of freedom of action. The first required that every person who causes injury to another must compensate that other regardless of his motives or intentions. That second required that the person causing injury should be called upon only if his action was intentionally wrongful, or was the result of an undue lack of consideration for the interests of others. The former is content with imposing liability for faultless causation, while the latter insists upon fault or culpability as a prerequisite for legal responsibility. But it’ll not be surprising to see that between

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these theories, a midway, a compromise has been found. “For somewhere the line must be drawn unless full rein be given to the doctrine that a man always acts at his peril that ‘coarse and impolitic idea’”.  

HISTORICAL ANTECEDENTS OF NEGLIGENCE

In the field of accidental injuries, the legal right to receive compensation or damages today is however generally said to depend on “negligence”. Yet as an independent basis of tort liability, it is a very recent creation. 

It isn’t therefore surprising to find that, neither the first book on common law attributed to Glanvill, Chief Justice to Henry II, nor the second great book on the same subject by Bracton written about the middle of the thirteenth century, contains any reference to negligence as a basis of liability. There was not even the title of “Negligence” in the year-books or any digest of English Law before Comyns (1762-67). 

Even Addison who wrote on the more modern Law of Torts in 1860, hardly devoted any space to the subject of Negligence, except where he treated it as a mental element in tortious liability. It was only in the second quarter of the twentieth century that the concept for negligence became crystallised. 

WHAT IS NEGLIGENCE?

Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man won’t do. 

Negligence has been defined by Winfield as “the breach of a legal duty to take care which results in damage undesired by the defendant to the plaintiff”. It contains three ingredients:

1. A legal duty to take care;
2. Breach of that duty; and
3. Consequential damage to the plaintiff.

Lord Atkin in Donoghue v. Stevenson, put it thus:

“You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who then, in law, is my neighbour? The answer seems to be persons who’re closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I’m directing my mind to the acts or omissions which are called in question.”

Lord Reid said that Lord Atkin’s dictum ought to apply unless there was some justification or valid explanation for its exclusion.  

FORESEEABILITY AND PROXIMITY

‘Foreseeability’ means whether a hypothetical ‘reasonable person’ would have foreseen damage in the circumstances.

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2 Read v. J. Lyons & Co. (1946) 2 All ER 471: 1947 AC 156 at 180. How this idea came to be considered as “coarse and impolitic” is difficult to understand.
3 Fleming on Law of Torts, p. 119, citing Winfield, The History of Negligence in the Law of Torts, 42 LQR 184, and Fitfoot, History and Sources of the Common Law, Chapter 8
4 Street: Foundation of Legal Liability, p. 187 (1906).
5 1932 AC 562 at 580.
‘Proximity’ is shorthand for Lord Atkin’s neighbour principle. It means that there must be legal proximity, i.e. a legal relationship between the parties from which the law will attribute a duty of care.

Note that a duty of care may not be owed to a particular claimant, if the claimant was unforeseeable.

**Negligence**

Breach of legal duty of care owed by D to C which causes C to suffer reasonably foreseeable damage

**Elements**

**Duty of Care**

Policy device used by judges to regulate and control liability for negligence

1. **Reasonable foresight**
   - **Donohue v Stevenson**
   - Should D have reasonable foreseen C being closely and directly affected?

2. **All circs.**
   - **Yuen Kun Yeu v AG of HK**
   - See if it is ‘fair and justifiable’
   - **Peabody Fund v Parkinson**
   - In light of proximity and case law **Caparo v Dickman**

**If Duty Established**

**Nervous Shock?**

How well did D have to behave?

**Breach of Duty?**

Is there an Actual Breach exist?

**Standard of Care**

How well did D have to behave?

- **Ordinary Standard**
  - Reasonable, prudent man

- **Variable Standard**
  - Look at act not actor
  - **Wilsher v Essex Area HA**
  - Reasonable person in that field / profession / trade **Bolam Case**

The C must prove D breached duty **Expert evidence** to prove fault

- Show a flaw that no reasonable manufacturer would have put into a product
If Duty Established (Continued)

1. Court consider evidence...
   - Degree of risk: Bolton v Stone
     - More likely to injure = more likely breach

2. Seriousness of injury: Paris v Stepney

3. Cost / practicability of avoiding risk: Latimer v AEC Ltd

4. Followed reasonable common practice: Maynard v W Mid

If Breach Established

- Causation
  - Fact: But for... Barnett v Kensington
  - Law: Break in chain

  - Natural Event
    - D liable up until original injury eclipsed by natural idleness

  - 3rd Party
    - Med treatment unlikely to Robinson v PO

  - The Claimant
    - Outrageous neg. R v Cheshire

  - Remoteness
    - Damage to C same as reasonable for?

  - Take victim as found
    - Smith v Leech Brain

Possible Defences / Remedies

- Defences
  - Contributory Negligence
  - Volenti
**NEGLIGENCE AS A STATE OF MIND OR UNREASONABLE CONDUCT**

Theorists have differed as to whether negligence is a mental attitude or conduct. According to the mental theory negligence is merely a state of mind involving indifference or inadvertence: “a form of mens rea standing side by side with wrongful intention as a formal ground of responsibility” for certain nominated torts. Those who maintain the former theory do not admit that negligence may itself be a specific tort. Those who propound the latter theory say that “negligence is conduct which falls below the standard established by law for the protection of others against unreasonable risk of harm and this is generally the accepted view. This conflict is referred to as one between objective and subjective negligence.

**TORT OF NEGLIGENCE**

The theory that negligence is conduct and not a state of mind has resulted in the development of the conception that negligence is a specific tort, and not a mere element in the commission of other torts. For a long time, the idea that negligence is itself a tort was never expressed in so many words, but there was a sub-conscious realisation of it. It took more than a century for English Law to arrive at the present stage of development. In *Donoghue v. Stevenson*, the House of Lords treats negligence as, “where there is a duty to take care, as a specific tort in itself, and not simply as an element in some complex relationship or in some specified breach of duty”.

**NEGLIGENCE IN LAW AND IN COMMON PARLANCE**

“In law ‘negligence’ means failure in a duty to take care.”

Lord Wright in *Lochegelly Iron and Coal Co. v Mullan*, put it as follows:

“In strict legal analysis ‘negligence’ means more than needles or careless conduct, whether in omission or commission; it properly connotes the complex concept of duty, breach, and damages thereby suffered by the person to whom the duty was owing.”

The term “negligence” has been frequently defined by courts and text-writers in various terms, such as carelessness, want or absence of care, failure to exercise such care and skill as the circumstances require, want of diligence and care reasonably required under all the circumstances, failure to use ordinary precaution, failure of duty to take care, omission or disregard of a legal duty, and in many other cognate terms.

**BENCHMARKS FOR ESTABLISHING NEGLIGENCE**

The standards for establishing negligence are:

1. The standard to determine whether a person has been guilty of negligence in the standard of care which in the given circumstances, a reasonable man could have foreseen;
2. The test is foreseeability, not probability;

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11 (1932) AC p. 562 | 101 LJPC p. 199 | 147 LT p. 281 (HI)
14 These are the terms commonly available in American Judgments.
3. The more serious the consequences if case isn’t taken, the greater is the degree of care which must be exercised;
4. While the initial burden of proof of negligence is on the claimant, barring exceptional cases the principle of *res ipsa loquitur* comes into play;
5. Having regard to the local conditions prevailing in the country, when *res ipsa loquitur* is attracted, it should be given as wide an amplitude and as long a rope as possible in its application to the case of a motor accident;
6. The defendant can’t escape liability by merely proffering hypothetical explanations, however plausible, of the accident.

**Basic Problem in the Law of Negligence**

Negligence is a matter of “risk”. This involves the two questions “Risk of what?” and “Risk to whom?”. In other words, the endeavour is to determine the nature of the risk and the scope of the risk. For this purpose, Courts in England have evolved a number of artificial technics like “duty of care” and “remoteness of damage” which are concerned with the basic problem of what harms are included within the scope of the unreasonable risk created by the defendant, and what interest the law deems worthy of protection against negligent interference in consonance with current notions of policy in that country.¹⁵

**Elements as to Cause of Action for Negligence**

From the present state of law, the essential elements constituting actionable negligence may be summarised as follows:

1. A duty recognised by law requiring conformity to a certain standard of conduct for the protection of others against unreasonable risk of harm.

   *This is commonly known as the “duty issue”*

2. Failure to conform to the required standard of care, or briefly, breach of that duty.

   *This element usually passes under the head of “negligence”.*

3. Actual loss or injury to the interests of the plaintiff.

   *This is otherwise stating that “damage is the gist of the action for negligence”.*

4. A reasonably proximate connection between the defendant’s conduct and the resulting injury.

   *This is the question relating to the principle of “remoteness of damage” or “proximate cause”; and*

5. The absence of any conduct by injured party disabling him from bringing an action for the loss he has sustained.

   *This involves consideration of two specific defences to the action, viz. (1) voluntary assumption of the risk and (2) contributory negligence, which are properly within the question of “remoteness of damage” or “proximate cause” and falling within the scope of the third element as mentioned above.*

¹⁵ Fleming: Torts p. 121
DUTY OF CARE: TESTS FOR ESTABLISHING DUTY

(1) Duty distinguishes situations in which a claim may be entertained from those where no action is possible

Duty is an artificial conceptual barrier which the claimant must overcome before his action can even be considered. Its role is to keep the tort of negligence within manageable proportions by distinguishing situations in which a claim may, in principle, be entertained from those in which no action is possible.

(2) Factors influencing the existence of a duty

The question of whether or not a duty exists is influenced by a number of factors, such as:

- the type of claimant (e.g., socially sympathetic claimants such as rescuers are generally owed a duty of care in a wider range of situations than are less sympathetic ones such as trespassers);
- the type of defendant (e.g., defendants with public functions owe a duty of care in more limited circumstances than do individual defendants);
- the nature of the damage caused (e.g., a defendant almost always owes a duty of care not to cause physical damage to person or property through his negligent act, but the duty owed with respect to psychiatric harm and pure economic loss is more restricted); and
- the nature of the conduct (e.g., active conduct is more likely to give rise to a duty of care on the part of a defendant than is a mere omission).

Donoghue v Stevenson – The Neighbour Principle

In Donoghue Lord Atkin laid down the foundation for the duty of care. Under his ‘neighbour principle,’ a defendant must avoid acts or omissions which will foreseeably harm persons who are so closely and directly affected by his acts or omissions that he ought to have them in mind as being so affected. The neighbour principle remains the backbone of duty, but in the ensuing years the courts have developed more complex tests. These tests, while generally built around the key element of foreseeability, have attempted to reflect more accurately some of the other factors inherent in establishing duty.

The Anns Two-stage Test

(1) Two stages: proximity based on foreseeability of harm and considering of policy factors

In Anns v Merton London Borough Council [1978] AC 728, Lord Wilberforce concluded that duty effectively comprised two stages. The first stage, derived from the neighbour principle, was a relationship of proximity or neighbourhood based on foreseeability of harm. The second was the consideration of policy factors which might negative, reduce or limit the scope of the duty, or the class of persons to whom it was owed, or the damages to which it might give rise.

(2) Difficulties arising from the two-stage test

The two-stage test led to expansionary decisions. This was partly because the notion of duty based on foreseeability without overt consideration of precedents at the first stage was inherently suited to developing, rather than restricting, the law. But it was also due to the fact that many judges were uncomfortable with the open articulation of policy, which led to the second stage of the test being under-used.
The Caparo Three-part Test

(1) Three stages: foreseeability, proximity and for imposing a duty to be fair, just and reasonable in the circumstances

Fear that the Anns test would lead to exponential development of the duty of care led the courts to favour an alternative test. This test, first developed by Deane J. in the High Court of Australia, initially consisted of foreseeability and proximity. To these elements, the requirement that it must be fair, just and reasonable in the circumstances to impose a duty of care was added in the case of Caparo Industries plc v Dickman [1990] 2 AC 605. The introduction of the three-part test reflected a more conservative approach to duty, and it coincided with a return to incremental development, also spearheaded by the Australian High Court (see, e.g., Sutherland Shire Council v Heyman (1985) 60 ALR 1).

(2) Difficulties arising from the three-part test

The three-part test remains – at least in theory – applicable in the UK, but it has been abandoned in Australia (see Sullivan v Moody [2001] HCA 59; (2001) 207 CLR 562), which now favours a ‘salient features’ approach to the determination of duty, due in large part to concern about the unsatisfactory nature of the proximity requirement. Although introduced as a tool for filtering out claims which lack the requisite closeness, proximity has always been a notoriously vague concept and its role has been undermined by its nebulous and indefinable nature. Canada has adopted a modified version of the Anns test, incorporating aspects of the Caparo test. At the first stage, there must be reasonable foreseeability of harm and sufficient proximity between the parties for it to be fair and just to impose a duty of care. At the second stage, the court examines whether there are residual public policy considerations to justify denying liability.

In recent years, the courts have moved away from the somewhat reactionary approach which marked their response to Anns. As a result, even in jurisdictions where Caparo still applies, negligence has been allowed more scope for development, although still in a largely incremental manner.

Duty of Care: Special Situations

A. Duty of care normally held to exist in straightforward cases involving physical damage to person or property

A duty of care will normally be held to exist in straightforward cases involving physical damage to person or property. However, in exceptional cases, where it won’t be fair in the circumstances to impose a duty of care, the courts may hold there to be no duty even where physical damage is involved: Marc Rich & Co v Bishop Rock Marine Co Ltd [1996] 1 AC 211.

B. Situations where courts do not recognise duty because of public policy reasons

In less typical circumstances, the courts are often more circumspect. They have, at various times, and in various jurisdictions, refused – largely for reasons of public policy – to recognize the existence of a duty of care in a range of situations, such as:

- where moral issues are involved (e.g., the cost of raising a healthy child following a failed sterilization, as in McFarlane v Tayside Health Board [2000] 2 AC 59, or the cost of raising a healthy child following a negligently-performed IVF procedure resulting in implantation of an embryo
fertilized by the wrong sperm, or where a disabled child claims his mother should have been advised to abort him, and *Harriton v Stephens (2006) 226 ALR 391*;

- where there is a conflict between negligence and other torts (e.g., damage caused by a negligent act or statement which would be protected under the defence of qualified privilege in defamation – although note that no such conflict is held to arise in relation to employee-references;
- where it is considered necessary to accord immunity to certain classes of defendants (e.g., damage caused as a result of judicial negligence).

In addition, there are a number of broad categories in which particular rules have been established to restrict the situations in which a duty is owed. These categories are examined below.

**C. Psychiatric harm: recovery possible when “three proximities” are fulfilled**

**Psychiatric Harm**

Historically, the courts were unwilling to allow recovery for negligently inflicted psychiatric illness. This unwillingness stemmed from an incomplete understanding of mental illness, and from fears that allowing recovery for mental, as opposed to physical, harm would give rise to fraudulent claims and lead to a potential flood of litigation.

The first cases to allow claims for psychiatric illness - also known as claims for “nervous shock”, due to the requirement that the condition must be caused by a sudden shock to the system - involved primary victims (i.e., those who feared for their own safety: *Dulieu v White [1901] 2 KB 669*). Technically, under current English law, a primary victim who suffers medically diagnosed psychiatric harm due to a defendant’s negligence need not even show that such damage was reasonably foreseeable, as long as some physical damage could reasonably have been foreseen: *Page v Smith [1995] 2 All ER 736*.

However, Page has been the subject of considerable criticism and is regularly distinguished by the English courts: see, e.g., *Rothwell v Chemical Engineering & Insulating Co Ltd & Anor [2007] UKHL 39* (a case which also confirmed that risk and anxiety do not constitute actionable damage in negligence).

**D. Pure economic loss not linked to physical damage**

The courts have always allowed recovery for economic loss which flows from physical damage: *Spartan Steel and Alloys Ltd v Martin & Co [1972] QB 27*.

It was, however, historically impossible to recover for ‘pure’ economic loss – i.e., loss which could not be linked to physical damage. The refusal to allow such claims was attributable to a number of concerns, the most significant of which was the perceived danger of a possible flood of litigation due to the knock-on effect of economic damage.

**Statements**

(1) **Negligent statements: recovery possible when there is voluntary assumption of responsibility and reasonable reliance**

In *Hedley Byrne & Co v Heller & Partners Ltd [1964] AC 465* the House of Lords first recognized the possibility of recovering for pure economic loss caused by negligent statements. The Hedley Byrne principle, based on reasonable reliance by a claimant in circumstances where a defendant voluntarily assumes responsibility for his statement, has since been applied in numerous cases in all major jurisdictions. The decision by the House of Lords in Caparo which confined the principle to situations where the statement was given by the maker to a known recipient for a specific purpose of which the
maker was aware, led for some years to a more cautious approach to imposing liability for negligent misstatements, particularly with respect to the liability of auditors when preparing company accounts.

**PROFESSIONAL RESPONSIBILITY**

(2) Professional responsibility: recovery possible for negligent performance

The Hedley Byrne principle has also been extended in most jurisdictions to cover professional responsibility (e.g., the negligent drafting or execution of wills and other documents by solicitors: *White v Jones* [1995] 2 AC 207. In such situation, a duty of care is held to exist even when the negligence complained of takes the form of an act rather than a statement, and even in the absence of active reliance by the claimant. For a decision of the Court of Appeal finding that a solicitor who negligently caused loss to non-contracting parties owed those parties a duty of care.

**E. No general duty for pure omissions**

(1) Reasons for not imposing duty with respect to pure omissions

Generally, no duty is imposed with respect to pure omissions – i.e., situations in which a defendant who has created no danger to the claimant merely fails to prevent him from sustaining harm. There are a number of reasons for this. One is the large number of potential defendants in situations of failure to act. Another is society’s focus on the more modest aim of discouraging wrongdoing rather than on the more ambitious one of encouraging good deeds. For these and other reasons, there is, for example, ordinarily no duty to rescue – even when such an act could be carried out without personal risk.

(2) Situations where there is a duty to act to prevent harm

However, there will be a duty to act to prevent harm in certain situations, e.g.:

- where the defendant and the claimant are in a special relationship of dependence (such as guardian / child, carrier / passenger, employer / employee);
- where the defendant has control over something which, or someone who, poses a threat to the claimant (in which respect, note that the responsibility of an occupier of premises to persons entering those premises – which was formerly determined by the application of special rules relating to occupiers’ liability; or
- where the defendant has assumed responsibility for the claimant or his property.

**F. Statutory authorities owe a duty only in restricted circumstances**

(1) Duty of care unlikely to arise where conduct involves policy, discretionary elements or the balancing of resources

A statutory authority owes a duty of care to members of the public for a failure to exercise its statutory powers – or for the improper exercise of those powers – only in restricted circumstances. This is because statutory authorities invariably have limited resources and are unlikely when allocating those resources to be able to act in a way which satisfies all those affected by their decisions. The courts, faced with turning what is effectively a public duty into a private one, have attempted to delimit the duty of care in negligence by developing various tests. These tests include the operational/policy test (Anns, see above), the ‘irrationality’ test (*Stovin v Wise* [1996] AC 293), and the ‘justiciability’ test (*Barrett v Enfield London Borough Council* [1999] 3 WLR 628). It is generally more likely that an act rather than an omission will be regarded as justiciable, and it is unlikely that conduct which involves policy or
discretionary elements or the balancing of resources or competing functions will be held to give rise to a duty of care.

(2) Developments in the United Kingdom

For several years, the UK courts were extremely cautious in their attitude to claims against statutory authorities: X (Minors) v Bedfordshire County Council [1995] 2 AC 633. However, later cases suggest a slight relaxation in this respect, particularly where there is a direct relationship between the statutory authority and the claimant: Phelps v Hillingdon London Borough Council [2001] 2 AC 619.

A number of cases relate to the duty owed by the emergency services in the exercise of their statutory functions. The majority of these cases concern the police, whose duty to protect the public at large does not extend to a duty to protect individual members of the public during the conduct of an investigation: Hill v Chief Constable of West Yorkshire Police [1989] AC 53, or even in response to an emergency call: Michael v Chief Constable of South Wales Police [2015] UKSC 2. The rationale for this seemingly harsh approach is that a private law duty by the police to protect individuals from criminal acts committed by third parties would not only be difficult to confine within rational parameters, but would also be contrary to the ordinary principles of common law. The fire services owe no duty to individual members of the public either, even when they have undertaken to deal with a fire, unless they actually make matters worse through their positive intervention: Capital and Counties v Hampshire County Council [1997] QB 1004. However, the ambulance services have been held to owe a duty of care to individual members of the public whom they’ve undertaken to assist: Kent v London Ambulance Services [1999] Lloyd’s Rep Med 58.

**Breach of Duty**

Before a court can determine whether the defendant has breached his duty to the claimant, it is first necessary to establish the standard of care to which he’ll be held.

**The Standard of Care**

A. Establishing the due standard of care: whether reasonable care has been taken to avoid reasonably foreseeable harm

The basic question in every case is whether reasonable care has been taken to avoid reasonably foreseeable harm. Factors which are relevant in this determination include:

- the likelihood or probability of the risk eventuating;
- the seriousness or gravity of the foreseeable risk;
- the practicability of avoiding or minimising the risk;
- the justifiability of taking the risk;
- the time for assessing the risk;
- the relevant characteristics of the foreseeable plaintiff

The test used is that of the reasonable person in the circumstances. It is an objective test, under which a defendant is judged not by his own characteristics and attributes but by the nature of the task he is performing and the circumstances in which he is performing it. For a clear illustration of the balancing of factors – including the magnitude of the risk inherent in an activity, the social utility of that activity, the seriousness of the harm should the risk eventuate, and the cost of taking precautions against the risk, see National Logistic Cell (NLC) vs Irfan Khan (2015 SCMR 1406 SC).
Note that in certain areas – such as industrial safety – there is considerable interplay between duty and standard of care. For a Court of Appeal decision recognising the extensive, non-delegable, nature of an employer’s obligations to its employees, and the standard of care to which the employer will consequently be held.

B. Special standards of care

(1) Standard of care not normally lowered to take account of a defendant’s inexperience

The standard of care isn’t normally lowered to take account of a defendant’s inexperience, since that would be unfair to those whom he injures: *Nettleship v Weston [1971] 2 QB 581*. For much the same reason, an amateur is judged according to objective standards of acceptability for the task in which he is engaged, not according to his personal level of expertise.

(2) Lower standard applied to children

A lower standard is applied to children: *Mullin v Richards [1998] 1 WLR 1304* and, it seems, to conduct in the heat of competition during sporting events: *Wooldridge v Sumner [1963] 2 QB 43*. A higher standard is applicable where the defendant knows or can foresee that a claimant is particularly vulnerable: *Paris v Stepney Borough Council [1951] AC 367*.

(3) Professional negligence: standard of care is that of “the ordinary skilled man exercising and professing to have that special skill”

The duty owed by professionals extends equally to acts and statements and is nowadays encompassed by the notion of ‘professional responsibility’. The applicable standard of care, as laid down by McNair J. in *Bolam v Friern Hospital Management Committee [1957] 1 WLR 582 (Bolam) at 586*, is that of “the ordinary skilled man exercising and professing to have that special skill.” Under the Bolam test, a professional will not be negligent as long as he meets the standard of an ordinary competent exponent of his profession.

When assessing whether or not a professional has been negligent, the courts will normally use as their benchmark the common practice within the relevant profession. However, where they consider that a profession adopts an unjustifiably lax practice, they may condemn the common standard as negligent: *Edward Wong Finance Co Ltd v Johnson, Stokes and Master [1984] AC 296*.

**Medical Negligence**

(4) Medical negligence: different applications of the Bolam test in various jurisdictions

In his decision in Bolam McNair J. laid down a specific test for determining the standard of care applicable to the medical profession. Under this test, a doctor “is not guilty of negligence if he has acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art.”

The Bolam test forms the basis for assessing medical negligence in Pakistan and in the UK, although in the latter its application is now confined to negligent treatment and diagnosis. Even though the question of whether or not a doctor has been negligent is ultimately for the court to decide (*Bolitho v City and Hackney Health Authority [1998] AC 232*), the significance which the courts place on the opinions of fellow doctors when determining the issue of negligence tends – particularly in Pakistan – to make it
more difficult for claimants to succeed in medical actions than might be the case in actions against other professions. See Dr Professor M.A. Cheema, Surgeon, PIC, Lahore vs Tariq Zia (2016 SCMR 119 SC).

**Proof of Breach**

*C. Proving breach of duty is a question of fact determined by specific circumstances of each case*

Whether or not a duty has been breached is a question of fact to be determined according to the specific circumstances of each case. For this reason, precedents are of value only in terms of the general principles which they establish: *Qualcast (Wolverhampton) Ltd v Haynes [1959] AC 743*.

(1) **Shifting of burden to the defendant:** where exact cause of incident is unknown, defendant had control over the agent of harm, and that relevant damage would not normally have occurred in the absence of negligence

In some circumstances, the claimant may lack sufficient knowledge to prove negligence on the part of the defendant. In such circumstances, the defendant will clearly choose to remain silent unless the normal rules for establishing negligence are varied. The courts will vary the rules and infer negligence if the claimant can show that the exact cause of the incident is unknown, that the defendant had control over the agent of harm, and that the relevant damage would not normally have occurred in the absence of negligence. On occasion the effect of this inference (sometimes referred to under the Latin maxim *res ipsa loquitur*) has been to shift the legal burden of proof onto the defendant, but it more frequently results only in the evidentiary burden being shifted.

**Causation of Damage**

*A. Causation: the physical link between the defendant’s negligence and the claimant’s damage*

Causation relates to the physical link between the defendant’s negligence and the claimant’s damage. Even if it can be shown both that the defendant breached his duty of care to the claimant and that the claimant sustained damage, the claim will not succeed unless the damage is shown to have resulted from the breach.

**Simple Issue of Causation**

*B. The ‘but-for’ test: dealing with simple issues of causation*

The basic test for establishing causation is the ‘but-for’ test, under which the defendant will be liable only if the claimant’s damage would not have occurred but for his negligence – or, looked at the other way round, the defendant will not be liable if the damage would, or could, have happened anyway, regardless of his negligence. However, the but-for test could also be extended to determine the issue of causation in fact in contract cases.

*C. Multiple consecutive causes: involvement of either a second tortfeasor or a natural event*

The ‘but-for’ test works well in straightforward situations where it is easy to establish that the damage has been caused by the defendant’s negligent act: see dicta, but it proves inadequate in establishing causation in more complex situations where a number of actual or potential causes operate either consecutively or concurrently.
MULTIPLE CONSECUTIVE CAUSES
When there are two discrete torts, one following the other, but no additional damage is caused by the second tort, only the first tortfeasor is liable. Where additional damage is caused by the second tort, each tortfeasor is liable for the damage he has caused. The first tortfeasor’s liability remains what it would have been had the second tort not occurred, even if the physical manifestations of the second tort appear to wipe out the damage caused by the first tort: Baker v Willoughby [1970] AC 467. This avoids the claimant being under-compensated or the second tortfeasor compensating for more harm than he has actually caused.

However, when a tort is followed by a natural event which wipes out the physical effects of the tort, the tortfeasor’s liability ceases at the date when the supervening condition manifests itself: Jobling v Associated Dairies [1982] AC 794. If this were not so, the defendant would be liable for damage which would have occurred naturally anyway due to the ‘vicissitudes of life.’

D. Multiple potential causes: claimant can succeed only if he proves on the balance of probabilities that the damage is attributable to the tort

Where there are several discrete potential causes of harm, some of which are tortious and some of which are natural, the basic rule is that the claimant can succeed only if he proves on the balance of probabilities that the damage is attributable to the tortious conduct: Wilsher v Essex Area Health Authority [1988] AC 1074.

In circumstances where a defendant has exclusive control over a damage-causing agent, he may be held liable even if his negligence cannot be shown to be the sole cause of the damage, as long as it can be proved to have made a material contribution: Bonnington Castings v Wardlaw [1956] AC 613. The Wardlaw principle was extended in McGhee v National Coal Board [1973] 1 WLR 1 to provide for liability even where a claimant can establish only that the defendant negligently increased the risk of harm. Although McGhee was implicitly criticised in Wilsher, its fortunes were revived in Fairchild v Glenhaven Funeral Services Ltd [2003] 1 AC 32, where it was held that several defendants who consecutively exposed claimants to the same risk (of mesothelioma), involving the same damage-causing agent (asbestos fibres), could all be treated as having materially contributed to the disease, and could thus be held jointly liable, even though it was impossible to determine which of them was actually responsible for triggering the condition. The subsequent decision in Barker v Corus UK Ltd [2006] 2 WLR 1027 re-interpreted Fairchild as having been based on increased risk, and favoured apportioned liability, but the effect of this decision was reversed by legislation which reinstated joint liability, at least in mesothelioma cases. The application of Fairchild to all mesothelioma cases – even those where exposure to the damage-causing agent is both tortious and environmental – was confirmed by the Supreme Court in Sienkiewicz v Greif (UK) Limited [2011] UKSC 10. However, as the judgments in Zurich Insurance PLC UK Branch v International Energy Group Limited [2015] UKSC 33 demonstrate, departure from the ‘but-for’ test in the UK under Fairchild and its satellite cases has given rise to some judicial disquiet. (Fairchild has yet to be accepted as good law in Australia, and in Amaca v Booth [2011] HAC 53 the High Court of Australia accepted evidence that mesothelioma could in fact develop as a result of cumulative exposure to asbestos fibres, rather than being triggered at a single moment.)

Note that while the Wardlaw, McGhee and Fairchild principles were developed in the context of industrial diseases contracted through exposure to dangerous dusts and fibres, several decisions in recent years have applied the principles in other circumstances – and most notably in medical negligence situations. And for an application of Wardlaw (in the wake of McGhee and, in particular, Fairchild) in the UK with respect to a hospital’s liability for a patient’s brain damage, see Bailey v Ministry of Defence [2008] EWCA Civ 883; [2009] 1 WLR 1052.
**LOSS OF A CHANCE**

The standard requirement that in civil actions a claimant must establish his case on the balance of probabilities applies equally to actions based on loss of a chance. Under English law, if there is a less than 51% chance that the thing which might have happened would actually have happened had it not been for the defendant’s negligence, the claimant will fail, even if he seeks to recover not for the whole of his damage but only for the chance which the defendant caused him to lose. This analysis has been applied primarily in medical cases, where actions by claimants whose chances of recovery from illness or injury have been reduced due to the negligence of their doctors have failed when they could not establish that, with proper treatment, their chances of recovery would have exceeded 50%: *Gregg v Scott [2005] UKHL 2; [2005] 2 WLR 268*. Although in the past claims for loss of chance succeeded in medical negligence cases in some Australian states (see, e.g., *Rufo v Hosking [2004] NSWCA 391*), the decision of the High Court of Australia in *Tabet v Gett [2010] HCA 12* established that Australian law does not recognise the concept of loss of chance in medical negligence proceedings.

The rule that a claimant cannot normally recover for a lost chance is modified in cases where a defendant negligently deprives the claimant of the opportunity to gain financial benefit or to avoid financial risk. In such cases, damages are assessed not on the outcome which the claimant would have sought, but on the economic opportunity which he has lost. The claimant must prove on the balance of probabilities that he would have taken action to obtain the relevant benefit or avoid the relevant risk. Once this has been established, he need then only show that the chance which he has lost was real or substantial, the test applied in the tort decision of *Allied Maples Group Ltd v Simmons & Simmons [1995] 1 WLR 1002*.

*F. Loss of a right: recovery possible if it can be shown that defendant’s failure to advise claimant of risks inherent in treatment has deprived him of the right to choose a more experienced doctor or defer treatment*

Founded on the notion of patient autonomy, medical negligence cases from both Australia and the UK suggest tacit recognition of a more rights-based approach to damage. Under this approach, a claimant who cannot establish causation using the traditional rules may nevertheless recover if he can show that in failing to advise him of the risks inherent in treatment a defendant has deprived him of the right either to choose a more experienced doctor: *Chappel v Hart [1998] 195 CLR 232* or to defer the date of the treatment.

*G. Breaking the chain of causation*

A defendant is potentially liable for all the foreseeable consequences of his negligence. However, the chain of causation between the defendant’s negligence and the damage ultimately sustained by the claimant will be broken by a new intervening act (or *novus actus interveniens*), whether by the claimant himself or by a third party. To break the chain of causation, the act must be something ultroneous which disturbs the sequence of events.

*(1) Defendant not liable for damage subsequently sustained by claimant’s own unreasonable response*

A defendant who has already negligently caused damage to a claimant, or who has negligently exposed a claimant to the risk of damage, will not be liable for any damage which the claimant subsequently sustains due to his own unreasonable response to the situation in which the defendant has placed him: *McKew v Holland & Hannen & Cubitts (Scotland) Ltd [1969] 3 All ER 1621*. English courts have refused to make a finding that the claimant has acted unreasonably in a number of situations (including that where a claimant commits suicide following injuries sustained at work: *Corr v IBC Vehicles [2008] UKHL*
Where the claimant’s response is not sufficiently unreasonable to break the chain of causation, the defendant will remain liable. However, if pleaded, the defence of contributory negligence may apply to reduce damages in such circumstances: *Sayers v Harlow DC [1958] 1 WLR 623*.

Where a defendant has created a situation of danger which requires the claimant to take immediate averting action, the defendant will be liable even if, in the ‘agony of the moment,’ the claimant makes the wrong decision and suffers damage which could have been avoided had he acted differently.

Where the claimant’s act is the very thing against which the defendant is required to offer protection, the defendant will be liable for the consequences of his negligence, however objectively unreasonable the claimant’s act may be, although damages may be reduced to take account of the claimant’s contributory negligence: *Reeves v Metropolitan Police Commissioner [2000] 1 AC 360*.

(2) *A new intervening act by a third party normally breaks chain of causation between the defendant’s negligence and the claimant’s damage*

A new intervening act by a third party will normally break the chain of causation between the defendant’s negligence and the claimant’s damage. However, an act will not be regarded as ‘new’ if it is sufficiently connected with damage which has already resulted from the defendant’s negligence – e.g., a subsequent accident after a road has been blocked due to the defendant’s negligence: *Rouse v Squires [1973] QB 889*, or medical negligence in the treatment of an injury caused by the defendant’s negligence: *Webb v Barclays Bank plc and Portsmouth Hospitals NHS Trust [2001] EWCA Civ 1141*. In such circumstances, the defendant may be held partly responsible for the subsequent damage, and the chain of causation will not be broken (although the subsequent tortfeasor will also be partly – and possibly even primarily – liable). Where the defendant has control over a third party, or where the third party is faced with a dilemma created by the defendant, the chain of causation is unlikely to be broken and the defendant will normally be liable to the claimant for the damage caused: *Home Office v Dorset Yacht Co Ltd [1970] AC 1004*.

(3) *Liability imposed if defendant’s negligence makes it very likely that the third party will cause damage to the claimant*

In other situations, a defendant will not be liable merely because his negligence makes damage to the claimant by a third party foreseeable. Liability will be imposed only if the defendant’s negligence makes it very likely that the third party will cause damage to the claimant: *Lamb v Camden LBC [1981] QB 625*.

**Remoteness of Damage**

Like duty of care, the rules on remoteness of damage effectively place an artificial limit on the number of negligence actions which can succeed. The role of remoteness is to filter out situations where – even assuming that duty, breach and causation can all be satisfactorily established – the nature of the damage sustained makes it unfair to make the defendant liable.

A. *Type of damage must be reasonably foreseeable*

(1) *Old approach to remoteness: defendant liable for damage directly resulting from negligence*

Under the old approach to remoteness, a defendant was liable for any damage which resulted directly from his negligence, no matter how unusual or unpredictable that damage might be. However, in the *Wagon Mound [1961] AC 388* the Privy Council replaced the direct consequence test with the
requirement that, in order to be recoverable, damage must be of a type which is foreseeable in all the circumstances, and this is approach is now universally favoured.

(2) New approach to remoteness: defendant liable for type of damage foreseeable in all circumstances

The Wagon Mound test is generally accepted as being less claimant-friendly than the direct consequence test. In order to ameliorate its harshness, the courts when deciding whether damage is of a foreseeable type normally take a relatively liberal view, holding that neither the manner nor the extent of the damage is relevant to the determination. Although some courts have on occasion adopted a more restrictive approach, the decision of the House of Lords in Jolley v Sutton London Borough Council [2000] 1 WLR 1082, suggests that the liberal approach is to be preferred.

THE EGG-SHELL SKULL RULE

In all tort actions, a defendant must take his victim as he finds him. Under the egg-shell skull rule, which applies to personal injuries, this concept is adapted to allow recovery even for unforeseeable damage. The egg-shell skull rule applies in circumstances where, due to a claimant’s innate physical susceptibility to illness or injury, he suffers extreme and unforeseeable damage which is triggered by the initially foreseeable damage caused by the defendant’s negligence: Smith v Leech Brain & Co Ltd [1962] 2 QB 405. When applied with respect to damage of an unforeseeable type (as opposed to merely an unforeseeable extent) the egg-shell skull rule operates as an exception to the Wagon Mound test.

B. The egg-shell skull rule: allowing recovery for unforeseeable damage

Under English law, where the claimant has an ‘egg-shell personality’ and the damage complained of is psychological rather than physical, he need not even show that the initial injury is of a foreseeable type, as long as some injury was foreseeable in the circumstances.

Under variants of the egg-shell skull rule, claimants may also seek compensation for unforeseeable property damage and for unforeseeable additional damage sustained due to extreme impecuniosity.

DEFENCES TO NEGLIGENCE

All the standard tort law defences are available in actions for negligence, but in the vast majority of cases the most relevant defences are illegality, volenti non fit injuria and – most importantly – contributory negligence. For discussion of all three defences, see Rashid Osman bin Abdul Razak v Abdul Muhaiminan bin Khairuddin and another [2013] SGHC 49.

A. Illegality: where a claimant is himself a wrongdoer

(1) Illegality may also be considered at the duty stage or when determining appropriate standard of care

Where a claimant is himself a wrongdoer, his action may be defeated on the grounds of his illegality. Illegality is sometimes considered at the duty stage, particularly in Australia: Miller v Miller [2011] HCA 9, and has in the past also been regarded as relevant to determining the appropriate standard of care: Pitts v Hunt [1991] QB 24. In the UK, cases involving joint illegal enterprises – the main circumstance in which illegality is pleaded – are now determined by reference to principles of causation: Joyce v O’Brien & Anor [2013] EWCA Civ 546. However, notwithstanding the various stages at which illegality is considered, it continues to be described in common parlance as a ‘defence’.

(2) Defence normally succeeds only in cases where the claimant’s conduct was criminal in nature
In theory, illegality (also known as *ex turpi causa non oritur actio*) extends to both illegal and immoral acts. Since illegality provides a complete defence to a defendant who is himself, by definition, a wrongdoer, the courts take a cautious approach when holding that it is applicable. Although the majority of cases in which illegality is pleaded successfully involve joint illegal enterprises, in the UK illegality has also defeated claims in cases of discrete wrongs where the claimant has committed a serious criminal offence (such as taking a life): see, e.g., *Clunis v Camden and Islington Health Authority* [1998] QB 978 and *Gray v Thames Trains* [2009] UKHL 33; [2009] 3 WLR 167.

(3) Defence will not succeed where wrong is insufficiently connected with claimant’s damage, or where damage defendant causes is disproportionate to the claimant’s wrong

Where the claimant’s wrong is insufficiently connected with his damage, or where the damage which the defendant causes is disproportionate to the claimant’s wrong, an illegality plea is unlikely to succeed. In the latter situation, however, the defence of contributory negligence may be applicable: *Revill v Newbery* [1996].

B. Consent: where claimant either expressly or implicitly accepts the risk of harm associated with a defendant’s conduct

(1) Consent is a full defence pleaded successfully only in extreme situations

Where a claimant either expressly or implicitly accepts the risk of harm associated with a defendant’s conduct, his claim may be defeated by the defence of volenti non fit injuria. However, since, like illegality, volenti is a full defence, the courts are generally unwilling to allow it to defeat a claim, and it is pleaded successfully only in extreme situations.

(2) Claimant must be shown to have had full knowledge and understanding of the risk involved and freely agreed to assume the very risk that materialized

For the defence to succeed, it must be shown that the claimant had full knowledge and understanding of the risk involved, that he freely agreed to assume that risk, and that the risk to which he consented was the one which materialized. Only rarely does the defence succeed in cases involving employees: *ICI v Shatwell* [1965] AC 656, and for policy reasons it is never available in actions brought by rescuers.

(3) Defence outlawed by legislation in cases of road traffic accidents

Where road traffic accidents are concerned, the defence has been outlawed by legislation. It may be pleaded in claims involving other types of vehicles (such as light aircraft), but it succeeds only in cases where the risks are substantial and the claimant’s conduct has been particularly cavalier: *Morris v Murray* [1991] 2 QB 6.

(4) Consent and risks assumed when participating in sporting activities

Volenti may be relevant to the risks assumed when participating in sporting activities, although in relation to risks faced by spectators a better approach is probably to treat the situation as one in which a lower standard of care is applicable: *Wooldridge v Sumner* [1963] 2 QB 43. For the interplay between duty of care and volenti in determining the liability of regulators and referees to participants in sports, see, e.g., *Watson v British Boxing Board of Control* [2001] QB 1134 and *Vowles v Evans & The Welsh Rugby Union Ltd* [2003] 1 WLR 1607.
C. Contributory negligence: where claimant suffers damage as a result partly of his own fault and partly of the fault of another or others

(1) Partial defence where damages are reduced to reflect claimant’s share of responsibility for harm sustained.

Historically, contributory negligence was a complete defence, but under the concepts of Contributory Negligence and Personal Injuries, a claimant who suffers damage as a result partly of his own fault and partly of the fault of another or others no longer has his claim defeated. Instead, his damages are reduced to reflect his share of the responsibility for the harm which he has sustained.

(2) Contributory negligence established where claimant fails to take reasonable care of himself according to the standards of the reasonable person

The standard of care is objective, so a claimant will be contributorily negligent if he fails to take reasonable care of himself according to the standards of the reasonable person. However, as with actions in the tort of negligence proper, lower standards of care may apply in some situations, and less is expected in terms of self-preservation on the part of child claimants: *Gough v Thorne [1966] 1 WLR 1387* and by claimants faced with situations of emergency: *Jones v Boyce (1816) 1 Stark 493*. Where a claimant has not himself been negligent, his damages will not normally be reduced merely because others have failed to take adequate care of him. One exception is where the claimant is an employer suing a defendant for damage caused to his property at a time when that property was in the care and control of his employee. In such circumstances, damages will be reduced to reflect any contributory negligence on the part of the employee.

(3) Claimant’s negligence results in reduction of damages only where it is causally relevant to the damage sustained

A claimant’s negligence will result in a reduction of damages only where it is causally relevant to the damage he has sustained. Where his negligence contributes to the accident itself (as where he crosses a road without using a pedestrian crossing) his damages may be reduced substantially. But where his negligence contributes only to the extent of his damage (as where he merely fails to wear a seat belt or crash helmet) the reduction in damages is normally small: *Froom v Butcher [1976] QB 286*.

(4) Damages reduced by one half where the claimant and the defendant are equally to blame

In situations where the claimant and the defendant are equally to blame, the claimant’s damages are reduced by one half. This is also the case where there are multiple defendants, and the claimant’s fault is equal to that of the defendants: *Fitzgerald v Lane [1988] 3 WLR 365*. It is generally (although not universally) accepted that it would be ‘logically unsupportable’ to reduce damages by 100% under the Contributory Negligence e.g., the decision of the Court of Appeal in *Pitts v Hunt [1991] QB 24*.

**Composite Negligence vs Contributory Negligence**

‘Composite negligence’ referred to the negligence on part of two or more persons. Where a person was injured as a result of negligence on the part of two or more wrongdoers, it was said that the person was injured on account of the composite negligence of those wrongdoers. In such a case, each wrongdoer was jointly or severally liable to the injured for payment of the entire damages and the injured person had the choice of proceeding against all or any of them. On the other hand, where a person suffered injury, partly due to his own negligence, then the negligence on the part of the injured which contributed to the accident was referred to as his contributory negligence.
Composite negligence meant that where the wrong, damage or injury was caused by two or more persons, each of the wrongdoer was jointly and severally liable to make good the loss to the claimant who suffered at the hands of such tortfeasors. Plaintiff had the prerogative to proceed against any or all such wrongdoers. Plaintiff was not saddled with the responsibility to establish separate liability against each of the tortfeasor nor was it considered the responsibility of the Court to ordinarily determine liability of each tortfeasor separately, proportionately and/or independently in absence of any such issue at the trial. In a case of composite negligence, it was the prerogative of the plaintiff, who had suffered loss or injury to recover the entire amount from either or any of the solvent tortfeasor, who may in turn seek recovery of proportionate or whole amount from the other tortfeasor in appropriate proceedings, after making good the compensation to the decree holder. National Logistic Cell (NLC) vs Irfan Khan (2015 SCMR 1406 SC)

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ABOUT THE AUTHOR
MUNEEB ZAFAR is a Business Law Attorney, Administrative Partner, Systems Connoisseur, Pro Web Developer, Technical Graphic Artist, SEO Expert and Professional Trainer who've been addicted with Info-Tech since 1982... Having passion of integrating business, information technology and law. Over 18 years of experience in Information Systems and Telecommunication Industry, Skilled in both technical and administrative supervision. Have proven his abilities to grasp quickly and ideally suited for projects that are challenging both technically and politically. Apart from above, he has extensible experience in Starting a Business, Contract Enforcement, Corporate Governance, Hiring and Firing of Workers, Trade Agreements and Commercial Services. You may reach him by connecting him at LinkedIn.