# Tort Law

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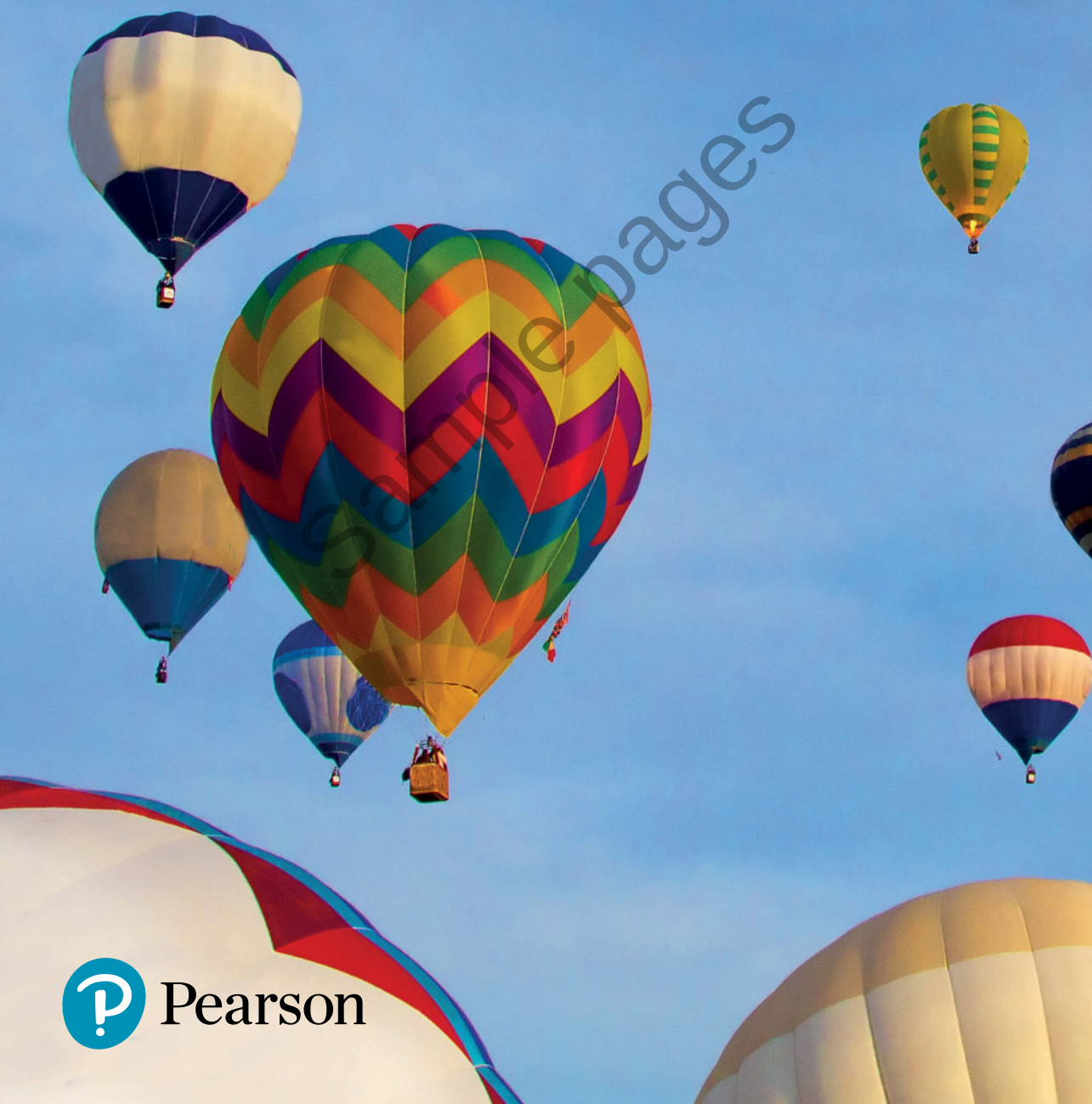



Pearson

It was at least arguable in *Barrett* that the social services had assumed a responsibility to the claimant in that case, and that the social services' duty of care to the claimant could be explained on that basis.[135] No such explanation can be offered of the decision of the Court of Appeal in *D* v *East Berkshire Community NHS Trust* (2004), which held that if a local authority receives reports that a child is being abused or neglected and the authority decides to investigate those reports, the authority will owe the child in question a duty to investigate the reports with a reasonable degree of care and skill.[136] The decision is incompatible with the *uniform approach* to determining whether or not a public body owed a claimant a duty of care to save them from harm that was endorsed by the UK Supreme Court in *Michael* v *Chief Constable of South Wales Police* (2015); after all, a neighbour who suspected that a child was at risk of being abused would not owe that child a duty of care to report their suspicions to the authorities.

Given this, it should come as no surprise that the history of how *D* v *East Berkshire NHS Trust* came to be decided was contaminated by the *policy approach* that was rejected in *Michael*. The roots of the decision in *D* lie in the decision of the House of Lords in *X* v *Bedfordshire County Council* (1995), where the House of Lords was asked to decide whether the social services could owe a duty of care to save a child that was at risk of being abused. As we have seen, the House of Lords held that the social services did not owe the child such a duty of care, but – influenced by Sir Thomas Bingham MR's judgment in the Court of Appeal in the same case – Lord Browne-Wilkinson based his decision on policy grounds, arguing that if the social services did owe a duty of care, then they would be vulnerable to being sued if they failed to save a child from being abused and the prospect of being sued for failing to save children from abuse would make the social services excessively cautious and overactive in investigating and acting on allegations of child abuse.[137] However, when the Human Rights Act 1998 ('HRA') came into force, that meant the social services could be sued *under the HRA* if they carelessly failed to protect an identified child who they knew was at risk of being abused[138] – and as a result the desire to protect local authorities from the prospect of being sued for failures to save children from being abused that lay at the root of Lord Browne-Wilkinson's refusal to find a duty of care in *X* could no longer be satisfied. Given this, the Court of Appeal in *D* v *East Berkshire* felt free to hold that the decision in *X* could not 'survive the Human Rights Act 1998'[139] and ruled that the social services *will* owe a duty of care to a child that is suspected of being at risk of abuse at home.



[135] This was Lord Hoffmann's explanation of *Barrett* in *Gorringe* v *Calderdale MBC* [2004] 1 WLR 1057, at [39]. The one difficulty with it is the lack of reliance (in the sense of doing something different that he would not otherwise have done) by the claimant on his carers.

[136] [2004] QB 558, at [83]. It is quite clear that the assertion in that paragraph that a duty of care is owed to a child who is suspected of being at risk of being abused at home extends to cases where the social services carelessly decide to leave the child in the family home as well as cases (such as that presented in *D* itself) where the social services carelessly decide to take the child out of the family home. A positive duty of care to save children at risk of abuse is also owed by the social services in New Zealand: see *Attorney-General* v *Prince* [1998] 1 NZLR 262 (NZCA) and *B* v *Attorney-General* [2003] 4 All ER 833 (PC).

[137] [1995] 2 AC 633, 650. This fear seems not to have been unfounded. After the 'Baby P' scandal, where a child was killed in his family home, despite being the subject of regular visits by the social services, the resulting opprobrium towards social workers generally triggered a huge increase in the number of applications to court by local authorities to take 'at risk' children into care.

[138] This was confirmed by the European Court of Human Rights in *Z* v *United Kingdom* [2001] 2 FLR 612, applying *Osman* v *UK* [1999] FLR 193: see above, § 1.11.

[139] [2004] QB 558, at [83].

It is highly doubtful that the decision in *D* v *East Berkshire NHS Trust* can survive the reasoning of the UK Supreme Court in *Michael* v *Chief Constable of South Wales Police* (2015).[140] However, it may be that no branch of the social services will want to incur the opprobrium of trying to overthrow it – and, in any case, the possibility of a claim under the HRA in cases where the social services carelessly fail to save a child from being abused in the family home makes it unlikely a case will come up where the issue of whether a duty of care was owed by the social services in negligence will have to be squarely confronted. So it may be that *D* v *East Berkshire NHS Trust* will be able to hang on – a relic of a way of thinking about the duties of care of public bodies that has now been firmly repudiated in *Michael*.

## Further reading

For detailed expositions of the law in this area, see **Nolan, 'The liability of public authorities for failure to confer benefits' (2011) 127 *Law Quarterly Review* 260; Bagshaw, 'The duties of care of emergency service providers' [1999] *Lloyd's Maritime and Commercial Law Quarterly* 71**; and **Fordham, 'Saving us from ourselves – the duty of care in negligence to prevent self-inflicted harm' (2010) 18 *Torts Law Journal* 22**, brilliantly synthesising the UK, Australian and Canadian authorities on when (if ever) defendants will owe claimants a duty of care to protect them from: (i) killing themselves; (ii) drunkenly injuring themselves; (iii) injuring themselves while engaging in dangerous sports; and (iv) gambling their money away.

**Tom Cornford's *Towards a Public Law of Tort* (Ashgate, 2008)** proposes that the law of negligence should be reformed to give effect to a principle ('Principle I') that a claimant who suffers harm as a result of a public authority's unreasonable failure to treat the claimant in the way that the law requires should be entitled to sue that public authority for compensation. The proposal assumes that negligence law is fundamentally about compensating for loss rather than vindicating rights. In **David Howarth's** casenote **'Poisoned wells: "proximity" and "assumption of responsibility" in negligence' (2005) 64 *Cambridge Law Journal* 23**, the former Lib Dem MP is acute (and disapproving) in pointing out that the common law regards decent public services as not something we have a *right* to; but he does not pursue that insight and instead concludes that decisions against holding public bodies liable for omissions are just a matter of 'policy' (no). What gives us a right to decent public services? Those who pay for those services might think they had a right to decent public services. But would we be happy with a law that said that taxpayers have a right to be protected by the police, but non-taxpayers must go hang? And how much of an individual taxpayer's money actually goes into the pocket of a policeman who is in a position to save that taxpayer from a beating?

In its 2008 Consultation Paper ***Administrative Redress: Public Bodies and the Citizen***, the Law Commission proposed that a public authority should be held liable for harm



[140] Lady Hale will have done the case (which she was party to deciding when she was a member of the Court of Appeal) no favours by pointing out in *Michael* the 'striking' parallels (*Michael*, at [195]) between *D* v *East Berkshire NHS Trust* and the *Michael* case. The parallels are, indeed, striking, and not in favour of the decision in *D* v *East Berkshire NHS Trust*.

caused or not averted as a result of the authority acting unlawfully but only if the authority was seriously at fault in acting (or not acting) as it did. The effect of the proposal would have been to radically expand public bodies' liability for failing to prevent harm, and radically contract their liabilities for causing others to suffer harm. The paper was widely criticised and the proposal has not been implemented.

Academics gave a generally warmer welcome to the decision of the New South Wales Court of Appeal in *Lowns* v *Woods* (1996), holding a GP liable for failing to come to the assistance of a boy having an epileptic fit: see **Williams, 'Medical Samaritans: is there a duty to treat?' (2001) 21 *Oxford Journal of Legal Studies* 393**, **Gray and Edelman, 'Developing the law of omissions: a common law duty to rescue?' (1998) 6 *Torts Law Journal* 240**, and **Haberfield, '*Lowns* v *Woods* and the duty to rescue' (1998) 6 *Tort Law Review* 56**.

# Chapter 7
# Breach of duty



## Aims and objectives

Reading this chapter should enable you to:

(1) Understand the factors that the courts will take into account in determining whether or not a defendant breached a duty of care owed to a claimant.

(2) Come to grips with the concept of a non-delegable duty of care, when a defendant will be held to have breached a non-delegable duty of care, and what sort of duties of care are non-delegable.

(3) Understand when a claimant will be able to establish that a defendant breached a duty of care by relying on a plea of *res ipsa loquitur*.



## 7.1 The basics

We have now finished discussing when one person will owe another a duty of care. In this chapter, we turn to the issue of when a duty of care will be held to have been breached. It is an obvious point, but one which is often overlooked by students, that a duty of care is not a duty to *ensure* that something happens or does not happen. The fact that A has crashed his car into B's car does not necessarily mean that A breached the duty of care that he owed B to *take care* not to crash into B's car. To show that A breached this duty of care we have to establish that . . . And at this point the law gets very difficult.

Most people would say that we have to establish that A's driving failed to come up to the standards of a *reasonable* driver, and more generally that we establish whether or not a defendant has breached a duty of care owed to a claimant by seeing whether the defendant failed to do what a *reasonable person* would have done, in the circumstances. Such formulations do emphasise an important point about duties of care. In most situations where it is alleged that a defendant breached a duty of care owed to the claimant, it is not enough for a defendant to say 'I did my best!' So, in the case we are considering, A cannot argue that he took care not to crash into B's car by merely saying he did his best not to crash into B's car. The duty of care that drivers owe other drivers requires drivers to live up to an *objective* standard of care in their driving, one which makes no allowances for the individual idiosyncrasies of a particular driver.

But at the same time, saying that we determine whether A breached the duty of care he owed B not to crash into B's car by seeing whether A's driving came up to the standards of a reasonable driver leaves too much open. How do we determine what those standards are? Suppose that A crashed into the back of B's car because his attention was momentarily distracted by a picture of a half-naked model on a billboard beside the road, and he failed to spot that B had unexpectedly braked in front of him. Would a *reasonable* driver's attention have been distracted in this way? How can we tell? If it could be established that 75% of male drivers would have taken their eye off the road when faced with such a distraction, would that show that a *reasonable* driver would have taken his or her eye off the road? Or do we follow the American judge Learned Hand's line that:

> in most cases reasonable prudence is in fact common prudence; but strictly speaking it is never its measure . . . Courts must in the end say what is required; there are precautions so imperative that even their universal disregard will not excuse their omission.[1]

The truth is – it is not possible to come up with any single rule, or standard, by which to determine whether a given defendant has breached a duty of care owed to a claimant. Many people have tried to come up with some such rule or standard. For example, the same American judge we have just quoted came up with a very famous formula for determining whether or not a failure to take a certain precaution meant that a defendant had breached a duty of care. In the case of *United States* v *Carroll Towing Co* (1947), the issue came up as to whether the owner of a barge that was tied up at a pier should have had someone on the barge during normal business hours to look after the barge if (as happened) it became untied from its moorings. Learned Hand J said:

> Since there are occasions when every vessel will break from her moorings, and since, if she does, she becomes a menace to those about her; the owner's duty, as in other similar situations, to provide against resulting injuries is a function of three variables: (1) The probability that she will break away; (2) the gravity of the resulting injury, if she does; (3) the burden of adequate precautions. Possibly it serves to bring this notion into relief to state it in algebraic terms: if the probability be called P; the injury, L; and the burden, B; liability depends upon whether B is less than L multiplied by P: i.e., whether $B < PL$.[2]

Learned Hand J applied the formula to find that the barge owner in the *Carroll Towing* case should have had someone on board during normal business hours: the cost of taking such a precaution was outweighed by the *magnitude of the risk* of something going wrong if someone was not on board at such a time. (Where the magnitude of the risk is assessed by multiplying the probability of something going wrong by the harm that will be done if something goes wrong.)

However, as we will see, the 'Hand Formula' for determining whether someone has breached a duty of care owed to another may not always apply.[3] For example, suppose that a car company discovers that a particular line of cars manufactured by the company suffers from a dangerous defect. As a result, the company will come under a duty to take reasonable steps to prevent that defect injuring those who might foreseeably be affected by the defect.[4] But what does taking such 'reasonable steps' require? Suppose that recalling and



[1] *The TJ Hooper*, 60 F 2d 737 (1932).
[2] 159 F 2d 169, 173 (1947).
[3] Richard Wright is the most vocal critic of the Hand Formula: see Wright 1995 and Wright 2003. See also Zipursky 2007.
[4] This is under the 'creation of danger' principle discussed above, § 6.3.

fixing the cars affected by the defect would cost £700m, and the prospective losses that would be suffered if the company did nothing (discounted by the probability of the defect in question causing harm) only came to £250m. In such a case, the Hand Formula might suggest that doing nothing is the reasonable thing to do as B > PL. However, were the company to do nothing in this situation,[5] it seems clear it would not just be held to have acted negligently – its negligence would be regarded as so serious that it might warrant an award of exemplary (or punitive) damages being made against it if and when the company was sued by any victims who suffered harm as a result of the defect that it did nothing to rectify.

Given that it is not possible to come up with a *single* rule, or standard, that we can employ to determine whether or not a given defendant has breached a duty of care that he owed to a claimant, the way we will proceed in this chapter is to set out a number of *different* rules that will govern this enquiry, but in relation to each rule explain the exceptions that exist to those rules (and, in some cases, the exceptions that exist to the exceptions). Those rules and their exceptions are briefly set out below:

**(1)** *Objectivity*. The *rule* is – as we have already seen – that the fact that a defendant did his or her personal best to avoid something happening will not necessarily mean that he or she did not breach a duty of care owed to the claimant. The standard of care that a defendant is expected to exercise in the interests of a claimant is *objective*. The *exceptions* to this rule are too complicated to set out here, but are set out in the next section.

**(2)** *Balancing*. The *rule* is laid out in the Hand Formula. If A owed B a duty to take reasonable steps to avoid X happening, and failed to take a given precaution P to avoid X happening, we determine whether A's failure to take precaution P put him in breach of the duty of care that he owed B by *balancing* the *cost* of taking precaution P against the *magnitude* of the *foreseeable* risk that X would happen if precaution P were not taken.

A possible *exception* to this rule is where the magnitude of the foreseeable risk that X would happen if precaution P were not taken was *very serious*. As the example considered above of the defective car shows, in such a case balancing the cost of taking precaution P against the magnitude of the risk that X would happen if that precaution were not taken may be inappropriate, and the courts may refuse to excuse A's failure to take precaution P on cost grounds. A possible *exception to this exception* is where taking precaution P would have *social costs* – that is, costs to society at large. In such a case, it might be that failing to take precaution P could be justified on grounds of the social cost involved in taking that precaution, even if the risk that X would happen if that precaution were not taken was relatively serious.

**(3)** *Common practice*. The *rule* is that pleading 'everyone (or most people) would have done the same as me' does *not* work to establish that you have not breached a duty of care owed to someone else. So the fact that 75 per cent of male motorists would have taken their eyes off the road to look at a poster of a half-naked model will not excuse a defendant who ran into the claimant's car because his attention was distracted by such a poster.



[5] Something that Ford is alleged to have done in the famous 'Ford Pinto case' (*Grimshaw* v *Ford Motor Co*, 119 Cal App 3d 757 (1981)), where – it is claimed – Ford decided against repairing a defect in the protection around the fuel tank in its Pinto range of cars on the ground that the repairs would cost more than it would have to pay out if the inadequate protection resulted in an accident. For a measured view of the Ford Pinto case, see Schwartz 1991.