INTRODUCTION

This chapter focuses upon tortious claims by employees against their employers, for physical injuries sustained in the workplace.

Recovery in tort for pure psychiatric injuries (including stress-related illnesses) suffered in the workplace are considered separately in Chapter 5, because different principles of law apply to the recovery of compensation in that area. The topics are necessarily separated, because, as one court remarked, ‘[i]n broad terms, every employer has a duty to provide his employee with a reasonably safe system of work, and to protect him from risks that are reasonably foreseeable. Protection from physical harm is long established [whereas] [p]rotection from psychiatric harm in tort is a developing area of the law’ (per Beattie v Ulster Television plc). There is certainly no overarching duty on an employer to protect an employee against all injury suffered in a workplace, as the seminal decision in White (Frost) v CC of South Yorkshire Police demonstrated (for, had that been the law, the psychiatrically-damaged police officers involved in the Hillsborough stadium tragedy would have been owed a duty of care by their employer – and they certainly were not).

Damages in tort may be claimed as ‘top-up’, or additional, sums to the as-of-right workers’ compensation payments which are governed by the Social Security Contributions and Benefits Act 1992. For example, under s 94(1) of that Act, ‘industrial injuries benefit shall be payable where an employed earner suffers personal injury … by accident arising out of and in the course of his employment’. The options of, say: putting the injured employee C to an election as to which avenue to pursue (statutory payments or tortious action); or precluding C from pursuing a tortious action altogether; or limiting C’s rights to pursue a tortious action only where the injury claimed for exceeds a threshold compensatory figure, do not feature in English employers’ liability law.

Various causes of action

Where an employee, C, suffers from physical injury during the course of his employment, C may seek compensation from his employer, D, for physical injuries, and consequential financial loss, via various causes of action: systemic negligence in the workplace; breach of statutory
duty (albeit that this is severely limited now, in light of statutory reform in 2013); breach of a non-delegable duty of care for the torts of an independent contractor; a statutory deeming provision, where applicable; and vicarious liability. Some of these actions are direct, and some of them only entail indirect liability, as illustrated in the Diagram below.

Employee C may be injured by the acts or omissions of his co-employee, by a third party, or by some natural event – any of which he may seek to attribute to the fault of his employer, under one (or more) of these causes of action. Of course, if successful, employee C can only recover his damages once against employer D.

In this chapter, all of these potential avenues of liability will be considered in the order in which they appear in the Diagram, except for Vicarious Liability, which is covered separately in Chapter 18.
It will be recalled, from Chapter 2 (and reiterated in the statement of Beattie v Ulster Television plc,\(^3\) above), that where physical injury is suffered by an employee at the workplace, the relationship of employer and employee is a distinct and recognised category of duty of care, to adopt Lord Bridge’s phraseology in Caparo Industries plc v Dickman.\(^4\) The analysis of the negligence action against employer D, in this context, necessarily turns upon a consideration of which aspect of the recognised duty of care has been engaged by D’s conduct – and, if engaged, whether D’s conduct constituted a breach; whether that breach caused employee C’s damage; and whether the damage was too remote to be compensable at law.

**The difference between personal liability and vicarious liability**

Where employee C suffers injury as the result of the fault of his co-employee, their employer D may be vicariously (strictly) liable (arising from the co-employee’s negligence). Additionally, employer D may be liable to C for direct wrongdoing because of some systemic fault on the part of employer D. Direct liability arises because employer D owes a personal, non-delegable, duty of care to C. Claims by employee C against employer D for vicarious liability and systemic negligence may be brought concurrently, notwithstanding that the bases for the claims are entirely different.

As discussed in Chapter 18, vicarious liability arises where there has been a tort by an employee, the liability for which shifts to the employer, when that tort was committed in the course of employment – but it entails no corporate failure on employer D’s part. Vicarious liability requires C to prove three elements, *viz*, that (1) an employee (his co-employee, in this case) (2) committed a tort (3) whilst acting in the course of his employment. Hence, the allegation of vicarious liability against employer D can run into some potential difficulties, in a scenario in which C is injured in the workplace, say, some problem in identifying which co-employee was the perpetrator/s of the wrongdoing; or in proving that, under the terms of his contract, the co-employee was indeed D’s employee; or in proving that the co-employee’s misconduct was within the course of his employment. Where established, vicarious liability constitutes *indirect* liability on employer D’s part.

Alternatively, ‘systemic negligence’ (also called an ‘institutional duty of care’, and a ‘non-delegable duty’ on employer D’s part) means that employer D failed to have in place management and operations procedures that would reasonably have prevented the injury to employee C. It is a direct form of wrongdoing alleged against D, not indirect or strict. Under this type of allegation, proving the identity and employment status of the employee wrongdoer, and that his particular act or omission caused C’s harm, is not essential to the issue of systemic breach (per Lord Browne-Wilkinson in X (A minor) v Bedfordshire CC\(^5\)).

In fact, systemic negligence may be held against employer D as a form of direct wrongdoing; and vicarious liability may be separately held against that same defendant as a form of indirect liability, for the wrongdoing of an employee towards C (with damages recoverable, of course, only once). The two bases of liability are conceptually quite distinct, but nevertheless, may be brought concurrently on a set of facts. Where employee C was injured by the act or omission of a co-employee which constituted a one-off incident, with no systemic nature to the failing, then vicarious liability will be C’s only avenue of claim against employer D.

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\(^3\) [2005] NIQB 36, [79].  
\(^5\) [1995] UKHL 9, [15].
In *R v MOD*, R, her female friend G, and a male colleague DJ, were members of the Royal Air Force at the same defence facility. Following a party, at which a lot of alcohol was consumed, G helped R to her room (which could not be locked) in the female accommodation block. After socialising with DJ at another party in the communal room of the block, G did not (contrary to the understanding that operated in the female accommodation block) escort DJ out of the building. DJ then went to R’s room and raped R. R sued G in negligence for failing to escort DJ off the premises (and the MOD vicariously for that omission). R also sued the MOD for systemic negligence for unreasonable security arrangements for its female employees (for failing to fit Yale locks to the bedroom doors and swipe card locks on corridor doors). **Held:** each of R’s claims failed. G owed R no duty of care, for she assumed no responsibility for R’s safety, hence the MOD could not be vicariously liable for G’s omission. Further, there was no systemic negligence by the MOD in failing to provide an alternative locking system within the female accommodation block.

In *Lynch v Binnacle Ltd (t/as Cavan Co-op Mart)*, Patrick Lynch, 45, C, was a cattle yardman and drover employed by Binnacle, D, to herd cattle from indoor pens to the mart yard and then into the sales ring. Usually, there were three drovers to undertake the task, but at the time of the accident, only C was present. As the sole drover, C had to enter the pen with the bullocks. He was kicked by a Limousin bullock, and suffered serious injury. **Held:** both direct wrongdoing and vicarious liability were proven against the employer, D. Using three drovers was a safe system of work, but the system became unsafe when there was only one drover present, as the drovers were given no orders or directions by D as to what should happen in those circumstances. Further, D was vicariously liable for the acts of the two drovers who had absented themselves without permission.

**SEM.2** An employer’s, D’s, duty to its employees may co-exist with duties of care which that D owes to other parties as a matter of law.

There are a number of employers upon whom the law casts duties of care which will be owed to different classes of claimant. These employers are often, but not always, offering public services of one type or another. As has been seen in other areas of negligence (e.g., in the *scenario* of D’s failing to control or supervise third parties who harm C, discussed in *Chapter 3*), the prospect of conflicting duties of care may actually preclude a duty from being owed at all in some cases – but in the context of employer liability, the prospect of co-existent duties of care being owed is more common.

For example, the Prison Service owes its employees the same duty to take reasonable care of their safety as any other employer – whilst owing co-existent duties of care to the public (to prevent the escape of dangerous prisoners) and a duty to the prisoners themselves (which includes a duty to take reasonable care of their physical safety and welfare whilst housed in detention) (per *Burn v MOJ*). In addition, in *Sussex Ambulance NHS Trust v King*, it was remarked that the ambulance service owes a common law duty of care to its employees, whilst at the same time owing duties to the patients served by those employees. Whether D has breached those co-existent duties is a question of fact.

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6 [2007] EWCA Civ 1472. There was no question of the MOD’s being vicariously liable for the rape committed by DJ.
7 [2011] IESC 8, [24]–[25].
9 [2002] EWCA Civ 953, [23].
DIRECT LIABILITY: COMMON LAW DUTIES IN NEGLIGENCE

The quartet of duties

The personal duty of care

In general, an employer, D, owes a personal, non-delegable duty to its employee, C, to exercise reasonable care for his physical safety. In particular, this encompasses four sub-duties, viz, to provide for the employee: (1) a safe system of work; (2) a safe place of work; (3) competent staff; and (4) appropriate and safe tools and equipment (sometimes called, ‘safe plant and equipment’).

These four duties were specified by the House of Lords in *Wilsons and Clyde Coal Co Ltd v English*,10 and thereafter approved by Lord Hailsham in *McDermid v Nash Dredging & Reclamation Co Ltd*.11 As Pearce LJ remarked in *Wilson v Tyneside Window Cleaning Co*,12 this articulation of sub-duties may be convenient for the purposes of analysis, but they are ‘only manifestations of the same duty of the master to take reasonable care so to carry out his operations as not to subject those employed by him to unnecessary risk’.

This quartet of common law sub-duties has entered the lexicon of workplace health and safety manuals too. For example, as noted in *MacIntyre v MOD*,13 the Joint Services Safe System of Training for the Armed Services requires reasonable measures to ensure: ‘safe people, safe equipment, safe place and safe practice’.

Additionally, in order to discharge the four sub-duties, the law expects employer D to ‘keep reasonably abreast ... where there is developing knowledge’ about safety, or risks, or the precautions that could reasonably be taken to protect employee C (per *Stokes v Guest, Keen and Nettlefold (Bolts and Nuts) Ltd*14). In fact, the Court of Appeal has gone so far as to suggest that keeping abreast is an overriding duty, such that the four sub-duties ‘cannot be properly discharged unless the employer takes steps to keep himself informed of developments and increased knowledge in the sphere in which he operates, and unless he uses any such information to keep his own system and equipment reasonably up-to-date and abreast of the times’ (per *McCafferty v Metropolitan Police Receiver*15).

A non-delegable duty

A non-delegable duty means that it is personal to D and is borne by him alone; it cannot be delegated or shifted to another to bear. The overall duty of care (and its sub-components) owed by employer D to his employee C is non-delegable (per *McDermid*). Although D is entitled to delegate the performance of the duty to others, it cannot delegate the responsibility for the negligent performance of the duty by those others. As the court put it in *Milstead v Wessex Roofline Ltd*, the true meaning of the employer’s non-delegable duty is that, ‘[w]hat is personal is not the actual performance of the duty, but the responsibility for its bad performance’.16

Of course, when systemic negligence is alleged against employer D, then it will be the acts or omissions of some individual employee which will provide the basis for that claim for direct liability against D. As Lord Browne-Wilkinson stated in *X v Bedfordshire CC*, an entity which
is ‘under a direct duty of care to [C] ... can only act through its servants.’\textsuperscript{17} However, the characteristic of a systems failure is that it is an organisational failure. The systems alleged to be careless ‘are rarely attributable to the work of any individual alone, are compiled at leisure to cater for application in haste, and are quintessentially the responsibility of the employer’ (per \textit{Woodland v Swimming Teachers’ Assn} \textsuperscript{18}). For this reason, the personal duty of care cannot be evaded by employer D’s pointing the finger at one of its employees and saying, ‘it was his fault’. \textit{Wilsons} itself is clear authority for that proposition.

In \textit{Wilsons and Clyde Coal Co Ltd v English},\textsuperscript{19} Clyde Coal, D, owned and operated a coal mine. Employee Mr English, C, worked underground in the mine, and was repairing an airway leading off one of the main underground haulage roads. At the same time that C was leaving at the end of the shift one day by way of that road, the haulage plant was put in motion. Before C could reach one of the manholes provided, he was caught by, and crushed between, that plant and the side wall of the road, suffering serious injury. C argued that the haulage plant should not have been operated on the main haulage roads during the end-of-shift, and that this was the usual and recognised mining practice in Scotland. D argued that there was an alternative road by which C could leave the pit, and that a safe system of work had been implemented by the man in charge of the haulage machinery, who was within easy call if any miner emerged into the road in the way of the plant. D argued that it had taken all reasonable care in entrusting the job of operating the haulage plant to a competent and trusted employee. \textbf{Held:} D was liable for breach of a personal, non-delegable duty owed to C, to ensure that reasonable care was taken by the person appointed to organise a reasonably safe system of work.

The reason for the emergence of an employer’s non-delegable duty of care appears to be rooted in history, so far as appellate English judicial opinion is concerned. As Lord Sumption pointed out in \textit{Woodland v Essex CC},\textsuperscript{20} at the time that \textit{Wilsons} was decided in 1938, the doctrine of common employment meant that employer D could not be vicariously liable towards employee C, where that employee was injured by the acts or omissions of another of D’s employees. This meant that the device of a non-delegable duty of care enabled injured employee C to successfully sue his employer, for the wrongs committed towards him by a work colleague. It circumvented ‘the injustice flowing from the doctrine of common employment’ (per Lord Phillips MR in \textit{A (a child) v MOD} \textsuperscript{21}). The doctrine was actually abolished in 1948\textsuperscript{22} – and indeed, the legal basis for that particular immunity which prevailed for employer D ‘seems archaic today’, as Lord Millett put it in \textit{Matthews v MOD}.\textsuperscript{23} An employer can now most certainly be vicariously liable for the wrongs committed by an employee which injure a co-employee C.

In \textit{Stapley v Gypsum Mines Ltd},\textsuperscript{24} John Stapley, C, was employed by Gypsum Mines, D, as a breaker in their gypsum mine, which entailed breaking up gypsum rock which had been blasted. One day, C was working with Mr Dale underground in a stope. Mr Dale was employed as a borer, and prepared the pile of rock for removal. They noticed that the roof of the stope was unsafe and likely to collapse, and were instructed to bring the roof down, so that it was safe to work in the stope. Having failed to bring down the roof with picks, they decided to return to their original work, with C working in the stope. C was then buried beneath a quantity of gypsum which had fallen from the

\textsuperscript{17} [1995] UKHL 9, [1995] 2 AC 633, 739–40 (emphasis added).
\textsuperscript{18} [2011] EWHC 2631 (QB), [2012] PIQR P3, [33].
\textsuperscript{19} [1938] AC 57 (HL).
\textsuperscript{20} [2013] UKSC 66, [13].
\textsuperscript{22} By virtue of the Law Reform [Personal Injuries] Act 1948, s 1.
\textsuperscript{23} [2003] UKHL 4, [2003] 1 AC 1163, [81].
\textsuperscript{24} [1953] AC 663 (HL) 677 (Lord Oaksey).
roof and was killed. **Held:** Mr Dale was negligent towards his colleague C; and with the ‘doctrine of common employment having been abolished, there is no doubt that [D] are [vicariously] liable for Dale’s negligence if it was causally connected with [C’s] death.’ That negligence was causally connected.

Further, it was noted by the Court of Appeal, in *Farraj v King’s Healthcare NHS Trust,*\(^\text{25}\) that although the *Wilson’s* court did not articulate the reasons for developing the notion of an employer’s non-delegable duty of care, undoubtedly the existence of the doctrine of common employment, together with an unwillingness to force the injured employee to sue his work colleague (‘a remedy of doubtful value’, in any event), lay at the heart of the non-delegable duty developed in that case. In other words, the motivation for the development of a non-delegable duty owed by employer D to its employee C was entirely ‘policy-driven’, i.e., to fill a gap in redress which the doctrine of common employment had created – and yet, despite that doctrine having been abolished in 1948, the principle of non-delegable duty remains firmly unchanged.

**Teasing out the sub–duties**

Given the enormous number of cases in which employees have sued their employers for breaches of one or more of the four sub–duties discussed above, it is only possible in a generalist text to outline the key components of each sub–duty, by reference to some leading cases:

<table>
<thead>
<tr>
<th>The sub–duty</th>
<th>Components of the sub–duty</th>
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<tr>
<td>Safe tools and equipment</td>
<td>• to take reasonable care to provide proper equipment for C;</td>
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<td></td>
<td>• to reasonably maintain that equipment in proper order;</td>
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<td>• to provide C with adequate instructions in the use of the</td>
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<td>equipment.</td>
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In *Mason v Satecom Ltd,*\(^a\) Satecom Ltd, D, provided and installed data switching equipment at various council sites in Redbridge LBC, and was responsible for providing on-site maintenance and software and technical support. The server room, where computer and information technology equipment was located, had a cabinet in it to store the Megabox router. Adam Mason, C, was employed by D as a field service engineer. One day, while replacing a circuit board card in the Megabox (which was 2.44 metres up the wall), C used a ladder in the room to gain access to the cabinet, lost his balance, fell, and hurt his spine. **Held:** negligence proven. Two sub–duties were engaged, and breached: failing to provide C with suitable plant or equipment; and failing to provide a safe system of work. D knew that C would have to gain access to the high cabinet, but gave no instruction in health and safety, or in relation to the use of equipment or in working at heights, and never provided C with any stepladders for his work. (Contributory negligence of 33% was assessed against C, however).

In *Hannington v Mitie Cleaning (South East) Ltd,*\(^b\) Mitie Cleaning, D, provided cleaning services for factory premises owned by De La Rue Cash Systems at Portsmouth. Stanley Hannington, C, was a contract cleaner with D. C had to collect rubbish and waste left around the premises and empty it into Biffa-type skips out in the large factory yard. The skip was a tall square bin with a heavy

\(^{25}\) [2009] EWCA Civ 1203, [2010] 1 WLR 2139, with quotes at [72], [74].

hinged plastic/rubber type lid which could be lifted and placed back in an upright position. There was no securing device, so if there was a gust of wind, the lid could slam shut. On a windy day, C was emptying rubbish into the skip, when the lid fell on his arm, causing injuries. **Held:** negligence proven. The sub-duties to provide C with adequate plant and equipment, with a safe place of work, and with a safe system of work were all engaged, and breached. The skip had a design fault so that it could slam shut in a sudden gust of wind when it ought to have been kept securely open (and with this being a windy yard, the risk of that accident occurring was ‘obvious’ and one which C would ‘inevitably encounter in the course of doing their work’). An appropriate and simple mechanism to avoid that type of accident should have been provided, despite absence of any specific previous complaint from the employees concerned.

A safe place of work

- to take reasonable precautions against dangers arising in the workplace;
- to give reasonable warnings and training to C to deal with the dangers of the workplace;
- to take steps to ensure that the system of work which applies at any off-site workplace is reasonably safe, depending upon all the circumstances.

It does not encompass a duty on employer D to remove all dangers in the workplace, or to ensure that a remote workplace is a reasonably safe place of work (the latter will be impossible to achieve, if the remote workplace is not within the control of D, hence, the emphasis upon exercising reasonable care to provide a safe system of work at the remote workplace).

In **Cockram v Commr of Police,** DC Jon Cockram, C, a DC with 15 years’ service, was undertaking a refresher course of arrest and restraint training, as his police employer D required, at Picketts Lock Sports Centre. The class was supposed to occur in the dojo room at the Centre with a judo matted floor, but it was moved to a hall with a concrete floor. The officers were training in pairs and were practising an exercise called the sweep kick. One judo mat, and not two, was provided for each pair. C fell to the floor, hitting his left knee on the concrete floor. This lead to permanent disability, and compulsory medical retirement. **Held:** negligence proven. The two sub-duties of a safe place of work, and a safe system of work, were engaged, and breached. D should have provided C with not one mat, but two. That measure was not a ‘a counsel of perfection’ (as the trial judge had held), but was needed to meet D’s duty of providing a reasonably safe system and place of work.

In **Latimer v AEC Ltd,** Mr Miller, C, was a machine operator employed by AEC Ltd, D, and was working on the night shift. After a heavy rain storm, the premises were flooded, and an oily liquid which normally collected in the channels on the floor spread across the entire floor. D spread sawdust in some areas of the factory, but did not have enough to cover the entire premises, including the area where C worked. Due to the slipperiness of the floor, C slipped whilst pushing a trolley, and crushed his ankle. C argued that D should have shut down the whole works (or part thereof), whilst the premises were slippery and unsafe. **Held:** no negligence proven. A safe system (and place) of work was provided here, in that sawdust was provided as a precautionary measure; no-one had ever slipped like this before, no complaints to D had been made; rain storms of this severity were very rare; and the post-war work which the factory was engaged in meant that sending the night shift home would have been detrimental to the economy.

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\(^c\) [2001] EWCA Civ 1483.
\(^d\) [1953] AC 643 (HL).
A safe system of work
• to take reasonable steps to devise, maintain and enforce a safe system of work;
• to specify the method of working, where managerial control would require that such method not be left to the employee;
• to encourage safe devices or procedures in the workplace, through supervision and oversight;
• to implement procedures as to what should happen if a safe system of work becomes unsafe for whatever reason.

In Cross v UGC Ltd ([t/as Oxford Automotive Components Ltd]), Patrick Cross, C, was working in the paint shop of Oxford Automotive Components Ltd, D, in Oxford, engaged in the task of routinely cleaning down the paint-spraying booth, by using a solution of water and cleaning agents. Inevitably, the floor and surroundings became wet and slippery. A ladder was necessary for part of the task, and as C climbed 2–3 steps of the ladder, he missed his footing, and fell backwards, suffering injury. Held: the sub-duty to provide a safe system of work was engaged, and breached. There were haphazard practices arranged by D in keeping the floor in a safe condition and the soles of C’s workboots free from slippery substances. Sawdust was not spread in the slippery premises in a systemic and regular manner either.

In McCarthy v The Highland Council, Teresa McCarthy, C, taught at an educational institution in Inverness, owned and operated by Council D, for pupils with special education needs. One day, one of her colleagues was punched repeatedly by an autistic student, M, who had ‘flipped’ about a lightswitch. C went to the assistance of her colleague, trying to shield her from the blows, and to distract M. Eventually, the two teachers left when another pupil attacked M. Thereafter, there were several incidents, involving M attacking or threatening C, and these often revolved around the trigger of lightswitches and lights in the leisure room. Held: the sub-duty to provide a safe system of work was engaged, and breached. A more adequate system was required to assess and manage risks to C and other staff members – to ensure that violent incidents were reported; to avoid or respond to recurrence of incidents to enable staff members to prevent such incidents; and to inform staff of strategies for dealing with pupils, to provide staff with relevant training, and to provide training, emergency alarms, and additional support.

Competent co-employees
• to manage, reprimand, or dismiss, unruly or dangerous co-employees, where they pose a threat to the safety of C;
• to ensure that each employee has received adequate safety training, so as to know, or be reasonably aware of, the safety procedures.

In Hudson v Ridge Manufacturing Co Ltd, Harold Chadwick, an employee of Ridge Manufacturing, D, had been an habitual practical joker on fellow employees, tripping them up, repeatedly making a nuisance of himself, etc. His employers, D, had reprimanded him many times, but he had taken no notice. Mr Hudson, C, a co-employee, was injured when he was tripped up by the practical joker, put out his hand to save himself, and broke his wrist. Held: the sub-duty to provide competent employees was engaged, and breached. If a fellow workman is not merely incompetent, but is likely to prove a source of danger to his fellow employees by his habitual conduct, then the employer is under a duty to remove that danger.

\* [2001] EWCA Civ 685.
\[2011\] CSIH 51, 2012 SLT 95.
\* [1957] 2 QB 348, 351, 359 (Streatfeild J).
Some additional principles are worthy of note, in the context of the quartet of common law duties:

Where C is injured off-site, at a place which was not under employer D’s control, then D’s duty to exercise reasonable care to provide a safe system of work still applies. However, whether or not a breach occurred on D’s part depends upon what is reasonable in all the circumstances.

Accidents at remote workplaces provide a particular legal problem. The fact that the injury to employee C occurred off-site, at premises which are not owned, occupied or controlled by employer D, certainly does not remove the duty of reasonable care owed by D to that employee.

However, the standard of care to be applied to D’s own premises will necessarily be very different to that applied to an off-site venue. As the court recently noted in McErlean v The Rt Rev Monsignor MacAuley, ‘[w]hile it might be a breach of an employer’s duty not to grit paths on premises within its control, it might not be a breach to require an employee to use an un-gritted public footpath. It depends on “all the circumstances”.’26

As pointed out in Wilson v Tyneside Window Cleaning Co,27 ‘[w]hether the servant is working on the premises of the master or those of a stranger, that duty is still ... the same; but as a matter of common sense, its performance and discharge will probably be vastly different in the two cases.’ In Smith v Austin Lifts,28 Lord Denning noted that, ‘employers who send their workmen to work on the premises of others cannot renounce all responsibility for their safety ... if they know, or ought to know, of a danger on the premises to which they send their men, they ought to take reasonable care to safeguard them from it’. More recently, Farquharson LJ pointed out, in Cook v Square D Ltd,29 that the following factors will all be relevant, as to whether employer D has exercised reasonable care to prevent injury to employee C at the remote workplace:

- the nature of the building at the remote workplace (if there is a building);
- the experience of C, who is despatched to work at the remote site;
- the nature of the work C was required to carry out;
- the degree of control that D could reasonably exercise in the circumstances;
- D’s own knowledge of the defective state of the premises.

It is a fact-sensitive inquiry (per Berry v Ashtead Plant Hire Co Ltd30).

In Wilson v Tyneside Window Cleaning Co,31 Gilbert Wilson, 56, C, worked for Tyneside Window Cleaning Co, D, as a window cleaner. He had been a window cleaner all his working life, was trained and very experienced, and had worked for D for 14 years. During a contract to clean the windows of Newcastle Breweries, C cleaned a window about 12 ft from the ground, which he had cleaned on previous occasions, and knew that the woodwork of the sash was a ‘bit rotten’, and that there was only one handle, not two. When C grabbed the handle, it came away in his hand, he lost balance and fell off the ladder, suffering severe injuries. C knew that he should not trust handles on windows, but he had never himself experienced the coming off of a handle. D had never given him general safety instructions, or said anything to him specifically about handles. Held: negligence failed. The sub-duty to provide a safe system of work was engaged, but not breached. D had told C that he need not clean any window which he considered unsafe. D was not obliged to go further.

Employer D’s duty to exercise reasonable care to provide a safe system of work must be examined against the backdrop that: (1) employer D must take account of both the experienced and/or diligent employee to whom the risks of the workplace may be obvious, and the inattentive and careless employee, when implementing a system of work; (2) the law is likely to require D to carry out a risk assessment to identify whether a precaution should have been taken in light of that assessment; (3) C may himself be negligent in failing to adhere to the system of work which was set by D, in which event the defence of contributory negligence will apply; and (4) employer D will be put on notice where a defect in the system of work has been drawn to its attention.

The 'safe system of work' duty undoubtedly involves some finely-balanced judgments, as to whether D has failed to implement a safe system, or whether employee C 'should have known better', or contributed significantly to his own downfall.

The philosophy behind this common law duty is that employee C is not in the same circumstances as the employer, and cannot create the safe system of work himself. As remarked in General Cleaning Contractors Ltd v Christmas: '[e]mployers are not exempted from this duty [to provide a safe system of work] by the fact that the men are experienced and might, if they were in the position of an employer, be able to lay down a reasonably safe system of work themselves. Workmen are not in the position of employers. Their duties are not performed in the calm atmosphere of a boardroom with the advice of experts. They have to make their decisions on narrow sills and other places of danger and in circumstances where the dangers are obscured by repetition.' The position was well-put by the Royal Court of Jersey (which looks to English law in this area) in Mullaney v Brenwal Ltd: 'it has to be recognised that the employer creates the circumstances and environment in which the employee has to take decisions as to precise modes of carrying out his duties, and the court should be slow to be overly critical [of the employee].'

In other words, there is a duty on employer D, in devising and monitoring the system of work for its employees, borne of the power and control of the former, and the vulnerability of the latter – a typical scenario in which a duty of care will be recognised, and enforced.

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228 Employers’ liability

and inspect each window or repair defective handles; D did not have any degree of control over Newcastle Breweries, and had done enough to exercise reasonable care to provide a safe system of work for its employees. In MacIntyre v MOD, Second Lieutenant Asa MacIntyre, C, was seriously injured in a climbing accident in the Bavarian Alps during an army adventurous training exercise. He had successfully climbed a steep section of the mountain following recognised routes, and was crossing an area of rugged terrain where the climbing was technically less difficult, but with a great quantity of hazardous loose rock. A rock-fall occurred from above, and C took the precaution of pressing himself as close to the rock face as possible. Despite this, he was struck on the head by a falling rock, suffered skull fractures resulting in a severe traumatic brain injury, and was eventually discharged from the Army on medical grounds. Held: negligence failed. The sub-duties to provide a safe system of work and competent co-employees were engaged, and not breached. This was a ‘tragic accident’ only. There was no question of the workplace being made entirely safe – it clearly could not be – but the systems of training and supervision were reasonable.
The onus on employer D has become even more demanding, under this limb, by the increasing recognition of four legal principles which are sympathetically-inclined towards employee C:

i. The inattentive or careless employee. It has long been established that a safe system of work may be required to protect the inattentive or careless employee from his own misjudgment.

   In *General Cleaning Contractors Ltd v Christmas*, Mr Christmas, C, was employed as a window cleaner by General Cleaning, D. He was sent to clean the windows of a club. He stood on the sill of a window to clean the outside of the window, when the sash of the window gave way and fell onto his fingers, causing C to lose his grip and fall. **Held:** negligence proven. A practice of ignoring obvious dangers had grown up in D's firm. By allowing individual workmen to decide themselves how to take precautions against an obvious danger (e.g., defective sashes due to rotten wood), D had failed to discharge their duty to provide a reasonably safe system of work for C and his colleagues. D was under a duty to devise a suitable system, and to supply any equipment that might be required to guard against the risks of defective sashes, e.g., safety belts, ladders, or harnesses.

   Lord Oaksey noted that it was 'well-known to employers ... that their workpeople are very frequently, if not habitually, careless about the risks which their work may involve. It is ... for that very reason that the common law demands that an employer should take reasonable care to lay down a reasonably safe system of work.'

   In an age of workplace health and safety manuals, computer-assessed tests which employees must undertake as part of their annual reviews, etc, the principle that a safe system of work may entail employer D's giving warnings against obvious risks is equally as applicable. It necessarily follows from *Christmas* that employer D's duty to exercise reasonable care to provide a safe system of work must also take account of obvious risks, e.g., by providing instructions or warnings on how to avoid them. It was recently suggested in *Ammah v Kuehne & Nagal Logistics Ltd* that to provide a system of work, via an instruction manual which pointed out the obvious risks of standing on boxes, would be to provide something akin to 'an idiot's guide'; but Richards LJ pointed out that *Christmas* supported the principle that employer D 'may be under a duty to warn against even an obvious risk'.

ii. Risk assessments. In *Steven Threlfall v Hull CC*, Smith LJ noted that the law had reached a point whereby it was 'generally recognised that a reasonably prudent employer will conduct a risk assessment in connection with his operations, so that he can take suitable precautions to avoid injury to his employees ... The modern requirement is that he should take positive thought for the risks arising from his operations. Such an [risk] assessment is, as Lord Walker said in *Fytche v Wincanton Logistics plc* “logically anterior” to the taking of safety precautions.'

   Notably, Regulation 3 of the Management of Health and Safety at Work Regulations 1999 requires employer D to undertake a 'suitable and sufficient' risk assessment. In *Robb v Salamis (M & I) Ltd*, Lord Hope clarified that this statutory obligation reflects a continuing common law duty to 'anticipate situations which may give rise to accidents. The employer is not permitted

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35 [1953] AC 180 (HL). The club, as occupier, was held by the CA not to be liable, given that C should have appreciated and guarded against any special risks ordinarily incident to his calling as a cleaner (now encompassed as s 2(3)(b) of the Occupiers' Liability Act 1957), and that point was not appealed to the HL.

36 ibid, 189–90. 37 [2009] EWCA Civ 11, [18].

38 [2011] PIQR P3 (CA) [35], with internal cite at: [2004] UKHL 31.
to wait for them to happen." Even if employer D considers that the risk to employee C was obvious, and one which C should have taken steps to guard against himself, the failure to undertake a risk assessment by employer D will be one important factor indicating common law negligence. The reasoning: a risk assessment would have flagged up that ‘obvious step’; employer D would have been ‘alerted to or reminded of the need for’ a precautionary step; it would have ‘ensured that what may appear to be obvious is in truth obvious, in the sense that both parties have appreciated the risk’; and the assessment would ‘provide the opportunity for an employer to ensure that he has taken appropriate steps to protect his employee’ (per *Sherlock v Chester CC*). The obligation to carry out a risk assessment (as part of the common law duty to provide a safe system of work) is, as with the overarching duty, non-delegable (per *Uren v Corporate Leisure (UK) Ltd*).

In *Sherlock v Chester CC*, Mr Chester, C, lost his left thumb and index finger when using a circular saw provided by Chester CC, his employer, D. A risk assessment would have identified that, when using the saw, C should have had either a run-off table or a second man involved, and should keep his hand well away from the saw blade (even if those were obvious steps). Held: negligence proven. D should have identified the risk of C’s system of work, via a risk assessment; and then instructed C to use a run-off bench, and had that been done, C would have followed the instruction (hence, causation was proven). In *Uren v Corporate Leisure*, Robert Uren, 21, C, a flying officer with the RAF, took part in a ‘Health and Fun Day’ at RAF High Wycombe, which entailed a game whereby participants entered a shallow pool and retrieved an object. C entered the pool (which was about 1 metre deep) headfirst, and was rendered a tetraplegic from his injuries. C sued Corporate Leisure (UK) Ltd, D1, which supplied the equipment and personnel for the games undertaken on the day, and the MOD, his employer, D2, who arranged the programme of events, in negligence. It was found (by the time of re-trial) that D2 did not carry out any risk assessment for the overall Health and Fun Day or for its constituent parts such as the pool game, and that the risk assessments prepared by D2 for the pool game were done without knowing the dimensions of the pool or the pool game to be played. D1 relied on those risk assessments and did not undertake its own. Held: both D1 and D2 were negligent: ‘the relevant risk assessments were defective because no one had addressed the question of headfirst entry into the pool’. The pool game posed an unacceptable risk of serious injury, and steps should have been taken by D1 and D2 to avoid that risk, which could have been done without diminishing the social and health value of the game (e.g., an instruction could have been given that, ‘any entry into the pool by diving or headfirst would render the team disqualified’).

Given the emphasis which is judicially placed upon risk assessment now, it calls into question whether the view expressed in *Withers v Perry Chain Co Ltd* – that where the risk of injury to employee C is low and known to C, then C can decide for himself whether to run it – remains strictly apt. In that case, employee C had chosen to go on working on bicycle assembly, even though there was a risk that she would again develop dermatitis, notwithstanding that her employer provided protective gloves, washing facilities, and other measures. Devlin LJ noted that, ‘[t]he relationship between the employer and employee is not that of schoolmaster and pupil ... It cannot be said that an employer is bound to dismiss an employee, rather than allow her to run a small risk. The employee is free to decide for herself what risks she will...
run ... if the common law were otherwise, it would be oppressive to the employee by limiting his ability to find work, rather than beneficial to him. Whilst the common law may not require employer D to dismiss or demote employee C in his own best interests, the emphasis upon risk assessment now, in exercising reasonable care to provide a safe system of work, means that precautionary measures by which to avoid the injury to employee C should be identified in that risk assessment.

iii. **Contributory negligence.** Rather than find that employer D committed no breach by not guarding employee C against the dangers of his own inattentiveness or carelessness in the workplace, the modern legal position is that a breach will be found, but an appropriate deduction will be made for contributory negligence. In *Robb v Salamis M & I Ltd*, Lord Hope affirmed that ‘account must be taken of the risk of mishandling by the careless or inattentive worker as well as by the skilled worker who follows instructions to the letter conscientiously every time and strives never to do anything wrong. The solution ... is to be found in the defence of contributory negligence.’

In *Sherlock v Chester CC*, facts above, **held:** C was liable for 60% contributory negligence. This was not a case of momentary inattention by an employee. This employee was skilled; ‘and the precaution in question is neither esoteric nor one which he could not take himself. In the present case he could have made himself a run-off bench, or ensured that Mr Webb was there when he cut the relevant fascia board.’

Indeed, the Scottish Outer House noted, in *Sutherland v McConchy’s Tyre Service Ltd*, that where: employee C cannot claim that he was somehow induced to expose himself to risk by his employers’ failure; C had used his own judgment to conclude that it was ‘not worth his while’ to take the precautions that his employers had instructed him to take for his own safety; and C even used a degree of deception to lead the employer D to believe that its health and safety system was being implemented, then a sizable contributory negligence finding (80% in that case) would be warranted.

iv. **Put on notice.** Employers who are put on notice of a hazard in the workplace must sufficiently respond to the risks posed by that hazard, and take suitable precautionary steps to abate that hazard. The very omission to take those steps may demonstrate that the system of work implemented by D was not of reasonable standard.

In *Smyth v Austin Lifts Ltd*, employee C had reported to his employer D a faulty door mechanism on the third party occupier’s premises where C was working. C and his colleagues reported that the machine house door was broken and needed re-fixing in position, on four separate occasions. D reported the defect to the occupiers, but did nothing further. **Held:** negligence proven on employer D’s part. ‘If the workmen had not reported any difficulty or defect on the premises, [D] would not have been responsible. They would have been entitled to assume that the means of access provided by the occupiers was reasonably safe. But when the workmen reported [the defect], [D] was put on enquiry whether the means of access provided by these doors was reasonably safe. [D] ought to have ... gone themselves to see if the means of access was reasonably safe. If they had done so, they would have found it unsafe and would have done something. They might have insisted on the door being mended, or they might have sent a long ladder to enable the men to get safely to the

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43 [2006] UKHL 56, [32]. 44 [2012] CSOH 28, [56]. Ultimately, no liability on the employer’s part was found.
machinery. Having done nothing, they cannot escape liability. In *McDonald v Dept for Communities and Local Govt*,\textsuperscript{45} facts shortly below, held: no negligence. 'This was not a case like *Smyth v Austin Lifts*, where an employer knows of a danger on premises to which the employee is sent'.

**Breach of duty**

$\text{SEM.6}$ There is no duty imposed upon employer D that the employer must ensure the safety of employee C. D is only required to take reasonable steps to avoid injury or damage to C. The usual principles governing breach, causation and remoteness, apply to a common law negligence action framed in employers’ liability.

**Establishing the standard**

As with all negligence-related causes of action, the standard of care applicable in employers’ liability is that of the reasonable employer – and not that of a perfect, entirely risk-averse, employer (see Chapter 6). An employer is not an insurer for all ills, and a ‘counsel of perfection’ is not the objective. There is no obligation on employer D to provide an entirely safe workplace to employee C (per *Withers v Perry Chain Co Ltd*\textsuperscript{46}). As always with negligence analysis, the standard of reasonableness is what matters.

Additionally, there is no such thing as an average standard of care – each incident which employee C encounters in the workplace will be assessed against the reasonable standard of care.

In *Lynch v Binnacle Ltd (t/as Cavan Co-op Mart)*,\textsuperscript{47} facts previously, held: negligence proven. The use of three drovers was a safe system of work. However, the system became unsafe when there was only one drover present, as the drovers were given no orders or directions as to what should happen in those circumstances.

**Proving breach**

When proving breach, the usual principles apply (as discussed in Chapter 7). Specifically, in the context of employers’ liability, the following points frequently arise on the facts:

i. **Foreseeability of accident.** Whilst employer D unquestionably owes a duty of care to employee C to prevent the risk of injury, the risk of the particular accident and injury which happened may have been so remote and unforeseeable as to have been one which no reasonable employer would have considered it necessary to guard against. In that event, there will be no breach proven – for a reasonable employer would not have taken any precautionary steps to prevent the risk of injury which was unforeseeable.

In *McDonald v Dept for Communities and Local Govt*,\textsuperscript{48} Percy McDonald, C, was employed by the Building Research Establishment, D, an arm of Government, to work at the Building Research Station at Watford during 1954–59, initially as a lorry driver and subsequently as a fitter. This work required C to drive his lorry to collect pulverised fuel ash from the Battersea Power Station in London. C alleged that, during these visits, he suffered exposure to asbestos dust, while boilers, pipes

\textsuperscript{45}[2013] EWCA Civ 1346, with quote at [39] (McCombe LJ). On appeal, negligence was not in issue: [2014] UKSC 53, [5].

\textsuperscript{46}[1961] 1 WLR 1314 (CA) 1320.

\textsuperscript{47}[2011] IESC 8, [24]–[25].

\textsuperscript{48}[2013] EWCA Civ 1346, with quote at [106] (Lord Dyson MR). On further appeal, negligence was not in issue: [2014] UKSC 53, [5].
and other equipment were being lagged with asbestos insulation, and he developed mesothelioma some 55 years later. **Held:** negligence failed. It was not reasonably foreseeable in the 1950s that ‘the quantities and intensity of any asbestos dust given off and to which C was exposed, would be likely to be injurious or offensive to his health’ (found the trial judge), and ‘[t]his finding is fatal to the negligence claims.

In fact, given that the issue of breach must be assessed in light of the ‘spectacles’ of the relevant time at which the breach by employer D allegedly occurred, courts have frequently been unwilling to hold that, as assessed by the standards of the time, it was reasonably foreseeable that employer D should have appreciated that the presence of asbestos dust was likely to be injurious to the health of its employees who came into contact with asbestos dust, in the quantities to which C was exposed during the course of his work (see, e.g., *Williams v Univ of Birmingham*[^49^] – although with a continuing development of knowledge of the risks of working with asbestos throughout the 1960s and 1970s and beyond, more extensive precautionary measures may have been expected in those later stages, such as the provision of protective respiratory equipment and clothing, per *Macarthy v Marks & Spencer plc*[^50^]).

ii. **An inevitable accident?** The law provides that employees must accept risks which are inherent in their work (i.e., those which cannot be removed by employer D via the exercise of reasonable care and skill). It may well be reasonably foreseeable that an injury may result to employee C from the system of work adopted by employer D, but if no precautionary step could have been taken to prevent the harm arising for C, then what occurred is an ‘inevitable accident’ (or a ‘simple accident’, as the court put it in *McErlean v The Rt Rev Monsignor MacAuley*[^51^]), and no negligence will be found.

In *McErlean*, Margaret McErlean, C, a primary school teacher, badly broke her wrist when she slipped and fell on a snowy and icy footpath whilst escorting a group of 48 pupils to a nearby chapel for choir practice. C sued her employer D in negligence. There had been many complaints in the media that winter about the state of the footpaths in the Greater Belfast area. Some other schools had closed for the day in question due to the adverse weather, but D’s school remained open. C slipped on a public pavement which was not under the control of the primary school. Just prior to the walk, C had complained that the conditions along the pavement were not safe. The question was whether the system of work, requiring C and pupils to walk along the pavement to the chapel that day, for choir practice, was reasonably safe. **Held:** negligence failed. D conducted a risk assessment immediately prior to the walk, which amounted to a verdict of ‘passable with care’. There was always an inherent risk of slipping on an icy footpath, and the fact that C slipped did not mean that D was in breach in carrying out its risk assessment. This was a ‘simple accident’, which occurred without any fault on C’s or D’s part.

iii. **Taking precautionary steps.** Precautionary steps may have prevented the injury to employee C from arising – but whether those steps were required by law (failing which employer D fell below the standard of reasonable care and committed breach) will require an application of one or more tests of breach.

[^50^]: [2014] EWHC 3183 (QB), although the claim against the occupier Marks & Spencer failed; and third party proceedings against C’s employer (which was a family company) thereby fell away.
[^51^]: [2014] NIQB 1, [22]. For another case involving an employee slipping on ‘black ice’, in which a claim in negligence against the employer also failed, see: *Burrows v Northumbrian Water Ltd* [2014] EWHC 3305 (QB).
The ‘quadrant of factors’ approach is frequently applied in employers’ liability (as per the case of the partially-sighted mechanic who should have been provided with goggles, in Paris v Stepney LBC\(^52\)). As Swanwick J remarked, in Stokes v Guest, Keen and Nettlefold (Bolts and Nuts) Ltd, employer D ‘must weigh up the risk in terms of the likelihood of injury occurring and the potential consequences if it does; and he must balance against this the probable effectiveness of the precautions that can be taken to meet it and the expense and inconvenience they involve’\(^53\) – in other words, a typical Bolton v Stone ‘quadrant of factors’ analysis. The fact that employer D typically (but not always, depending upon the size of the workplace) knows of any vulnerability of its employee C may require an extra precautionary step, where ordinarily, that step would not be required – as the facts of Paris aptly demonstrated. As Devlin LJ noted of the Paris decision, it casts a more onerous obligation on employer D, for ‘when the susceptibility of an employee to [a risk of injury] is known, there is a duty on the employer to take extra or special precautions to protect such an employee’ (per Withers v Perry Chain Co Ltd\(^54\)).

Alternatively, the Bolam-Bolitho-type approach may be applied, in that (per Swanwick J again), ‘where there is a recognised and general practice which has been followed for a substantial period in similar circumstances without mishap, [employer D] is entitled to follow it, unless in the light of commonsense or newer knowledge it is clearly bad’. The sentiments of Swanwick J were explicitly approved by the Supreme Court in Baker v Quantum Clothing Group\(^55\).

Both methods of proving breach were evident in the following case.

In Mitchell v United Co-operatives Ltd\(^56\) Josephine Mitchell, C, and two colleagues, were employed by United Co-operatives, D, to work in a Co-op convenience store at Heaton Moor. One night, robbers entered, and stole cigarettes and cash. C suffered (psychiatric) injuries as a result. D were alive to the risk of attacks on their premises and employees, and had had risk assessments performed, from which D introduced a series of measures to reduce the incidence of robbery, including: CCTV monitoring outside and inside the shop; panic alarms connected to a control centre; video surveillance; fob-operated door locks; minimising the amount of cash in tills; provision of ‘smoke notes’; training of staff to avoid confrontation with the robbers; provision of a part-time security guard for a limited period after a robbery; and provision of a mobile security response team. However, C argued that D should not have removed glass security screens around the till, and should have employed a security guard. Held: negligence failed. Screens carried with them a risk to staff, because they were only effective if kept locked and all staff were within them, but staff could not retreat easily if a robber somehow breached that secure area. Further, a permanent security guard outside the premises would have cost about £30,000; the shop was running at a loss of about £60,000 p.a.; and a ‘proper approach requires a balance to be struck against the probable effectiveness of the precaution that can be taken and the expense that it involves’: Also, D’s approach to risk management was standard practice for retail outlets of this kind, and there was certainly no evidence to suggest that small convenience stores in a suburban area should be equipped with a security guard on the door during all opening hours.

In addition, it is worth reiterating the implementation of s 1 of the Compensation Act 2006, whereby a court must take into account whether, by taking precautions against the risk of injury, it may result in the prevention of a desirable activity being undertaken ‘at all, to a particular extent or in a particular way’ or ‘discourage persons from undertaking functions in

\(^{52}\) [1951] AC 367 (HL).

\(^{53}\) [1968] 1 WLR 1776 (QB) 1783.

\(^{54}\) [1961] 1 WLR 1314 (CA) 1320.

\(^{55}\) [2011] UKSC 17, [9].

\(^{56}\) [2012] EWCA Civ 348, [23].
connection with a desirable activity'. Employers frequently undertake work which has a wider community or public interest (e.g., in McErlean, ‘practising for a nativity play or taking part in choir practice is a desirable activity’). However, whether s 1 adds anything to the common law is doubtful – a thorny issue which has been considered earlier in Chapter 7.

iv. The problem of employees who work for emergency service providers. Undoubtedly, the assessment of Bolton v Stone’s four factors as part of a balancing exercise produces ‘winners’ and ‘losers’, which may seem to be unjust. Employees who are employed by emergency service providers are one such category. Precedent shows that proof of breach can be difficult to establish in that context:

In Watt v Hertfordshire CC, William Watt, C, was employed by the Hertfordshire Fire Service, D, stationed at Watford. An emergency call came into the fire station, that a woman was in a car accident and trapped under a heavy vehicle about 200–300 metres from the Watford Fire Station. It was clear that there might be need for lifting apparatus of some kind, and a jack capable of raising heavy weights (on loan to D from the London Transport Executive) was loaded into the fire engine. A jack was required on only very rare occasions. There was one fire vehicle fitted to carry the jack, but it was out on other service. The fire team, including C, loaded the jack into another vehicle, and held it steady. Unfortunately, the driver had to brake very suddenly, and the jack moved uncontrollably, hitting and badly injuring C’s leg. C claimed that another vehicle should have been fitted to accommodate the jack, or the jack should not have been taken out. Held: no negligence proven. The sub-duties to provide safe equipment and a safe system of work were engaged, and not breached. The risk of injury was low (on only one previous occasion had the jack been required), and the cost of providing such a vehicle at all times was not warranted, in light of the low risk of injury. Additionally, the task being undertaken by C was to save life. ‘If this accident had occurred in a commercial enterprise without any emergency, there could be no doubt that [C] would succeed. But the commercial end to make profit is very different from the human end to save life or limb. The saving of life or limb justifies taking considerable risk’.

In Sussex Ambulance NHS Trust v King, Anthony King, C, was employed by Sussex Ambulance, D, as an ambulance officer. C and a colleague were sent to collect a patient from a cottage in Seaford and take him to hospital. The patient was an elderly man, in his early 70s, and about 14 stone. He was upstairs in bed. His cottage stairway was narrow and steep, with a bend. C and his colleague decided to take the patient downstairs in a carry chair, with C carrying the back of the chair and thus walking forwards down the stairs bearing most of the weight. The colleague experienced a sudden pain as they came down the stairs, let the chair go, and C bore the whole weight. He suffered jarring injuries to his thumb, back and knees. He sued his employer, inter alia, for negligence. Held: no negligence proven. The sub-duties to provide a reasonably safe system of work, and equipment, were engaged, and not breached. There was no other suitable piece of equipment available for this particular task. Also, it was not necessary to call the fire brigade, given that it was not an emergency, that took time, and involved great distress to the patient.

Private employees, vis-à-vis public employees, are arguably better-protected, if they are injured in the course of their employment, mainly because their employer is engaged in commercial/profit-making activities, and hence, the fourth quadrant of Bolton (i.e., the social utility of D’s activities) is not as significant in the balancing exercise, as it is when the employer is an

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emergency services provider. Their employer, D, is not engaged in ‘social utility’ or ‘desirable activity’ of the sort that emergency service providers are, and hence, the private employee has a better chance of proving negligence against D. This criticism was made by Buxton LJ in *Sussex Ambulance NHS Trust v King.* Buxton LJ suggested that the principle in *Watt v Hertfordshire CC,* in particular, which gives rise to this result, should be revisited on appeal, for two reasons:

- there was no reason why the employees of a public body (such as the ambulance in this case) which exposes the employee to risk of injury, albeit for meritorious public reasons rather than for private commercial gain, should be any less well protected by the law of negligence. To deny justice to the former would ‘raise considerations of distributive justice ... if employees required to run risks to advance private interests can recover if doing their employer's bidding leads to injury, so employees required to run risks to advance public interests should by the same token be able to recover’;
- in *Ogwo v Taylor,* the House of Lords rejected the so-called ‘fireman’s rule’. That rule had held that a public employee cannot complain in negligence if that employee is injured, whilst engaged in the very hazard (e.g., fire-fighting) that he was employed to deal with. The result in *Watt* is difficult to reconcile with ‘the spirit of *Ogwo v Taylor’.*

v. **Res ipsa loquitur.** It will be recalled that this rule of evidence (translatable as ‘the facts speak for themselves’) applies where the circumstances are such that the court can conclude that the accident which befell C is of a type that does not usually happen without negligence. Where the doctrine applies, the court will draw the inference that, *prima facie,* negligence has been shown, and the evidential burden then passes to D to show that the accident happened without negligence on his part. However, without the assistance of the doctrine, the burden remains on C, ‘fairly and squarely’, to prove negligence on D’s part.

There is no principle in English law which precludes the operation of the doctrine in the realm of employment accidents, but these scenarios rarely permit an inference of negligence to be drawn.

In *Brazier v Dolphin Fairway Ltd,* Terence Brazier, C, was employed by Dolphin Fairway Ltd, D, as a machine operator. C suffered a hernia injury, when trying to lower down a wooden 6-ft by 6-ft pallet from a stack of pallets which was about 6-ft high. C claimed that lifting a heavy wooden pallet was too much for him, and that D failed to provide any, or any adequate, equipment to enable C to lower the pallets in a safe manner. **Held:** negligence failed. There was no evidence adduced as to how heavy the pallets were which C was handling (or whether the pallet that he was handling was wet, and therefore heavier). This was not an appropriate case for application of the doctrine of *res ipsa loquitur* either. The fact that C had had an accident with a pallet, and that the agreed medical evidence was to the effect that the accident had accelerated the onset of a hernia (to which C was in any event pre-disposed) was not sufficient to give rise to the inference.

### Causation and remoteness

The general principles governing proof of causation (discussed in Chapter 8) and remoteness of damage (in Chapter 9) apply with equal vigour to employers’ liability. Some small vignettes of illustrative cases which adhere to those aforementioned principles include:

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i. **But-for test.** Employer D may have failed to implement a precautionary step, and hence, fallen below the standard of reasonable care – but even if the system of work had been altered so as to implement that precautionary step (say, provide a piece of protective equipment), employee C may have persisted in ignoring the step altogether, in which case causation will fail (per McWilliams v Sir William Arrol & Co Ltd). Where employer D was in breach of duty by failing to provide equipment to employee C, then the assumption is that the equipment would have been used, because a reasonable employee in C’s position would have seen the benefit of it, unless employer D proves to the contrary (per Hampshire Police v Taylor). Where the breach alleged on the part of employer D is that D did not instruct C as to risks that were ‘perfectly obvious’, then if the court concludes that any such training or instruction given by D would not have prevented the injury from occurring, causation will fail.

In Cox v MOJ, Susan Cox, C, was the catering manager at HMP Swansea, owned and operated by the MOJ, D. The lift in the prison was regularly out of service, because the prisoners apparently deliberately damaged the sensors on the doors. The stairs were often used out of necessity, and that was where the accident to C, with a falling foodstuffs bag, occurred. A prisoner employee, Mr Inder, was carrying two 25kg sacks of foodstuffs, when he dropped one whilst walking around a spillage of a broken rice bag. Mr Inder had been told by C to wait until the spillage was cleared up, but he ignored that and virtually walked over C, whilst she was helping to clear up the spillage. He dropped one sack accidentally onto C’s back, causing her injury. **Held:** the sub-duty to provide a safe system of work was engaged, and was not breached. Causation failed. D was not required to train Mr Inder, the prison employee, in manual handling, such as the risks caused by carrying heavy and awkward loads past persons in vulnerable positions. Manual handling training of the sort which C claimed should have been provided was not part of the duty to provide a safe system of work. Furthermore, had that instruction been given by D, that training would not have been likely to include instruction on the particular risk that arose; and it was such an obvious risk that training would not have made Mr Inder more obedient to C’s instructions. Hence, re C’s direct liability claim against D, causation failed. (However, C succeeded on the basis of vicarious liability.)

ii. **Omissions and hypothetical causal links.** As with any omission-based breach, the court must hypothetically fill in the causal links, and conclude that, had the omission been corrected, then the damage would not have happened, on the balance of probabilities. In that regard, the failure to undertake a suitable and sufficient risk assessment falls into that category.

That precise point was made by Smith LJ in Uren v Corporate Leisure (UK) Ltd: ‘[i]t is obvious that the failure to carry out a proper assessment can never be the direct cause of an injury. There will, however, be some cases in which it can be shown that, on the facts, the failure to carry out a risk assessment has been indirectly causative of the injury. Where that is shown, liability will follow. Such a failure can only give rise to liability if a suitable and sufficient assessment would probably have resulted in a precaution being taken which would probably have avoided the injury. A decision of that kind will necessitate hypothetical consideration of what would have happened if there had been a proper assessment.’

iii. **Exceptional theorems.** The McGhee/Fairchild exception, by which employee C can seek to jump the ‘evidential gap’ when exposed to an agent, both tortiously (by employer D) and

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innocently (whether by another party, from his own activities, or by naturally-occurring environmental exposure), has been particularly fruitful in the employment context.

iv. Remoteness. The damage suffered by employee C must not be too remote (per Hughes v Lord Advocate\textsuperscript{67}). The classic ‘egg-shell skull’ case – that of Smith v Leech Brain & Co Ltd,\textsuperscript{68} where a small burn to the employee’s lip, of which the employee ‘thought nothing’, was an injury which led to cancer and death – arose in the employment context.

**When the duties apply**

\textsuperscript{SEM.7} Although the law is not entirely settled, English case law suggests that the quartet of common law duties owed by employer D to employee C applies only where a relationship of employer–employee arises (which relationship may exist between a parent company and a subsidiary’s employees).

**Relationship of employer–employee**

Although the leading English authorities involved an employee who was in paid employment with D, this may not, in fact, be strictly necessary, to invoke the quartet of common law duties arising in employers’ liability. Where C is an unpaid volunteer worker, it has been suggested obiter that C can nevertheless succeed in an action for damages if he can show that he worked for D ‘in some capacity which created a common law duty towards him’ (according to the Northern Ireland High Court in McElhatton v McFarland\textsuperscript{69}).

One recent contentious issue in the context of employers’ liability is whether a parent company can owe a duty of care to employees of its subsidiary in health and safety matters. The question has arisen, for example, where employee C’s immediate employer has become insolvent or is uninsured, and C is seeking to recover compensation from the parent company as the ‘deep-pocketed’ defendant. The issue has particularly emerged in the scenario of asbestos exposure, where the exposure suffered by employee C occurred decades previously, and by the time of the litigation, C’s immediate employer had ceased to trade. In Chandler v Cape plc,\textsuperscript{70} the Court of Appeal held that a parent company can owe a direct duty of care to the employees of its subsidiary company, to advise on, or exercise reasonable care to provide, a safe system of work for the subsidiary’s employees. In effect, this means that the law can impose on a parent company legal responsibility for the health and safety of its subsidiary’s employees. The scenario could arise in the following circumstances (according to Chandler):

- the businesses of the parent and subsidiary are similar;
- the parent has, or ought to have, superior knowledge on some relevant aspect of health and safety in the particular industry;
- the subsidiary’s system of work was unsafe as the parent company knew, or ought to have known; and
- the parent knew, or ought to have foreseen, that the subsidiary or its employees would rely on its using that superior knowledge for the employees’ protection. It is not necessary (said the Court) to establish that the parent frequently intervened in the health and safety policies of the subsidiary; it would be enough if the parent frequently intervened in the trading operations of the subsidiary, via production and funding issues.


However, according to the more recent authority of *Thompson v Renwick Group plc*, the parent company has appointed someone as director of its subsidiary company with responsibility for health and safety matters, then no automatic duty of care will be owed by the parent to employee C merely by virtue of that appointment. Rather, what is required is proof that ‘the parent company is better placed, because of its superior knowledge or expertise, to protect the employees of subsidiary companies against the risk of injury and ... because of that feature, it is fair to infer that the subsidiary will rely upon the parent deploying its superior knowledge in order to protect its employees from risk of injury’. In *Thompson*, the parent company was a mere holding company, not one that had any operational activities to do with asbestos, and hence, the mere appointment of a health and safety manager did not activate any duty of care by the parent company toward the subsidiary’s employee C.

**In the course of employment**

In *Reynolds v Strutt & Parker LLP*, the court suggested that where employee C is injured, not during an ‘ordinary incident’ of C’s employment with his employer, but as a result of an ‘extraordinary incident’, then C has no remedy in negligence against his employer on the basis of the employer’s non-delegable duty. In other words, the quartet of duties may not apply – such that employer D cannot be liable for the injury suffered by employee C – if C was injured during activities that fell outside ‘the course of his employment’. However, as the following case shows, it will depend upon all the circumstances.

In *Reynolds v Strutt*, Mr Reynolds, C, who was employed by the property and real estate firm, Strutt, D, suffered a very serious head injury when he fell from a bicycle whilst competing in a race at a work ‘fun day’ and ‘a team building day’. 

**Held:** D had breached its non-delegable duty of care, in that it had failed to carry out any risk assessment regarding the ‘fun day’. The event was organised for employees outside the context of their normal, daily work, and strictly speaking, C’s voluntary attendance and participation in this social occasion was not in the course of his employment. However, D had arranged the activities for the day, and hence, a risk assessment should have been performed, to ensure that participants such as C were reasonably safe.

HHJ Oliver-Jones called ‘in the course of employment’ a ‘pure concept’ which he was required to examine – and concluded that riding a bike during a fun day did not fall within that concept. However, although the event in which Mr Reynolds was injured was not in the course of ordinary employment, that finding was trumped by the fact that his employer arranged the ‘fun day’ and failed to carry out a risk assessment for the participants.

However, the decision in *Reynolds* has been questioned subsequently, as not being ‘altogether persuasive’. The Scottish Outer House remarked, in *Grant v Fife Council*, that the distinction drawn between ‘ordinary’ incidents (which definitely fell within the non-delegable duty of care owed by employer D) and ‘extraordinary’ incidents of employment (which may not) was ‘not sourced’ to legal authority. Further, the court suggested that, if employee C’s activity is ‘incidental, in the sense of being a minor accompanying feature, it does not matter whether it is ordinarily or extraordinarily incidental: in both situations it is capable of being within the course of employment.’ This is surely correct.

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71 [2014] EWCA Civ 635, [37].  
72 [2011] EWHC 2263 (Ch) (HHJ Oliver-Jones), with quotes at [36], [37].  
73 Usually speaking, the concept of, ‘in the course of employment’, relates to proof of vicarious liability, as discussed in Chapter 18.  
74 [2011] EWHC 2263 (Ch) [36].  
75 [2013] CSOH 11, [7].
Hence, it would appear that injuries that are suffered by employees during the course of fun days, social events, Christmas parties and the like, will render the employer liable (as occurred in Reynolds itself), but the precise circumstances in which a non-delegable duty may not be owed remains somewhat unresolved.

**STRICT LIABILITY: STATUTORY DEEMED NEGLIGENCE**

The common law duty imposed upon employer D to take reasonable care to provide safe plant and equipment is buttressed by the implementation of the Employer’s Liability (Defective Equipment) Act 1969. This Act deems employer D to have, itself, been negligent, in respect of any defective equipment provided by a third party to employer D, and which then causes injury to employee C who uses it.

The legislation contains a ‘deeming provision’ which provides as follows:

Employer’s Liability (Defective Equipment) Act 1969:

s 1(1) Where...

(a) an employee suffers personal injury in the course of his employment in consequence of a defect in equipment provided by his employer for the purposes of the employer’s business, and

(b) the defect is attributable wholly or partly to the fault of a third party (whether identified or not), the injury shall be deemed to be also attributable to negligence on the part of the employer...

s 1(3) ‘equipment’ includes any plant and machinery, vehicle, aircraft and clothing;

The section enables employee C to sue his employer D directly, under s 1(1)’s deeming provision, as if employer D himself had been liable for the defect, and then leave it to employer D to seek contribution from that third party under the Civil Liability (Contribution) Act 1978, if that third party can be identified.

That ‘third party’ is typically a manufacturer who provided the equipment (or part of it) to C’s employer. As Lord Oliver explained in *Coltman v Bibby Tankers Ltd*, the Act was introduced to give a remedy to employee C against employer D, where a piece of equipment, which had been purchased by employer D from a manufacturer, contained a defect about which D had no actual or constructive knowledge. However, the provision can also apply where a contractor carried out the servicing or repair of equipment which was then provided to employer D.

In *Stephen v Peter*, Leith Stephen, C, worked for Robert Peter, D, as a lorry driver. D owned and operated his own haulage business, with several heavy lorries. C was engaged to drive D’s Scania tractor unit and trailer for a delivery of paper rolls to London. On the way, the trailer overturned, the lorry collided with a crash barrier, and C suffered total paraplegia. C sued employer D under the 1969 Act, arguing that a contractor, X, erroneously calibrated the tachograph, so that when C thought that he was driving at 56mph on a bend, he was actually driving in excess of 62 mph. **Held:** employer D was liable under the Act. The tachograph and speed limiter serviced by X were not performing the task for which they were fitted, and this amounted to a defect in equipment

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provided by employer D for the purposes of this business. The calibration of the tachograph by X at the calibration centre was equivalent to repair of equipment.

**The employer and the third party under the 1969 Act**

- **Employer:** Robert Peter, haulage operator; New Merton Mills
- **Employee:** C (Leith Stephen, lorry driver; Mr Davie)
- **Third party:** (manufacturer, repairer, etc) (contractor X who repaired and fitted the tacograph; the manufacturer of the tool)

In fact, it was to correct a possible injustice to employee C that the 1969 Act was introduced. Section 1(1) reversed the common law position – whereby, provided that employer D purchased the equipment from a ‘reputable source’, employer D could not be liable to employee C in negligence. The common law position could cause significant problems for employee C, where the manufacturer was insolvent, uninsured, etc. In that scenario, employee C, who was injured by the defective equipment, would have no remedy at all.

In *Davie v New Merton Board Mills Ltd*, Mr Davie, C, a maintenance fitter, was knocking out a metal key by means of a drift and hammer when, at the second blow of the hammer, a particle of metal flew off the head of the drift and into his eye, causing injuries. The drift had been provided for his use by New Merton Mills, his employer, D. Although it was apparently in good condition (and D could not have detected its latent defect), the drift was excessively hard, and was a dangerous tool. The drift had been negligently manufactured by reputable makers, who had sold it to a reputable firm of suppliers who then sold it to D. C claimed damages for negligence against D on the basis that it had supplied him with a defective tool. Held: D was not liable in negligence, as it had purchased the drift from a reputable manufacturer, and had no means of discovering the latent defect (ultimately, though, C did recover damages from the manufacturer itself).

What constitutes ‘equipment’ under s 1(3) (an inclusive definition only) has been construed widely. For example, a flagstone being laid by an employee fell within the meaning of that word in *Knowles v Liverpool CC*, as did a ship in *Coltman v Bibby Tankers* (above), and the tachograph and associated speed limiter fitted to a lorry in *Stephen v Peter* (above).

**Limited use to change?**

In practice, the 1969 Act has not proven to be much relied-upon to date. There are perhaps four reasons for this, as the law has unfolded since the Act was introduced.

1. The protection offered by the 1969 Act has ‘overlapped to some extent with that provided by the Provision and Use of Work Equipment Regulations 1998’ (noted in *Spencer-Franks v Kellogg Brown and Root Ltd (Scotland)*, and illustrated in *PRP Architects v Reid*, where the employee succeeded in her claim against her employer under those 1998 Regulations). However

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(and as discussed in the next section), compensatory damages arising from a breach of those Regulations, by means of a civil action for breach of statutory duty, has been precluded by reforms implemented in 2013 – and the demise of that avenue of claim may have the effect of regenerating some interest in employee C’s pursuing claims against employer D under the 1969 Act.

ii. Additionally, for C to take advantage of the 1969 Act, some type of ‘fault’ must be shown against the third party (manufacturer, supplier, etc), in order to trigger the deemed negligence provision. Of course, ‘fault’ in s 1(1) is defined, in s 1(3), to cover negligence on the part of the third party – but as Pill LJ noted in PRP Architects v Reid,81 if the defect in the equipment was unforeseeable (in that case, employee C accepted that the defect in the lift door which caused her injury was not foreseeable on the part of the third party which maintained and serviced the lift), then negligence cannot be proven against that third party, and there is no way in which C’s employee can therefore be deemed to be negligent under s 1(1).

iii. Also, a causal link must be established, by virtue of the words in s 1(1), ‘in consequence of’ (per Stephen v Peter82). It follows that, if C’s injury occurred because of C’s manner of using the equipment, rather than from any feature of the equipment itself, then causation will fail, and employer D will not be liable under the Act (per Parkinson v Lyle Shipping Co Ltd83).

iv. Furthermore, the implementation of the Consumer Protection Act 1987 (the CPA) (the subject of analysis in the online chapter, ‘Defective Products’), almost two decades after the ‘deemed negligence’ provision in the 1969 Act, provides a very useful avenue for employee C to sue the manufacturer of defective equipment which causes him injury. Employee C has standing to sue under the CPA regime whenever he is injured by a defective product provided by a manufacturer (‘a producer’, to adopt the language of the CPA), an ‘own-brander’, an importer, or a ‘supplier’. Helpfully for employee C, it is not necessary for him to prove negligence against that producer, etc; all that is required is a ‘defect’ in the product, which simply means that ‘the safety of the product is not such as persons generally are entitled to expect’ (s 3(1)). Hence, a strict liability claim under the CPA 1987 would enable an employee, say, in the position of Mr Davie, to sue the manufacturer of the defective tool, rather than having to sue his employer for ‘deemed negligence’.

An interesting (and seemingly unresolved) interpretative point arises, however, regarding the interaction between the CPA and the 1969 Act, given that employer D is deemed to have been negligent, wherever the defect in the equipment was ‘attributable ... to the fault of a third party’ under s 1(1) of the 1969 Act. It will be recalled that some type of ‘fault’ must be shown against the third party (manufacturer, supplier, etc), in order to trigger the deemed negligence provision. The word ‘fault’ is defined in s 1(3) of the 1969 Act, to mean, ‘negligence, breach of statutory duty or other act or omission which gives rise to liability in tort in England and Wales’. Query whether ‘fault’ encompasses strict liability under the CPA. If ‘fault’ can include strict liability, then it would presumably follow that C’s successful claim against the manufacturer of defective equipment under the CPA would automatically deem his employer to be negligent under the 1969 Act – an especially advantageous position for employee C, if the manufacturer is insolvent or uninsured. So far as the author’s searches can ascertain, this point has not been judicially discussed to date (e.g., it did not arise for discussion in PRP Architects v Reid, as a CPA claim was not possible to bring against the party who maintained

and serviced the lift, given that a repairer is not an appropriate D under the CPA). However, if the deemed negligence provision can provide an avenue for redress against an employer D for a manufacturer’s strict liability, then that may be particularly beneficial to injured employee C, now that the action for breach of statutory duty has suffered a significant demise, following the 2013 reforms.

**DIRECT LIABILITY: BREACH OF STATUTORY DUTY**

The tort of breach of statutory duty is analysed in detail in the online chapter of the same name. It contains six elements (per *X (Minors) v Bedfordshire CC*, and confirmed subsequently in *Morrison Sports Ltd v Scottish Power*), briefly summarised as follows (in the employer–employee context):

1. A health or safety statute imposed a duty on employer D (i.e., that D is the appropriate individual or entity upon whom a duty is imposed by the statute).
2. Employer D breached that duty imposed upon him.
3. Employee C belongs to the class of persons (i.e., a class more limited than the general public) for whose protection the statute was enacted. The class of employees is a sufficiently-defined class to satisfy this element, in respect of statutes directed towards workplace health and safety.
4. It was Parliament’s intention to confer a private right of action (for civil remedies for damages) upon employee C who was harmed by a breach, for breach of the statute (where Parliamentary intention is gauged by various interpretative tools).
5. The breach of duty imposed by the statute caused C loss as a consequence. The tort is not actionable *per se*; it requires proof of loss or damage, to make out the cause of action. If the breach was not causative of C’s damage, then the tort must fail.
6. C’s loss was of a kind which the statute protected C against.

However, the cause of action has a very diminished importance now, in the context of employers’ liability.

The Health and Safety at Work, etc, Act 1974, a key piece of legislation protecting safety in the workplace, contains an express ouster of any private law right of action for breach of any of the duties imposed by ss 2–8, by virtue of s 47(1)(a). However, for those statutes which are silent on the issue of a civil right of action, health and safety statutes were long considered to confer a private right of action at the suit of employee C. For example, in the 1898 decision in *Groves v Lord Wimborne*, it was held that such legislation was ‘passed in favour of the workers in factories and workshops to compel their employers to do certain things for their protection and benefit’, a proposition that was confirmed by the House of Lords in the 1912 decision of *Butler (or Black) v Fife Coal Co Ltd*. As the House of Lords commented in 2004 in *Fytche v Wincanton Logistics plc*, *Groves* was a ‘landmark decision’, to enable legislation protecting safety in the workplace to give rise to an action for breach of statutory duty (especially when negligence was so difficult to pursue against an employer in early times, principally due to the now-revoked ‘common employment’ defence discussed earlier in the chapter).

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86 [1898] 2 QB 402 (CA) 406 (Smith LJ).  
87 [1912] AC 149 (HL) 165.  
88 [2004] UKHL 31, [61].
However, whatever beneficence the courts may have traditionally shown towards the tort of breach of statutory duty at the behest of employees, has well and truly been overtaken by legislative developments.

The 2013 reforms

For an employment-related accident which occurs after 1 October 2013, employee C must bring that action under common law negligence in order to recover compensatory damages, instead of relying on breach of statutory duty, by virtue of s 69(3) of the Enterprise and Regulatory Reform Act 2013.

The significant change

An array of health and safety Regulations impose statutory duties on employer, D, to maintain a safe working environment for its employee, C. Many of these have been enacted under the Health and Safety at Work, etc, Act 1974 (‘the 1974 Act’), over the course of the previous two decades, in order to implement the EU Framework Directive on Health and Safety.89 They include the following (in chronological order):

A snapshot of the principal 'health and safety Regulations'

- Electricity at Work Regulations 1989 (SI No 635/1989);
- Personal Protective Equipment at Work Regulations 1992 (SI No 2966/1992);
- Workplace (Health, Safety and Welfare) Regulations 1992 (SI No 3004/1992);
- Construction (Health, Safety and Welfare) Regulations 1996 (SI No 1592/1996);
- Provision and Use of Work Equipment Regulations 1998 (SI No 2306/1998);
- Lifting Operations and Lifting Equipment Regulations 1998 (SI No 2307/1998);
- Management of Health and Safety at Work Regulations 1999 (SI No 3242/1999);
- Control of Substances Hazardous to Health Regulations 2002 (SI No 2677/2002); and
- Work at Height Regulations 2005 (SI No 735/2005).

Prior to 1 October 2013, infringing the duties contained in these Regulations would potentially expose D to the tort of breach of statutory duty. Indeed, breach of statutory duty was a frequently-litigated tort, in the context of employees' claims for workplace injuries and/or death. Whilst it could accompany claims for systemic negligence or vicarious liability against employer D, breach of statutory duty could be more favourable to C than those other claims, and indeed, in some cases, negligence was not pleaded at all. The presumption under the 1974 Act was that the abovementioned Regulations gave rise to civil liability for breach of statutory duty, unless any Regulation provided to the contrary. This presumption followed from s 47(2) of the 1974 Act (‘Breach of a duty imposed by health and safety Regulations ... shall, so far as it causes damage, be actionable, except in so far as the Regulations provide otherwise’).

89 Directive 89/391/EEC.
However, the legal landscape significantly changed, as of 1 October 2013, as a result of the enactment of s 69(3) of the Enterprise and Regulatory Reform Act 2013 (ERRA 2013). The Health and Safety at Work, etc Act 1974 is now amended. The previous s 47(2) is repealed, and replaced by a new provision:

**s 47(2)** Breach of a duty imposed by a statutory instrument containing ... health and safety Regulations shall not be actionable, except to the extent that Regulations under this section so provide.

**2A** Breach of a duty imposed by an existing statutory provision shall not be actionable except to the extent that Regulations under this section so provide (including by modifying any of the existing statutory provisions).

Hence, the legislative position is now entirely reversed. The previous presumption was that a civil action for breach of statutory duty did exist under health and safety Regulations (or any other existing statute), whereas the presumption now is that no civil action is available, unless any Regulation expressly confers a civil right of action (which is very rarely done90). Notably, the ouster of any private right of action under ss 2–8 of the 1974 Act, mentioned above, is unaffected by the 2013 reforms.

Hence, the quartet of employers’ duties, outlined in the first section of this chapter, will assume far more importance in future workplace personal injury claims than has been the case during the last two decades.

In order to understand the Governmental reforms – and to appreciate how this area may develop in the future – a short overview of the pre-2013 landscape may be useful.

**Some key aspects of the pre-October 2013 landscape**

The so-called health and safety Regulations were typically divided into two types:

i. **The strict liability statutes.** From employee C’s point of view, the most sorely-missed types of actions will be those which could be based on those rare instances in which Parliament imposed strict liability on employer D, whereby infringement of the statutory obligation, without fault on D’s part, is sufficient to constitute breach. The most notable of this type is contained in the Provision and Use of Work Equipment Regulations 1998:

**Reg 5(1)** Every employer shall ensure that work equipment is maintained in an efficient state, in efficient working order and in good repair.

That provision imposes an absolute obligation on D, and not merely a duty to exercise reasonable care. The language of the provision has been construed as imposing strict liability, and that has proven most advantageous to employees. C does not need to prove that injury to C was reasonably foreseeable, that D could have ascertained the defect in the work equipment

90 A ‘new or expectant mother’ has a civil right of action for breach of statutory duty under the Management of Health and Safety at Work Regulations 1999, as conferred by: Health and Safety at Work etc. Act 1974 (Civil Liability) (Exceptions) Regulations 2013, Reg 3.
with reasonable endeavours, or that D could have guarded against the risk of injury arising from the equipment.

In *Stark v Post Office*, Mr Stark, 60, C, was a postman. The Post Office, D, provided him with a bicycle for his mail rounds. One day, his front wheel locked and he was flung over the handlebars, suffering serious injury. The accident was caused when the stirrup, part of the front brake, broke in two, and one part lodged in the front wheel. It broke due to either metal fatigue or some manufacturing defect, but that defect could not have been discoverable by D on any routine inspection. D had a policy of replacing bicycles at 10 years, but this was not an inflexible rule, and this one was 14 years old. **Held:** a breach of statutory duty proven. (The court was considering the same wording as Reg 5(1) of the Provision and Use of Work Equipment Regulations 1998, under the predecessor statute.) Given the absolute obligation imposed by Reg 5(1), then as the bicycle was not in an efficient state or in efficient working order when the stirrup broke, D was in breach.

Other aspects of Reg 5(1)’s drafting are also pro-employee C. For example, the term, ‘work equipment’, was said, in *PRP Architects v Reid*, not to be an easy definition to apply, but that the expression should be given a broad construction. Indeed, the expression covers a wide array of equipment, according to the guidelines which accompanied the legislation, e.g., ‘[w]hen one looks down [the list], one sees dumper truck, portable drill, mobile access platform, soldering iron, trench sheets, air compressor, meat cleaver, etcetera, and such things as linear accelerators, blast furnace detonators’ (per *Wallis v Balfour Beatty Rail Maintenance Ltd*). Also, nothing in the 1998 Regulations suggests that the duties imposed on D are to be limited to full-time employees (per *Spencer-Franks v Kellogg Brown and Root Ltd*). Further, the duty under Reg 5(1) can be imposed upon non-employers too, which can be useful for C, where the premises where the accident happened were not within the control of his employer, but at a third party’s premises (per *Mason v Satelcom Ltd*). Hence, when it could give rise to an action for breach of statutory duty prior to October 2013, the provision offered substantial advantages to C, over the common law action in negligence.

**ii. The ‘negligence-type’ statutes.** By contrast to Reg 5(1), most of the relevant Regulations enacted under the Health and Safety at Work, etc, Act 1974 do not impose strict liability. Rather, the following provision of the Electricity at Work Regulations 1989 is more typical:

<table>
<thead>
<tr>
<th>Reg 4(3)</th>
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<tbody>
<tr>
<td>Every work activity, including operation, use and maintenance of a system and work near a system, shall be carried out in such a manner as not to give rise, so far as is reasonably practicable, to danger.</td>
</tr>
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Such a provision does not impose an absolute obligation on employer D to ensure that the operation and use of a system of work should not give rise to danger. Regulation 4(3) is entirely distinguishable from Reg 5(1) of the Provision and Use of Work Equipment Regulations 1998, in that the words, ‘so far as is reasonably practicable’, invokes a standard of care...
similar to, or ‘brings in considerations comparable to’, negligence (per *Berry v Ashtead Plant Hire Co Ltd*[^97^]).

In *Berry v Ashtead Plant Hire*, Kendal Calling Ltd, D1, promoted and organised an annual music festival in the Lowther Deer Park near Penrith, and needed several accommodation units which were supplied by Ashtead Plant Hire Co Ltd, D2. Ashtead arranged for Star Autos Ltd, D3, to collect and deliver the units a few days before the festival began. Donald Berry, C, a Star Autos employee, delivered the units in a lorry with a mounted crane. C was operating the crane using hand-operated controls, and during that operation, either crane or accommodation unit came into contact with a live overhead power cable, and C was electrocuted. He survived, but suffered severe brain damage and other injuries. C had been signalled by the events operation manager not to unload the unit while some loose cattle were being moved; but C proceeded and ignored that signal. **Held:** (this was an interim payment application only); liability under Reg 4(3) was unlikely, given the interpretation of ‘reasonably practicable’.

The same phraseology, ‘so far as is reasonably practicable’, also appeared in the (now repealed[^98^]) s 29(1) of the Factories Act 1961:

**s 29(1)** There shall, so far as is reasonably practicable, be provided and maintained safe means of access to every place at which any person has at any time to work, and every such place shall, so far as is reasonably practicable, be made and kept safe for any person working there.

That provision was the subject of a claim for breach of statutory duty in *Baker v Quantum Clothing Group Ltd*[^99^] – about which provision Lord Mance said: ‘[t]he criteria relevant to “reasonable practicability” must, on any view, very largely reflect the criteria relevant to satisfaction of the common law duty to take care. Both require consideration of the nature, gravity and imminence of the risk and its consequences, as well as of the nature and proportionality of the steps by which it might be addressed, and a balancing of the one against the other’. Hence, the phrase imports a classic negligence analysis, akin to the ‘quadrant of factors’ in *Bolton v Stone*[^100^].

Further, where a ‘reasonably practicable’ requirement applies, then the burden shifts to employer D to show that it was not reasonably practicable to make and keep the workplace safe (per *Baker*[^101^]).

In *Baker v Quantum Clothing Group Ltd*, various test cases were brought by employees who worked in the knitting industry of Derbyshire and Nottingham, for hearing loss shown to have been suffered during their employment. The action was brought in negligence, and under s 29(1) of the Factories Act 1961 (which remained in force throughout the period with which case was concerned), for noise-induced hearing loss resulting from exposure to noise levels between 85–90dB. **Held:** no negligence or breach of statutory duty could be proven.

**Other interpretative points.** Quite apart from interpreting the standard of care statutorily-imposed on employer D, an entire body of case law built up around the Regulations enacted

[^100^]: [1951] AC 850 (HL) 858.
[^101^]: *ibid*, [76], [108], [125], [195], citing, on this point: *Nimmo v Alexander Cowan & Sons Ltd* [1968] AC 107 (HL).
pursuant to the Health and Safety at Work, etc, Act 1974, which is now rendered irrelevant for strict precedential purposes, at least for the purposes of the employee’s civil action for breach of statutory duty.

To take one example, viz, the Workplace (Health, Safety and Welfare) Regulations 1992: in PRP Architects v Reid, employer D was not civilly liable for breach of Reg 5(1) of the Regulations, because D did not have the requisite control over the defective lift; in Wallis v Balfour Beatty Rail Maintenance Ltd, employer D was liable for breach of statutory duty for failing to maintain an accessible and suitable traffic route; in Jaguar Cars Ltd v Coates, employer D was not liable for failing to provide a handrail for steps, because the Regulations only applied to the maintenance of equipment, and not the provision of it; and in Cox v MOJ, employer D was not liable for breach of statutory duty where it had shut down a defective lift and taken it out of use, as it was not in an inefficient condition, for the purposes of Regulation 5(1). Such cases could not be pleaded as civil actions for breach of statutory duty now, given the enactment of s 69(3).

The thinking behind the 2013 reforms are summarised in the Box below:

**The law reform corner: Abolishing the tort in part**

- The Government commissioned a review of health and safety legislation, given perceived unfairness towards, and unjust burdens upon, employers, in the operation of breach of statutory duty in the workplace. In his resulting report, Professor Ragnar Löfstedt recommended that, ‘regulatory provisions that impose strict liability should be reviewed by June 2013 and either qualified with “reasonably practicable” where strict liability is not absolutely necessary, or amended to prevent civil liability from attaching to a breach of those provisions’.

- In the Government Response to the Löfstedt report, similar concerns were expressed about the effect of strict liability in workplace health and safety legislation: ‘The [1974 Act] is underpinned by the principle of “reasonable practicability”, which weighs a risk against the trouble, time and money needed to control it. This allows employers to exercise judgment on the actions that they should take to meet their responsibilities ... [but] In some health and safety regulations ... the duty imposed on the employer is a strict one, and no defence of having done all that is reasonably practicable is available ... in the civil sphere, this does have the potential to impact unfairly ... The Government recognises the unfairness which results where an employer is found liable to pay damages to an injured employee, despite having taken all reasonable steps to protect their employees from harm. The Government will look at ways to redress the balance, in particular preventing civil liability from attaching to a breach of such provisions’. The Govt was concerned that ‘[e]mployers can be held liable for damages when an injury is caused by equipment failure, even when a rigorous examination would not have revealed the defect’ (per Hansard).

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103 [2003] EWCA Civ 72.
105 [2013] EW Misc 1 (Swansea CC).
However, it was not only breaches of statutory duty based upon strict liability provisions which are affected by the enactment of s 69 of the ERRA 2013. Rather, the provision has the effect that, in respect of workplace injuries occurring after 1 October 2013, the right of employee C to claim damages from his employer based on any breach of statutory duty is removed. It precludes all such actions, whether employer D is strictly liable for accidents, or is required to do whatever is ‘reasonably practicable’ to achieve workplace health and safety. Even Prof Löfstedt commented, later, that the ERRA 2013 ‘is more far-reaching than I anticipated in my recommendation’.

Employees who suffer workplace injuries are therefore restricted to the remedies of: suing employer D in negligence; suing for breach of statutory duty in the rare instance where that action is preserved; or pursuing any enforcement processes or criminal sanctions in the workplace legislation (if applicable).

**The way forward?**

The 2013 reforms notwithstanding, it is likely that judicial opinion in the case law spawned under those various Regulations which contain a ‘reasonably practicable’ requirement will inform the analysis of common law negligence, in the post 1 October 2013 landscape, for two reasons.

First, statutory obligations contained in the Regulations may indicate the standard of care expected of employer D, breach of which would be evidence of negligence (per *Exel Logistics Ltd v Curran*[^110^] – so that non-compliances with the health and safety Regulations may be used as evidence, or particulars, of breaches under common law negligence. This will, of course, depend entirely upon what the statute requires, given that even compliance with the Regulations may not be sufficient, if the common law standard of care expected of a reasonable employer is held to be higher than what the statute requires.

Secondly, as noted above, several of the Regulations under which those cases were decided impose a requirement on employer D to take ‘reasonably practicable’ steps in the circumstances, which phrase imports a negligence analysis. Hence, the statutory wording used in those Regulations, and a finding as to what precautionary steps and protective measures were required on employer D’s part to do that which was ‘reasonably practicable’, will likely remain important for the assessment of future common law negligence actions instituted against employer D. To reiterate, as Lord Mance stated, in *Baker v Quantum Clothing Group Ltd*, ‘[t]he criteria relevant to “reasonable practicability” must, on any view, very largely reflect the criteria relevant to satisfaction of the common law duty to take care. Both require consideration of the nature, gravity and imminence of the risk and its consequences, as well as of the nature and proportionality of the steps by which it might be addressed, and a balancing of the one against the other’. On the other hand, the case law generated under strict liability health and safety provisions (such as *Stark v Post Office*, decided under Reg 5(1) of the Provision and Use of Work Equipment Regulations 1998) will presumably have little legal relevance or interest in the future landscape.


given that common law negligence does not impose upon employer D the standard of care which strict liability entails. Reasonable care is all that is required.

In a further change, and as noted above, one of the consequences of the phrase, ‘so far as is reasonably practicable’, was to shift the burden of proof to employer D, to show that it was not reasonably practicable to do more than what was done. It was not for employee C to prove that it was reasonably practicable for such steps to be made. However, in a common law negligence action, the burden does remain on C throughout. In Baker v Quantum Clothing Group Ltd, Lord Dyson noted that ‘few cases of this kind are likely to be decided on an application of the burden of proof’, but that, ‘nevertheless, in this respect, there is a legal difference between the statutory and common law positions.’

In any event, at the time of writing, the wider impact of s 69 of the ERRA 2013 on a claim by employee C against employer D, for personal injuries suffered in the workplace, remains untested.

**DIRECT LIABILITY: NON-DELEGABLE DUTIES RE INDEPENDENT CONTRACTORS**

Where an independent contractor, D2, is engaged by employer D1 to perform some work or services for D1 in the workplace, and by some tortious act or omission, that independent contractor injures C, who is an employee of D1, then D1 will be in breach of its non-delegable duty of care to its own employee C, to exercise reasonable care to provide C with a safe system of work, safe equipment, and a safe place of work.

**The general rule**

As a general principle, an employer is vicariously liable to C for the torts committed by his employees (i.e., by those that he engages under a ‘contract of service’), but is not vicariously liable for the torts committed by his independent contractors (i.e., by those whom it engaged to perform services). The effect is that, essentially, ‘a duty at common law [borne by an employer] can be delegated to that independent contractor’ (per Holding & Management (Solitaire) Ltd v Ideal Homes North West Ltd).

However, an employer may be liable for the torts of his independent contractors, in various exceptional circumstances. These exceptions are discussed in Chapter 18. There are a limited number of instances in which an employer who engages an independent contractor will owe a non-delegable duty of care to C, who is harmed by the acts or omissions of that independent contractor. These instances cover where the independent contractor, e.g., is engaged in ultra-hazardous activities; or allows a dangerous thing to escape; or creates a public nuisance that harms C as a road-user. In these instances, the employer who engaged the independent contractor owes a non-delegable duty of care to the injured party, C.

The particular exception which merits attention in this chapter, in the context of an injury to employee C in the workplace, is that C’s employer, D1, who engages an independent contractor, D2, to undertake a particular task, owes C a non-delegable (i.e., a personal) duty of care, to ensure that the independent contractor takes reasonable care of C’s safety. The principle was affirmed by Lord Brandon in McDermid v Nash Dredging & Reclamation Co Ltd in this way: ‘it is no defence for the employer to show that he delegated its performance to a person, whether his

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servant or not his servant, whom he reasonably believed to be competent to perform it. Despite such delegation, the employer is liable for the non-performance of the duty.113

It follows that the entirety of the quartet of duties owed by employer D to his employee C (i.e., to exercise reasonable care to provide a safe place of work, safe equipment, competent co-employees, and a safe system of working) cannot be delegated by the employer to an independent contractor to perform. If that independent contractor appointed by employer D commits some act of negligence which injures D’s employee, C, then employer D is personally liable to employee C, as if the employer had committed the wrong itself.

Theoretically speaking, this is not a case of vicarious liability on the part of employer D. As Lord Bridge explained in D & F Estates Ltd v Church Commissioners for England, those exceptional scenarios in which an employer owes a non-delegable duty of care ‘are dependent upon a finding that the employer is, himself, in breach of some duty which he personally owes to [C]. The liability is thus not truly a vicarious liability, and is to be distinguished from the vicarious liability of a master for his servant.’114 In fact, as pointed out in Ship Chandlers v Norfolk Line Ltd, if the employer’s liability in this scenario were truly vicarious, it would follow that the employer owed no duty of care to C, but ‘merely bore the burden of the independent contractor who did. However, non-delegable means something else.’115

In McDermid v Nash Dredging and Reclamation Co Ltd,116 Mr McDermid, C, was employed by Nash Dredging, D1, as a deckhand on a tug. He was seriously injured (with an above-the-knee amputation required) when Captain Sas, the captain of the tug, D2, prematurely put the engines in throttle before the ropes were properly untied by C. The ropes were not tied properly, and snaked around C’s leg, pulling him into the water and causing him the injury. Nash Dredging, however, was not the captain’s employer. Captain Sas was employed by the owner of the tug, Stevin. Hence, the captain was treated as an independent contractor engaged by Nash to service the needs of the tug’s operations. Held: the captain, D2, had been negligent, but Nash Dredging, D1, could not be vicariously liable for the captain’s negligent acts, given that the captain was not their own employee. However, Nash, D1, was personally liable to C, on the basis that D1 owed a personal (non-delegable) duty to its employee, C, to exercise reasonable care to ensure that the system of work provided for its employee was safe. The system used aboard this tug to loosen and store ropes was certainly not.

Showing the tri-partite relationship as follows:

### Non-delegable duties of care owed to an employee

| D1, the employer of C, which engaged the independent contractor to perform some service (Nash Dredging) |
| C, the employee, is injured during his course of employment (Mr McDermid) |
| D2, the independent contractor, has directly committed some act of negligence against the employee, C (Captain Sas, the captain of the ship) |

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113 [1987] AC 906 (HL) 919.
114 [1989] AC 177 (HL) 208, citing: Clerk and Lindsell on Torts (15th edn, 1982) [3.37].
115 QB, Judge Hicks QC, 10 April 1990 (paraphrased).

As pointed out in *Woodland v Essex CC*,\(^{117}\) there will exist, as between employee C and employer D, a contract of employment – so that it could be an implied term in that contract that the employer cannot delegate the performance of its duty of care to any other party. However, this is not the path which English law followed, and hence, the non-delegable duty of care owed by employer D remains an established principle of Tort law.

**The caveat**

\(\text{§EM.11}\) The non-delegable duty of care owed to employee C by employer D is circumscribed by the fact that D is not liable for any ‘collateral negligence’ on the part of the independent contractor.

Collateral negligence arises from acts which were ‘coincidental’ or ‘casual’, and which were not central to the work which the independent contractor was engaged to do (per *Wilsons and Clyde Coal Co Ltd v English*\(^{118}\)). In other words, the acts of the independent contractor must fall within the scope of the employer’s personal duty (per *Woodland v Essex CC*\(^{119}\)).

In *McDermid v Nash Dredging & Reclamation Ltd*,\(^{120}\) Nash Dredging, D, argued that the actions of Captain Sas in putting the engine of the tug into operation before it was safe to do so was collateral negligence. **Held:** no collateral negligence occurred here, and C’s employer Nash was liable for the negligence of Captain Sas, its independent contractor. Operating the tug, in a safe system of work, was precisely what Captain Sas was engaged by Nash to do.

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