Duty I – General principles governing duty of care

Online content (part of chapter only)

Barristers (when conducting matters in court)

§2.A

A barrister or solicitor advocate, D, does not enjoy an immunity from suit in negligence, in respect of either criminal or civil proceedings conducted in court on client C’s behalf. A duty of care to conduct the proceedings with reasonable care and skill is imposed, as a matter of policy.

This is an area of duty of care jurisprudence which has changed markedly during the 20th century. In fact, it marked one of the important developments for the English legal profession. Hence, the key decision of Arthur JS Hall & Co (a firm) v Simons,1 when it came in 2000, was comprised of a bench of seven Lords, and entailed the intervention of the Bar Council, and representatives of the Solicitors’ Indemnity Fund. The development of a duty of care in the scenario turned solely on policy factors.

The previous law. Barristers’ previous immunity from suits in negligence was of very long standing, but crystallised, for modern purposes, in the 1967 decision of Rondel v Worsley.2

In Rondel v Worsley, Mr Rondel, C, sued his barrister, Mr Worsley, D, who had defended him on a charge of causing bodily harm with intent. C admitted inflicting the shocking injuries in respect of which he had been convicted, but claimed self-defence. C claimed that D had negligently not cross-examined Crown witnesses to show that C had inflicted those injuries with his teeth and bare hands rather than with a knife (even if that cross-examination would not have led to an acquittal). D sought to have the claim struck out. Held: public policy demanded that counsel, advocates and solicitors should enjoy complete immunity from an action alleging negligence in respect of their ‘conduct of a case in court’.

In a unanimous decision, several policy reasons (which were ‘not immutable’3) were given as to why barristers and solicitor advocates should not owe a duty of care to their aggrieved clients, in respect of the conduct of matters in court (the immunity did not apply to non-contentious, e.g., advisory work).

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1 [2000] UKHL 38, [2002] 1 AC 615, with quotes in Table at: 677 (Lord Steyn), 687, 686 (Lord Hoffmann).
3 [1969] 1 AC 191 (HL) 227 (Lord Reid).

Online resources: Mulheron, Principles of Tort Law, Cambridge University Press, © 2016
The ‘old’ policy reasons in play

- **the conflict of duties problem**: barrister D’s overriding duty is to the court (e.g., to not mislead the court). If D owed a duty to his client too, that might undermine D’s willingness to acquit his duty to the court, even subconsciously – causing a conflict of duties. This factor was ‘the pivot on which, in 1967, the existence of the immunity hinged. But for it, the case would probably have been decided differently’ (Lord Steyn, *Arthur Hall*);

- **the res judicata problem**: it was undesirable for issues decided in the original proceedings to be re-litigated, via a later suit against D in negligence – particularly in criminal proceedings, where a convicted criminal ‘was likely to have leisure to ponder the way his trial had been conducted, and access to legal aid’ (per Lord Hoffmann in *Arthur Hall*). Causation issues were likely too, for even if the conduct of the earlier proceedings was negligent, what should happen then – damages? Release? Non-release but a retrial? An immunity avoided these problems;

- **the cab-rank rule**: this ‘valuable professional ethic of the English bar’ (per Lord Hoffmann in *Arthur Hall*) meant that barrister D had to accept instructions from anyone who wished to engage his services in his practice areas. D could not pick and choose his clients – to protect D from claims that he was engaged by an unsavoury client, and to allow difficult cases to be brought to court. The immunity was a *quid pro quo*;

- **the witness immunity in court proceedings**: if witnesses, lawyers, and the judge, were able to obtain an immunity from being sued in defamation for anything said in court, then an analogous immunity should apply to allow barristers to conduct cases without fear of litigation too.

However, when the House of Lords had reason to consider the question of a barrister’s immunity again in 1980, in *Saif Ali v Sydney Mitchell & Co*, divisions in opinion were starting to show. Lord Diplock (dissenting) considered it correct to depart from *Rondel v Worsley* (although upheld the immunity on other grounds), whilst the test of ‘conduct of the case in court’ was proving increasingly difficult to apply, as that case demonstrated. The barrister’s immunity was then impinged-upon (i.e., moderated) by Parliament, by virtue of s 51 of the Supreme Court Act 1981, which enabled the courts to make wasted cost orders against legal practitioners, including barristers, for their conduct (whether in court, or outside of it) which lead to wasted costs (and applied in, e.g., *Ridelalgh v Horsefield*). As Lord Hoffmann put it in *Arthur Hall*, ‘it was a limited form of liability because it was restricted to the payment of wasted costs. ... But the costs of modern litigation can amount to a good deal of money.’ Furthermore, whilst the liability to pay wasted cost orders was not quite in the same league as a barrister’s having to pay damages for negligence, there were no floodgates of wasted costs orders against barristers after the provision was introduced. This legislation, in effect, started the evolution from ‘immunity’ to ‘accountability’.

Furthermore, the scope of the immunity was originally intended to apply to D’s conduct of proceedings in court. However, this became shrouded in controversy over time. In *Saif Ali*, the question was whether D’s failure to advise a client to join additional parties before the limitation period expired was within the immunity – being professional duties which were performed *outside* of court. The House of Lords developed a modified test of immunity: that D’s work had...
to be so ‘intimately connected’ with the conduct of the case in court as to constitute a decision as to how it would be conducted at the hearing (so D’s conduct was not covered by the immunity). Some judges were not enamoured of that test, however, with Lord Hoffmann stating that it was a distinction with which a court would ‘struggle’, and that it was ‘very difficult to apply with any degree of consistency’.\(^8\) One of the questions in *Arthur Hall* itself was whether the immunity covered out-of-court settlement discussions which C claimed were disadvantageous to them (in the context of a building dispute and a family dispute). The interplay between the immunity and settlements reached at the courtroom door ‘had remained open to considerable debate’ (per *Richardson v Morton*\(^9\)).

The current law. The House of Lords anticipated the implementation of the ECHR (which came into force in October 2000, three months after *Arthur Hall v Simons*), when assessing whether the barrister’s immunity could still be justified, in both its criminal and civil contexts.\(^10\) Whilst holding, *unanimously*, that it should be removed for the conduct of *civil proceedings* in court, it was at pains to emphasise that *Rondel v Worsley* was not wrongly decided,\(^11\) but was a decision of its era. Times (and policy) had changed.

### The modern policy reasons in play (civil proceedings)

- **treat ing Ds alike:** other professionals (e.g., doctors) are also subject to the ‘cab rank principle’, and yet, do not enjoy any immunity from negligence. Besides, the effect of the principle for barristers was overstated, given that, ‘[i]n real life, a barrister … is free to raise the fee within limits. It is not likely that the rule often obliges barristers to undertake work which they would not otherwise accept’ (Lord Steyn);
- **conflicts of duties:** other professionals owe conflicting duties too, e.g., what if ‘an AIDS-infected patient asks a consultant not to reveal his condition to the patient’s wife, GP [etc]?’ Such decisions may easily be as difficult as those facing barristers’ (Lord Steyn). The potential for conflicts does not give rise to an immunity *per se*;
- **no res judicata concerns:** there were ample safeguards against frivolous and vexatious litigation, if the immunity was removed, e.g.: striking out claims as an abuse of process; seeking summary judgment; relying on the principles of *res judicata* and issue estoppel. Also, judges have much greater control over civil proceedings than they do over criminal proceedings, and can intervene and case-manage, so that the risks to the administration of justice which would flow from the removal of the barrister’s immunity are less obvious;
- **floodgates concerns misplaced:** (1) In Canada, the barrister’s immunity disappeared in 1979, when *Rondel v Worsley* was departed from: *Demarco v Ungaro*,\(^12\) and there had been no floodgates of litigation against barristers since. For England too, floodgates fears were ‘unnecessarily pessimistic’ (Lord Steyn). (2) Judges (having come up to the Bench through the Bar) were the best arbiters of what is barristers’ negligence – they will take into account ‘the difficult decisions faced daily by barristers working in demanding situations to tight timetables’, and hence, negligence against a barrister ‘will not be easy to establish … courts can be trusted to differentiate between errors of

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\(^10\) The points in the boxed list are located at: [2002] 1 AC 615 (HL) 678, 680–83, 697. 
\(^11\) [1969] 1 AC 191 (HL) 682–83 (Lord Steyn), 704 (Lord Hoffmann). 
\(^12\) (1979), 95 DLR (3rd) 385 (Ont SCJ, Krever J).
It should also be added that the very difficulty in legally defining the scope of the immunity—and precisely what was meant by conduct ‘intimately connected with the conduct of the case in court’—was a further reason to depart from the immunity, for civil cases. As Lord Hutton noted in Arthur Hall, the immunity clearly covered conduct outside the courtroom (as observed in Rondel v Worsley itself, regarding some pre-trial preparation work); but to what extent it covered pre-trial work, and negotiations during trial but taken ‘in the relative tranquillity of barristers’ chambers’, rendered the ‘intimate connection’ test uncertain and difficult to apply in practice. It is now accepted that the removal of the Rondel v Worsley immunity means that an advocate’s loyalty ‘may be pulled in opposite directions’, i.e., to the court and to the client (per Lumsdon v Legal Services Board).

Re criminal proceedings, however, the decision in Arthur Hall was much more finely-balanced. By a bare 4:3 majority, it was held that the immunity from negligence should be removed for the conduct of criminal proceedings. Lords Steyn, Browne-Wilkinson, Hoffmann, and Millett did not distinguish between civil and criminal proceedings, holding that the immunity should be removed for both. However, in addition to the reasons given in the boxed list above, some supplementary justifications for the removal of the immunity for the conduct of criminal proceedings were made by the majority.

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13 This test was adopted in Saif Ali from: Rees v Sinclair [1974] 1 NZLR 180 (CA) 187 (McCarthy P).
14 [2002] 1 AC 615 (HL) 729.
16 [2002] 1 AC 615 (HL) 685 (Lord Browne-Wilkinson), 696 (Lord Hoffmann), 750 (Lord Millett).
However, the minority (Lords Hope, Hutton and Hobhouse) considered that there were special reasons as to why the immunity of an advocate in a criminal trial should be maintained. The varied list of policy reasons, drawn from the separate judgments, emphasised the difficulty in resolving the question of the barrister’s immunity. To mention just a few:

**Policy reasons of the minority (criminal proceedings)**

- *abuse of process*: the appropriate challenge to a criminal conviction is by way of appeal, and not by suing the barrister in negligence. If the criminal conviction is set aside on appeal, then an action in negligence against the barrister conducting the defence is possible, but is unlikely to succeed (because courts can be relied upon to distinguish mere errors of judgment from negligence in criminal trials too) (Lords Steyn, Browne-Wilkinson);
- *floodgates unlikely*: the number of negligence actions brought after a criminal conviction is set aside was 'likely to be small' (Lord Browne-Wilkinson), or 'so narrow that it cannot justify a total immunity from actions for negligence in the conduct of all criminal cases' (Lord Hoffmann);
- *distinctions between civil and criminal difficult*: to distinguish between civil and criminal proceedings would make an immunity difficult to apply, because some proceedings tried before magistrates are civil in character, but are classified as criminal proceedings; and disciplinary proceedings before professional bodies are classified as civil proceedings, but are quasi-criminal in character – would the immunity apply there? (Lord Millett);
- *public confidence*: the public perception of the immunity applying for criminal, but not for civil, proceedings would be unattractive from the public perception point of view: 'a party would have a remedy if the incompetence of his counsel deprived him of compensation for (say) breach of contract or unfair dismissal, but not if it led to his imprisonment for a crime he did not commit and the consequent and uncompensated loss of his job ... The more thoughtful members of the public might well consider that we had got it the wrong way round' (Lord Millett).

The points in the boxed list are at: [2002] 1 AC 615 (HL) 696, 715, 717, 721, 723, 730, 734–35.
Once the immunity was removed, it was removed retrospectively. It was held, in *Awoyomi v Radford*, 18 that the removal of the barrister’s immunity was not prospective only, but also covered conduct between the date of the alleged negligence with which *Arthur Hall* was concerned (which occurred in 1991) and the date of the *Arthur Hall* decision itself (in 2000). Only one of the *Arthur Hall* court (Lord Hope 19) would have held that the removal of the immunity was prospective only – a view which he repeated in *National Westminster Bank plc v Spectrum Plus Ltd*. 20 According to the rest of the House, by 1991, the immunity was no longer justified; the decision dealt with any cases arising between 1991 and 2000; and hence, no immunity could be accorded to conduct which occurred in 1995.

In *Rondel v Worsley*, 21 the immunity was held to apply to all the ‘essential ingredients of the judicial process’, *viz*., the parties, witnesses (whether ‘friendly’ or opposing), advocates, judges and jurors. Quite apart from barristers, not all of those participants have continued to enjoy a continuing immunity in English law. In *Jones v Kaney*, 22 the Supreme Court decided (by majority) that an expert witness should no longer possess an immunity from negligence claims, in relation to an expert report prepared for the purpose of litigation or in relation to evidence given in litigation. However, the ‘judicial proceedings immunity’ (i.e., ‘that those involved in the judicial process should be immune from civil suit for what they do or say in the course of the litigation’) continues to apply, in a limited form (per *Singh v Moorlands Primary School* 23). For example, the immunity from suit that a High Court judge possesses when acting judicially has recently been described as a ‘fundamental principle’ (per *Ketley v Brent* 24). Due to space constraints, the duty of care position in relation to these other participants in the courtroom lies outside the scope of this work.

### Parental liability for their children’s negligence

#### §2.B

Although English law is not entirely settled, the preferable view is that a parent or guardian, D, owes a duty of care to C, who is injured or killed by the acts or omissions of D’s child, where D created an opportunity for that child, who was under his control and supervision, to cause injury or death to C. However, whether D breached that duty of care will depend, in part, upon the age of D’s child, and the circumstances of C’s injury or death.

In this context, a ‘parent’ includes one *in loco parentis* to the child (such as a guardian or foster parent).

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However, a parent’s liability for the acts or omissions of his children is too dissimilar to those in charge of children’s care homes, to draw any useful analogy. As Lord Hutton remarked in *Barrett v Enfield LBC*, the liability of a local authority for the exercise of its parental responsibility towards a child in its care is distinguishable from a parental liability for two reasons: first, the local authority ‘has to make decisions of a nature which a parent with whom a child is living in a normal family relationship does not have to make’; and secondly, ‘a local authority employs trained staff to make decisions and to advise it in respect of the future of a child in its care’, a formalised relationship which does not reflect ordinary family life. In *Woodland v Essex CC*, Lord Sumption described the parental relationship with his child as being ‘not only gratuitous, but based on an intimate relationship not readily analysable in legal terms. For this reason, the common law has always been extremely cautious about recognising legally enforceable duties owed by parents on the same basis as those owed by institutional carers’. Of course, even if a duty of care is owed by a parental D towards C who was harmed by that parent’s child’s conduct, no liability on the parent’s part may eventually be proven, in that the parent may have done his ‘reasonable best’ to prevent the harm occurring to C.

Notably, there is little case law in this area. Parents are rarely sued for their negligence, where the allegation is that the parental D failed to control or supervise his child – undoubtedly because that parent is unlikely to be covered by an insurance policy for the harm caused. Being a ‘shallow-pocketed’ D, the utility of a law suit is likely to be nullified.

**Conflicting authorities.** Given the lack of lawsuits in English law which have dealt with the liability of parents for the torts of their children, there is a marked lack of discussion as to what policy factors govern this duty of care scenario – and what there is tends to be inconclusive and contradictory.

On the one hand, there are certain statements which suggest that it is fair, just and reasonable that no liability be imposed on a parental D for the wrongdoings of his child. In the 1860 case of *Moon v Towers* (which was a trespass to the person, not a negligence, case), Willes J remarked that the mere father–son relationship was not sufficient to ‘make the acts of the son more binding upon the father than the acts of anybody else’. Almost a century later, in *Donaldson v McNiven*, Lord Goddard CJ observed that, ‘[s]ome people have thought that parents ought to be responsible for the torts of their children, but they are not’. On the other hand, Lord Reid remarked, in *Carmarthenshire CC v Lewis* (dicta), that any argument that a duty of care would put ‘an impossible burden on harassed mothers who will have to keep a constant watch on their young children’ was wide of the mark, because it was only ‘reasonable behaviour’ that the law expected of that harassed mother, and not the ability to be in two places at once or to keep her children ‘cooped up’ for fear of what harm or mischief they could get up to. Moreover, in another House of Lords decision, in *Home Office v Dorset Yacht Co Ltd*, it was suggested (again in dicta) that D would be liable in negligence towards C, if D’s child was of such a young age that the child was not responsible for his own actions and could not appreciate the danger which he could create, if unsupervised and uncontrolled. Viscount Dilhorne approved of the High Court of Australia’s statement, in *Smith v Leurs*, that, ‘it is incumbent on a parent who maintains control over a young child to take reasonable care so to exercise that control as to avoid conduct on his part exposing the person or property of

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[27] (1860) 8 CB (NS) 611, 615, 141 ER 1306, 1308.  
[28] [1952] 2 All ER 691 (CA) 692.  
[29] [1955] AC 549 (HL) 553–54, 566.  
[31] (1945) 70 CLR 256 (HCA) 262 (Dixon J).
others to unreasonable danger.’ Both House of Lords’ authorities thereby suggest that a duty of care could be owed by a parental D for the acts or omissions of their children.

Hence, and \textit{Donaldson} notwithstanding, there is some high-level English authority which supports the notion of parental liability towards C, for the acts or omissions of D’s child – although it is dicta only, and was not analysed in \textit{Caparo}-type terms, being decided pre-1989.

Nevertheless, in any circumstance where a parent is being sued, the Supreme Court noted in dicta, in \textit{Woodland v Essex CC}, that ‘[t]he courts are anxious not to impose an impossibly high standard of care in an ordinary domestic setting’.\textsuperscript{32} Hence, not only is the standard of care likely to be suppressed, but proof of breach may be difficult, for the following reasons:

\textbf{Age of the child.} The acts of older children (closer to maturity – say, the 15-year-olds in \textit{Dorset Yacht} itself) would apparently not generally expose the parent D to any breach of duty, given the statements of the House above. On the other hand, the acts of a 3-year-old (such as David in \textit{Carmarthenshire CC v Lewis}) could expose D to liability in negligence – in \textit{Lewis}, the nursery school there owed the same duty, analogously, as that which would be owed by ‘a careful parent’ of a child that young.\textsuperscript{33}

\textbf{Whether the child had a particular tendency or propensity.} A breach by the parent is more likely to be found, where the child concerned had propensities that could give rise to the risk of injury, for it is then more feasible that a reasonable parent D should have taken steps to guard against that risk. Those propensities could amount to extreme youth or past bad behaviour.

Very young children have a well-known tendency to be ‘unpredictable’, and their attempts to do things, never fearing for their own safety and well-being, should be anticipated by those \textit{in loco parentis}, according to Lord Reid in \textit{Lewis}. Hence, analogising \textit{Lewis}, any child of tender years who is allowed by parent D to cause harm to road user C, by running onto a road which is near, or adjacent to, where that child is living/playing, may arguably give rise to a breach of duty by the parent.

Knowledge (whether actual or constructive) of his child’s past dangerous behaviour may also, arguably, expose parent D to liability. The Irish Law Commission\textsuperscript{34} noted (by reference to authorities from England and elsewhere) that breach may be proven, if the parent has knowledge that his child ‘has attacked other persons previously, or has displayed a tendency to steal or to set fire to property’.

In \textit{Bebee v Sales},\textsuperscript{35} Mr Sales, D, gave an airgun to his son, 15, as a present. A mill-owner complained to D that his son had used the airgun to shoot at the mill and break a window, and D promised to destroy the airgun. Later, D’s son was playing with another boy, C, and shot C in the eye. \textbf{Held:} D was negligent towards C in allowing his son to have the gun, after he received warnings about his son’s misbehaviour.

\textbf{What weapon/instrument was the harm done with.} Exceptionally, parent D may breach a duty of care to C, who is injured or killed by the acts of D’s more mature child, where D has failed to supervise the child in the exercise of a thing involving special hazards (such as a gun or other weapon). In \textit{Dorset Yacht}, Lord Pearson considered (again, in dicta) that it was proper for parent D to be held liable for the acts of older children, as part of the broader principle on D’s part to ‘exercise due care in the control of things involving special danger’. The child’s access to the dangerous thing may arise because parent D has left it lying around, or has given

\textsuperscript{32} [2013] UKSC 66, [41]. \textsuperscript{33} [1955] AC 549 (HL) 561 (Lord Goddard).
\textsuperscript{34} Liability in Tort of Minors and the Liability of Parents for Damage Caused by Minors (Rep 17, 1985) 34.
\textsuperscript{35} (1916) 32 TLR 413 (DC), as cited \textit{ibid}, 33 (with case description from the case digest on the Lexis Library case law database).
it to the child for his use. However, no breach is likely if parent D has given his child adequate instruction and counselling in the use of the dangerous thing.

In the following, the child used the weapon to injure C, and where D was the child’s father: in Newton v Edgerley, D permitted his son, 12, to own a .410 gun (liability proven); in Gorely v Codd D allowed his mentally-disabled son, 16, to use a .22 gun (no liability proven); in Bebee v Sales, facts previously (liability proven); and in Court v Wyatt, D allowed his son, 15, to use an airgun (liability proven).

Interestingly, both the Irish and English Law Commissions have suggested (by reference to the abovementioned cases) that English law does impose liability in negligence upon parent D for a failure to supervise his child’s activities, at least where a ‘dangerous thing’ is used by D’s child and injures C.

§2.C Two other legal bases upon which parent, D, may be liable to C, for the acts or omissions committed by D’s child – but which lack settled English authority – are: ratification; and vicarious liability.

Ratification. It may be possible to argue that, where parent D adopts a tortious wrongdoing done by his child towards C; and that wrongdoing was for the use and benefit of D, then D can be said to have ‘ratified’ the tort, and can be made liable on that basis. The proposition has some weak support in Moon v Towers – albeit that the case did not concern negligence (it was pursued against the father, Mr Towers, in trespass and false imprisonment); and there were no facts to justify ratification by D of his son’s wrongs. Hence, anything said on the effect of ratification was dicta only. Also, the court split on whether D could have ratified his son’s wrongs – with Erle CJ and Willes J appearing to leave the question open. Moon v Towers has never been applied in a parental liability case since, so far as the author’s searches can ascertain.

Vicarious liability. In any scenario in which the child is an employee of parent D, and the child commits a negligent act during the course of his employment with D, then D will be vicariously liable for the negligence of his child, according to the usual principles governing vicarious liability (discussed in Chapter 18).

Outside the employment context, vicarious liability can also arise (e.g., in the principal/agent relationship). However, some attempts to fix a parental D with vicarious liability, under the ‘temporary management of another’s chattel’ category, have not been affirmed as part of English law to date. This is significant, given that the leading case of ‘temporary management of another’s chattel’ – the Irish case of Moynihan v Moynihan – occurred in the context of a mother who was vicariously liable for the actions of her daughter in spilling a teapot onto C.

The Irish Law Reform Commission noted that Moynihan ‘would appear to be of some significance in relation to the liability of parents for the torts of their children ... [albeit that it] proceeds on the basis of liability for control of domestic hospitality’, and not on the strict relationship of mother/daughter. Moreover, as discussed in Chapter 18 (under ‘Miscellaneous’, an online section of that chapter), there has been a distinct lack of support for the Moynihan doctrine in English vicarious liability law.

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Parental liability to their children

§2.D

A parental D does not enjoy any general immunity from his child’s action against him in negligence (although, for practical reasons, a suit may not be feasible), but a parental D does appear to have immunity in negligence in respect of general questions of the upbringing of the child, C. (This principle is subject to the mother’s immunity from suit, discussed in principle §3.1.)

Recently, it has been judicially suggested that a parental D is not protected, by policy reasons, from a negligence suit brought by his child, because a parent does owe his child a duty of care. In Woodland v Essex CC, Lady Hale remarked, in dicta, that, ‘[c]hildren rarely sue their parents for the harm that they suffer at their parents’ hands, save where that harm is covered by an insurance policy. But that is not because the parents do not owe them a duty of care. Rather, it is because any damages recovered will normally reduce the resources available to cater for the needs of the child and her family.’

On this view, clearly, the prospect of parental wealth being diverted to the child C, by means of a damages claim, does not absolutely preclude a duty of care from being owed in that scenario (although that prospect has figured in other scenarios, viz, where the child is negligently injured in utero – unless the parental D was insured – as discussed in Chapter 3).

Other English authority has also supported the imposition of a duty of care on the parental D. The Court of Appeal suggested, in Surtees v Kingston-upon-Thames BC, that foster parents owed exactly the same duty as was owed ‘by the ordinary parent to his or her own children [but] There are very real public policy considerations to be taken into account if the conflicts inherent in legal proceedings are to be brought into family relationships’ (a consideration which pertained to breach, but not to duty). In XA v YA, Thirlwall J also noted that where C, a child, is injured by his parent, D, via negligent driving, then D owes C a duty of care, because any passenger is owed that duty by a driver, and ‘the fact that the driver is a parent matters not’. However, Thirlwall J described these as ‘circumscribed contexts’, where it is a particular incident by the parent which is under scrutiny.

By contrast, a contrary view – that a duty of care should not be owed to his child by a parental D – was expressed by Lord Hutton in Barrett v Enfield LBC, in the wider context of child C’s upbringing: ‘it would be wholly inappropriate that a child should be permitted to sue his parents for decisions made by them in respect of his upbringing which could be shown to be wrong’. However (said Lord Hutton), that did not preclude a local authority D from being sued, for decisions which that local authority made to take C into care and to make arrangements for C’s future. That was because ‘the comparison between a parent and a local authority is not an apt one, because the local authority has to make decisions of a nature which a parent with whom a child is living in a normal family relationship does not have to make, viz, whether the child should be placed for adoption or placed with foster parents, or whether a child should remain with foster parents or be placed in a residential home. ... it is erroneous to hold that, because a child should not be permitted to sue his parents, he should not be permitted to sue a local authority in respect of decisions which a parent never has to take’. In XA v YA too, a duty on parent D’s part to her child was disapproved, on the basis that to impose a duty in respect of the way in which a child was treated during his youth would be contrary to policy

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(as, again, relating to the child’s upbringing). The case is important, for it represents a ratio determination of the issue:

In *XA v YA*, XA, 32, C, sued his mother, YA, D, for damages for personal injury, on the basis that, during his childhood, D assaulted him, was responsible jointly for assaults upon him by his father, and negligently failed to protect him from his father. C alleged that he suffered, inter alia, physical injury. C was one of five siblings, and claimed that his father assaulted all of them throughout their childhood, but himself worst of all. **Held:** D did not owe C a duty of care.

Policy reasons precluding a duty on the part of the parent, D

- **the 'what would it achieve' factor:** if child C could succeed against his mother, D, where there was, in this household, a history of domestic violence towards D (from her partner) as well as to the children, then a duty of care would be imposed on the most vulnerable mothers in very difficult situations, and ‘I doubt that the imposition of a common law duty of care would improve the lives of children within the home’;
- **the non-justiciable factor:** it was ‘undesirable for the ordinary civil courts to have to judge, retrospectively, the decisions of a mother about how best to ensure a secure upbringing for her children in the context of a claim for damages for negligence’;
- **conflicts of duty:** to impose a duty on mother D would ‘go the heart of family relationships’, whereby D would be required to break up the family permanently. To discharge the duty of care here, D would need to leave the abusive father, take the children with her, remove the father permanently from the family home, have her children (including C) looked after under a private arrangement, or have the children taken into care. ‘To discharge the duty involves, effectively, the break up of the family by one route or another’.

Even if a duty is owed by a parental D, proof of breach – i.e., that the parental D fell below the standard of reasonable parenting, given that a 24-hour lookout for the child is impracticable, if not impossible – may be difficult to substantiate. In *Surtees*, the problem was explained thus: ‘[t]he studied calm of the Royal Courts of Justice, concentrating on one point at a time, is light years away from the circumstances prevailing in the average home. The mother is looking after a fast moving toddler at the same time as cooking the meal, doing the housework, answering the telephone looking after the other children and doing all the other things that the average mother has to cope with simultaneously, or in quick succession, in the normal household’.\(^{50}\) In summary, ‘the court should be wary in its approach to holding parents in breach of a duty of care owed to their children’. (These issues are discussed further in Chapter 6, ‘Parents, or in loco parentis’, an online section of that chapter.)

D, *in loco parentis* to a child, has also been held to owe a duty of care to that child. In *Lewis v Carmarthenshire CC*, a kindergarten teacher’s duty to a young child within her care ‘was that of a careful parent’\(^{51}\) – albeit that breach in that case was impossible to prove either, given the competing demands on her attention by other young children in her care. Similarly, in *Barnes v Hampshire CC*,\(^{52}\) a school which let its young children out before the day’s end, and where one child was then injured whilst crossing a busy road without the usual company of her mother, owed a duty to that child.

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\(^{50}\) [1991] 2 FLR 559 (CA) 583.\(^{51}\) [1955] AC 549 (HL) 560 (Lord Goddard).\(^{52}\) [1969] 1 WLR 1563 (CA).
Regulators/inspectors/certifiers

§2.E Whether inspectors or certifiers of vessels/vehicles/structures, etc, owe a duty of care to C, who suffers physical injury from defects therein, is a matter of policy, upon which the outcomes of key cases have differed.

In *Marc Rich & Co AG v Bishop Rock Marine Co Ltd*, an industry-specific survey/classification society was held not to owe a duty of care to those cargo owners whose goods ended up at the bottom of the ocean. That conclusion was purely policy-driven (given that reasonable foreseeability was conceded, and proximity was assumed without deciding, for the purposes of this preliminary issue).

In *Marc Rich & Co v Bishop Rock Ltd*, the Nippon Kaiji Kyokai (NKK), D, was a society which classified seagoing ships for seaworthiness. One of its surveyors had surveyed a vessel laden with cargo which was owned by Marc Rich, C, and recommended permanent repairs in dry dock. The vessel’s owners baulked at this, as it would have meant discharging and reloading the cargo. D’s surveyor was persuaded to change his mind, and he pronounced the ship fit to proceed after some temporary repairs to the shell plating. The welding cracked a few days into the voyage, and the ship sank, with no loss of life, but with full loss of C’s cargo. **Held:** D’s surveyor owed no duty of care to C, the cargo owners.

The availability of insurance was a key policy factor which drove the conclusion. However, in addition, other policy reasons tended to negate a duty of care being owed by the classification society too — which reiterates the point that rarely do any of these policy factors operate alone. As Lord Steyn said, ‘[t]hese factors are, by themselves, far from decisive’ — it is a judgment ‘in the round’.

However, in analogous cases — but involving personal injury, and not property damage — some of the abovementioned policy reasons simply did not count for the weight which had been accorded to them in *Marc Rich*, or were ignored altogether. A duty of care was owed in both of the following cases:

In *Perrett v Collins*, Simon Collins, D1, assembled a model aircraft from a kit, and took Anthony Perrett, C, for a spin in the plane. Unfortunately, it crashed shortly after take-off, and both men were badly injured. C sued the Popular Flying Co (PFA), D2, which ran a scheme allowing its members to construct and fly their own light aircraft assembled from kits. These aircraft had to obtain a full certificate of airworthiness from an inspector appointed by D2. For this aircraft, the gearbox was changed, but not the propeller that should have gone with that substituted gearbox, which mistake was not picked up by D2’s inspector. **Held:** a duty of care was owed by D2’s inspector, and by his employer, to C. In *Wattleworth v Goodwood Road Racing Co Ltd*, Simon Wattleworth, C, was driving his Austin Healey on the Goodwood motor racing circuit, when he lost control and collided with a tyre-fronted earth-bank, and was killed. C’s estate alleged that his death was caused by negligent design or selection of the tyre structure fronting the bank at that bend, and sued, inter alia, the Royal Automobile Club Motor Sports Assn Ltd (MSA); and the Federation Internationale de l’Automobile (FIA), alleging that these bodies failed to exercise proper skill and care in regard to their inspections, and the advice or recommendations given to the track occupier, Goodwood, in

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55 [2004] EWHC 140, [124].
13  Duty I – General principles governing duty of care

respect of track safety, and in issuing the track licence. This accident happened at a non-MSA event. **Held:** the MSA owed a duty of care to C; however, the FIA did not. (Ultimately, the MSA committed no breach.)

The cases are not easy to resolve, but the Table below outlines the policy reasoning which is relevant to such cases (even if the application of such policy to any given case remains an ‘unruly horse’).

### Policy reasons re certifiers/controllers/regulators

- **insurance availability:** to hold that the certifier owed a duty of care would be unfair, etc, because an extra layer of insurance would become necessary for certifiers, whereas the system for settling cargo claims against shipowners was a ‘relatively simple one’, based on ‘an internationally agreed contractual structure’. For cargo owners, the existing system protected them via the Hague Rules or Hague-Visby Rules, and any shortfall was readily insurable for them, which helped preclude a duty of care (*Marc Rich*). On the other hand, in *Perrett*, although the PFA was not a commercial entity, the fact that it might not be able to afford increased insurance premiums did not preclude a duty of care (Buxton LJ: ‘I cannot see that it would be right to withhold relief from [C] simply on the ground that to grant that relief might cause a rise in the PFA’s insurance premiums’). Similarly, *Wattleworth* held that any increased cost of premiums could be passed on to circuit owners, or the MSA could seek to disclaim responsibility from liability by effective disclaimers. Either way, insurance was available to it;

- **prospect of indeterminate liability:** the certifier in *Marc Rich* acted for the collective welfare (conducting about 14,500 inspections per annum), but unlike shipowners, would not have the benefit of any limitation provisions. On the other hand, there was no prospect of the MSA being liable to an indeterminate class — their liability was only to those using the circuit of Goodwood (and other race-tracks), where the MSA had, in practice, a degree of control over the circuit and the safety barriers (*Wattleworth*);

- **defensive practices:** according to *Marc Rich*, if a duty of care were imposed on certifiers, then they might be unwilling to survey the very vessels which most urgently required an independent examination, for the safety of crew and cargo. On the other hand, the fact that the PFA might ‘withdraw from its work’ was no reason to preclude a duty of care, said *Perrett*;

- **diversion of resources:** to uphold a duty of care would divert people and resources from the prime function of certifiers, namely to save lives and ships at sea (*Marc Rich*);

- **floodgates concerns:** to impose a duty here could involve wide-ranging exposure for other certifiers to claims in negligence too (i.e., it could logically extend to annual surveys, docking surveys, boiler surveys, etc) (*Marc Rich*);

- **subordination of the individual to the wider public good:** NKK certifiers acted in the public interest, by saving lives and ships at sea. It was an independent and non-profit-making entity, fulfilling a role which otherwise would have to be fulfilled by government agencies, thus militating against it being liable in negligence (*Marc Rich*);

- **the type of damage suffered:** C suffered indirect property damage in *Marc Rich*, with the loss of the cargo. It may have been different if the certifier had carelessly dropped a lighted cigarette into the hold, filled with combustible cargo, causing the ship to explode, because that ‘would be a paradigm case of directly inflicted physical loss’ on C. By contrast, C each suffered personal injury
These contrasting cases provide a small vignette of why it is so difficult to predict the outcome of policy determinations in a duty of care assessment. In *Wattleworth*, Davis J sought to explain the contrast away by noting that *Marc Rich* was an economic loss case, and ‘had special features relating to cargo claims’, but it is obvious, from the Tables above, that there was a clear division of judicial opinion as to which policy factors warranted the greatest weight.

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[2004] EWHC 140 (QB) [111].