Legal duty or social obligation?

The popular notion that there exists some kind of universal “duty of care” which is owed by us all to each other may explain the increasing use of the expression in public discussion of the supposed incompetence or misconduct of individuals, companies or public authorities. But lawyers at least must be careful to distinguish between a “duty” which is better characterised as a social obligation and true legal duties or responsibilities which are enforceable by claims for damages.

When I drive my car, for example, I am under a legal duty of care to any other motorist or pedestrian. But (here’s a thought) imagine I were the gamine presenter of television weather forecasts, to be delivered in the modern, risk-averse, state-of-the-art-vacuous and inclusive style that is so popular: Whilst I may feel a social or contractual obligation to take some care over what I foresee for those who are “planning to be out and about” or “on the journey to work in the rush hour” tomorrow, so that I usually urge my devoted viewers not to forget to “take that umbrella”, to “wrap up warm” or just “take extra care” in the face of the weather warning of a “snow event”, no one can sue me if I get it wrong even if they have they relied on my fundamentally inaccurate and incompetent description of what to expect and skid on an icy road or catch a nasty chill.

Similarly, a road accident victim cannot bring an action against me if I stood beside him at the roadside as he prepared to cross and failed to suggest he look to his right before crossing the busy road and was flattened by the approaching lorry. Nor, to use the vivid illustration given by Lord Keith in *Yuen Kun Yeu v A.G of Hong Kong*¹, have I any legal liability if I fail

¹ [1988] A.C 175
to shout a warning to the absent minded wanderer who is striding along with head in air, oblivious to the approaching cliff’s edge.

Why not? After all, the driver might have taken more care had I warned of the icy roads. The coatless walker might have avoided his sniffles had I reminded him to take his coat. The pedestrian would have escaped injury if I had spoken out. My cliff walker would have looked up and saved himself. So why have I no responsibility for them in law? All I had to do was be neighbourly and/or careful: is that too much to ask?

The explanation can only be that in all those cases the law imposes no duty of care. But why should that be? The classical answer is to be found in the three part test identified in Caparo Industries v Dickman\(^2\) (and elsewhere) which is now very well known. The application of that decide means that a duty of care will depend on (i) foreseeability (ii) proximity and (iii) it being fair, just and reasonable that such a duty should be imposed (i.e policy).

In this paper I am concerned here with the practical application of that test and suggest that, in the examples I have given, two key ingredients are missing. First, I have assumed no responsibility to the unfortunate victim. Second, either the victim has not relied on me or, if he did, he had no reasonable basis for so doing as opposed to relying on his own judgment and making his own choice.

My contention is that those two essential ingredients can be found at the heart of all those cases where a duty of care is imposed in situations which exist beyond the existing categories where a duty of care is already recognised by common law or imposed by statute. I have argued the importance of these ingredients this before in an article written following the decision of the Court of Appeal in Poppleton v Trustees of the Portsmouth Youth Activity Centre\(^3\). But, perhaps, of rather more comfort to the reader may be the fact that those elements form the cornerstone of the analysis of duty of care by the House of Lords in the recent decision in Mitchell v Glasgow City Council\(^4\).

\(^2\) [1990] AC 465

\(^3\) [2008] EWCA Civ 646: see Issue 3 (page 187) of JPIL 2008

\(^4\) [2009] UKHL 11: modesty forbids I should point out that the first draft of this article was written before the House provided authoritative re-assurance that – this time anyway – I was not talking nonsense.
Of course, I do not suggest that these two ingredients are alone decisive of the imposition of a duty of care: rather, they are important indicators that such a duty may be owed in the particular circumstances\(^5\).

This article therefore intends to deal as broadly as possible but as briefly as is realistic with the principles underlying the fundamental pre-condition of liability in tort that, first, one must be clear that there is a duty owed by one party to another and what the duty is.

\textit{The duty of care issue in a nutshell}

It is not possible to offer a single test which is applicable to all situations and certainly the bases for the imposition of a duty cannot be precisely defined so as to apply to every case. For example, all lawyers are familiar with the test of reasonable foreseeability but that alone constitutes but one of those bases. Hence the need to find the other key ingredients: at least in the context of personal injury claims, they are not entirely elusive.

I begin my discussion of the case law by re-stating my central thesis which is that, in personal injury claims, the development of a legal duty of care through the common law beyond the existing categories has increasingly depended on those two related concepts of assumption of responsibility and reliance whilst taking account of a third. That third, related, concept which qualifies those first two key elements is the increasing emphasis placed by the courts on \textit{personal responsibility} and \textit{free will} – in definite contra-distinction to the culture of blame/litigation with which the tabloid press and pub lawyers are so much absorbed.

\textit{The development of a common law duty}

The development of the common law has seen a gradual (or incremental) extension of those categories in which a true legal duty can be shown to exist.

\(^5\) In \textit{Bishara v Sheffield Teaching Hospitals} [2007] EWCA Civ 353, at paragraph 11, Sedley LJ said that “assumption of responsibility is simply one of the ways in which the necessary degree of proximity may arise”.

In some types of case, the existence of the duty is so well established as to be entirely uncontroversial. In the case of an employer, for example, there can be no doubt that, regardless of any contractual obligation, the employer owes a duty to his employee to take reasonable care for the safety of his employees. Clearly, the important features of assumption of responsibility and reliance are present in all those cases.

A recent example of the importance of those features in identifying the true relationship of employer/employee is *Jennings v Forestry Commission*[^6^] in which the Court of Appeal held that, on the facts of that case, the claimant’s status was that of independent contractor rather than employee: in deciding the extent, if any, to which the alleged employer ‘controlled’ the operation, the court paid particular attention to the issues of ‘assumption of responsibility’[^7^] (by the employer) and ‘reliance’ (by the employee).

This is entirely consistent with the classical exposition of the employer’s duty in *Wilsons & Clyde Coal Company Limited v English*[^8^], where Lord Wright put it this way:

"I think the whole course of authority consistently recognises a duty which rests on the employer and which is personal to the employer, to take reasonable care for the safety of his workmen, whether the employer be an individual, a firm, or a company and whether or not the employer takes any share in the conduct of the operations."[^9^]

There have been many other formulations of the employer’s duty but, since the existence of the duty has never been in issue, the cases have concentrated on questions of standard rather


[^7^]: At paragraph 43 and following


[^9^]: The obligation, Lord Wright explained, was threefold (because the doctrine of common employment abolished with effect from 1945 still then existed: the duty, as he explained, was the provision of competent staff, adequate material and a proper system and effective supervision. For a recent discussion of the limits and extent of the duties see, for example, *Mason v Satelcom Limited* [2008] EWCA Civ 494.
than duty of care – see, for example, *Stokes v Guest Keen & Nettlefold Ltd*\(^\text{10}\) or *Barber v Somerset County Council*\(^\text{11}\).

Similarly, we all can identify any number of categories in which there can be no argument but that a common law duty of care is owed. Such a duty is owed by the professional adviser to his client because, as Dyson LJ said recently in *Rowley v Secretary of State*\(^\text{12}\),

> “a solicitor owes a duty of care in tort because, like any professional person. He or she voluntarily assumes responsibility towards an individual client”.

Other obvious examples are adults looking after children, and schools. An adult supervising a child obviously owes such a duty, just as a school will owe a duty to pupils in its care, whether they are on school premises or subject to their control on outside activities. The activities organised for the children must be run in such a way that the risks of injury are limited as far as this can reasonably be achieved. All of this is uncontroversial\(^\text{13}\). Again, the issue here is not ordinarily as to whether any duty of care exists but, rather, whether the adult or school has fallen below the standard of care that might be expected, to which the answer will be infinitely variable depending on the circumstances\(^\text{14}\). But it may be recognised that both these examples demonstrate my preconditions of assumption of responsibility and reliance.

Those who are actively engaged in or organise activities which place others at physical risk are similarly under an obligation to conduct themselves carefully. That is the rationale of activities as diverse as driving a car on the one hand, or allowing a dangerous pyrotechnic display to take place upon your land\(^\text{15}\). No-one, in such a case, is likely to argue with any

\(^{10}\) [1968] 1 WLR 1776

\(^{11}\) [2004] 1 WLR 1089. A useful discussion of the nature and extent of the common law duty is to be found in Chapter 10 of the 11\(^{\text{th}}\) edition of Charlesworth & Percy on Negligence.

\(^{12}\) [2007] EWCA Civ 598 at paragraph 57

\(^{13}\) See, for example, Lord Esher in *Williams v Eady* (1893) 10 TLR 41.

\(^{14}\) A good example being *Chittock v Woodbridge School* [2002] EWCA Civ 915, where the Court of Appeal held that the teacher had acted reasonably in discharging a general duty of supervision of a 17 year old boy on a skiing holiday.
hope of success that they owe no duty of care whatsoever so that pedestrians or other motorists or the spectator at the firework display must trust to luck that they should not be injured. But again, what may be in issue is the standard of care.

The defendant in such a case is not the guarantor of everyone else’s safety. If I attend a cricket match or motor-sport event, I cannot expect my day to be entirely risk free. There is a remote chance I may be hit by a ball in my seat in the stands. Even if I watch the race from behind the barriers provided, I may be hit by a flying part thrown from the track after a high speed crash. But the reason why I probably have no claim is not just because the risk is one I choose to take or I should at least recognise as a possibility, however remote; nor is it because I was owed no duty of care at all. Rather, it is because, whilst those who own the ground, put on the race or are playing the game may owe a general duty of care, the standard of care will be generously interpreted. Amongst other things, it will take account not only of the nature of the game and the circumstances in which it is played but also the very low magnitude of risk – see Bolton v Stone (cricket) and Hall v Brooklands (motor sport).

Nor is there any issue about the duty of care owed by someone such as an occupier whose responsibilities, as regards the state of the premises at least, are fully provided for in the Occupiers’ Liability Acts 1957 and 1984. But a study of the occupiers’ liability cases shows that the occupier/owner who does not purport to provide anything other than the premises themselves owes no wider duty than that which statute imposes in relation to the state of the premises, given the purposes for which the visitor is there, and in relation to the activities of one visitor if they may place another at risk.

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15 See Bottomley v Todmorden Cricket Club [2003] EWCA Civ 1575.

16 As in Bottomley.

17 [1951] A.C. 850: see also other examples from the world of golf, for example in Charlesworth on Negligence 11th Edition at 6-13, 7-90.

18 [1933] 1 K.B 205: see also Wattleworth v Goodwood [2004] PIQR P25

19 The duty to a trespasser is narrower but is still directed exclusively to the state of the premises

20 See Tomlinson v Congleton Borough Council [2003] UKHK 47 – Lord Hoffmann at paragraph 26. The way in which that duty is discharged by the occupier (especially where contractors are allowed on to the premises), or the landlord, will depend very much on the facts – see, for example, Lips v Older [2007] EWCA Civ 1361, Ward v Ritz Hotels (1992) PIQR P 315 and Lough v Intruder Detention [2008] EWCA Civ 1009.
The preceding discussion of familiar categories in which a duty of care is owed is not intended to be exhaustive. I intend only to explain that there are many cases in which there can be no serious issue about the existence of a duty of care, and the real argument will be about the standard of care. However, a study of the cases also shows that not everyone automatically owes a duty of care to those who might be adversely affected by something that they are doing or by a situation that they have created. Rather, courts will be careful to scrutinise rigorously whether, in the particular circumstances of the case, the Claimant can show that he falls within one of the established and recognised categories and, if he does not, whether the necessary preconditions exist for imposing a duty of care in that particular situation. Hence, my concentration on those necessary preconditions and on how and where they can be identified in our jurisprudence.

**Physical harm and economic loss**

Historically, a distinction was drawn by the law between the existence of a duty to prevent physical harm and a duty not to expose someone to adverse economic consequences even though, as the leading case. But as the law of negligence developed to allow claims for purely economic loss to be pursued in each case, and it was necessary for the courts to reconsider the limits of and preconditions for such liability, of one of the key factors has been the assumption of responsibility by A towards B and B’s reliance upon A to conduct himself carefully. The history of the duty in relation to purely economic loss can conveniently be traced from cases such as *Hedley Byrne v Heller*\(^{21}\) to the very much more recent case (and, to some, the *locus classicus* for the true test) of *Caparo Industries v Dickman*.

Although *Caparo* itself was a case about economic loss, the principles for the existence of a duty of care in all tort actions are clearly expressed within it and are the foundation for any analysis in the case of both economic and physical damage. The validity of this parallel was confirmed in *Mitchell v Glasgow*, where it was argued unsuccessfully that, as *Caparo* was concerned only with economic loss, it had no or little application to personal injury claims. In the words of Lord Hope\(^{22}\),


\(^{22}\) See paragraph 24 of his Opinion
“...the origins of the fair, just and reasonable test show that its utility is not confined to that category”

In Caparo itself Lord Bridge explained the key preconditions thus, having analysed the previous cases:

“What emerges is that, in addition to the foreseeability of damage, necessary ingredients in any situation giving rise to a duty of care are that there should exist between the party owing the duty and the party to whom it is owed a relationship characterised by the law as one of ‘proximity’ or ‘neighbourhood’ and that the situation should be one in which the court considers it fair, just and reasonable that the law should impose a duty of a given scope on the one party for the benefit of the other.”

Overlap between the Caparo conditions

As expressed, they are three: first, foreseeability; second, proximity; third, policy (though expressed as that which is ‘fair, just and reasonable’).

There is, as the cases demonstrate, obvious overlap between each or all of those concepts: as Lord Hoffmann put it in Sutradhar v NERC, the boundaries between them are “somewhat porous but they are probably none the worse for that”. We can see that in the cases themselves, as we look at the applications of the 3 concepts individually and as a whole.

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23 Pp 617 – 618.

24 [2006]UKHL 33 at paragraph 32
Beyond the ‘neighbour’ principle: shortcomings of a single ‘foreseeability’ test

To express the test in such terms in Caparo demonstrates that the courts have come some way from the formulation of the duty of care simply on the basis of the “neighbour” principle.

That principle is expressed in the very well known words of Lord Atkin in Donoghue v Stevenson when he said:

“The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer’s question ‘Who is my neighbour?’ receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be – persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.”

Certainly, Donoghue v Stevenson remains a cornerstone of the law in relation to duty of care, especially as regards the key issue of foreseeability – that is, the first of the three Caparo components. However, foreseeability alone is but one element. So in Dorset Yacht Co. v Home Office Lord Reid said that:

“In later years, there has been a steady trend towards regarding the law of negligence as depending on principle so that, when a new point emerges, one should ask not whether it is covered by authority but whether recognised principles apply to it. Donoghue v Stevenson may be regarded as a milestone, and the well known

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26 [1970] AC 1004 at 1027
The distinguished Australian Judge, Brennan J, addressed the shortcomings of foreseeability as a single test in *Sutherland Shire Council v Heyman*\(^{27}\):"Lord Atkin’s ‘neighbour’ test involves us in hopeless circularity if my duty depends on foreseeability of injury being caused to my neighbour by my omission and a person becomes my neighbour only if I am under a duty to act to prevent that injury to him. Foreseeability of an injury that another is likely to suffer is insufficient to place me under a duty to act to prevent that injury. Some broader foundation than mere foreseeability must appear before a common law duty to act arises.”

The cases referred to above\(^{28}\) are sufficiently clear illustrations of the point that foreseeability alone is not enough to impose liability. One further quotation is useful: in *AG of the BVIs v Hartwell* Lord Goff said

“I wish to emphasise that I do not think that the problem in these cases can be solved simply through the mechanism of foreseeability. When a duty is cast upon a person to take precautions against the wrongdoing of third parties, the ordinary standard of foreseeability applies.....there is at present no duty at

\(^{27}\) (1985) 60 ALR 1.

\(^{28}\) *Yuen Kun Yeu* and *Mitchell v Glasgow*. Another well-known example is *Bolton v Stone* [1951] AC 850. As Lord Hoffmann observed at paragraphs 36-37 of his opinion in *Tomlinson*, it was always foreseeable that a passer-by might be hit by a cricket ball: but it was reasonable, not least because the cricket club was carrying out a socially useful activity, that they should do nothing about it.
common law to prevent persons from harming others by their deliberate wrongdoing, however foreseeable such harm may be if the defender does not take steps to prevent it”.

**Proximity and policy**

As can be seen in the judgments in *Perrett v Collins*\(^\text{29}\)* (where the issue was whether the inspector who had certified the aircraft as airworthy had been under a duty of care when he did so), just as there is an overlap between the first two elements of foreseeability and proximity, so also is there a considerable degree of overlap between the proximity test and the question of whether it is fair and reasonable – as a matter of policy – that a duty of care should be imposed on the particular relationship. And as I have already observed, the elements of assumption of responsibility and reliance are both to be found within the second and third parts of the *Caparo* tests.

**Assumption of responsibility through the cases**

The language of “assumption” and “responsibility” can be found in another Judgment in the *Sutherland Shire Council* case. There, Dean J identified both “physical” proximity, and “circumstantial” proximity as important. He explained that any or all of those elements:

“...may reflect an **assumption** by one party of a **responsibility** to take care to avoid or prevent injury, loss or damage to the person or property of another or **reliance** by one part upon such care being taken where the other party ought to have known of such reliance.”

Clearly, both these elements were key to the imposition of a duty of care in *Perrett* and that which may attach to any body or person undertaking something which approximates to a regulatory responsibility.

\(^{29}\) [1998] 2 Lloyds Law Rep 255. At p 268 Swinton Thomas LJ said that on the facts of that case these two elements could “conveniently be considered together”
Swinton Thomas LJ, for example, at page 270, emphasised the importance of assumption of responsibility, without – at first - using those actual words:

“The first and second defendants have undertaken to discharge the statutory duty and in my judgment no injustice is done by imposing such a duty on them in respect of a negligent act”.

Later (at page 272), he said this:

“...the second defendant...certified that the aircraft was safe to fly....they voluntarily assumed...the responsibility of issuing the certificate...and, accordingly, in effect, certifying that the aircraft was safe....the Judge was right to hold that there was sufficient proximity and that it was fair, just and reasonable to impose a duty”

Reliance, too, was a key component: at page 272, Swinton Thomas LJ continued

“...any reasonably well informed member of the public.... would expect there to be such a regulatory system in force to ensure his safety...a member of the public would expect that a person who is appointed to carry out these functions of inspecting aircraft and issuing permits would exercise reasonable care in doing so

These elements recur in several other cases. Lord Brown made clear in Sutradhar (at paragraph 48) that the nature of the relationship between the parties is all-important: unlike the defendant in Perrett, the NERC did not have

“‘control over’ or ‘responsibility for’ ....the provision of safe drinking water to the citizens of Bangladesh in the same way as the architect, the air safety inspector and the British Boxing Board of Control had control over and
responsibility for ensuring respectively a safe wall\textsuperscript{30}, a safe aircraft and a safe system for treating injured boxers’’

It follows that there is a simple truism to the effect that whether or not a duty will be imposed by law depends very much on the particular nature of the relationship between the parties and the factual basis upon which the party alleged to be under that duty is required or empowered to exercise it in the particular circumstances.

\textit{Public Bodies and the decision in Mitchell v Glasgow}

There are, of course, countless authorities in which the duty of care of a public authority has been debated and established or rejected. It is well beyond the scope of this article to discuss all of them here in any detail.

Highways cases are one such category where questions have arisen as to the scope, existence and nature of any statutory or common law duty that may be owed. In \textit{Stovin v Wise}\textsuperscript{31}, a majority of the House of Lords held that the highway authority\textsuperscript{32} owed no duty to the member of the public who suffered injury at a cross-roads where visibility was restricted. The failure to exercise its power to require the removal of the obstruction (which was on someone else’s land) was an omission only and that was not actionable. The Highway Authority had done nothing positive: it was a case of “\textit{simple omission and therefore excluded as a matter of policy from the arena of tort liability}”\textsuperscript{33}.

The situation may be different where a public authority takes an active step such as where it issues a licence without which the activity in question would be impermissible – that is, does

\textsuperscript{30} \textit{Clay v AJ Crump} [1964] 1 QB 1134

\textsuperscript{31} [1996] AC 923

\textsuperscript{32} See also \textit{Clark v Havering LBC} [2007] EWHC 3427 (QB) where the Judge rejected the contention that there had been any assumption of responsibility and \textit{Gorringe v Calderdale MBC} [2004] UKHL 15 where the House of Lords rejected the argument that the local authority owed a duty of care to paint markings on the road or put up signs warning motorists to slow down.

\textsuperscript{33} Per Sedley LJ in \textit{Bishara} at paragraph 11
something positive\textsuperscript{34}. But, again, no single test will apply to very situation. So one can find any number of cases in which the courts have considered the possible duties of care that might be owed by local authorities\textsuperscript{35} and their building inspectors\textsuperscript{36}, the emergency services\textsuperscript{37}, an NHS hospital\textsuperscript{38}, the Secretary of State for Work and Pensions\textsuperscript{39}, the Police\textsuperscript{40}, prosecuting authorities\textsuperscript{41} and a body like the National Environment Research Council\textsuperscript{42}. There are many other examples in an area particularly rich with authority\textsuperscript{43}. Much of it shows the considerable influence played by considerations of public policy in applying the tests and principles discussed above.

The most recent authoritative analysis in this context – and one to which I have referred already – is the decision in Mitchell. What was in issue was whether a local authority was under a duty to warn one of their tenants that he was at risk of attack by a neighbour. In discussions as to whether, on the facts of this case, such a duty should be imposed, the

\textsuperscript{34} I deal with this more directly in relation to ‘regulators’ – see below

\textsuperscript{35} Consider the discussion of Murphy v Brentwood [1991] 1 AC 398 in Perrett at p 275 and see other well known authorities such as X v Bedfordshire CC [1995] 2 AC 633 and Barrett v Enfield BC [2001] 2 AC 550

\textsuperscript{36} Governors of Peabody DF v Sir Lindsay Parkinson (1985) AC 210 where the House of Lords found it inappropriate to impose a duty on the local authority which approved the plans for the drains in circumstances where the Peabody Trust “relied on the advice of their architects, engineers and contractors (so that) it would be neither reasonable nor just...to impose upon Lambeth a liability to indemnify Peabody against loss resulting from such disastrous reliance” (per Lord Keith at p 241).

\textsuperscript{37} Kent v Griffiths (2000) 2 WLR 1158, cf Capital and Counties PLC v Hampshire CC (1997) 3 WLR 331

\textsuperscript{38} See Bishara v Sheffield Teaching Hospitals [2007] EWCA Civ 353

\textsuperscript{39} Rowley v S of S [2007] EWCA Civ 598: in rejecting the argument that the Sof S owed a duty of care, the CA stressed that the question of assumption of responsibility was indeed critical: But the S of S did not in such a case voluntarily assume any such responsibility in making his decision under the scheme. See also Customs and Excise Commissioners v Barclays Bank [2006] UKHL 28 where the bank had not, in any meaningful sense, assumed responsibility towards the commissioners, White v Jones [1995] AC 207 and Sandford v Waltham Forest LBC [2008] EWHC 1106 (QB) where the Judge rejected the proposition that there was ‘free-standing and actionable duty on the local authority in respect of a statutory duty to provide aids and equipment

\textsuperscript{40} See Van Colle v Chief Constable [2008] UKHL 50 where the House of Lords restored the principles (founded, essentially, in policy) previously laid down in Hill v Chief Constable (1989) AC 53. But the House of Lords recognised that there were “undoubtedly cases where things done by the police can give rise to positive or negative duties under Article 2 if life is to be protected” – Lord Bingham at paragraph 71, who dissented in respect of the associated appeal of Smith.

\textsuperscript{41} M v MPC [2007] EWCA Civ 1361

\textsuperscript{42} Sutradhar v NERC [2006] UKHL 33

concept of “assumption of responsibility” was again very much to the fore. At paragraph 29 of his Opinion Lord Hope said this

“...I would also hold, as a general rule, that a duty to warn another person that he is at risk of loss, injury or damage as a result of the criminal act of a third party will arise only where a person who is said to be under that duty has by his words or conduct assumed responsibility for the safety of the person who is at risk”

[my emphasis]

At paragraph 40, Lord Scott put it thus

“The requisite additional feature that transforms what would otherwise be a mere omission, a breach at most of a moral obligation, into a breach of a legal duty to take reasonable steps to safeguard, or to try to safeguard, the person in question from harm or injury may take a variety of forms. Sometimes the additional feature may be found in the manner in which the victim came to be at risk of harm or injury. If a defendant has played some causative part in the train of events that led to the risk of injury, a duty to take reasonable steps to avert or lessen the risk may arise. Sometimes the additional feature may be found in the relationship between the victim and the defendant: (e.g employee/employer or child/parent) or in the relationship between the defendant and the place where the risk arises (e.g a fire on the defendant’s land as in Goldman v Hargrave\(^{45}\)). Sometimes the additional feature may be found in the assumption of responsibility\(^{46}\) by the defendant for the person at risk of injury (see Smith v Littlewoods\(^{47}\)). In each case where particular

\(^{44}\) A fortiori, as a lawyer might say, a duty to take any more active steps

\(^{45}\) [1967] 1 AC 645

\(^{46}\) See also Lord Scott’s reference (at paragraphs 43, 44) to the South African case of Silva Fishing v Maweza, a case which again depended on assumption of responsibility

\(^{47}\) [1967] 1 AC 645

\(^{47}\) [1987] AC 241 – per Lord Goff at p 272
circumstances are relied on as constituting the requisite additional feature....the question for the court will be whether the circumstances were indeed sufficient for that purpose or whether the case remains one of mere omission”.

And at paragraph 82, dealing with familiar authorities including *Home Office v Dorset Yacht* 48, Lord Rodger put the test in similar terms:

“...Similarly, if A specifically creates a risk of injury...he may be liable for the resulting damage....Similarly, A may be liable if he assumes specific responsibility for B’s safety but carelessly then fails to protect B..”

**Regulators undertaking responsibility**

Those who exercise some form of regulatory control in the context of laying down and enforcing rules or guidelines designed to control the activities of those under their authority can more readily be held to owe a duty of care than those who merely fail to exercise a power. The key reasons for this distinction are those which we have already identified. Considerations of foreseeability and proximity (which may well be demonstrated by the control that the regulator exercises over the matter in question) and reasonableness/policy will again be the key considerations.

As we have seen already, assumption of responsibility will be one important consideration helping to illuminate the particular principle in issue. That process will involve identifying the actual responsibility that has been assumed by the regulator and whether the person affected is likely to have relied on that regulator to apply the regulatory regime carefully. But in all these cases, whether or not a duty of care can be made out will again depend very much on the facts.

In some situations, the answer seems clear – at least with hindsight. For example, Michael Watson succeeded in his action against the British Boxing Board of Control 49 because the BB

48 [1970] AC 1004
of C entirely controlled the provision of medical services at the fight and Mr Watson relied on that assumption of responsibility by the Board and expected them to do so to an appropriate standard. It was the same, in effect, in *Perrett v Collins*\(^{50}\) so that the Claimant who was injured in an aircraft accident succeeded in an action against one of the inspectors of the Popular Flying Association who had certified that the aircraft was airworthy.

In the *Perrett* case, the Court of Appeal reviewed many of the cases showing the development of the common law duty of care, some of which have also appeared in this paper. Buxton LJ rejected the argument that the *Marc Rich v Bishop Rock Marine Co.*\(^{51}\) was of much help in personal injury cases. Instead, he found that the necessary ingredients for establishing a duty of care all existed which, with hindsight, seems hardly surprising: after all, a claimant might be expected to know that all aircraft require some form of airworthiness certificates and to rely upon the person providing such certification to have done his or her job properly.

Similarly, in *Watson*, the boxer was entitled to expect that the BB of C, which regulated the contest and provided the medical facilities at ringside, would provide facilities that were of an appropriate standard. After all, the Board required that the bout be conducted according to its rules and, as Lord Phillips MR pointed out\(^{52}\), those engaged in the bout relied on the Board to provide appropriate medical supervision. So, at paragraph 43 of his judgment, the Master of the Rolls identified the “special features” of the case in these words

> “The principles alleged to give rise to a duty of care in this case are those of assumption of responsibility and reliance”

He went on\(^{53}\) to explain why those elements were present and decisive in that particular case.

\(^{49}\) [2001] 2 WLR 1256.

\(^{50}\) [1998] 2 Lloyds Rep 255.

\(^{51}\) [1996] AC 211.

\(^{52}\) At paragraph 33 of his judgment

\(^{53}\) See particularly paragraph 87
The same general principle also applies to activities such as motor sports – as can be seen in *Wattleworth v Goodwood*[^54] where Davis J held that the Goodwood Road Racing Company and the Sports National Licensing Body both owed a duty of care to the competitors: the former was as regards all aspects of track safety, in which respect it was also entitled to rely on outside advice: the latter was owed in respect of the advice given as to necessary safety features and arrangements for the course. Here too the licensing body’s assumption of responsibility was the key to the existence of a duty of care. Competitors will have expected that organisers would take advice and run a proper event. Only on that assumption will they have entered and competed.

There are other cases in which it has been held at least arguable that the regulator owed some such duty. In *HSE v Thames Trains*[^55], for example, the HSE exercised a regulatory, supervisory and licensing role. But although it was only an organisation which monitored the safety standards of others (particularly, Railtrack) and it was suggested that there might not be a relationship of sufficient proximity to the travelling public to justify the imposition of such a duty[^56], the Judge held that the contrary was arguable.

Equally, some cases against regulators or quasi-regulators have not succeeded. One example would be *Yuen Kun You v AG of Hong Kong*[^57].

In summary, in relation to this category, I suggest that the key considerations of proximity and policy are usually defined by the ingredients of assumption of responsibility/control and, of course, reliance by the victim: but it must be emphasised that no single test can be articulated to provide the answer in all differing factual situations. We can only hope to identify the relevant components for what is, so often, a pragmatic decision.


[^56]: It may be counted somewhat unfortunate that the decision in *Perrett*, which may be thought the most valuable on the duty – if any – of a regulator was apparently only introduced into the argument after the Judge had completed the first draft of his judgment – see paragraph 89. The Judge found that the case (and two articles) “fortified” his decision that the claims should not be struck out.

[^57]: (1988) AC 175
**Sporting Activities**

In the case of accidents in a sporting context\(^58\) the debate is more often about the standard of care as opposed to whether there was any kind of duty in the first place.

It may seem trite to state that a duty of care will be owed by the organiser both to competitors and spectators and by the competitors to each other. But the issue has not always been that simple.

Two of the rugby cases, *Vowles* and *Smoldon* illustrate the issues well. The only real arguments against the imposition of a duty of care on a referee whose job it is to apply rules that exist not just for the proper regulation of the game but also in the interests of players’ safety are arguments of policy of policy. In the *Caparo* sense, then, the issue is not foreseeability or proximity but of fairness and reasonableness. And it is clear that the assumption of responsibility (by the referee) and reliance (by the player) upon the referee to discharge that duty were key to the Claimants’ success in their appeals.

Perhaps, with hindsight, the duty of care imposed on the referee by the Court of Appeal in *Vowles v Evans*\(^59\) may seem less controversial now than it may have done to some at the time. In reality – as had been the defendants’ approach in *Smoldon v Whitworth*\(^60\) - it may seem to us now that the defendant’s real argument should always have been about standard as opposed to duty of care. And that standard will not be unduly onerous, as was clear from the Court of Appeal’s decision in that earlier case. But although the defendants in *Smoldon* had conceded that they owed a (limited) duty of care, any such duty was denied in *Vowles*, the defendants’ argument being founded largely on policy. The argument was firmly rejected.

Lord Phillips M.R put it this way\(^61\)

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\(^{58}\) On which subject I commend the excellent article by Bruce Gardiner of 2 Temple Gardens in Issue 1 of JPIL 2008.

\(^{59}\) [2003] 1 WLR 1607.

\(^{60}\) [1997] ELR 249.

\(^{61}\) At paragraph 25 of his judgment in *Vowles*.
“Rugby football is an inherently dangerous sport. Some of the rules are designed to minimise the inherent dangers. Players are dependant for their safety on the due enforcement of the rules. The role of the referee is to enforce the rules. Where a referee undertakes to perform that role, it seems to us manifestly fair, just and reasonable that the players should be entitled to rely on the referee to exercise reasonable care in so doing....”

As I say, that is exactly the language of a duty which depends on assumption of responsibility and reliance.

The duties that attach to participants in sports are usually less controversial. There can be no question but that the person actively participating may well do something that creates an immediate risk of very serious injury. In such cases, the debate is usually not so much about whether the one owes any duty of care to the other but, rather, about what is the appropriate standard of care that is apt in the sport in context.

A good example of the Courts’ approach on the issue of standard in the sporting context is *Caldwell v McGuire*\(^{62}\). In that case, it was accepted that each jockey owed a duty of care to the other, but what was in issue was the standard of care in the particular circumstances of a sport in context. The appropriate standard of care was also the real issue in two of the football cases – *Condon v Basi*\(^ {63}\) and *Watson v Gray*\(^ {64}\) where the Court of Appeal held that the duty of care between players in competitive sports was always a duty to take reasonable care in the particular circumstances and that the standard of care was an objective one, albeit one varying according to the particular circumstances of the case which would include the degree of skill to be expected by one competitor to be shown by another.

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\(^{62}\) [2001] EWCA Civ 1054.

\(^{63}\) [1985] 1 WLR 866.

\(^{64}\) Times 26\(^{th}\) November 1998: see also Charlesworth at 2-77
By the same token, we may expect, according to the Courts, that ballroom dancers should
dance in such a way that “a reasonable person would (not) have said he was putting his
partner at risk”65.

Organisers

It cannot be doubted that those who actively undertake the organisation of events are likely to
be held to owe a legal duty of care – and this has frequently been recognised in the sporting
and social context alike, especially where the event is inherently dangerous66.

It is of fundamental importance to distinguish between those who organise events and
undertake some sort of supervision and those who are simply the occupiers of the premises
and purport to offer no supervision or instruction and cannot reasonably be taken to be doing
otherwise. Perry v Harris67 - the bouncy castle case – has to be seen in that context.

Given that a parent had undertaken to supervise those playing on the bouncy castle because
of the obvious dangers, it may seem unsurprising that the question of whether a duty of care
was owed was not in issue. Instead, the Court’s focus was on the standard of care. Decisions
on standard are always extremely fact sensitive and so Perry need not be taken as authority
for anything beyond the uncontroversial proposition than that the standard of care depends,
amongst other things, on the degree and extent of the danger in respect of which the duty is
owed.

It may be that policy considerations and a judicial distaste for the perceived compensation
culture played a part in determining the outcome of that case. Nevertheless, the ratio of the
case and the decisive factor (at least according to the Court of Appeal’s finding) as regards
the standard of care, is no more controversial than that the standard of care depends to a

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65 See Spry (sic) v Plowright, Times 14th March 1998.

66 See Bottomley v Todmorden (above) and Cole v Davis-Gilbert [2007] EWCA Civ 396 (the maypole case). See also
Charlesworth at 2-74

67 [2008] EWCA Civ 907. The 11 year old claimant was seriously injured playing on a bouncy castle at a birthday party
organised by the defendant.
considerable extent on the nature of the activity in question and, in particular, on the severity of injury that might ensue: since it was not reasonably foreseeable that any injury on the bouncy castle was likely to be serious, the standard of care required did not mean that children playing on the bouncy castle needed to be kept under constant surveillance.

Responsibility for contractors

Another example of the duty which attaches to the organiser of events arises where the occupier engages independent contractors. He will have a duty to take steps to ensure that they are competent which, in the case of Gwilliam v West Herts Hospital NHS Trust might, in certain circumstances, extend to ascertaining whether the independent contractor had satisfactory insurance in position (although, as Neuberger LJ observed in Naylor v Payling, Gwilliam is not an entirely straightforward case). But whatever may be the standard of care in the circumstances, there can be no question but that a duty is owed, probably both at common law and under the Occupiers Liability Act 1957.

Those who provide a facility and are also occupiers

It is possible to identify at least three different (though sometimes overlapping) categories of duty.

First, there is the duty that attaches to all occupiers in respect of the state of the premises which, as is apparent from the terms of the duty under the 1957 Act, has to be judged in the context of the purposes for which the visitor is there. Second, there are premises which

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68 Cf Anderson v Lyotier [2008] EWHC 2790 (QB) where Perry was distinguished on the basis that a collision with a tree carried an obvious risk of serious injury and the chance of such a collision was not too remote to be foreseeable

69 [2002] 3 WLR 1425. Bottomley, of course, provides further analysis of what may be expected of someone who organises an event on his land and invites in outside contractors (in that case, stunt operators who gave a pyrotechnic display)

70 [2004] EWCA Civ 560, at paragraph 37

71 See also Humphries v Fire Alarm Fabrication [2006] EWCA Civ dealing with the relationship between independent contractor and occupier. Bear in mind also, as can be seen in Bottomley that the 1957 Act only replaced the common law rules relating to occupancy duties and not those that are concerned with activity duties – see also Honeywill & Stein v Larkin (1934) 1 KB 191
cannot be regarded as unsafe but where there may be hidden dangers. Third, there are those premises on which activities are permitted (without being organised as such by the occupier) and which may themselves give rise to a danger.

Let us first consider the duty that attaches to the occupier of a house. It must be reasonably safe for the visitor to use in the light of “the purposes for which he is invited or permitted by the occupier to be there”\(^\text{72}\). As many recent authorities remind us\(^\text{73}\), both under the 1957 and 1984 Acts, that duty attaches to the “state of the premises” and does not impose any free-standing supervisory duty in relation to what goes on upon them.

It should, however, be borne in mind that as the occupier goes around his house, he may well owe a duty to his visitors quite apart from the duty as regards the state of the premises under the 1957 and the 1984 Act. If he were to carelessly shut the door upon somebody else’s finger or to lead his unwitting guests, persuaded to embark on a late night ramble, to fall into a pond the presence of which he had not previously mentioned, then he may be taken to have owed a duty of care and to have failed to discharge it. But in those cases the occupier owes a duty because he has done something positive (or arguably negative) so that the three \textit{Caparo} conditions are easily satisfied. Otherwise, an accident sustained by someone on his land, whether visitor or trespasser, will only be actionable under the 1957 or 1984 Act if it results in something wrong with the premises.

If it were apparent before, all of this was made crystal clear by the Court of Appeal in \textit{Donoghue v Folkestone Properties}\(^\text{74}\) and by the House of Lords in \textit{Tomlinson v Congleton Borough Council}\(^\text{75}\).

The starting point here is the wording of Section 2(2) of the 1957 Act which provides that the “\textit{common duty of care is a duty to take such care as is in all the circumstances of the case is}

\[^{72}\text{The words of s 2(2) of the 1957 Act}\]

\[^{73}\text{Tomlinson and Keown, to name but two. The reference in the 1984 Act (in section 1(3)) to “any danger due to the state of the premises or things done or omitted to be done on them” and the terms of the 1957 Act duty are directed to an occupier who allows activities t take place by one visitor which may harm another – see the example of the speedboat allowed amongst swimmers given by Lord Hoffmann at paragraph 29 of Tomlinson.}\]

\[^{74}[2003]\text{EWCA Civ 231.}\]

\[^{75}[2004]\text{1 AC 46.}\]
reasonable to see that the visitor will be reasonably safe in using the premises for the purpose for which he is invited or permitted by the occupier to be there”. But as Lord Hoffmann explained in Tomlinson, the duties under the 1957 and 1984 Acts arise only where it is the “state of the premises” which has given rise to the risk of injury.

That was exactly the approach of Lord Phillips MR in Donoghue. There are, as he observed at paragraph 35 of his judgment,

“…some features of land that are not inherently dangerous which may tempt a person on the land to indulge in an activity which carries a risk of injury. Such activities include cliff-climbing, mountaineering, ski-ing by way of example. It does not seem to me that a person carrying on such an activity can ascribe to the ‘state of the premises’ an injury sustained as a result of a mishap in the course of carrying on the activity – provided of course that the mishap is not caused by an unusual or latent feature of the landscape”

Concentration on the duty arising because of the state of the premises, as opposed to having some other basis, explains the Court of Appeal’s approach in Keown v Coventry Healthcare and at the very least casts some doubt on the decision of Morison J in Young v Kent County Council.

In the Keown case, the 11 year old Claimant was playing on a fire escape in the accommodation block of a hospital and fell. His claim failed because that fall had nothing to do with the state of the premises and so the 1984 Act duty did not bite, notwithstanding that the occupier knew that children did play in the grounds. In Young, a similar situation arose but Morison J at first instance found for the 12 year old Claimant who had climbed onto a roof and jumped on a skylight. It was brittle and he fell through. As Longmore LJ explained in Keown, the decision in Young can only be justified on the basis that the Judge found that the roof with a brittle skylight was inherently dangerous and so made the premises unsafe.

77 [2005] EWHC 1342 (QB)
78 Or Morison J was simply wrong, as Lewison J said in Keown. However, Lewison J’s attempt to let down Morison J gently on the basis that the Defendant in Young had not argued the “state of the premises” point was generous (at least to his
As regards occupiers, Lord Hoffmann made it clear in *Tomlinson* that it would be:

“Extremely rare for an occupier of land to be under a duty to prevent people from taking risks which are inherent in the activities they freely choose to undertake upon the land. If people want to climb mountains, go hang gliding or swim or dive in ponds or lakes, that is their affair.”

The second category arises where there is a hidden danger. There can be no doubt that the occupier has a duty to warn of such a danger, whether as a consequence of a common law obligation or because, in relation to an Occupiers Liability Act duty, the state of such premises could not otherwise be regarded as safe. In *Poppleton*, for example, it was argued that the very depth of the safety mat, well in excess of industry standards, constituted a “hidden danger” in the sense that someone inclined to jump down or fall from several feet above it might not have appreciated that he or she might still suffer injury – especially if they fell awkwardly as Mr Poppleton did. Where there is some genuine hidden danger, it will usually suffice that the danger is properly marked or the visitor clearly advised as to its presence.

The Court of Appeal firmly rejected the idea that there might be some duty to warn of an obvious or self-evident danger but that is not to say that the existence of a real hidden danger might not give rise to such a duty. Even if it could be argued that it did not relate to the state of the premises or the “activity duty” under section 2(2) of the 1957 Act, such a duty would probably arise anyway from the implicit assumption that if one is permitted to go onto someone’s land one may reasonably be expected to be warned of a risk of injury that one might not ordinarily have expected to see for oneself. In that case, all three *Caparo* conditions should sensibly be seen as satisfied.

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79 See paragraph 45 of his Opinion.

80 Which it probably could, in this author’s view.
A third category concerns the kind of case where the occupier provides a facility but does not provide supervision or instruction (at least unless asked to do so). We have already seen that, in such a case, the 1957 Act obliges the occupier to provide premises that are reasonably safe for whatever activities are allowed to be carried out upon them. But let us assume the state of the premises is beyond criticism. Does that negate the possibility that any other duty is owed?

The answer – at least in my opinion – is that, in some cases, there may be a duty because of an implicit assumption of responsibility by the occupier and implicit reliance by the visitor. Let us take two examples: on the one hand, a dry ski slope, properly laid out; on the other, a commercial swimming pool with the depths properly marked: what supervisory duty, if any, might attach to those who run such places?

Again, the answer will be fact sensitive. To discharge his section 2(2) duty, the ski slope provider will have to take care not to allow complete novices entirely free access because of the potential harm to other visitors. But that is a different question from whether there would be any duty owed to the ambitious novice ski-ing alone – if, for example, he were the only visitor on the day in question and, as a consenting adult, asked for no help, was given none and crashed because he was not competent to descend any part of the slope. What if the swimming pool had no lifeguards on duty? What about a skateboard park – or an area, indoor or out, in which the public were permitted to go rock climbing? Does some supervisory responsibility attach simply because the facility has been provided? Does it make any difference if a fee has been paid?

In my view, it is probable that no common law duty would ordinarily arise in those cases. If a court found otherwise, it would necessarily be on the basis of an implicit assumption of responsibility and reliance, perhaps arising out of standard industry practice: the novice ski-er who expected to be told the basics (a difficult finding) or the swimmer who assumed – in a professionally run pool – that there would be lifeguards on duty because he understood that to be the norm (less controversial, perhaps). So the answer will depend on what the user would ordinarily be entitled to expect and what he expected in fact.

Certainly, if the occupier actually provides supervision, then that supervision must be done competently, not least because those who go on the premises in the knowledge that there is
supervision may be expected to rely upon the supervision provided and to that extent the supervisors will be taken to have assumed a responsibility. That explains why in *Baldacchino v West Wittering Estates*[^81], the owners/occupiers of the West Wittering Beach were not responsible for the serious injuries suffered by the 14 year old Claimant who suffered a serious spinal injury when diving off the marker at the end of a groyne extending from the beach. On the other hand, if the life guards who were on duty had not adequately supervised those on the beach, they might have been liable if they were held to have owed a duty on the basis that they had assumed responsibility to do a lifeguard’s job properly and those using the beach had relied on them to do. That would be no different from the duty that might be owed by the lifeguards at a swimming pool who would be liable if they failed to take reasonable steps to observe and assist someone who got into difficulty.

Otherwise, I would suggest that the mere provision of a facility with no hidden dangers does not of itself create the existence of a wider duty. It is for that reason that the Claimant failed when *Poppleton* got to the Court of Appeal. Again, it was a case in which the existence or otherwise of the duty depended on the facts.

The uncontroverted facts were that Gary Poppleton, then aged 25, and a group of 4 friends each paid £3 to use the indoor climbing (“bouldering”) room at the Peter Ashley Centre on Portsdown Hill. This was a specially constructed facility in an old ammunition store within Fort Purbrook[^82]. There was nothing wrong with its design or construction and the floor was covered with a deep (12 to 16 inch) safety mat, the obvious purpose of which was to provide protection against impact injuries in the event that a climber fell. The walls themselves were, in line with industry standards, some 16 feet high.

His accident happened when, from a position about two thirds of the way up the back wall, he tried to jump horizontally across towards a bar some 7 feet 6 inches away and just under 12 feet above the matting. It was obviously very challenging but not a standard indoor or

[^81]: Unreported, QBD, December 2008

[^82]: One of “Palmerston’s Follies”, a group of forts and structures built around the coast in the 1860s to withstand the non-existent threat of a French invasion. Similar concerns about the strength of the French navy prompted the building of HMS Warrior as an answer to the French ship, La Gloire. These fixed defences were the most costly defensive system ever created in Britain in peacetime.
outdoor climbing manoeuvre. Unfortunately, but unsurprisingly, he missed his handhold. Tragically, he fell awkwardly onto the mat below, breaking his neck, as a consequence of which he is now tetraplegic.

The Claimant and his companions (two of whom were experienced climbers) had been there 3 or 4 times previously. The Claimant neither sought nor was he offered supervision or instruction. However, the signing-in and induction procedures were not up to the standards recommended for such facilities within the industry (particularly the British Mountaineering Council) nor were the Rules of the Centre (which included the injunction “Do not jump down from the walls”) given sufficient prominence. Particularly, and also contrary to those recommendations, the Centre did not draw to the Claimant’s attention the recognised risk that the provision of a safety mat might create a false sense of security, encouraging someone to take a chance that one might not if the floor had been made of concrete.

The *Poppleton* decision was consistent with an earlier decision of the Court of Appeal, *Fowles v Bedford CC*[^83] where, again, assumption of responsibility was a key question. That case involved a 21 year old who, having been taught gymnastics by the Defendant, was allowed to use the facilities unsupervised and performed a dangerous manoeuvre with a safety mat which he had put in the wrong place. His claim succeeded[^84], but only because the earlier relationship of teacher[^85] and pupil created the necessary degree of proximity. Indeed, Millett LJ (as he then was) rejected the argument that sufficient proximity was established just because of the relationship of occupier to visitor and / or because they allowed him to use the equipment. At pp 19 – 23 of the judgment, he said the Defendants:

> “... were under no duty as occupiers to take steps to prevent their visitors harming themselves by their own foolish conduct while on the premises. As for the mat, it was not inherently dangerous nor was it an allurement; and Mr Fowles was not a child...”

[^83]: [1995] PIQR P380: Interestingly, perhaps ironically, the Defendant’s solicitor on that appeal in due course became a circuit judge and deputy high court judge – in which capacity he ruled in Gary Poppleton’s favour at first instance!

[^84]: Assessing contributory negligence, the Judge found the claimant was two thirds to blame. The CA upheld this apportionment although Millett LJ commented that it was “if anything, too favourable to Mr Fowles”.

[^85]: The teacher was in fact not properly qualified to have taught the Claimant as he did.
However, by specifically teaching the Claimant how to perform the forward somersault

... the defendants voluntarily assumed a duty to teach him properly and to make him aware of the dangers. They failed to do either: and then compounded their failure by providing unrestricted access to the crash mat, thereby encouraging him to use it to practise what he had been taught, without warning him that he must on no account do so without supervision

The organiser, like the occupier, will undoubtedly owe some general duties. If equipment is provided, it needs to be reasonably safe otherwise it will constitute a defect in “state of the premises” or will simply be actionable on a common law basis. If staff are provided, they too must be competent or otherwise the organisers will be vicariously liable for their negligence.

This, of course, provides a salutary lesson in the dangers facing those who help to run cricket clubs and provide cricket coaches or gymnasium clubs such as in the case of Harcourt v Griffin. The case also reminds us, incidentally, of the need for sufficient levels of indemnity insurance cover for all those who, whether out of the goodness of their heart or for reward, are responsible for organising such activities or providing sporting facilities.

In all those cases, it may be apparent that the party held to owe and be in breach of a duty of care had indeed assumed responsibility to the other. It was the absence of such an assumption of responsibility which meant that Gary Poppleton’s claim failed, one of a number of recent cases which tend to suggest that the courts are not keen to extend duties of care to organisations or bodies which provide a facility but do not purport to offer active supervision or instruction.

Another such case is Evans v Kosmar in which a holidaymaker, aged nearly 18, failed in his claim for damages having dived into the shallow end of a swimming pool in the early hours

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86 Reported only on the question of the Defendant’s obligation to disclose the full nature and extent of insurance cover at [2007] EWHC 1500 (QB).

87 [2007] EWCA Civ 1003
of the morning. The Court of Appeal accepted that a duty of care in contract arose to the effect that the tour operator would take care in the provision of facilities and services at the hotel complex in question. But that duty did not extend\(^{88}\) to protecting the claimant against an obvious risk, a danger of which he was or should have been well aware.

**Emphasis on free will**

In both *Tomlinson* and in *Evans v Kosmar*, the House of Lords and Court of Appeal have been at pains to point out that it is a fundamental principle that people should take responsibility for their own selves and that the imposition of a duty of care on others may constitute an erosion of that important principle. This is not a novel concept and may be seen as the obverse of the notion of assumption of responsibility. Both these authorities enable us to see how the common sense of that proposition is translated into jurisprudence.

For the purposes of this paper, it may suffice to begin with *Ratcliff v McConnell*\(^ {89}\) in which a student gained access to a swimming pool at night by climbing over a locked door before suffering severe injuries when diving into the shallow end. The Court of Appeal held that he was owed no duty under the Occupiers Liability Act 1984 or otherwise: the claimant was aware of the risk he took and voluntarily accepted it.

This same concept of personal responsibility is also an important feature of the Court of Appeal’s rejection of the idea that a duty was owed to Mr Donoghue by the Folkestone Harbour authorities and of the approach of the House of Lords in *Tomlinson*.

At paragraph 26 of his opinion, Lord Hoffmann observed that “...the only risk arose out of what he chose to do and not out of the state of the premises”. At paragraphs 44-50, he returned to the importance of “free will” recognising the importance of the proposition that “people should accept responsibility for the risks they choose to run” in these terms

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\(^{88}\) See paragraph 41 of the judgment of Richards LJ

\(^{89}\) [1999] 1 WLR 670
“I think it will be extremely rare for an occupier of land to be under a duty to prevent people taking risks which are inherent in the activities that freely choose to undertake upon the land”

Those same ‘free will’ arguments appear again as an important theme in Evans v Kosmar. At paragraph 39 of his judgment, Richards LJ said

“...the core of the reasoning in Tomlinson, as in earlier cases such as Ratcliff v McConnell, was that people should accept responsibility for the risks they choose to run and that there should be no duty to protect them against obvious risks (subject to Lord Hoffmann’s qualification as to cases where there is no genuine or informed choice or there is some lack of capacity).”

The Compensation Act 2006 and judicial attitudes to the standard of care

Whilst this article has concentrated on whether a duty of care is owed in various circumstances, we have seen that there can be considerable overlap between the policy considerations that illuminate issues as to the standard of care and those that may explain why a duty is or is not owed before any question of standard arises.

The general tenor of recent judicial attitudes to which I have already referred may be thought to reflect the spirit of Section 1 of the Compensation Act 2006, even though the statute itself is directly concerned not so much with identifying when a duty of care is owed as the standard of care if it is.

For a judicial statement of the policy considerations underpinning this issue, I quote Lord Hobhouse (at paragraph 81 of Tomlinson)

“In truth, the arguments for the claimant have involved an attack upon the liberties of the citizen which should not be countenanced. They attack the liberty of the individual to engage in dangerous, but otherwise harmless, pastimes at his own risk and the liberty of citizens as a whole to enjoy the
variety and quality of the landscape of this country. The pursuit of an unrestrained culture of blame and compensation has many evil consequences and one is certainly the interference with the liberty of the citizen. The discussion of social utility in the Illinois Supreme Court\textsuperscript{90} is to the same effect”.

Consistently with that theme, Section 1 of the 2006 Act provides that:

“A court considering a claim in negligence or breach of statutory duty may, in determining whether the Defendant should have taken particular steps to meet a standard of care (whether by taking precautions against a risk or otherwise) have regard to whether a requirement to take those steps might

(a) Prevent a desirable activity from being undertaken at all, to a particular extent or in a particular way, or

(b) Discourage persons from undertaking functions in connection with a desirable activity.”

It should be noted that this statutory provision, introduced as a response to the perceived evil of a compensation culture which may be more illusory than real, pre-supposes that the Defendant did indeed owe a duty of care in the first place. The Explanatory Notes at paragraph 8 expressly recognise that it is directed not to the question of whether there is a duty of care but whether there is a breach of that duty. Paragraph 9 states that:

“The question whether there has been a breach of a duty of care involves two elements: how much care is required to be taken (the standard of care) and whether that care has been taken.”

\textsuperscript{90} In \textit{Bucheleres v Chicago Park District} 171 Ill 2d 435
It is therefore concerned with those people who actively engage in socially beneficial activities (running sports clubs, for example, or organising activities on the village green, of which an example is *Cole v Davis-Gilbert* 91). In such cases, the assumption is that the duty already exists and so, according to paragraph 10 of the Explanatory Notes, the provision “is intended to contribute to improving awareness of this aspect of the law 92 (and) providing reassurance to the people and organisations who are concerned about possible litigation (so as to ensure) that normal activities are not prevented because of the fear of litigation and excessively risk-averse behaviour”.

**Conclusion**

This paper has sought to concentrate on identifying two of the key components for a duty of care in tort, namely, the assumption of responsibility by the alleged tortfeasor and the reliance of the victim upon that other. I have tried to tie in the more important cases in which those elements are directly or indirectly emphasised. Whether that exercise has proved valuable is something for others to judge but whether it provides an answer to the real case study with which I began this talk is another question entirely.

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91 [2007] EWCA Civ 396. Mrs Cole tripped in a hole which had previously held a maypole. Her claim was advanced as common law negligence rather than under the Occupiers’ Liability Act – for reasons which, in the words of Scott Baker LJ, were “not entirely clear”. There was no issue about whether a duty of care at common law was owed to the Claimant and the Court of Appeal proceeded on the basis that a common law duty was no more onerous than that under the 1957 Act. However, the Court of Appeal found that Mrs Cole’s claim must fail because there was no evidence that the Defendants knew or had reasonable grounds to believe that the maypole hole was dangerous in the sense of being exposed. As Scott Baker LJ ruled (at paragraph 48), “…accidents happen… if the law were to set a higher standard of care than that which is reasonable in cases such as the present, the consequences would quickly become inhibited”.

92 That is, the concept of reasonable care which will vary according to the circumstances.