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Preface

The rapid developments of science and technology aim to improve our everyday lives, but also constitute a constant source of new risks. At the same time, the economic crisis has risen as a threat of global proportions, adversely affecting social and business activities. All these new applications and problems constitute sources of risk that need to be handled with care and accompanied by appropriate measures to prevent damage to individuals and legal entities. In case a risk is realized and loss is incurred, the universal concept of justice dictates that it should be restituted. Claims due to careless conduct and wrongdoing are usually resolved through remedies available in tort law – more specifically, claims for tortious negligence, which is one of the most complex and fast-developing areas of law in most jurisdictions.

Almost all legal systems include provisions regarding tortious liability for unintentional harm and allow those who suffered some kind of loss to seek compensation from the tortfeasor. The relevant methodologies present many variations, the most significant being the difference between systems based on one or more general clauses laying down the requirements for tort liability and those that recognize various separate categories of torts. The former – among which the Greek law of tort – are regarded as more flexible thus easily adaptable to novel tortious liability situations. A representative example of the latter is the English common law, which includes distinct legally recognized civil wrongs or nominate torts, and is designed to safeguard the predictability of court rulings and promote safety in legally relevant human behaviour[1]. Undoubtedly, a common objective of all tort law systems is to achieve an effective combination of both flexibility of their legal rules and stability of court decisions. Consequently, legal scholars and practitioners from either of the above main tort systems could benefit from an acquaintance with the reasoning and basic principles of the other, which could potentially offer them a new perspective and complement their legal education.

The aim of this study is thus twofold: on one hand to make a succinct presentation of the basic elements of tortious liability for negligent conduct in English and Greek law, and on the other to draw certain conclusions which could hopefully contribute to a cross-jurisdictional dialogue. The focus will be on the notions of duty of care and breach of duty in the English tort

1 Georgiadis, Apostolos, *Law of Obligations-General Part* (Athens: P. N. Sakkoulas, 2015) p.647-8.

of negligence and the requirements of unlawfulness and fault in the form of negligence in the tort law provisions of the Greek Civil Code. The condition of damage is often absorbed into one of the other requirements. Therefore, it will be analyzed in connection with the notion of duty of care in the English common law and in the chapter on tort categories created by the Greek jurisprudence. Finally, causation is not included in the present study, as it presents more similarities than differences in these two legal systems and does not offer sufficient material for a comparative study.

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Summary

The focus of this paper is on the notions of duty of care and breach of duty of the English tort of negligence and unlawful behaviour and fault as requirements of tortious liability in the general clause of art. 914 of the Greek Civil Code. In the context of Greek tort law, only fault in the form of negligence as described in art. 330 subpar. 2 GCC is considered. After a presentation of the way these legal concepts function in the two legal systems under examination, one brief chapter gives the perspective of two significant legal works on the European harmonization of tort law. Finally, a series of comparative observations are set forth in an effort to highlight the key differences but also overlapping approaches in the way English and Greek courts resolve negligence conflicts.

I. Introduction

The law of torts of the English common law has been evolving in a piecemeal way, case by case, since Norman times. It comprises a series of separate torts, each governed by its own set of rules and principles and protecting different legal interests. In the fourteenth century, two distinct forms of action were recognized: "trespass" and "trespass on the case" or simply "case". The first was a remedy against any direct harm to the body, land or property inflicted through the use of force, while the latter was aimed at the restitution of damage resulting from a wrongful act which was neither direct nor violent. Today, torts which are actionable *per se*, such as trespass to the person (battery, assault, false imprisonment) or trespass to land, descend from the action of trespass; torts which require the claimant to prove that he/she incurred damage, namely nuisance and negligence, originate in case[2].

However, the general categorization of modern torts is not owed – at least not entirely – to their provenience. In the late 19th and early 20th century, legal scholars from England and the U.S.A. engaged in the ambitious project of rationalizing the various torts that had developed haphazardly. Their goal was to organize the common law based on principles and methods elaborated by jurists from civil law legal systems. Within this framework, they grouped together torts according to the type of legal interests included in their protective scope as well as according to whether they required intentional or negligent behaviour or strict liability. Until then, though, English law was based on writs which did not correspond to a list of interests worthy of protection but had other unifying characteristics, such as the manner in which an injury was inflicted. Furthermore, the notions of intent, negligence and strict liability were not clearly distinguished. Soon it became evident that this reform could not be fully conciliated with the English legal tradition. The core differences between the tort system of the common law and concepts deriving from continental jurisdictions were so overwhelming, that this effort was never brought to completion. The result was a series of anomalies which were never seamlessly incorporated into the common law[3].

The Greek Civil Code does not share the common law's vast historical background. Its official version was put into force on March 15th 1940, after years of scientific research and

2 Turner, Chris, and Sue Hodge, *Unlocking Torts* (London: Hodder & Stoughton, 2008) p.1.
3 Gordley, James, *Foundations of Private Law* (Oxford: Oxford University Press, 2007) p.159.

elaboration by a group of prominent Greek legal scholars. It is interesting to note that its enactment was an initiative of the dictatorship of Ioannis Metaxas, whose advisors saw it as an opportunity to reap the rewards of this significant scientific work – which had already been put into motion before their coming into power – in order to efficiently promote the regime's propaganda[4]. The Greek private law was modeled after the codifications of the European civil law systems and its general clause on tort liability, art. 914 GCC, is based on art. 41 of the Swiss Law of Obligations. The requirements for tortious liability are set out in the above general clause, while more detailed provisions on specific forms of wrongful behaviour are included in other articles of the same chapter ("wrongful acts"). More types of unlawful conduct are described and regulated in special legislation, which is related mostly to strict liability claims and applies jointly with the tort provisions of the GCC. Art. 914 GCC contains abstract legal notions such as unlawful behaviour and fault, which jurists need to interpret in order to give them concrete content so as to apply them to particular cases[5].

From all the above, a fundamental difference in direction between the two tort systems can be discerned. The English common law prioritizes the predictability of court decisions as a means of promoting legal clarity and safety. On the other hand, the Greek Civil Code aims primarily at being adaptable to novel circumstances through the flexibility of its general clauses and abstract concepts.

In the English law of torts, negligence is not a mere degree of culpability but a distinct tort in its own right. Its indispensable ingredients are duty of care, breach of duty, causation and damage. Contrary to other torts which are linked to specific legal rights – some of them punishing a particular type of behaviour *per se* – the tort of negligence aims to protect a vast variety of interests, its main focus being on the defendant's conduct. Therefore, its range is extremely wide and may often concur not only with narrower nominate torts but also with liability arising from contract. The problem of concurrence of tort and contract as well as the fear of indeterminate liability are the main reasons why the English courts have elaborated an intricate set of rules delimiting the scope of the tort of negligence[6]. Negligence was officially

4 Geordiadis, Apostolos*, Law and legal science during the dictatorship of the 4th of August* (Chronika Idiotikou Dikaiou, IB/2012) p.8-9.

5 Georgiadis, Apostolos, *Law of Obligations-General Part* (Athens: P. N. Sakkoulas, 2015) p.654.

6 *Clerk & Lindsell on Torts* (London: Sweet & Maxwell, 2006) par. 8-01 to 8-4.

distinguished as a separate tort by the House of Lords in 1932. Since then, it has been growing exponentially and is considered of central importance in the law of torts. Indeed, the majority of tort claims today are based on negligence, as it is deemed the best means to resolve conflicts arising from new applications of science and technology which constitute sources of risk[7].

In the context of Greek tort law, negligence is defined in art. 330 subpar. 2 GCC as the "diligence required in social activities". It is a form of fault, which in turn is one of the four essential elements of tort liability, the other three being unlawful behaviour, damage and a causal link between the last two. Although art. 330 provides an objective criterion which often overlaps with the precondition of unlawful conduct, the prevailing view in Greek jurisprudence regards negligence as a distinct requirement of tortious liability which is of subjective nature.

With respect to the content of the term "negligence" in the English and Greek legal systems, one difference should be pointed out for purposes of clarity. In Greek tort law, negligence can be of two types: "unconscious" and "conscious". The latter is often confused with *dolus eventualis* (as opposed to *dolus directus*), as in both forms of fault the wrongdoer is able to predict the injurious result. What sets them apart, is the element of acceptance of predicted damage, which must be present for the fulfillment of *dolus eventualis* but absent in conscious negligence, where the wrongdoer does not accept the harmful result but hopes or wishes to avoid it[8]. These two legal terms are both translated in English as "recklessness". In common law, recklessness involves taking a risk with someone's interests (bodily integrity, property etc.), in the sense of putting them to one's purposes. Injury features in the defendant's intention because he/she was able to foresee it. Therefore, recklessness is irrelevant in the context of the tort of negligence, where the defendant causes harm inadvertently, because he/she was not able to foresee it, despite the fact that, by objective standards, damage was foreseeable[9]. Hence, in the English common law, there is only one type of negligence: ordinary negligence, which is assessed on the basis of objective criteria. By contrast, the Greek tort law distinguishes two types: "conscious" and "unconscious" negligence, for the determination of which, special individual characteristics of the wrongdoer are taken into consideration.

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7 Harpwood, Vivienne, *Modern Tort Law* (London and New York: Routledge-Cavendish, 2008) p.8.

8 Karakostas, Ioannis, *The Law of Tort-Articles 914-938 GCC* (Athens: Nomiki Vivliothiki, 2014) p.129-30.

9 Beever, Allan, *A Theory of Tort Liability* (Oxford and Portland, Oregon: Hart Publishing, 2016) p.179-80.

In this study, only two of the elements of tort liability from each legal system are chosen for comparison: duty of care and breach of duty from the tort of negligence and unlawful behaviour and fault in the form of negligence from art. 914 GCC. The notion of damage is more controversial in English law, thus will be examined in relation to duty of care which is often dependent on the type of loss incurred. This is because common law does not treat all kinds of damage in the same way. Conversely, Greek tort law does not distinguish between various types of harm so no special mention will be made to this tortious precondition. With respect to causation, it is noted that both tort systems approach it in more or less the same way. The prevailing view in Greek jurisprudence supports the theory of *causa adequata*, often combined with the theory of *conditio sine qua non*. The English common law distinguishes between factual and legal causation. The first, known as the "but-for test", coincides with *causa adequata*, whereas the second is based on foreseeability of harm and is similar to *conditio sine qua non*[10].

10 Karakostas, Ioannis, *The Law of Tort-Articles 914-938 GCC* (Athens: Nomiki Vivliothiki, 2014) p.185.

II. The elements of the tort of negligence in English law

A successful negligence claim under common law needs to fulfill four criteria: duty of care, breach of duty, damage and a causal link between the damage incurred and the defendant's behaviour. A better way to comprehend these elements of the English tort of negligence is to formulate them as questions: does the law attach liability to carelessness in this situation? Did the defendant fail to measure up to the standard of care imposed by the law? Is the harm caused by the negligent conduct legally interesting? Is the defendant responsible in the eye of the law for the harm suffered by the claimant? If all the above are answered affirmatively, the defendant is liable to compensate the claimant for his/her loss[11].

1. Duty of care

In English common law the main mission of the concept of duty of care is to determine the scope of the tort of negligence by categorizing the multitude of different criteria used by the courts. These include the restitution of different kinds of damage, the protection of different classes of claimants or even the status of certain categories of defendants said to enjoy immunity from negligence liability. By contrast, civil law systems employ the legal notions of unlawfulness, fault, causation and damage, often interchangeably, to delimit the range of tort liability[12].

In the tort of negligence, the term "duty of care" is mainly used to delineate a notional duty owed to a general group of claimants or with respect to certain kinds of damage. If a notional duty does not exist, there are no grounds to look for a factual one in a particular case[13]. A procedural mechanism known as a "striking-out application", which deals with preliminary issues of law, helps keep obviously baseless claims from proceeding to a full trial if the court reaches the conclusion that, assuming the claimant's allegations were true, a notional duty of care would not arise[14]. In negligence cases defendants often resort to this option when the alleged duty of care does not clearly fall under an established category[15].

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11 Deakin, Simon, Angus Johnston, and Basil Markesinis. *Markesinis and Deakin's Tort Law* (Oxford: Clarendon Press, 2008) p.113-4.

12 Deakin p.116-7.

13 *Clerk & Lindsell on Torts* (London: Sweet & Maxwell, 2006) par. 8-06.

14 Harpwood, Vivienne, *Modern Tort Law* (London and New York: Routledge-Cavendish, 2008) p.27.

15 Elliott, Catherine, and Frances Quinn, *Tort Law* (Essex: Pearson Education Limited, 2005) p.18.

1.1 From the "neighbour principle" to the two-part test in *Anns*

The origin of the tort of negligence lies in the decision of the House of Lords in *Donoghue v Stevenson*[16]. Until then, the courts accepted liability for negligent infliction of damage only in a small number of special cases which lacked general principles that could be unified and classified under one separate doctrine of negligence[17].

According to the facts of the case, Mrs. Donoghue went to a café with a friend who bought for her a bottle of ginger beer. The bottle was opaque so the claimant was unable to see its contents. She poured half of the ginger beer in a glass and drank it. While pouring the rest of it, she saw that the bottle contained a decomposing snail and realized she had consumed part of it. As a result, she suffered severe shock and gastroenteritis. Since it was her friend and not the claimant who had bought the drink, there was no contractual remedy available to her for compensation. Therefore, she decided to bring an action in tort against the manufacturer. The latter argued that there was no duty of care owed to Mrs. Donoghue so no action could be founded on her claim.

Up to that point, contract law was the main source of negligence liability and tort was applied only exceptionally. Consequently, the House of Lords had to address the main issue of lack of privity of contract. According to the strict doctrine of privity, a duty of care could not arise in the absence of a contractual relationship between the parties. Rejecting the application of this principle in this particular instance, the Lords decided in favour of the claimant, on the basis that manufacturers owed a duty of care to the end consumers of their products[18].

Despite the importance of establishing a general liability for defective products and recognizing negligence as a source of liability independent from contract, this case is probably best known for the celebrated "neighbour principle" in Lord Atkin's judgment: "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 so

16 [1932] AC 562.

17 Rogers, W.V.H., *The Law of Tort* (London: Sweet & Maxwell, 1994) p.41.

18 Deakin, Simon, Angus Johnston, and Basil Markesinis. *Markesinis and Deakin's Tort Law* (Oxford: Clarendon Press, 2008) p.114-5.

closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when directing my mind to the acts or omissions which are called in question"[19].

According to Lord Atkin, the general test for concluding the existence of a duty of care in any given situation comprises of two requirements: foreseeability of harm and proximity between the two parties. The first is objective in the sense that the court does not have to determine what the particular defendant actually predicted but what would be expected from a reasonable person in the same factual context. Furthermore, the defendant does not have to be able to identify the specific plaintiff; in many cases it will suffice that the latter belongs to a broader group of people against whom the risk of injury could have been predicted[20]. The second requirement corresponds to closeness in law, meaning there has to be a legally interesting relationship between the parties[21]. Some authors suggest that this was included as a way to moderate the foreseeability test and restrict its application[22].

It is interesting to note that one of the dissenting judges, Lord Buckmaster, raised an objection to a general test for establishing a duty of care, especially in the particular circumstances (liability of a manufacturer to any ultimate customer). The basis of his argument was that it would be detrimental to commerce, as companies would be vulnerable to an indeterminate number of actions, while the consumers would end up bearing the cost of imposed damages which would be added to the price of the products. However, it was in his effort to counter this exact fear that Lord Atkin formulated his neighbour principal. According to his statement, its application would demarcate and limit the range of claims based on tort negligence[23].

The importance of this judgment is paramount, not only because it identified negligence as a separate tort for the first time and established the neighbour principle as a method for ascertaining the existence of a duty of care, but also for three other critical elements it contains. First, that lack of privity of contract does not prevent the injured party from raising a claim.

19 See *Donoghue v Stevenson* [1932] AC 562, 580.
20 Elliott, Catherine, and Frances Quinn, *Tort Law* (Essex: Pearson Education Limited, 2005) p.16.
21 *Clerk & Lindsell on Torts* (London: Sweet & Maxwell, 2006) par. 8-11.
22 Steele, Jenny, *Tort Law-Text, Cases and Materials* (Oxford University Press, 2007) p.146.
23 Harpwood, Vivienne, *Modern Tort Law* (London and New York: Routledge-Cavendish, 2008) p.20.

Second, that proof of negligence consists of three requirements: the existence of a duty of care owed by the defendant to the claimant, the breach of that duty and loss suffered by the claimant as a result. And thirdly, the *ratio* of the case, which established a duty of care of manufacturers to consumers, half a century before statutory confirmation in the Consumer Protection Act 1987[24].

In the years following *Donoghue v Stevenson*, the neighbour principle was used in novel duty situations to justify judgments that established a new category of duty of care for policy reasons. Judges usually rule on policy grounds when they feel compelled to extend the scope of the tort of negligence to new areas because they believe that such extension would serve the public interest[25]. However, this practice was infrequent and certainly not influential enough to transform Lord Atkin's foreseeability and proximity test into one of universal application, as the test itself was not the *ratio decidendi* of *Donoghue* but only the means by which the decision was reached[26]. Thus, over a period of many decades, the tort of negligence developed incrementally, the rule being that the majority of cases were decided on the basis of previous authorities. Part of the legal community started to challenge this conservative stance in the early 1970s[27].

A drastic change came in 1978, with the case of *Anns v Merton London Borough Council*[28]. The claimants were tenants in a building which suffered defects due to the fact that its foundations were not deep enough. The Council was responsible for the inspection of the foundations before construction and the claimants alleged that it had either performed the inspection negligently or not at all. The House of Lords found for the claimants, recognizing that a duty of care was owed to them by the defendant public authority.

In this case, Lord Wilberforce formulated a simplified test for the establishment of a duty of care in any given situation[29]. This test consisted of two parts which were to be followed

24 Harpwood, Vivienne, *Modern Tort Law* (London and New York: Routledge-Cavendish, 2008) p.21.
25 Elliott, Catherine, and Frances Quinn, *Tort Law* (Essex: Pearson Education Limited, 2005) p.16.
26 *Clerk & Lindsell on Torts* (London: Sweet & Maxwell, 2006) par. 8-14.
27 Rogers, W.V.H., *The Law of Tort* (London: Sweet & Maxwell, 1994) p.43.
28 [1978] AC 728.
29 [1978] AC 728, Lord Wilberforce at 751-2: "in order to establish that a duty of care arises in a particular situation, it is not necessary to bring the facts of that situation within those of previous situations in which a duty of care has been held to exist. Rather the question has to be approached in two stages. First one has to ask whether, as between the alleged wrongdoer and the person who has suffered damage there is a sufficient relationship of proximity or neighbourhood such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter – in which case a *prima facie* duty of care arises. Secondly, if the first question is answered affirmatively, it is necessary to consider whether there are any considerations which

consecutively: first, it should be determined that sufficient proximity or neighbourhood existed between the parties, making it foreseeable for the defendant that carelessness from his/her part could result in harm for the claimant. If this was established, then a *prima facie* duty was identified and it was for the courts to decide, during the second part of the test, whether policy reasons dictated that a duty of care did not exist after all. Moreover, the application of this principle meant that it was no longer necessary to base the extension of the range of a duty on previous authorities[30].

It is obvious that the first part of the *Anns* test refers to the neighbour principle. However, the phrasing used by Lord Wilberforce led to the conclusion that proximity was subsumed into foreseeability, hence not functioning as a distinct criterion for the establishment of a duty of care[31]. This observation, combined with the inverted logic of a *prima facie* duty, which would not be based on precedent and which would be ruled out only by countervailing policy factors, ultimately led to much criticism, mostly because of the excessive discretion it was deemed to give to the judges[32]. But its main impact was an over-expansion of the scope of duty of care, especially in areas that, until then, were considered to be in the outermost boundaries of the tort of negligence, such as pure economic loss and psychiatric injury[33].

Indeed, in *Junior Books Co. Ltd. v Veitchi Co*[34], the House of Lords was said to have crossed a line when it allowed a claim for purely financial loss. According to the facts of the case, the claimant had signed a contract for the replacement of the flooring in his factory. The floor was not installed by the main contractor but by a sub-contractor. When it proved defective, the owner opted to sue the sub-contractor instead of the main contractor with whom he had a contractual relationship. The court ruled in favour of the claimant, and this judgment was criticized for two main reasons. First, because of the famed "floodgates concern"; this decision could potentially generate an indeterminate number of frivolous claims. Secondly, there was the fear that the distinction between contract and tort liability would be blurred, causing uncertainty

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ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed or the damages to which a breach of it may give rise […]".

30 Elliott, Catherine, and Frances Quinn, *Tort Law* (Essex: Pearson Education Limited, 2005) p.16-7.

31 Steele, Jenny, *Tort Law-Text, Cases and Materials* (Oxford: Oxford University Press, 2007) p.146-9.

32 Rogers, W.V.H., *The Law of Tort* (London: Sweet & Maxwell, 1994) p.44-5.

33 Elliott, Catherine, and Frances Quinn, *Tort Law* (Essex: Pearson Education Limited, 2005) p.17.

34 [1983] AC 520.

in the legal and commercial landscape. This reaction to *Junior Books* provoked a backlash against *Anns,* which was considered to have incited this sudden and unwanted change in the doctrine of duty of care. Ultimately, *Anns* was formally overruled by the House of Lords in *Murphy v Brentwood District Council*[35] in 1991 and is now part of legal history[36].

1.2 The modern approach to duty of care: the three-part test in *Caparo*

Even before the two-stage test in *Anns v Merton LBC* was swept away, it had become evident that the duty of care notion could not be based on one general principle which could be applied in a universal manner. In various decisions, the courts promoted the idea of a piecemeal evolution of the tort of negligence, by analogy with previous cases involving similar facts[37]. This return to a more traditional approach of the element of duty, often referred to as the "incremental approach", was expressly stated in *Caparo Industries plc v Dickman*[38]. Lord Bridge's opinion in this case contains a tripartite test known as the "*Caparo* test"[39], which represents the modern approach to determining a duty of care. According to this test, in order to establish a duty of care the courts must: 1) find that the injurious result of the defendant's behaviour was reasonably foreseeable, 2) consider whether there is a relationship of proximity between the parties and 3) decide whether or not it is fair, just and reasonable in all the circumstances to impose a duty of care[40].

It is widely accepted that all three parts of the *Caparo* test have equal status, overlap and do not function as separate consecutive steps. Foreseeability of damage is no longer sufficient to

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35 [1991] 1 AC 398.

36 Deakin, Simon, Angus Johnston, and Basil Markesinis. *Markesinis and Deakin's Tort Law* (Oxford: Clarendon Press, 2008) p.127.

37 Steele, Jenny, *Tort Law-Text, Cases and Materials* (Oxford: Oxford University Press, 2007) p.153.

38 [1990] 2 AC 605.

39 [1990] 2 AC 605, Lord Bridge of Harwich at 617-8:"But since the *Anns* case a series of decisions […] have emphasized the inability of any single general principle to provide a practical test which can be applied to every situation to determine whether a duty of care is owed and, if so, what is its scope […]. 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 characterized 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 upon the one party for the benefit of the other".

40 Lunney, Mark, and Ken Oliphant, *Tort Law-Text and Materials* (Oxford University Press, 2008) p.140-1.

establish a *prima facie* duty, while proximity has reclaimed its independence from it and is considered a distinct criterion. In addition, the requirement of fairness, justice and reasonableness, which often corresponds to policy, is no longer subordinate to foreseeability[41].

The new approach varies significantly from the two-stage test in *Anns,* in that it attaches importance to established duty categories, permitting a moderate expansion of the scope of negligence to new areas, only if all three requirements of foreseeability, proximity and fairness are fulfilled. In other words, where *Anns* presumed the existence of a duty, which could potentially be canceled out by policy factors at the next stage, the *Caparo* approach assumes that no duty exists unless policy dictates otherwise[42].

Of course, having a formula for duty of care can prove helpful only in situations which lie in the grey areas of the tort of negligence. Those are mainly the issues of economic loss, psychiatric injury and liability of public bodies. In straightforward cases, as for example physical damage caused by positive acts, the application of the *Caparo* test may be superfluous[43].

The notion of foreseeability has the same content as in the neighbour principle, referring to whether or not the defendant could have reasonably predicted that his/her act could cause harm to the claimant. As mentioned above, proximity is no longer synonymous with foreseeability and is used to determine the relationship between the two parties. It has been described as the balancing factor between the plaintiff's right to restitution for tortious infliction of harm and the defendant's right to not bear unlimited and disproportionate responsibility for his/her actions[44]. Many authors share the view that proximity is conventionally used to limit the range of duty of care with respect to specific categories of damage, notably pure economic loss and psychiatric injury. A finding of no duty in such cases often corresponds to a finding of no proximity, i.e. no preexisting relationship of a closeness that could give rise to a duty of care. According to the same opinion, the boundaries between proximity and fairness, justice and reasonableness are convoluted and frequently these two criteria are used indistinctly[45].

41 Steele, Jenny, *Tort Law-Text, Cases and Materials* (Oxford University Press, 2007) p.156-7.
42 Lunney. Mark, and Ken Oliphant, *Tort Law-Text and Materials* (Oxford University Press, 2008) p.141.
43 Lunney p.141.
44 *Clerk & Lindsell on Torts* (London: Sweet & Maxwell, 2006) par. 8-15 to 8-16.
45 Lunney. Mark, and Ken Oliphant, *Tort Law-Text and Materials* (Oxford University Press, 2008) p.142.

The application of the criterion of proximity is clearly illustrated in *Watson v British Boxing Board of Control*[46] and *Sutradhar v Natural Environment Research Council*[47]. In the first case, Watson was a professional boxer who suffered serious injuries during a boxing match. The medical care he received was insufficient and he nearly lost his life. When he recovered, he brought an action against the Boxing Board on the basis of their responsibility for health and safety measures during professional boxing matches, and because they had not provided him prompt medical attention. The Court of Appeal held that the Board was the only authority in the UK in control of boxing, and boxers reasonably relied on it to provide them with proper medical care. Since the defendant was the sole authority in complete control of the situation, there was sufficient proximity between the two parties to establish a duty of care.

Conversely, in *Sutradhar* the court found that there was not sufficient proximity to give rise to a duty of care, because the defendant was neither the sole responsible for the claimant's damage nor in total control of the situation. In this instance, the claimant was a resident of Bangladesh who suffered arsenic poisoning after drinking contaminated water. He sued the defendants on the grounds that a few years earlier they had inspected the local water system and had not tested specifically for arsenic. The court concluded that it was the Bangladesh public authorities that had the duty to ensure the safety of drinking water. The defendant had no control over the situation and consequently could not be held responsible.

The third and last condition of the three-stage test is often described as a test of reasonable thinking, common sense and pragmatism. From this follows that it encompasses a wide variety of arguments, which make it readily applicable to situations where foreseeability and proximity are not sufficient to justify extension of liability to a novel category of claim. Its flexibility is the source of great concern among the legal community. The main fear is the notorious "floodgates argument", according to which, establishing new classes of claimants or defendants or novel categories of actionable damage may lead to unlimited liability as well as to the excessive burdening of defendants, with adverse consequences on commerce, insurance and society as a whole. Another facet of this argument is that many people may be discouraged from undertaking socially beneficial tasks which involve risk and could potentially lead to liability,

46 [2001] QB 1134.

47 [2004] EWCA Civ 175; [2006] UKHL 33.

fearing the possibility of costly litigation or exorbitant amounts of compensation. Moreover, professionals might start being excessively careful in their work, which again adds cost to everyday transactions. This last version of the argument is sometimes referred to as the "overkill" concern, a good example of which is the phenomenon of defensive medicine: some doctors may be inclined to perform over-detailed or unnecessary tests to reduce the risk of being sued for negligence[48].

However, the main function of the "just, fair and reasonable" element of the *Caparo* test is to either broaden the notion of duty of care or to restrict it when the public interest so dictates. In *MacFarlane and another v Tayside Health Board*[49], the claimants were the parents of a healthy child who sued the defendants for the cost of its upbringing. The grounds were that the defendants had negligently performed an unsuccessful vasectomy on the father, who already had four children and did not wish to have another. Despite the fact that there was a preexisting contractual relationship between the parties which signified sufficient proximity, the House of Lords based its decision on policy and held that it was not fair, just and reasonable for the defendant to compensate for the birth of a healthy child, which is generally regarded as a blessing by society. Another example of the application of the above criterion, is *Rees v Darlington Memorial Hospital NHS Trust*[50]. In this instance, the claimant was a disabled mother who had undergone a sterilization operation in order not to have children. The surgery was not successful due to the defendants' negligence and she became pregnant and gave birth to a healthy child. She subsequently brought an action for the extra cost of bringing up a child as a disabled mother. The House of Lords applied *MacFarlane* and denied her claim on policy grounds.

From all the above, it is clear that in novel situations, where a duty of care has not been established by previous authorities and all three elements of the *Caparo* test come in play, the result will be unpredictable. This is mostly due to the fact that miscellaneous policy arguments creep into the courts' decisions[51]. However, the law needs a certain degree of predictability in order to be effective. This is why the modern approach of the courts to the expansion of the

48 Lunney, Mark, and Ken Oliphant, *Tort Law-Text and Materials* (Oxford University Press, 2008) p.144.
49 [2000] 2 AC 59.
50 [2004] 1 AC 309.
51 Steele, Jenny, *Tort Law-Text, Cases and Materials* (Oxford: Oxford University Press, 2007) p.158.

scope of duty of care is more practical and focuses on an incremental, slow and steady growth, using the method of analogy with established heads of liability[52].

2. Special applications of duty of care

The law on duty of care is not limited to the general principles described in the chapter above. Whereas a general duty of care is undoubtedly established in relation to protection from bodily harm and injury to tangible property[53], there are duties linked to specific heads of damage considered as "grey areas" of the tort of negligence. These are claims concerning psychiatric injury and pure economic loss, which the courts hesitate to compensate. Consequently, additional sets of rules have been elaborated for these two categories of negligence claims, imposing further restrictions to plaintiffs seeking compensation for these types of loss[54].

In addition to specific rules applied to certain categories of damage, there are also rules establishing a higher level of protection against tort liability for certain classes of defendants. These include mainly public bodies and state authorities such as the police and other emergency services, local government authorities as well as National Health System and educational organizations[55]. Courts are so hesitant to accept that public bodies owe a duty of care to individuals for their negligent acts or omissions, that it is often said that these classes of defendants enjoy a "blanket immunity from suit"[56].

Legal scholars and members of the judiciary in the UK agree that these particular areas of tortious negligence are still under development and there is concern that relevant judgments are mostly based on policy and contradict one another.

2.1 Psychiatric injury

52 Deakin, Simon, Angus Johnston, and Basil Markesinis. *Markesinis and Deakin's Tort Law* (Oxford: Clarendon Press, 2008) p.131.

53 Deakin p.138.

54 Harpwood, Vivienne, *Modern Tort Law* (London and New York: Routledge-Cavendish, 2008) p.37.

55 Deakin, Simon, Angus Johnston, and Basil Markesinis. *Markesinis and Deakin's Tort Law* (Oxford: Clarendon Press, 2008) p.208.

56 Elliott, Catherine, and Frances Quinn, *Tort Law* (Essex: Pearson Education Limited, 2005) p.74-6.

Traditionally, English courts have not regarded mental trauma as equal to bodily harm. Psychiatric injury, known as "nervous shock" in early cases, was initially subject to a lot of skepticism, mainly due to the fact that symptoms of a psychological illness were believed to be more easy to fake[57]. In recent years, the progress of medical science has enabled courts to accept the existence of psychiatric illnesses such as clinical depression or post-traumatic stress disorder (PTSD), a condition which usually develops after experiencing or witnessing a tragic occurrence[58]. Thus, the first and main requirement of a successful claim for psychiatric injury, is a serious recognized psychiatric condition[59]. Cases of this kind significantly depend on clinical evidence and it should be noted that a claimant will not be compensated for mere anxiety, grief or any other temporary situation of simple mental or emotional discomfort which is normally experienced by most people at some point in their lives[60].

As soon as the shift in the courts' attitude towards psychiatric injury became evident, the number of relevant claims increased. Fearing that this would "open the floodgates of litigation", judges responded by elaborating additional control devices applicable to mental trauma cases[61]. Thus, apart from the criterion of reasonable foreseeability of harm which applies to all negligence claims, the plaintiff has to meet further requirements, which are related to the distinction between "primary" and "secondary" victims. Primary victims are those who were directly affected by the defendant's carelessness and suffered physical and psychiatric or purely psychiatric harm as a result of it. Secondary victims are those who were present at the scene and suffered psychiatric trauma as a result of witnessing the shocking event caused by the defendant's act or omission. As a rule, in primary victim cases the plaintiff will be subject only to

57 Harpwood, Vivienne, *Modern Tort Law* (London and New York: Routledge-Cavendish, 2008) p.38.

58 Deakin, Simon, Angus Johnston, and Basil Markesinis. *Markesinis and Deakin's Tort Law* (Oxford: Clarendon Press, 2008) p.139.

59 See for example *Johnston v Nei International Combustion Ltd* [2007] UKHL 39*, Grieves v Everard and Others* [2006] EWCA Civ 27 and *Gregg v Scott* [2005] UKHL 2, where it was held that anxiety about an illness which may or may not occur in the future as a result of the defendant's negligence, does not constitute recoverable psychiatric injury; *Reilly v Merseyside Regional Health Authority* [1994] 23 BMLR 26, where a couple trapped in an elevator failed in their claim for claustrophobia and insomnia suffered after the event, because those are not recognized as serious psychiatric illnesses.

60 The only exception to this rule is the "bereavement award" or "fatal accident compensation" inserted in section 1A of the Fatal Accidents Act 1976 by the Administration of Justice Act 1982. It is awarded to close relatives of victims whose death was caused by a negligent act or omission of the defendant. Bereavement claims can be raised only by spouses, parents or children of the deceased and the plaintiffs do not need to prove that they suffer from a serious and debilitating psychiatric injury. The amount of the compensation is fixed and relatively low, serving only as a financial token for the loss of the claimant family members.

61 Steele, Jenny, *Tort Law-Text, Cases and Materials* (Oxford: Oxford University Press, 2007) p.302.

the general criteria for establishing a duty of care – in addition of course to proving that he/she suffered an accepted psychiatric condition. On the contrary, secondary victims are subject to many more restrictions. For this reason, those in favour of the extension of the scope of liability for psychiatric harm, focus mainly on stretching the concept of primary victims so that it will include more classes of claimants[62].

In primary victim cases, there are two categories of claimants: those who suffered both physical and psychiatric injury as a result of the same accident, and those who did not suffer any bodily harm but felt fear for their lives and safety which led to psychiatric damage[63]. The leading authority on primary victims of the second category is *Page v Smith*[64]. In this case, the negligent conduct of the defendant caused a car accident but the plaintiff was not hurt. However, he later had a recurrence of ME (myalgic encephalomyelitis, known as "chronic fatigue syndrome"), a psychiatric condition of which he had suffered in the past, which left him unable to work. Although psychiatric injury was not foreseeable under the circumstances of the case, the House of Lords ruled that there was reasonable foresight of risk of physical damage, which was sufficient to establish a duty of care[65]. A famous case considered to lie at the margin of the primary victim concept is *W v Essex County Council*[66]. Here the defendant local authority placed a boy in the home of the claimants who acted as foster parents. The boy was under investigation for rape but the council did not inform the claimants of this. When the parents found out that their own children had been sexually assaulted by the boy, they brought an action against the council claiming damages for themselves, because they suffered from clinical depression as a result of the council's negligence. The defendants argued that the parents were secondary victims who were not even present when the shocking events occurred but were informed about them later. The House of Lords rejected those arguments and ruled that the claimants were in fact primary victims deserving compensation.

62 Deakin, Simon, Angus Johnston, and Basil Markesinis. *Markesinis and Deakin's Tort Law* (Oxford: Clarendon Press, 2008) p.140-1.

63 Elliott, Catherine, and Frances Quinn, *Tort Law* (Essex: Pearson Education Limited, 2005) p.39.

64 [1996] 1 AC 155.

65 See also *Simmons v British Steel plc* [2004] UKHL 20, which was decided in the same principle.

66 [2001] 2 AC 592.

The first case in which the House of Lords made the distinction between primary and secondary victims was *McLoughlin v O'Brian*[67]. According to the facts, the plaintiff rushed to the hospital immediately after she was told that her husband and children had been in a serious car accident. There, she found out that one of her daughters had been killed and the other members of her family were badly injured. When she saw them, they were in a bad state from the accident and one of her sons was screaming in pain and shock. The acute grief she felt resulted in severe clinical depression and personality changes. Until then, only claimants who had witnessed through their own senses the accident caused by the defendant's negligence were awarded compensation for psychiatric injury. This was the first time that a secondary victim, meaning a person who was not present at the scene of the incident but came to its immediate aftermath, was successful in her claim for damages. However, in order to prevent a potential increase in secondary victim claims, the judges suggested certain restrictions regarding the closeness of the claimant's relationship to the primary victim as well as his/her proximity in time and space to the occurrence[68].

These restrictions were further elaborated in *Alcock v Chief Constable of South Yorkshire*[69], where it was clarified that claims by secondary victims were to be an exception to the rule that psychiatric injury actions are brought by primary victims[70]. *Alcock* was one of the cases related to the Hillsborough football stadium disaster, in which, due to police negligence, an excessive number of spectators was allowed in one terrace, resulting in its collapsing and crushing 96 people. The plaintiffs in this particular case were relatives of the victims, seeking compensation for post-traumatic stress disorder as secondary victims of the horrific accident. None of them had actually witnessed the death of their loved ones; some were inside the stadium but at a distance from the exact location of the incident, others had rushed to the stadium after hearing what had happened and some had watched it live on television. The House of Lords rejected all claims for various reasons and determined that there are three requirements for the existence of a duty of care in secondary victim cases: a) the claimant must have seen the accident as it happened or come to its immediate aftermath, b) there must be a close relationship of love

67 [1983] 1 AC 410.

68 Elliott, Catherine, and Frances Quinn, *Tort Law* (Essex: Pearson Education Limited, 2005) p.42.

69 [1992] 1 AC 310.

70 Deakin, Simon, Angus Johnston, and Basil Markesinis. *Markesinis and Deakin's Tort Law* (Oxford: Clarendon Press, 2008) p.143.

and affection between the claimant and the primary victim and c) the claimant must have perceived the occurrence in a way which provoked a shock to him/her[71].

More in particular, the first of the above control devices refers to the proximity of the claimant to the place where the event occurred. The general requirement is the plaintiff's physical presence at the scene. Alternatively, this criterion may be extended to the immediate aftermath of the accident, if the time between the claimant's first hearing of the occurrence and witnessing shocking scenes related to it, can be considered an uninterrupted sequence of events[72]. Surprisingly, in the *Alcock* case, some of the claimants who identified the bodies of their relatives in the temporary mortuary set up outside the stadium some hours after the event, were held to fail in meeting the immediate aftermath condition. However, authorities before and after *Alcock* show signs that the immediate aftermath notion may be stretched if policy reasons so dictate[73].

According to the second criterion, the claimant must prove a close tie of love and affection with the primary victim of the accident, which would justify his/her suffering a serious psychiatric condition as a result of the event. The closeness of certain types of relationships such as parents and children, spouses and even fiancés is considered self-evident, although it may be disproved by the defendant, as for example in cases where a married couple is estranged due to separation. Other classes of claimants, however, need to go through the embarrassing and often insulting process of proving that they loved and cared for the primary victim[74]. In *Alcock* for instance, one of the plaintiffs was the brother of a primary victim who had died in the tragedy; he was not allowed to recover because he was not able to prove that he had a close tie of love and affection with his brother. An important conclusion which may be drawn from the precondition of proximity of relationship, is that mere bystanders who happen to come upon the scene of a tragedy but have no personal connection to the immediate victims, are not entitled to seek

71 Lunney, Mark, and Ken Oliphant, *Tort Law-Text and Materials* (Oxford University Press, 2008) p.346-8.

72 Deakin, Simon, Angus Johnston, and Basil Markesinis. *Markesinis and Deakin's Tort Law* (Oxford: Clarendon Press, 2008) p.146-7.

73 *Galli-Atkinson v Seghal* [2003] EWCA Civ 697; *North Glamorgan NHS Trust v Walters* [2202] EWCA Civ 1792; *Froggatt v Chesterfield and North Derbyshire Royal Hospital NHS Trust* [2002] WL 3167323; *Farrell v Merton, Sutton and Wandsworth HA* [2000] 57 BMLR 158.

74 Lunney, Mark, and Ken Oliphant, *Tort Law-Text and Materials* (Oxford: Oxford University Press, 2008) p.346.

compensation[75]. This is related to a further restriction on secondary victims, that they should be of normal fortitude of character. People who are hyper-sensitive and excessively fragile may not seek damages for mental trauma, unless any person of ordinary fortitude would have suffered the same harm under the same circumstances[76].

The third control mechanism is related to the means by which the accident was witnessed. This means that the claimant must have perceived the scene of the accident with his/her own unaided senses and suffered a sudden shock as a result. This particular precondition is justified by the fact that only seeing or hearing an accident directly has the power to produce a reaction of shock so intense that could lead to psychiatric injury[77]. Consequently, being informed about the incident by a third party is not considered sufficient to fulfill this requirement[78]. In *Alcock*, the House of Lords examined whether watching the event broadcasted live on television was enough to allow the claimants to recover. They concluded that watching an event unfold on television is not on a par with direct perception, especially since in the particular circumstances the scenes were taken from a distant angle so that individuals were not recognizable, in compliance with the Broadcasting Code of Ethics.

Another case which arose from the Hillsborough tragedy was *White v Chief Constable of South Yorkshire*[79]. This claim was brought by police officers against their employer for post-traumatic stress disorder induced by the horrific accident which was due to the negligence of their co-workers. They based their claim on the fact that they were primary victims, either because of their status as rescuers or because their employer owed a duty of care to them not to put them in such distressing situations. Until then, rescuers were considered a special class of plaintiffs who could recover as primary victims, as policy reasons dictated that people who volunteered their help in emergencies should be rewarded and encouraged[80]. In *Chadwick v*

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75 *Robertson and Rough v Forth Road Bridge Joint Board* [1995] IRLR 251; *McFarlane v E.E. Caledonia Ltd* [1994] 2 All ER 1.

76 Steele, Jenny, *Tort Law-Text, Cases and Materials* (Oxford: Oxford University Press, 2007) p.303.

77 Lunney, Mark, and Ken Oliphant, *Tort Law-Text and Materials* (Oxford: Oxford University Press, 2008) p.347.

78 *AB and Others v Leeds Teaching Hospital* [2004] EWHC 644; *Palmer v Tees Health Authority* [2000] PIQR PI; Ravenscroft v Rederiaktiebolaget Transatlantic [1992] 2 All ER 470.

79 [1999] 2 AC 455.

80 Elliott, Catherine, and Frances Quinn, *Tort Law* (Essex: Pearson Education Limited, 2005) p.47.

British Railways Board[81], the leading case on rescuers, the plaintiff spent hours at the scene of a horrific train accident near his house, helping the victims. As a result, he suffered an anxiety-related neurosis for which he successfully claimed damages. However, in *White* the court took a much more restrictive view on rescuers, determining that they should not enjoy special protection. After classifying *Chadwick* as a primary victim case on the basis that the claimant had been in fear of his own life while helping in the unsafe environment of the accident aftermath, they ruled that the plaintiffs in *White* were not primary victims since they were not in real danger themselves. Consequently, in order to recover, they would have to fulfill the requirements set out in *Alcock* for all secondary victims. As none of the claimant policemen had a close relationship with the main victims, their action failed. Thus, *White* established that rescuers can claim as primary victims only if they were in actual physical danger when offering their assistance[82].

The second argument of the police officers in *White* that their employer owed them a duty of care was also rejected on the grounds that, because of their professional training, their employer was entitled to expect them to be able to endure stressful situations. The decisions in *Alcock* and *White* were obviously influenced by the "floodgates argument"; had the court allowed secondary victims to recover, the defendant police authority would have been exposed to disproportionate liability. Furthermore, in *White* the judges clearly took into consideration the injustice of allowing police officers to recover when claims brought by relatives of the victims had failed in *Alcock*. The excessive restrictions introduced by these two decisions were questioned by legal authors, who maintained that the single requirement of proof of a serious psychiatric condition could function as a sufficient control mechanism in secondary victim cases[83].

In cases where the parties were in a pre-tort relationship, it is easier to accept that the defendant owed a duty to the plaintiff not to expose him/her to risk of psychiatric harm. The first relevant category of claimants is that of employees. In *Hatton v Sutherland*[84], the Court of Appeal elaborated a series of guidelines related to the establishment of a duty of care in

81 [1967] 1 WLR 912; see also *Hale v London Underground* [1992] 11 BMLR 81, where a fireman recovered for post-traumatic stress disorder following the King's Cross fire.

82 Deakin, Simon, Angus Johnston, and Basil Markesinis. *Markesinis and Deakin's Tort Law* (Oxford: Clarendon Press, 2008) p.151-2.

83 Deakin p.143-4 and 151.

84 [2002] EWCA Civ 76.

situations where psychiatric harm is caused by stress in the work environment. According to these, employers are obligated to take measures to prevent stress at work but are entitled to assume that their employees can bear ordinary pressure. The rules set out in the above judgment are followed in most cases regarding work-related psychiatric injuries[85]. When the pre-tort relationship is between educational institutions and minors under their care, a duty of care is clearly present without the need to resort to the confusing notions of primary and secondary victims[86].

The fragmentary and inconsistent way in which common law deals with liability for psychiatric harm, has led to severe criticism and the adoption of polar opposite views on the subject by legal authors. At one end of the spectrum are those who contend that mental trauma should not be treated differently than bodily harm, as an injured mind is often more difficult to heal than an injured body. Consequently, all relevant restrictions should be abandoned[87]. The opposing approach is an extreme one, suggesting that the legal principles concerning psychiatric damage are so inefficient, that it would be preferable to "wipe out recovery for pure nervous shock"[88]. The question of whether or not a legislative reform is needed in this area of the common law was examined by the Law Commission, which published its report n. 249 titled "Liability for Psychiatric Illness" in 1998[89]. According to the report, the requirement of a close relationship between the claimant and the main victim is sufficient to limit liability, while the conditions of sudden shock, means of perception and proximity in time and space should be abolished. In 2007, the government officially rejected the Commission's proposals in a consultation paper of the Department of Constitutional Affairs, concluding that the development of the law on psychiatric harm should remain in the jurisdiction of the courts[90].

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85 *Intel Corporation UK Ltd v Daw* [2007] EWCA Civ 70; *Green v DP Group Services* (UK) Ltd [2006] EWHC 1898 QB; *Hartman v South Essex Mental Health & Community Care NHS Trust* [2005] EWCA Civ 6; *Barber v Somerset Council* [2004] UKHL 13; *Walker v Northumberland County Council* [1995] 1 All ER 737.

86 Deakin, Simon, Angus Johnston, and Basil Markesinis. *Markesinis and Deakin's Tort Law* (Oxford: Clarendon Press, 2008) p.154. See *Bradford-Smart v West Sussex County Council* [2002] EWCA Civ 7; *Phelps v Hillingdon London Borough Council* [2001] 2 AC 619.

87 Handford, Peter, *Mullany and Handford's Tort Liability for Psychiatric Damage* (Ryde, New South Wales: Law Book Co, 2006) par. 30.40 and 30.60.

88 Stapleton, Jane*, In Restraint of Tort*, in P. Birks (ed.), *The Frontiers of Liability*, vol.2 (Oxford: Oxford University Press, 1994) p.95-6.

89 lawcom.gov.uk/project/liability-for-psychiatric-illness.

90 http://webarchive.nationalarchives.gov.uk/+/http:/www.dca.gov.uk/consult/damages/cp0907.pdf p.36-43.

2.2. Pure economic loss

Another problem-area related to duty of care, is the type of damage characterized as "pure economic loss". While losses directly linked to or deriving from bodily injury or damage to property are usually compensated in the tort of negligence, when it comes to harm which is merely financial, English courts have traditionally been hesitant to allow a claim[91]. A milestone case often cited to demonstrate the difference between various kinds of damage, is *Spartan Steel and Alloys v Martin & Co (Contractors) Ltd*[92]. The claimants owned a stainless-steel factory, which was forced to shut down for several hours after the defendant's workers negligently cut a cable supplying electricity to the facility. The claimants brought an action seeking compensation for the metal which solidified inside the furnace, for the profit that would have been made from this metal and for the profits they would have made from processing more quantities of metal in the furnace, had there not been a power cut. The first head of loss was clearly physical damage to property and the second was directly connected to the first, therefore the claimants recovered for them. The third, however, was categorized as pure economic loss and was not compensated.

There are two main reasons for the English courts' reluctance to compensate pure economic loss in the context of the tort of negligence. The first and most obvious one, is the concurrence of tort and contract law. In situations where the incurred damage is purely pecuniary, there is usually a contractual relationship between the parties and judges consistently believe that contract should take precedence over tort as the vehicle of protecting financial interests[93]. Indeed, many actions in tort arise despite the existence of an agreement between claimants and defendants, for reasons such as the loss of the time limit for bringing an action in contract or the fact that the party who could have been sued in contract has gone bankrupt, so the injured party seeks another source of compensation[94]. Allowing such claims to succeed would

91 Elliott, Catherine, and Frances Quinn, *Tort Law* (Essex: Pearson Education Limited, 2005) p.21.
92 [1973] 1 QB 27.
93 Deakin, Simon, Angus Johnston, and Basil Markesinis. *Markesinis and Deakin's Tort Law* (Oxford: Clarendon Press, 2008) p.160.
94 Rogers, W.V.H., *The Law of Tort* (London: Sweet & Maxwell, 1994) p.57-8.

hurt the much-needed predictability that contract law provides in the unstable environment of commercial transactions[95].

The second reason why the tort of negligence, as a rule, does not allow recovery for pure economic loss, is the famous "floodgates argument" mentioned above[96]. This is often defined as the fear of exposing defendants to extensive liability, either in the sense of an extremely high sum of compensation or an excessively large number of potential plaintiffs. However, according to a more precise interpretation of this argument, the real risk does not lie in liability which is just extensive but otherwise predictable, but in indeterminate liability. Take as an example a driver who negligently causes an accident in a highway during rush hour. Whereas the direct victims should undoubtedly be able to recover for damage to their cars, physical injuries as well as loss of profits due to these injuries, compensating other drivers present at the scene for loss of income caused by their being late to an important meeting, would not only lead to unfair results but also render insurance against traffic accidents practically impossible. Thus, it is not the fact that pure economic loss could potentially result in excessive or large-scale claims but the danger of unpredictability which makes the "floodgates argument" plausible[97].

The denial of English courts to recognize a duty of care for pure economic loss was formulated for the first time in *Candler v Crane, Christmas & Co*[98]. Their initial position was so inflexible that many legal academics still refer to the existence of a general exclusionary rule within the tort of negligence in relation to this particular head of damage[99]. However, in 1964, the landmark case of *Hedley Byrne & Co v Heller & Partners*[100] introduced the first exception by stating that financial loss incurred by negligently provided information or advice was possible under certain circumstances. In this case, the claimants were an advertising company approached by another firm called Easipower, to buy advertising space on their behalf. Since they had never worked with Easipower before, they asked the latter's bank to provide them information on the

95 Elliott, Catherine, and Frances Quinn, *Tort Law* (Essex: Pearson Education Limited, 2005) p.21.
96 See p.9.
97 Deakin, Simon, Angus Johnston, and Basil Markesinis. *Markesinis and Deakin's Tort Law* (Oxford: Clarendon Press, 2008) p.159-160.
98 [1951] 2 KB 164.
99 Lunney, Mark, and Ken Oliphant, *Tort Law-Text and Materials* (Oxford University Press, 2008) p.375; Steele, Jenny, *Tort Law-Text, Cases and Materials* (Oxford: Oxford University Press, 2007) p.341; Deakin, Simon, Angus Johnston, and Basil Markesinis. *Markesinis and Deakin's Tort Law* (Oxford: Clarendon Press, 2008) p.158.
100 [1964] AC 465.

firm's creditworthiness. The bank gave a positive reference, in which they included a disclaimer of liability. Based on this information, the claimants proceeded to fulfill Easipower's order. In reality the firm was not in a good financial state and, when it went into liquidation, Hedley Byrne sued Easipower's bank in negligence. The court ruled that the disclaimer protected the defendants against liability, but took the opportunity to examine what their decision would have been in the absence of a disclaimer. Thus, they laid down three criteria for imposing liability for negligent misstatements: 1) the existence of a "special relationship" between the parties, 2) voluntary assumption of responsibility by the defendant for the provision of the information or advice and 3) reasonable reliance of the claimant on this statement[101].

The first requirement of the "special relationship" between the parties was not thoroughly clarified in *Hedley Byrne.* Initially, it was narrowly interpreted as a specific business context, in which the person providing the statement is a professional specialized in the subject on which he/she gave the information or advice[102]. In *Mutual Life & Citizens Assurance Co v Evatt*[103], the majority of the court, elaborating on this requirement, held that the defendants, an insurance company, were not liable for giving inaccurate investment advice to their clients, since they were not professional financial and investment advisors. However, the dissenting judges argued that statements made in any business circumstances by professionals in the course of their work would suffice as proof of the existence of the special relationship criterion[104]. In later cases, it was this broader approach that the courts opted to follow[105].

According to the second requirement, as set out in *Hedley Byrne*, a professional asked for an expert opinion has three options: to refuse to give any advice, to give advice but deny any responsibility for its accuracy, or to give information without a disclaimer. A person who chooses the third alternative will be considered to have voluntarily assumed responsibility towards the other party. In *Dean v Allin & Watts*[106], the defendant was a solicitor instructed by his clients to

101 Deakin, Simon, Angus Johnston, and Basil Markesinis. *Markesinis and Deakin's Tort Law* (Oxford: Clarendon Press, 2008) p.161-2.
102 Harpwood, Vivienne, *Modern Tort Law* (London and New York: Routledge-Cavendish, 2008) p.74.
103 [1971] AC 793.
104 Lunney, Mark, and Ken Oliphant, *Tort Law-Text and Materials* (Oxford: Oxford University Press, 2008) p.412.
105 *Lennon v Commissioner of Police of the Metropolis* [2004] 1 WLR 2594; *Frances v Barclays Bank* [2004] EWHC (Ch).
106 [2001] EWCA Civ 758.

prepare the necessary documents for the security of a loan they intended to take from the plaintiff. The defendant gave wrong instructions to his clients and consequently the loan was not properly secured, to the detriment of the plaintiff. Because the defendant knew that the plaintiff – who was not his client – had not sought independent legal advice but relied solely on his professional statements, the court held him liable for negligent misstatement and allowed the claimant to recover. In other cases, the relationship between claimant and defendant was considered very close to a contractual one and the foreseeability of the claimant's reliance on the defendant's expert opinion so intense, that even the existence of a disclaimer did not prevent courts from finding the defendant liable for negligent misstatement[107].

The third *Hedley Byrne* condition requires reliance on the defendant's professional advice, in the sense that the claimant must have based his/her decision on it. Furthermore, this reliance must have been reasonable[108]. In *Reeman v Department of Transport*[109], the claimant had bought a boat covered by a certificate issued by the Department of Transport, according to which the vessel was fit to be used at sea. When the buyer discovered that the Department's inspection had been conducted negligently and that the boat was in fact worthless, he sued for his economic loss due to the Department's negligent misstatement. The court denied the claim on the grounds that the claimant's reliance was unreasonable, since certificates of this kind were issued for public safety reasons and were not to be relied upon in relation to a vessel's monetary value. Nevertheless, in other cases policy reasons prevailed, leading judges to disregard the unreasonableness factor and rule in favour of claimants who relied on statements made for a different purpose that the one ultimately used for[110].

It has been argued that the *Hedley Byrne* principles may also apply to statements made before signing a contract, during the negotiations stage. This is true to some extent, however, the Misrepresentation Act 1967 has rendered negligence claims of this kind practically worthless, as it provides potential claimants with a better basis for their actions. Under section 2(1), the burden of proof is reversed in favour of the plaintiff, leaving defendants with the onerous task of proving

107 *Smith v Eric S. Bush* [1990] 1 AC 831; *Harris v Wyre Forest DC* [1989] 2 All ER 514; *Yianni v Edwin Evans & Sons* [1982] QB 438.

108 Elliott, Catherine, and Frances Quinn, *Tort Law* (Essex: Pearson Education Limited, 2005) p.29-30.

109 [1997] EWCA Civ 1355.

110 *Law Society v KPMG Peat Marwick* [2000] 4 All ER 540.

that they took all reasonable measures to make sure that the statements and information they provided during the negotiations were true[111].

Following *Hedley Byrne*, which introduced the first exception to the exclusionary rule regarding compensation for pure economic loss, another extension of negligence liability was brought about by the notorious case of *Anns v Merton London Borough Council*[112]. This was the first of a series of judgments which allowed claimants to recover for pure economic loss caused by negligent acts. This expansion reached its peak with *Junior Books Co Ltd v Veitchi Co*[113], a ruling which was considered as going too far and severely criticized by those fearing the "floodgates" risk[114]. As mentioned above under chapter 1.1, *Anns* was eventually overruled in *Murphy v Brentwood District Council*[115]. Surprisingly, the same did not happen with *Junior Books*, but judges refused to follow it in later cases, considering it as unique to its facts. Consequently, after *Murphy*, the common law went back to its strict approach towards financial loss incurred by negligent acts, especially in the area of liability of builders for defective premises and manufacturers for defective products[116]. Since recovery for negligent misstatements was still possible under *Hedley Byrne*, this led to the inconsistent result that architects and other consulting professionals were liable under *Hedley Byrne*, as their services were considered "negligent statements", while builders were not, because their work was deemed to fall under the non-compensable "negligent acts" category[117].

In 1995, in the milestone case of *Henderson v Merrett Syndicates Ltd*[118], the House of Lords took another cautious step towards the extension of liability for pure economic loss, by stating that the *Hedley Byrne* principles could also apply to the negligent provision of services[119].

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111 Bermingham, Vera, *Tort in a Nutshell* (London: Sweet & Maxwell, 2005) p. 19; Mc Kendrick, Ewan, *Contract, Tort and Restitution Statutes* (London: Sweet & Maxwell, 1997) p.29.

112 [1978] AC 728.

113 [1983] AC 520.

114 Elliott, Catherine, and Frances Quinn, *Tort Law* (Essex: Pearson Education Limited, 2005) p.22-3.

115 [1991] 1 AC 398.

116 *Mirant-Asia Pacific v OAPIL* [2004] EWHC 1750; *Horbury Building Systems Ltd v Hampden Insurance NV* [2004] EWCA Civ .418; *Holding and Management (Solitaire) Ltd v Ideal Homes North West Ltd* [2004] EWHC 2408 and *Samuel Payne v John Setchell Ltd* [2002] BLR 489.

117 Deakin, Simon, Angus Johnston, and Basil Markesinis. *Markesinis and Deakin's Tort Law* (Oxford: Clarendon Press, 2008) p.184.

118 [1995] 2 AC 145.

119 Deakin, Simon, Angus Johnston, and Basil Markesinis. *Markesinis and Deakin's Tort Law* (Oxford: Clarendon Press, 2008) p.172.

This case arose from significant financial losses incurred by Lloyd's Names when a series of natural and man-caused disasters in the early 1990s resulted in excessively high insurance claims[120]. The Names were investors in the Lloyd's insurance organization who were organized in syndicates and had assumed unlimited liability when underwriting Lloyd's policies. They had been willing to take this risk, because the agents who had organized the syndicates had advised them that becoming a Name was a sure way to make substantial earnings. Some of the Names did not have contracts with the agents and some did but missed the limitation period to bring an action in contract. The only means of recovery available to them was a claim based on the tort of negligence, since the statute of limitations for tort actions is of six years while for contract claims only three. Therefore, the main issue the court had to address, was the concurrence of tort and contract law. Until then, tort law was considered supplementary to contract, meaning that the existence of a contractual relationship between the parties would preclude any tortious liability from arising[121]. As Lord Goff stated in *Henderson*, "the law of tort is the general law, out of which the parties can, if they wish, contract[122]". However, in this case the judges ruled in favour of the plaintiffs, clarifying that the existence of a contract would hinder a remedy in tort, only where this would oppose the clauses of the agreement between the parties[123].

In both cases of *Hedley Byrne* and *Henderson*, which introduced exceptions to the exclusionary rule regarding compensation for pure economic loss based on the tort of negligence, the fact that the claimants relied on the defendants' statements or services played a key role in the courts' decisions. Nevertheless, there are instances where negligence claims for economic loss were successful, although the requirement of reliance was completely absent[124]. In *White v Jones*[125], the claimants were the intended beneficiaries of a will. Their father (the testator) had instructed his solicitor to change the will so as to include his daughters. The solicitor did not follow through promptly and as a result, when the father died, the will had remained unchanged. The daughters then brought an action in negligence against the solicitor. The House of Lords

120 Other significant cases which derived from the economic losses suffered by Lloyd's Names during the same period: *Brown v KMR Services Ltd* [1995] 4 All ER 598; *Aiken v Stewart Wrightson Memebrs Agency Ltd* [1995] 1 WLR 1281; *Jaffay and Others v Society of Lloyds* [2002] EWCA Civ. 1101.

121 Heuston, R.F.V., and R. A. Buckley, *Salmond and Heuston on the Law of Torts* (London: Sweet & Maxwell, 1996) p.207-8.

122 [1995] 2 AC 145, Lord Goff at 193.

123 Elliott, Catherine, and Frances Quinn, *Tort Law* (Essex: Pearson Education Limited, 2005) p.35.

124 Elliott p.32.

125 [1995] 2 AC 207.

allowed their claim despite the fact that none of the *Hedley Byrne* requirements seemed to be present. Indeed, there was no special relationship between the claimants and the defendant, the latter had not assumed any responsibility towards them (only towards their father) nor were his services relied upon by the claimants (it was again their father who had contracted the defendant's services).

The court's decision in the above case was mostly based on practical justice. The strict doctrine of privity prevented the claimants from bringing an action in contract, since no agreement existed between them and the defendant. On the other hand, the testator's estate could only sue for nominal damages (which would basically correspond to the solicitor's fees) because it had not incurred any loss. Consequently, if no claim was allowed in tort, the solicitor would escape liability for his negligence, while those who had actually suffered loss would be left with no means of recovery[126]. This would have been an unfair result due to a gap in the law regarding contracts for the benefit of third parties[127]. Thus, the principle established in *White v Jones* has been argued to represent a legal mechanism which bears some resemblance to the concept of "contract in favour of a third party", which is used in other jurisdictions to resolve this type of conflict[128]. Even though it is not quite clear whether this mechanism constitutes a definite extension of liability for pure economic loss, it is an indication that the courts are prepared to stretch the law to accommodate practical needs[129]. *White v Jones* was the first in a series of judgments known as "the wills cases"[130], as they all related to probate law. However, the duty of care affirmed in them has hence been applied in agreements other than wills[131].

Overall, the legal framework related to pure economic loss is characterized by an inconsistency resembling the one identified in the case law on psychiatric injury[132]. According to the current state of the law, there is no recovery for financial harm arising from negligent acts and defective premises and products. The *Hedley Byrne* principles allow compensation only for

126 Bermingham, Vera, *Tort in a Nutshell* (London: Sweet & Maxwell, 2005) p. 20-1.
127 Elliott, Catherine, and Frances Quinn, *Tort Law* (Essex: Pearson Education Limited, 2005) p.32-3.
128 Deakin, Simon, Angus Johnston, and Basil Markesinis. *Markesinis and Deakin's Tort Law* (Oxford: Clarendon Press, 2008) p.173.
129 Elliott, Catherine, and Frances Quinn, *Tort Law* (Essex: Pearson Education Limited, 2005) p.36.
130 *Carr-Glynn v Frearsons* [1998] 4 All ER 225; *Esterhuizen v Allied Dunbar Assurance plc* [1998] 2 FLR 668; Chappell v Somers & Blake [2004] Ch.19.
131 *Gorham v British Telecommunications plc* [2000] EWCA Civ 234; *Spring v Guardian Assurance* [1995] 2 AC 296.
132 Harpwood, Vivienne, *Modern Tort Law* (London and New York: Routledge-Cavendish, 2008) p.93.

negligent statements and services. In some cases, these principles extend to damage incurred by persons who were not parties to agreements aimed to benefit them. The unpredictability resulting from classifying cases under "pockets" of liability such as "negligent misstatements" or "negligent acts", has led some authors to propose a retreat to the general exclusionary rule of "no liability in negligence for pure economic loss"[133]. Although there are instances in which courts prioritize practical justice, many academics feel that the indeterminate liability argument is much too often used as a pretext for the judiciary's unwillingness to address policy issues in a more straightforward way[134].

2.3. Special groups immunities

Another grey area in the context of duty of care is the high degree of protection against negligence liability conferred to certain categories of defendants, namely the police, the fire brigades and other emergency services, local government authorities, NHS and educational organizations and other public bodies[135].

Given their wide range of activities and the fact that they are regarded as a more secure source of compensation than private individuals or corporations, the fear of indeterminate litigation is the obvious reason for this immunity from negligence suits enjoyed by bodies of the public sector[136]. Nonetheless, there is a series of other policy reasons often taken into consideration by judges when deciding on whether or not a duty of care is owed by a defendant of this particular category. First, the threat of a negligence action may force public servants to perform their duties in a defensive way, hence diverting time, human resources and funds from their official functions and negatively affecting their efficiency[137]. Second, there is the issue of justiciability, meaning the suitability of a dispute to be evaluated and resolved by courts. Public bodies are often compelled or allowed by statute to make policy decisions based on specialized knowledge which judges do not possess. In addition, their decisions may be influenced by a

133 Stapleton, Jane, *Duty of Care and Economic Loss: A Wider Agenda*, in *The Law Quarterly Review*, vol.107 (April 1991) p.294.
134 Harpwood, Vivienne, *Modern Tort Law* (London and New York: Routledge-Cavendish, 2008) p.93.
135 Harpwood p.95.
136 Lunney, Mark, and Ken Oliphant, *Tort Law-Text and Materials* (Oxford University Press, 2008) p.500.
137 Elliott, Catherine, and Frances Quinn, *Tort Law* (Essex: Pearson Education Limited, 2005) p.63.

multitude of factors which the courts ignore. In other words, where statutes confer power of discretion to public bodies judges choose not to interfere, unless the actions of the defendant were so unreasonable that clearly exceeded the scope of the discretion[138]. Finally, another mechanism also aiming to protect the decision-making independence of public bodies is the distinction between operational matters, meaning the way in which a decision is applied in practice, and policy matters, which correspond to the overall planning of how a public body's resources will be used or which tasks will be prioritized. Despite the fact that this distinction is not always clear and reliable, it is often employed to justify why policy issues are not justiciable whereas purely operational ones may give rise to a duty of care[139].

Hill v Chief Constable of West Yorkshire[140] is the leading judgment on police immunity from negligence actions. In this case, the mother of the last victim of a serial killer known as the "Yorkshire Ripper" sued the local police claiming that they were negligent in their investigations and could have prevented the murder of her daughter by apprehending the criminal earlier. The House of Lords ruled that, first of all, there was an obvious lack of proximity since the police did not owe a duty to protect this particular victim, who was in the same position as any other member of the general public. Furthermore, the imposition of a duty of care in this instance would compromise the quality of police officers' work by shifting their focus from combatting crime to defending themselves against negligence actions. The same reasoning was used in a series of cases following *Hill*[141], which was viewed as establishing an immunity in favour not only of the police but also other public bodies. However, this should not be interpreted as totally shielding the police from any kind of negligence claims. In situations where a specific responsibility is undertaken towards an individual such as an informant[142] or a prosecution witness[143], the police owe a duty not to negligently disclose information on their identity.

138 Deakin, Simon, Angus Johnston, and Basil Markesinis. *Markesinis and Deakin's Tort Law* (Oxford: Clarendon Press, 2008) p.210-1.

139 Craig, Paul, *Administrative Law* (London: Sweet & Maxwell, 2003) p.897-8.

140 [1989] AC 53.

141 *Alexandrou v Oxford* [1993] 4 All ER 328; *Ancell v Mc Dermott* [1993] 4 All ER 355; *Cowan v Chief Constable of for the Avon and Somerset Constabulary* [2002] HLR 830; *Marsh v Chief Constable of Lancashire Constabulary* [2003] EWCA Civ 284; *Brooks v Commissioner of Police of the Metropolis* [2005] 1 WLR 1495.

142 *Swinney v Chief Constable of Northumbria Police* [1997] QB 464.

143 *Van Colle v Chief Constable of Hertfordshire* [2007] EWCA Civ 325; *R (on the application of Bloggs 61) v Secretary of State for the Home Department* [2003] EWCA Civ 686; *R (on the application of DF) v Chief Constable of Norfolk* [2002] EWHC 1738.

Moreover, the close relationship between the police and an employee[144] or a prisoner under their care[145] or an individual who has received personal threats and has asked for their assistance[146] could also give rise to a duty of care.

When it comes to other emergency services such as fire brigades and coastguard authorities, the relevant rulings have established that they do not owe a duty to respond to all calls for help, as they may prioritize one emergency over another. If they do turn up at an emergency situation, they cannot be held responsible for the way in which they carry out their duties[147], unless they negligently cause additional damage[148]. However, the position of ambulance services is different. The judgment in *Kent v Griffiths, Roberts and London Ambulance Service*[149], a case where the delay of the ambulance resulted in the patient losing her baby and suffering long-term physical and psychiatric harm, clarified that the ambulance services' acceptance to respond to a call establishes a special relationship with the patient, who is the only individual who could be harmed by their negligence. Thus, their duties are comparable to those owed by hospitals and not the police or the fire brigades, who are usually responsible for the public at large. In the same case, the court took the opportunity to emphasize the distinction between operational and policy issues, meaning that if the defendant had argued that the delay was due to the lack of resources or more pressing emergencies, the result of the case would have been different.

Especially regarding negligence liability of local authorities, the milestone case of *X v Bedfordshire County Council*[150] established an approach similar to the one taken in *Hill*[151]. In this instance, the House of Lords examined five different claims against local authorities for carelessly carrying out their duties with respect to the protection of children from abuse and the

144 *Waters v Commissioner of Police for the Metropolis* [2000] 4 All ER 934.
145 *Reeves v Commissioner of Police for the Metropolis* [1999] 3 WLR 363.
146 *Smith v Chief Constable of Sussex* [2008] EWCA Civ 39.
147 *John Munroe (Acrylics) Ltd v London Fire and Civil Defense Authority and Others* [1997] 2 All ER 865, CA; *OLL Ltd v Secretary of State for Transport* [1997] 3 All ER 897.
148 *Capital and Counties plc v Hampshire County Council* [1997] 2 All ER 865.
149 [2000] 2 WLR 1158.
150 [1995] 2 AC 633.
151 See also *D v East Berkshire Community NHS Trust* [2005] 2 AC 373; *Harris v Evans* [1998] EWCA Civ 709; *Stovin v Wise* [1996] AC 923. Especially on the subject of immunity of local authorities from duty to repair highways, see *Sandhar v Secretary of State for Transport, Environment and the Regions* [2005] 1 WLR 1632; *Gorringe v Calderdale MBC* [2004] 1 WLR 1057; *Goodes v East Sussex CC* [2000] 1 WLR 1356.

provision of appropriate education to children with special needs. All claims were dismissed during the striking-out procedure[152], on the grounds that it was not fair, just and reasonable to impose a duty of care on public bodies for decisions made within their discretionary power, unless of course said decisions were incontestably irrational. As in *Hill*, it was determined that such a burden would be counter-productive because it would deflect the public sector's scarce resources from child care to the preparation against negligence suits. Anyway, there were other remedies under public law available to citizens for the resolution of such disputes[153].

This preferential treatment of public services and organizations has not gone unchallenged. In *Osman v UK*[154], the European Court of Human Rights had the opportunity to examine the issue of blanket immunities protecting public bodies from negligence liability, in connection with the striking-out procedure frequently applied by English courts to determine the existence of a duty of care. The claimants in this case had repeatedly reported threats and attacks made against them by a teacher who was obsessed with the family's son. Despite that the teacher's criminal behaviour was well known to the local police authorities, no effective action was taken against him. As a result of the police's inaction, the teacher eventually killed the father and seriously injured the son. The Osmans filed a negligence lawsuit against the police, who countered with a striking-out application. The court followed the principle established in *Hill* – that the police do not owe a duty of care with respect to the way they choose to conduct their investigations – and struck out the claim[155]. Subsequently, the Osmans brought their case before the European Court of Human Rights. One of their main arguments was that the dismissal of their claim at the striking-out procedure deprived them of their right to present the merits of their case before a court of law. The ECHR agreed that the rule set out in *Hill* had the effect of granting the police a blanket immunity which, combined with the striking-out mechanism, constituted a breach of article 6 of the European Convention on Human Rights (the right to a fair trial). The main reasoning of the ECHR was that the practice of dismissing claims at the stage of the striking-out procedure prevented the English courts from looking into the facts of each individual case. Thus, while there is an indisputably important public interest supporting the *Hill*

152 See above p.3-4.
153 Elliott, Catherine, and Frances Quinn, *Tort Law* (Essex: Pearson Education Limited, 2005) p.69-70.
154 [1998] 25 EHRR 245.
155 *Osman v Ferguson* [1993] 4 All ER 344.

principle, namely safeguarding the emergency services' efficiency, cases where opposing public policy arguments might have countervailed it are left unexplored[156].

This judgment triggered intense disputes in the British legal world, with some academics arguing for the abolition of the striking-out device or at least its use only in the most straightforward cases[157]. Not surprisingly, a shift in the courts' approach towards public bodies' immunity from negligence actions begun to be noticed soon afterwards. As *Osman v UK* was considered applicable not only to claims against the police but also any other authority of the public sector, there are many instances where educational institutions were held accountable for careless provision of services to children[158] or where courts refused to strike out claims against local authorities for negligently handling foster-care[159] and child-abuse cases[160]. In a later decision, *Z v UK*[161], the ECHR acknowledged that their judgment in *Osman* had been due to a misinterpretation of the English tort of negligence. In particular, they conceded that the striking-out hearing provides the courts sufficient opportunity to weigh all competing policy factors, given that they explore what the outcome would be if the allegations made by the claimant were true. Although this backtracking of the ECHR was received with a sigh of relief by the English legal world, it would not be accurate to say that English courts went back to their previous practice of recognizing an immunity from negligence suit for public bodies[162]. Thus, the situation in this area is currently unpredictable and the only common denominator of relevant rulings is that they are mostly based on policy considerations and the three-stage *Caparo* test[163].

3. Breach of duty

156 Elliott, Catherine, and Frances Quinn, *Tort Law* (Essex: Pearson Education Limited, 2005) p.76.
157 Elliott p.77.
158 *E v Dorset CC* [1994] 3 WLR 853; *Phelps v Hillingdon London Borough Council* [2001] 2 AC 619; *Carty v Croydon London Borough Council* [2005] EWCA Civ 19.
159 *Barrett v Enfield BC* [2001] 2 AC 550; *A and B v Essex CC* [2002] EWHC 2707 (QB), [2003] 1 FLR 615; *Bluett v Suffolk County Council* [2004] EWCA Civ 1707.
160 *W v Essex CC* [2001] 2 AC 592; *L (A Child) and Another v Reading BC and another* [2001] 1 WLR 1575; *S v Gloucestershire CC* [2001] Fam 313; *Pierce v Doncaster MBC* [2007] EWHC 2968 (QB); *A v Hoare; C v Middlesbrough Council; X v Wandsworth LBC; H v Suffolk CC; Young v Catholic Care* [2008] UKHL 6.
161 [2001] 2 FLR 612.
162 Elliott, Catherine, and Frances Quinn, *Tort Law* (Essex: Pearson Education Limited, 2005) p.78.
163 Harpwood, Vivienne, *Modern Tort Law* (London and New York: Routledge-Cavendish, 2008) p.128.

After establishing the existence of a duty of care, the next requirement of tortious liability is the breach of this duty. Breach of duty refers to the standard of care appropriate to the duty owed. It is a key notion in the tort of negligence and corresponds to fault on the part of the defendant. This fault essentially means that the latter fell below the proper standard of care by not behaving in a reasonable way in a particular situation[164].

Unlike the complicated duty concept which is the source of much controversy, the standard of care required for breach is more concrete and comprehensible without being less significant. As its focus is on the defendant's conduct, it lies at the heart of this tort and often arises as the defining component of negligence. From a historical standpoint, carelessness resulting in loss was the single common denominator of a series of uncategorized actions which were grouped together during the nineteenth century to form a new nominate tort: the tort of negligence[165].

An important distinction of practical nature between duty of care and breach is that the first is a matter of law while the second of fact. From this follows that a ruling based on breach will rarely reach an appellate court – this will happen only in the event that the evaluation of the facts blatantly disregards the evidence. However, the House of Lords in *Benmax v Austin Motor Co Ltd*[166] distinguished the notion of primary facts from the concept of inferences deriving from them; it was stated that while an appellate court cannot review the factual circumstances of the case, when a dispute concerns the conclusions drawn from them by the trial judge, then the court of second instance has the authority to revisit the merits of the case. This approach is the threshold through which the element of breach may be evaluated by higher courts and introduced into decisions of precedential value[167].

3.1 The "reasonable man" test

164 Harpwood p.129.
165 Steele, Jenny, *Tort Law-Text, Cases and Materials* (Oxford: Oxford University Press, 2007) p.110-1.
166 [1955] AC 370.
167 Lunney, Mark, and Ken Oliphant, *Tort Law-Text and Materials* (Oxford: Oxford University Press, 2008) p.161-2.

Notwithstanding that the notion of personal fault is at the heart of the breach element of negligence, the test for determining that the defendant's conduct was careless is an objective one. The standard of care a defendant has to meet in order not to be found negligent is that of the reasonable person, the ordinary citizen who is prudent and careful, described as "the man on the street, or the man on the Clapham Omnibus"[168]. The common law does not admit various types of standards or different degrees of negligent behaviour; the standard is always one and the same and the only form of negligence is failure to meet it[169]. In *Glasgow Corporation v Muir*[170], Lord Macmillan gave a much-quoted definition: "The standard of foresight of the reasonable man eliminates the personal equation and is independent of the idiosyncrasies of the particular person whose conduct is in question".

Given that it is objective, the standard of care is determined according to the activity undertaken by the defendant rather than his/her personal characteristics. Thus, it generally does not take account of inexperience or sickness or any other factor influencing the defendant's conduct. This becomes more obvious in areas of human activity affecting public safety. In *Nettleship v Weston*[171], the claimant was a driving instructor who was injured when the learner driver he was teaching lost control of the vehicle and crashed into a lamp post. The Court of Appeal held the defendant liable, despite the fact that she was a learner driver. One of the dissenting judges argued that the learner's inexperience was not irrelevant in that case because there was a pre-tort relationship between the two parties, due to which the claimant was aware of the defendant's lack of skill. In such circumstances, a mistake is highly predictable for any ordinary inexperienced person. But the majority concluded that the standard of care could not vary according to the relationship of the defendant with any potential victim, as this would lead to uncertainty and injustice. This is the approach followed by the English courts up to this day[172]. Of course, it has to be noted that one of the reasons behind this judgment was the Court's awareness that the defendant was insured and that the compensation would be covered by the insurance company. In his speech, Lord Denning pointed out that in areas such as road traffic

168 *Hall v Brooklands Auto-Racing Club* [1933] 1 KB 205.

169 Heuston, R.F.V., and R. A. Buckley, *Salmond and Heuston on the Law of Torts* (London: Sweet & Maxwell, 1996) p.222-3.

170 [1943] AC 448, 457.

171 [1971] 2 QB 691; see also *Roberts v Ramsbottom* [1980] 1 WRL 823; *Broome v Perkins* [1987] RTR 321.

172 *Clerk & Lindsell on Torts* (London: Sweet & Maxwell, 2006) par. 8-122 to 8-122.

accidents, the law is more concerned with the question of who should bear the burden of loss than the justice of the individual case. There is no doubt that an insurance company is better equipped to afford the cost of the accident than the wrongdoer[173]. This line of reasoning is an indication that where insurance is compulsory or customary, negligence may be equated with strict liability[174].

By attempting to assess every situation based on the same criteria, the "reasonable man test" disregards the diversity of individuals and circumstances, resulting in the imposition of strict liability in cases where the defendant, due to a specific deficiency, cannot measure up to the objective standard. This criticism is expressed by authors who advocate for a more fault-centered formula for tort liability, which would yield more fair results. Some of them take this argument further in stating that the idea of a uniform criterion does not distinguish between the terms "proper" and "ordinary" behaviour, promoting the latter as the only decisive factor. But what is ordinary or normal cannot convincingly be argued to include groups of people who are traditionally discriminated against, such as ethnic, racial or religious minorities, the poor or people with disabilities[175].

However, some variations of the standard of care do exist. The first is the standard used for children, which is of the typical child of the defendant's age group. Secondly, it is accepted that in sports there is usually no time to assess a situation and react in the best possible way. The courts are then more inclined to recognize attenuating circumstances and find that the defendant's conduct did not fall below the appropriate standard[176]. The same reasoning is generally followed in cases where the defendant acted in an emergency; provided that the alleged negligent behaviour was not unreasonable under the specific circumstances, the defendant will not be held liable[177].

In deciding whether the defendant's conduct is reasonable or not, the courts have to take into consideration a series of factors such as the foreseeability and magnitude of the damage, the

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173 Steele, Jenny, *Tort Law-Text, Cases and Materials* (Oxford University Press, 2007) p.113.

174 Deakin, Simon, Angus Johnston, and Basil Markesinis. *Markesinis and Deakin's Tort Law* (Oxford: Clarendon Press, 2008) p.226.

175 Moran, Mayo, *Rethinking the Reasonable Person: An Egalitarian Reconstruction of the Objective Standard* (Oxford University Press, 2003) p.301-2.

176 Steele, Jenny, *Tort Law-Text, Cases and Materials* (Oxford: Oxford University Press, 2007) p.116-7.

177 *Clerk & Lindsell on Torts* (London: Sweet & Maxwell, 2006) par. 8-126.

practicability of preventing it and the potential benefits of taking the risk. A famous attempt to balance the first three of the above factors is the formula elaborated by the American judge Learned Hand in a series of American cases[178]. According to the "Learned Hand formula", if the probability of injury is P, the gravity of the loss L and the burden of precautions against it B, then liability depends on whether B is less than L multiplied by P. Proponents of the economic analysis of the law refer to it as a test which imposes liability only where it is economically efficient to do so and which sets the ideal standard for deterrence from careless conduct[179]. The main objection to this rule is that it puts a price even on personal injuries which can never be compensated in full; bodily or mental harm is not comparable to a pecuniary burden imposed on the defendant. Moreover, it is generally considered offensive to allow injury on a human being just because it is economically beneficial. All the same, this formula could prove a useful mechanism with respect to property damage, as it is undeniable that the question of breach requires some sort of weighing of competing interests[180].

Another argument against the "Hand formula" is that it leaves out of the equation the fourth factor which needs to be assessed in the context of breach, namely the utility (if any) of the activity undertaken by the defendant. The element of utility or benefit of the risk should also be weighed against the cost of prevention[181]. In *Watt v Hertfordshire County Council*[182], the claimant was a firefighter who was called with other colleagues to the rescue of a woman trapped under a car. In order to save her, they had to take a heavy jack from the fire station. The vehicle normally used to transport it was not available, so they had to carry it in the fire engine unsecured, which resulted in the jack slipping and injuring the claimant. The court held that his employers were not negligent because the need to get to the scene fast and save the woman's life prevailed over the risk taken in carrying the jack in a non-designated vehicle.

178 See *United States v Carroll Towing Co* [1947] 159 F 2d 169.

179 Landes, William M, and Richard A. Posner, *The Economic Structure of Tort Law* (Harvard University Press, 1987) p. 85.

180 Deakin, Simon, Angus Johnston, and Basil Markesinis. *Markesinis and Deakin's Tort Law* (Oxford: Clarendon Press, 2008) p.235.

181 Rogers, W.V.H., *The Law of Tort* (London: Sweet & Maxwell, 1994) p.65.

182 [1954] 1 WLR 835.

A much-cited case which aptly illustrates the balancing of all the above criteria is *The Wagon Mound No.2*[183]. The facts were that the vessel of the defendants leaked oil close to a wharf in the harbour of Sydney due to carelessness of the seamen. Some hours later, the wind carried debris under the wharf, where welding works were being carried out. As a result, the debris caught alight and the fire spread through the oil and caused considerable damage to the wharf as well as to adjoining ships. Two actions were brought against the owners of the "Wagon Mound". In the first the claimants were the owners of the wharf. The Judicial Committee of the Privy Council held there was no negligence because the damage was not reasonably foreseeable[184]. In the second case, *The Wagon Mound No.2*, the defendants were sued by the owners of the ships. In this case, the court took into account more factors than mere foreseeability and held that the defendants were in breach of a duty to care. In particular, the judges reasoned that although the likelihood of damage was low given that oil of that kind on the water surface was extremely unlikely to catch fire, the magnitude of the risk was great, while at the same time preventing the damage would have cost nothing. Furthermore, the utility of the activity carried out on the "Wagon Mound" was of commercial nature and benefited only the owners, so it could not justify taking the risk.

Once all relevant factors have been assessed and the breach of duty established, another rule has to be applied: it is known as the "thin skull" or the "egg-shell skull rule" which is often summarized as "defendants must take the victims as they find them". This essentially means that liability stretches to the whole extent of the loss, even if it ends up being much greater than what could have been reasonably anticipated[185].

3.2 The standard of care for professionals

Acts and omissions of professionals are not assessed according to the "reasonable man" test but compared against the standards appropriate for their peer group. Defendants who cause injury to

183 [1967] 1 AC 617

184 *The Wagon Mound No.1* [1961] AC 388.

185 Lunney, Mark, and Ken Oliphant, *Tort Law-Text and Materials* (Oxford: Oxford University Press, 2008) p.171, 274.

others by not meeting the level of skill accepted within the area of their expertise, are in breach of their duty to care[186].

The standard of care for professionals has its origin in a case regarding medical malpractice, *Bolam v Friern Barnet Hospital Management Committee*[187]. The claimant suffered from psychiatric problems and decided to undergo electro-convulsive therapy. His doctor did not give him relaxant drugs during the treatment and as a result the patient suffered fractures. At the time, the medical community was divided on whether administering relaxant drugs to patients undergoing electro-shock therapy was acceptable practice or not, and evidence was presented supporting both opinions. The court decided that there was no negligence on the defendant's part because, as Mc Nair J stated: "A doctor is not guilty of negligence if he has acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art. Putting it another way round, a doctor is not negligent if he is acting in accordance with such a practice, merely because there is a body of opinion that takes a contrary view[188]".

This formulation, known as the *Bolam* test, was later extended to cover other areas of professional negligence[189] and was taken to mean that if a defendant could provide evidence that his/her view on a particular matter was supported by another group in the same profession, no matter how small that group might be, he/she could escape liability[190]. It is indeed understandable that judges hesitate to interfere with differences of opinion among professionals by choosing one expert approach over another. Furthermore, there is the argument that negligent practices can be prevented or deterred more efficiently by professional bodies with the authority to control and sanction them than through litigation. Especially where medical malpractice is concerned, the threat of costly and time consuming legal proceedings brings about the counter-productive practice of "defensive medicine", which hinders scientific progress as doctors tend to

186 Elliott, Catherine, and Frances Quinn, *Tort Law* (Essex: Pearson Education Limited, 2005) p.82.
187 [1957] 1 WLR 582.
188 [1957] 1 WLR 582, 587.
189 *Saif Ali v Sydney Mitchell & Co.* [1980] AC 198, where the *Bolam* test was applied to lawyers; *Mutual Life Assurance Co. Ltd v Evatt* [1971] AC 793, where it was applied to accountants; *Luxmoore-May v Messenger May and Baverstock* [1990] 1 All ER 1067, where it was applied to auctioneers; *Vowles v Evans* [2003] EWCA Civ 318, where it was applied to a referee; *Gates v McKenna* [1998] Lloyd's Rep Med 405 where it was applied to a stage hypnotist.
190 Harpwood, Vivienne, *Modern Tort Law* (London and New York: Routledge-Cavendish, 2008) p.143.

adhere to widely accepted techniques and fear to develop new ones[191]. For all these reasons, the *Bolam* test was commonly applied by courts in medical and other professional negligence cases. In *Maynard v West Midlands RHA*[192], Lord Scarman justified this line of thinking by stating that: "Differences of opinion exist […] in the medical as in other professions. […] A court may prefer one body of opinion to the other; but that is no basis for a conclusion of negligence", while in *Sidaway v Governors of the Bethlem Royal Hospital*[193], the *Bolam* principle was extended to the issue of "informed consent"; the House of Lords concluded that a doctor was not negligent in giving the patient less information than the latter deemed necessary, provided that other colleagues would have done the same in an analogous situation.

However, this overt pro-defendant stance of the courts in professional misfeasance cases, eventually led to intense criticism of the *Bolam* rule. Firstly, while the standard of care for people other than experts is objective and decided by the court, professionals are free to set their own standards, since the only thing they have to do to disprove negligence is find other colleagues willing to testify in support of their act or omission. Thus, professionals enjoy more protection than any other type of defendant[194]. Further, it follows that even practices that are only marginally accepted precisely because they are more likely to result in harm, are condoned by the law[195]. An effort to moderate the rigidity of the *Bolam* test was made in *Hills v Potter*[196], where the judgment specified that the body of medical opinion providing testimony for the defendant should be "both respectable and responsible and experienced in the particular field of medicine". Nonetheless, this additional requirement was not deemed sufficient to mitigate the unfairness of the test for claimants, because its content was vague and did not include a definition of the terms "respectable", "responsible" or "experienced"[197].

191 Deakin, Simon, Angus Johnston, and Basil Markesinis, *Markesinis and Deakin's Tort Law* (Oxford: Clarendon Press, 2008) p.232-3.
192 [1984] 1 WLR 634.
193 [1985] AC 871.
194 Brazier, Margaret, and José Miola*, Bye-Bye Bolam: A Medical Litigation Revolution?* (Medical Law Review, Oxford University Press, 2000) p.85.
195 Harpwood, Vivienne, *Modern Tort Law* (London and New York: Routledge-Cavendish, 2008) p.144-5.
196 [1984] 1 WLR 641.
197 Harpwood p.144.

All this criticism culminated in the modification of the *Bolam* principle in *Bolitho v City and Hackney Health Authority*[198]. According to the facts of the case, a two-year-old boy who was being treated in the defendants' hospital for croup, suffered a cardiac arrest resulting in brain damage and death. Before that, the boy had two episodes of respiratory failure and the nurses responsible for his care called for a doctor to intubate him. Unfortunately, on both occasions no doctor appeared. The mother brought an action claiming that if a doctor had intubated her child, his death would have been avoided. The doctor's case on the other hand was that even if she had attended, she would not have chosen to intubate, thus the fact that she did not answer the nurses' calls was not the cause of the injury. Ultimately, the question the court was faced with was whether the doctor's decision not to intubate the boy would have been negligent had she attended. Both parties produced expert witnesses who supported their opposing views. Normally this would mean that the doctor could not be found liable, since her opinion was accepted by a body of competent medical professionals. The House of Lords, while still confirming *Bolam* as good law, took this opportunity to clarify that a "responsible, reasonable or respectable" body of opinion meant that the experts giving testimony should weigh the risks against the benefits of the practice or approach in question. Consequently, it was stated that the court was not bound to find for the defendant, if it was not satisfied that the evidence produced by his/her experts was based on logical and convincing arguments.

This was undoubtedly a new approach to the standard of care for professionals. However, the House of Lords in the same judgment concluded that more often than not, the very fact that a group of experts shared a view would make it a reasonable one, and only in very rare occasions were courts to reject an expert opinion as lacking any logical foundation. In the end, they found the defendant not negligent on the basis that the decision not to intubate the child was supported by other medical professionals and was not proven unreasonable. Despite the outcome of the case, the new version of the *Bolam* test, as developed in *Bolitho*, was later used more decisively to hold professionals to higher standards of care[199]. In a case which received wide media coverage in 2004, *A, B and others v Leeds Teaching Hospitals NHS Trust*[200], the claimants were parents who had not been notified that the organs of their deceased children had been retained

198 [1998] AC 232.

199 *Chester v Afshar* [2005] 1 AC 134*; Hunt v NHS Litigation Authority* [2002] WL 1480071; *Ryan v East London and City HA* [2001] WL 1890334.

200 [2004] EWHC 644.

after their deaths for research purposes. They brought an action against the hospital claiming they had suffered psychiatric injury after the shock of finding out what had happened. In the course of the case it was proven that many other doctors would have acted in the same way. In addition, the court accepted that the defendants were in good faith, as they intended to advance medical research and at the same time avoid causing additional pain to bereaved parents by exposing them to all the details of post-mortem examinations. Nevertheless, the ruling was in favour of the claimants. According to the judgment, the defendants had a duty to present all the facts to the parents, so that they would have been able to make an informed decision on whether or not they would give their consent to the doctors to retain their children's organs for research.

3.3 The doctrine of *res ipsa loquitur*

In tort negligence actions, the burden of proof is upon the claimant. The latter has to collect all relevant evidence and prove, "on a balance of probabilities" – as is the civil evidentiary standard – that it was more likely than not that the defendant's careless conduct resulted in breach of a duty of care and caused the plaintiff's loss[201]. One exception to this rule, where the onus of proof is reversed, is stated under section 11 of the Civil Evidence Act 1968. According to this provision, which is commonly applied in road accident cases, criminal convictions are admitted as evidence in civil negligence actions regarding the same factual situation. In such cases, it is for the defendant to disprove that his or her act or omission was negligent[202].

Under certain circumstances, it might be especially difficult or even impossible for the plaintiff to prove how the accident happened because he/she is in no position to know the series of events that led up to the breach. In such cases, the claimant may invoke the principle of *res ipsa loquitur*, meaning "the thing speaks for itself", which allows the court to draw an inference of negligence from the nature of the accident or the description of the damage suffered. In a nutshell, the claimant does not have to provide evidence of the defendant's conduct that brought the damaging result, as would be the usual burden[203]. The criteria for the application of *res ipsa*

201 Steele, Jenny, *Tort Law-Text, Cases and Materials* (Oxford University Press, 2007) p.134.

202 Deakin, Simon, Angus Johnston, and Basil Markesinis, *Markesinis and Deakin's Tort Law* (Oxford: Clarendon Press, 2008) p.241.

203 *Clerk & Lindsell on Torts* (London: Sweet & Maxwell, 2006) par. 8-151.

loquitur, as established in the leading case *Scott v London and St. Catherine Docks Co*[204], are three: 1) the cause of the incident must be unknown, meaning that neither the claimant nor the defendant must be able to readily produce an explanation, 2) the incident could not have occurred but for careless human behaviour and 3) the situation must have been under the total control of the defendant or another person for whom the latter was responsible[205]. Successful invocation of this principle enables the claimant to make his/her case by establishing a *prima facie* finding of negligence which the defendant will have to disprove by producing a plausible explanation of the occurrence or by providing proof that his/her conduct did not fall below the appropriate standard of care[206]. Application of this maxim is frequent in traffic accident cases where there is no criminal conviction, as well as employer's liability actions. It was also commonly raised in cases involving foreign bodies in food products, until the Consumer Protection Act 1987 established strict liability for manufacturers and rendered the operation of the principle redundant[207]. Regarding the area of medical malpractice, despite the fact that all three requirements of the doctrine will be present in most cases, the courts are hesitant to accept its application, as this might result in "opening the floodgates" of litigation to the detriment of the medical profession[208].

There have been disputes regarding the exact nature and effect of *res ipsa loquitur*, especially on a procedural level. It has been strongly suggested that its operation reverses the burden of proof in favour of the claimant, which practically means that it establishes a kind of strict liability in situations where the defendant cannot explain how the accident occurred[209]. According to this view, the application of the principle raises a presumption of negligence. If the defendant's version of events is equally plausible as the claimant's but not more so, then the court is bound to find for the claimant. The opposing view is that the invocation of the doctrine does not raise a presumption but only an inference of carelessness, thus the plaintiff bears the onus of proof throughout the whole proceeding. This means that the defendant can win the case

204 [1865] 3 H & C 596.

205 [1865] 3 H & C 596, 601.

206 Deakin, Simon, Angus Johnston, and Basil Markesinis, *Markesinis and Deakin's Tort Law* (Oxford: Clarendon Press, 2008) p.242-3.

207 Harpwood, Vivienne, *Modern Tort Law* (London and New York: Routledge-Cavendish, 2008) p.158; Deakin, Simon, Angus Johnston, and Basil Markesinis, *Markesinis and Deakin's Tort Law* (Oxford: Clarendon Press, 2008) p.243.

208 Harpwood, Vivienne, *Modern Tort Law* (London and New York: Routledge-Cavendish, 2008) p.158.

209 *Widdowson v Newgate Meat Corporation* [1998] PIQR P 138; *Ward v Tesco Stores* [1976] 1 WLR 810.

by producing an explanation of the occurrence which is equally plausible to the claimant's[210]. The fact that the burden of proof does not move from the claimant to the defendant was clarified by the Privy Council in *Ng Chun Pui v Lee Chuen Tat*[211] and is supported by the majority of the legal community in England[212].

However, whatever the actual function of *res ipsa loquitur* may be, the main advantage of its application is a practical one. By raising an inference of negligence, it often helps the parties reach a settlement at an early stage, if both are incapable of convincingly explaining what happened[213].

210 *Clerk & Lindsell on Torts* (London: Sweet & Maxwell, 2006) par. 8-155; Harpwood, Vivienne, *Modern Tort Law* (London and New York: Routledge-Cavendish, 2008) p.159.

211 [1988] RTR 298; see also *Schellenberg v Tunnel Holdings* [2000] 200 CLR 121.

212 Lunney, Mark, and Ken Oliphant, *Tort Law-Text and Materials* (Oxford: Oxford University Press, 2008) p.205; Harpwood, Vivienne, *Modern Tort Law* (London and New York: Routledge-Cavendish, 2008) p.157; Steele, Jenny, *Tort Law-Text, Cases and Materials* (Oxford: Oxford University Press, 2007) p.134; Deakin, Simon, Angus Johnston, and Basil Markesinis, *Markesinis and Deakin's Tort Law* (Oxford: Clarendon Press, 2008) p.242.

213 Harpwood, Vivienne, *Modern Tort Law* (London and New York: Routledge-Cavendish, 2008) p.159; Deakin, Simon, Angus Johnston, and Basil Markesinis, *Markesinis and Deakin's Tort Law* (Oxford: Clarendon Press, 2008) p.242.

III. The conditions of tortious negligence in Greek law

In contrast with the English common law, the Greek Civil Code (hereinafter GCC) does not recognize separate tort categories but states the requirements for tortious liability in one general clause. According to article 914 of the GCC, "a person who causes harm to another unlawfully and through his/her own fault, shall be liable to compensate the injured party". Thus, in order for tortious liability to be established, the following conditions need to be met: unlawful human behaviour (act or omission), fault of the person who behaved unlawfully in the form of intention or negligence and damage. Although it is not specifically stipulated in the above article, the existence of a causal link between the act or omission and the damage also needs to be proven[214]. It is evident from the above, that there is no distinction between intentional and negligence torts. No matter whether the act or omission is intentional or negligent, the same general requirements are needed, the only difference being the form of fault.

The Greek tort law follows the European civil law tradition[215]. It is organized around one basic provision, the general clause of art. 914 GCC – which is mostly based on art. 41 of the Swiss Code of Obligations[216] – and includes more detailed articles (915-938), the sum of which forms the 39th chapter of the GCC, titled "torts", which in turn makes part of the second book of the Civil Code, dedicated to the law of obligations in general (contract, tort, unjust enrichment). The decision of the Greek legislator to state the abstract legal concepts of unlawfulness and fault as conditions of tort liability, aims to make the law flexible enough to cover numerous situations of delictual behaviour. This is said to promote the ability of Greek tort law to adjust to novel circumstances which may give rise to negligence claims. On the other hand, the absence of clear and unequivocal criteria for the determination of tort liability often results in insecurity and confusion[217].

214 Karakostas, Ioannis, *The Law of Tort-Articles 914-938 GCC* (Athens: Nomiki Vivliothiki, 2014) p.29.

215 Most European civil law codes include general clauses on tort liability: articles 1382, 1383 of the French Civil Code, 41 of the Swiss Code of Obligations, 1295 of the Austrian CC, 1902 of the Spanish CC, 162 of the Dutch CC, 2043 of the Italian CC and 483 of the Portuguese CC.

216 Kornilakis, Panos, *Law of Obligations-Special Part I* (Athens-Thessaloniki: Sakkoulas Publications, 2002) p.467.

217 Karakostas, Ioannis, *The Law of Tort-Articles 914-938 GCC* (Athens: Nomiki Vivliothiki, 2014) p.23.

1. Unlawful behaviour

There are two theories in the Greek law of tort regarding the definition of the legal concept of unlawful or wrongful conduct. According to the first, known as the "subjective theory", art. 914 GCC is a rule of substantive law which prohibits any harmful conduct due to a person's fault, unless the latter has a legal right to act this way. Breach of this legal rule entitles the injured party to claim compensation. This theory evidently considers the condition of unlawfulness included in art. 914 redundant. It is not widely accepted by the Greek jurisprudence mainly because it leads to excessive liability, but also because it contradicts the letter of art. 914, which clearly states that illegality and fault are two distinct requirements of tortious liability.

According to the prevailing "objective theory", the general clause of art. 914 is open with respect to the content of the notion of illegality, which needs to be sought in other legal norms, whatever their provenience (civil, criminal or public law). Thus, the determination of whether an act or omission is wrongful or not, is based on other prohibitive or mandatory provisions. This makes art. 914 a "blank norm", containing only a sanction (compensation of the injured party), in case all tort liability requirements are fulfilled. In compliance with the objective theory, the prerequisite of wrongful conduct is generally defined as an act or omission which violates a prohibitive or mandatory legal norm[218]. This definition is quite broad and difficult to comprehend without further elaboration on the various forms of unlawfulness.

1.1. Violation of another person's rights

Undoubtedly, the most common form of illegality is the violation of another person's absolute rights. These are the fundamental human rights to life, bodily integrity, mental health, liberty, honour, name, privacy, etc. – all of which are protected in the Greek Civil Code under the provisions on personality[219] – as well as property, possession, family life, inheritance, intellectual

218 Georgiadis, Apostolos, *Law of Obligations-General Part* (Athens: P. N. Sakkoulas, 2015) p.655-6; Kornilakis, Panos, *Law of Obligations-Special Part I* (Athens-Thessaloniki: Sakkoulas Publications, 2002) p.477-9.

219 Articles 57-59 of the Greek Civil Code.

property etc. A violation of an absolute right is wrongful in itself, since it goes against the person's freedom to enjoy it.

Apart from the above rights, which are protected against any third party, a person may derive a right from a contract. When such a right is breached by someone outside of the contractual relationship, then no liability in tort can be established, since private agreements are only binding for the parties. Again, no tort liability arises in the event that a contract is violated by one of the parties; such claims are resolved according to the provisions on breach of contract[220]. Nevertheless, it is not uncommon for one act or omission to constitute breach of contract and wrongful behaviour at the same time. This happens when the conduct in question would have been unlawful even in the absence of a contractual bond, as for example in the case that a contractor negligently handles the material provided by the employer and destroys it[221]. In such cases, there is a concurrence of contractual and delictual liability, which entails the problem of the dynamic of the relationship between the two claims that arise from the same tortious act.

There are three main theories attempting to resolve the above issue. According to the first, known as "free concurrence of claims", two individual claims arise, one from the breach of the agreement and one from the wrongful act. Despite that they both aim at the restitution of the same damage, they are considered independent from each other. This means they can be brought to court separately – one based on provisions on breach of contract and the other on tort law – or assigned to a third party. To the extent that one of them is compensated, it cancels out the other. This theory is widely accepted and followed by courts, however, it has been pointed out that it presents some serious disadvantages, as it disregards the fact that contract and tort are governed by different principles and have different provisions on the limitation period or the degree of fault required for the determination of liability. Furthermore, in case one of the claims is transferred to a third party, the defendant will have to pay twice for the same damage, which is an unjust result[222].

220 Karakostas, Ioannis, *The Law of Tort-Articles 914-938 GCC* (Athens: Nomiki Vivliothiki, 2014) p.108-9.

221 Kornilakis, Panos, *Law of Obligations-Special Part I* (Athens-Thessaloniki: Sakkoulas Publications, 2002) p.460.

222 Dacoronia, Eugenia, *Tort Law in Greece. The state of art* in *Studia in Honorem Pelayia Yessiou-Faltsi* (Athens-Thessaloniki: Sakkoulas Publications, 2007) p.76-7.

The second theory of "interacting concurrence" addresses the inconsistencies of the above approach by supporting that the two individual claims may have an effect on each other. More specifically, the defendant will be liable only for gross negligence, which is the degree of fault required for breach of contract, while where a shorter limitation period is applicable in contract law, the same will apply in case the claimant decides to bring an action in tort. In other words, where the legislator imposes a stricter requirement, this has to be met no matter whether the claimant brings an action in contract or tort. It is obvious that this approach only answers the question of which provisions are applicable, but does not resolve the other problem of the first theory (assignment of one claim to a third party). In addition, there is no legal foundation for the application of provisions of contract law in tort actions[223].

A third theory, which has been gaining acceptance among legal authors but is not followed in court decisions, states that only one claim arises and it is founded on multiple legal bases. This position is considered as the most consistent with legal doctrine, as it allows that each claim is formed according to its specific characteristics. Moreover, it complies with modern procedural principles, which support that the object of every individual lawsuit is undivided and determined by its claim, which, in the event of concurrence of contractual and delictual liability, always corresponds to the restitution of the damage incurred. The justification of this "individualized" approach is that the decision of the legislator to impose stricter criteria in some situations reflects a balancing of opposing interests, thus cannot be ignored. On a practical level, this theory has the same results as the second one ("interacting concurrence"), the main difference being that it is considered as offering a better legal argument[224].

1.2. Violation of legal interests

223 Kornilakis, Panos, *Law of Obligations-Special Part I* (Athens-Thessaloniki: Sakkoulas Publications, 2002) p.464.

224 Georgiadis, Apostolos, *Concurrence of claims and concurrence of legal bases of a claim: a review* (Chronika Idiotikou Dikaiou, ΙΣΤ/2016) p.5-7; Kornilakis, Panos, *Law of Obligations-Special Part I* (Athens-Thessaloniki: Sakkoulas Publications, 2002) p.465-6; see also Karasis, Marianos, *Concurrence of contractual and delictual liability: a pseudo-problem?* (Elliniki Dikaiosyni, Volume 46th, May-June, Issue 3-Year 2005) p.650-2, where the author proposes the interesting view that there is a *lacuna* in relation to the concurrence of contract and tort liability, which could be filled by a general legal principle inferred by analogy of law. He calls it "obligation of protection" and defines it as a special kind of *ex lege* obligation, autonomous and independent from contract as well as tort law.

In general, the violation of simple private interests which do not enjoy the same legal status as legal rights specifically established in rules of law, does not constitute illegal behaviour as required in art. 914 GCC. However, according to the prevailing view in Greek jurisprudence, the condition of unlawfulness may be present in cases where an act or omission breaches the provisions of a law which aims to protect the interests of the general public. More specifically, if the protective law in question is deemed to protect, apart from the public interest, individual interests as well, rendering them legally relevant and equating them to legal rights, then said breach will be considered as wrongful conduct. The decision of whether or not the violation of a protective norm equals to illegality establishing tort liability, depends on its interpretation by the court. The methodological theory of the "objective of the rule of law" is a useful tool for the determination of which interests, to what extent and from what kind of violations are included in the protective scope of a particular legal provision[225].

Protective provisions which do not concern exclusively public interests but also private ones, can be found in the Greek Criminal Code[226] and other special criminal laws[227], in the Road Traffic Code, in various administrative statutes[228] etc. Another example is article 281 GCC on the abusive exercise of a legal right[229], which is considered to protect individuals who are harmed by another person's abuse of his/her legal rights. This provision is deemed to also protect society as a whole, because conduct of this kind goes against the overall legal system. In such cases, articles 914 and 281 GCC apply jointly to establish tort liability for acts or omissions against good faith or *contra bonos mores*[230]. It should be noted that art. 919 GCC (acts *contra bonos mores*)[231], which is a tort law provision, also establishes tortious liability for behaviour contrary to the principles of morality, however, it requires intention as a degree of fault. The joint application of articles 914 and 281 GCC offers a solution for situations where harm is caused negligently or where it is the result of conduct not against morality but only against good faith,

225 Georgiadis, Apostolos, *Law of Obligations-General Part* (Athens: P. N. Sakkoulas, 2015) p.659.
226 As for example art. 216 on forgery, art. 375 on embezzlement, art. 386 on fraud etc.
227 As for example art. 79 of law 5960/1933 on bounced cheques.
228 As for example law 4177/2013 on market regulations.
229 Article 281 GCC: "The exercise of a legal right is prohibited if it obviously exceeds the limits imposed by good faith or the principles of morality or the social or economic objective of the right".
230 AP 122/2011; AP 1063/2010; AP 841/2010; AP 690/2010; AP 1933/2009; AP 1457/2009; AP 480/2009; AP 876/2009; AP Ol 11/2007; AP 1398/2000. All the above are published in the databank of the Athens Bar Association "ISOCRATIS" [TNP DSA].
231 Article 919 GCC: "Intentional harm *contra bonos mores* shall be compensated".

with the restriction that the violation should be "obvious", which is not a requirement for art. 919 GCC. In such cases, the type of damage caused is indifferent, meaning that even pure economic loss is compensated[232].

The above observation is of paramount importance in relation to the issue of pure economic loss, especially if it results from negligent acts or omissions. Greek law does not recognize an absolute right to the sum of the value of a person's assets, but to each one of them separately. This means that damage which corresponds only to a decrease in the monetary value of a person's total assets, is not restituted. In order to be awarded compensation in such cases, the injured party must also prove damage to an absolute right or a legally protected individual interest. Therefore, pure economic loss is more easily restituted when caused by an intentional act or omission. In order to determine compensable economic loss in negligence cases, courts apply the general clause of art. 914 GCC combined with art. 281 GCC mentioned above or with art. 288 GCC on *bona fidem*[233] – frequently a combination of all three[234]. The claimant will have to prove a close legally relevant relationship with the defendant, because of which the latter should have acted in good faith and exercised proper care[235].

1.3. Breach of the general duty of care

Another form of illegality which satisfies the criterion of wrongful conduct stated in art. 914 GCC, is the violation of the unwritten rules regarding the "duty to exercise prudence and diligence" in social interaction. This general duty of care is required in any type of social activity which involves some level of risk, thus compels those who engage in it to take the appropriate precautionary measures in order to countervail or at least reduce the possibility of damage. The legal basis of the unlawfulness of such behaviour can be found in the two general clauses of the GCC mentioned in the chapter above: art. 281 GCC on the abusive exercise of a legal right and

232 Kornilakis, Panos, *Law of Obligations-Special Part I* (Athens-Thessaloniki: Sakkoulas Publications, 2002) p.490.

233 Article 288 GCC: "Obligations shall be carried out according to good faith, taking into account market customs".

234 EfLar (=Court of Appeal of Larissa) 575/2011 TNP DSA; AP 1768/2009 TNP DSA.

235 Karakostas, Ioannis, *The Law of Tort-Articles 914-938 GCC* (Athens: Nomiki Vivliothiki, 2014) p.95-99.

art. 288 GCC on good faith, which again are applied jointly with art. 914 GCC[236]. As it is essentially a set of unwritten rules of conduct, this duty of safety and care can also be deduced from the values emanating from the Greek legal system in its entirety[237].

The extent of the protection against negligent conduct of this kind is restricted by the defendant's freedom of economic activity, which is protected under art. 5 par. 1 of the Greek Constitution. This means that the opposing rights in every individual situation should be balanced against each other, while the principle of proportionality stated in art. 25 par. 1 subpar. 4 of the Greek Constitution[238] should also be taken into account[239]. In any case, the standard of the general duty of prudence and care is not determined according to uniform criteria applicable in all human activities, but according to the ordinary level of skill required for the activity in question. The standard of care is higher for activities of increased danger. As is widely accepted, those who create or maintain a source of risk are obligated to take all necessary measures to keep it under control and avoid damage to others[240].

As has become evident from the above, this form of illegality is very similar to the notion of negligence as a form of fault. For this reason, some authors have expressed the opinion that negligence has a double function: as a form of fault as well as of unlawfulness. This will be discussed in more detail in the next chapter. However, according to the prevailing view in Greek jurisprudence, art. 914 GCC expressly states fault and wrongful conduct as two distinct conditions, both of which have to be met for the establishment of tort liability[241].

2. Fault in the form of negligence

236 AP 2075/2013 NoV 62, 926; AP 370/2011 TNP DSA; AP 867/2010 TNP DSA; AP 2219/2009 TNP DSA; AP 206/2009 NoV 57, 2161; AP 440/2007 TNP DSA.

237 Kornilakis, Panos, *Law of Obligations-Special Part I* (Athens-Thessaloniki: Sakkoulas Publications, 2002) p.492; Georgiadis, Apostolos, *Law of Obligations-General Part* (Athens: P. N. Sakkoulas, 2015) p.660.

238 Art. 25 par. 1 subpar. 4 of the Greek Constitution: "Any restrictions which, according to the Constitution, may be imposed on these rights [of the person as an individual and as a member of society] should be stipulated in the Constitution or in a rule of law, if the Constitution so permits, and should comply with the principle of proportionality".

239 Karakostas, Ioannis, *The Law of Tort-Articles 914-938 GCC* (Athens: Nomiki Vivliothiki, 2014) p.110.

240 Karakostas, Ioannis, *Liability of Manufacturers of Defective Products* (Athens: A. N. Sakkoulas, 1995) p.45.

241 Dacoronia, Eugenia, *Tort Law in Greece. The state of art* in *Studia in Honorem Pelayia Yessiou-Faltsi* (Athens-Thessaloniki: Sakkoulas Publications, 2007) p.65-6.

The element of wrongful behaviour alone does not suffice for the establishment of tortious liability in Greek law. As mentioned above, fault is also required. This is because an unlawful act or omission is deprecated *per se* by the legal order, before any personalized judgment against the tortfeasor. Therefore, the determination of the unlawful character of the conduct logically precedes its attribution to the defendant's fault. The condition of fault is fulfilled when the actor intended to cause harm (*dolus directus*) or accepted the possibility of a damaging result (*dolus eventualis*) or did not behave carefully enough so as to avoid it (negligence). From this follows that tort liability is of subjective character and should not be confused with strict liability, where the law determines that a certain form of conduct is wrongful in itself and the additional element of fault is not required. Examples of strict liability can be found in the GCC under the chapter on tort law[242] but are considered exceptions to the rule of the fault principle.

The definition of fault in the form of negligence is provided in art. 330 subpar. 2 GCC: "Negligent is a person who falls below the standard of care required in social activities". Like art. 914 GCC, this is a general clause which needs further elaboration. According to the interpretation established by the jurisprudence, negligence is present in situations where the actor should have been able to predict the damaging outcome of his/her conduct, which could have been avoided if the appropriate precautions had been taken[243].

2.1. Conscious and unconscious negligence

In Greek tort law, negligent behaviour is characterized as "conscious" when the actor foresees the possibility of a damaging result but hopes, wishes or believes that it will not occur. On the contrary, when a person is not able to foresee the damaging result of his/her conduct because he/she falls below the required standard of care, his/her fault is described as "unconscious negligence"[244]. The fact that harm was foreseeable does not mean that this type of negligence is

242 Art. 924 subpar. 2 GCC (liability for animals) and art. 925 (damage caused by the collapse of buildings or other works).

243 EfPir (=Piraeus Court of Appeal) 91/2012 TNP DSA; AP 1955/2009 TNP DSA.

244 EfLar (=Larissa Court of Appeal) 344/2011 TNP DSA; EfAth (=Athens Court of Appeal) 3723/2011 TNP DSA; EfAth 3886/2008 TNP DSA; EfLar 427/2007 TNP DSA.

equated to gross negligence. For example, in case the tortfeasor was convinced that the injurious result would be avoided, his/her carelessness was not serious but ordinary[245].

The notion of conscious negligence is often confused with that of *dolus eventualis*, as in both forms of fault there is the element of foreseeability of harm. A safe way to distinguish one from the other is to find whether the actor accepted that his/her act or omission could potentially cause damage. The element of "acceptance" of the result is only present in *dolus eventualis*, whereas a consciously negligent person does not accept the injurious outcome but merely believes, wishes or hopes to avoid it. However, on a practical level, it is not always easy to determine the form of fault based on this particular criterion, as the existence of the element of acceptance is a matter which needs to be proven by the claimant. The difficulty of this burden is further highlighted by the fact that the high degree of probability of the realization of the risk and the defendant's refusal to heed relevant warnings, do not predetermine that the tortfeasor's fault will be deemed *dolus eventualis*. Anyway, in case of doubt, the court is bound to find that the defendant was consciously negligent[246].

2.2. Standard of care and degrees of negligence

According to the prevailing view in Greek civil law, the standard of care taken into consideration to determine tort negligence is that of the ordinary reasonable and prudent person who is a typical representative of a particular social, professional or age group at a specific time and place. This view complies with the objective theory on the standard of care, as opposed to the subjective theory, which uses the criterion of the individual skills and capabilities of the particular defendant. The latter is applied in criminal law, which aims to impose a sanction on the culprit and deter him/her and others from committing criminal offenses, but is not compatible with the main objective of tort law, namely the restitution of the injured party. In professional liability cases, the standard of care is specified according to the relevant codes of conduct or good practice[247] and may vary depending on the level of skill of the defendant. For example, in

245 Karakostas, Ioannis, *The Law of Tort-Articles 914-938 GCC* (Athens: Nomiki Vivliothiki, 2014) p.129-130.
246 Karakostas, Ioannis, *The Law of Tort-Articles 914-938 GCC* (Athens: Nomiki Vivliothiki, 2014) p.130-1.
247 As for example the Code of Lawyers (law 4194/2013) and the Code of Ethics of the Medical Profession (law 3418/2005).

medical negligence cases, specialized doctors are bound to observe a higher standard than general practitioners, since patients rely on their services for more complex health issues and are prepared to pay higher fees [248]. Another type of negligent conduct is the engagement in activities requiring a special skill-set which the tortfeasor does not possess[249], as when an inexperienced computer technician takes on the installation of a company's complex computer network.

With respect to the degree of the defendant's carelessness, there is a distinction between gross negligence and ordinary negligence, which is known as "minor negligence" (*culpa levis*) in Greek law. Gross negligence is a significant and unusual deviation from the conduct of an ordinary reasonable and diligent person, which demonstrates the tortfeasor's utter indifference to the injurious result of his/her wrongful behaviour. An indicative list of the criteria that the courts take into account to decide whether a certain act or omission constitutes gross negligence or not, are the following: the status of the legal norm which was violated, the magnitude of the potential damage, repetition of the negligent conduct by the defendant, the defendant's disregard of warnings or indications that such conduct could potentially lead to a damaging result[250]. The notion of gross negligence is an abstract legal concept and the court's interpretation is a matter of law, thus can be appealed in third instance before the Greek Supreme Court (Areios Pagos)[251].

Culpa levis or "minor negligence" is negligence which is not gross. Contrary to gross negligence, it is used to describe conduct which does not deviate significantly from that of the ordinary reasonable person. There are two further categories of *culpa levis*: "abstract minor negligence", where the standard of care is measured according to the care exercised by the ordinary person of the particular group where the defendant belongs, and "individualized minor negligence", which is measured against the care that the tortfeasor exercises when handling his/her own affairs. The latter type of negligence is more favourable for the defendants, because it frees them from liability in case they are found to be more careless in all their endeavours than the ordinary reasonable person. Thus, as a rule, tort liability requires minor abstract negligence, whereas minor individualized negligence is applicable only in cases where a close relationship of

248 Karakostas, Ioannis, *The Law of Tort-Articles 914-938 GCC* (Athens: Nomiki Vivliothiki, 2014) p.130-4.
249 Kornilakis, Panos, *Law of Obligations-Special Part I* (Athens-Thessaloniki: Sakkoulas Publications, 2002) p.510-1.
250 AP 1058/2012 TNP DSA; Ef/Ath 2369/2012 TNP DSA; AP 1306/2007 TNP DSA; AP 1627/2007 TNP DSA.
251 Karakostas, Ioannis, *The Law of Tort-Articles 914-938 GCC* (Athens: Nomiki Vivliothiki, 2014) p.136.

trust exists between the injured party and the defendant and only where it is expressly stated in a legal provision[252].

The distinction between gross and ordinary negligence is important on a practical level for a series of reasons. First, in certain situations the law expressly exempts the tortfeasor from liability only when his/her fault corresponds to ordinary or minor negligence[253]. Secondly, exemption from liability may be agreed upon for ordinary but not for gross negligence[254]. Finally and most importantly, in claims for moral harm or pain and suffering according to art. 932 GCC (compensation for moral harm), the court may award a higher amount of compensation if the damage was caused by grossly negligent conduct.

2.3. The "duality" of negligence in Greek tort law

As is evident from the above, the notion of negligence as a form of fault is in some cases very similar to the requirement of wrongful conduct. Despite that the prevailing view in Greek jurisprudence makes a clear distinction between these two elements of tort liability, there has been an ongoing debate among academics on the issue of the expansion of the concept of illegality, so as to include the violation of the general duty of prudence and care that every person ought to exercise within the context of every social activity, especially when others may be affected by his/her acts or omissions.

According to one opinion, unlawfulness is present not only when a prohibitive or mandatory rule of law is violated, but also when a person does not behave as carefully as every ordinary reasonable member of society should, in order to avoid causing harm to persons and goods in his/her proximity. This duty is deduced and dictated by the general clauses of the Greek Civil Code, especially art. 288 GCC on good faith (*bona fides*), which imposes a general duty of safety and care owed to others. Therefore, the element of negligence as defined in art. 330

252 Karakostas, p.138-9.

253 As for example in art. 355 GCC (liability of debtor during creditor's delay to perform); Art. 499 par. 1 GCC (liability of donor); art. 811 GCC (liability of user of non-monetary loan); art. 732 GCC (liability of unauthorized agent in *negotiorum gestio*); art. 1083 GCC (liability of finder of an object).

254 Art. 332 par. 1 and 2 GCC.

subpar. 2 GCC[255], fulfills both conditions of unlawfulness and fault at the same time. More specifically, the nature of the notion of negligence is twofold: external, when it corresponds to a wrongful act or omission, and internal, when it corresponds to fault. The presence of negligence in its external form, as conduct that a reasonable person ought to have avoided, is a necessary precondition of internal negligence which, according to its objective nature deriving from the relevant provisions of the GCC, refers to the ordinary prudent person's ability to foresee and avoid damage[256].

A similar theory on the expansion of the notion of unlawfulness considers *bona fides* as the basis of a duty to take precautionary measures to safeguard and protect others from harmful acts or omissions. However, this duty is not of a general nature. The judges should look at the facts of each case and determine *in concreto* whether or not the principles of good faith impose an obligation to take preventive measures. Moreover, under no circumstances should the requirement of fault be absorbed by the concept of wrongful behaviour; even in cases where unlawful conduct coincides with negligent conduct, fault remains a distinct condition of tort liability which needs to be proven. The only difference when it comes to negligence as a form of fault (in contrast to intention as a form of fault), is that its notion is of objective nature in Greek tort law, according to art. 330 subpar. 2 GCC, which establishes an objective standard of care (the standard required in social activities). The reasoning behind this approach is that the Greek tort law does not recognize separate delicts but assigns judges to specify the notion of wrongful conduct in the context of each claim. On the other hand, negligence is strictly defined in art. 330 subpar. 2 GCC. Thus, in civil claims courts do not have the same discretion as in criminal cases with respect to the determination of the content of negligence[257].

A third approach which is closer to the prevailing view followed by courts, challenges both of the above opinions, as they essentially propose the abolition of the element of negligence as fault within the context of tort liability. This is not acceptable, since the notion of negligence

255 Art. 330 subpar. 2 GCC: "Negligent is a person who falls below the standard of care required in social activities".

256 Stathopoulos, Michalis, *Unlawfulness in 914 GCC and the interpretation of the notion of good faith*, in Applications of Civil Law and Procedure [EfAD 8-9/2014] (Athens: Nomiki Vivliothiki, 2014) p.643-5.

257 Doris, Philippos, *Thoughts on the requirement of "illegality" in tort liability, on its relationship with "fault" and on the "dual function of negligence" according to art. 330 subpar. 2 GCC*, in *Honorary Volume for Michalis P. Stathopoulos* (Athens: A. N. Sakkoulas Publications, 2010) p.514-26.

allows courts to explore the individual characteristics of the defendant, while an objective interpretation of the element of negligence leads to liability based on wrongful conduct alone. Therefore, this approach proposes the customization of the notion of negligence according to the facts of each claim. More specifically, in cases where the same negligent act or omission constitutes unlawful conduct and fault at the same time, the only way to safeguard the distinction between those two elements of tort liability is to take into consideration the individual capabilities and weaknesses of the defendant and the overall circumstances in which he/she committed the delict. However, between the fault requirement of art. 914 GCC and the objective type of negligence as set out in art. 330 subpar. 2 GCC, there is a legal gap. And whereas in most cases this gap remains unresolved and judges simply infer negligence from the wrongful conduct, whenever there is an indication of the presence of special circumstances which might justify the negligent behaviour, it would be unjust to sacrifice them in the name of an "objective type of negligence". In other words, these special circumstances should be allowed to individuate the content of negligence and highlight it as a clear, distinct and subjective condition of tort liability[258].

3. An indicative categorization of the most common types of negligence tort claims according to judgments of Greek Courts

Given that art. 914 GCC is a general clause which needs interpretation in order to be applied in the context of a specific lawsuit, it is often complemented as to the requirement of wrongful conduct by legal provisions contained in special statutes. These are laws on specific areas of social activity which greatly affect our everyday lives and constitute sources of increased risk, such as driving a car or handling complex equipment at work. Another category of special statutes regulating tortious liability, are those aimed at the protection of claimants who, due to their lack of technological means or specialized knowledge, are in a position of weakness with respect to the defendants. Laws 2251/1994 on the protection of consumers, 1178/1981 and 2243/1994 on liability of the press and 2472/1997 on wrongful processing of personal data, are

258 Roussos, Kleanthis, *The system of tort liability in Greek and European law*, in Chronika Idiotikou Dikaiou [ΧρΙΔ ΙΓ/2013] (Athens: P. N. Sakkoulas Publications, 2013) p.87-91.

designed to enable injured parties to prove fault and causation and to discourage potential tortfeasors from abusing their position of strength[259].

All the above statutes may constitute legal bases for various types of tort claims, which may be categorized accordingly, and are usually applied jointly with the provisions on tort liability of the GCC. Finally, tort claims against state authorities could be classified under a distinct broad category. It is important to note that the Greek State and public bodies, organs and organizations are not immune from tort liability, thus can be sued under art. 914 GCC just like private individuals and corporations.

3.1. Road traffic accidents, harm in the course of employment and medical negligence

Not surprisingly, the most frequent claims for negligent wrongful behaviour arise in areas of human activity where a higher degree of care is appropriate. Therefore, the majority of negligence tort claims concern road traffic accidents[260], followed closely by accidental injuries or other type of harm incurred by employees in the course of their work and cases of medical negligence. Law 3950/1911 on civil and criminal liability from motor vehicles and law 551/1915 on employers' liability for accidents at work, establish strict liability from which derives a rebuttable presumption of the defendant's malfeasance. This favours claimants, because they do not have to prove fault initially – only disprove the other party's no-liability arguments. In general, the justification for the imposition of strict liability in specific areas of human activity lies in the argument that those who benefit from the use of sources of risk, should bear the burden of paying extra attention and restituting any harm resulting from their carelessness[261].

Although strict liability for careless drivers and employers is helpful for claimants, on a practical level most plaintiffs opt to base their claims on the GCC, which includes more detailed

259 Dacoronia, Eugenia, *Tort Law in Greece. The state of art* in *Studia in Honorem Pelayia Yessiou-Faltsi* (Athens-Thessaloniki: Sakkoulas Publications, 2007) p.58-61.

260 AP 408/2016; AP 99/2015; AP 100/2015; AP 151/2015; AP 235/2015; AP 324/2015; AP 412/2015; AP 762/2015; AP 923/2015; AP 32/2014; AP 91/2014; AP 210/2013; AP 426/2013. All the above are published in the databank of the Athens Bar Association "ISOCRATIS" [TNP DSA].

261 Georgiadis, Apostolos, *Law of Obligations-General Part* (Athens: P. N. Sakkoulas, 2015) p.642-3.

provisions on various heads of damage[262] and allows them to recover for moral harm as well[263]. Furthermore, as a rule, when a high degree of fault is proven, the court takes it into consideration for the assessment of damages. From this follows that a finding of gross negligence will result in a higher sum of compensation.

Especially with respect to employers' liability, the latter are obligated to observe a series of rules and regulations concerning precautionary measures for the protection of health and safety in the work environment and the avoidance of accidents and work-related diseases. Thus, in the vast majority of cases of this category, the element of illegality corresponds to the violation of these rules by not taking the necessary precautions. This further entails that torts of this type are mostly committed by omission and the form of fault almost always corresponds to negligence[264].

Medical negligence cases are also based on the GCC provisions on tort liability[265]. However, in order to determine whether the doctor's act or omission was wrongful or not, judges take into consideration other legal norms as well, such as the Code of Medical Ethics (law 3418/2005). For example, liability could arise from the delicate issue of the patient's informed consent, which derives from the doctor's duty of truth, based on the provisions of art. 11 of the above Code, art. 47 par. 4 of law 2071/1992 and art. 5 of law 2619/1998, which incorporated the Oviedo Convention[266] in the Greek legal system. Furthermore, doctors are liable for negligence in case they violate the norms of their science (*leges artis*)[267], which also constitutes breach of

262 Art. 928 GCC: "In case of death"; art. 929 GCC: "In case of injury to the body or health"; art. 931 GCC, where it is provided that any disability or disfigurement of the claimant shall be taken into consideration by the court for the assessment of damages, if it will affect him/her in the future.

263 Art. 932 GCC: "Compensation for moral harm".

264 AP 181/2016; AP 255/2016; AP 981/2015; AP 179/2015; AP 182/2015; AP 196/2015; AP 693/2015; AP 1383/2015; AP 1264/2014; AP 1266/2014; AP 1577/2014. All the above are published in the databank of the Athens Bar Association "ISOCRATIS" [TNP DSA].

265 AP 238/2016; EfLar (=Larissa Court of Appeal) 298/2015; EfLar 216/2014; AP 1683/2014; AP 1693/2013. All the above are published in the databank of the Athens Bar Association "ISOCRATIS" [TNP DSA].

266 Convention for the Protection of Human Rights and Dignity of the Human Being with Regard to the Application of Biology and Medicine, known as the Oviedo Convention.

267 AP 633/2014; AP 974/2014; EfLar (=Larissa Court of Appeal) 3/2009; AP 1634/2008; AP 2196/2007. All the above are published in the databank of the Athens Bar Association "ISOCRATIS" [TNP DSA].

art. 288 GCC on good faith[268]. Lastly, like all individuals and especially professionals, they are liable for undertaking a task which lies outside of their specialty or skill-set[269].

All three above categories of cases often include a claim for moral harm – apart from compensation for physical injury and loss of profit. In case of death, the victim's family may also claim restitution according to art. 932 GCC[270]: "In case of tortious injury, the court may award pecuniary compensation for moral harm, independently from compensation for other damages. This applies especially when the injured party incurred damage to health, honor, chastity or freedom. In cases of death, the above pecuniary compensation may be awarded to the family of the victim for pain and suffering". The term "family" is not strictly defined in the GCC, so as to allow judges to adapt it to the ever-changing social views. According to the Greek jurisprudence, it extends principally to spouses, direct descendants and ascendants, siblings and half-siblings as well as parents-in-law and sons and daughters-in-law[271], but not to unmarried co-habiting partners[272]. A milestone judgment of the Greek Supreme Court, 97/2001[273], expanded the notion of family to unborn foetuses – if born alive – and infants.

3.2. Other categories of negligence cases

The types of tort negligence cases are infinite, as technological, scientific, technical and economic advancements and their applications create new risks and novel liability situations every day. Within this context, Greek courts respond by interpreting the general clauses of the GCC and expanding their range to cover more civil wrongs, while frequently applying them jointly with provisions deriving from special statutes.

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268 Karakostas, Ioannis, *The Law of Tort-Articles 914-938 GCC* (Athens: Nomiki Vivliothiki, 2014) p.69-70.

269 AP 1741/2013 [TNP DSA]: breast-augmentation operation with silicone implants by a non-specialized doctor, which resulted in the patient being infected with e-coli.

270 AP 48/2016; AP 60/2016; AP 211/2016; AP 154/2015; AP 1025/2015; AP 560/2014; AP 1136/2014 on road traffic accidents resulting in death; AP 459/2016; AP 561/2015; AP 196/2015; AP 703/2014; AP 975/2014; AP 1076/2014; AP 81/2013 on fatal accidents or diseases at work; AP 88/2016; 1408/2015; AP 496/2010; AP 2/2009 on medical negligence resulting in the patient's death, all published in the databank of the Athens Bar Association "ISOCRATIS" [TNP DSA].

271 Dacoronia, Eugenia, *Tort Law in Greece. The state of art* in *Studia in Honorem Pelayia Yessiou-Faltsi* (Athens-Thessaloniki: Sakkoulas Publications, 2007) p.74-5; AP 795/2004, NoB 53-2005, 1414; AP 924/2004, EEN 2005, 34.

272 AP 434/2005, EEN 2005, 676.

273 Published in the databank of the Athens Bar Association "ISOCRATIS". [TNP DSA]

The general clause of art. 288 GCC on good faith plays a key role in this effort, as it is considered the basis of the general duty of prudence and care and the duty to take appropriate protective measures when involved in activities which may constitute a danger to others. Thus, banks are liable for carelessness of their employees while verifying the identity of persons acting as agents[274] or the validity of cheques[275] or while carrying out forced execution procedures[276]. When the damage is due to gross negligence, the bank may be held liable for moral harm as well[277]. Another example of breach of the duty to take safety precautions is the negligent construction of buildings[278] or other technical works such as elevators[279], especially when the damage caused is bodily harm or death[280]. Related to this is the category of claims against civil engineers for negligent provision of services such as technical reports and supervision of building construction works[281], where there is usually concurrence of contract and tort liability.

According to other applications of the above principles, it has been held that individuals[282] and organizations, such as the Hellenic Railways Organization (OSE) or the Athens Water Supply and Sewage Company (EYDAP S.A.), are liable for negligent maintenance of their premises, buildings or network systems or omission to comply with statutory safety regulations[283]. Furthermore, lawyers are liable for harm caused not only to their clients but also to third parties[284], stock-market and investment firms owe a duty to uphold the Code of Conduct

274 AP 1220/2014; AP 363/2012, published in the databank of the Athens Bar Association "ISOCRATIS" [TNP DSA].
275 AP 4/2016; 719/2012, published in the databank of the Athens Bar Association "ISOCRATIS" [TNP DSA].
276 AP 1084/2013 [TNP DSA].
277 AP 2257/2014; AP 1058/2012; EfAth (=Athens Court of Appeal) 2369/2012 [TNP DSA].
278 AP 493/2015; AP 1156/2015 [TNP DSA].
279 AP 1850/2014 [TNP DSA].
280 AP 602/2015; AP 604/2015 [TNP DSA].
281 AP 114/2012; AP 727/2011; AP 1840/2011; EfPir (=Piraeus Court of Appeal) 435/2010 [TNP DSA].
282 AP 1512/2014: flooding due to works in adjacent building without permit by competent planning authorities; AP 1156/2013: damage to adjacent building caused by defendant's negligent maintenance of water supply system [TNP DSA].
283 AP 30/2014; AP 1510/2014; AP 219/2006: OSE's failure to take proper precautionary measures resulting in fatal collisions of trains with cars; AP 2256/2014: failure to take adequate safety measures in port; AP 77/2014: EYDAP is liable for property damage caused by inefficient maintenance of its network; AP 1043/2014: injury of spectator of football match due to football company's failure to comply with safety measures indicated by police; AP 1277/2014: damage to fish-farming unit due to negligent disposal of waste and debris; AP 1451/2014: injury by collapsing tree which the municipal authorities were responsible to maintain, all published in the databank of the Athens Bar Association "ISOCRATIS" [TNP DSA].
284 AP 1627/2007 [TNP DSA].

regarding their services and protect investors[285], while the members of a company's executive board are liable to compensate the company for any damage resulting from negligent management[286].

Concluding this brief presentation of recent judgments of Greek courts on negligence tort liability – which by no means should be considered exhaustive – it would be amiss not to mention liability for negotiations. In case of harm resulting from discussions before a contract and in particular in cases where the signing of the agreement falls through because of careless conduct during its preparatory stage, the general clauses of arts. 288 and 914 GCC are applied jointly with the provisions of arts. 197 and 198 GCC on liability from negotiations[287], to establish tort liability. The compensation of the claimant may include the economic loss resulting from his/her belief that the contract would be concluded, as for example other relevant investments, or expenses related to the signing of the agreement (legal fees for consultation services etc.)[288].

3.3. Liability of the Greek State and public bodies

The Introductory Law of the Greek Civil Code includes three provisions on the liability of the State and its organs (articles 104-106). More specifically, art. 104 provides that public bodies are liable according to the general provisions on legal entities (art. 61 et seq. GCC), for acts or omissions related to private law obligations or to the management of their private property. Art. 105 stipulates that state authorities are liable to compensate harm caused during the performance of their public duties, unless the damage resulted from the breach of a legal provision aimed at the protection of the public interest. However, if the violated rule aims to safeguard individual rights or interests, exclusively or in parallel with the interests of the general public, the above exemption does not apply.

285 AP 1029/2015 [TNP DSA].
286 AP 320/2015; AP 1572/2014 [TNP DSA].
287 Art. 197 GCC: "During the negotiations before a contract, the parties shall comply with the tenets of good faith and market customs"; art. 198 GCC: "Damage caused through fault of one of the parties during the negotiations before a contract shall be restituted even if the contract is not concluded. With respect to the limitation time for this claim, the provision on limitation time for tort claims is applicable".
288 AP 1435/2015; AP 1513/2014 [TNP DSA].

According to interpretation of art. 105 of the Introductory Law of the GCC by the Greek courts, public bodies are liable for wrongful omissions when they neglect to take the proper action imposed on them by the nature of their duties, by law or by the principle of good faith[289]. Thus, the Council of the State (StE), which is the highest administrative court in Greece, has held that police authorities are liable for omitting to protect private property from damage[290], for inefficiently protecting citizens from bodily harm[291], for negligently conducting body searches of football fans before games[292] or for carelessly checking passports at the airport hence enabling the commission of a crime[293]. Furthermore, in a series of claims linked to the notorious "Ricomex" case following the collapse of a building during an earthquake, it was held that the land-planning authorities were liable for negligently conducting structural stability tests during and after construction[294]. In general, when it comes to public works, the competent state authorities are liable for damages due to negligent construction[295], even if the construction works were carried out by a private company[296].

Art. 106 of the Introductory Law of the GCC extends liability of state organs, as set out in articles 104 and 105, to municipal or other local authorities and other types of public law legal persons, such as public hospitals. Therefore, the latter are liable for medical negligence of their employees[297] as well as failure to take proper measures to ensure health and safety of their personnel[298]. As can be concluded from all the above, the only significant difference between tort claims against private individuals and corporations and against public bodies, is of procedural nature. The first are tried by civil while the second by administrative courts. In all tort claims, the articles of the GCC on tort liability (art. 914 et seq.) are applicable.

289 Karakostas, Ioannis, *The Law of Tort-Articles 914-938 GCC* (Athens: Nomiki Vivliothiki, 2014) p.57; StE 2818/2005 [TNP DSA].
290 StE 725/2010; StE 1590/2010; StE 1364/2008 [TNP DSA].
291 StE 1677/2008 [TNP DSA].
292 Athens Administrative Court of First Instance 3441/2006, published in the legal databank "NOMOS".
293 StE 4343/2009 [TNP DSA].
294 StE 1702/2010; StE 3559/2010; StE 2671/2009 [TNP DSA].
295 StE 529/2014 [TNP DSA].
296 Athens Three-Member Administrative Court of Appeal 239/2010; Athens Three-Member Administrative Court of Appeal 1206/2009 [TNP DSA].
297 StE 2671/2009 [TNP DSA].
298 StE 3098/2015 [TNP DSA].

IV. Scientific works on the European harmonization of tort law

On a European level, there have been two significant efforts to elaborate new principles of tort law of country-neutral character, based on the comparative study of the existing European legal systems. In 1992, the European Group on Tort Law (EGTL), consisting of eminent law professors from various European countries as well as other important legal orders, such as those of the U.S.A., Switzerland, South Africa and Israel, started working on an ambitious project regarding the exchange of views on fundamental concepts of tort law. In 2002, the EGTL decided to use the conclusions of this research as basis for the drafting of a proposal for a comprehensive system of tortious liability. The final text of their work, titled "Principles of European Tort Law" (PETL), was published in 2005.

In 2009, after eleven years of intensive research, the Study Group on a European Civil Code (SGECC) together with the Research Group on Existing EC Private Law, known as the "Acquis Group", published the finalized version of the "Draft Common Frame of Reference" (DCFR), which is divided in ten books and contains principles, definitions and model rules covering most areas of private law (contracts, obligations, tort, unjust enrichment, trusts etc.). The sixth book is on tort law, or, according to the descriptive term used in the DCFR, non-contractual liability[299].

The above works have many common characteristics. Both of them start with a core provision reminiscent of a general clause, stipulating the basic requirements of tort liability. The content of this clause is clearly to be complemented by the other articles. They are structured according to civil law codifications and include comparative comments and interpretative guidelines. The drafters, especially in the DCFR, opted for neutral and descriptive wording, so as to avoid misunderstandings due to discrepancies in legal terminology among different jurisdictions. Furthermore, both works acknowledge that they are not legal texts of binding force, but academic projects aiming at contributing to the harmonization of European legal systems and assisting future legislators in addressing novel or important policy questions. They do not

299 Dacoronia, Eugenia, *Proposals on the European harmonization of Tort Law*, in *Honorary Volume for Ioannis S. Spyridakis* (Athens: A. N. Sakkoulas Publications, 2014) p.124-5.

constitute a fusion of the existing tort law provisions of various European legal systems, but proposals for legal norms and principles from a new perspective[300].

1. Principles of European Tort Law (PETL)

The Principles of European Tort Law consist of ten chapters divided in six titles. Title I Chapter 1 includes only one article (1:101) which is the "basic norm". Titles II and III include explanatory provisions on damage, causation, fault and strict liability, while titles IV to VI are dedicated to defenses against tort claims, multiple tortfeasors and remedies.

Art. 1:101 stipulates: "(1) A person to whom damage to another is legally attributed is liable to compensate that damage. (2) Damage may be attributed in particular to the person (a) whose conduct constituting fault has caused it; or (b) whose abnormally dangerous activity has caused it; or (c) whose auxiliary has caused it within the scope of his functions". This core provision is based on the Roman rule of *casum sentit dominus*, according to which everyone should bear the cost for damage he/she suffers, unless there is a legal reason obligating another person to bear it. From this follows that the objective of the PETL is to restitute real loss, thus does not support claims for punitive damages. All three liability bases enumerated in the second paragraph are of equal standing, meaning that liability based on fault is not to be taken as the rule and the other two as exceptions. Overall, the basic norm is an original provision in that it refers to fault, strict liability and liability for third persons, all at once[301].

Title II, "General Conditions of Liability", contains articles on damage and causation. Art. 2:101 defines recoverable damage as "damage (which) requires material or immaterial harm to a legally protected interest". Which interests are protected is to be determined by the sum of the legal order, however, art. 2:102 provides an indicative list of the factors that should be taken into account when establishing the range of protection. More specifically, the higher the value, the precision of definition and the obviousness of an interest, the wider its protection. The provision proceeds by ranking legal rights and interests by order of importance: first are life,

300 Giliker, Paula, *The Europeanisation of English Tort Law* (Oxford and Portland, Oregon: Hart Publishing, 2014) p.198-200.

301 European Group on Tort Law*, Principles of European Tort Law-Text and Commentary* (Vienna, New York: Springer, 2005) p.19-22.

health, dignity and freedom, then comes property, then purely economic interests and contractual relationships, the protection of which is more limited. Art. 3:101 adopts the theory of *conditio sine qua non* with respect to causation[302].

Title III elaborates on fault as liability basis. According to art. 4:101, fault may be intentional or negligent. In the latter case, the required standard of care is that of "the reasonable person in the circumstances". Therefore, it is of objective character and has to be met independently from a person's individual capabilities, but may be adjusted for reasons of fairness and justice according to a person's age or disability or in case of extraordinary situations. Given that it is difficult to give an accurate and comprehensive definition of the standard of conduct, art. 4:102 par. 1 states a series of criteria to take into consideration when determining it: the nature and value of the protected interest, the level of risk of the activity in question, any specialized knowledge of the person engaging in the activity, foreseeability of harm, the proximity of the relationship between the parties and the availability and cost of preventive or alternative measures[303].

Another interesting provision is the one included in art. 5:101 on strict liability, according to which a person engaging in abnormally dangerous activities should bear the cost of damage resulting from the realization of the risk of said activity. This constitutes the minimum measure of strict liability. Art. 5:102 stipulates that national laws may establish other forms of strict liability, even in cases where the activity is not unusually dangerous. Finally, a provision on preventive protection is included, allowing recovery for expenses incurred to guard against the realization of a risk.

2. Draft Common Frame of Reference (DCFR)

Book VI of the Draft Common Frame of Reference is dedicated to non-contractual liability arising out of damage caused to another. The drafters opted for a more descriptive language than that of the PETL, avoiding technical terms such as "delict" or "tortfeasor", in order to make their

302 European Group on Tort Law, *Principles of European Tort Law-Text and Commentary* (Vienna, New York: Springer, 2005) p.24-5.
303 *Ibid* p.65-70.

work more accessible to legal communities of both civil law and common law legal systems[304]. Furthermore, the DCFR contains more detailed provisions than PETL on protected rights and interests, which are described as "particular instances of legally relevant damage", as well as on strict liability ("accountability without intention or negligence") and defenses.

Chapter 1 ("fundamental provisions") starts with the "basic rule" (art. 1:101): "(1) A person who suffers legally relevant damage has a right to reparation from a person who caused the damage intentionally or negligently or is otherwise accountable for the causation of the damage. (2) Where a person has not caused legally relevant damage intentionally or negligently that person is accountable for the causation of legally relevant damage only if Chapter 3 so provides". According to the explanatory comments below the basic rule, paragraph 1 is a brief account of the necessary prerequisites of tort liability, giving force and content to all other provisions in Book VI. It is further clarified that it is not presented from the standpoint of the tortfeasor, which is characteristic in most tort law systems, but takes the perspective of the person who suffers the damage, as this approach was considered more direct. The originality of this article consists in that it refers to all bases of tort liability: fault (intention or negligence) as well as strict liability[305].

The drafters go on to clarify that art. 101:1 is of somehow different nature from the typical general clause because, although it can undoubtedly function as the basis of claim, it cannot stand on its own but needs to be supplemented by the other provisions of the Book. Therefore, its content is both extended and restricted by the articles that follow it. This does not mean that all the other provisions are strictly delineated; on the contrary, some may also be formulated as general guidelines, as for example art. 4:101, which is the general rule on causation[306]. Chapter 1 also includes arts. 1:102 on preventive legal protection and 1:103 on the scope of application of the two previous articles[307].

Chapter 2 further elaborates on the meaning of legally relevant damage, defining it in art. 2:101 as any type of harm resulting from violation of one of the provisions that follow in section

304 *Principles, Definitions and Model Rules of European Private Law-Draft Common Frame of Reference [DCFR]* (Full Edition, 2009) p.2978.
305 *Ibid* p.2979.
306 *Ibid* p.2981.
307 *Ibid* p.2981-2.

2 of this chapter (arts. 2:201-2:210) or of a right recognized by another law or of an interest important enough to deserve legal protection. If the breach falls under one of the two latter categories, a policy criterion of fairness and reasonableness is to be used for the determination of whether the loss incurred should be redressed or not. The articles that follow in the second section of this chapter (arts. 2:201 to 2:210) are classified under the umbrella term "particular instances of legally relevant damage" and correspond to rights specifically protected by Book VI of the DCFR, such as health and bodily integrity, dignity, liberty, privacy and property, or heads of loss due to the infringement of various duties of care (breach of confidence, inaccurate advice, false information about another person etc.)[308].

Chapters 3, 4, 5 and 6 are dedicated to accountability, causation, defenses and remedies respectively, while chapter 7 contains ancillary provisions. One article worth highlighting is art. 6:204, regarding compensation for "injury as such": "Injury as such is to be compensated independently of compensation for economic or non-economic loss". This is a totally new concept, as no national legal system contains a rule of analogous form, even though the essence of it is recognized by many legal orders. This provision is to be applied jointly with art. 2:201 (personal injury and consequential loss) and art. 2:203 (infringement of dignity, liberty and privacy) and expresses the notion that violations of rights protected under these articles are often injurious *per se,* and restitution should not necessarily depend on the harm incurred. More in particular, "injury as such" is to be restituted even if the element of economic or non-economic loss is absent. If a person does suffer such losses, then compensation for "injury as such" is to be awarded independently from any redress for those damages[309].

Finally, it is worth noting that art. 7:104 expressly excludes from the scope of Book VI of the DCFR any liability of employees or employers arising in the course of employment, as well as of trade unions and employers' associations arising in the course of industrial dispute. The reason for this is provided in the relevant comments, where it is stated that the model rules of the DCFR are not as detailed and comprehensive as to constitute a successful basis for the resolution

308 *Principles, Definitions and Model Rules of European Private Law-Draft Common Frame of Reference [DCFR]* (Full Edition, 2009) p.3030-1.
309 *Ibid* p.3631.

of such complex matters, which lie in the borderline of tort law and individual and collective labour law, are highly sensitive and affect society as a whole[310].

The model rules of the DCFR as well as the PETL norms have been well received by European legal communities, however, they have also been criticized for being so basic and succinct, that even though it is hard to find fault with them, they do not offer much real assistance in terms of direction to legal scholars and practitioners[311].

310 *Principles, Definitions and Model Rules of European Private Law-Draft Common Frame of Reference [DCFR]* (Full Edition, 2009) p.3659.

311 Van Dam, Cees, *European Tort Law* (Oxford: Oxford University Press, 2013) par.607.

v. Comparative observations

As mentioned at the beginning of the present paper, the most basic difference between the law of torts of the English common law and the Greek tort law system is one of structure. The former comprises several distinct torts, while the latter is based on a set of legal rules which are applicable in any tortious situation. Therefore, the tort of negligence is a nominate tort of the common law that includes its own set of rules, separate from other torts, while according to the Greek Civil Code the general clause of art. 914 on the requirements of tort liability is the basis of all tort claims. For negligence tort claims in particular, art. 330 subpar. 2 GCC also applies.

For the purposes of this study, the elements of damage and causation, common to both tort systems, are left out, while duty of care and breach of duty are compared to unlawful conduct and fault (in the form of negligence). The reason for this is definitely not that these conditions of tort liability are comparable. On the contrary, it cannot be argued convincingly that duty of care corresponds to either of the two tort liability conditions of the Greek law or that breach of duty is the exact equivalent of wrongful conduct. Hence, the reason underlying this choice is rather of inverted logic: it is the overwhelming discrepancies between these legal notions that make them, in my opinion, ideal for comparison.

In the following chapters, I will attempt a presentation of comparative remarks from general to specific.

1. Objectivity v individual characteristics

In the Greek tort law, of all the elements of liability, fault is closely connected to the defendant's idiosyncrasy. On the other hand, in the English tort of negligence all requirements are examined by courts from an objective perspective. The categories of duty of care are more or less pre-established, while the standard of care for breach of duty is measured against that of the ordinary reasonable man. At first glance this seems like a crucial difference, however, a closer look at both tort systems reveals overlapping concepts.

First, the theory of the "duality" of negligence in Greek tort law attributes a twofold nature to the notion of negligence, supporting that it fulfills the condition of unlawful conduct and fault at the same time[312]. Even though this is not the prevailing view in Greece, part of the judiciary follows it. This approach removes any individual characteristics from the tortious equation. But even according to the view shared by the majority of the Greek legal community, that wrongful behaviour and negligent fault are two distinct prerequisites of tortious liability, the line between these two notions is often blurred. This happens for example when the tortfeasor violates the general duty of prudence and diligence which all persons must observe and which derives from the general clause on good faith. Furthermore, the definition of negligence in art. 330 subpar. 2 GCC is of objective character since it refers to the diligence generally required in all areas of human activity. To resolve this problem, various theories have been proposed, like the one supporting the existence of a *lacuna* in the law[313], but none has provided a universally accepted answer.

In the common-law tort of negligence, various categories of duties of care have developed according to the class of claimants or the nature of the interests that need to be protected, the person on whom an obligation is imposed and the type of damage incurred[314]. In addition, not all classes of defendants are treated in the same way, for instance doctors or public bodies are said to enjoy a kind of immunity from suit. These legal categories have multiplied in the course of time, exceptions have been added and extensions of their scope have been established. In brief, the pre-determined "pockets of liability" where a new case may be slotted are of such variety[315], that it would not be far from the truth to say that most of the individual characteristics that a defendant or even a claimant may have, have already been taken into account by previous judgments. Furthermore, judges are known to allow policy considerations to creep into their judgments, especially in novel cases which present unprecedented challenges. In

312 Stathopoulos, Michalis, *Unlawfulness in 914 GCC and the interpretation of the notion of good faith*, in Applications of Civil Law and Procedure [EfAD 8-9/2014] (Athens: Nomiki Vivliothiki, 2014) p.641.

313 Roussos, Kleanthis, *The system of tort liability in Greek and European law*, in Chronika Idiotikou Dikaiou [ΧρΙΔ ΙΓ/2013] (Athens: P. N. Sakkoulas Publications, 2013) p.90.

314 Heuston, R.F.V., and R. A. Buckley, *Salmond and Heuston on the Law of Torts* (London: Sweet & Maxwell, 1996) p.198.

315 Deakin, Simon, Angus Johnston, and Basil Markesinis. *Markesinis and Deakin's Tort Law* (Oxford: Clarendon Press, 2008) p.132.

this way, any particularities that a case may have are allowed to play their role in the procedure, despite the fact that the tort of negligence employs objective criteria for the assessment of claims.

2. Form and degrees of fault

The English law of torts differentiates between negligence as a form of fault and the independent tort of negligence. As a pillar of fault, it corresponds to the mental attitude of the tortfeasor towards the injurious result of his/her conduct. It is distinguished from intention, where the wrongdoer desires to cause harm, and it is the minimum fault requirement in a limited number of torts (such as nuisance or trespass to land). As a nominate tort, it includes a series of principles and objective tests for the determination of its elements but does not require a certain state of mind. In the context of the tort of negligence, the adjective "negligent" or "careless" refers to conduct, not to a person[316]. From all the above, it can be deduced that the form of fault plays a key role in many nominate torts of the common law but is of no significance for the tort of negligence. If an act or omission falls within the scope of the latter, it will be assessed on the basis of objective criteria and not the defendant's state of mind.

In Greek tort law, the distinction between intentional and negligent infliction of harm is of paramount importance for the application of certain provisions where intent is a necessary precondition, such as art. 919 GCC on the violation of the principles of morality. In general, though, the law restitutes damage caused through any kind of fault. Art. 330 subpar. 1 GCC states that a person is liable for any intentional or negligent breach of his/her obligation. Thus, the above distinction is not of great practical importance, since in any case the same general tort provisions are applicable[317].

With respect to degrees of negligence, Greek law attributes great significance to a finding of gross negligence. As mentioned above, there are provisions that expressly exempt liability for

316 Heuston, R.F.V., and R. A. Buckley, *Salmond and Heuston on the Law of Torts* (London: Sweet & Maxwell, 1996) p.194-6.

317 Kornilakis, Panos, *Law of Obligations-Special Part I* (Athens-Thessaloniki: Sakkoulas Publications, 2002) p.509.

minor or ordinary but not for gross negligence[318], whereas compensation for moral harm or pain and suffering may be higher in cases where gross negligence is proven. On the contrary, the English tort law is cautious towards this distinction. As Lord Millett stated in *Armitage v Nurse*[319], the leading authority on the common law's perception of gross negligence: "It would be very surprising if our law drew the line between liability for ordinary negligence and liability for gross negligence. In this respect, English law differs from civil law systems, for it has already drawn a sharp distinction between negligence, however gross, on the one hand, and fraud, bad faith and willful misconduct on the other".

3. Concurrence of contract and tort law

In Greece, it is stated that a breach of contract is simultaneously a tort, in cases where the damaging conduct would have been wrongful even if there had been no agreement between the parties. However, there has been an ongoing debate on the issue of concurrence of contract and tort claims. According to the prevailing theory of "free concurrence of claims", in such cases there are two separate claims, independent from one another, both aiming at the restitution of the same damage. The injured party can choose to pursue either one or both of them or even assign one of them to a third party. One of the claims is governed by provisions on breach of contract and the other on tort law. If one is compensated, it cancels out the other, unless the latter is broader, in which case it remains actionable for the extra sum. This approach presents inconsistencies for which it has been severely criticized by legal authors[320].

On a procedural level, the English legal system proposes a straightforward solution. A plaintiff can bring an action in tort or base it on breach of contract cumulatively or alternatively, taking advantage of any favourable provisions[321]. The issue of concurrence was addressed in

318 As for example in art. 355 GCC (liability of debtor during creditor's delay to perform); Art. 499 par. 1 GCC (liability of donor); art. 811 GCC (liability of user of non-monetary loan); art. 732 GCC (liability of unauthorized agent in *negotiorum gestio*); art. 1083 GCC (liability of finder of an object).

319 [1997] EWCA Civ 1279.

320 Georgiadis, Apostolos, *Concurrence of claims and concurrence of legal bases of a claim: a review* (Chronika Idiotikou Dikaiou, ΙΣΤ/2016) p.4-5.

321 *Principles, Definitions and Model Rules of European Private Law-Draft Common Frame of Reference [DCFR]* (Full Edition, 2009) p.3019.

Henderson v Merrett Syndicates Ltd[322], where the House of Lords clarified that a tort claim in negligence was not prevented by the existence of a contractual relationship between the parties, unless this was contrary to the clauses of their agreement[323]. Until then, in case of concurrence, tort claims were excluded for the reason that tort law was ancillary to contract[324].

However, in common law problems arise when claims are made for pure economic loss, which is closely linked to concurrence, as this head of damage is mostly caused within the context of a contractual relationship. This type of loss is distinguished from economic loss directly resulting from personal injury or damage to property and is compensable only exceptionally. The legal framework thereof remains in a state of constant change and instability[325]. Thus, there is no duty of care to subsequent purchasers of defective property[326], while only once have the English courts held that the existence of a contract with a third party would give rise to a duty of care in tort, namely *Junior Books Ltd. v. Veitchi Co. Ltd*[327], which has not been followed.

By contrast, in Greek law compensable pecuniary loss corresponds to the difference between the total value of the claimant's assets after the injurious event and their hypothetical value, as would have been if the damaging event had not occurred. Therefore, the courts have to assess the effect of the wrongful act or omission on the entire property of the aggrieved party, not just the directly affected asset[328]. Furthermore, even if no particular asset was harmed, various theories on the extension of the range of the element of unlawfulness allow courts to compensate pure economic loss arising from the infringement of any rule of law or of the general duty of diligence and care, in case such violation damages the claimant's patrimony as such[329].

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322 [1995] 2 AC 145.

323 Elliott, Catherine, and Frances Quinn, *Tort Law* (Essex: Pearson Education Limited, 2005) p.35; see also *Hamilton Jones v. David & Snape* (a firm) [2004] 1 WLR 924.

324 Heuston, R.F.V., and R. A. Buckley, *Salmond and Heuston on the Law of Torts* (London: Sweet & Maxwell, 1996) p.207-8.

325 *Principles, Definitions and Model Rules of European Private Law-Draft Common Frame of Reference [DCFR]* (Full Edition, 2009) p.3051.

326 *Bellefield Computer Services Ltd. v. E Turner & Sons* [2002] EWCA Civ 1823.

327 [1983] 1 AC 520.

328 Kornilakis, Panos, *Law of Obligations-Special Part I* (Athens-Thessaloniki: Sakkoulas Publications, 2002) p.517.

329 Kornilakis p.484-9.

Thus, Greek courts have repeatedly compensated claimants for pure economic loss caused, for instance, by careless conduct of bank employees while verifying the identity of persons acting as agents or the validity of cheques or while carrying out forced execution procedures[330], which would not be possible under the principles of common law. An example of this is the judgment in *Customs & Excise v. Barclays Bank*[331]. In this case, the defendant bank had received from the claimant a notification of an injunction freezing the account of a customer. Nonetheless, due to carelessness of its employees, it carried out an instruction of its customer to transfer money from the account. The House of Lords held that there was no duty of care owed by the bank to the claimant for the restitution of pure economic loss.

4. Breach of statutory duty v liability from special legislation

In the English legal system, various specific areas of human activity, especially those which constitute sources of increased risk, are regulated by special statutes, such as the Employer's Liability Act 1969, the Defective Premises Act 1972, the Fatal Accidents Act 1976, the Occupiers Liability Act 1984, the Consumer Protection Act 1987 and many more. The infringement of an obligation imposed by a statutory provision is known as "breach of statutory duty", which is a tort in its own right. Each claim is governed by the special rules stipulated in the statute. Whether a particular statute gives the injured party the right to bring a civil action for damages depends upon its interpretation according to the intention of Parliament[332]. Claims for breach of statutory duty can be brought together with negligence actions[333]. It is self-evident that aspects of a sector of human activity which may not be covered by the relevant statute, fall under the rules of other separate torts. An example of this is loss of or damage to property, which will only fall within the ambit of the Consumer Protection Act 1987, if the property is intended for

330 AP 4/2016; AP 1220/2014; AP 2257/2014; AP 1084/2013; AP 363/2012, all published in the databank of the Athens Bar Association "ISOCRATIS" [TNP DSA].

331 [2006] UKHL 28, 1 AC 181.

332 Bermingham, Vera, *Tort in a Nutshell* (London: Sweet & Maxwell, 2005) p. 93.

333 Harpwood, Vivienne, *Modern Tort Law* (London and New York: Routledge-Cavendish, 2008) p.19.

private use or consumption, meaning that commercial usage is excluded and any liability thereof is founded on the general principles of the tort of negligence[334].

In Greek law, Art. 914 GCC can be fleshed out as to the requirement of unlawful behaviour, by any other provision in any special law from which liability may arise. Thus, negligence tort actions may be based on law 3950/1911 on civil and criminal liability from motor vehicles, law 551/1915 on employers' liability for accidents at work, laws 1178/1981 and 2243/1994 on liability of the press, law 2121/1993 on the protection of intellectual property, law 2251/1994 on the protection of consumers or law 2472/1997 on wrongful processing of personal data, to mention a few[335]. The difference from common law is that here one claim arises, which may be founded on multiple bases.

5. *Res ipsa loquitur* v strict liability in the Greek Civil Code and special laws

Closely connected to the issue examined in the previous paragraph is the concept of strict liability, which in Greece is established in most of the above-mentioned special laws. Furthermore, strict liability is expressly provided in certain articles of the GCC, such as art. 922 on liability for third persons, art. 924 on liability for animals and art. 925 on liability due to the collapse of a building or other construction. Liability established by the last two articles (924 and 925 GCC) and in some of the above laws, is otherwise known as risk liability, because it is justified by the argument that those who create or benefit from sources of risk, should be liable to restitute any damage resulting from them[336].

By contrast, the common-law tort of negligence is not concerned with the notion of strict liability, as it is not fault-based; indeed, the requirement of duty of care, which functions as the threshold to tortious liability, is determined according to objective criteria and could itself be construed as establishing a sort of risk liability. As a rule, the claimant has to prove his/her case according to the civil evidentiary standard of "balance of probabilities"[337]. There is, however,

334 *Principles, Definitions and Model Rules of European Private Law-Draft Common Frame of Reference [DCFR]* (Full Edition, 2009) p.3377.
335 Karakostas, Ioannis, *The Law of Tort-Articles 914-938 GCC* (Athens: Nomiki Vivliothiki, 2014) p.80-112.
336 Georgiadis, Apostolos, *Law of Obligations-General Part* (Athens: P. N. Sakkoulas, 2015) p.642-3.
337 Steele, Jenny, *Tort Law-Text, Cases and Materials* (Oxford University Press, 2007) p.134.

one doctrine which introduces an exception to this rule and has the practical effect of reversing the burden of proof in favour of the claimant. This is the mechanism of *res ipsa loquitur*, which is applied in cases where the plaintiff is in a position of weakness, meaning that he/she does not have the specialized know-how so as to be able to explain how the accident happened. In such cases, *res ipsa loquitur* is invoked and the court draws an inference of negligence from the nature of the accident or the description of the damage suffered [338]. This principle is widely used in road accident cases so that criminal convictions are admitted as evidence in the corresponding negligence actions[339]. Otherwise, strict liability is expressly stated in some statutes which give rise to a claim for breach of statutory duty – not in all of them though.

6. Compensation in case of death

According to art. 932 subpar. 3 GCC, in case of death, the pecuniary compensation which would have been awarded to the victim may be claimed by members of his/her family as compensation for pain and suffering. Family is an open-ended legal term which is adapted by courts to social perception of its content. According to current judicial interpretation, it includes spouses, parents, children, siblings and half-siblings, parents-in-law and sons and daughters-in-law[340], but not unmarried co-habiting couples[341]. It has also been extended to infants and foetuses, if born alive[342].

The English common law, on the other hand, does not recognize such a remedy. Close relatives of the victim may only claim compensation as secondary victims by bringing an action in negligence. In order to succeed, they have to fulfill a series of restrictive requirements. First and foremost, they have to prove that they suffered a serious recognized psychiatric condition as a result of witnessing the accident, given that not even primary victims are allowed to recover for mere grief or mental discomfort. Furthermore, they have to meet three additional conditions that

338 *Clerk & Lindsell on Torts* (London: Sweet & Maxwell, 2006) par. 8-151.

339 Deakin, Simon, Angus Johnston, and Basil Markesinis, *Markesinis and Deakin's Tort Law* (Oxford: Clarendon Press, 2008) p.241.

340 Dacoronia, Eugenia, *Tort Law in Greece. The state of art* in *Studia in Honorem Pelayia Yessiou-Faltsi* (Athens-Thessaloniki: Sakkoulas Publications, 2007) p.74-5; AP 795/2004, NoB 53-2005, 1414; AP 924/2004, EEN 2005, 34.

341 AP 434/2005, EEN 2005, 676.

342 AP 97/2001 [TNP DSA].

were set out in *Alcock v Chief Constable of South Yorkshire*[343], where it was clarified that claims by secondary victims were to be an exception to the rule that psychiatric injury actions are brought by primary victims[344]. According to the *Alcock* criteria: a) the claimant must have seen the accident as it happened or come to its immediate aftermath, b) there must be a close relationship of love and affection between the plaintiff and the primary victim and c) the claimant must have perceived the accident in a way capable of provoking a shock to him/her[345].

The only other remedy available to the family of an accident victim is the "bereavement award" or "fatal accident compensation" provided in the Fatal Accidents Act 1976, which is awarded to close relatives of victims whose death was caused by a negligent act or omission of the defendant. Bereavement claims are allowed only for spouses, parents or children of the deceased. The plaintiffs do not need to prove that they suffer from a serious and debilitating psychiatric injury, however, the amount of the compensation is fixed and relatively low, serving only as a financial token for the loss of the claimant family members[346].

7. Liability of public bodies

Fearing the "floodgates argument" which refers to indeterminate liability, the English judiciary has traditionally been hesitant to recognize duties of care owed by public bodies for their negligent acts or omissions against individuals. Therefore, the common law has developed a series of policy-based arguments in order to justify this broad protection from suit. One much-used control mechanism to shield public organs from liability, is the concept of justiciability. Acts or omissions of state authorities based on decisions taken within their discretionary power are not justiciable, meaning they cannot be evaluated by courts[347]. Another device is the distinction between operational matters, which pertain to the practical application of a public organ's decisions and are justiciable, and policy matters, which refer to the overall planning and

343 [1992] 1 AC 310.

344 Deakin, Simon, Angus Johnston, and Basil Markesinis. *Markesinis and Deakin's Tort Law* (Oxford: Clarendon Press, 2008) p.143.

345 Lunney, Mark, and Ken Oliphant, *Tort Law-Text and Materials* (Oxford University Press, 2008) p.346-8.

346 Mc Kendrick, Ewan, *Contract, Tort and Restitution Statutes* (London: Sweet & Maxwell, 1997) p.55.

347 Deakin, Simon, Angus Johnston, and Basil Markesinis. *Markesinis and Deakin's Tort Law* (Oxford: Clarendon Press, 2008) p.210-1.

allocation of resources and do not give rise to a duty of care[348]. After the decision of the European Court of Human Rights in *Osman v UK*[349] criticized the issue of the "blanket immunity" enjoyed by public bodies, there was a change of direction. Some duties of care started being recognized in relation to careless services to children by educational institutions[350] and negligent handling of foster-care[351] and child-abuse cases[352] by local authorities, however, the legal landscape thereof remains in a state of flux.

By contrast, the Introductory Law of the GCC includes three provisions (arts. 104-106) on the liability of public bodies for acts and omissions related to private law obligations or to the management of their private property. Thus, they can be sued under the general tort provisions of the GCC (art. 914 et seq.) by individuals and corporations, unless their violation was of a law aimed exclusively at the protection of the public interest. According to judicial interpretation of art. 105, public bodies are also liable for omitting to take the proper action imposed on them by the nature of their duties, by law or by the principle of good faith[353]. Finally, art. 106 extends the liability of state organs to local authorities and other types of public law legal persons.

8. Medical negligence

English courts have often been criticized for their preferential treatment of the medical profession in negligence cases. In general, professionals are not judged on the basis of the "reasonable man" test but have to meet the level of skill accepted within the area of their expertise[354]. The origin of the professional standard of care is in a medical negligence case, *Bolam v Friern Barnet Hospital Management Committee*[355], were it was established that doctors

348 Craig, Paul, *Administrative Law* (London: Sweet & Maxwell, 2003) p.897-8.
349 [1998] 25 EHRR 245.
350 *E v Dorset CC* [1994] 3 WLR 853; *Phelps v Hillingdon London Borough Council* [2001] 2 AC 619; *Carty v Croydon London Borough Council* [2005] EWCA Civ 19.
351 *Barrett v Enfield BC* [2001] 2 AC 550; *A and B v Essex CC* [2002] EWHC 2707 (QB), [2003] 1 FLR 615; *Bluett v Suffolk County Council* [2004] EWCA Civ 1707.
352 *W v Essex CC* [2001] 2 AC 592; *L (A Child) and Another v Reading BC and another* [2001] 1 WLR 1575; *S v Gloucestershire CC* [2001] Fam 313; *Pierce v Doncaster MBC* [2007] EWHC 2968 (QB); *A v Hoare; C v Middlesbrough Council; X v Wandsworth LBC; H v Suffolk CC; Young v Catholic Care* [2008] UKHL 6.
353 Karakostas, Ioannis, *The Law of Tort-Articles 914-938 GCC* (Athens: Nomiki Vivliothiki, 2014) p.57; StE 2818/2005 [TNP DSA].
354 Elliott, Catherine, and Frances Quinn, *Tort Law* (Essex: Pearson Education Limited, 2005) p.82.
355 [1957] 1 WLR 582.

are not liable if they acted in accordance with a practice accepted by a "responsible body of medical men". On a practical level, this means that even practices that are only marginally accepted precisely because they are more likely to result in harm, are accepted as exculpatory evidence[356]. The *Bolam* test is commonly applied by courts in other professional negligence cases as well, while in *Sidaway v Governors of the Bethlem Royal Hospital*[357], it was extended to the issue of informed consent. Intense criticism of the *Bolam* principle culminated in *Bolitho v City and Hackney Health Authority*[358], where the House of Lords, while still confirming *Bolam* as good law, clarified that the experts giving testimony should weigh the risks against the benefits of the practice or approach in question and courts are not bound to find for the defendant, if they are not satisfied that the evidence produced by his/her experts is based on rational and convincing arguments. Despite the fact that this new version of the *Bolam* test, as developed in *Bolitho*, was later used more decisively to hold professionals to higher standards of care[359], there are still concerns that doctors enjoy a higher level of protection against liability than ordinary defendants or even other professional groups.

In Greece, medical malpractice claims are based on the general tort provisions of the GCC[360] and seem to be more frequently compensated than in English law. Doctors are liable for negligence in case they violate the norms of their science (*leges artis*)[361], which constitutes breach of art. 288 GCC on good faith[362]. For the determination of the standard of care that medical professionals are required to meet, judges refer to other legal norms as well, such as the Code of Medical Ethics (law 3418/2005). With respect to the issue of the patient's informed consent, it is accepted that doctors have a duty to tell the truth to their patients, which is based on

356 Harpwood, Vivienne, *Modern Tort Law* (London and New York: Routledge-Cavendish, 2008) p.144-5.
357 [1985] AC 871.
358 [1998] AC 232.
359 *Chester v Afshar* [2005] 1 AC 134*; Hunt v NHS Litigation Authority* [2002] WL 1480071; *Ryan v East London and City HA* [2001] WL 1890334.
360 AP 238/2016; EfLar (=Larissa Court of Appeal) 298/2015; EfLar 216/2014; AP 1683/2014; AP 1693/2013. All the above are published in the databank of the Athens Bar Association "ISOCRATIS" [TNP DSA].
361 AP 633/2014; AP 974/2014; EfLar (=Larissa Court of Appeal) 3/2009; AP 1634/2008; AP 2196/2007. All the above are published in the databank of the Athens Bar Association "ISOCRATIS" [TNP DSA].
362 Karakostas, Ioannis, *The Law of Tort-Articles 914-938 GCC* (Athens: Nomiki Vivliothiki, 2014) p.69-70.

the combination of articles 11 of the Code of Medical Ethics, 47 par. 4 of law 2071/1992 and 5 of law 2619/1998, which incorporated the Oviedo Convention[363] in the Greek legal system.

In the context of medical negligence, special reference should be made to one of the most controversial tort law issues with which many European jurisdictions are concerned in recent years: legal questions arising in relation to the birth of a child. For purposes of clarity, a distinction should be drawn between wrongful conception (liability for the birth of a healthy child due to error in recommended contraception methods), wrongful birth (liability for the birth of a disabled child due to failure of prenatal diagnostic tests) and wrongful life (again liability for the birth of a disabled child, but from the perspective of the child's right to claim compensation for medical mistakes which led to the mother's failure to abort)[364].

In both English and Greek jurisdictions, there is a lack of case-law on the third issue of wrongful life, but according to relevant legal literature, it should be considered non-actionable. As a rule, wrongful conception is not regarded as compensable damage by the common law[365], however, in *Rees v Darlington Memorial Hospital NHS Trust*[366] a minor exception was introduced when it was held that a person who receives negligent contraceptive treatment or advice and as a result gives birth to a healthy but unwanted child, is entitled to a small amount of conventional damages for the loss of reproductive autonomy.

The issue of wrongful birth was discussed in *Parkinson v St. James and Seacroft University Hospital NHS Trust*[367], where the parents of a disabled child who was conceived after a negligently performed sterilization procedure were compensated for the extra cost that would be required for the upbringing of a disabled child. A somewhat contradicting conclusion was reached in *Rees v Darlington Memorial Hospital NHS Trust*[368], where the claimant was a disabled mother who had undergone sterilization in order not to have children. The surgery was carried out negligently and she became pregnant and gave birth to a healthy child. She

363 Convention for the Protection of Human Rights and Dignity of the Human Being with Regard to the Application of Biology and Medicine, known as the Oviedo Convention.

364 *Principles, Definitions and Model Rules of European Private Law-Draft Common Frame of Reference [DCFR]* (Full Edition, 2009) p.3069.

365 *McFarlane v. Tayside Health Board* [2000] 2 AC 59.

366 [2003] 3 WLR 1091.

367 [2002] QB 266.

368 [2004] 1 AC 309.

subsequently sought compensation for the extra cost of bringing up a child as a disabled mother, but the House of Lords denied her claim for policy reasons. In Greece, in cases where parents would have aborted children born with severe disabilities, but were not given the option due to negligent prenatal diagnostic tests, compensation for moral harm is awarded to the claimants[369].

9. Breach of contract in favour of a third party

The Greek legal system recognizes the concept of a contract from which a third party – other than the parties to the agreement – may draw a benefit. Infringements of this type lie in the borderline between tort and contract law, where issues of concurrence arise. According to art. 288 GCC on the tenets of good faith, within the context of a contract in favour of a third party, the debtor is liable for breach of any ancillary or supplementary duties of diligence and care towards third parties which derive from the contract, if two conditions are present: a) the third person has a close relationship with the creditor (e.g. he/she is a relative of the latter) and b) due to the nature of the agreement, the debtor should reasonably foresee that his/her acts or omissions linked to the performance of his/her contractual obligations, might result in harm of third parties. If both of the above requirements are fulfilled, then the injured third parties have a right to claim compensation on the basis of the more favourable provisions on liability for breach of contract[370].

The English common law on the other hand, is unfamiliar with the notion of contract in favour of a third party[371]. There is a gap in the law for this type of conflicts, which usually result in pure economic loss, for the restitution of which the injured party cannot sue in contract because of lack of privity. The only remedy available in such cases is an action in negligence. However, claims for negligent misstatements or services under *Hedley Byrne*, have to meet three strict criteria: a) a special relationship between the claimant and the defendant, b) voluntary assumption of responsibility from the defendant to the claimant and c) reliance of the claimant on the defendant's statement or service. As is evident, in situations where a third party suffers

369 AP 633/2014; EfPir (=Piraeus Court of Appeal) 242/2012 [TNP DSA].

370 Karakostas, Ioannis, *The Law of Tort-Articles 914-938 GCC* (Athens: Nomiki Vivliothiki, 2014) p.53-4; AP 1768/2009 [TNP DSA].

371 Elliott, Catherine, and Frances Quinn, *Tort Law* (Essex: Pearson Education Limited, 2005) p.32-3.

loss from the infringement of a contract between others, the three *Hedley Byrne* requirements cannot possibly be fulfilled. The House of Lords filled this gap in the law by introducing an extension of the *Hedley Byrne* principle in *White v Jones*[372], a decision which was based on policy arguments and practical justice, in order to avoid the unfair result of tortfeasors escaping liability and victims of tortious behaviour being left without a remedy[373]. Even though there is no consensus on whether this mechanism constitutes a definite extension of liability for pure economic loss, it is a manifestation of English courts' willingness to stretch legal doctrines to resolve practical problems[374].

10. Negligence liability from negotiations

In common law, it is possible to bring an action in negligence based on the *Hedley Byrne* principles, for damaging statements made at the stage of negotiations before a contract. However, this kind of tortious conduct also falls into the ambit of the Misrepresentation Act 1967, which provides that the burden of proof is reversed in favour of claimants and defendants have to prove that they took all reasonable measures to ensure that the statements and information they provided during the negotiations were true[375]. Consequently, negligence claims of this type are a rare occurrence.

According to Greek jurisprudence, in case a contract falls through because of careless conduct during its preparatory stage, tort liability is established by joint application of the general clauses of arts. 288 (*bona fides*) and 914 GCC and the provisions of arts. 197 and 198 GCC on liability arising from negotiations. The injured party may claim compensation for the economic loss which resulted from actions he/she took based on his/her belief that the contract would be concluded[376].

372 [1995] 2 AC 207.

373 Deakin, Simon, Angus Johnston, and Basil Markesinis. *Markesinis and Deakin's Tort Law* (Oxford: Clarendon Press, 2008) p.173.

374 Elliott, Catherine, and Frances Quinn, *Tort Law* (Essex: Pearson Education Limited, 2005) p.36.

375 Bermingham, Vera, *Tort in a Nutshell* (London: Sweet & Maxwell, 2005) p. 19; Mc Kendrick, Ewan, *Contract, Tort and Restitution Statutes* (London: Sweet & Maxwell, 1997) p.29.

376 AP 1435/2015; AP 1513/2014 [TNP DSA].

VI. Conclusion

The above comparison includes mostly remarks that highlight the differences between the two tort systems. The list of dissimilarities is not, of course, exhaustive, as many more would arise in the context of a juxtaposition of court judgments from both jurisdictions and a detailed analysis of the way in which the English case law and the Greek jurisprudence approach and resolve various issues that may emerge in a negligence claim.

Nevertheless, there are also significant similarities of the examined tort systems, which should not be disregarded. Probably the most important one is noted in the policy arguments that frequently creep into judicial reasoning to help judges address practical problems and serve the individual justice of each case. In Greek tort law, this is due mostly to the general clauses which allow for a lot of "creative thinking" if methodological rules of legal interpretation are not followed properly. In common law, this practice has proven beneficial – at times – to the evolution of the tort of negligence, as it helps judges stretch the law to accommodate novel duty situations. Furthermore, the hesitation of both tort systems to compensate pure economic loss is indicative of the tendency to prioritize the protection of absolute rights. The latter term may be alien to the English common law, however, fundamental rights such as bodily integrity and health, freedom, reputation and property are widely protected by a series of nominate torts, the tort of negligence included. Another common characteristic is the elaboration of legal doctrines and mechanisms to enable individuals who are in a position of weakness due to economic, educational or social factors, to support and prove their cases in order to get compensated for losses they incur.

All the above may be an indication that justice has a more or less uniform content in legal orders of the Western World – or at least of the European continent. Indeed, more often than not, the judicial evaluation of cases of the same type produce similar results in England and in Greece, despite the fact that their tort law systems are of totally diverse provenience and structure. On the other hand, the means through which a judgment is reached in each jurisdiction are quite different, sometimes polar opposites. Hence the tempting question: which tort system is more efficient? Which one is better equipped to address and resolve novel tortious situations?

Both legal systems have advantages and disadvantages, positive and negative characteristics. Of course, their historical backgrounds, goals and overall philosophy differ greatly. The English common law prioritizes safety and predictability of court rulings, by utilizing an intricate system of separate "pockets of liability" in the form of independent nominate torts, where each case may be easily and predictably slotted. On the contrary, the Greek tort law gives precedence to flexibility and adaptability by employing the method of general clauses and abstract legal concepts, which can be properly construed and stretched so as to assimilate new instances of malfeasance. From this follows that an attempt to give a clear and definite answer to the above question would be futile or the result of over-simplification.

Then what is the purpose of a comparative study? one must surely wonder. An answer, in my opinion, could be identified in the reasoning behind the formulation of legal principles and doctrines. These are employed by jurists in both jurisdictions to enable them to apply the law and confer justice. In the context of the Greek tort system, they are indispensable tools for deciphering the necessary and concrete meaning of general clauses and abstract notions which will render them ready for application. In common law, they are stepping stones for judges to cross the restrictive boundaries of precedents and extend the law to new areas of liability. Undoubtedly, doctrines cannot be "transplanted" from a common law to a civil law jurisdiction; they would be inoperative due to fundamental discrepancies between the two systems. However, the same could not be said for the reasoning, the legal arguments behind them. The latter are more pliable and usable within a different framework.

A comparative study surely cannot offer readily applicable solutions. What it can offer, though, is an "outward glance" at a foreign way of thinking and an opportunity for cross-jurisdictional dialogue.

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