

Introduction to English Tort Law

The legal system operating in England and Wales is a common law system of law. The essential difference between a common law system and a civil law system (the predominant legal system in Europe) is that in the former judicial decisions are binding both on lower courts and on the court that has made the decision. This is called a system of precedent. Although there are no formal divisions within English law, one can distinguish roughly between Public and Private law. Within private law, there is again a rough divide between property law and the law of obligations. The law of obligations consists of contract, tort and restitution. In the compensation culture context we are primarily concerned with the law of tort.

Tort law is concerned with civil wrongs. Undoubtedly the largest (and most dynamic) area of law within tort is the law of negligence. In the context of personal injury claims, the injured person will most likely sue in negligence, although there are other regimes which are also relevant. Negligence is a relatively new tort, and it has been largely developed by the judiciary. Its expansion throughout the late 19th and 20th century reflects the pressures which the rise of industrial and urban society has brought to bear upon the traditional categories of legal redress for interference with protected interests¹. Its flexibility means that it can be used by the courts to find liability in novel contexts.

For the court to make a finding of negligence, the claimant must prove a number of things. Firstly it must be shown that the defendant owed the claimant a duty of care. The duty concept was generalised in the famous judgment of *Donoghue v Stevenson*²; in which the House of Lords rejected the previous law in which liability for careless behaviour existed only in a number of separate, specified situations, and embraced the idea of a general duty to "...take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour...[i.e.] persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or

¹ Deakin, Johnston and Markesinis *Markesinis and Deakin's Tort Law*, Oxford University Press, 5th edition, 2003 p74

² [1932] AC 562

omissions which are called into question”³. The most recent authority on the question of establishing a duty of care is *Caparo v Dickman*⁴. A court will find a duty of care if the claimant can show that the damage he suffered was foreseeable; that there was proximity between himself and the defendant; and that in all the circumstances it would be fair, just and reasonable to impose liability on the defendant. A denial of a duty of care means that even if the defendant was at fault, and his fault caused the claimant’s loss, there will be no liability – it is akin to immunity from liability for the defendant against the present and future claimants. The concept was used regularly in the early 1990s to deny liability, especially in actions against public bodies⁵, however since a ruling of the European Court of Human Rights in 1998 English courts have been more reluctant to deny a duty of care, preferring to decide the liability question at the breach stage after full argument on the substantive merits of the individual case has been heard.

Once the claimant has shown that the defendant owed him a duty of care, he must prove that the defendant was at fault – i.e. that he is in breach of his duty of care. Determining whether the defendant was at fault is a two-stage process. First, the court must determine the standard of care that the defendant owed the claimant. The standard of care will be the standard that the ‘reasonable person’ would adopt in the profession, occupation or activity in question. In determining this standard, the courts will often balance the degree of foreseeability or risk of harm against the cost of avoiding the harm, and the benefits to society foregone if the activity in question is not carried on⁶. The standard is objective. In professional negligence cases (e.g. cases of alleged medical negligence), the standard is that of a reasonably competent person in the profession in question or the particular branch of it. In practice this means that the courts defer substantially to the standards set by the profession itself and supported by a responsible body of opinion⁷. Setting the standard is a question of law. The court will then determine whether the actions of the defendant himself reached this standard. This is a question of fact.

³ Ibid, p580

⁴ [1990] 2 AC 605

⁵ For example, *X (Minors) v Bedfordshire CC* [1995] AC 633. This case found that social workers were under no duty of care in conducting their investigations to children who were being abused at home.

⁶ Deakin, Johnston and Markesinis *Markesinis and Deakin’s Tort Law*, Oxford University Press, 5th edition, 2003 p80

⁷ *Bolam v Friern Hospital Management Committee* [1958] 1 WLR 582

The claimant must then show that the defendant's breach of duty caused the damage that he suffered. The test is a 'but-for' test – but for the defendant's tort, would the claimant have suffered the loss or damage? If the answer is no, then the causation test is satisfied. If it is yes, the defendant will not be liable, even if he has acted negligently. This will often be a straightforward issue; however the courts have recently been faced with difficult causation cases, most notably in the context of mesothelioma contracted as a result of exposure to asbestos. A lack of knowledge of the etymology of this particular cancer meant that the claimant was unable to say when exactly he contracted the disease; or indeed whether it is caused by a single fibre of asbestos, or a build-up in his lungs of asbestos fibres. In *Fairchild*⁸ the claimants had been negligently exposed to asbestos by a number of employers/occupiers of properties where they had worked, and they were unable now to say which breach of duty had caused the contraction of mesothelioma. The House of Lords' response was to relax the causation rules. This will be dealt with later in the paper, for now it suffices to say that this exception to normal causation rules has been strictly confined.

Even if the claimant satisfies the but-for test he must show that the damage he suffered is not too remote from the defendant's negligence. For example, the court may find that it was in fact the act of a third party, or the claimant himself which caused the damage, i.e. this act has broken the chain of causation between the defendant's act and the damage suffered. The defendant will also not be liable for a kind of damage which he could not reasonably have foreseen⁹.

Finally, the damage suffered by the claimant must be a type of damage that can be recovered under the law of negligence. For example, where the claimant has suffered the loss of a chance of avoiding physical injury, this loss will not be compensatable. The issue arose in *Gregg v Scott*¹⁰. The claimant's GP negligently failed to diagnose that he suffered from non-Hodgkin's lymphoma. After the cancer was subsequently diagnosed, expert evidence was that the negligent delay in diagnosis reduced the

⁸ *Fairchild v Glenhaven Funeral Homes* [2003] 1 AC 32

⁹ *The Wagon Mound (No.1)* [1961] AC 388

¹⁰ [2005] UKHL 2

claimant's chance of survival for a five-year period from 42% to 25%. The House of Lords denied that the claimant had suffered a compensatable injury in this case.

If these criteria are fulfilled, the claimant is entitled full compensation. In other words, as far as is possible, the claimant is to be put into the position he would have been in had the tort not occurred. In a typical personal injury case, the claimant will be compensated for:

- Pecuniary loss: loss of earnings, cost of medical care, out of pocket expenses that have arisen because of the tort, any damage to the claimant's property
- Non-pecuniary loss: damages for loss of amenity, and for pain and suffering

If the injury continues after the trial, the judge is required to assess the compensation required for future loss of earnings and medical care at the date of trial. Damages cannot be re-assessed at a later date. As Lord Scarman commented in *Lim v Camden & Islington Health Authority*, "There is really only one certainty: the future will prove the award to be either too high or too low"¹¹.

There are some important points to note about personal injury litigation. The first is that punitive damages are not available in the law of negligence¹². Therefore, in awarding damages a judge must only compensate the claimant; that is all the defendant is liable for. The second point is that in negligence trials it is a judge and not a jury who both hears and decides the cases, and awards the damages. Finally, it is usual for the losing party to be ordered to pay the winning party's costs.

The defendant has a number of defences available to him, which he can rely upon should it be shown that he acted negligently. If the claimant also acted negligently, and his negligence contributed to the damage he incurred, then the court will apportion responsibility between the claimant and the defendant and adjust the claimant's damages¹³. The defendant can exclude his liability completely if he can show that the claimant consented to a particular risk of injury (*volenti non fit injuria*),

¹¹ [1980] AC 174, p183

¹² *Kralj v McGrath* [1986] 1 All ER 54

¹³ Law Reform (Contributory Negligence) Act 1945

or that the claimant was acting illegally at the time – although this defence rarely succeeds because of the resulting harshness to the claimant¹⁴.

¹⁴ Deakin, Johnston and Markesinis *Markesinis and Deakin's Tort Law*, Oxford University Press, 5th edition, 2003 p768

Liability of Public Bodies

There is no strict separation between Public Law and Private law in the English legal system. This means that public bodies can be proceeded against by individuals in the same way as one would proceed against another private party; they do not enjoy any general immunity from suit. However, there are considerations which the court will take into account in a case brought against a public body that have no application in cases between private parties.

Breach of statutory duty¹⁵

Any person, corporation or body subject to duties laid down in statute may be sued for breach of statutory duty. A statute may explicitly create or deny a private right of action for breach of its provisions. More usually it will be for the courts to determine whether, on its proper construction, a civil action arises by implication. Whether the action is strict liability or fault-based depends again on the construction of the statute. As Markesinis and Deakin point out, outside the area of industrial health and safety, "...the instances of civil liability for statutory breach are few and far between".¹⁶ Where the statute is silent, the normal rule is that a civil action will be excluded in any case where the statute provides for a criminal sanction as a means of enforcing the duty unless it is shown that the statutory duty was imposed for the benefit of a particular class of persons separate from the public at large¹⁷ (an example would be the class of workers in the context of industrial health and safety regulations). The courts will also lean against finding a private cause of action where the statutory provisions confer broad discretionary powers on public bodies¹⁸. It must then be shown by the claimant that:

- The defendant's conduct infringed the standard set by the Act;
- The claimant was a member of the class protected by the Act;

¹⁵ See further Deakin, Johnston and Markesinis *Markesinis and Deakin's Tort Law*, Oxford University Press, 5th edition, 2003 p358-74

¹⁶ *Ibid*, p362-3

¹⁷ *Lonrho Ltd v Shell Petroleum Co Ltd* (No 2) [1982] AC 172, p182

¹⁸ Deakin, Johnston and Markesinis *Markesinis and Deakin's Tort Law*, Oxford University Press, 5th edition, 2003 p368; an example is *O'Rourke v Camden LBC* [1998] AC 189 where the Act in question conferred wide discretion in relation to the allocation of resources to deal with the homeless

- And the damage occurred in the manner the Act was meant to guard against.

Causation must also be proved in the same way as in a negligence action (see above).

Negligence claims against public bodies

Markesinis and Deakin lay down a number of reasons why public bodies are treated differently in the context of negligence claims¹⁹:

- Substantial claims for economic compensation have to be met from public funds – which means either a diversion of resources away from general expenditure, or an increase in taxation
- A desire to protect public bodies from frivolous and speculative claims – the important practical bar of insolvency or bankruptcy that applies to businesses and individuals does not apply to public authorities, who may, as such, be viewed as a good target for litigation. Even if such cases were to result in a finding of no liability, there would be considerable expenditure of time and money
- A fear of unduly restricting the policy-making functions of the body in question, and of trying to decide questions not suitable to judicial determination – public bodies are traditionally thought to be better able to make decisions in the public interest, judges lacking the necessary expertise and information
- A fear of defensive practice on the part of the public body
- A pressing legal consideration concerns the fact that a public body's actions will also be regulated a statutory framework, and principles of Public Law.
- There are alternative remedies to private law litigation – either through Public Law, or an Ombudsman

These factors have all featured in cases concerning the negligence liability of public authorities in favour of restricting liability in this area²⁰.

¹⁹ Deakin, Johnston and Markesinis *Markesinis and Deakin's Tort Law*, Oxford University Press, 5th edition, 2003 p376-381

²⁰ Two of the most famous cases in this respect are *X v Bedfordshire* [1995] AC 633 (now overruled) and *Stovin v Wise* [1996] AC 923

However, more recent cases have seen the courts expanding the possibility of public body liability in negligence. Recent cases²¹ have cast doubt on the policy reasons used to justify a restrictive approach, refusing to take at face value the fear of vexatious litigation and defensive practice, and casting doubt on the effectiveness of alternative remedies. The current position seems to be that it will rarely be appropriate for the courts to make a finding that no duty of care is owed to the claimant by the public body. However, the court's relative lack of expertise in any given area (a 'justiciability' issue) may still require a finding of no duty. And the distinctive concerns outlined above will still be factored into the standard of care required of a reasonable public body. A notable exception to this trend is the liability of the police. The decisions in *Hill v Chief Constable of West Yorkshire*²², and more recently in *Brooks v Commissioner of the Police for the Metropolis*²³ created and maintained a situation in which the police do not owe a duty of care to victims or witnesses when investigating a crime. An omission by a public authority where it had a statutory power to act will almost never give rise to a duty of care in negligence²⁴. In cases involving the rescue services, the public body will only be liable if it makes things worse²⁵.

Clinical negligence, i.e. cases involving the NHS or private medical care providers, is a subset of the general law of negligence – and the general principles apply.

Aggravated damages

The tort of misfeasance in a public office is available if “an official knowingly acts in excess of his powers or acts with malice towards the plaintiff”²⁶. As the name of the tort implies, this action is only available against public bodies and officials. If the plaintiff is successful in bringing a claim punitive damages may be awarded if the act complained of was oppressive, arbitrary or unconstitutional²⁷.

²¹ See, for example, *Barrett v Enfield LBC* [2001] 2 AC 550; *Phelps v Hillingdon LBC* [2001] 2 AC 619; *D v East Berkshire* [2005] UKHL 23

²² [1989] AC 53

²³ [2005] UKHL 24

²⁴ *Stovin v Wise* [1996] AC 923; *Gorringe v Calderdale MBC* [2004] UKHL 15

²⁵ *Capital and Counties plc v Hampshire CC* [1997] QB 1004

²⁶ Deakin, Johnston and Markesinis *Markesinis and Deakin's Tort Law*, Oxford University Press, 5th edition, 2003 p399

²⁷ *Kuddus v Chief Constable of Leicestershire* [2002] 2 AC 122

Other claims for damages against public bodies

Damages can be sought if a public body is in breach of European Community Law, or if there is a failure to transpose certain European legislation into domestic law. The European Court of Justice has held in a number of cases that domestic courts must develop national remedies so as to render rights established by European Community law effective. This may extend the situations in which compensation is available from a public body.

A breach of the European Convention of Human Rights may also give rise to an action for damages against a public body under section 8 of the Human Rights Act 1998. The award of damages is left to the court's discretion, i.e. unlike in tort law, a public authority may be found to have breached its statutory duty under the HRA, yet the claimant will not have a *right* to compensation. The Act may also have an effect on the development of the law of tort itself, with human rights concerns informing future expansion or contraction of the law.

Employers' Liability

The liability of an employer may be divided into two aspects. There is his liability to his employees and his liability for the acts of his employees to third parties, and both of these represent 'stricter' forms of liability than negligence²⁸. In other words the requirement of fault is either absent on the part of the employer, or diluted.

To his employees

An employer's liability for an injury at work to his employee may be based on common-law rules or one of the many statutory provisions governing health and safety at work.

Under the common law, an employer may be vicariously liable for the tort of one employee which causes injury to another employee. This is considered in the next section. Or he may be liable himself for a breach of his non-delegable duty to provide a safe system of work. It is not the performance of this duty which is non-delegable but rather the responsibility for its performance. The classic exposition of the duty found in *Wilson and Clyde Coal Ltd v English*²⁹; it is to see that reasonable care is taken to provide:

- Competent staff
- Adequate material
- A proper system of work, including supervision (i.e. devising precautions; giving instructions, etc)
- A safe place of work

However these are only aspects of a broad duty to see that reasonable care is taken³⁰. Recent decisions have extended this area of the law from a duty to protect the employee's physical safety to a duty to protect him from certain kinds of psychiatric harm.

²⁸ Deakin, Johnston and Markesinis *Markesinis and Deakin's Tort Law*, Oxford University Press, 5th edition, 2003 p559-60

²⁹ [1938] AC 57

³⁰ Deakin, Johnston and Markesinis *Markesinis and Deakin's Tort Law*, Oxford University Press, 5th edition, 2003 p563

The employer will be liable for any breach of this duty, even if he personally has taken care, for example by engaging a competent third party – he must ensure that care is taken by the third party. In this sense there is strict liability as even if all care is taken by the employer he may still be liable. However it is not completely strict, as it is a defence to show that care was taken by the employer, and the person engaged by him³¹.

The Employers Liability (Defective Equipment) Act 1969 makes an employer liable for the default of anyone (manufacturer, supplier, etc) which renders equipment, provided by the employer for the purposes of his business, defective. The employer can recover an indemnity from the party to blame for the defect. However, for technical reasons, this Act has not benefited injured employees in the manner envisaged (largely due to difficulties in proving that the fault caused the accident)³².

An employer owes his employees various statutory duties. In practice, employers are subjected to an ever growing number of duties designed to improve health and safety at work. Liability is also often absolute in these circumstances³³. Recent developments in this area tend to originate in European Community legislation on health and safety³⁴.

The Employer's Liability (Compulsory Insurance) Act 1969 made liability insurance compulsory for all employers. Failure to insure is a criminal offence.

Vicarious Liability

Vicarious Liability is imposed on an employer for the tort of his employee committed against a third party in the course of employment. Again liability is strict in the sense that no fault is required on the part of the employer (if the employer is at fault, for example by failing to adequately supervise his employees he may be directly liable in negligence to the third party). However some fault is required in that the employee must have committed a tort.

³¹ Ibid, p565

³² Ibid

³³ For example in *John Summers and Sons Ltd v Frost* [1955] AC 740 the s14(1) of the Factories Act, which provides for fencing of dangerous parts of machinery, was interpreted as giving rise to absolute liability even where it could be shown that fencing would render the machine inoperable

³⁴ For example Directive 89/391 [1989] OJ L183/1 – EC Framework Directive on Health and Safety

In *ICI v Shatwell*³⁵, Lord Pearce noted that the doctrine has grown not from a clear principle but from ‘social convenience and rough justice. The employer is better able to compensate the victim, and better able to spread losses through insurance. One might also add that the employer gains the benefits from the enterprise and therefore should also bear the risk of torts happening in the course of business.

A claimant, in order to sue an employer under the doctrine of vicarious liability must prove three things:

- That the offender was his employee (and not an independent contractor hired by him to carry out work)
- That the employee committed a tort (determined by the general rules on tortious liability)
- And that this tort was committed in the course of his employment.

This last aspect is the trickiest to demonstrate. The most recent cases have adopted a ‘close connection test’ to determine whether the tortious act was in the course of employment³⁶. The House of Lords has held that it is necessary to take a broad approach to the nature of the employment, and for the court to ask itself whether the tort is so closely connected with the employment that it would be fair, just and reasonable to hold the employer liable³⁷; or whether the tort falls within a risk created by the enterprise which is known to be inherent to it³⁸.

If he is found liable the employer is legally entitled to a full indemnity from the employee who committed the tort³⁹. However there is a ‘gentleman’s agreement’ on the part of insurance companies not to use their right of subrogation to pursue such claims unless there is evidence of collusion or wilful misconduct⁴⁰.

³⁵ [1965] AC 656

³⁶ First adopted in *Lister v Hesley Hall Ltd* [2002] 1 AC 215. In this case, the employee had been abusing the children he had been employed to care for.

³⁷ *Ibid*, per Lord Steyn, p 229

³⁸ *Ibid*, per Lord Millett p 245

³⁹ Civil Liability (Contribution) Act 1978 s1(1) provides for a statutory right; *Lister v Romford Ice* [1957] AC 555 provides for a common law right based on the contract of employment

⁴⁰ Deakin, Johnston and Markesinis *Markesinis and Deakin’s Tort Law*, Oxford University Press, 5th edition, 2003 p597

Product Liability

Product liability law is relatively new to England. Traditionally liability for defective products was dealt with either under contract law (if there happened to be a contract between the claimant and the defendant)⁴¹, or under the general law of tort, after *Donoghue v Stevenson* exploded the ‘privity fallacy’⁴², a case which recognised that the ultimate consumer of a product could sue the manufacturer (or indeed anyone else in the supply chain whose fault has caused a defect) in tort.

These bases for a cause of action in contract and tort still exist, despite the recent legislation in the area. It may still be necessary to rely on these grounds should the Consumer Protection Act 1987 not cover the particular situation the claimant finds himself in.

Suing in negligence can prove difficult for a claimant. The courts have however found negligence “...as a matter of inference from the existence of the defects taken in connection with all the known circumstances”⁴³; the relevant circumstances being that the defect could not have occurred without some fault during the manufacturing process. However the inference is not always used (for example if the fault could have been the suppliers⁴⁴), and there has been debate over the strength of the inference, and what is required to rebut it.

If the negligence claim is successful, the claimant can recover compensation for personal injury and property damage caused by the defect, but not for economic loss (i.e. the price of the faulty product).

The Consumer Protection Act 1987

The CPA was enacted in order to transpose EC Directive 85/374⁴⁵. Broadly, the Act renders the producer of a product, and certain others dealing with it, liable in damages

⁴¹ Sale of Goods Act 1979 provides for the seller’s implied undertakings as to compliance with description, satisfactory quality, fitness for purpose and compliance with sample in the contract of sale. The standard is strict liability.

⁴² [1932] AC 562

⁴³ *Grant v Australian Knitting Mills* [1936] AC 85, per Lord Wright p101

⁴⁴ *Evans v Triplex Safety Glass Co* [1938] 1 All ER 283

⁴⁵ OJ L 210/29

for personal injury and some property damage caused by a defect in the product, without the necessity for the claimant to show fault, though certain defences may be raised by the producer⁴⁶.

Defect is defined in section 3 as being present where “the safety of the product is not such as persons are generally entitled to expect”, with all circumstances being taken into account to determine whether this is the case. In *A v National Blood Authority*⁴⁷, it was held that the cost and practicability of eliminating the defect were not elements to be considered here. The standard therefore is what persons are generally entitled to expect, and this will be determined by the court. Section 3(2) provides that the safety of a product is to be judged by reference to standards prevailing when it was put into circulation.

There is a ‘development risks’ defence available to producers. Section 4(1)(e) states that if “the defendant can show that the state of scientific and technical knowledge [at the time of supply] was not such that a producer of products of the same description as the product in question might be expected to have discovered the defect if it had existed in his products while they were under his control”. The European Commission challenged the inclusion of this defence before the European Court of Justice, arguing that it was a more lenient defence than the Directive allowed. However the ECJ ruled in favour of the UK, provided the CPA is interpreted in the light of the Directive⁴⁸. According to the ECJ, the provision is directed at the state of knowledge in general, and not in the specific industrial sector. However the knowledge must be accessible. The defence applies if there is no knowledge of the risk of defect; and not if the risk is known but there is no available method of discovering the defect in individual products⁴⁹.

There are other defences available:

- The defect is attributable to compliance with any requirement imposed by law
- The defendant did not at any time supply the product to another

⁴⁶ WVH Rogers *Winfield & Jolowicz on Tort* Sweet & Maxwell 16th edition 2002

⁴⁷ [2001] 3 All ER 289

⁴⁸ *European Commission v UK* [1997] All ER (EC) 481

⁴⁹ *A v National Blood Authority*, *ibid*

- Any supply by the defendant was non-commercial
- The defect did not exist in the product when he put it into circulation
- A defence for a component part producer where the defect is due to the fault of the producer of the product in which it is comprised

The Law Reform (Contributory Negligence) Act 1945 applies to actions under the CPA. Section 7 of the Act provides that any contract term, notice or other provision limiting or excluding liability is invalid. Liability is extinguished 10 years after the product has been put into circulation.

The Act provides for compensation for death and personal injury, and for property damage over £275. There is no liability in respect of loss of or damage to the product itself or the whole or any part of the product which has been supplied with the product in question comprised in it⁵⁰.

⁵⁰ Section 5(2)

Class actions

A class action is a legal procedure which enables the claims of a number of persons against the same defendant to be determined in one suit. One or more persons, the 'representative plaintiffs', sues on his own behalf and on behalf of a number of other persons, the 'class', who have claims that share questions of law or fact in common with those of the representative plaintiff. Only the representative plaintiff is a party to the action. The class members are not usually identified as individual parties but are merely described. The class members are bound by the outcome of the litigation on the common issues, although they do not for the most part take any active part in the litigation⁵¹.

The jurisdiction of England and Wales does not have a formal class action procedure. There are however, other techniques for multi-party litigation available:

- Group Litigation Orders (GLO): for the case management of claims which give rise to common or related issues of fact or law⁵².
- Representative action: where more than one person has the same interest in a claim⁵³.

The 'same interest' requirement of the representative action has been interpreted restrictively by the courts; as such it has been of limited use. Hence the introduction of GLO responded to the perceived need to introduce a new mechanism for multi-party litigation in 2000⁵⁴. Under the GLO schema, once GLO issues are identified, then a register of group claims must be established, and a court must be established which will manage the claims⁵⁵. The court has wide-ranging powers of management, For example it may:

- Vary the GLO issues
- Direct that one or more claims go to trial as test cases

Any judgment or order on a GLO issue is binding on the other parties on the register (who must choose to opt-in).

⁵¹ R Mulheron *The Class Action in Common Law Legal Systems : A Comparative Perspective* Hart Publishing 2004 p 3

⁵² Civil Procedure Rules 19.10 (introduced in 2000)

⁵³ CPR 19.16 (which predate the 2000 reforms)

⁵⁴ R Mulheron, *ibid*, p 68

⁵⁵ CPR 19.11(2)

There are very few stipulated criteria for the commencement of a GLO:

- A number of claims
- That give rise to common or related issues of fact or law
- Managing the litigation by means of a GLO must be consistent with the aim of the CPR, i.e. must enable the court to deal with cases justly
- The consent of the Lord Chief Justice or Vice-Chancellor is required
- A GLO will not be commenced if consolidation of the claims or a representative proceeding would be more appropriate
- The class must be defined by the number of claims already issued and the number of parties likely to be involved

The main distinction between multi-party litigation in England and class actions is that in the former each group litigant is a member of the procedural class *as a party*, and not as a represented non-party⁵⁶. Each party must issue a claim before it can be entered on the group register⁵⁷

The GLO schema has been used on a modest scale, only 54 GLOs have been ordered since their inception⁵⁸.

It is interesting to note that Lord Woolf in his final report rejected the adoption of the formal class action procedure, because of fears of US-style litigation⁵⁹, and Lord Steyn, writing extra-judicially, notes that “the introduction of United States style class actions cannot but contribute to such unwelcome developments [allowing our social welfare state to become a society bent on litigation] in our legal system”⁶⁰.

⁵⁶ Mulheron, *ibid*, p 100

⁵⁷ Practice Direction 19B [6.1A]

⁵⁸ <http://www.hmcourts-service.gov.uk/cms/150.htm>

⁵⁹ Mulheron, *ibid*, p 72

⁶⁰ “Foreward” C. Hodges *Multi-Party Actions* OUP 2001

Road traffic accidents

Road traffic accidents are dealt with under the general law of negligence. It is now well-established that the drivers of motor vehicles owe a duty of care towards one another, other road users and pedestrians. The standard is that of a reasonable careful driver, and everyone is expected to attain this standard, even learner drivers⁶¹. It is a completely objective standard – drivers have been found liable for injuries caused whilst suffering a heart attack⁶² and a diabetic attack⁶³ at the wheel; the standard they were held to was still that of the reasonably careful driver. The approach of the courts is to ensure the maximum coverage of liability. However, where the driver is unaware of the condition that impairs his safety behind the wheel, he will not be held liable where this condition manifests itself and he causes injury to another – liability is still founded on fault⁶⁴.

The successive Road Traffic Acts⁶⁵ have imposed compulsory third-party insurance covering owners and drivers of vehicles against liability for both personal injury and property damage. The intention is to ensure compensation for victims of accidents⁶⁶. Any person who is covered by the policy may enforce it against the insurer⁶⁷. The victim may claim from the insurer the amount plus interest and costs for which a court has condemned the negligent party⁶⁸.

Maximum coverage of liability is also ensured by section 149 of the Road Traffic Act 1988, which invalidates any agreement to limit or restrict the liability of a vehicle user to a passenger in circumstances where the user is required to be covered by a policy of insurance. The section also provides that ‘the fact that a person so carried has willingly accepted as his the risk of negligence on the part of the user shall not be treated as negating any such liability on the part of the user’. In other words the

⁶¹ *Nettleship v Weston* [1971] 2 QB 691

⁶² *Roberts v Ramsbottom* [1980] 1 WLR 823

⁶³ *Broome v Perkins* [1987] RTR 321

⁶⁴ *Mansfield v Weetabix Ltd* [1998] 1 WLR 1263

⁶⁵ Now regulated by the Road Traffic Act 1972

⁶⁶ Deakin, Johnston and Markesinis *Markesinis and Deakin's Tort Law*, Oxford University Press, 5th edition, 2003 p172

⁶⁷ RTA 1972 section 148(4)

⁶⁸ RTA 1972 section 149

defence of consent has been abolished in relation to road traffic accidents⁶⁹. The partial defence of contributory negligence does still apply, for example if the injured party is not wearing a seatbelt, his damages will be reduced accordingly⁷⁰

Section 151(2) of the Road Traffic Act 1988 places an obligation on the insurers of the legal owner of a stolen vehicle to meet a judgment against the driver of the stolen vehicle.

⁶⁹ Made clear in *Pitts v Hunt* [1991] 1 QB 24 by Beldam LJ

⁷⁰ Cf. *Froom v Butcher* [1976] QB 286

State compensation schemes

Injured workers

Injured workmen enjoy limited *no-fault* benefits through the national insurance system. This statutory scheme provides benefits for injuries arising out of and in the course of insurable employment. Both employers and employees contribute and claims are made against the state and not the employer⁷¹.

However, these benefits are unlikely to amount to full compensation for the injured worker; therefore some do turn to the law of tort in order to claim additional damages.

*Motor Insurers' Bureau*⁷²

The MIB provided for additional protection of victims of car accidents where the driver is either uninsured or unknown. It was set up in 1946 by an agreement between the government and insurance companies. It is a company limited by guarantee and financed by a levy on member companies in proportion to their motor premium incomes. Every insurer underwriting compulsory motor insurance is obliged, by virtue of the Road Traffic Act 1988, to be a member of MIB and to contribute to its funding⁷³. The MIB's obligations are linked to the compulsory insurance requirements of the Road Traffic Act, so the protection provided is limited to where there is a legal requirement to insure.

The Bureau both meets judgments against uninsured motorists, and makes *ex gratia* compensation payments to the victims of unknown drivers, if it is satisfied that the motorist would have been held liable if traced and sued.

In the case of personal injury, there is no limit on the compensation that can be paid out by the MIB. However in the case of property damage the RTA imposes a £300 threshold and a £250,000 limit.

⁷¹ Social Security Contributions and Benefits Act 1992; Social Security Administration Act 1992

⁷² Deakin, Johnston and Markesinis *Markesinis and Deakin's Tort Law*, Oxford University Press, 5th edition, 2003 p53

⁷³ <http://www.mib.org.uk/MIB/en/Default.htm>

In 1946-1947, the first year of its operation, the Bureau paid compensation totalling £11,500. In 2005 compensation was paid totalling £320.8m. The administration cost to the Bureau for 2005 was £12m. Total compensation paid since 1946 amounts to more than £2 billion⁷⁴. There has been a rise from about 40,000 claims in 1995 to 75,000 in 2003, and the amounts paid to claimants have risen from under £100 million to almost £240 million⁷⁵. At the moment the cost per individual motor policy holder of running the scheme is £15-£30 per policy.

As a general principle, the MIB is a fund of last resort and does not pay where the victim has already been compensated from another source.

Criminal Injuries Compensation Scheme

The Criminal Injuries Compensation Authority administers the criminal injuries compensation scheme, paying compensation to people who have been the victim of a violent crime.

Since the first scheme was set up in 1964, the Authority, together with the Criminal Injuries Compensation Board which we replaced, has paid more than £3billion in compensation, making it among the largest and most generous of its type in the world⁷⁶. The scheme is governed by the Criminal Injuries Compensation Act 1995.

The scheme allows financial awards to be made:

- to recognise the injuries, physical and mental, caused by a crime of violence
- in certain circumstances, to compensate for past or future lost earnings or special expenses caused by such a crime
- for bereavement as a result of a crime of violence, including, in some cases, compensation for the lost earnings of the person who has been killed.

There are some limitations to who may receive compensation. Firstly, the claimant must be the victim of a violent crime. Secondly, the likelihood of someone making a claim depends on their knowledge of the scheme; hence victims are dependent on the

⁷⁴ <http://www.mib.org.uk/MIB/en/AboutMIB/FAQ/FAQGFUKHOWMUCH.htm>

⁷⁵ R Lewis, A Morris, K Oliphant *Tort Personal Injury Claims Statistics: Is there a Compensation Culture in the United Kingdom* (2006) 2 JPI Law 87, p 97

⁷⁶ https://www.cica.gov.uk/portal/page?_pageid=115,64686&_dad=portal&_schema=PORTAL

police providing them with information. If the victim has a criminal record, the Authority can decide not to make a payment for this reason. The same applies to a victim whose conduct led to him being injured, and to a victim who refuses to cooperate in bringing the offender to justice. If a victim receives a tort award this will be deducted from any payment made under the scheme, however for practical reasons, it is unlikely that the victim of a violent crime will be able to take advantage of the rules of tort law.

Since 1996 payments have been made according to a tariff set by Parliament (prior to this revision, payments were made according to traditional tort principles. There are set amounts of compensation for particular injuries. For example, paralysis of all limbs results in £250,000. If the injury results in loss of wages for over 28 weeks compensation may be awarded for loss of earnings, and there may be extra compensation awarded for medical treatment.

Applications have increased steadily since the scheme's inception, rising from an average of 4000 in the 1960s, to 35,000 in the 1980s, to around 75,000 in more recent years⁷⁷. In 2003-2004 total running costs for the year were £23.611 million, with the cost of resolving individual cases at £305 average. £218,442,000 was paid out to victims under the tariff scheme in operation since 1996 (revised in 2001), and £47,208,000 was paid out to victims under the pre-tariff scheme⁷⁸.

In 2002-2003, the number of cases resolved was at 79,248. The CICA has seen this figure grow at 6% per year over the last two years. However the number of new applications was actually a substantial decrease on 2001-2002⁷⁹.

A Report by the European Commission has estimated that the UK receives more claims and pays out more money than all other member states combined⁸⁰.

⁷⁷ R Lewis, A Morris, K Oliphant *Tort Personal Injury Claims Statistics: Is there a Compensation Culture in the United Kingdom* (2006) 2 JPI Law 87, p 97

⁷⁸ Criminal Injuries Compensation Authority Annual Report and Accounts 2003-2004 (available at www.cica.gov.uk)

⁷⁹ https://www.cica.gov.uk/portal/page?_pageid=115,64721&_dad=portal&_schema=PORTAL#facts_fi

⁸⁰ The Institute of Actuaries, *The Cost of Compensation Culture* (2002)