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# Reforming the English Law on Parental Liability: A Comparison With The French Experience.

Claire Marie McIvor

*English law has demonstrated itself to be particularly hostile to the idea of holding parents tortiously liable for the acts of their children. It deals with allegations of parental negligence with a degree of leniency that, arguably, defies all rational justification. In advocating reform, the primary objective of this thesis is to put forward a proposal for a new regime of liability that obliges parents to take much greater legal responsibility for their children's conduct.*

*The proposition set out is that English law has a lot to learn from the continental approach to parental liability. In seeking guidelines for change, the French system is singled out as a particularly good model for comparison. Over the years it has experimented with different forms of parental liability, and so its law in this respect is well developed, not to mention excellently documented.*

*The French system offers two main options for reform: a regime of strict liability based on a rebuttable presumption of fault or a regime of vicarious liability. It is contended that, for present purposes, the former offers the more viable solution for a legal system that is notoriously resistant to the concept of no-fault liability.*

*In adapting this French regime to suit English needs, the focus of this thesis is on the substantive legal issues involved. The normative feasibility of the proposed regime is established by demonstrating its consistency with the principles of English negligence law. This, in turn, is done by demonstrating the existence, in a typical parental liability action, of the elements of duty of care, breach of duty and both factual and legal causation.*

**Reforming the English Law on Parental Liability: A  
Comparison With the French Experience.**

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October 1999

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## Introduction.

The common law approach to the liability of parents for harm committed by their children contrasts starkly with that adopted under the civil law regime. Whereas civil law systems attribute great legal significance to the parent/child relationship and treat the ensuing liability of parents as being of a vicarious nature, common law countries prefer to align themselves with the principle of individual moral responsibility. Consequently, they will hold parents liable for their children's wrongdoings only upon proof of personal negligence. Moreover, while parental liability is strictly enforced in civil law, the tendency in common law is rather to protect parents from such legal action and to avoid their liability as far as possible. English law stands out in this respect because it has manifested a particularly hostile attitude to the whole concept of parental liability and has taken the notion of parental immunity from suit to the extreme. It deals with allegations of parental negligence with a degree of leniency that, even by common law standards, can only be described as excessive. It is thus asserted that the current English approach to parental liability is insupportable and, in demonstrating this, the primary aim of this thesis will be to put forward a suitable proposal for reform. The view taken is that English law has a lot to learn from the continental approach and that, in seeking guidelines for change, the French experience of parental liability may be singled out as a particularly good model for comparison.

The main problem with the current English system of parental liability is that it promotes a sentiment of irresponsibility. While procreation is regarded as a natural human prerogative, so that individuals are free to bring children into the world, they are under little onus to control the actions of their offspring once there. Parenthood is also a choice, the exercise of which entails a multitude of rights and responsibilities. At present, the legal balance is weighted disproportionately in favour of the former. It is argued that this should be remedied at least to the extent of making parents take greater legal responsibility for their children's actions. This can be justified on the basis that such third party responsibility may be regarded as a natural attribute of parental status. Parents occupy a position of authority in relation to their children, which consequently makes them best placed to control their conduct. As a direct result of the relationship of dependency between them, parents play a key role in the



formation of the character of their children<sup>1</sup> and this enables them to exert at least some influence over their behaviour.

That parents have a role to play in preventing their children from inflicting harm on third parties is well recognised by the criminal law. In various studies commissioned by the government into the problem of youth offending and juvenile delinquency, poor parenting and lack of parental control have been consistently identified as key factors contributing to youth criminality<sup>2</sup>. As a result, the role played by parents has been the focus of various measures designed to combat the problem. Of greatest significance is s.55 of the Children and Young Persons Act 1933 which provides for the imposition of financial penalties<sup>3</sup> on parents for criminal offences committed by their children. Notable also is the new 'parenting order' created by the Crime and Disorder Act 1998. It requires parents of delinquent children to attend counselling and guidance sessions designed to improve their parenting skills. That the law seems readily prepared to invoke the responsibility of parents for damage inflicted by their children where the conduct amounts to a criminal offence but extremely reluctant to do so where it constitutes a civil wrong is clearly anomalous. It can only be explained on the basis that the law is more concerned to prevent criminal behaviour because it regards it as representing a greater threat to society. It is contended that such reasoning is unsound and that the law should rather be concerned to prevent all harm that is capable of being prevented, whatever form it may take.

Such an argument would be fervently endorsed by the victims of harm suffered at the hands of children who, in the majority of cases, are left without any compensation for their injuries. Although they have the option of suing the child perpetrator if the conduct in question amounts to a tort, such actions are usually not worth pursuing because children are generally impecunious. Indeed, recent developments in the tort of negligence in relation to children have made this course of action even less appealing. In *Mullin v Richards*<sup>4</sup>, the Court of Appeal held that the applicable standard of care in negligence actions against children is that of the 'reasonable child' rather than the ordinary standard of the 'reasonable man'. Consequently, it is now much more difficult to establish that a child has been at fault.

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<sup>1</sup> See C. Barton & G. Douglas, *Law and Parenthood* (1995) at p.11, where the authors refer to the role played by parents in the 'socialisation' of children.

<sup>2</sup> Eg. "Crime, Justice and Protecting the Public", (1990, Cm. 965); "No More Excuses – A New Approach to Tackling Youth Crime in England and Wales", (1997, Cm. 3809).

<sup>3</sup> These are known as Compensation Orders.

<sup>4</sup> [1998] 1 All ER 920.

Since children are, by their nature, immature and inexperienced and thus likely to engage in conduct in which an adult would not, they do pose a significant risk of harm to others. It is because of their irresponsibility that they are cared for by adults throughout their childhood years. If they are unable to take responsibility for themselves, then it is only natural that such responsibility should fall upon their parents who, by accepting the role of parenthood, have assumed overall responsibility for their general upbringing.

While the issue of parental liability has received very little attention in English law<sup>5</sup> and is dealt with according to the ordinary principles of negligence, in France it is an important area of liability, governed by its own specifically developed set of legal rules contained in the Civil Code. It is, as a result, better documented and much more developed. What makes the French system such a good case-study is that, over the years, it has experimented with different forms of parental liability, ranging from traditional fault-based liability to strict vicarious liability. After analysing the current English approach to parental liability, it is therefore proposed to embark on detailed study of the French experience in this respect and to see if any of the systems of liability it has implemented could be adapted to suit English needs.

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<sup>5</sup> Indeed, all the leading tort textbooks allocate little more than a paragraph to the matter. The fact that the family of one of the victims of the Columbine High School massacre has recently initiated an action in negligence against the parents of the student gunmen may, however, help to raise its profile.

## **Chapter 1: The Current English Approach to Parental Liability.**

The principles of English law on harm resulting from the conduct of children betray a distinct reluctance to hold their parents liable. They will be immune from liability in tort unless held personally negligent for contributing in some way to the circumstances leading to the wrongdoing<sup>6</sup>. Therefore, in accordance with the ordinary principles of negligence, in order to establish parental liability, a plaintiff must demonstrate to the court that he or she was owed a duty of care by the defendant parent, that this duty has been breached and that this breach resulted in the harm complained of. These components of negligence are commonly referred to as duty, fault and causation.

Litigation based on the tortious liability of parents constitutes something of a rarity in common law courts and when instituted such actions are rarely successful. The judiciary has demonstrated itself to be very reluctant to intrude in any way into the essentially private domain of family life and this attitude may be explained on the basis of policy considerations. The family unit is regarded as one of the foundational institutions underpinning society and the courts are keen to promote the existence of stable relationships in order to protect family harmony. It is feared that all of this would be jeopardised by the admission into the courts of actions in negligence against parents. As Jane Wright comments, the issue of parental liability in tort raises strong social and moral questions, for it inevitably calls into question the degree of autonomy and discretion accorded to parents in deciding how to bring up their children<sup>7</sup>. Indeed, freedom from interference in one's family affairs is recognised as a fundamental human right by the European Convention of Human Rights, of which Article 8 (1) sets out that: "Everyone has the right to respect for his private and family life, his home and his correspondence." It is to be noted, however, that this is a heavily qualified right and that, most notably, the Convention also provides that it may be sacrificed for the protection of the rights and freedoms of others<sup>8</sup>.

The infrequent appearance of parents as defendants to negligence actions brought by third parties in respect of harm caused by a child is further explained, as a

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<sup>6</sup> Of course, the obvious exceptions to this would be if the child is actually employed by the parent and the damage is inflicted in the 'course of employment', or if the parent has actually authorised or ratified the child's wrongful acts, for in these cases the principles of vicarious liability will apply in the ordinary way.

<sup>7</sup> "Negligent Parenting – Can My Child Sue?", (1994) JCL 104.

<sup>8</sup> Art. 8 (2) of the ECHR.

matter of legal principle, on the basis that parental liability conflicts with the well established common law rule that there can be no duty imposed on an individual to control the actions of another. This derives from the wider rule against imposing liability for omissions. The basis of this rule is the traditional distinction made in the common law between misfeasance and nonfeasance. Whereas the former relates to the infliction of harm through positive action, the latter refers rather to failing to prevent harm from occurring. It is seen as the difference between acting to the detriment of another and simply failing to confer a benefit on him or her. In English law, the view is taken that it is a greater interference with an individual's basic right of freedom to compel him or her to act positively to confer a benefit on another than it is to require him or her to take steps to ensure that his or her conduct does not harm others. The reasoning behind the omissions rule is thus that to impose a duty of affirmative action would be to subject an individual to an unfair and unduly onerous burden.

This position is clearly stated by Willes J in *Moon v Towers*<sup>9</sup>:

“I am not aware of any such relationship as between a father and a son though the son be living with his father as a member of his family, as will make the actions of the son more binding upon the father than the actions of anybody else.”

Parents are under no duty to prevent their children from causing harm to third parties simply on the basis of the mere fact of their parenthood. The obvious inference to be drawn from this is that the liability of a parent in this respect is no different to that of a stranger. However, in describing the legal position as such, Willes J is guilty of oversimplification for he neglects to consider the exceptions which inevitably accompany every general rule. In this respect, reference must be made to the famous statement of Dixon J in the Australian case *Smith v Leurs*<sup>10</sup>, which is regarded as the seminal judicial pronouncement relating to the rules governing parental liability. In it he affirms the absence of any general duty to control the actions of another, but goes on to say that there could be extraordinary circumstances in which ‘special relations’ give rise to such a duty, the relationship between parent and child in some instances falling into this category.

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<sup>9</sup> (1860) 141 ER 1306

<sup>10</sup> (1945) 70 CLR 256.

“...[I]t is incumbent upon a parent who maintains control over a young child to take reasonable care so as to exercise that control so as to avoid conduct on his part exposing the person or property of another to unreasonable danger. Parental control, *where it exists*, must be exercised with due care to prevent the child inflicting intentional damage on others or causing damage by conduct involving an unreasonable risk of injury to others.”<sup>11</sup>

Indeed, there would appear to be a common assumption on the part of legal academics generally that the parent-child relationship constitutes an exception to the general rule and gives rise to duties of affirmative action<sup>12</sup>. Markesinis and Deakin suggest that this duty is composed of two elements: (1) To see to the safety of the child; and (2) To see that the child does not cause harm to third parties<sup>13</sup>. It will be shown, however, that this assumption is not borne out by the case law.

From the statement of Dixon J, it is obvious that the duty of care owed by parents to third parties is based on the exercise of parental control. Unfortunately, however, Dixon J does not elaborate any further upon the meaning or content of this notion. It is clear that he does not consider parental control to exist in all relationships between a parent and child, so that what he is referring to is not something that arises automatically upon attainment of parenthood. He could be referring to the legal duty to control imposed upon parents as part of their statutorily recognised ‘parental responsibility’. If so, then duties of affirmative action in respect of a child would only be imposed upon persons exercising such responsibility, as a matter of law, under s. 3(1) of the Children Act 1989. Alternatively, he could be referring simply to parents who, in a given situation, are able to exercise *de facto* control over their children. Or perhaps he means to limit such duties to persons who have both parental responsibility and *de facto* control at the relevant time. A further complicating factor is that Dixon J gives no indication either of the circumstances in which a duty of care towards third parties, the breach of which would give rise to an action in negligence, would be imposed on parents.

To fill in these gaps it is necessary to turn to the case law. The dearth of English authority on the subject makes it necessary to take the analysis further afield and include the jurisprudence of the Commonwealth courts. It is significant that all the

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<sup>11</sup> Ibid, 262 (emphasis added).

<sup>12</sup> See, for example: D. Howarth, *Textbook on Torts* (1995), p. 173; P. Cane, *Atiyah's Accidents, Compensation and the Law* (1993), p.69; J. G. Fleming, *The Law of Torts* (1998), p.171; M. A. Jones, *Textbook on Tort* (1996), p.53.

<sup>13</sup> *Tort Law* (1994), p.130.

cases that deal directly with the issue of parental liability are based on a similar factual scenario. This is where a child has caused harm to the plaintiff through the misuse of a dangerous object and an action in negligence has been brought against the parents for allowing the child to have possession of the object and then exercising inadequate supervision. It appears that, in determining whether a parent is under a duty of care in such circumstances and whether or not his or her conduct is to be construed as constituting a breach of duty, the courts are generally influenced by a number of common factors. These are, in particular: the circumstances in which the child obtained the object, the nature of the object and the age and general disposition of the child. It is possible to divide the cases into three separate categories, from which a series of patterns can be seen to emerge. The categories are:

- (A) Entrustment;
- (B) Accessibility;
- (C) Unknown possession.

(A). Entrustment.

Entrustment refers to cases in which the defendant parent either gave the object to the child or was aware that the child had the object and allowed him or her to retain possession of it. It is in these cases that the liability of the parent is most likely to be established. This stands to reason since entrustment can quite easily be construed as a positive action. The courts can, therefore, recognise a duty of affirmative action without transgressing the traditional rules or causing any controversy.

In assessing breach of duty, the most important consideration for the courts appears to be the nature of the object involved. Whether a finding of fault will be made therefore depends to a large extent on whether the object is to be classified as one that is dangerous *per se* or merely as being potentially dangerous if misused. The entrustment cases may, therefore, be further sub-divided according to this classification of the instrument causing the harm.

An example of an object that the courts consider to be dangerous *per se* is a gun. Where such an object is involved, the liability of the parent is often established on the mere fact of allowing the child to be in possession of the weapon, without anything

more. In *Newton v Edgerley*<sup>14</sup>, a twelve-year-old boy bought a shotgun with his father's approval and, in direct disobedience to his father's orders not to use the gun outside their farm, he took it with him on an outing with some friends. Walking along, another boy tried to take the gun off him and, in the process, accidentally pulled the trigger with the result that the plaintiff was shot in the leg. The father of the boy who owned the gun was held to have been negligent in that he should either have forbidden the use of the gun altogether or else, anticipating his son's disobedience, he should have given careful instruction to the boy as to the use of the weapon to ensure that he did not represent a danger to others. It is difficult to gauge what level of instruction would have been needed to satisfy the court that the boy had been rendered totally safe in the use of the gun. It is submitted that even if the father had given further safety instructions, the same result would have been reached. Such a conclusion is supported by a much earlier decision in which a master was held liable for injuries caused by his maidservant through her use of a gun<sup>15</sup>. The court considered that either he should have rendered the weapon totally harmless before entrusting it to her or he should have prevented her from using it altogether. Waller considers that had it been the defendant's own *child* who had caused the harm, the same principle would have applied<sup>16</sup>.

A further decision in this respect is that of the British Columbia Court of Appeal in *Edwards v Smith*<sup>17</sup>. In this case, a father who bought a spring gun for his children was held liable for the actions of his son in injuring the plaintiff through the use of the gun. This was so despite the fact that the son had acted in direct disobedience to his father's orders not to use the gun unsupervised. O'Halloran J. A. stated that the father incurred such responsibility "as he permitted a dangerous thing to come into the hands of an immature boy without control under circumstances in which he should have anticipated ...that harm might be done to the...third party"<sup>18</sup>. In this case, the duty to control was directly linked to the tender age and immaturity of the child perpetrator. In this context, reference must be made to the speech of Goodman J in the Canadian case *Ryan v Hickson*<sup>19</sup>. Referring specifically to cases of

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<sup>14</sup> [1959] 1 WLR 1031.

<sup>15</sup> *Dixon v Bell* (1816) 5 M & S 198.

<sup>16</sup> P. L. Waller, "Visiting the Sins of Children: The Liability of Parents for Injuries Caused by Their Children", (1963) 4 Melbourne University Law Review 17, p.26.

<sup>17</sup> [1941] 1 DLR 736.

<sup>18</sup> *Ibid*, 745.

<sup>19</sup> [1974] 55 DLR (3d) 196.

the type being described, he said that the parents are liable because they are to be regarded, in the circumstances, as having direct control of the object causing the harm. This makes them personally responsible to the victim. In support of this, it is possible to cite the decision in *North v Wood*<sup>20</sup>. In this case, the plaintiff's puppy was attacked and killed by a dog owned by the defendant's daughter. The dog was known to be savage and had previously attacked other dogs. The action in negligence against the father failed. His daughter was aged seventeen at the time and was considered by the courts to be old enough to exercise control over the dog herself. The implication is that if she had been younger the decision may have been different.

That the liability of parents in allowing their children to be in possession of dangerous objects is no different to the liability of a stranger in this respect is exemplified by the decision in *Burfitt v Kille*<sup>21</sup>. In this case, a shopkeeper who sold a pistol and some cartridges to a twelve-year-old boy was held liable for injuries occasioned to a third party by the boy through the use of the weapon. His liability was based on the sole fact of having made the sale. The court held that, while in ordinary cases where dangerous articles are sold, the seller is under a duty to third parties likely to be injured by such weapons to warn buyers of the potential dangers involved in the use of the object, where the customer is a young child, the matter is taken one step further in that the seller must refrain from selling the article at all. This establishes the age of the child as a decisive factor in the determination of liability.

Similarly, in the Australian case of *Curmi v McLennan*<sup>22</sup>, a father who allowed his son and some of his friends to stay unsupervised in a boathouse which was owned by him and in which he kept a loaded gun was held liable for the actions of both his son *and another boy* in using the gun to injure a third party. His duty of care obviously arose out of his actions in providing the boys with a dangerous object.

Where the object inflicting the damage is not dangerous in itself but rather has the potential to be dangerous if mishandled by its user, different considerations apply, with a lesser duty of care being imposed upon the parents. Typical instruments falling into this category are airguns, pellet guns and catapults. In *Beebee v Sales*<sup>23</sup>, a fifteen-year-old boy using an airgun shot and blinded the plaintiff in one eye. The boy's father was held liable for the harm. It is significant, however, that there was no

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<sup>20</sup> [1914] 1 KB 629.

<sup>21</sup> [1939] 2 All ER 372.

<sup>22</sup> [1994] 1 VR 513.

<sup>23</sup> (1916) 32 TLR 413.

negligence alleged on his part in allowing his son to be in possession of the weapon. The particulars of the claim related rather to his actions in permitting his son to continue to use it after he had received a warning about the potential hazards created by this, for a neighbour whose window had been broken by the boy through the use of the gun had already made a complaint to the father. Thus it would appear that, even if Mr Justice Lush was “far from saying that even if the father had not been warned beforehand, there would have been no negligence on his part”<sup>24</sup>, this factor, if it was not decisive of liability, at least influenced to a large extent the decision of the court. Several subsequent decisions lend support to this proposition.

In the famous Australian case *Smith v Leurs*, the parents of a boy younger than the defendant’s son in *Beebee* were held not liable for the eye injury sustained by the victim as a result of an accident caused by their son’s use of a catapult. Although the court held that the knowledge of the defendants that their son was in possession of such a weapon placed them under a duty to third parties to control his actions, this duty was discharged by the simple act of issuing warnings to the boy about the dangers of using the catapult and receiving assurances from him that he would only use it against the house wall.

Similarly, in *Donaldson v McNiven*<sup>25</sup>, a boy who was again younger than the defendant’s son in *Beebee* also blinded his victim using an airgun and his father was held not to have been negligent. His duty to take care for the safety of third parties by supervising and controlling his son was also fulfilled by the simple act of exacting a promise from the boy that he would only use the gun in the cellar. The statement of Lord Goddard CJ that “[h]e cannot be watching his son all day and everyday, nor is there any obligation on him to do so”<sup>26</sup> illustrates clearly the reluctance of the courts to impose onerous duties on parents.

It is instructive to draw a contrast here between the decision in *Donaldson* and the one previously discussed in *Newton v Edgerley*. In the latter case, an express prohibition issued by the father did not suffice to exonerate him from liability since the weapon involved was classified as inherently dangerous. The differences in the ages and character of the children involved in both cases provided a further ground upon which the House of Lords in *Donaldson* was able to distinguish *Newton*, in that

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<sup>24</sup> *Idem*.

<sup>25</sup> [1952] 2 All ER 691.

<sup>26</sup> *Ibid*, 692.

in *Donaldson* the boy in question was older and more mature. This evidently made it more reasonable for the defendant father to rely on the promise given by him.

*Gorely v Codd*<sup>27</sup> similarly involved an injury caused by the improper use of an airgun, although this time by a mentally retarded sixteen and a half year old boy. The action against the father was based on his alleged negligence in allowing his mentally incompetent son to possess such a weapon and then failing to adequately supervise him or instruct him in the use of it. True to form, the court took a very lenient approach to the question of the father's liability. It held that his conduct was not unreasonable because, although his son was academically retarded, in all other respects he was a normal boy. Indeed, Nield J appeared to be particularly persuaded by the good character of the youth, describing him at one point as a "decent young person" who was not prone to violence. This seemed to make the judge more favourably disposed toward the defendant father, as though these attributes of the son were an accurate reflection of the father's good parenting skills. He thus held that sufficient instruction had been given and that, incredibly, supervision was not necessary<sup>28</sup>.

While the English cases indicate that the duty of care placed on parents by reason of their allowing their children to be in possession of potentially dangerous objects is very easily discharged in the absence of special circumstances, the Commonwealth courts would appear to adopt a more stringent approach<sup>29</sup>. In *Starr v Crone*<sup>30</sup>, a British Columbia case, an eleven-year-old boy who had been given an airgun by his father wilfully shot and injured the plaintiff in the eye. After carefully reviewing the existing authority on the subject, Wilson J summed up the legal position as being that it is negligent to entrust a dangerous weapon to a young boy unless it is proved: (a) that he was properly and thoroughly trained in the use of the weapon, with particular regard to using it safely and carefully; and (b) that the boy was of an age, character and intelligence such that the father might safely assume that the boy would understand and obey the instructions given to him.

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<sup>27</sup> [1967] 1 WLR 19.

<sup>28</sup> See also, *Rogers v Wilkinson* (1963) *The Times*, Jan 19, (airgun, father not liable).

<sup>29</sup> Eg. in *LaPlante v LaPlante* (1995) 125 DLR (4<sup>th</sup>) 569, a father who allowed his inexperienced son to drive a car in treacherous icy conditions with some of his younger children in the back was held liable for the injuries suffered by the children when the car crashed. The defendant's liability was, however, based specifically on a breach of the duty of care he owed to the victims as his children to protect them, rather than on a breach of any duty to control the actions of his son. It is submitted that if the plaintiffs had been anybody else other than his children the ruling would have been different.

<sup>30</sup> [1950] 4 DLR 433.

In ordinary cases, where the injury has been caused by a simple act of carelessness on the part of the child, the giving of detailed instructions is generally enough to satisfy the court of the reasonableness of a parent's conduct. The actual decision in *Starr*, however, demonstrates that additional principles apply where the child has demonstrated some form of malice. In such cases, parental liability is more likely to be established. Wilson J considered that since there had been such a gross misuse of the weapon, a strong initial presumption that the boy in question was not of a character and mentality to understand the instructions given by his father was created<sup>31</sup>. In order to rebut the presumption, express evidence to the contrary was required and it was not forthcoming in this case. In particular, Wilson J stated that he would have liked the boy to have appeared as a witness in court so that he could have had the opportunity to assess him personally.

The notion of being under a duty to give detailed instructions as to the use of a dangerous object and to further ensure that the child is capable of following them was also taken up by the Ontario High Court in *Ryan v Hickson*<sup>32</sup>. In this case, two fathers were held liable for the damage caused by their children in driving snowmobiles. In considering whether their children were sufficiently trained in the safe operation of such machines, the defendants should have taken into account “the ordinary character of boys twelve to fourteen years of age, their general aptitude for mischief, their desire for excitement, their lack of good and mature judgment and propensity for irresponsible acts in the use of motorised vehicles.”<sup>33</sup> This case would also suggest that the Canadian courts place parents under a stricter duty of supervision than their English counterparts<sup>34</sup>.

That the nature of the object being entrusted to a child similarly affects the liability of strangers is evidenced by *Ricketts v Erith Borough Council*<sup>35</sup>. Like *Burfitt v Kille*, it was concerned with the liability of a shopkeeper for selling to a child an object that is subsequently used to injure a third party. In this case, however, the object in question was a bow and arrow, which was not considered to be dangerous *per se*. The court, in consequence, held that the shopkeeper was not under any duty of

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<sup>31</sup> Indeed, in holding the defendant father liable, Wilson J distinguished the facts of the case from an earlier decision, *Turner v Snider* (1906) 16 Man R 79, in which a father who had entrusted a shotgun and some shells to his son was exonerated. He pointed to the fact that in *Turner* the act committed by the boy was one of mere negligence and not a wilful assault.

<sup>32</sup> [1975] 55 DLR (3d) 196.

<sup>33</sup> *Ibid*, 207.

<sup>34</sup> See also, *Ingram v Lowe* [1975] 55 DLR (3d) 292.

<sup>35</sup> [1943] 2 All ER 629.

care, either to the boy or any other person. This case also provides an example of the rather ridiculous lengths to which the courts are sometimes prepared to go in treating the perceived disposition of the child as being relevant to question of breach and duty. In arriving at his decision, Tucker J made a point of saying that the young boy in question was “intelligent and bright-looking”<sup>36</sup>. This was evidently meant to imply that he would have given the defendant no cause for concern in selling him the bow and arrow. It is extremely doubtful whether the defendant would have been able to make such an assessment of the boy in the space of a single transaction, or that he would even have been inclined to, for that matter. As such, it is unrealistic to think that this influenced in anyway his decision to sell the weapon to the boy. It must also be questioned how it is possible to discern that someone is ‘bright-looking’ and whether there is necessarily any direct correlation between the facial expressions of a child and his or her behaviour? Indeed, are not bright children often the most mischievous?

#### (B). Accessibility.

The above category deals with cases in which parents leave objects in places in which they are accessible to children. The children then get hold of the object for themselves and use it to cause harm to a third party. The cases show that in such circumstances, the duty of care placed on parents is less onerous again and depends to an even greater extent on the nature of the child’s character. What the parent is being reproached for is not exactly a misfeasance and, as such, there is evidently a less strong impetus to impose a duty of affirmative action. However, it cannot properly be described as a ‘pure omission’ either for there is some element of positive conduct. It is probably more accurate to describe it as “an omission as part of an action”<sup>37</sup>.

In *Hatfield v Pearson*<sup>38</sup>, a thirteen-year-old boy, in direct defiance of his father’s orders and unknown to him, took a rifle that was kept in the house and subsequently injured the plaintiff as a result of his misuse of it. The British Columbia Supreme Court held that the imputed mischievous nature of young boys made it foreseeable that the defendant’s son might meddle with the gun and this imposed on

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<sup>36</sup> Ibid, 631.

<sup>37</sup> Such is the phrase used by J. C. Smith and P. Burns in “*Donoghue v Stevenson* – The Not So Golden Anniversary”, (1983) 46 MLR 147, 156.

<sup>38</sup> (1957) 6 DLR (2d) 593.

the defendant a duty to physically remove it from the boy's reach, either by locking it away or hiding it. This decision was, however, overturned by the Court of Appeal, which held that such a duty only arises in special circumstances in which the child in question has previously demonstrated a propensity to intermeddle going beyond that of a generally obedient boy of average intelligence. Otherwise, the placing of a simple moral restraint on the child by giving an order not to touch the dangerous article and securing a promise to that effect is apparently all that a reasonable parent would be expected to do.

Indeed, although it was set out by Lord Esher MR in *Williams v Eady*<sup>39</sup> that, as a general rule, in carrying out their duty of care to children, parents are "bound to take notice of the ordinary nature of young boys, their tendency to do mischievous actions and their propensity to meddle with anything that [comes] in their way"<sup>40</sup>, it would appear that the courts tend not to apply this principle. It is only really where a child has demonstrated a particular propensity to misbehave that a heightened duty of care is placed on parents. In *Smith v Leurs*, Dixon J considered that society would only expect a parent to take steps to prevent conduct that was reprehensible, for otherwise, the causing of harm by children was simply to be regarded as an "unavoidable or reasonable incident of vigorous boyhood"<sup>41</sup>.

Waller would also suggest that, despite the constant refusal of the courts to equate children with animals<sup>42</sup>, the fact that they are more inclined to impose liability on parents for harm caused by children shown to be of bad character indicates that the English and Australian courts are influenced, to some extent at least, by considerations similar to those governing the doctrine of scienter. He also points out that there is a clear application of the doctrine in several American cases, which he terms the 'vicious child cases'<sup>43</sup>.

That the bad character of the child operates to impose a greater duty on parents to supervise and control is justified on the basis that such parental knowledge, actual or imputed, makes the risk of injury more foreseeable. This cannot, however, mean that parents of children who are of generally good character are relieved of all need to take any real steps to control them. As the cases illustrate, harm is just as likely to be

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<sup>39</sup> (1893) 19 TLR 41.

<sup>40</sup> Ibid, 42.

<sup>41</sup> (1945) 70 CLR 256, 263.

<sup>42</sup> Starke J in *Smith v Leurs* stated that "[y]oung boys, despite their mischievous tendencies, cannot be classed as wild animals", *ibid*, 260.

<sup>43</sup> *Op. cit.*, p. 29.

caused by obedient children as by mischievous ones. Harm is often caused by children just being children and, hence, irresponsible. Innocent torts are torts no less than those that are caused intentionally or recklessly and can often be easily prevented through the exercise of adequate supervision and control. It cannot therefore be denied that there is a role for the law of tort in labelling such conduct socially undesirable and, in so doing, providing some reparation to the victims of children.

(C). Unknown possession.

This final category deals with cases in which the parents are unaware that the child is in possession of the object causing the harm. Here it would seem that if parents are placed under any duty of care at all, it is no more than a very slight duty of supervision. *Walmsley v Humenick*<sup>44</sup> illustrates the point. In this British Columbia case, the parents of a five-year-old boy who had shot an arrow from a bow and struck another child in the eye were held to be exempt from liability on the basis that they did not know that their son had such an object. While the mother, who had seen her son whittling the sticks which were later used as arrows, was deemed under a duty to supervise her children as a result, this involved little more than glancing at them through the window from time to time. Indeed, it would seem that but for the fact of her witnessing this activity, there would have been no duty of care at all. In any event, there was none placed on the father. This can only be explained on the basis that all that the father could be reproached for was a pure omission.

It would also appear that, in these cases, the nature of the child's character is less significant and that parents are subject to a much lower standard of care. In *Streifel v Strotz*<sup>45</sup>, the British Columbia Supreme Court held that the parents of two youths aged fourteen and fifteen were not liable for damage caused by their sons arising out of their theft of a car since the boys had not previously demonstrated a propensity to steal cars. Wittaker J went on to say that even if the parents had known of such a tendency, the plaintiff also had to show that there was some reasonable step the parents could have taken to prevent the theft, which they negligently failed to take. He also pointed to the fact that it had not been proved that the parents in question had

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<sup>44</sup> [1954] 2 DLR 232.

<sup>45</sup> (1958) 11 DLR 667.

been 'more than ordinarily lax'<sup>46</sup> in training or supervising their children. The obvious implication is that the acceptable standard of parental care is ordinary carelessness. To establish a breach of duty, therefore, it would seem that plaintiffs are required to show that the conduct complained of was extraordinarily unreasonable rather than just unreasonable. Thus parents, like professionals and public bodies, are set apart as a special category of defendant.

(D). Identifying the need for reform of the current legal rules governing parental liability.

The analysis of the case law has highlighted a number of deficiencies in the approach taken by the English judiciary to the issue of parental liability. It is argued that the law treats parents far too leniently and that, as a result, it discriminates against the victims harmed by children who are inadequately controlled or supervised. In the first place, the law is very vague on the circumstances in which a duty of care will be placed on parents to control their children. It would appear that, in accordance with the general common law rule against imposing duties to control the actions of another, such duties are only really recognised in situations in which the conduct of the parent can in some way be described as positive action. It would seem that the parental duty of care is, therefore, not an exception to the non-liability for omissions rule. In his famous speech on the subject then, Dixon J would appear to have been mistaken, as would the majority of the academic community.

Indeed, the analysis may also indicate that a further, major limiting factor on the circumstances in which a parental duty to control may arise is that of factual scenario. All the cases studied, without exception, involved harm being caused by a child through the medium of an object. Although there are some judicial dicta supporting the idea that a parental duty may be imposed in other circumstances<sup>47</sup>, until the issue has been litigated it remains just a theoretical possibility.

It would also seem that another way developed by the courts to confine this category of negligence even further is the implementation of a rather stringent

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<sup>46</sup> Ibid, 668.

<sup>47</sup> In *Carmarthenshire County Council v Lewis* [1955] AC 549, the House of Lords suggested that a mother who allows her young child to wander onto a road and thereby cause an accident may be held liable for damage to third parties if she failed to take reasonable precautions for the safety of the child. Significantly, however, liability would not be imposed just because the mother temporarily left the child unattended. See also, *Nicholas H* [1994] 3 All ER 686 at 692 (per Saville LJ).

requirement of foreseeability of harm, for liability has been largely confined to cases in which parents were aware of their child's participation in a hazardous activity. By exonerating parents who are oblivious to their children's activities, without making any real inquiry as to whether they should have been more aware in the circumstances, the courts are effectively excluding the ordinary tortious concept of reasonable foreseeability and replacing it with a requirement that amounts almost to inevitability.

To like effect is the implied rule that parents of children of bad character are more likely to be held liable than those whose offspring are said to be ordinarily obedient. It is argued that the judiciary's current view of the relevancy of the general disposition of a child harm-doer is seriously misguided and, as such, insupportable.

Such observations suggest that the courts are only willing to impose a duty of care on persons who are in a position to exercise *de facto* control, construed not just in the sense of being physically able to take appropriate action at the relevant time but also in the sense of being actually aware of the need to intervene in the first place. Unfortunately, the analysis reveals little else about any additional criteria relating to parental status that the courts consider to be a prerequisite to liability.

Finally, the cases show that even where the courts do recognise a duty, the resultant standard of care expected of parents is set so low and is so easily discharged as to make it nigh on impossible, in the absence of special circumstances, for a plaintiff to succeed in an action in parental negligence. What is needed is the introduction of a structured approach to questions of parental negligence that will make the liability of parents much stricter and restore legal coherency and consistency to this area of civil law. It is submitted that the answer lies in the French system.

## Chapter 2: The French Experience of Parental Liability.

The French equivalent of the law of tort is contained in just five articles of the Civil Code. Articles 1382 to 1386 set out general principles of law providing for all cases of delictual liability. The most important of the five provisions is Article 1382, which imposes liability for personal fault<sup>48</sup>. For present purposes, however, the relevant provision regarding parental liability is Article 1384<sup>49</sup>. By contrast to the brevity of Article 1382, this provision contains eight separate paragraphs and is rather long and detailed. Not only does it govern all the various instances of third party liability in French law but it also sets out a principle of liability for the ‘deed of things in one’s keeping’. It will be seen that the significance of Article 1384 has increased dramatically over the last century. Conducive to judicial manipulation, it has been the subject of numerous substantive changes at the hands of the courts and, as a result, it is associated with some of the greatest developments in the history of the French law of delict. The law on parental liability, in particular, has undergone several major transformations.

Paragraph 1 of Article 1384 states: “One is responsible not only for one’s own act, but also for that which is caused by the act of persons for whom one is responsible or by things which one has in one’s care.” It was originally intended as a mere introduction to the subsequent provisions, with the reference to responsibility for the acts of others acting as a preface to the specific instances of third party liability set out in paragraphs 4 to 8 and the reference to liability for things in one’s care relating to Articles 1385 and 1386. Through a process of judicial interpretation, this particular paragraph has since been adapted by the courts to meet changing social needs. In 1896<sup>50</sup>, in response to the rise in the number of accidents due to machines as a result of the industrial revolution, it was dramatically reformulated by the *Cour de Cassation* (the French Supreme Court) to include a general principle of strict liability for the deed of things in one’s care. This very famous example of judicial law-making is a tribute to the adventurousness of the French courts and it is significant, in the context of the present discussion, in that it demonstrates the relative ease which new

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<sup>48</sup> Art. 1382 provides that: “Any human deed whatsoever which causes harm to another creates an obligation in the person by whose fault it was caused to compensate it”. Translation taken from J. Bell, S. Boyron and S. Whittaker, *Principles of French Law* (1998), p.355.

<sup>49</sup> Art. 1383 supplements Art. 1382 and establishes that liability may be imposed for both acts and omissions. Art. 1385 deals with liability for animals and Art. 1386 governs liability for buildings.

<sup>50</sup> Civ. 16 juin 1896, D.1897.I.433, note Salielles, concl. Sarrut; S.1897.I.17, note Esmein.

legal rules may be created by the courts<sup>51</sup>. It is in this respect that the various developments soon to be described in the law relating to parental liability may all be described as products of judicial invention<sup>52</sup>.

Paragraphs 4 to 8 of Art.1384<sup>53</sup> deal with the issue of liability for the acts of others. They set out four specific relationships that give rise to a form of such liability.

- Parent and child (paragraphs 2 and 7)
- Master and servant (paragraph 5)
- Teacher and pupil (paragraphs 6 and 8)
- Artisan and apprentice (paragraphs 6 and 7)

Each relationship gives rise to a different form of third party liability.

Employers are subject to a regime of vicarious liability while teachers can only be found liable on the basis of proven fault<sup>54</sup>, and artisans are bound by a presumption of fault. As already mentioned, the basis of parental liability has changed dramatically over the years. It has developed from a system of fault-based liability into a system of quasi-strict liability and then into a rather extreme form of vicarious liability, operating on a policy of automatic compensation.

As regards this evolution of the French principle of parental liability, it is possible to identify three stage-posts that mark the major developments in this area of law:

- (1). The *Gesbaud*<sup>55</sup> decision in 1966.
- (2). The *Fullenwarth*<sup>56</sup> decision in 1984.
- (3). The *Bertrand*<sup>57</sup> decision in 1997.

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<sup>51</sup> Although, in the absence of a doctrine of binding precedent, French case law is said to constitute more of a persuasive authority than an official source of law, it is recognised that important branches of French law are largely judge-made, of which the law relating to civil liability represents just one. Indeed, as Lawson comments "French law has become as much a system of judge-made law as English law. Indeed, the judges are prepared...to make law *contra legem* in a way that no English judge would do at the present day.", F.H. Lawson, *A Common Lawyer Looks at the Civil Law*, (1953), p.82

<sup>52</sup> It is perhaps also worthy of note that, in recent years, there have been further attempts to construe the rest of Article 1384(1) as setting out a general principle of vicarious liability for person's in one's care, outside of the categories listed in the Code and they met with varying degrees of success. Although of incidental relevance to the subject at hand, to pursue this point any further would exceed the boundaries of this thesis.

<sup>53</sup> Paragraphs 2 and 3 deal with liability for fires.

<sup>54</sup> New regime introduced by the Law of 5 April 1937. Prior to this liability was based on a presumption of fault.

<sup>55</sup> Civ. 2e, 10 fevr. 1966, D.1966.332, concl. Schmelck.

<sup>56</sup> Ass. Plén., 9 mai 1984, D.1985.525, concl. Cabannes, note Chabas.

<sup>57</sup> Civ. 2e, 19 févr, 1997, D.1997, somm. 290, obs. Mazeaud.

Before discussing the changes effected by these decisions, it is first of all necessary to consider the legal position existing prior to 1966.

(A). The Legal Position Before 1966.

Paragraph 4 of Article 1384, as created by the Law of 4 June 1970, provides that the father and mother, to the extent that they exercise the right of custody, are jointly liable for damage caused by their minor children living with them<sup>58</sup>.

Paragraph 7, which was inserted into Article 1384 by the Law of 5 April 1937, states that such liability applies unless the father and mother prove that they could not prevent the act which gave rise to liability<sup>59</sup>.

While it does not contain specific wording to that effect, until 1997, paragraph 7 was always interpreted as creating a rebuttable presumption of fault as the basis of parental liability. Such a presumption was said to relate to a failure on the part of parents to adequately carry out their duties to supervise and educate their children as set out in Article 371-2 of the Civil Code<sup>60</sup>. Located in that section of the Code that deals with parental authority, this Article sets out that: “ The authority belongs to the father and mother to protect the child in its security, health and morality. They have, with regard to the child, the right and duty to keep, supervise and educate”. It must be noted, however, that the duty to educate is to be construed in the broad sense as relating to the general upbringing of the child. This is clearly a very wide-ranging duty that is open to an infinite number of subjective interpretations. In consequence, it has given rise to difficulties for parents as regards discharging the burden of proof.

Based as it is on the exercise of the right of custody of the child and on the duties to supervise and educate, it is clear that parental liability stems from the exercise, as a matter of law, of parental authority<sup>61</sup>. This is clear also from the second prerequisite to liability specified in the code, namely, the fact that the child perpetrator must be living with the parents at the time the damaged was caused. As a corollary of the right of custody, the function of this requirement of cohabitation, set out in paragraph 4 of Art. 1384, is to ensure that liability is only imposed on parents

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<sup>58</sup> Prior to 1970, the mother only became responsible upon the death of the father.

<sup>59</sup> This provision also applies to artisans.

<sup>60</sup> Bénabent, *Droit Civil, Les Obligations*, (1995), p.569.

<sup>61</sup> Crim. 5 nov. 1986, JCP.II.21064.

who are in a position to effectively supervise and educate the child. To put it another way, it means that only those parents exercising real parental authority may be held responsible for their children's actions<sup>62</sup>.

As regards the operation of this criterion of liability, it should be noted that parents may not easily plead immunity from liability based on lack of cohabitation. In cases where the child is not living with either parent at the time the damage is caused, or, alternatively, is living with only one, the firm stance adopted by the courts has been that absence from the family home will only preclude application of Article 1384(4) to the non-resident parent where there is a legitimate reason for his or her absence. It must not be due to what may be construed as any fault on the part of that parent. The fact that one parent has moved out of the family home due to a marital separation or the initiation of divorce proceedings or the fact that the child is not living in the family home at the relevant time because he or she has run away are not considered to be legitimate explanations<sup>63</sup>.

It should be pointed out at this stage that liability under Article 1384(4) only applies to the child's natural or adoptive parents and only if they exercise parental authority. It thus excludes guardians who, in France, do not have parental authority as a matter of law and also third parties having custodial care of the child tortfeasor<sup>64</sup>. Where the child in question is in the care of the local authorities, it is clear that Article 1384(4) does not come into play either.

A very important point to be made was that the system of liability as applied at this time was designed only to impose liability on parents for the *torts* of their children. Conduct of a child resulting in harm but not amounting to a tort did not give rise to an action in parental liability based on Art. 1384 (4). The presumption of fault on the part of the parents was, therefore, conditional upon proof of fault on the part of the child. When it did come into play, the theory was that it would operate to effect a reversal of the burden of proof. The idea was that the commission of the tort by the child would presuppose that the parents had failed to carry out their parental duties properly and this would give rise to a *prima facie* finding of negligence. The parents would then be given the opportunity to rebut the presumption by attempting to

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<sup>62</sup> Crim. 13 déc. 1982, JCP.1983.IV.77; R.T.D.civ.1983.539.

<sup>63</sup> Cf: Civ. 1re, 4 déc. 1963, D.1964.159, note Voirin (separation); Crim. 21 août 1996, D.1996. IR.235 (divorce); Civ. 2e, 24 nov. 1996, Bull. Civ. II, no. 922 (runaway).

<sup>64</sup> It is in relation to these persons that attempts have been made to establish a general principle of vicarious liability.

establish that they had adequately supervised and educated the minor so that they could not have prevented the harm.

Such a system was designed to benefit victims by relieving them of at least some of the difficulties inherent in establishing fault and placing the burden instead on the parents to prove that they had not been negligent. At the beginning, however, this is not how the doctrine was implemented in practice. Up until about 1979 the courts merely paid lip-service to the presumption without actually applying it and, in most cases before then, the victim was required to furnish proof of actual negligence on the part of the parents. By way of example, in one 1960 decision<sup>65</sup>, in which a nineteen year old boy<sup>66</sup> crashed into the plaintiff while riding his moped at night and without any insurance, the finding of the Court of Appeal that it could be inferred from the facts that the boy's father had not adequately supervised or educated his son was quashed by the *Cour de Cassation*. It held that the Court of Appeal should have directed its attention as to whether, in the circumstances, the father had behaved as a reasonable man, which is a clear application of the ordinary principles of negligence. It further held that the fact that a parent allows a child to use a particular object which subsequently causes harm will only constitute fault on the part of the parent if, by reason either of the age, inexperience or intellectual incompetence of the child, or of the poor condition or dangerous character of the object or of the abnormal circumstances in which the child was using it, an accident was foreseeable. The approach of the French courts at this point to the issue of parental liability may thus be compared to the current UK system of ordinary fault-based liability.

In another case the following year, the *Cour de Cassation* did exactly the same thing again. It quashed the finding of the Court of Appeal that the commission of harm by a thirteen-year-old boy who fired a pellet gun at his friend and hit him in the eye was sufficient proof, in itself, that the boy's father had failed in his duty to educate. The case was sent back to be retried.

Commenting upon these two decisions, Rodière suggested that the legal consequence of this approach taken by the French Supreme Court was, effectively, the eradication of the principle of parental liability from the Civil code<sup>67</sup>. He did, however, also intimate that the reasoning behind the first decision may have been the

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<sup>65</sup> Civ. 2e, 2 nov. 1960, D.1961.770.

<sup>66</sup> In 1960 in France the age of majority was 21. It was not lowered to 18 until 1974.

<sup>67</sup> "La Disparition de l'Alinéa 4 de l'Article 1384 du Code Civil", D.1961. Chron. 209.

age of the youth involved, for the position is clear that as children become older the duties of parents become less onerous<sup>68</sup>. Nevertheless, both decisions illustrate a clear tendency of the courts to avoid the liability of parents in the absence of personal fault.

A third decision provides further persuasive authority to this effect<sup>69</sup>. It involved a claim for compensation for injuries sustained by the plaintiff in a large department store as a result of being hit by stool which had been thrown over the railings five floors above by a two and a half year old child. The Court of Appeal, quite astonishingly, held that the shop was liable and did not even consider the question of the mother's liability. It found that the shop had a duty to supervise the child and that this duty was made particularly onerous by the fact that the child was located in the children's clothing department when the incident occurred. The reasoning behind this was apparently that this section of the shop constituted a particular allurement to young children. In quashing the decision, the *Cour de Cassation* resisted this attempt to dilute even further the duties placed on parents but, unfortunately, it did so by stating that the Court of Appeal should have established whether the mother had been personally at fault by determining whether she had been in a position to prevent the harm occurring, instead of imposing the presumption and leaving it up to her to submit such evidence in her defence.

At this stage, therefore, it can be seen that the victim had a double hurdle to clear in establishing liability, being required to establish both the fault of the child and the parents. This position was remedied to some extent by the *Gesbaud* decision in 1966<sup>70</sup>, relative to the question of the child's liability.

#### (B). The *Gesbaud* Decision.

*Gesbaud* marked the first step in the movement towards objective liability. It established that where harm has been caused by the child through the medium of an object, the liability of the child, from which the liability of the parents was to be derived, could be established on the basis of Art. 1384, paragraph 1, rather than on the basis of Art. 1382. In other words, instead of having to prove actual negligence on the part of the child in accordance with Art. 1382, plaintiffs could invoke the principle of

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<sup>68</sup> Civ. 1re, 6 janv. 1982, JCP.1982.IV.107; Paris, 7e ch. B, 12 juill. 1990, JCP.1991.IV.248.

<sup>69</sup> Civ. 1re, 20 déc. 1960, D.1961.141, note Esmein.

<sup>70</sup> Civ. 2e, 10 févr. 1966, D.1966.332, concl. Schmelck.

strict liability for the deed of things in one's keeping contained in Art. 1384 (1). To satisfy the requirements of liability on this basis, all that needed to be proven was that the child had the use, direction and control of the object that caused the harm. Given that, in most cases, the infliction of harm by children is to be attributed to their use of an object<sup>71</sup>, the impact of this decision was clearly very far-reaching. In the majority of subsequent cases, the need for the plaintiff to establish fault on the part of the child perpetrator was dispensed with so that presumption of parental negligence contained in Article 1384(4) could be brought into play practically automatically.

It was established by the famous *Jeand'heur* decision<sup>72</sup>, which constitutes a landmark in French legal history, that Article 1384, paragraph 1 of the Civil code implements a presumption of liability rather than a presumption of fault. The difference is that a presumption of liability may only be rebutted by proof of a *force majeure* (the closest English equivalent to this concept being that of the 'Act of God') or contributory negligence. This clearly operates to the advantage of plaintiffs by effectively guaranteeing a positive verdict in all but the most exceptional of cases.

It is significant that, at this stage, Article 1384(1) could not be used to give rise to an action in personal negligence against the child<sup>73</sup>, children having traditionally been exempt from such a regime of liability. Parental liability was thus evidently based on the objective negligence rather than the actionable negligence of the child perpetrator.<sup>74</sup>

The consequence of the *Gesbaud* decision was that in cases of harm caused by a child through the medium of an object, parental liability was based on two presumptions: the presumption of fault on the part of the parent based on the presumption of the child's liability.

However, an examination of the cases reveals that the courts continued for many years to disregard the presumption of negligence contained in Article 1384(4) and to require proof of fault on the part of defendant parents in order to impose

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<sup>71</sup> This point is made by Waremhourg-Auque, "L' Irresponsabilité de l'Infans", R.T.D.civ. 1982.329. She suggests that this is because, otherwise, children do not generally have enough physical force to inflict significant harm.

<sup>72</sup> Ch. réunies, 13 févr. 1930, D.1930.1.57, note Ripert.

<sup>73</sup> It was not until 1984 that Art. 1384 (1) could be used to impose liability on children: Ass. plén., 9 mai 1984, D.1984.525, concl. Cabannes, note Chabas.

<sup>74</sup> Although there was no formal legal rule to this effect contained in any French text, it was the opinion of leading jurists in this field that this was the state of the law as applied by the courts, such conclusions being drawn from a detailed study of the relevant case-law. Cf. Waremhourg-Auque, *op. cit.* and Puill, "Les Caractères de Fait Non Fautif de la Victime", D.1980.Chron.157,nos13s.

liability. In one 1970 decision<sup>75</sup> the *Cour de Cassation* stated that the plaintiff was required to prove that the defendant father had acted unreasonably and it applied the increasingly familiar formula for determining negligence: that of inquiring whether by reason of the age or inexperience of the child, the state of the object used to cause the harm or the circumstances surrounding the activity, an accident was foreseeable.

A change in attitude may be identified as taking place around 1979, when the courts began to adopt a stricter approach to parental liability and actually started to apply the presumption in its intended form. Liability began to be imposed in circumstances in which, previously, parents would nearly always have been exonerated. In a decision of 7 November 1979<sup>76</sup>, the Supreme Court applied the presumption of fault to the father of a child who caused an accident while riding his bicycle in the street. It also held that evidence that the father had expressly forbidden the son to do so was insufficient to rebut the presumption.<sup>77</sup>

Two 1980 decisions reported together indicate that the courts had a tendency to treat evidence of the bad character of the child perpetrator as conclusive proof that the parents had failed in their duty to educate. In such cases the presumption became, to all intents and purposes, irrebuttable. In this way, the approach of the French courts at this stage may be compared with the current tendency of the common law courts to impose liability more readily in cases of reprehensible conduct. In the first case<sup>78</sup>, the boy in question had aggressive tendencies which were assumed to have been known to his parents and the incident which gave rise to this action involved him kicking a fellow pupil at school. The court held the father liable due to a breach of his obligation to properly educate his son even though the boy was actually under the care and supervision of the particular educational establishment at the time. In the second case<sup>79</sup>, the boy in question had committed arson with malicious intent and a similar decision was reached. In a commentary accompanying these two decisions it was suggested that basing liability on evidence of a poor upbringing was only a pretext for deciding that parents are generally responsible for the character of their children. A call was made at this early stage for the courts to state that parental liability was not based on a presumption of fault and that neither did it have anything to do with any

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<sup>75</sup> Civ.2e, 4 nov. 1970, D.1971.205

<sup>76</sup> Civ. 2e, 7 nov. 1979, JCP.1980.IV.27

<sup>77</sup> See also Crim. 17 oct. 1979, D.1980.IR.131, although in this case the court took a more lenient approach to the application of the presumption by holding the parents not liable.

<sup>78</sup> Civ. 2e, 4 juin 1980, D.1981.IR.322

<sup>79</sup> Crim. 18 juin 1980, D.1981.IR.322

notional duties to supervise and educate. It was argued that the courts should simply admit that parents are, in accordance with Starck's famous formulation of the '*obligation de garantie*', under an obligation to act as guarantors of the character defects and unsociable traits of their children. It was also recognised at this stage that, if this were the case, there would no longer be any need for the requirement of cohabitation, it being specifically linked the duties to supervise and educate.

Such a change in attitude prepared the way for the next major development in this area of the law, in the form of the *Fullenwarth* decision<sup>80</sup>.

### (C). The Fullenwarth Decision.

*Fullenwarth* was one of five decisions examined and delivered together on the same day by the Supreme Court sitting in plenary session, a formation which lends even greater authority to the conclusions reached by the court. For present purposes, however, the *Fullenwarth* case is the only one of the decisions that deals specifically with parental liability, for the others are concerned rather with the related issue of the personal liability of children.

In *Fullenwarth*, a child aged seven fired an arrow from a homemade bow and arrow set in the direction of his friend and blinded him in one eye as a result. Having lost before the Court of Appeal, the defendant father brought his case before the *Cour de Cassation*, contending that the Court of Appeal had erred in its decision in not considering whether his son had sufficient understanding or awareness of his actions in order to establish liability on his part on the basis of fault. The position in French law until then had always been that, fault being an essentially moral concept based on blameworthiness, an individual could only be capable of negligence in the legal sense if he or she was fully aware of the import of his or her actions. Young children lacking reason were thus generally exempt from the regime of liability contained in Article 1382, with no particular age limit being fixed for the attainment of the so-called 'age of reason'. In this case the father was arguing that the presumption of negligence against him contained in Article 1384(4) only came in to play upon proof of the prior liability of the child tortfeasor, so that if the child was not liable the then presumption could not apply. This contention, although a perfectly accurate statement

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<sup>80</sup> Ass. plén., 9 mai 1984, D.1984.525, concl Cabannes, note Chabas.

of the pre-existing law, was rejected by the *Cour de Cassation* which held that to invoke the principle of parental liability as set out in Article 1384(4), it sufficed that the act committed by the minor was the ‘direct cause’ of the harm. The actual terminology used by the court was also significant in that it referred to a ‘presumption of liability’ rather than a presumption of fault, thereby reversing its previous position<sup>81</sup>. Thus, from 1984 onwards, parental liability, as a mere causation-based liability, was no longer based on the prior liability of the child perpetrator.

Around the time of the decision, there were some doubts expressed by academics as to whether this judicial finding of the Supreme Court actually represented any development in the law at all. Reference was made to a 1974 decision in which the Supreme Court held that, in order to invoke the presumption of parental fault, it was not necessary to establish actual negligence on the part of the child if the conduct complained of could, alternatively, be qualified as containing at least some element of unlawfulness<sup>82</sup>. It was said that if the verb ‘to commit’ which was specifically used by the Supreme Court in *Fullenwarth* in referring to the actions of the minor implied that there had to be some element of impropriety on the part of the minor then the decision could not be regarded as constituting any significant development of this area of law<sup>83</sup>. It has, however, now been largely accepted that this is not the case and that the reasoning of the court in *Fullenwarth* applies to any act of the child, be it reprehensible or not<sup>84</sup>.

An important observation to make here is that, at this point, the regime for establishing parental liability became even stricter than the corresponding doctrine of employer’s liability which continues to this day to require that the liability of the employee be established as a prerequisite to the application of its’ legal principles<sup>85</sup>. Moreover, *Fullenwarth* also operated to place those victims who had suffered at the hands of children in a more favourable position than those who had been injured by adults, for they were afforded the opportunity of suing the parent for the act of a child

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<sup>81</sup> Cf. Civ. 2e, 15 févr. 1956, D.1956.410

<sup>82</sup> Civ. 2e, 13 juin 1974, Bull. Civ. II, no.198

<sup>83</sup> See, for example, comments made by N. Dejean de la Bâtie, obs. JCP.1984. II.no.20255 and Fulchiron, note 1988.JCP.II.21064.

<sup>84</sup> Civ. 2e, 24 avr. 1989, D.1990.519, note Dagorne-Labbé. It is to be questioned whether the 1974 decision actually represented an accurate description of the law as it then stood for, subsequent to that decision, the Supreme Court confirmed in 1980 that parental liability presupposes the liability of the child: Civ. 2e, 15 déc. 1980, JCP.1981.IV.89

<sup>85</sup> Civ. 2e, 19 févr. 1997, D.1997.265, note Jourdain.

which, in ordinary cases, would not give rise to the primary liability of an adult because it is simply not negligent according to ordinary standards of reasonableness.

Taken in conjunction with the *Gesbaud* decision, it can be seen that the legal consequences of the *Fullenwarth* case were very far-reaching. It applied in all those cases in which the principle of strict liability for the deed of things in one's keeping did not because the harm complained of had not been caused by the child's use of an object. It thus filled in the gaps left by *Gesbaud*, to ensure that the task of qualifying the child perpetrator's conduct could no longer constitute an obstacle to the imposition of parental liability.

The concern of the French judiciary at this time was clearly to improve the situations of victims. This was, no doubt, at least partly in response to the declaration of the Constitutional Council in 1982 that all persons who suffer harm at the hands of another have a constitutional right to receive compensation<sup>86</sup>. Indeed, Article 62, paragraph 2 of the Constitution of 1958 sets out that the decisions of the constitutional judge are binding on all public powers and on all administrative and judicial authorities.

Also significant, in the sense of being indicative of the legal atmosphere of the time, is the law of 5 July 1985, which implemented a new system of liability in relation to road accidents in France. Operating largely on a no-fault basis and awarding to victims of road accidents an essentially automatic right to compensation, it constituted a major inroad into the fault doctrine. It is illustrative of how the notion of moral imputability was being supplanted by considerations of reparation, as the policy of compensation adopted by the courts became an important method of determining questions of liability<sup>87</sup>.

In the light of these victim-orientated developments, it is not surprising that following the 1984 decisions many more calls were made for a radical overhaul of the regime and the process of reforming this area of the law stepped up a gear. Commentators were more or less unanimous in the view that only the transformation of parental liability into a system of automatic liability based solely on the fact of parenthood and regardless of the actual conduct of such defendant would suffice to

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<sup>86</sup> Déc. no.82-144 du Conseil Constitutionnel du 22 oct. 1982, J.O. 23 oct. 1982, Gaz Pal. 1982.2, Bull. Legisl. 764

<sup>87</sup> For a discussion, in English, of the French law on road accidents see T.A. Downes, "French Lessons on Motor Accident Compensation", in R. White & B. Smythe, *Current Issues in European and International Law* (1990), p.173 and R. Redmond-Cooper, "The Relevance of Fault in Determining Liability for Road Accidents: The French Experience", (1989) 38 ICLQ 502.

restore coherency to this area of law<sup>88</sup>. It was similarly envisaged that, in order to be financially sustainable, such a proposal would have to be based on the existence of obligatory liability insurance. Since specific insurance cover had already existed in this domain for many years and was already widely subscribed to, it was generally considered that the jump to compulsory indemnity policies would not be too traumatic. Many authors also pointed to the fact that the basis of the presumption as it then stood was, in most cases, entirely fictitious<sup>89</sup>. Indeed, Fulchiron pointed out in this respect that while parental liability was then said to be based on the exercise of parental authority, such authority was actually made up of a bundle of rights and duties extending beyond custody, supervision and education. The concept of the duty to educate, in particular, was the subject of further criticism because of its inherent ambiguity and the resulting inconsistencies in court decisions to which it gave rise<sup>90</sup>.

Initially, the courts responded to this surge of opinion by making the existing regime of parental liability stricter. The presumption of liability was more stringently applied<sup>91</sup> and the cohabitation requirement was broadened so that it was held to be satisfied for the purposes of Article 1384(4) even where the child perpetrator was temporarily in the care of a third party when the damage occurred<sup>92</sup>. It was not, however, until 1997 that the *Cour de Cassation* took the opportunity to resolve definitively this debated issue.

#### (D). The Bertrand Decision.

While the legal implications of *Bertrand* were to form the subject of innumerable commentaries and debates, the actual facts giving rise to it could hardly have been more mundane. The plaintiff brought an action based on Article 1384(4) against the father of a twelve-year-old boy who had collided with her while riding his

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<sup>88</sup>Viney, "La réparation des dommages causés sous l'empire d'un état d'inconscience: un transfert nécessaire de la responsabilité vers l'assurance", JCP.1985.I.3189; Puill, "Vers une réforme de la responsabilité des père et mère du fait de leurs enfants? D.1988, chr. 185; Fulchiron, JCP.1988.II.21064.

<sup>89</sup>Fulchiron, *ibid*; Dagorne-Labbé, note D.1990.519; Jourdain, note D.1997.265.

<sup>90</sup>See, for example, H et L Mazeaud, *Traité théorique et pratique de la responsabilité civile délictuelle et contractuelle*, 6e ed., t.1 par A Tunc, ed, (1965), p.869. no.756; Jourdain, note D.1997.265; Vailard, note D.1990.207.

<sup>91</sup>Civ. 2e, 3 mars 1988, JCP.1988.IV.176; Civ. 2e, 16 mai 1988, Gal. Pal.1989.2.Somm.371; Lyon, 16 nov. 1989, D.1990.207 note Vialard; Civ. 2e, 16 janv. 1991, JCP.1991.IV.97.

<sup>92</sup>CA Nancy, 1re ch. civ., 20 oct. 1993, JCP.IV.2636 ; CA Paris, 9 avr. 1996, D.1996.IR.128 ; Civ. 2e, 19 févr. 1997.

bicycle. The Court of Appeal upheld her claim and the defendant father brought the case before the Cassation court, contending that the Court of Appeal should have considered the evidence submitted by him to the effect that he had properly carried out his duties to educate and supervise his son. The Cassation court, rejecting his argument, held that the courts were no longer bound to take into account such evidence because parental liability was no longer based on these duties to supervise and educate. It further held that, in future, the only defences that would be available to parents under Article 1384(4) would be those of *force majeure* and contributory negligence. The presumption of liability had been categorically replaced by a principle of automatic liability.

The overall reaction to the decision from legal quarters has been one of overwhelming support<sup>93</sup>, with many calling for further legislative intervention in order to make parental insurance cover compulsory. The view shared by the majority is that the imposition of no-fault liability is justified by sociological factors such as the strengthening of family links, with closer relationships developing between parents and children, and the fact that many children remain in the family home for longer due to the modern trend of embarking on extended periods of study, thus prolonging the period of dependency<sup>94</sup>.

It is also said that the availability of the sole defences of *force majeure* and contributory negligence is entirely consistent with the actual wording of Article 1384, paragraph 7, since it does not refer to fault at all but merely states that liability is to be imposed unless the parents prove that they could not have prevented the act of the child which gave rise to the harm. It has also been pointed out that the new interpretation of these provisions of Article 1384 is more reconcilable with Article 482, governing the legal position of parents in relation to emancipated children, for it sets out that “parents are not automatically responsible for damage caused by an emancipated child subsequent to emancipation”.

Much criticism has since been directed at the cohabitation requirement, to the effect that it is totally inapplicable and out of step with the new regime of liability. This is because its original purpose was to ensure that parents were in a position to exercise effective supervision of their children, a consideration that is no longer of any formal relevance according to the *Cour de Cassation*. It has been pointed out,

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<sup>93</sup> Jourdain, D.1997.265; Radé, Chron. D.1997.279; Mazeaud, Somm. D.1997.290.

<sup>94</sup> Jourdain, *ibid*.

however, that it is not possible to simply remove or ignore this criterion for it is set out in black and white in Article 1384<sup>95</sup> and so it is likely that to get around this the courts will simply continue to apply to the concept a very liberal interpretation.

Overall, the regime of vicarious parental liability has been well received by the French legal community and, judging from the decisions since *Bertrand*, it would appear that the courts are also prepared to apply the principle of no-fault liability in its full rigor<sup>96</sup>. It seems that the French have finally found a system of parental liability that works for them.

#### (E) Using the French Experience as a Model for Reform of the English Law.

Put simply, the French system provides two main options for reform: a regime of strict liability based on a rebuttable presumption of fault or a regime of vicarious liability. For present purposes, the focus will be placed on the former. As the less radical alternative, it would seem to offer the more viable solution for a legal system that is notoriously resistant to the concept of no-fault liability. Of the different versions of strict liability sampled by France, it is proposed to use the regime that applied from 1984 to 1997 as the model for reform of English law. It is to be recalled that under this regime, as modified by the *Fullenwarth* case, the need for the conduct of the child to constitute an actionable tort is eliminated. The presumption of fault is triggered by the mere fact of the child causing the harm<sup>97</sup>. It is considered that such an approach strikes the correct balance as regards the emphasis placed on the respective rights of parents and victims. It greatly facilitates the victim's task of establishing liability while at the same time ensuring that parents are not unduly burdened and not unfairly treated.

There are a number of considerations to be taken into account in adapting such a regime to suit the English legal system. The basic components of negligence in English law, while they operate in a similar manner, are implemented in a way that is

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<sup>95</sup> Jourdain, *ibid*. He also makes the point that while having a child cannot be said to constitute a fault, it is nevertheless a personal choice which is rather selfish. As such, the consequences of this choice should not be imposed upon others (at 283).

<sup>96</sup> Civ. 2e, 4 juin 1997.D.1997.IR.159; Crim. 25 mars 1998, D.1998.IR.152; Civ. 2e, 1er avr. 1998, D.1998.IR.120; Civ. 2e, 2 déc. 1998, D.1999.IR29.

<sup>97</sup> Since it is the primary liability of parents that is being invoked, there is no need to establish the liability of the children also. Such a requirement would only be necessary if parents were subject instead to the principles of vicarious liability, for then the rule against the imposition of secondary liability in the absence of primary liability would come into play.

quite different to the French method. Some requirements exist in English law that find no direct counterpart in French law, while others are treated with varying degrees of importance by the two jurisdictions. The most important task ahead will therefore be to establish the normative feasibility of the proposed regime by demonstrating the existence, in a typical parental liability action, of the elements of duty of care, breach of duty and both factual and legal causation. It will also be necessary to consider the persons to whom the regime will apply. Each of these issues will be taken in turn.

### Chapter 3: The Duty of Care.

In France, the imposition of a doctrine of *prima facie* liability has been greatly facilitated by the fact that its legal system does not recognise, as a component of tortious liability, any concept comparable to the common law notion of duty of care. French plaintiffs are thus not constrained to the same extent by the difficulties notoriously associated with the duty device that typically beset their British counterparts, often at the outset of a claim. As various authors have commented, it has managed perfectly well without it for it has been able to limit the seemingly unbounded application of its general principles of liability by using the ordinary principles of negligence<sup>98</sup>. It thus deals with what may be regarded in common law as duty issues under the rubric of one or other of the three constitutive elements of liability set out in Article 1382 of the Civil code – namely: fault, causation or damage.

Thus, while in France it is not an issue, in the UK, it is this need to establish in every negligence action that a duty of care is owed by the defendant to the plaintiff that constitutes the greatest obstacle to the assimilation, into the domain of parental liability, of a doctrine of strict liability. The reason is that to recognise that parents are under a duty to control the actions of their children to prevent harm being caused to third parties would be to impose upon parents a duty of affirmative action and this would run counter to the well entrenched common law rule against liability for omissions. Again in France, such legal wrangling is mercifully avoided for the French courts have no problem with imposing liability for nonfeasance. Indeed, French law-makers have even gone so far as to impose upon French citizens a duty to rescue someone in peril where this may be done at no risk to the rescuer, the breach of which constitutes a crime as well as a tort<sup>99</sup>.

Moreover, the task of establishing that a duty of care is to be applied to a class of persons to whom it previously did not apply as a general rule, thus creating a new instance of liability, is further complicated by the fact that the current trend in the UK

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<sup>98</sup> D. Howarth, *Textbook on Tort* (1995), p.157 ; D. Howarth, "Negligence After Murphy: Time to Rethink" (1991) CLJ 58 at 68, citing R. David, *English Law and French Law* (London; Stevens, 1976), p. 153 ; B. Markesinis, "Negligence, Nuisance and Duties of Affirmative Action" (1989) 105 LQR 104 at 112, commenting upon the statement of Lord Goff in *Smith v Littlewoods Association Ltd.* [1987] AC 241 at 280 that 'not only are we beset by the same practical problems but broadly speaking we reach the same practical solutions'.

<sup>99</sup>See Article 236-2 of the New Criminal Code, formerly Article 63 of the previous criminal code.

law of tort is towards the limitation of liability rather than its extension. Indeed, the House of Lords in *Murphy v Brentwood District Council*<sup>100</sup> proclaimed that the categories of negligence have been closed and that in order to establish a duty of care on a certain class of plaintiff, it is necessary to proceed by analogy with existing case-law. For present purposes, therefore, it is a question of seeking out existing authorities in support of the idea that a parental duty of control already exists, albeit in latent form, so that it can be transformed into a duty of general applicability.

(A). The Omissions Rule.

It is proposed to address, first of all, the omissions issue. In order to ensure a full appreciation of the legal aspect of the judicial reluctance to recognise the existence of a general parental duty of control, it is instructive to consider briefly the traditional arguments generally put forward by the partisans of the rule in justification of the non-recognition of liability for omissions<sup>101</sup>.

The first point to be made is that the primary function of the misfeasance/nonfeasance dichotomy is said to lie in its maintenance of the crucial distinction between law and morality, this clear identification of law and morality as autonomous spheres being described as ‘the hallmark of English jurisprudence’<sup>102</sup>. In addition, the assertion that the imposition of a duty of affirmative action constitutes an unjustified infringement of individual liberty is also commonly relied on as militating against liability in a system of corrective justice founded on the fundamental right of individual freedom as determined by notions of Kantian Right<sup>103</sup>. This argument has particular force in cases in which the fulfilment of a positive duty of action would involve significant expenditure in terms of time, effort or resources, thus placing onerous burdens on the defendant.

It is, furthermore, regarded as being less culpable to refrain from benefiting the position of another by failing to prevent harm than to actively exacerbate it by positively inflicting the harm. Lastly, it has also been suggested that cases of

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<sup>100</sup> [1991] 1 AC 398

<sup>101</sup> Fuller accounts of the rule are put forward by J. Logie, “Affirmative Action in the Law of Tort: The Case of the Duty to Warn” (1989) CLJ 115; M. A. Jones, *Textbook on Torts* (1996), pp.43-46; D. Howarth, *Textbook on Tort* (1995), pp. 171-185 and Smith, J.C. & Burns, P. “Donoghue v Stevenson – The Not So Golden Anniversary” (1983) 46 MLR 147.

<sup>102</sup> Smith & Burns, *op. cit.*, p.163

<sup>103</sup> By contrast, a decision to engage in a positive act is said to be consistent with the individual right to freedom for it is seen as a free exercise of agency.

nonfeasance are apt to give rise to causation problems, particularly as regards the identification of individual defendants.

It can be seen from the persuasive nature of these arguments that a strong case may be made in favour of the non-liability for omissions rule. On the other hand, however, the rule is not without its critics. In recent years, it has come under heavy and sustained attack from various academic quarters, being criticised as fervently as it is defended. Logie, for example, suggests that the distinction between misfeasance and nonfeasance is often a difficult one to make and, having given careful consideration to all the arguments just set out in favour of the rule, he concludes that they are 'at best inconclusive'<sup>104</sup> and he suggests that it would be better to use the ordinary principles of negligence in cases of nonfeasance<sup>105</sup>.

Howarth would also appear to subscribe to this view for he similarly suggests that the reason why the arguments in defence of the exclusion of such liability are so inadequate is that what they seek to protect may be easily achieved through the application of other legal rules, particularly those governing fault and remoteness. He concludes, therefore, that the arguments do not justify the existence of a separate rule<sup>106</sup>. It must be pointed out, however, that in giving his account of the law relating to omissions Howarth maintains an entirely objective stance and deliberately does not place himself on either side of the debate.

Markesinis, on the other hand, goes much further and advocates that the non-liability rule should be completely discarded. He manifests himself to be very much in favour of the formulation of a duty to rescue in order that the UK may be brought into line with the position already adopted by most of Continental Europe as regards this question of law<sup>107</sup>.

Despite mounting opposition, the rule against liability for omissions continues to hold sway and Stapleton offers perhaps the most convincing explanation of the traditional resistance mounted by the judiciary against all attempts to erode the principle of non-liability when she comments that the primary attraction of the

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<sup>104</sup> Logie, *op. cit.*, p.120

<sup>105</sup> It should be noted that what Logie is opposed to is the blanket exclusion of liability operated by the law in this respect rather than the actual existence of the rule itself for he does consider the omissions principles to be of some merit, believing for example that it would be undesirable to impose a duty to rescue.

<sup>106</sup> *Textbook on Tort*, p.183

<sup>107</sup> Markesinis, *op. cit.*

omissions rule is its potential to place limits on the tort of negligence in an era of otherwise rapid expansion<sup>108</sup>.

For present purposes, this relatively brief description of the current state of the law relating to omissions suffices, for all that is intended is to place the present discussion of the parental duty of care within its wider legal context. It is not, therefore, necessary to become embroiled in the debate about the reform of this entire area of law, for such a huge task would go well beyond the bounds of the present thesis. Rather the subject of the current discussion concerns only one narrow aspect of the law on omissions, namely the recognition of a duty to control the acts of another for whom one is responsible in order to prevent harm being caused to third parties, such a duty being further limited to very close relationships of control such as that between a parent and child. As such, this would involve making just one exception to the wider rule. This should be more achievable than abolition because it is much less controversial, especially given the fact that such an exception is already widely proclaimed to exist in certain circumstances. What is being proposed, therefore, is really only an extension of an existing exception into the status of a principle of general applicability in relation to parents, their children and their children's victims.

Put another way, it is the difference between making A liable to C for failing to prevent B from causing harm to C and the much more extreme scenario of making A liable to C if A fails to prevent harm generally occurring to C. In the first instance, all that needs to be proven is that A owes a duty to protect C by controlling the actions of B, while in the second case it would be a question of imposing a wider and much more onerous duty on A to protect C. This would effectively be a duty to rescue and is obviously a much greater task.

Recognition of this limited sphere of application of the proposed exception to the general omissions rule should go some way towards assuaging fears about the compromise of legal rules and uncontrollable extensions of liability.

#### (B). Providing a Legal Basis For the Parental Duty of Care.

To recap on what has already been discussed about the current English approach to the question of the existence of parental duties: although there would

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<sup>108</sup>J. Stapleton, "Duty of Care: Peripheral Parties and Alternative Opportunities for Deterrence", (1995) 111 LQR 301, as quoted by Jones, *op. cit.*, p.44

appear to be an assumption among academics that the parent/child relationship, as a category of the 'special relations' exception set out by Dixon J, constitutes a general exception to the principle against imposing liability for the acts of others, an excursus of the relevant case-law indicates that the practical experience is quite the opposite. The duty to control, as it now stands, does not constitute an exception to the wider rule at all for it appears only to be recognised in limited factual situations where the imposition of an affirmative duty of action is justified by the fact that the parent has engaged in some positive act. Taken in conjunction with the additional requirement that he or she must also be in a position to exercise *de facto* control, this means that, in effect, it can only be treated as an ordinary application of the traditional rules of liability.

In order to elevate it to the status of a general duty, it must be argued that a duty to control is part and parcel of the exercise of legal responsibility for the child in question. As has already been stated, it is submitted that recognition of such a duty is justified on the basis of parental authority over the child<sup>109</sup>, including the right to direct the child's conduct and exercise discipline as well as the fact of being in a position to control the child's day to day activities<sup>110</sup>. Unfortunately, this task is not facilitated by the relevant family law provisions governing the parent/child relationship. Although the Children Act 1989 purports to define the term "parental responsibility", which was introduced by that reforming statute to replace the old expressions of "parental rights and duties" and "parental powers and duties", what it actually provides may more accurately be described as a non-definition. To say that it withholds more than it provides would be a great understatement for it does not actually provide any real substantive explanation of this important socio-legal concept, Article 3(1) of the 1989 Act merely stating:

"Parental responsibility means all the rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to the child and his property".

That is not to suggest, however, that even if the definition had specified a duty to control the child, this would automatically translate into a legal obligation towards

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<sup>109</sup> Such is the case in France.

<sup>110</sup> See, F. F. Stone, "Liability for Damage Caused by Minors: A Comparative Study", (1952) 5 Alabama Law Review 1.

third parties, the breach of which would give rise to an action in negligence against the parent. In this respect it is acknowledged that, of the specific parental duties and responsibilities which are recognised, not all of them give rise to tortious liability. It is pointed out by Fleming<sup>111</sup> that, at least in Australia, the failure of parents to adequately carry out their duties to maintain their children by providing food, shelter and clothing, which he refers to as the “duties of conscientious parenthood”, is not actionable in tort, although obviously it may give rise to criminal sanctions. The important point is that, nevertheless, it is theoretically possible to establish parental liability on other grounds and that, crucially, the fact of parenthood does not constitute a bar to actions in tort being brought against parents<sup>112</sup>. Authority for this is provided by the seventeenth century case of *Ash v Ash*<sup>113</sup> in which a mother was successfully sued by her daughter for the torts of assault, battery and false imprisonment.

It may be questioned at this point why parents are given the benefit of immunity in some instances and not in others. It is submitted that a plausible explanation of this would be that such immunity is reserved for cases involving matters which are regarded as falling solely within the realm of parental discretion, those decisions which are seen as being the most private family matters, core matters which the law wishes to remain within the private domain. It is presumably felt that any interference by the law here would constitute the greatest intrusion into what is essentially seen as an out of bounds area. Yeo, in his discussion of the issue of parental liability, makes a comment to a similar effect when he considers the possibility of treating all parental conduct falling within the description of “common domestic activities” as being completely outside the boundaries of negligence<sup>114</sup>.

Returning to the task at hand, it is submitted that establishing a duty to control as a component of parental responsibility in its legal sense would be a start, for it would at least constitute a basis upon which to argue that it should give rise to liability in tort. It is suggested that one way of doing this would be to present the duty to

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<sup>111</sup> *The Law of Torts*, (1998), p.748, citing *Rogers v Rawlings* [1969] Qd. R. 262 in authority.

<sup>112</sup> In contrast, a doctrine of parental tortious immunity was long implemented in various US states although it has since been largely abrogated.

<sup>113</sup> (1696) Comb 357

<sup>114</sup> Stanley Yeo, “Am I My Child’s Keeper? Parental Liability in Negligence” 1998 AJFL Lexis 12 at pp. 55-56 of the lexis transcript. Although very much in favour of the idea he concludes that practical difficulties of implementation render it unfeasible.

control as forming an integral part of one of the established parental duties already recognised by the law as actionable in negligence.

The most obvious parental duty in this respect which immediately comes to mind is that of the obligation of parents to protect their own children from foreseeable dangers. It seems entirely reasonable to argue that a parental duty to control the actions of a child to protect third parties could arise out of an initial duty to protect the child. There is some judicial dicta in support of such a proposition. In the well-known case of *Carmarthenshire County Council v Lewis*<sup>115</sup> the appellant education authority argued that while it may have owed a duty to the child in question, it did not owe any duty to other users of the highway so that, even if it had been negligent in allowing the child to escape onto the street, it could not be held liable for harm caused to others when there. Rejecting this argument outright, Lord Reid stated that in his opinion “all but the most careless mothers do take many precautions for their child’s safety and *the same precautions serve to protect others*”<sup>116</sup>. He thus had no problem in recognising that a duty of care to third parties arose out of the duty to the child, as long as the injury to the third party was reasonably foreseeable. For him, therefore, the issue involved was obviously one of remoteness rather than duty.

A statement to a similar effect was made by Saville LJ in *Nicholas H*<sup>117</sup>:  
“Walking down the street I see a blind man about to cross the road in front of a vehicle. It is foreseeable that he will be injured. I am under no legal duty to take care to save him from danger. But if I am in charge of a child in the street and the child starts to run in front of the traffic, I am under a legal duty to take care to save the child from danger *and indeed other road users from the danger the child may create.*”

The problem with these statements lies in determining whether they ought to be read as limited only to the factual situation therein described, namely the presence of a child on or near a roadway, or whether they can be relied on as the articulation of a much wider principle of a general duty of protection. This latter conclusion is negated to some extent by the fact that, in addressing this point of parental duty, other texts use this same specific context of it arising out of the danger represented by roads. The one instance suggested by Fleming, for example, in which parental liability in negligence may arise is that of the “puerile hazard” of “toddlers diving into traffic and

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<sup>115</sup> [1955] AC 549.

<sup>116</sup> *Ibid*, 566 (emphasis added).

<sup>117</sup> [1994] 3 All ER 686 at 692 (emphasis added).

causing drivers to imperil themselves in evasive manoeuvres”<sup>118</sup>, and this very passage was quoted affirmatively by Gruchy J in the New Zealand case *Jordan v Schofield*<sup>119</sup>. On the other hand, it is submitted that the danger represented by the presence of a child on a roadway is merely an obvious example of the point in question and that, furthermore, the example has simply been drawn from the facts of *Carmarthenshire* as the only known judicial utterance on the subject.

Aside from this, the main difficulty with trying to argue that a general duty of control arises out of the parental duty to protect the child lies in determining whether this latter duty itself actually constitutes a general duty giving rise to liability in negligence. As in the case of the duty to control, there are judicial dicta and academic comment to the effect that it does, but similarly, the law as applied in practice in this respect may suggest otherwise.

The parent/child relationship is widely regarded as falling into that category of exception to the non-liability for omissions rule constituted by the existence of a ‘special’ or ‘fiduciary’ relationship between the plaintiff and the defendant. Indeed, it is commonly regarded as the epitome of this exceptional duty to rescue<sup>120</sup>. Moreover, in addition to the judicial comments just discussed in *Carmarthenshire* and *Nicholas H*, reference may be made to three other cases involving similar statements about the nature of parental duties to children. All three cases are based on the same factual scenario, that of a child being injured on someone else’s land with the legal issue at stake being the question of the landowner’s or occupier’s ensuing responsibility towards the injured child.

In *Glasgow Corporation v Taylor*<sup>121</sup>, a seven-year-old boy died after eating poisonous berries growing on a shrub in some public gardens in Glasgow. In *Phipps v Rochester Corporation*<sup>122</sup>, a five-year-old boy broke his leg after falling into a trench on a building site and, lastly, in *Simkiss v Rhondda Borough Council*<sup>123</sup>, the seven-year-old plaintiff sustained serious injuries after falling off a dangerous bluff on land owned by the local council. The courts in all three cases arrived at the same decision to avoid the liability of each occupier, holding that the responsibility for the safety of

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<sup>118</sup> *The Law of Torts* (1998), p.749.

<sup>119</sup> (1996), 148 N.S.R.(2d) 104, para. 10.

<sup>120</sup> See Logie, *op. cit.*, p. 121; Jones, *op. cit.*, p.52 citing *Barnes v Hampshire County Council* [1969] 3 All ER 746 as authority; P. Cane, *Atiyah’s Accidents, Compensation and the Law* (1993), pp. 68-69.

<sup>121</sup> [1922] 1 AC 44

<sup>122</sup> [1955] 1 QB 450

<sup>123</sup> [1983] 81 LGR 460

little children rests primarily on the parents, even when they are not actually present at the scene. This means that, to quote the words of Lord Shaw in the *Glasgow* case, owners of land on which children are present are “entitled to take into account that reasonable parents will not permit their children to be sent into the midst of familiar and obvious danger except under protection or guardianship.”<sup>124</sup>

However, it would obviously be unwise to speculate whether the courts would have applied the same reasoning to hold the actual parents liable in negligence if they had been the defendants to the case rather than the landowners and so the persuasive nature of the dicta from these cases can only count for so much<sup>125</sup>. This is where the proposed analogy being sought would appear to fall down somewhat, for actual authority on the question in the form required is scarce to say the least, this fact itself perhaps bearing some significance.

In the space of nearly three hundred years, there have been just two reported English decisions<sup>126</sup> in which a parent has been sued in respect of injuries sustained by his or her own child. The first is the seventeenth century case of *Ash v Ash* which has already been mentioned and which is really of no further relevance to the present discussion. It merely provides authority for the undisputed proposition that parents may be liable to their children for specific torts perpetrated directly by them on the child. In such cases, a specific duty of care is owed and the liability of the parent is the same as that of any stranger, the relationship of parenthood being merely incidental<sup>127</sup>. What we are concerned with here is rather the issue of liability for general negligence based on a failure to prevent injury being sustained to the child, so that the central question is whether parents can be held to be under a positive duty to protect their children at all times from foreseeable harm. Fortunately, this question is directly addressed by the second reported decision.

In *Surtees v Kingston-upon-Thames Borough Council*<sup>128</sup>, the adult plaintiff brought an action in negligence against her former foster parents<sup>129</sup> and against the

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<sup>124</sup> N.121 above, 65

<sup>125</sup> There is perhaps some scope for arguing that the transfer of notional responsibility to the parents in these decisions was merely an easy way for the courts to avoid the liability of local authorities upon whom they are even more loath to impose onerous burdens, without fear of actually adversely affecting parents either.

<sup>126</sup> There is also the Scottish case of *Young v Rankin* [1934] SC 499, in which an infant plaintiff brought an action against his father for injuries sustained due to his negligent driving.

<sup>127</sup> See dictum of Lucas J to this effect in the Australian case *Cameron v Commissioner for Railways* (1974) Qd. R 480, in reference to the Scottish case *Young v Rankin*.

<sup>128</sup> [1991] 2 FLR 559

<sup>129</sup> It was accepted by the court that the duty owed by a foster parent is exactly the same as that owed by an ordinary parent.

local authority that had placed her with them, for serious injuries sustained to her foot when she was just two- years-old<sup>130</sup>. It had been clearly established that the injuries had been sustained through immersion in water hot enough to cause third degree burns, but the facts as to the actual circumstances surrounding the injury were unclear. The plaintiff alleged that while left unattended she must have placed her foot in a basin containing hot water, whereas the foster parents argued that she had somehow activated the hot tap herself after placing her foot in the wash basin.

The facts of the case are not important here. Rather, the significance of the decision for present purposes relates to the unanimous finding of the judges that, in determining whether a duty of care is owed by a parent to a child in a given situation, the appropriate test to be applied is that of reasonable foreseeability of injury of the type sustained. The only deduction to be made from this is that the parental duty of protection arises solely in certain circumstances and is not recognised as a general duty.

Although the Court of Appeal held that, on the facts, a duty of care was imposed on the foster mother, apparently because she was in a position to exercise *de facto* control, it accepted her version of the disputed facts and the majority (Beldam LJ dissenting) went on to decide that there could be no liability because the injury was too remote to be attributed to any fault on her part. In their refusal to characterise as negligent “the care which ordinary, loving and careful mothers are able to give to individual children, given the rough and tumble of home life”<sup>131</sup>, the judges would appear to have been motivated by a desire to avoid the imposition of an ‘impossibly high’ standard of care on parents and to preserve family harmony<sup>132</sup>. Thus, it may be concluded that even where a duty is held to exist, liability is likely to be avoided as the courts appear reluctant to recognise cases of ‘negligent parenting’.

In the absence of any other English authority on the subject, it is instructive to consider at this point how the question has been dealt with by other commonwealth courts for, having been confronted with the issue in a greater number of cases, they have had the opportunity to give it a more detailed examination. It is worthy of note that in all the cases about to be discussed, the action in negligence against a parent has actually been instigated by a third party, usually an insurance company, in the form of

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<sup>130</sup> In the case of children, the ordinary limitation period of three years applicable to tort claims does not start to run until the age of majority has been attained – Limitation Act 1980, s.28.

<sup>131</sup> [1991] 2 FLR 559 at 583 and 584, per Browne-Wilkinson V-C.

<sup>132</sup> Ibid, 582.

contribution proceedings. The general set-up is that a child victim sues a third party for injuries sustained and this first defendant, in seeking a contribution to any damages payable, alleges that the parents are also partly responsible because they negligently failed to protect the child. In England and Wales, this issue is governed by the Civil Liability (Contribution) Act 1978, s. 1(1) of which provides that: “any person liable in respect of any damage suffered by another person may recover contribution from any other person liable in respect of the same damage...”. As this is likely to give rise to some confusion, it must be made clear that it is the parent’s liability towards the child victim and not to the alleged third party tortfeasor which must be established by that third party if he or she is to be partially exonerated.

The two leading commonwealth decisions on the subject of the parental duty of care are that of the New Zealand Court of Appeal in *McCallion v Dodd*<sup>133</sup> and the High Court of Australia in *Hahn v Conley*<sup>134</sup>. In *McCallion v Dodd*, the four-year-old plaintiff was struck by a car as he walked along the roadside with his parents, in the dark and against the flow of traffic. While the plaintiff was to the outside, being led by the hand by his mother, his father was on the inside carrying the baby. The plaintiff sued the defendant motorist whose insurance company claimed contribution from the boy’s father, alleging negligence on his part. In considering the nature of the duty of care owed by the father to his son, the judges offered differing opinions. North P considered that the mere presence of the parent at the scene, coupled with the relationship of parenthood, placed him under a legal duty to ensure the child’s safety. By contrast, Turner and McCarthy JJ approved of the approach taken in the Australian cases *Cameron v Commissioner for Railways*<sup>135</sup> and *D. J. Collett v Hutchins*<sup>136</sup> to the effect that the basis of a parent’s duty of care to a child is no different to that of a stranger and arises only where the parent has assumed responsibility for the child in a particular situation. McCarthy J, in particular, stated that there is no legal duty on a parent *qua* parent to protect and control a child, only unenforceable moral duties.

In ordinary cases, the application of these rules would mean that the fact that the child was in the physical control of one parent at the time of the injury, such as is the case where a child is led by the hand, would suffice to exonerate the other parent. In *McCallion*, however, there were special circumstances to be considered because of

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<sup>133</sup> [1966] NZLR 710.

<sup>134</sup> (1971) 126 CLR 276.

<sup>135</sup> (1964) Qd. R. 480

<sup>136</sup> (1964) Qd. R. 495

the fact that the mother was deaf and the father knew that she was not wearing her hearing aid at the time. In the view of the court, this meant that the father still retained some degree of care and charge over the child. This imposed upon him a duty of care, which he had failed to discharge.

The judgment of McCarthy J was approved by the majority of the High Court of Australia in *Hahn v Conley* in which a three year old girl was knocked down by a car as she crossed a road to see her grandfather who was on the other side. The child brought an action in negligence against the motorist whose insurance company duly claimed contribution from the grandfather alleging negligence on his part in failing, first of all, to prevent her from wandering on to the road and then in failing to come to her aid when she called out to him from the other side.

While all the judges agreed that the existence of a duty of care depended solely on the particular factual situation and not on the blood relationship, there was great divergence of opinion as to the significance of the particular facts of the case and the actual application of the concept of foreseeability. In the end, the decision reached by a three to two majority was that the grandfather was not under a duty to the child. Barwick and McTiernan JJ held that, in the circumstances, no legal duty could be imposed in the absence of some positive action on the part of the grandfather, such as calling the child over to him and so leading her into danger. As it stood, all that he could be admonished for was nonfeasance. Windeyer J disagreed with their opinions to the extent that he did consider that a duty of care arose but he agreed with the overall decision not to impose liability because he held that the duty had not been breached.

In their dissenting judgements, Menzies and Walsh JJ held that the grandfather was under a duty and that he had breached it for he should have foreseen that, as a familiar figure to the child, it was likely that she would attempt to cross the road to reach him<sup>137</sup>.

It is clear from this case that if the relationship of parenthood cannot constitute the source of a duty then the only way in which it can be relevant is in so far as it may influence the nature and extent of the steps necessary to discharge the duty. This means that it can only go to questions of breach and not duty. It is, moreover, the only way in which the liability of parents differs from that of strangers in this respect.

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<sup>137</sup> It is with these dissenting opinions that Jane Wright concurs – “Negligent Parenting. Can My Child Sue?” (1994) JCL 104 at 106 and 107.

Jane Wright comments that these decisions indicate that, in comparison with that of the English courts, the commonwealth approach to the question of the circumstances giving rise to a parental duty is much more severe, for in *Surtees* the Court of Appeal was at least prepared to accept that the fact of having *de facto* care of a child is enough to place a parent under an obligation of protection<sup>138</sup>. The position set out by the High Court of Australia in *Hahn* has, however, been largely affirmed in subsequent decisions of the Supreme Court of South Australia and in other Australian jurisdictions<sup>139</sup>.

In his excellent, detailed examination of the decision in *Hahn*, Stanley Yeo interprets the High Court as drawing a clear distinction between commissions and omissions in such cases and he states the ratio of the decision as being that a parental duty of care will only be recognised where the conduct of the parent can properly be described as a positive act creating the risk of injury. Of course, the most obvious example of this is that of taking a child on to a road and thus leading him or her into danger.

This, however, is not to be regarded as a straightforward application of the traditional rules of liability for omissions for, if Yeo's interpretation is to be approved of, there are inner complexities to this case that are not readily discernible at first glance. It is such that Yeo further maintains that Barwick CJ intended the non-recognition of a duty in respect of omissions rule, as articulated by him, to be restricted solely to parents or persons standing in *loco parentis* to the injured child. What this effectively means is that while parents do not owe a duty to protect their children from harm, temporary custodians of children *not* standing in *loco parentis* do. The exception to the non-liability for omissions rule constituted by persons in a pre-tort relationship with a child is recognised as justifiable, indeed as essential, but the parent/child relationship is effectively regarded as an exception to the exception.

Yeo goes on to apply this rationale to the seemingly contradictory decisions of the other judges in *Hahn* to present the majority of the court as being in total support of this proposition. He claims that the dissenting judgments of Menzies and Walsh JJ are entirely consistent with Barwick CJ's ruling for he asserts that the reason they

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<sup>138</sup> Wright, *op. cit.*, p.107

<sup>139</sup> *Robertson v Swincer* (1989) 52 SASR 356 and *Towart v Adler* (1989) 52 SASR 373 (S.A.); *Darcy v Nominal Defendant* (1985) 2 MVR 447 (Queensland); *Anderson v Smith* (1990) 101 FLR 34 (N.T.); *Kerr v Allen* (1995) Aust Torts Reports 81-323 (N.S.W.). All citations are taken from S. Yeo, "Am I My Child's Keeper? Parental Liability in Negligence" (1998) AJFL Lexis 12.

imposed a duty of care on the grandfather was that they considered that he was not in *loco parentis* to the child, while Barwick CJ obviously considered that he was. In other words, they agreed on the legal principle but disagreed on the facts. Yeo claims that Windeyer J was the only one who disagreed with the ruling that the case turned on the question of whether the defendant was in *loco parentis* or not, for he based his decision instead on whether there was a relationship of proximity.

Yeo's analysis of the case is certainly logical and, as such, it is a convincing explanation of the actual outcome, but surely it must be questioned whether any of the judges consciously applied the simple logic which he attributes to them. It is submitted that, if they had done so, the majority judgments would all have been delivered much more coherently and succinctly. As it stands, they appear at times confusing and often blatantly contradictory.

Yeo further contends that Barwick CJ was motivated in his approach by public policy considerations which he did not actually spell out in his judgment. He does go on rather more helpfully, however, to explain that a list of such considerations has subsequently been drawn up by the Supreme Court of South Australia in two later decisions: *Posthuma v Campbell*<sup>140</sup> and *Robertson v Swincer*<sup>141</sup>. Both cases typically involved a third party being sued by a child plaintiff and claiming contribution from the child's parents on the basis of their failure to adequately supervise the child. These claims thus depended on the existence of a parental duty to protect the child by exercising adequate supervision.

He identifies four policy considerations, the first of these being that the imposition of a legal duty on parents to take positive step to prevent injury to their offspring would represent a "wholly unacceptable intrusion of the law of negligence into family and domestic relationships"<sup>142</sup>. Closely linked to this is the second public policy argument that it would be virtually impossible to set universal standards for the care and control of children. It is pointed out by King CJ in *Robertson* that there are no readily recognisable standards for parental supervision such as there are for specific activities such as driving<sup>143</sup>. In answer to this, it must be said that while it is recognised that parents are wholly entitled to give effect to their individual views as to how to bring up their children, so that it is their prerogative to encourage an attitude

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<sup>140</sup> (1984) 37 SASR 321

<sup>141</sup> (1989) 52 SASR 356.

<sup>142</sup> As per Jacobs J in *Posthuma v Campbell* at 329. Cited with approval in *Robertson* at 361.

<sup>143</sup> (1989) 52 SASR 356 at 365

of independence through personal experience in their progeniture if that is the approach they wish to take, there must be a limit drawn to the degree of autonomy accorded to children where such lack of parental involvement poses a risk of harm to the child and to others. While there can never be any suggestion of obliging parents to conform to any framework of rules in this respect, there can be no real objection in the same context to the legal imposition of minimum standards of care and control set by reference to common practices and usages<sup>144</sup>. It is suggested that this would not infringe unduly the general discretion of parents.

The third policy argument, according to Yeo, is that the translation of the moral duty of protection into a legal duty would result in unduly onerous burdens being placed on parents, which Legoe J in *Robertson* described as a placing of the 'sword of Damocles' over parental heads<sup>145</sup>. While it is acknowledged that, in the majority of cases, this moral duty is sufficient in itself since, as Jane Wright comments, most parents are motivated to care for their children by natural feelings of love and affection<sup>146</sup>, it is submitted that she perhaps underestimates the number of relationships in which parents are indefensibly lax in this respect. Undoubtedly there are cases in which more than a little gentle persuasion is needed and which can be provided in the form of the possibility of legal action. Anyway, if these moral duties are carried out as they are supposed to be, then the burdens imposed by this would really be no more onerous than if they were also recognised at law. Since this is recognised as a particularly strong moral duty, then there is arguably a case for creating legal mechanisms for its enforcement.

The fourth policy argument is that to allow such actions in negligence against a parent in favour of a child would, paradoxically, be to the financial detriment of the child, or at least not provide any financial advantage. It is said that any damages awarded to a child against a parent would have to be taken from funds which would have been for the child's benefit anyway so that the child would be no better off. This, however, is based on the gross assumption that all parents are willing to offer their children all that they have and it also ignores the fact that actions in negligent parenting may be brought years after the alleged offence, possibly when the child has become estranged from the parents, as is illustrated by *Surtees*. Alternatively, it is also

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<sup>144</sup> See *Ryan v Hickson* [1975] 55 DLR (3d) 196 at 206, per Goodman J, citing *Hatfield v Pearson* (1957) 6 DLR (2d) 593.

<sup>145</sup> (1989) 52 SASR 356 at 359

<sup>146</sup> Wright, *op. cit.*, p.108

contended that the fact that parents are not insured against such liability, since most public risk policies exclude liability to members of the insured's family living with him or her, should, in the interests of fairness, preclude such actions altogether. It is submitted, however, that this argument would apply equally well to a large number of tort claims, for it is a simple fact that people are not insured against every eventuality and it is not suggested in these other cases that lack of insurance should constitute a bar to recovery. Although Markesinis may disagree with him<sup>147</sup>, even Legoe J in *Robertson* rejects this argument, putting forward what is to be regarded as the judicially correct corrective justice view that considerations of insurance cannot form the basis of decisions about liability<sup>148</sup>.

Rather, the most convincing financial argument and, it is suggested, the one which is most likely to influence the court, is that to uphold a claim in contribution against a parent would be to effectively reduce the award of damages which a child victim would otherwise have received. It is here that the practical reality of the general form taken by such cases of parental negligence becomes significant, for as has already been pointed out, the vast majority of these allegations arise in contribution proceedings. In a similar vein, Jane Wright comments that the decision in *Hahn* may well have been motivated by "an unarticulated desire to avoid the consequences of the contribution legislation"<sup>149</sup>.

Giving his wholehearted support to these public policy arguments which he considers to be entirely convincing, Yeo maintains that they justify the distinction made by the courts between commissions and omissions in this context to determine whether a duty of care exists in a particular case because they apply only to cases of nonfeasance. It is said that, in the contrary case, where parents commit acts which expose their children to the risk of harm, it is only reasonable for the law to impose a positive duty of protection on them and that this would not be regarded as an unfair infringement of parental rights<sup>150</sup>. In this last respect, the point should be briefly made that even where the conduct of the parent can be construed as a positive act, this does not necessarily mean that a legal duty will automatically be held to exist, for the

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<sup>147</sup> Markesinis, B. "La Perversion des Notions de Responsabilité Civile par la Pratique de l'Assurance" 1983 Rev. Int. Dr. Comp. 310

<sup>148</sup> (1989) 52 SASR 356 at 370

<sup>149</sup> Wright, *op. cit.*, p.107

<sup>150</sup> Yeo, *op. cit.*, p.49

courts may even in these cases be so heavily influenced by the policy issues that they will deny the existence of such obligations<sup>151</sup>.

Yeo further maintains that because they are all premised on the nature of the parent/child relationship, these same policy arguments justify the limitation of the non-recognition of duty rule to parents and persons in *loco parentis* only<sup>152</sup>. He obviously considers that it is only right that other persons having temporarily assumed responsibility for children should be under a positive duty to protect them while in their care. This leads to the position, which can only be described as rather anomalous and contrary to established moral beliefs, that parents will be under a positive duty to protect other children in their care but not their own offspring. This may be illustrated using an example provided by Yeo of a mother who organises a birthday party for her young son<sup>153</sup>. If she placed a birthday cake along with some matches and candles before the children and then left the room momentarily, during which time her son and another child lit the matches and were burned as a result, she would be held to owe a duty to each child. If, however, the children had got hold of the matches themselves from a cupboard while left unattended, she would be held to be under a duty to the other child only and not to her own son. While such a situation would appear to be an affront to common sensibilities, Yeo considers it to be entirely logical and defensible.

Whatever the soundness of such policy considerations, the fact has to be recognised that the judiciary has shown itself to be very attached to them and that they do represent the law on this point. Perhaps what it all comes down to in the end is something as vague as the suggestion made by Hocking and Smith, that it is somehow 'wrong' for a child to sue its parents<sup>154</sup>, which is an instinctive sentiment that cannot easily be argued down. Whatever the case, the fact is that the legal position in this respect turns out to be the opposite of what was initially premised in this thesis.

In retrospect, therefore, the obvious conclusion to arrive at would be that the idea of establishing a duty to control third parties by analogy with the pre-existing duty to protect the child is not really a plausible one, for even though the approach of

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<sup>151</sup> See *Towart v Alder* (1989) 52 SASR 373, in which the Supreme Court of South Australia held that the defendant father was not under a duty to take positive steps to protect his daughter even though he was the one who had opened the window through which she subsequently fell.

<sup>152</sup> Yeo, *op. cit.*, p.35

<sup>153</sup> *ibid*, p.57

<sup>154</sup> Hocking, B.A. "The Potential of the Law of Torts to Assist in the Protection of Children" *E Law – Murdoch University Electronic Journal of Law*, Vol 3, No 1 (May 1996) [<http://www.murdoch.edu.au/elaw/issues/v3n1/hockingb.html>]

the British courts, as set out in *Surtees*, appears to be more generous than that of the New Zealand or Australian courts as regards the circumstances in which a duty can be held to exist, it still establishes that the parental duty of protection is not an automatic duty and it demonstrates that the British courts are preoccupied by the same policy issues as to the preservation of family harmony. However, before this exercise is lightly dismissed as a waste of time, it is suggested that there is perhaps another, less obvious way in which the legal position as just described in relation to the parental duty of care can be interpreted as supporting the expressed aim of this thesis. Far from negating the proposed theory, as it would at first sight appear to do, it is contended that Yeo's appraisal of the law governing parental liability actually advances it because it presents the concept of duty of control owed to third parties as conversely being entirely justifiable by way of these same policy arguments.

The first point to be made is that Yeo promotes the judicial perspective as being that pre-tort relationships involving children, as a general category, do constitute an entirely legitimate exception to the rule against liability for omissions but that the position of parents simply represents an exception to the exception. Moreover, Yeo presents the affirmative duties involved in such relationships as consisting of both a duty to protect the child and, consistent with the original argument put forward in this thesis, a corresponding duty to control the actions of the child to protect third parties. Indeed, these duties are to be regarded as being imposed automatically on custodians of children upon taking charge of the child.

It is asserted that this very idea that the fact of establishing a relationship of care with a child gives rise to automatic legal obligations is also to be detected in several English cases and that the presumption to be made is that it is based on the general classification of the character of children as being irresponsible and mischievous. It is the notion that since children cannot be expected to take responsibility for themselves, then such responsibility automatically transfers to the adult in charge of them. In *Carmarthenshire*, Lord Keith made it clear that his decision in that case to impose liability on the education authority was based on the very young age of the child in question (three and a half years) and his ensuing irresponsibility and lack of road sense<sup>155</sup>. Similarly, the distinction made by Saville LJ in *Nicholas H* between the duties owed to the blind man and to the young boy was

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<sup>155</sup> [1955] AC 549 at 570

presumably based on the youthfulness and incumbent irresponsibility of the latter, although his rather vague assertions that the nature of the distinction lay in “considerations of justice, fairness and reasonableness”<sup>156</sup> do not help to clarify the matter. The decision in *Haynes v Harwood*<sup>157</sup> is also relevant in this respect. In this case, the defendant left his horses unattended in a busy street, near to where some children were playing. A young boy threw a stone at the horses as a result of which they bolted and ran away. The plaintiff to the action, who was a policeman, was injured as he attempted to stop them. In holding the defendant liable for these injuries, the Court of Appeal did not even question whether the defendant owed any duty in respect of the children by which he could be held liable for their actions for it simply proceeded on the basis that he did. His liability was based primarily on the fact that he should have anticipated that children in such close proximity to the horses would become engaged in some sort of mischievous enterprise, and so the issue at stake was really one of remoteness.

However, the most important point of all made by Yeo in this respect is that the policy considerations which provide parental immunity only apply in actions between parents and children for, as regards the question of parental duties towards strangers, he maintains that either they are wholly inapplicable or they do not apply with the same force<sup>158</sup>, so that he actually endorses the idea of parental liability towards third parties. While he recognises the apparent illogicality of such a state of affairs, he maintains that the soundness of the policy considerations behind the principle make it entirely defensible<sup>159</sup>. In support of this it must be repeated that the position as regards the parental duty to the child is not the norm, it is the exception.

If it can be argued on this basis, therefore, that parental duties of control owed to strangers can be regarded as a corollary of the duties of protection owed to children and that they do arise automatically upon assumption of responsibility for the child, then all that is left to do is to distinguish between the positions of parents and ordinary custodians in this respect. This is not a difficult task. There is no problem at all with holding that parents and temporary carers of children are under the same duties in respect of the children because, to meet the expressed aim of this thesis, all that needs to be shown is that there is a case to be put for a more stringent enforcement of

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<sup>156</sup> [1994] 3 All ER 686 at 692

<sup>157</sup> [1935] 1 KB 146

<sup>158</sup> Yeo, *op. cit.*, p.25

<sup>159</sup> *Ibid*, p.16

parental duties. Quite simply, temporary carers will not be included in the proposed strict liability regime, so that their liability will continue to be determined according to the ordinary principles of negligence<sup>160</sup>. It is submitted that the more rigorous approach in the case of parents is justified on the basis of their exercise of parental authority, their ability to control the day to day activities of the child and the permanent nature of their relationship with the child.

(C).Dorset Yacht Principles.

An alternative basis for establishing a parental duty of care owed to third parties may be provided by the House of Lords decision in *Home Office v Dorset Yacht*<sup>161</sup>. In *Dorset Yacht*, Dixon J's famous words setting out an exceptional category of 'special relations' giving rise to a duty to control the actions of another were relied on in a different context to impose a form of non-vicarious liability for the acts of another. Indeed, this case has been hailed as 'the turning-point' in the evolution of such liability<sup>162</sup>. While it does not specifically involve a parent-child relationship, it is submitted that the particular attributes of the special relation in that case giving rise to the duty to control also apply to relations as between parents and children. Indeed, it may be argued that they are more pertinent to such relations. If so, an even more compelling case may be made for the imposition of such positive duties in cases of parental liability on the basis of the *Dorset Yacht* principles than in the actual category of relationship out of which they were born.

In order to assess the weight of the *Dorset Yacht* case as an authority on this point of law, some consideration must be given to the general judicial reaction to the decision, which can be ascertained from the many subsequent cases in which its principles have been invoked. What is perhaps of particular interest, however, is that all of the cases in which it has been directly relied on as an authority for the imposition of such non-vicarious liability involved attempts to extend the scope of the principles so as to make them apply to acts of wrongdoing carried out by third-party strangers. While, overall, these attempts have been unsuccessful and, as such, must be regarded as indicative of a judicial retreat, it is submitted that they do not compromise

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<sup>160</sup> See below, Chapter 6.

<sup>161</sup> [1970] AC 1004

<sup>162</sup> G. H. L. Fridman, "Non-Vicarious Liability for the Acts of Others" (1997) 5 Tort L Rev 102, p.103.

in any way the principles established by the decision in relation to this particular issue because, quite simply, none of the cases fell properly within their sphere of application. The pivotal element of control was lacking in each one. As regards this duty aspect of the decision, therefore, the *Dorset Yacht* case stood to be distinguished, its validity unquestioned.

In *Dorset Yacht*, seven borstal boys working on an island were left to their own devices one night after the officers in charge of them had retired early to bed, during which time they boarded the plaintiffs' yacht and subsequently damaged it. The plaintiffs brought an action in negligence against the Home Office, as being vicariously liable for the officers, based on the alleged failure of the officers to exercise any effective control or supervision over the boys, in the light of their knowledge of the boys' criminal records and history of previous escapes from borstal institutions. On trial of the preliminary issue of whether the Home Office owed any duty of care to the plaintiffs to control the young offenders in their care, Theisger J. answered the question in the affirmative and his judgment was affirmed by the Court of Appeal. On appeal to the House of Lords, the Home Office contended that there was no pre-existing authority to support the recognition of a duty in the situation at hand and that, furthermore, it should be denied on the grounds of public policy, with the ever-familiar 'floodgates' argument being trundled out to bolster fears about uncontrollable extensions of liability<sup>163</sup>. By a four-to-one majority (Viscount Dilhorne dissenting), the House of Lords rejected the Home Office's claim and upheld the ruling of the Court of Appeal. The Home Office did owe a duty of care to the plaintiffs, the breach of which was capable of giving rise to tortious liability.

It is to be noted though that, in arriving at this decision, a number of different approaches to the duty question were adopted by the court and, in particular, there can be identified on the part of the majority of the Law Lords a clear tendency to overlap questions of duty and remoteness. The approach taken by Lord Reid may be said to mirror that which he took in *Carmarthenshire County Council v Lewis*<sup>164</sup>, for he considered that the duty question was not an issue at all and that the crux of the case was grounded rather in considerations of remoteness. In his view, "the ground of liability is not responsibility for the acts of the escaping trainees; it is liability for

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<sup>163</sup> It should be noted, however, that there was also concern, particularly in the Court of Appeal, about the implications a finding of liability would have on the future viability of progressive rehabilitative regimes such as that operated by the 'open prison' system.

<sup>164</sup> [1955] AC 549, in particular at 566

damage caused by the carelessness of these officers in the knowledge that their carelessness would probably result in the trainees causing damage of this kind”<sup>165</sup>. He therefore regarded the general rule against imposing liability for the acts of third persons, as set out in *Smith v Leurs*, as being irrelevant in the present context. He further suggested that even if the case had centred on this duty question, the fact that the recognition of such a duty would involve the creation of a new instance of liability unsupported by previous authority would not necessarily defeat the claim. He arrived at the conclusion by relying on a very liberal interpretation of the classic speech of Lord Atkin in *Donoghue v Stevenson*<sup>166</sup>, presenting it as a statement of principle according to which a duty of care would be held to arise in all cases of foreseeable injury to foreseeable plaintiffs unless there were good reasons to deny its existence. He thus maintained that, in accordance with the dictates of modern law, the time had come to abandon the old approach of establishing duty situations by analogy with existing case law and to replace it with this *prima facie* duty doctrine. In this he is in direct opposition to Viscount Dilhorne, the dissentient, who refused to depart from the orthodox position and held that the case was easily resolved on the basis of no precedent, no duty.

It is in this respect that *Dorset Yacht* is often regarded as the first step in the great movement towards establishing general principles of liability, culminating in the momentous decision in *Anns v Merton London Borough Council*<sup>167</sup>. An important distinction between the two cases, of course, is that *Anns* has since been overruled by the House of Lords<sup>168</sup>, along with all subsequent decisions purporting to implement it, while *Dorset Yacht* still remains good law. Although, in the light of these developments, it is unlikely that Lord Reid’s *prima facie* duty doctrine could be construed as a reliable authority.

The judgment of Lord Morris, while treading the same path as Lord Reid’s, is perhaps more reconcilable with modern legal trends, for it manifests a more cautious approach. He directly applied Lord Atkin’s ‘neighbour principle’ to the facts of the case but astutely qualified his move by stating that the principle would not apply in all cases where injury is reasonably foreseeable. In particular, he recognised that in ordinary cases involving questions of liability for the acts of others, such a duty would

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<sup>165</sup> [1970] AC 1004 at 1027.

<sup>166</sup> [1932] AC 562.

<sup>167</sup> [1978] AC 728.

<sup>168</sup> In *Murphy v Brentwood District Council* [1991] 1 AC 398.

not arise automatically for much would depend on the degree of likelihood of harm occurring. In other words, in such cases, he regarded the remoteness rules as having a large role to play, although he frames them in terms of duty issues. In the present case, however, he reasoned that such complexities were avoided because the right of control exercised by the officers over the boys created a special relation as described by Dixon J, and on this authority established a duty of care. Presumably he meant that the existence of this right of control made the injury reasonably foreseeable in accordance with the neighbour principle. Lord Morris thus used the *Donoghue v Stevenson* principle to achieve the task at hand, but without turning it into a general principle, thereby avoiding controversy.

Lord Pearson's approach may be largely compared with that of Lord Morris'. While he also stressed that the *Donoghue v Stevenson* principle was not to be regarded as a universal one, he took the view that it would apply to the present case unless there was some compelling reason to discount it. He then went on to consider the various grounds on which a duty might be negated and concluded that neither questions of proximity, nor remoteness, nor public policy affected the issue. As regards the general rule against imposing liability for the acts of others, as set out by Dixon J in *Smith v Leurs* and by Lord Sumner in *Weld-Blundell v Stephens*<sup>169</sup>, *Dorset Yacht* constituted a legitimate exception because the right of control exercised by the officers created a special relationship.

Lord Diplock's speech is not so easily summarised because he engaged in a very long and elaborate discussion of the subject of third party liability which is at times quite hard to follow. What he appeared to be saying was that the fact that the issue involved in this case was the imposition of liability for the acts of another person did not, of itself, preclude application of Lord Atkin's neighbour principle. That *Dorset Yacht* involved an additional relationship merely represented a factual variation on the theme of *Donoghue v Stevenson* and this did not affect the existence of the duty but rather changed the position as to the actual scope of the duty. It was obviously the statutory authority of the officers to detain and control the boys that created the legal relationship between them and also between the officers and the plaintiffs, and their careless performance of this statutory obligation was held to be

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<sup>169</sup> [1920] AC 956 at 986.

actionable in tort because it could not be construed as a *bona fide* exercise of a delegated discretion.

Lord Diplock then identified a second feature of the case that had even more bearing on this latter question of the scope of the duty of care. The harm for which it was sought to make the defendant liable had been caused by “an act of conscious volition”, carried out by a person of full legal capacity, capable of taking individual responsibility for that act. He drew a clear distinction between acts of this type, on the one hand, and acts carried out by legal incompetents, such as children and mental defectives, on the other, for he considered that the liability of custodians of perpetrators falling into this latter category would be more easily established and more extensive. In cases such as the present one, by contrast, questions of liability would be more closely associated with the particular facts of the case. In particular, they would be much more susceptible to, and hence more likely to be defeated by, issues of foreseeability and remoteness which would be applied in order to determine who can be regarded as a neighbour for the purposes of Lord Atkin’s statement. In *Dorset Yacht*, the relevant facts affecting liability in this respect included the criminal histories and escape records of the boys, and the fact that at the relevant time the boys were on an island, as this placed great spatial limits on the potential range of persons and property which could be affected by them in the course of an escape attempt. Taking into account these considerations, Lord Diplock duly restricted the ambit of the duty owed by the officers to “persons whom [they] could reasonably foresee had property situate in the vicinity of the place of detention of the detainee which the detainee was likely to steal or to appropriate and damage in the course of eluding immediate pursuit and recapture”<sup>170</sup>.

The decision in *Dorset Yacht* can be construed as lending direct support to the idea canvassed in this thesis that parents owe a general duty of care towards third parties to protect them from harm caused by their children. If the relationship of control existing between the officers and the detainees can form the basis of a duty of care then arguably, using the same inductive reasoning process as that applied by Lord Diplock, the same principle applies to all similar relationships of control and, notably, to that as between parents and children. There are, however, a number of objections which could be raised to this analogy. The first and most obvious of these

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<sup>170</sup> [1970] AC 1004 at 1070, 1071.

is that the right to control in *Dorset Yacht* arose out of a statutory obligation while the original basis of the right in the case of parents is essentially a moral one. It is submitted, however, that in determining whether such a right should be construed as amounting to a legal duty for the purposes of tort law, it is not the source of the control that counts but rather the practical application of the right in terms of its import and effect. What matters is that these custodians are in a position to effectively direct, monitor and sanction the conduct of their charges. Indeed, that it is this perspective of the right that gave rise to the duty in *Dorset Yacht* has since been emphasised by the House of Lords and the Privy Council in several decisions. In *Yuen Kun-Yeu v Attorney General of Hong Kong*<sup>171</sup>, a company in which the plaintiff had deposited money was wound up, due to the fraudulent behaviour of its managers, with the result that the plaintiff lost his deposit. In an attempt to recover his losses, he brought an action against the Commissioner of Deposit-Taking Companies who had registered the company in the first place, based on the alleged negligence of this body in failing to warn the individual investors of the irregularities in the company. Dismissing the claim, Lord Keith distinguished *Dorset Yacht* on the ground that the relationship between the Commissioner and the managers of the company did not fall into Dixon J's category of special relation in the way that that between the officers and the borstal boys did because the Commissioner had no power to control the day to day activities of the managers.

Similarly, in *Davis v Radcliffe*<sup>172</sup>, the plaintiff who lost money in a bank when it went into liquidation sued the defendants who had issued the bank its licence in the first place. One of the grounds on which liability was denied by the Privy Council was that the defendants did not possess sufficient control over the management of the bank<sup>173</sup>. In *Hill v Chief Constable of West Yorkshire*<sup>174</sup>, the personal representative of the last victim of the infamous 'Yorkshire Ripper' brought an action against the police based on its alleged negligence in failing to apprehend the murderer earlier and preventing him from carrying out the attack. *Dorset Yacht* was again distinguished on the ground that the police had no control over, and hence no special relation with, the murderer.

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<sup>171</sup> [1988] AC 175.

<sup>172</sup> [1990] 1 WLR 821.

<sup>173</sup> Ibid at 827, per Lord Goff.

<sup>174</sup> [1989] AC 53.

This same qualification of the right of control may also be used to pre-empt a second objection that could be raised to the proposed analogy. It stems from the view advanced by some commentators that it was the classification of the borstal boys as dangerous persons that formed the basis of the duty of care on the officers in *Dorset Yacht*<sup>175</sup>. This leads to an interpretation of the ratio of the case as being very specifically that it is only the control of such designated persons which gives rise to a duty of affirmative action on the custodian. The argument necessarily follows from this that since ordinary children cannot properly be described as dangerous in this sense, then the precedent set by *Dorset Yacht* cannot be said to apply in cases of parental liability. To neatly dispose of this argument, all that needs to be said, or repeated, is that it is the nature and degree of the control and not its source that determines the duty question. This is also made clear by Lord Diplock's speech. For while it would seem on the surface to corroborate this interpretation of the case, in fact he considered the character and backgrounds of the boys as being relevant only as regards the scope of the duty as not as regards the question of its existence. Indeed, it is ironic that while his assessment of the application of the relevant legal rules to the particular facts of the case was arguably the most restrictive of the majority, it is his judgment that lends the most weight to the proposition being put forward about the parental duty of care. This is because he made explicit his opinion that the liability of custodians of children would be much more extensive than that imposed on the borstal officers as set out in the case. He considered that that there were much more compelling legal justifications for obliging responsible adults to take the blame for irresponsible charges than for requiring carers of persons of full legal capacity to do so. Moreover, he implied that the notion that custodians of legal incompetents would be under an automatic duty in this respect was so obvious and fundamental as to be taken for granted.

A study of subsequent cases in which the *Dorset Yacht* decision has been invoked, in an attempt to impose liability for the act of another, has been carried out by Fridman<sup>176</sup>. He regards the notion of control set out in *Dorset Yacht* as forming the basis of non-vicarious liability in English law. In his view, such control does not stem from the relationship between the defendant and the tortfeasor, as it does in cases of true vicarious liability, but rather is established as a consequence of the knowledge

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<sup>175</sup> See e.g. Howarth, *Textbook on Tort* (1995), p. 173

<sup>176</sup> Fridman "Non-Vicarious Liability".

and foresight of the defendant. Not is it control of the actual person of the third party so much as control of the situation. In cataloguing the reluctance demonstrated by the courts to recognise any further instances of such third party liability in the absence of a meaningful relationship of control, his principle focus is on a series of cases based on the same kind of factual scenario and giving rise to the same legal issues, namely: the liability of owners or occupiers of property for failing to prevent a third party stranger from causing damage to someone else's property. In *Lamb v Camden London Borough Council*<sup>177</sup>, the local council was responsible for rupturing a water main while carrying out some work in the road next to the plaintiff's house, with the result that soil was washed out from the foundations of the house and serious subsidence was caused. The plaintiff's tenant was forced to move out and while the house lay empty awaiting repairs, further serious damage was caused by vandals. The plaintiff sued the local authority who admitted liability for the subsidence but denied responsibility for the criminal damage caused by the intruders. In *P. Perl (Exporters) Ltd. v Camden London Borough Council*<sup>178</sup>, intruders entered the defendant's premises, gained access into the plaintiff's adjoining basement by knocking a hole into their common wall and stole goods being stored there. The plaintiff sued for the value of the stolen items. Lastly, in *King v Liverpool County Council*<sup>179</sup>, vandals entered a vacant council flat situated immediately above that belonging to the plaintiff and tampered with the water system on several occasions with the result that the plaintiff's flat was flooded. The plaintiff sued the council for the damage, alleging that it had been negligent in failing to make the flat secure.

In all three cases liability was denied by the Court of Appeal. What is significant is that it was negated each time, by reference to *Dorset Yacht*, on the grounds of remoteness rather than duty, for it was Lord Reid's speech in relation to the degree of likelihood necessary to establish such non-vicarious liability that was most commonly cited. Indeed, in giving his judgment in both *Lamb* and *P. Perl*, Oliver LJ intimated that the test for duty was the same as the test for remoteness<sup>180</sup>. In fact, Goff LJ, in *P. Perl*, was the only one who gave his judgment specifically in terms of duty, and he found that there could be no liability for the wrongdoing of a third party in the absence of a special relationship. It may be questioned at this point

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<sup>177</sup> [1981] 1 QB 625.

<sup>178</sup> [1983] 3 All ER 161

<sup>179</sup> [1986] 3 All ER 544.

<sup>180</sup> N.177 above at 643 and n.178 above at 167.

why there is such a tendency on the part of the judiciary in these cases to revert to the remoteness rules. Perhaps one possible explanation is that, where the act of wrongdoing in question has been carried out by a stranger, the grounds for liability are recognised at the outset as being so tenuous that there is no actual possibility of the claim succeeding and that it is simply easier to deny it on remoteness principles, thereby averting the need to become embroiled in complex duty issues.

It is submitted that, while they have essentially been based on considerations of remoteness, they have, nevertheless, been correctly decided in terms of duty also. *Dorset Yacht* cannot be applied to impose liability for the acts of a stranger. It requires a pre-tort relationship between the defendant and the active injurer, whereby the former exercises a very strong degree of control over the latter. Indeed, Howarth would even replace this requirement of an existing relationship with the more stringent condition of liability that there be an actual assumption of responsibility on the part of the defendant towards the third party wrongdoer<sup>181</sup>. There is therefore no need to go into these cases in any more detail in relation to this particular issue because, on the bare facts, it is clear that the absence of an immediate relationship of control precludes the application of the *Dorset Yacht* principles. It may be asserted that this will always be the case where the harm in question has been caused by an independent third party stranger.

The consistency of the Court of Appeal's approach in rejecting these claims would appear to establish the non-liability of property owners in such situations as a settled point of law. In the light of this, therefore, the fact that the very same issue arose for a fourth time in litigious form, in this instance going all the way to the House of Lords, is perhaps to be greeted with some surprise. In *Smith v Littlewoods Organisation Ltd.*<sup>182</sup>, a derelict cinema was repeatedly broken into and vandalised, unbeknown to its owners who therefore made no attempt to improve its security. On one occasion, a fire was started in it which spread to adjoining properties owned by the plaintiffs, causing serious damage. While the plaintiffs' action in negligence against the defendants succeeded at first instance, in accordance with the established case-law on the subject, this decision was reversed by the Court of Appeal, whose finding was duly affirmed by the House of Lords.

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<sup>181</sup> *Textbook on Tort* (1995), pp. 175-179.

<sup>182</sup> [1987] AC 241.

On the face of it, therefore, *Smith* would seem to simply represent the definitive judicial confirmation of the precedent already set by the preceding trilogy of cases. Indeed, *Smith* is widely cited as firm authority for the proposition that there can be no general duty at common law on any individual to control the actions of another. Markesinis and Howarth, however, would suggest that, while this has gone largely unnoticed by the legal community, an entirely different reading can be given to the ratio of the decision which has the potential to cast a whole new perspective on this area of negligence law, perhaps even opening up an additional category of liability<sup>183</sup>. It all hinges on which Law Lord's speech is to be treated as formulating the ratio of the case, for two main judgments were delivered, manifesting two starkly contrasting approaches. While Lord Goff's speech is generally heralded as representative of the law, these two authors would contend that it is rather Lord Mackay's that occupies this position for it is his that is endorsed by the majority<sup>184</sup>. Indeed, Howarth even goes so far as to describe the speech of Lord Goff as being more along the lines of a dissenting judgment<sup>185</sup>.

Lord Goff denied liability outright on the ground that the omissions rule clearly precluded the recognition of a general duty to prevent a third party from causing harm to another. What is rather ironic in the present context, is that he cited the *Dorset Yacht* case as the authority for this, quoting a paragraph from the speech of Lord Diplock<sup>186</sup>. He did, however, go on to say that, while there can be no general duty in this respect, there are special circumstances which may exceptionally give rise to such a duty, one such instance being where there is a special relationship, with *Dorset Yacht* again being used by way of illustration<sup>187</sup>. Lord Goff thus cited *Dorset Yacht* as authority for the rule as well as for an exception to it. This is important because it means that he recognised the legitimacy of the actual *ratio decidendi* of the case, but regarded it as having a very specific domain of application that simply did not extend to the case at hand. His decision thus amounts to a blanket exclusion of liability extending to all cases where, merely by virtue of occupation, property owners who

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<sup>183</sup> B. Markesinis, "Negligence, Nuisance and Affirmative Duties of Action", (1989) 105 LQR 104 ; D. Howarth, "My Brother's Keeper? Liability for the Acts of Third Parties", (1994) 14 Legal Studies 88.

<sup>184</sup> Markesinis, "Affirmative Duties of Action", p.108; Howarth, "My Brother's Keeper?", p.95.

<sup>185</sup> D. Howarth, "Negligence After Murphy: Time to Rethink", (1991) CLJ 58 at 77.

<sup>186</sup> [1987] AC 241 at 271.

<sup>187</sup> Ibid, 273.

fail to prevent third parties from gaining access to their property are blamed for harm that is subsequently caused to neighbouring properties<sup>188</sup>.

Lord Mackay, on the other hand, saw the issues raised by the case as being based rather on considerations of fault and causation. He considered that liability would depend on the defendant's degree of knowledge of the risk of harm, which would in turn depend on the individual facts of each case. This was, therefore, essentially a matter for the judge of fact to decide, by reference to the standard of the reasonable man. In this respect, he states: "I consider that much must depend on what the evidence shows is done by ordinary people in like circumstances to those in which the claim of breach of duty arises"<sup>189</sup>. Of crucial importance, on the facts of the case, was that the defendants had not been aware of the previous break-ins, presumably because this made it less reasonable to say that they ought to have foreseen that an act of vandalism might result in a fire spreading to neighbouring properties. There was also the fact that, in any event, the only effective measure which could have been taken to prevent intruders would have been the installation of a round-the-clock guard. The impracticability of this militated against any finding that a reasonable man would have engaged in such a course of action. Consistent with this approach, Lord Mackay construed the previous non-liability decisions in *Lamb*, *P. Perl* and *King* as being based on the fact that the harm caused was not reasonably foreseeable<sup>190</sup>.

Lord Griffiths stated himself to be in total agreement with the speech of Lord Mackay and, in his short judgment, he exclusively used standard of care terminology. On the facts, the defendants could not have been expected to act any differently.

Lord Brandon based his decision on the same issues as those stated by Lords Mackay and Griffiths, although he framed it, rather confusingly, in terms of duty. In stating that the defendants were under a general duty to the plaintiffs to ensure that their premises did not become a source of danger, he maintained that the question for the court to decide was whether this duty encompassed a "specific" duty to prevent young persons obtaining unlawful access to the property and setting fire to it. His conclusion that, on the facts, no such specific duty could be recognised because the harm complained of was not reasonably foreseeable and that the defendants could not have been expected to have acted otherwise is clearly a point that goes to fault and not

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<sup>188</sup> Note, contra, dicta of Lord Nicholls in *Stovin v Wise* [1996] 3 All ER 801 at 807.

<sup>189</sup> [1987] AC 241 at 270.

<sup>190</sup> *Ibid*, 265.

duty. This is confirmed by Howarth, who describes this speech as a clear example of judicial confusion between breach and duty<sup>191</sup>.

Lord Keith's position is almost impossible to categorise in this respect, for he claimed to concur with both leading judgments! However, even if he is discounted, or for that matter placed on the side of Lord Goff, Lord Mackay still holds the majority support. The significance of this interpretation of the actual ratio of *Smith* lies in the fact that, rather than denying liability generally through the duty device, the decision against liability must be regarded as being limited to the particular facts of this case, so that this avenue of third party liability has been left open for future exploitation. Therefore, having identified the particular legal issue arising from an individual case as being this type of non-vicarious liability, rather than dismissing the case outright on the basis that it is non-justiciable, an inquiry must be made into its factual circumstances, for each case must be decided on its own particular merits. The ratio of *Smith* may thus be used to support a finding of such non-vicarious liability in cases where the conduct of the third party perpetrator can be regarded as readily foreseeable and easily preventable. Indeed, Howarth has already put forward a suitable candidate for the application of such reasoning<sup>192</sup>. In *Topp v London Country Buses (South West) Ltd.*<sup>193</sup>, a bus which had been left unlocked and with the key in the ignition was stolen by joy-riders who, in the course of their recklessness, knocked down and killed the plaintiff's wife. The plaintiff sued the company that owned the bus. The trial judge held that the defendants had been negligent in leaving the bus unattended for such an inordinately long length of time but that liability was, nevertheless, avoided because they were under no duty of care to the plaintiff. His decision was affirmed by the Court of Appeal. Giving the main judgment, Dillon LJ relied entirely on the speech of Lord Goff in *Smith*. Howarth suggests that, on the basis of Lord Mackay's ratio, this case was wrongly decided since the requisite degree of carelessness had been clearly established<sup>194</sup>.

If it is possible to establish a duty to control the acts of a stranger in the absence of a pre-tort relationship or anything resembling an assumption of responsibility then,

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<sup>191</sup> Howarth, "Time to Rethink", p.73.

<sup>192</sup> Howarth, "My Brother's Keeper?".

<sup>193</sup> [1993] 3 ALL ER 448.

<sup>194</sup> Of course, the necessary degree of foreseeability as set out by Lord MacKay would also have to be satisfied, so that it would need to be established that the conduct of the joyriders was "highly probable or very likely".

*a fortiori*, there can be no logical objection raised to the imposition of such a duty in the case of parents and children. By virtue of the nature of the relationship between them, this would be infinitely more justifiable from the point of view of both law and morality. Moreover, while Lord Mackay would suggest in *Smith* that the majority of such actions against property owners are likely to fail because carelessness will rarely be established on the facts, by contrast, the right of control existing in the parent/child relationship is likely to make all the difference as regards establishing breach of duty and negating remoteness in cases based on parental liability, for the parent will often be in a position to physically prevent the child causing harm. Making a similar point, Howarth suggests that one ground for distinguishing between the findings of the House of Lords in *Smith* and in *Dorset Yacht* is that in the former case it was not feasible for the defendants to have taken precautions against the risk involved, while in the latter case the officers had both the legal powers and the practical capacity to restrain the youths<sup>195</sup>. This obviously made the expectation that they should have prevented the harm much more realistic.

In the light of this discussion of the established case-law on non-vicarious liability for the acts of third parties, it is with some confidence that the assertion is made that the existence of *de facto* control on the part of a parent in relation to a child militates strongly in favour of the recognition of a general parental duty of care owed to third parties to protect them from harm caused by their children. The control exercised by parents is much stronger than that which existed in any of the cases in which liability was imposed, or the potential for liability at least recognised, on this basis. It is more extensive than the notion of control elaborated by Fridman. As a concept giving rise to liability, parental control would be inferred from the fact of the relationship with the child and from the knowledge and foresight of the parent, and it would relate to physical control of the child as well as the fact of being in a position to exert control over the circumstances in which harm may occur. In this respect, parental liability may be seen as perhaps even crossing the boundary into ordinary vicarious liability. This would in turn provide greater justification for making it a form of strict liability.

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<sup>195</sup> Howarth, "My Brother's Keeper?", p.95.

(D). Public authority liability.

There are a number of other cases in which a duty to control the actions of a third party has been held to arise at common law, all involving public bodies. While there is no obvious comparison to be made between the position of any of these bodies and that of a parent, so that none of the cases in this category may be said to lend any direct support to the notion being canvassed in this thesis about the existence of a parental duty of care, they are worthy of mention to the extent that they raise a number of interesting issues, particularly in relation to the concept of proximity. Indeed, rather ironically, since the third party liability of public authorities is subject to a number of control devices, there is actually more benefit to be derived from distinguishing the position of parents in this respect.

The duty to control on the part of public authorities arises as a corollary to a wider obligation imposed by statute. Not every statutory duty, however, encompasses a corresponding common law duty giving rise to a cause of action in tort. The circumstances in which such “free standing” duties will be held to exist are complicated and controversial<sup>196</sup>, but since they are not particularly relevant to this aspect of the question of parental liability<sup>197</sup>, they need not detain us here. Rather, the focus will be on the situations in which duties have already been clearly established. The case law demonstrates that there are three main public bodies which may be held accountable in civil law for a failure to control the actions of a third party: (1) the police; (2) the health authorities; and (3) the prison authorities. It is instructive to consider each one briefly in turn.

While the role of the police is to protect the general public from all manner of criminal activity, they owe a common law duty of protection only to specific individuals known to be at risk from identified criminals and for whom the police may be said to have assumed some degree of responsibility. Plaintiffs bringing negligence actions against the police thus have a double hurdle to cross to circumvent the

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<sup>196</sup> The leading authority on the matter is the House of Lords decision in *X (minors) v Bedfordshire County Council* [1995] 3 All ER 353. For further discussion of the case, see D. Brodie, “Public Authorities – Negligence Actions – Control Devices”, (1998) 18 *Legal Studies* 1; P. Cane, “Suing Public Authorities in Tort”, (1996) 112 *LQR* 13.

<sup>197</sup> The issues raised by the *Bedfordshire* case will be dealt with presently, in the section governing the definition of the term ‘parent’, in relation to the question whether parental liability can be imposed on local authorities for the acts of children in their care.

omissions rule, for they must effectively establish the existence of two special relationships, one between themselves and the defendant and another between the defendant and the third party perpetrator. Thus, in *Swinney v Chief Constable of Northumbria*<sup>198</sup>, the police were held to be under a duty to protect one of their own informants against reprisal from the person implicated by her in a crime, while, by the same token, the action against the police in *Hill v Chief Constable for West Yorkshire*<sup>199</sup> was doomed to failure. The victim, as an undifferentiated member of the general female population that was at risk, had no special status marking her out for any specific police protection. Nor had the police established any particular relationship with Sutcliffe. Although he had been known to them and had previously been taken into custody in connection with the crimes in question, this did not suffice to establish the requisite degree of proximity. According to Lord Keith, the police would only have been under a duty to control his activities if, at the relevant time, he had escaped from custody. Their Lordships also elaborated upon a number of public policy concerns which they regarded as militating further against a finding of liability, the most important of these being that the threat of litigation would perhaps encourage the practice of defensive policing, that valuable police resources would be wasted in defending court actions and that the courts were not in a position to judge “the reasonableness of discretionary policing”. This would suggest that, even if sufficient proximity had been established, liability would probably have been avoided anyway on grounds of public interest. Such a conclusion is borne out by the decision in *Osman v Ferguson*<sup>200</sup>, in which the police were awarded immunity from suit, even though the victims in that case were well known to the police to be under serious threat from a particular individual. However, this decision has since been criticised by the European Court of Human Rights<sup>201</sup>.

It is perhaps worthy of note that, even where the victim and the aggressor are one and the same person, a duty of protection against self-inflicted harm will still arise on the basis of the same principles if a special relationship with this person can be established. Such was the case in *Kirkham v Chief Constable of the Greater Manchester Police*<sup>202</sup>, in which the police were held responsible for the death of the

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<sup>198</sup> [1996] 3 All ER 449.

<sup>199</sup> [1989] AC 53.

<sup>200</sup> [1993] 3 All ER 344.

<sup>201</sup> *Osman v UK* [1999] 1 FLR 193.

<sup>202</sup> [1990] 2 QB 283.

plaintiff's husband who committed suicide after being transferred to prison. The Court of Appeal found that the police, having taken him into custody, and as a result of their knowledge of his suicidal tendencies, had assumed the responsibility to the prisoner of passing on this information to the prison authorities upon transferring him to them.

As regards health authorities, it is the particular position of mental health hospitals which is of most interest in the present context, for it is only in relation to these institutions that the courts have recognised a direct duty to control the actions of a third party, extending towards members of the general public. It has been clearly established that ordinary hospitals<sup>203</sup> are under a common law duty, existing alongside their statutory obligations<sup>204</sup>, to provide "a reasonable regime of care"<sup>205</sup> and that part of this involves ensuring that there is adequate provision and supervision of staff. Thus, in certain circumstances, harm committed by an employee may be said to constitute a breach of this duty and will give rise to the primary liability as well as the vicarious liability of the hospital<sup>206</sup>. This duty is, however, limited solely to patients receiving treatment in the hospital. Mental hospitals, on the other hand, may continue to retain some responsibility for patients who are released back into the community<sup>207</sup>. Moreover, there is a better analogy to be drawn between children and mental patients as the subjects of a duty of control, both being categories of persons deemed to lack full competence.

Again, however, the circumstances in which a common law duty of care will be held to arise alongside the statutory duties of these institutions have been strictly curtailed by the application of a very narrow concept of proximity. Therefore, although plaintiffs bringing these cases will have an easier task than those suing police authorities, in that establishing a special relation with the actual injurer will not be a problem, the requirement that victims have a special status is still likely to render the majority of claims in this category non-justiciable. Thus, in *Palmer v Tees Health Authority*<sup>208</sup>, the court held that the defendant health authority could not be liable for the actions of a psychiatric out-patient in sexually abusing and murdering a young girl where the victim was not in a defined category of persons at risk from the patient. The

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<sup>203</sup> This includes NHS hospitals and private hospitals.

<sup>204</sup> *M v Calderdale & Kirklees Health Authority* [1998] Lloyd's Rep Med 157.

<sup>205</sup> As per Brooke LJ in *Robertson v Nottingham HA* [1997] 8 Med LR 1, p. 13.

<sup>206</sup> *Bull v Devon Area Health Authority* [1993] 4 Med LR 117; *Kirklees*, n. 204 above. See also *Blyth v Bloomsbury Health Authority* [1993] 4 Med LR 151 (duty but no breach) and *Robertson*, *ibid*.

<sup>207</sup> *Holgate v Lanchashire Mental Hospitals Board* [1937] 4 All ER 19.

<sup>208</sup> (1998) *The Times*, June 1. This decision has recently been affirmed by the Court of Appeal, (1999) *The Times*, July 6.

fact that she lived in the same area as this person did not suffice to place her in this special class.

As regards prison authorities, the focus must again be on a sub-category of this wider institutional function, for it is the liability of open prisons and open young offenders' institutions which is of most relevance to the present discussion. Ordinary 'closed' prisons do owe a common law duty of care to their inmates to take reasonable care for their safety, and this includes protecting them from harm caused by fellow prisoners<sup>209</sup>. As in the case of hospitals, however, this duty does not extend outside the institution<sup>210</sup>. As Viscount Dilhorne stated in *Dorset Yacht*<sup>211</sup>, quoting from Lord Uthwatt in *Read v J. Lyons & Co. Ltd.*<sup>212</sup>, "matters happening within one's own bounds are one thing and matters happening outside those bounds are an entirely different thing".

In contrast, institutions operated under the open prison system are much more likely to be held to be under a duty to members of the general public because, by virtue of the very nature of their organisation, they allow for greater contact between detainees and the outside world. In particular, they make it much easier for detainees to abscond. In *Greenwell v Prison Commissioners*<sup>213</sup>, the defendant authority, which maintained an open borstal near the plaintiff's estate, was held liable for damage caused to the plaintiff's property by an escaped detainee. Of course, the particular situation pertaining to the *Dorset Yacht* case is the most closely analogous to the position of parents, for there the borstal boys had been taken outside the institution to work on an island in contact with the general public. Thus, the duty of the supervising officers to the persons in the vicinity of the boys was taken one step further. Whereas in *Greenwell*, the duty of the defendant was essentially to prevent the culprit escaping from the borstal and thus having the opportunity to cause harm, in *Dorset Yacht*, the duty of the officers was to physically prevent the specific acts of the boys causing the damage to the plaintiffs' boat, they having been the ones to place them in that environment.

The proximity requirement is, however, again apt to cause problems in relation to the *Dorset Yacht* analogy being relied on as a basis for establishing the existence of

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<sup>209</sup> *D'Arcy v Prison Commissioners* (1955) Times, November 17; *Ellis v Home Office* [1953] 2 All ER 149; *Palmer v Home Office*, The Guardian, 31 March 1988.

<sup>210</sup> See further, S. Livingston and T. Owen, *Prison Law*, (1999).

<sup>211</sup> [1970] AC 1004 at 1047, with reference to *D'Arcy v Prison Commissioners*, n.209 above.

<sup>212</sup> [1947] AC 156 at 186.

<sup>213</sup> (1951) 101 LJ News 486. A note on the case is contained in [1952] LQR 18.

a parental duty of care, for this being a further instance of public authority liability, it operates to confine the scope of the duty within closely defined perimeters. This was not raised as a major issue in *Dorset Yacht* itself simply because the duty in that case was naturally self-limiting due to its factual setting – the fact that the incident took place on an island. Obviously, in cases of parental liability, it would not be desirable to require plaintiffs to demonstrate themselves to be of special status, as this would greatly reduce the scope of the regime and defeat the purpose of the proposed strict liability approach. It is submitted, however, that the position of parents may be distinguished from that of public authorities on this point, so as to avoid the need to impose such disqualification on the duty issue. The basis of the distinction is a familiar one by now and may be summed up in two simple words: public policy. As was made clear in *Hill*, the reason such valiant attempts are made to abridge the duties of public authorities is that the courts are concerned that findings of liability against these bodies would effect an undesirable reallocation of their resources and inhibit their ability to carry out their day to day functions. In these cases, therefore, a judgment will often be made that the interests of the individual plaintiff are outweighed by the competing public interest. Such policy concerns are inapplicable in the case of parents, and so there is no reason why their liability should not be limited in the ordinary way to the ‘foreseeable plaintiff’, defined as someone falling within the foreseeable range of the risk. Since their duty would arise out of their control of their own children, as a limited and defined class, they would not be susceptible to the same kind of indeterminate liability necessitating control devices in the case of public authorities.

## Chapter 4: Fault.

Whereas, to establish parental liability under the current law, the plaintiff has to prove that the defendant parent has breached the duty of care, under the proposed strict liability approach, this requirement would be replaced by a rebuttable presumption of fault. It is in this respect that this new approach is most clearly distinguished from the old one and is set apart as an entirely separate regime of liability. Relieving the victim of the difficulties notoriously associated with the fault requirement, the operation of the presumption would greatly facilitate the plaintiff's task of establishing liability. It would be brought into play by the mere fact of harm being caused by a child and would be subject to no other conditions of applicability<sup>214</sup>.

It is a well-entrenched common law rule that the legal burden of proof must always rest on the plaintiff throughout a negligence action. Failure to discharge this burden means that judgment must be entered for the defendant. When it comes to establishing fault, this can have very serious consequences for plaintiffs, for it is here that they commonly encounter evidential problems. The plaintiff may be thwarted by a lack of reliable witnesses to the incident in question. Often plaintiffs are unable to adduce all the necessary information relating to the defendant's conduct simply because they are not in a position to gain access to it. Only the defendant can really be privy to all the relevant details surrounding his or her own actions. This is especially true in cases of parental liability where, in determining whether the required standard of care has been attained, it may be necessary to have regard to the long-term conduct of the parent in relation to the child. In recognition of this, it is intended that the presumption of fault being brought into play in such cases would operate to reverse the burden of proof, placing it instead on the defendant parents. It would, therefore, be up to them to rebut the allegations of negligence by convincing the court of the reasonableness of their behaviour.

In some respects, it may be possible to view the presumption as an application of the maxim *res ipsa loquitur*. At one time there was strong support for the view that this maxim constituted a special rule of substantive law by virtue of which the legal

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<sup>214</sup> It is not proposed to impose any kind of cohabitation requirement. The French experience has demonstrated that it serves little useful purpose. If a child is not living with his or her parents when harm occurs, it will be up to the parents to submit this as evidence in their defence in attempting to rebut the presumption.

burden of proof was transferred to the defendant and that, as such, it could properly be described as a doctrine in its own right<sup>215</sup>. It seems, however, that the prevalent view in current times, following the decision of the Court of Appeal in *Lloyde v West Midlands Gas Board*<sup>216</sup>, is that the maxim merely describes a situation in which, as a matter of common sense, it is possible to infer from the occurrence of the harm that it was probably caused by the negligence of the defendant<sup>217</sup>. As such, it is merely an inference of negligence by which, crucially, the court is not bound. It is, therefore, more accurately described as an evidential tool. By this token, it is probably not appropriate to speak in terms of *res ipsa loquitur* in the present context. Rather, in seeking a qualification of the presumption, it might be more helpful to turn to the classification system set out by Denning<sup>218</sup>. Criticising the traditional distinction between presumptions of fact and presumptions of law, Denning instead categorises presumptions as being either “provisional”, “compelling” or “conclusive”. While provisional presumptions may be described as non-obligatory inferences of fact<sup>219</sup>, compelling presumptions are rather inferences that the court must draw in favour of a party who proves certain preliminary facts. Having the force of law, these presumptions are decisive of the issue in question unless rebutted by the other side. It is in this last respect that they are to be distinguished from conclusive presumptions, which are so named because they are irrebuttable. On this analysis, the type of presumption being put forward in this paper would naturally be designated as a compelling one.

Having established that the presumption of fault will effect a transfer of the legal burden of proof, the focus of the discussion to follow must be on the position of parents in attempting to rebut the presumption. In order to decide what kind of evidence they will need to submit in this respect, it will be necessary, first of all, to pitch the standard of care that is to be required of parents under this new regime. Then, to determine how this standard of care is to be fulfilled, it will be a question of elaborating upon the actual constitution of the duty to control forming the basis of the parental duty of care.

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<sup>215</sup> P. S. Atiyah, “*Res Ipsa Loquitur* in England and Australia”, (1972) 35 MLR 337.

<sup>216</sup> [1971] 2 All ER 1240. Note, in particular, the speech of Megaw LJ at 1246.

<sup>217</sup> See, J. G. Fleming, *The Law of Torts* (1998), p.353; M. Brazier & J. Murphy, *Street on Tort* (1999), p.258.

<sup>218</sup> T. A. Denning, “Presumptions and Burdens”, (1945) 61 LQR 379.

<sup>219</sup> It is interesting to note that it is into this category that he places *res ipsa loquitur*, *ibid*, p.380.

In keeping with the central argument of this thesis, which is that parents should take greater responsibility for the acts of their children, it is contended that the standard of care that is currently required of them in this respect will have to be raised significantly. While, at present, they are often not expected to take any positive steps to prevent their children causing harm to others, or indeed go out of their way at all, and are generally indulged in an atmosphere of laxity, the view put forward here is that they should be required to go to considerable lengths to control such harmful conduct. The new 'reasonable parent' will be someone who respects the rights of others and who teaches his or her own children to do the same. The 'reasonable parent' will be prepared to do all that is in his or her power to prevent a child injuring someone else. However, it is not intended that this task of preventing harm should be impossible to carry out in practice. In this respect, it must be stressed that this parental duty of care is not an absolute duty. As with all the duties of care in tort, it can only be regarded as a duty to take reasonable care. The 'reasonable parent' thus becomes someone who is prepared to do all that is in his or her power, by the taking of reasonable steps, to prevent a child from causing harm. The term 'reasonable steps', however, will have to be given a much more stringent interpretation than it has been in the past, to accord with this new stricter approach.

In answer to the objections that will inevitably be raised in respect of this standard of care, to the effect that it is being set unrealistically high, it must be pointed out that the 'man on the Clapham omnibus', who is used as the role model in ordinary negligence cases, cannot be regarded as a realistic representation of any member of society. Basic human nature prevents ordinary individuals from meeting his exemplary standards. Everyone is prone to the simple errors and inadvertences that are condemned by him. However, it is recognised that while the reasonable man is only required to take care in respect of his own actions, the reasonable parent is being asked to control the conduct of another person and so some allowance must be made for this. It must be ensured that the presumption of fault is applied in a way that is practical and realistic, so that parents who are not at fault and whose conduct cannot be construed as blameworthy will be able to rebut it. Parents must not be made to feel as though they are caught in a no-win situation or as if the legal system is against them. Nor is it desirable that they should become overprotective, as this will stifle the personal development of the child and the long term consequences of this can only be negative. It must be stressed that what the courts will want to see is that overall the

parents made considerable efforts to control the child and manifested a responsible attitude to their parental responsibilities. If they tried but failed, they cannot be reproached.

The question to be asked at this point is what exactly do parents have to do to satisfy this standard of the reasonable parent. It is clear that they will have to do more than was required of the officers in *Dorset Yacht* for, in comparison with the nature of the relationship between the officers and the borstal boys, that existing between a parent and child is much more extensive and so it follows that the ensuing responsibilities will be much greater. It is perhaps worthwhile to recall what was done by the French courts.

In the French system, paragraph 7 of Article 1384 sets out that parents are to be liable for harm caused by their children unless they show that they could not have prevented the harm. During the period of the strict liability application of this provision, the basic approach taken by the courts and the legal community was to view all harm as being preventable through the proper exercise of parental authority and its incumbent obligations. Parents could only be exonerated if they showed that they had fulfilled these obligations and that still the harm was beyond their control. If the parents were unable to present themselves as entirely without blame<sup>220</sup>, then, whether or not the harm could have been prevented by them had they exerted their authority properly, the courts held them responsible. The logic behind this was evidently that as the parents were the ones to have deprived the courts of knowing whether the outcome would have been any different, then they should suffer the consequences of the resultant uncertainty. In other words, since it could not be proved otherwise, the courts would assume that they could have prevented the harm.

Insofar as it could be used to prevent harm, the French courts treated the notion of parental authority as consisting exclusively in the effective exercise of the specific duties to supervise and to educate. This is because the term parental authority was so defined in Article 371-2 of the Civil code. It was criticised at the time as being too limited a definition. Fulchiron pointed out that, in practice, parental authority was actually much more wide-ranging than that, although this was to support his argument that parental liability should be applied on a no-fault basis<sup>221</sup>. Perhaps where the criticism should lie, however, is not in the specification of these duties, for the duty to

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<sup>220</sup> This also assumes that the defences of *force majeure* and contributory negligence are unavailable.

<sup>221</sup> 1988.JCP.21064.

educate, relating as it does to the general upbringing of the child, is so expansive as to be capable of taking in every conceivable aspect of parental duty. Rather it should relate to the very artificial meaning given to the duty to educate by virtue of the abstract way in which it was applied. The courts began to lose sight of the criterion according to which the conduct of the parents in this respect was to be evaluated, which was whether the proper fulfilment of the duty to educate would have prevented the harm complained of. Instead, evidence pointing to the bad character of the child perpetrator was treated as being conclusive proof that the parents had failed in their duty to educate and, hence, they were deprived of their opportunity to convince the court of their faultlessness. This was to assume, wrongly, that all harm could be prevented through the proper exercise of parental authority. It negates the existence of any external factors affecting a child's behaviour, factors that can effectively place the child beyond the realm of parental control. In this respect, it is possible to cite as examples: genetic predisposition, peer pressure and conditions of poverty<sup>222</sup>. It must be acknowledged that not all parents are able to control their children. Some children are beyond parental control.

Prior to 1979, the reason for the low success rate of claims based on Article 1384(4) was not that parents were able to easily convince the courts that their duties had been properly carried out, but rather that the courts did not even shift the burden of proof onto the defendants in the first place as they should have done had they been applying the presumption properly. Indeed, following the turnaround of the judiciary in 1979, it can be seen that the duty to educate was, on the contrary, given an unduly large sphere of application, which was wholly unwarranted and indeed inconsistent with the professed strict liability interpretation of the relevant statutory provisions.

The problem with the concept of the duty to educate is that it is too vague to be applied with consistency for, as such, it lends itself too easily to subjective interpretations. It was used as a label. By concentrating too closely on the label, the courts lost sight of the bigger picture. There is a lesson to be learned from the French system here. It is submitted that parents should not be restricted as to the kind of evidence they may submit in attempting to rebut the presumption of fault. The courts

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<sup>222</sup> It is acknowledged that significant evidential difficulties could be encountered in attempting to give effect to such external factors. For instance, in determining what constitutes admissible evidence in this respect, at what point would the boundaries have to be drawn? While it is recognised that such difficulties are apt to be obstructive, it is not thought that they are so overwhelming as to cause the whole regime to founder.

should look to the whole spectrum of parental conduct. In order to establish some kind of framework for the courts to work with, however, it is suggested that they would look particularly at the key features of supervision, discipline, guidance and training. Since the infliction of harm by a child through the use of a dangerous object is evidently such a common phenomenon, it is further contended that it would make sense to formulate a special approach to be taken in future cases of this nature. It is submitted that the strategy adopted by the Canadian courts in this respect is to be commended and that much would be gained from following their lead. It is to be recalled that in *Starr v Crone*<sup>223</sup>, it was stated that parents who entrust dangerous objects to their children will be regarded as negligent unless they prove: (a) that the child was properly and thoroughly trained in the use of the instrument, with particular regard to using it safely and carefully; and (b) that the child was of an age, character and intelligence so that the parent might safely assume that he or she would understand and obey the instructions given.

In implementing these guidelines, the courts will be further influenced by a number of other factors. It is clear that the emphasis to be placed on the different aspects of parental conduct specified above will vary according to the conduct of the child causing the harm. Moreover, the age and character of the child in question, as factors influencing the exercise of *de facto* parental control, will also affect the strength of the presumption and, hence, the defendant's task of rebutting it.

As an example of how the nature of the conduct giving rise to the harm may be relevant, it is suggested that distinctions may be made between the following:

- (i) Harm caused purely accidentally, which could have been prevented, on the spot, through adequate supervision.
- (ii) Harm which, although not caused maliciously or intentionally, has come about through conduct on the part of the child simply because he or she did not know any better.
- (iii) Harm caused wilfully or maliciously.

While, in the first category, it is self-evident that the issue of supervision will be paramount, in cases falling into the second one, it is suggested that the focus of the

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<sup>223</sup> [1950] 4 DLR 433.

court would rather be on the training and guidance given to the child. In the final category, although training and guidance would also be very important, the question of discipline would probably be to the fore.

One of the reasons that the age of the child is important relates to the fact that the courts have formally recognised that as a child approaches the age of majority, parental authority diminishes correlatively. This notion is commonly referred to as “*Gillick* competence”, following the decision of the House of Lords in *Gillick v West Norfolk and Wisbech AHA*<sup>224</sup> that parents do not have the right to veto a consent to medical treatment given by a child who is deemed by the court to be of “sufficient understanding and intelligence”<sup>225</sup> to be capable of making up his or her own mind about the matter. Since the particular issue in that case, the extent to which parental rights must yield to the rights of the child, was set in the context of a specific medical matter, the actual ratio of the case must be regarded as so duly confined. Barton and Douglas have commented that it is unclear how these principles would apply to general parenting<sup>226</sup>. Nonetheless, the general consensus of the Law Lords that parental authority, and the control that goes along with it, is a “dwindling right” is relevant to the present discussion as being, at the very least, indicative of the attitude of the judiciary on this particular point. It is to be assumed that, in cases of parental liability, the *Gillick* notion of the “mature minor” will influence judges to some extent, even if it is only implicitly.

The most practical implication of this concept of ‘*Gillick* competence’ would be in the level of supervision required to be given to older children. In keeping with the idea that they should be given greater independence to allow for personal development, they will require less one-to-one supervision. Such supervision would probably be reserved for cases in which the parent knows, or the court deems that on the evidence before it the parent ought to have known, that the child was engaged in a potentially hazardous activity. In this situation, if the parent is unable to provide direct supervision, then he or she must arrange for someone else to do so. However, this does not mean that, otherwise, supervision does not need to be exercised at all. This duty still involves parents making sure they know, as far as possible, where their children are and what they are doing.

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<sup>224</sup> [1986] AC 112.

<sup>225</sup> *Ibid*, per Lord Scarman at 186.

<sup>226</sup> C. Barton and G. Douglas, *Law and Parenthood* (1995), p.118.

Generally speaking, though, the closer an adolescent is to the age of majority, the easier it should be for parents to convince the courts that they should not be regarded as responsible for the harm, unless, of course, their conduct is clearly reprehensible. Since one of the main justifications of the system of parental liability is that the parents should take responsibility for their children's acts because they are unable to do so themselves, it is only logical that, as children approach adulthood, the law should recognise that they are ready to accept individual responsibility for their own actions.

At the other end of the scale, in accordance with the argument that the level of supervision is commensurate with the age of the minor, the balance will shift totally in relation to very young infants, for it is here that parents will be required to be most vigilant. Since they are too young for training, guidance and discipline to have any kind of significant effect on their behaviour, in most cases involving harm caused by toddlers, supervision will count for everything. However, even in these cases, parents could not be expected to keep their eyes on their children continuously. Toddlers are renowned for their ability to wreak havoc as soon as their parents' backs are momentarily turned and some allowance will have to be made for this. It is submitted that much will have to depend on the length of time an infant causing harm was left unsupervised. In some instances, depending on the surrounding circumstances, in particular the location, more than a few moments will be too long. Such considerations are obviously a matter of common sense.

The character or temperament of the child perpetrator will be relevant insofar as it will influence the nature and extent of the steps that a parent must take to ensure that his or her conduct satisfies the requirement of reasonableness. It has already been pointed out that, under the present system, the evidential weight that is attached to such considerations of character is misplaced. While it may not be quite as marked as it is in France, there is a tendency on the part of the English courts to treat evidence of the child's character as being directly indicative of the existence or absence of fault on the part of the parent. Thus the courts have demonstrated themselves to be more likely to impose parental liability in cases of harm inflicted wilfully or maliciously by a child and to absolve parents in cases where the child in question is shown to be of a generally obedient nature. To reiterate the point, a further consequence of this is that "innocent torts" are all but excluded from the domain of liability. The focus must

rather be on preventing all unjustified harm that is capable of being prevented, even if it is only the product of something as minor as simple carelessness.

Where a child has a known propensity to misbehave, the degree of foreseeability that he or she will cause harm to another is much greater than it would be in the case of an ordinarily well-behaved child. The parents of such a child would thus be required to go to greater lengths to control this kind of conduct. In many cases, this will make the presumption harder to rebut. On the other hand, such evidence may also provide the very circumstances in which some parents may be exonerated at the outset, if it is clear to the court that the child in question was beyond parental control. By the same token, in the case of harm caused by a child of generally good character, the presumption must stand if it is demonstrated that it was within the power of the parents to prevent it.

It may be questioned whether special considerations should apply to parents of children with medically recognised behavioural problems. It is submitted not. The notion of fault is an objective one and, as a fundamental principle underlying the law of negligence, it dictates that all parents must be subjected to the same standard of care. Just as learner drivers are expected to display the same skills as an ordinarily experienced driver and partially sighted drivers owe the same duty as normally sighted ones and are simply required to exercise greater care, so parents of problem children cannot expect to receive any concessions from the courts.

It would undoubtedly be helpful at this point to consider how this new regime of liability would operate in practice, to see how its results would differ from those produced under the old system. This may be done by taking some of the existing parental liability cases and re-evaluating them according to the new principles, to see whether any of their outcomes would change. Of course, any conclusions made in this respect can only be speculative, for they must be based solely on the evidence made available to the courts at the time of the original decisions. To carry out a full assessment of the given situations in accordance with the proposed strict liability approach, additional information relating, in particular, to the long term conduct of the parent in respect of the child tortfeasor would often be required.

Sharing, as they do, many similarities, it is convenient to look at *Donaldson v McNiven*<sup>227</sup> and *Smith v Leurs*<sup>228</sup> together. Both cases involved harm caused by a

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<sup>227</sup> [1952] 2 All ER 691.

<sup>228</sup> (1945) 70 CLR 256.

child's misuse of a dangerous object, which the parents knew to be in the child's possession and both times liability was denied. By the simple act of issuing a warning about the potential dangers of the weapons in question and receiving assurances from the culprits that they would not use them outside of their home premises, the defendants were held to have discharged their parental duties. This was so despite the fact that no real supervision was exercised, that little or no instruction on the safe use of the weapon was given and that no attempt was made to prevent the boys from taking the weapons off the premises. It is submitted that, under the new system of liability, these parents would almost certainly be unable to rebut the presumption of fault. If the approach of the Canadian courts in relation to the level of instruction to be given to a child on the handling of a dangerous or potentially dangerous instrument is to be followed, it is clear that their defence would be unable to get past this hurdle. Given that the boys in question were aged just ten and thirteen, it is argued that the "reasonable parent" would also have supervised such activities very closely.

By a similar analysis, the defendant father in *Gorely v Codd*<sup>229</sup>, the case involving the sixteen year old mentally retarded boy with the airgun, would seem destined to the same fate. Although some instruction as to the safe handling of the gun was given, in view of the low level of intelligence of the boy, this was, arguably, insufficient. In any event, he should certainly not have been allowed to use it totally unsupervised.

In these cases, the knowledge of the parents that the child was using the object causing the harm counts against them at the outset and automatically makes the task of rebutting the presumption much more difficult. This is justified on the basis that such knowledge makes the risk of harm much more foreseeable. It follows that parents not privy to such information will, therefore, be spared this initial obstacle. This does not mean, however, that they will be subject to a lesser standard of care. The courts will still require very cogent evidence on their behalf that they were not at fault in any way and could not reasonably have prevented the harm. Thus, the courts would take a very dim view of a parent who leaves a rifle in a place that is accessible to a child, as did the defendant in *Hatfield v Pearson*<sup>230</sup>. It is submitted that the decision in that case to exculpate the father on the basis that he had acted reasonably in placing a simple moral restraint on the boy not to touch it since his son was of

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<sup>229</sup> [1967] 1 WLR 19.

<sup>230</sup> (1957) 6 DLR (2d) 593.

generally good character would no longer be tenable either. The fact that the boy went ahead and took the rifle anyway clearly supports the contention made earlier that such considerations of character cannot be such a decisive factor in determining what action a reasonable parent would take to prevent a child being an instrument of harm. It demonstrates that, while it may be more marked in some than in others, all children do have a penchant for mischief and that, as such, all parents must endeavour to keep dangerous objects out of their reach. Since very little effort would be involved in locking such objects away, this could hardly be regarded as the placing of an onerous or unreasonable duty on parents.

By the same token, it is also argued that the decision in *Walmsley v Humenick*<sup>231</sup> to relieve from liability the parents of a five year old boy who shot an arrow into the eye of another child, on the basis that they did not know that their child was in possession of such a weapon, would no longer be allowed to stand under the new system either. Implementing the new principles, the court would have to consider whether the parents ought to have known, especially since the mother had seen her son whittling the sticks that were later used as arrows. In any case, given the young age of the boy in question, the amount of supervision exercised was again wholly inadequate and would certainly not convince any court to cast aside the presumption.

However, it will be in extending the potential scope of liability to cover a wider variety of actions in parental negligence that the new regime will effect the greatest progression in the law. Whereas, at present, it is only really in respect of conduct that can be construed in some way as misfeasance rather than nonfeasance that the courts will even consider imposing liability, the strict liability approach will open up the doors of the courts to claims of negligence based on a 'pure' omission. The only real case of this type known to have reached the litigation stage in the past is *Streifel v Strotz*<sup>232</sup>. It is clear, however, that in that case the British Columbia Supreme Court had no intention of holding the defendants responsible for the damage caused by their sons in a stolen car, for they were exonerated on the basis that they had been 'no more than ordinarily lax' in carrying out their parental duties. Such an observation made under the new regime would, in itself, suffice to seal their fate. They would certainly fail to meet the reformulated standard of the reasonable parent.

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<sup>231</sup> [1954] 2 DLR 232.

<sup>232</sup> (1958) 11 DLR 667.

*Carmarthenshire* provides a further, obvious, example of a situation in which parental liability may arise: that of a parent who allows a toddler to run out onto a road. While Lord Goddard stressed that, in such circumstances, liability would not be imposed simply because the parent turned his or her back for a few moments<sup>233</sup>, as stated earlier, much will have to depend on the length of time for which the child was left unattended. In any event, it would still be regarded as highly unreasonable for a parent to fail to take precautions against a child gaining easy access to such a hazard and the courts should be slow to accept evidence to the contrary.

(A). Operation of the Presumption Where the Child is in the Temporary Care of a Third Party.

This is a very important question given that it is common practice for children to spend a lot of time in the care of persons other than their parents. Most children spend a significant proportion of their time at school. In many households today it is also a common social arrangement for both parents to be working and for the services of a professional childminder to be engaged to cover these working hours. There is a further role played by casual babysitters. With this in mind, the issue to be determined here is whether parents should be regarded as retaining responsibility for their children, even when they have arranged for someone else to take care of them. Obviously, in such cases, a cause of action may lie against the third party carer, based on the ordinary principles of negligence, but should the claimant also have the option of invoking the strict liability of the parent? If so, then it can be readily envisaged that, unless the personal fault of the third party is blatantly obvious, parents would be by far the most popular choice of defendant.

The response tendered here is in the affirmative. It is argued that the parental duties and responsibilities forming the basis of their liability are designed to be permanent and ongoing. Given their nature and purpose, it is clear that they cannot be surrendered so easily. Since the overall task to be achieved is one that only someone in the position of a parent can properly carry out, it is submitted that the parental duty of care should be construed as a non-delegable duty. Borrowing the term from the

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<sup>233</sup> [1955] AC 549 at 561.

doctrine of *respondeat superior*<sup>234</sup>, where it is used in the context of the liability of employers for the acts of independent contractors, this means that although parents may be able to transfer the actual performance of the duty, they cannot transfer their responsibility for the way in which the duty is carried out.

It is recognised, however, that to allow the presumption to arise automatically against parents each time harm is caused by their children, regardless of whose care they are in at the time, could cause unfairness in cases where the harm could only have been prevented by the parents if they had had *de facto* physical control. This would relate primarily to cases of injury inflicted purely accidentally due to inadequate supervision. To attach liability to parents here would be to make a mockery of the fault principle. To overcome this, it would be necessary to cast the duty to supervise as an exception to the non-delegation rule. This would be to say that of the various duties making up the parental duty of care, only that of supervision is fully transferable. In all other respects it would be construed as a non-delegable duty.

This would mean that where harm is wholly due to a lack of effective supervision, liability would attach to the party having the immediate control of the child rather than to the parent. So, to return to the familiar example of a young child running out onto a busy road and causing an accident, the victim would, in theory, turn to the person looking after the child at the time for compensation. The same would apply in the case of a toddler knocking over an expensive display in a shop, or hitting another child over the head with a toy, or running into someone and causing him or her to trip. By contrast, if a child, while in school, were to attack another pupil, or to write a defamatory statement on a wall, or to accidentally injure someone in the playground with a catapult, it would seem a more plausible explanation that such harm was due to a particular failing on the part of the parents and so there would be a firm basis for applying the presumption of fault against them.

But how would this exception be applied in practice? To prevent the presumption being applied to parents automatically in cases of transferred care, it would be necessary for the courts to determine at the outset that the only issue involved is that of supervision and that the liability of parents is thereby excluded. This will not always be an easy or straightforward task. Conduct will often be subject

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<sup>234</sup> The same concept is also used in the field of medical negligence, in relation to the duty of care owed by hospitals to their patients. For a recent decision on the matter, see *M v Calderdale and Kirklees HA* [1998] Lloyd's Rep Med 157. See, generally, I. Kennedy & A. Grubb (eds.), *Principles of Medical Law* (1999), pp. 446-491.

to a number of different qualifications. It is possible to envisage that lawyers acting on behalf of plaintiffs in such actions would go to great lengths in their arguments to place the harm complained of within the wider parental duty. Alternatively, the supervision exception could be used as a tool by 'old school' judges who are reluctant to impose such responsibility on parents in order to avoid their liability outright. It would obviously be undesirable for arguments of this nature to arise at this stage of the litigation process as they could even go so far as to force plaintiffs to submit evidence of actual parental negligence in order to state the eligibility of their case. This would, obviously, defeat the whole purpose of having the presumption in the first place.

It is submitted, therefore, that perhaps the easiest solution in this respect would be to hold that the presumption does come into play in all cases of harm caused by a minor, regardless of the individual circumstances, and then simply leave it up to the parents to rebut it. If the issue involved is clearly one of supervision and the parent has entrusted this obligation to another person, then it ought to be very easy for them to establish this and so exonerate themselves. It is envisaged that in such cases, where the grounds of liability are very tenuous, the knowledge that the presumption will be easily rebutted will discourage plaintiffs from bringing an action against the parents in the first place.

It is to be stressed again that the function of this new approach to parental liability is not to saddle parents with responsibility at all cost. It is simply to make sure that they take their responsibilities seriously and carry out their duties effectively, as so many fail to do at present. They need only to be able to show the courts that they have acted responsibly and made considerable efforts to control their child's behaviour. There is clearly a very delicate balance to be struck between making liability much stricter and, at the same time, seeking to be fair to parents. In practice, the courts will simply have to be entrusted with the task of finding it.

## Chapter 5: Causation.

### (A). Factual Causation.

If under the proposed system of parental liability the plaintiff is to be relieved of the burden of proving actual negligence, then clearly he or she must also be spared the requirement of proving causation in the traditional way. Otherwise, much of the legal progress achieved by the presumption of fault will be undone. The only way to do this is to hold that causation is to be presumed also. This, in turn, necessitates the provision of a sound legal basis for such a presumption. In many ways, it would be easy to construe a presumption of causation as being inherent in the presumption of fault. Alternatively, if this would appear to be stretching the presumption of fault too far, then it is submitted that a more legitimate basis for a similar argument may be found in the House of Lords' decision in *McGhee v National Coal Board*<sup>235</sup>.

In negligence law, the requirements of fault and causation are closely entwined, often inextricably so. Indeed, Howarth argues that, given its full meaning, fault actually implies causation<sup>236</sup>. This is because it is essentially a finding that the defendant could have avoided causing the harm by taking a different course of action. The courts, however, do not subscribe to this view. Attributing to fault a much narrower meaning, they prefer to treat it as an entirely separate issue from that of factual causation. The principle justification for regarding causation as a stand-alone concept is that it has been allocated specific functions, of which the most important may be said to be that of limiting the number of potential defendants in a given action. It is submitted, however, that Howarth's argument acquires greater persuasive force in the case of the proposed system of strict parental liability because of the way in which the presumption of fault operates. It is specified that it applies unless the parents show that they could not have prevented the harm. Parents who are able to rebut the presumption in this way, by convincing the court that they had done all that could have been expected of them and that the harm still occurred anyway, not only exonerate themselves on the basis of fault, they also, inadvertently, exclude their liability in accordance with the 'but for' test of causation. In the absence of a rebuttal,

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<sup>235</sup> [1972] 3 All ER 1008.

<sup>236</sup> *Textbook on Tort* (1995), p. 89.

the presumption that they could have prevented the harm continues to stand, along with the fact of causation implied therein.

From a practical point of view, this approach is attractive in its simplicity. Academically, however, it is much less satisfying for it lacks the kind of grounding in established legal principle that is central to normative legitimacy. It represents a departure from the orthodox test of causation and would lead the courts into unfamiliar territory. Taking into consideration also the insistence of the courts on treating causation as an individual issue and their predilection for all things based on pre-existing authority, it would seem prudent to offer a separate legal basis to justify the drawing of inferences of causation in favour of plaintiffs in a parental negligence cases. The House of Lords decision in *McGhee v National Coal Board* would seem to provide just the solution. Although this decision has been rather heavily criticised in the past, it is submitted that the particular traits of parental liability litigation may be sufficiently distinguished from those aspects of the decision that have been tainted by controversy to enable the principles established by it to be adapted to suit present purposes in a way that is legally defensible. Most importantly, this proposed application would not involve any extension of the ratio.

The plaintiff in *McGhee* contracted dermatitis as a result of working in a brickworks. He sought to place responsibility for this on his employers, arguing that they had been negligent in failing to provide adequate washing facilities and thereby prolonging his contact with the brick dust by the length of time it took him to make his way home and shower. It was easily established that, in this respect, the defendants were in breach of their duty of care to the plaintiff. The problem was that it was not possible to say whether this lack of facilities had actually 'caused' the harm. While it was certain that the medical cause of the dermatitis was the brick dust, it was not medically possible to determine during which stage of exposure to it the disease had actually been contracted. It was just as likely to have occurred during work as after it. The reason why this question was of such crucial importance was that the court had already found that the defendants were not at fault for exposing their employees to the dust during working hours. Therefore, if it was during this time that the disease was contracted, there could be no tort at all. Everything depended on the plaintiff being able to prove that it was most probable that he would not have ended up suffering from this skin complaint if he had been able to take a shower at work. Since the most that he could assert was that the lack of showering facilities had

‘materially increased the risk’ of him getting dermatitis, then, technically, he should have failed.

Sympathetic to his plight, however, the Law Lords were determined that the plaintiff should succeed and they went out of their way to accommodate him on the causation issue by adopting an extremely liberal approach. It was clear that the plaintiff would be unable to satisfy the requirement of causation according to the traditional rules and this was because his case fell into a gap in this area of the law. As Weinrib points out, cases of multiple causation generally fall into two basic fact patterns<sup>237</sup>. The most common are those involving causal factors that are mutually dependent and individually insufficient. They are subject to the ‘but for’ test of causation. By contrast, where the causal factors are, rather, independent and individually sufficient, the so-called ‘necessary element of a sufficient set’ test (NESS test) applies<sup>238</sup>. This means that the defendant’s conduct will be said to have caused the harm if it was a necessary step in a series of events that were in themselves sufficient to produce the harm. *McGhee*, however, contained a combination of both. While the exposure to the dust during work could properly be described as an independent, sufficient factor, the failure to provide washing facilities could only be considered as a possible cause of the harm if taken in conjunction with this prior exposure. It was thus a dependent and insufficient factor. Such a situation was simply not catered for. Since it was likely that the two causes had operated cumulatively to produce the dermatitis, so that the lack of showers could reasonably be assumed to have contributed to the harm to at least some extent, it seemed unfair that the plaintiff should suffer because of a deficiency in the law. Policy, therefore, dictated that some method be devised to circumvent the strict causal requirement. The court opted to reduce the standard of care required of the plaintiff. In a display of judicial inventiveness, they came up with the formula of a “material increase in the risk”, holding that such proof would amount to sufficient causation.

Lords Simon<sup>239</sup>, Reid<sup>240</sup> and Salmon<sup>241</sup>, perhaps in an attempt to disguise the radical nature of their actions, treated a “material increase in the risk” as being the same as a “material contribution to the damage”, which automatically brought it one

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<sup>237</sup> E. J. Weinrib, “A Step Forward in Factual Causation”, [1975] 38 MLR 518, 521.

<sup>238</sup> Weinrib refers to this as the ‘substantial factor’ test.

<sup>239</sup> [1972] 3 All ER 1008 at 1014.

<sup>240</sup> *Ibid*, 1011.

<sup>241</sup> *Ibid*, 1017.

step closer to direct causation. Of course, this is a clear example of a legal fiction. Lord Wilberforce's speech was much more explicit in this respect and, as a result, it has attracted the most academic attention. He openly acknowledged that there was an evidential gap but stated that, for policy reasons, the court was prepared to make an inference of fact in favour of the plaintiff<sup>242</sup>. There has been some dispute as to what exact interpretation should be given to Lord Wilberforce's words. He certainly seemed to be suggesting that the practical effect of the plaintiff showing that the defendant had brought about "a material increase in the risk" of harm would be to shift the burden of proof from the plaintiff to the defendant. Writing in 1975, Weinrib demonstrated himself to be very much in support of this view. Welcoming the decision, he commented that it had the potential to cause "nothing less than an upheaval"<sup>243</sup> in the law. Indeed, as the full magnitude of the decision began to be realised, judicial hostility towards the decision mounted steadily. Fearing that it would open the floodgates to large scale, high profile group claims, such as those against the tobacco industry, which had so far been resisted on causation grounds, the courts sought to deny that such an extension of the law in favour of plaintiffs had been effected and resisted attempts to apply the *McGhee* principles in other cases. An attempt to resolve the matter definitively was made by the House of Lords in 1988 in *Wilsher v Essex Area Health Authority*<sup>244</sup>.

The plaintiff in *Wilsher* was a premature baby who contracted a medical condition, the exact cause of which could not be ascertained. There had, however, been identified five distinct possible causes, one of these being the defendants' negligence. Counsel for the plaintiff sought to argue that, on the basis of *McGhee*, he was entitled to succeed on the causation issue simply by showing that the default of the defendants had materially increased the risk of the harm complained of. Overturning the decision of the Court of Appeal, the House of Lords held that *McGhee* did not have the effect of reversing the burden of proof and that, moreover, plaintiffs still have to prove positive causation. Thus, the plaintiff was duly defeated by the medical uncertainty in that case.

The important point about *Wilsher*, however, is that, while it may have undermined it somewhat, it did not overrule *McGhee*. The House of Lords simply

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<sup>242</sup> *Ibid*, 1013.

<sup>243</sup> *Op. cit.*, p.523.

<sup>244</sup> [1988] AC 1074.

distinguished it on the facts. *McGhee*, therefore, remains good law. Indeed, although it is now subject to the condition that the burden of proof does not change, this makes little difference to the practical effect of the decision. As Jones comments, if the court is prepared to draw an inference of causation in favour of the plaintiff, then the burden of proof will be of no significance because the defendant will be thwarted by the same factual uncertainty as the plaintiff and will be unable to rebut the inference anyway<sup>245</sup>. It is more a matter of semantics than anything else. Nor in parental liability cases is a reversal of the burden of proof paramount. All that matters is that the burden on the plaintiff is significantly reduced. If the court is going to make such an inference, the burden will be virtually non-existent anyway. Defendants will still be able to submit evidence in their defense, where appropriate. In many cases, parents will themselves, inadvertently, fulfil the plaintiff's task of demonstrating a material increase in the risk. This is because it should be clear to the court from the evidence they submit to rebut the presumption of fault whether or not there is any causal link between their behaviour and the victim's injury.

The principle reason why the *McGhee* analogy was rejected in *Wilsher* was that its application would have resulted in an unwarranted extension of the principle set by the case. This is commonly explained by reference to a distinction between 'cumulative' and 'discrete' causes. Basically this means that in *McGhee* there were only two possible causes of the harm, which were presumed to have operated together to inflict the dermatitis, while in *Wilsher* there were five separate possible causes, only one of which could have caused the injury. In *McGhee*, therefore, it seemed safe to assume that the lack of showers made at least some contribution to the injury, while in *Wilsher* the issue was much more black and white. The negligence of the defendants either was or was not a cause. In fact, there was an eighty- percent chance that a tort had not even been committed at all. In this respect, parental liability cases are more comparable to *McGhee* than to *Wilsher*.

In *Wilsher*, the particular issue involved was that of multiple causation. The evidential gap arose because of medical uncertainty. In cases of parental negligence, the question of causation arises for different reasons. For one thing, the conduct under scrutiny is an omission rather than a commission. Conceptually, this complicates matters because the causation issue involved is one of non-prevention rather than

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<sup>245</sup> M. A. Jones, *Textbook on Torts* (1996), p.181.

active cause. However, this means that the type of uncertainty involved is purely factual rather than scientific and, as such, it is more conducive to the application of inferences of fact. As was established by *Fitzgerald v Lane*<sup>246</sup>, *McGhee* is not confined solely to cases dealing with medical uncertainties. Moreover, the notion that, by failing to act, parents contribute in some way to the commission of harm by their children is a very plausible one. Furthermore, it may be said that, in many respects, the lack of proof is down to the parents because it is their inaction that has deprived the court of the very information that would enable it to determine the causation issue. This makes it more justifiable that the burden of proof should fall upon them. Indeed, Weinrib comments that in all the previous cases in which the courts have countenanced a reversal of the burden of proof of causation, such as in *Cook v Lewis*<sup>247</sup>, the famous two hunter case, the evidential deficiency was somehow linked to the culpable behaviour of the defendant<sup>248</sup>.

Overall, there should be no real problem in applying the *McGhee* rules to parental liability cases, as long as no attempt is made to extend them any further. The causation requirement does not need to be overcomplicated. In practice, if the plaintiff gets past the presumption of fault stage because the defendant parents are unable to convince the court that they could not reasonably have prevented the harm, then the fact of causation will more or less speak for itself.

#### (B). Remoteness.

As has already been stated, the issue of remoteness in relation to third party liability is one that has given rise to some considerable confusion in the courts. Such confusion relates not only to the question of its proper domain of application and particularly its relationship with the duty of care, but also to which of the various remoteness tests in existence is the most appropriate. As Howarth points out<sup>249</sup>, in *Dorset Yacht*, for example, Lord Pearson appeared to favour the old directness style approach, as set out in *Re Polemis*<sup>250</sup>, while the rest of the majority applied *Wagon*

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<sup>246</sup> [1987] 2 All ER 455.

<sup>247</sup> [1952] 1 DLR 1.

<sup>248</sup> *Op. cit.*, p.526.

<sup>249</sup> D. Howarth, *Textbook on Tort*, (1995), pp. 140-144.

<sup>250</sup> [1921] 3 KB 560.

*Mound*<sup>251</sup> foreseeability<sup>252</sup>. Whatever the proper qualification of the principles of legal causation, as far as the elaboration of the proposed theory of parental liability is concerned, the focus must be on the general approach adopted by the courts in dealing with cases of non-vicarious liability for the acts of others, for it is the question of how the courts are likely to treat the remoteness issue today that is of practical importance.

It is possible to point to a particular guiding principle which has been followed very consistently by the courts in this respect and which is peculiar to this category of liability. For, in recognition of the status of third party liability as an exceptional instance of liability, the court have imposed in such actions the special requirement of a high degree of likelihood that harm will occur.

It is Lord Reid who is generally attributed with formulating what is commonly referred to as the 'likelihood test', for it is his speech in *Dorset Yacht* that has been largely relied on in subsequent decisions. He stated: "Where human action forms one of the links between the original wrongdoing of the defendant and the loss suffered by the plaintiff, that action must at least have been something very likely to happen if it is not to be regarded as a *novus actus interveniens*"<sup>253</sup>. It should be pointed out, however, that a similar notion had been put forward much earlier in the pre-*Wagon Mound* case *Haynes v Harwood*, in which Greer LJ stated that the intervention of a third party will break the chain of causation between the defendant's wrongdoing and the harm suffered by the plaintiff unless it is "the very thing likely to happen", in the sense of being a "natural and probable consequence" of the defendant's negligence<sup>254</sup>.

It is also possible to take issue with Lord Reid's use of the phrase *novus actus interveniens* in the circumstances of the *Dorset Yacht* case, for it is really only appropriate to speak in such terms in cases where the conduct of the defendant and that of a third party constitute two separate causes of the plaintiff's harm. To say that the conduct of the latter 'breaks the chain of causation' is to imply that a causal link already exists between the defendant's wrongdoing and the harm complained of. Where the defendant is being sued for an alleged failure to control the actions of the third party perpetrator, however, there is no cause of action against the defendant without the conduct of the third party because the intervention of the third party is the very reason for calling the defendant negligent. It is the third party's act which

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<sup>251</sup> *Overseas Tankship (UK) Ltd. v Morts Dock and Engineering Co. Ltd., The Wagon Mound* [1961] AC 388

<sup>252</sup> Howarth places the blame for this judicial confusion squarely on the *Wagon Mound* decisions, *op. cit.*, p. 143.

<sup>253</sup> [1970] AC 1004 at 1030.

<sup>254</sup> [1935] 1 KB 146 at 156.

constitutes the defendant's breach of duty and which effectively establishes the causal link between the defendant and the plaintiff. Thus, in the event that the occurrence of the third party act is held not to satisfy the likelihood test, it would be more correct to simply state that the plaintiff's injury is too remote to be legally attributed to the defendant. In this way, Lord Sumner's famous speech in *Weld-Blundell v Stephens*<sup>255</sup>, as echoed by Lord Goff in *Smith v Littlewoods Organisation Ltd.*<sup>256</sup>, must be seen as applying only to cases where the act of the third party is totally independent of that of the defendant<sup>257</sup>.

While Lord Reid's 'likelihood' speech has generally been cited with approval<sup>258</sup>, there has been some debate as to the exact degree of likelihood required. In *Lamb v Camden London Borough Council*, Oliver LJ considered that it would be much higher than that intimated by Lord Reid in *Dorset Yacht*. He considered that "[t]here may...be circumstances in which the court would require a degree of likelihood amounting almost to inevitability before it would fix a defendant with responsibility for the act of a third party over whom he has and can have no control"<sup>259</sup>. According to Howarth<sup>260</sup>, Lord Mackay, on the other hand, would contend that Lord Reid did not propound a 'high likelihood' test but merely set out that the intervention should be 'likely' or 'probable'. To be precise, however, it must be pointed out that what he actually said was that "[u]nless the judge can be satisfied that the result of a human action is *highly probable* or *very likely* he may have to conclude that all that a reasonable man could say was that it was a mere possibility"<sup>261</sup>. Whether there would be much practical difference between these two views is a matter for debate, but it can be said with certainty that the general thrust of Lord Mackay's speech in this respect was that there should be a real risk as opposed to a mere possibility of danger. Either way, for present purposes, his approach is still to be preferred over that of Oliver LJ and it is submitted that, in cases of parental

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<sup>255</sup> [1920] AC 956 at 986.

<sup>256</sup> [1987] AC 241 at 272

<sup>257</sup> For example, in cases such as *Baker v Willoughby* [1970] AC 467 and *Jobling v Associated Dairies* [1981] 2 All ER 752.

<sup>258</sup> It was fiercely criticised by Lord Denning MR in *Lamb v Camden London Borough Council* [1981] QB 625, as being incompatible with *Wagon Mound* foreseeability. Lord Denning MR was, however, unable to suggest a suitable alternative and appeared to be motivated by a desire to avoid liability outright in that case on grounds of public policy.

<sup>259</sup> [1981] QB 625 at 644. Oliver LJ's approach was endorsed by the courts in *Paterson Zochonis v Merfarken* [1986] 3 All ER 522 and in *King v Liverpool City Council* [1986] 3 All ER 544.

<sup>260</sup> *Op. cit.*, p.147.

<sup>261</sup> *Smith v Littlewoods Organisation Ltd.* [1987] AC 241 at 260 (emphasis added).

negligence, it is the more appropriate one to follow. In this respect, it is possible to argue that the words of Oliver LJ should not be taken out of the context in which they were uttered, which is, specifically, liability for the acts of strangers. While it may be reasonable to require such a high degree of likelihood in these cases where the grounds of liability are more tenuous, it is, arguably, totally unnecessary, and indeed unjustifiable, where there is a pre-tort relationship between the defendant and the third party perpetrator.

If it can be accepted that Lord Mackay's approach is more applicable to cases of parental liability, then it remains to be considered whether the need to establish the conduct of the child as very likely or probable is apt to cause problems. It is submitted not. It must be questioned whether the actions of a child left to his or her own devices can ever be regarded as improbable or unexpected, especially since the courts have explicitly recognised the mischievous nature of children<sup>262</sup> and have always expected adults to guard against their unpredictability<sup>263</sup>. Indeed, in *Thorpe Nominees v Henderson & Lahey*<sup>264</sup>, Lord Reid was interpreted as referring only to the intervention of the third party and not to the likelihood of his or her negligence, which makes the test easier again to satisfy. In a similar vein, Jones<sup>265</sup> and Fleming<sup>266</sup> have both made comments to the effect that it would not make sense to label as too remote harm that the defendant was under a specific duty to prevent.

That being said, it cannot be concluded that actions in parental negligence will never be defeated by the remoteness rules for it is acknowledged that there may be exceptional circumstances in which the harm committed by the child will be regarded as totally unconnected with, and independent of, the conduct of the parent. The remoteness issue will always depend on the infinitely variable nature of the individual facts of each case. The most that can be said is that, in the majority of parental liability cases, remoteness is unlikely to constitute a major problem.

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<sup>262</sup> *Williams v Eady* (1893) 10 TLR 41.

<sup>263</sup> See, for example: *Glasgow Corporation v Taylor* [1922] 1 AC 44; *Wells v Metropolitan Water Board* [1937] 4 All ER 639; *Pearson v Lambeth Borough Council* [1950] 2 KB 353; *Yachuk v Oliver Blais* [1949] AC 386; *Haynes v Harwood* [1935] 1 KB 146.

<sup>264</sup> [1988] 2 Qd. R 261, as cited by J. Fleming, *The Law of Torts* (1998), p.250.

<sup>265</sup> M. A. Jones, *Textbook on Torts* (1996), p.55.

<sup>266</sup> *Op. cit.*, p.251.

## Chapter 6: Defining 'Parent'.

Of great practical importance will be the task of determining the persons to whom the proposed scheme of parental liability will apply. Obviously, to take account of modern family structures, this particular legal definition of 'parent' will have to extend beyond the ordinary meaning of the term, limited as it is to natural and adoptive parents. As Barton and Douglas point out, in recent years there have been significant changes in patterns of family formation<sup>267</sup>. Over the last three decades, the divorce rate has been constantly increasing while the marriage rate has been decreasing. There are more single parents than ever before and more and more children born outside marriage. That there are a large number of children living in state care must also be taken into consideration.

It is to be remembered that one of the main justifications for attributing the responsibility for harm caused by a child to its parents is the position of authority they occupy in relation to the child and the subsequent influence they are able to exercise over his or her behaviour. Such status is acknowledged by the law through the attribution of what is known as "parental responsibility", as set out by s. 3(1) of the Children Act 1989. A starting point would therefore be to state that the strict liability regime will only apply to persons exercising such responsibility in law for the child in question. As such, legal guardians who have parental responsibility under s. 5(6) of the 1989 Act would also be classified as parents in this way. An unavoidable consequence of setting parental responsibility as a basic requirement of liability, however, is that it may operate to exclude unmarried fathers from the proposed system. This is because the law dictates that when a mother and father are not married at the time of the child's birth it is only the mother who receives automatic parental responsibility. S. 2(2) of the 1989 Act sets out that the only ways in which an unmarried father may acquire these legal rights and duties in respect of the child is to apply to the court for a 'parental responsibility order' or to make a parental responsibility agreement with the mother. That such a provision has survived numerous family law reforms has been heavily criticised but, for so long as it remains the law, it will simply have to be accepted. It is thought that to set unmarried fathers

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<sup>267</sup> C. Barton and G. Douglas, *Law and Parenthood*, (1995), p.3.

apart as an exception to the rule would lead to unnecessary problems and would be likely to cause more problems than it would solve.

It is submitted that a further distinction will have to be made between persons who exercise parental responsibility on a permanent basis and those who exercise it on a merely temporary basis, with only the former falling within the proposed regime. This is because one of the underlying reasons for imposing third party liability on parents is that by accepting the role of parenthood, they are regarded as having effectively agreed to take on the responsibility for all aspects of a child's upbringing, right through until adulthood. It is for this reason that it is suggested that foster parents should be excluded from the system of parental liability. Although it is acknowledged that some foster parents do care for children on a long-term basis, in most cases, foster care is only envisaged as a temporary arrangement. It is recognised, however, that this move to exclude foster carers as an entire category is one that would be open to debate. Indeed, the introduction of a minimum period of care as a prerequisite to liability in such cases is an option which may be worth considering. Also excluded on this basis would be those persons exercising temporary parental responsibility by virtue of a residential order or an emergency protection order. In such cases, the parental responsibility lasts only as long as the order itself<sup>268</sup>.

Local authorities assuming parental responsibility for children by virtue of a care order occupy a special position in the parental status debate and, as such, warrant separate consideration. On the face of it, it would seem logical to argue that they should be treated in the same way as ordinary parents and should be subject to the same system of liability. However, as explained earlier, the relevant case law clearly illustrates that the courts are very hostile to the idea of public authority liability and have made it extremely difficult for plaintiffs to succeed in negligence claims against such bodies. It would seem that, as far as the liability of local authorities in respect of children in care is concerned, this judicial attitude is no different. Although there have been some recent signs to indicate that this tide may be turning, it is argued that the established immunity of local authorities is so strong as to make it unwise, for the present time at least, to advocate their inclusion into the regime of parental liability.

The leading authority on the matter is the House of Lords decision in *X (Minors) v Bedfordshire County Council*<sup>269</sup> (hereafter referred to as *X*). Although the

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<sup>268</sup> See, respectively, s. 12(2) and s. 44 of the 1989 Act.

<sup>269</sup> [1995] 2 AC 633.

issue involved was whether local authorities are under a duty of care to protect children in their care from harm caused by third parties as opposed to a duty to protect third parties from harm caused by children in care, the decision is still very relevant to the present discussion as being indicative of the general attitude of the courts to the liability in negligence of such bodies.

*X* actually refers to a group of five consolidated appeals. The claims in each case related to the performance of various local authorities of their statutory functions to provide social welfare and educational services<sup>270</sup>. The main judgment was delivered by Lord Browne-Wilkinson. Although he made it clear that his speech was not intended as a general statement of the applicable law<sup>271</sup>, this is exactly how it has subsequently been treated. He suggested that in determining whether the performance of a statutory function gives rise to a common law duty of care, there are a number of important considerations that the court must take into account. First of all, it must be determined whether the performance of the function in question is a discretionary matter or an operational matter. The distinction drawn by Lord Browne-Wilkinson in this respect is between, on the one hand, complaints relating to the conduct of a public body in deciding whether or not to exercise a discretion and, on the other, those referring to the practical manner in which the decision has been implemented. As an example, he suggested that a decision to close a school would be a discretionary matter whereas the actual running of the school would fall within the operational domain.

The reason that this distinction is so important is that the conferral of a statutory discretion is effectively seen as a parliamentary rubber stamp to engage in whatever course of action seems appropriate to the appointee. Therefore, claims falling within the first category can only be actionable if the conduct in question is deemed to be so unreasonable that it falls completely outside the ambit of the discretion. Cane refers to the application of the concept of *Wednesbury*<sup>272</sup> unreasonableness here<sup>273</sup> and comments that the standard of care in issue is similar to that applied to professionals

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<sup>270</sup> It is to be noted that in addition to the claims based on primary negligence, the plaintiffs also alleged that the defendant local authorities were vicariously liable for the negligence of their employees and that they had committed the tort of breach of statutory duty.

<sup>271</sup> N. 269 above, 731.

<sup>272</sup> *Associated Provincial Picture Houses v Wednesbury Corporation* [1948] 1 KB 223.

<sup>273</sup> P. Cane, "Suing Public Authorities in Tort", (1996) 112 LQR 13 at 15.

under the *Bolam* test<sup>274</sup>. That they are subject to a more stringent test for negligence emphasises how public bodies are treated as a special class of defendant.

The second factor to be taken into account is whether the exercise of the discretion will involve a consideration of policy matters by the authority, for this is forbidden territory for the courts. Any hint of policy will therefore preclude the court's involvement. Thus, even if the requirement of unreasonableness is satisfied, the plaintiff's claim could still be rendered non-justiciable on this basis. Furthermore, regardless of whether the plaintiff's complaint relates to a discretionary or an operational matter, a duty of care will not be recognised if it would be inconsistent with the relevant statutory scheme.

That the effect of *X* has been to accord local authorities almost total immunity from liability as regards their performance of statutory duties in relation to vulnerable children has been confirmed by two subsequent decisions: *H v Norfolk County Council*<sup>275</sup> and *Barrett v Enfield London Borough Council*<sup>276</sup>. It should be noted, however, that the plaintiff in *Barrett* has recently been successful in an appeal to the House of Lords against the Court of Appeal decision to strike out his claim<sup>277</sup>. It remains to be seen how he will fare at trial.

Curiously, the Court of Appeal has also held, very recently, that although established authority dictates that a local authority cannot be held liable to a child in its care for harm suffered as a result of a placement in an inappropriate foster home, it may be liable to other children in the foster home to protect them from harm caused by the foster child. In *W v Essex County Council*<sup>278</sup>, a fifteen-year-old suspected child abuser was placed with a couple who had four young children. The children were all subsequently abused by the boy. An action in negligence<sup>279</sup> against the council and one of its social workers was brought by all six members of the family. While the claim of the parents for damages for psychiatric injury was struck out on the grounds that it did not satisfy the necessary criteria set out in *Alcock v Chief Constable of*

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<sup>274</sup> *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582. Cane, *ibid* at p.17.

<sup>275</sup> [1997] 1 FLR 384.

<sup>276</sup> [1997] 2 FLR 167. For a detailed discussion of these decisions see, K. Standley, "No duty of care to children in care – *H v Norfolk C.C.* and *Barrett v Enfield London B. C.*", [1997] 9 CFLQ 409.

<sup>277</sup> *Barrett v Enfield London B. C.*, (1999) *The Times*, June 18. A decision along similar lines has also been made recently by the New Zealand courts: *A-G v Prince* [1998] 1 NZLR 262.

<sup>278</sup> [1998] 3 All ER 111.

<sup>279</sup> The plaintiffs also, unsuccessfully, entered claims for misfeasance in public office and breach of contract.

*South Yorkshire*<sup>280</sup>, by a two to one majority, the claims of the children in respect of physical and psychological harm suffered were allowed to proceed. The Court of Appeal took the approach that everything depended on whether the same policy considerations which had negated the existence of a duty of care in *X* applied in this case. Judge and Mantell LJ considered that they did not apply with the same vigour and that this made it just and reasonable to impose a duty of care while Stuart-Smith LJ dissented on this point.

On the surface then, this decision would appear to directly support the imposition on local authorities of the kind of third party liability for the acts of children that is being put forward in this thesis. Upon closer scrutiny, however, it soon becomes clear that the ratio has been deliberately expressed in very narrow terms so that there is no scope for any wider application beyond the particular circumstances of the case. First of all, it is limited as regards the factual scenario involved. As stated explicitly by Judge<sup>281</sup> and Mantell LJ<sup>282</sup>, the principles established by the case apply solely to cases of harm arising from the placement of a child in foster care as a result of a local authority failing to disclose a known risk. Secondly, the cause of action would also appear to be strictly limited as regards the particular class of plaintiff who may avail of it; namely, other members of the foster family. In *W*, there was very close proximity between the victims and the perpetrator as well as between the victims and the defendants. The victims were specifically identified individuals who had special status<sup>283</sup>. Indeed, an identifying feature of this case was that the foster parents had even received oral assurances from the defendant council that they would not be allocated a known or suspected child abuser. It is submitted that it is extremely unlikely that a local authority would be held liable under similar circumstances to a third party stranger.

Whether or not this decision signals the dawn of a new era in public authority liability, it is really too early to say. Early indications are not very encouraging. One of the first commentaries to have been written about the case is highly critical, the author arguing that it has been wrongly decided<sup>284</sup>. Indeed, he concludes with a plea

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<sup>280</sup> [1992] 1 AC 310.

<sup>281</sup> N.278 above, 136.

<sup>282</sup> *Ibid*, 141.

<sup>283</sup> In accordance with the criteria set out in *Hill v Chief Constable of West Yorkshire* [1988] 2 All ER 238.

<sup>284</sup> K. Oliphant, "*W v Essex County Council*, Local Authority Liability for the Acts of Children in Foster Care", (1998) 10 CFLQ 303.

to the House of Lords to intervene promptly to remedy the situation. For present purposes, therefore, it would seem that the prudent thing to do would be to exclude local authorities from the parental liability scheme. It is readily acknowledged, however, that this particular issue would be open to review should there be any further developments of the law in this respect.

## Conclusion.

The current English law on parental liability is in a shambolic state. Its domain of application is much too limited, it is excessively permissive and it fails to adequately respect the rights of victims. The proposed regime of strict liability, modelled on a past experience of the French system, would rectify these matters by significantly broadening the situations in which the liability of parents may be invoked and by raising the applicable standard of care. Through the introduction of a structured approach it will also restore legal coherency and consistency to this area of the law.

Whereas before, a very narrow interpretation of the duty of care meant that actions in parental negligence were limited to cases of misfeasance, they will now also include cases of nonfeasance. It has been shown that, in such situations, the duty owed by parents to third parties may be regarded as an extension of the duty owed by parents to their children. Alternatively, it could be based on the *Dorset Yacht* concept of a duty to control.

The operation of the presumption of fault means that when such actions are brought, they are also much more likely to succeed than at present. It relieves plaintiffs of the difficulties notoriously associated with the fault requirement and does so in a way that is legally defensible because it proves parents with a realistic opportunity to defend themselves. Although some evidentiary problems are perhaps to be anticipated in applying the presumption, they are thought not to be insurmountable.

The new method of establishing causation will also work to the advantage of victims. While in the past they have often been thwarted by the requirement of a very high degree of foreseeability, they will now benefit from the enforcement of an inference of causation, in accordance with the House of Lords decision in *McGhee v National Coal Board*. There should not be any problems in relation to remoteness either.

While the focus of this thesis has been on the substantive legal issues involved in introducing such a reform and, to this end, it has been shown that the proposed regime satisfies the principles of negligence, it is recognised that the extent to which it would be considered acceptable in the English law of tort would be further determined by other, broader, legal and social issues. For one thing, the issue of how the regime would be financed is apt to cause difficulties for it is obvious that the only

viable method would be via the insurance industry. Many parents are likely to object to being asked to take out such insurance cover simply because they will not see the benefit of it initially, unaccustomed as they will be to the idea of their children constituting a potential source of liability. The premium will be regarded as an additional expense and may seem unwarranted because it is one that they have never had to take account of in the past. It can only be hoped that once such cover would become widespread and its long-term benefits would be felt, any initial resistance to such an insurance scheme would gradually fade<sup>285</sup>.

A further source of difficulty lies in the domain of legal philosophy, the question of whether the strict liability regime can be regarded as normatively justifiable in accordance with the philosophical foundation of the English law of tort being of crucial importance. When an attempt is made to transpose a set of legal rules from one legal system to another, any philosophical differences existing between can create problems of legal compatibility. In the present context, this stems from the fact that the English law of tort is essentially a corrective justice regime whereas the corresponding French system may be regarded as constructed rather more along the lines of a distributive justice theory. While the depth of analysis required by this question clearly exceeds the boundaries of this thesis, one point that can be made is that the fact that, under the new regime, parental liability is still being based essentially on fault would certainly work in its favour in this respect<sup>286</sup>.

Lastly, it is recognised that there are strong policy reasons underlying the current judicial reluctance to interfere in domestic relations and these are accepted. What is not accepted, however, is that in preventing the law from causing injustice to parents, their application is currently causing injustice elsewhere. That cannot be tolerated. The new regime attempts to achieve a balance between the interests of the parties involved. By intruding into it only when there is good reason to do so, it still respects the sanctity of family life and, hopefully, promotes overall justice and fairness.

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<sup>285</sup> In many respects, it may even be regarded as a gentle introduction to the shape of things to come. Tort law is certainly changing and, in view of the movements in recent years to encourage people to insure themselves against a greater variety of risks, a system in which liability is predominantly governed by considerations of insurance would appear to be the general direction in which it is heading. See, eg., P. S. Atiyah, "Personal Injuries in the Twenty First Century: Thinking the Unthinkable", in P. Birks (ed.), *Wrongs and Remedies in the Twenty First Century* (1996), p.1; P. S. Atiyah, *The Damages Lottery* (1997).

<sup>286</sup> See further, D. G. Owens (ed.), *Philosophical Foundations of Tort Law* (1995) and I. England, *The Philosophy of Tort Law* (1992).

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