2.01 Learning Outcomes
On successful completion of this module, students should be able to:

i. Scrutinise the interface between the Tort of Negligence and the Duty of Care;

ii. Ascertain the implications of Legal Professional Negligence for Practicing Professional Accountants;

iii. Appraise the requirements of the law with respect to the general principles of liability.

2.02 Definitions
The word 'Tort' is derived from the French word for wrong. A tort is a civil wrong or wrongful act, whether intentional or accidental, from which injury occurs to another. Torts include all negligence cases as well as intentional wrongs which result in harm. Therefore, tort law is one of the major areas of law (along with contract, real property and criminal law), and results in more civil litigation than any other category. Some intentional torts may also be crimes such as assault, battery, wrongful death, fraud, conversion.

The wrongs dealt with by the law of tort include:

a. Causing physical injury to another intentionally or negligently (Trespass to Person or Negligence)

b. Interfering with another person's land (Trespass and Nuisance)

c. Making a false statement about another person (Defamation)

A tort is a civil wrong for which a remedy may be obtained. The remedy in tort tends to be damages (money). Basically, a tort is something someone else did wrong that caused you injury and for which you can sue. Most torts require proof of loss (i.e. broken arm or loss of earnings from being out of
work) however some torts are actionable per se, which means that once you prove the elements of tort or wrong, there is no need to prove am loss. An example of this second situation is where a newspaper defames you by writing lies about you, there is no need to show how or what loss has been caused, once you prove the article is untrue, you will succeed in an action for defamation, (it is possible if highly unlikely that an untrue article about you results in a gain such as more book sales). Attempts are often made to define the tort by contrasting it with other distinct areas of the law. For example, the primary function of the law of torts is to provide a method of redress for individuals who have suffered loss.

The object of a criminal prosecution is to punish those who break the criminal code and to protect society from crime. However, there is one exception to the rule that tort law serves a solely compensatory function and that is when punitive or exemplary damages are awarded against the defendant. Exemplary damages are “criminal, vindictive, or punitive in nature. Furthermore, some overlap exists between the law of torts and the criminal law. For example, the “drunken driver who kills a pedestrian. [He] may be prosecuted for manslaughter or dangerous driving causing death and sued for negligence”.

Tort law is also defined or described by contrast with contract law. A contract exists where there has been an agreement between parties and where the parties intended to create legal relations and have supported their agreement with consideration. The contractual relationship is denoted by the concept of privity, which means that only a party to a contract can sue on it. The law of torts exists outside the confines of the doctrine of privity of contract, and therefore a contract is in no way a prerequisite for a successful tort action. The case which best illustrates this fact is Donoghue v. Stevenson. However, a breach of contract may also amount to a tortious act, for example the selling of a car with faulty brakes. A plaintiff is free to sue for breach of contract and in tort in the same set of proceedings (see, for example, the words of Henchy J. in Finlay v. Hegarty ante).

Apart from the requirement of a contract in the first instance, there are several other differences between tort and contract law. For example, the limitation period within which an action based
on contract must be taken is (generally speaking) 6 years for contract actions, as opposed to 3 for actions in tortious actions involving personal injury. Furthermore, the rules for assessing damages differ between the two areas of law and different tests of remoteness of damage are also adopted (Wall v. Hegarty).

2.03 The Tort of Negligence

Negligence is a specific tort and may be described as the failure to exercise that care which a reasonable man would exercise in all the circumstances of the case. Therefore, negligence may consist of omitting to do something which ought to be done or doing something which ought to be done either in a different manner or not at all. In Blyth v. Birmingham Waterworks Alderson B said:

“Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do.”

However, liability in negligence will not exist unless a duty of care exists between the parties. The duty of care, if it does exist, is owed only to those persons who are in the area of foreseeable danger.

The tort of negligence consists of three essential elements:
1. The duty of care,
2. Breach of that duty by the defendant and
3. Damage resulting from the breach

The duty determines whether the type of loss suffered by the plaintiff is, in all the circumstances of the case, actionable. Breach of duty is concerned with the standard of care that ought to have been reached in all the circumstances of the case to avoid liability in negligence. Damage must result from the breach before the negligence will be actionable. The tort of negligence is not
complete until the plaintiff has suffered some actionable damage or injury or loss which would be capable of attracting an award of compensation or damages in a court of law. We have already noted the concept of remoteness of damage. The issue here is the extent to which the law recognises the loss to the plaintiff.

In Attorney-General of Bendel State v. UBA (1986) 4 NWLR (PT. 37) 547, the appellants discovered that the aircraft that they wanted to buy had been sold by the seller and they wrote to the respondents to suspend payment to the sellers. The respondents failed to act on this letter on time, and because of this delay, the respondents' correspondent bank overseas paid the price of the aircraft to the sellers who had already sold it to someone else. The Supreme Court held that the respondents were not protected by the exemption clause because the loss in this case was not beyond the powers of the bank and the bank acted negligently. However, even though the respondent acted negligently, the appellants allowed too much time to pass before they brought an action, thus, sleeping on their right.

2.04 The Duty of Care
The modern tort of negligence is founded on the neighbour principle set out by Lord Atkins in Donoghue v. Stevenson. It was this principle which led negligence to be recognised as a separate tort. Prior to this decision the law had been built up in disconnected slabs exhibiting no organic unity of structure. Instead of one unified concept of duty of care there were at least 56 separate duties of care recognised e.g. the duty of care recognised between road users.

It is a question of law whether in any particular circumstances a duty of care exists, and before 1932 there was no general principle. In that year, Mrs. May Donoghue claimed that she had suffered injury because of seeing and drinking the contaminated contents of a bottle of ginger beer manufactured by the respondent and bought from him by Minchella, the owner of the Wellmeadow Cafe, Paisley, from whom in turn it had been bought by a friend of the persuer.

The House of Lords, by a bare majority, held that if the persuer could prove that which she averred she would have a good cause of action. Salmond notes that the decision is authority for
two distinct propositions, the first being that negligence is a distinct tort, and the second, that the absence of privity of contract between plaintiff and defendant does not preclude the latter's liability in tort.

“It is also of course an indisputable authority for the proposition that manufacturers of products owe a duty of care to the ultimate consumer or user. Although it was sometimes said that the ratio decidendi of the case was limited to this proposition, it became clear that the case was authority for something more than the proposition that a duty of care is owed to consumers of snails in ginger-beer bottles. This was the famous passage in which Lord Atkin formulated "the neighbour principle"."

Lord Atkin outlined "a general conception of relations giving rise to a duty of care, of which the particular cases found in the books are but instances". He stated: “The rule that you are to love your neighbour becomes in law you must not injure your neighbour; and the lawyer’s question who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be liable to injure your neighbour. Who, then, in law, is my neighbour? The answer seems to be - persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question”.

In the recent case of Marion McKenna v. Best Travel Ltd. (1998 3 1R 57) the plaintiff brought an action based in contract and tort for personal injuries sustained during a mini-cruise to Egypt and Israel. A stone was thrown through the window of a coach in which the plaintiff was travelling on the outskirts of Bethlehem. The plaintiff was struck on the head. The trial judge, Lavan J., held that while there was no breach of contract there had been a breach of the duty of care owed to the plaintiff by the defendants. On appeal to the Supreme Court (Hamilton CJ, Keane and Barren JJ.) the defendant's appeal was allowed. The extent of the defendant's duty of care included all matters concerning the safety, well-being and comfort of the tourist which by the nature of the relationship would or should have been known to the tour operator but not the tourist.
The test in relation to what warnings should be given by travel operators to its customers was what a reasonably prudent tour operator exercising reasonable care would have considered necessary to inform those travelling with it. In the words of Barron J. (giving the judgment of the Court) "[t]he defendant's in this case were not insurers that nothing would happen to injure the plaintiff. Their obligation stops at taking all reasonable steps to insure the safety and well-being of their customers. The: fact of unrest in certain parts of Israel at the material time was well-known and a tour-operator is entitled to assume such knowledge on the part of its customers."

2.05 Breach of the Duty of Care

The defendant will be deemed to have breached the duty of care owed to the plaintiff if his conduct does not meet the standard which would be reached by the reasonable man. The defendant will not be excused if throughout his impugned course of conduct, he did his best if that merely amounted to doing his incompetent best. However, the issue of negligence can properly be determined only in the particular context in which the defendant has acted.

Byrne & Binchy: “It is worth reflecting on where, and how, the line should be drawn between so-called subjective and objective factors when determining whether conduct should be stigmatized as negligent. The answer is a good deal more difficult than it may first appear”.

There is a fourfold approach taken in answering the question "what would the reasonable man have done?" Regard is had to:

i. The probability of the accident
ii. The gravity of the threatened injury
iii. The social utility of the defendant's conduct
iv. The cost of eliminating the risk

The reasonable man test is objective. In Vaughan v. Menlove (1837) the plaintiff had an interest in certain cottages on land adjoining that on which the defendant had erected a haystack which was not properly ventilated. The plaintiff's cottages were damaged by a fire which had spontaneously ignited in the haystack. The argument put forward by the defendant that it was
enough if had acted bona fide to the best of his judgment was rejected and the reasonable man
test firmly asserted by the court.

2.06 The Concept of Causation

“Damage is essential to liability in negligence, and the law has been shaped by many
considerations. In the first place, it must be shown that the damage complained of was caused
by the defendant's carelessness. Courts have stressed repeatedly that legal causation is not based
on science or philosophy, but on common sense." In a similar vein Lord Wright has stated” “In
the varied web of affairs, the law must abstract some consequences as relevant, not perhaps on
grounds of pure logic but simply for practical reasons.”

The test which is applied whether determining the issue of factual causation is the 'but for' test.
The court asks ‘would the harm to the plaintiff not have occurred but for the defendant's
negligent act or omission. For example, in Barnett v. Chelsea & Kensington Hospital Management
Committee the plaintiffs spouse attended the defendant's outpatient department on New Year's
morning complaining of severe pain and vomiting. He was told to see his own doctor in the
morning. Within a short time thereafter he died from arsenic poisoning. However, expert
evidence was given (which was accepted by the court) that he would have died from the
poisoning even if he had received proper care at the defendant's hospital. The 'but for' test was
not satisfied, the defendants did not cause the damage suffered by the plaintiff's spouse.

It is important to distinguish factual and legal causation. The former arises where the defendant
is linked in a factual or scientific way to the plaintiff's injuries. Factual causation is a prerequisite
for legal causation. The 'but for' test is the test of factual causation. However, it can cause
substantial problems where multiple causes operate to bring about the same event or damage.

McMahon & Binchy provide the example of two independent fires converging simultaneously on
the plaintiff's property, here the strict application of the 'but for' test would mean that neither
of the persons responsible for the fires would be liable. Having established factual causation, the
plaintiff is then obliged to establish legal causation. Prosser & Keaton define it in the following
terms: “The defendant's conduct is [the legal] cause of the event if it was a material element and substantial factor in bringing it about.” Therefore, the test of factual causation, the but for test, "acts as a preliminary filter. to eliminate the irrelevant rather than to allocate legal responsibility”. The material element and substantial factor test is the test applied by the courts to determine legal causation once factual causation has been established.

2.07 Novus Actus Interveniens

A defendant's negligence will sometimes form part of a sequence of events leading to injury or harm to the plaintiff. If part of this sequence is a novus actus interveniens, the court will deem it to have broken the chain of causation between the defendant's negligence and the damage suffered by the plaintiff. As a result, the defendant will not be held liable in negligence. The intervening act may be that of a third party, or of the plaintiff himself or it may be an intervening act of nature.

Novus actus interveniens simply means that an act or event has intervened to break the chain of causation which was set in motion by the defendant's negligence. It is defined in Murdock's Dictionary of Irish Law as 'a defense in an action in tort whereby it is claimed that A is not liable for the damage done to B, if the chain of causation between A's act or omission is broken by the intervention of a third party, thereby rendering the damage too remote...It is of the essence of novus actus interveniens that the damage complained of should have resulted from the act of another person who is independent of both the plaintiff and the defendant: Coyle v. An Post (1993, Supreme Court, ILRM 508).

In Lambe v. Camden B.C. (1981) the defendants, by their negligence, damaged a water main outside the plaintiff's house. This resulted in major subsidence of the house. In consequence the tenant moved out and shortly afterwards squatters moved in and inflicted substantial damage on the property. The plaintiff sought to recover from the defendants for this damage. The Court of Appeal held that the plaintiff could not recover but had difficulty justifying their decision. Lord
Denning decided the issue on policy grounds whereas the other members of the court held that the damage was too remote a consequence of the defendant's negligence (see Remoteness of damage notes). “It was inconceivable that the reasonable man, wielding his pick in the road in 1973, could be said reasonably to foresee that his puncturing of a water main would fill the plaintiffs house with uninvited guests in 1974.”

2.08 Remoteness of Damage

The Direct Consequence and Reasonable Foreseeability Tests

It is an essential ingredient of the tort of negligence that the defendant's breach of duty caused the plaintiff damage. But what if the resultant damage turns out to be more extensive or of a different type or occurred in a different way from that which might reasonably be expected to arise from the defendant's conduct? Remoteness of damage is the criteria which the courts use in fixing the cut-off point in the line of consequences, beyond which the defendant will not be accountable.

There was always some authority for the proposition that a wrongdoer is liable only for damage which was intended by him or which, though not intended was the natural and probable consequence of his unlawful act. This test of reasonable foreseeability having been decisively rejected by the Court of Appeal in Re Polemis, was as decisively accepted and restored to favour by the Judicial Committee of the Privy Council in The Wagon Mound. In Re Polemis the direct consequence test was adopted. It was held that if the damage caused was a direct consequence of the defendant's negligent act then the defendant will be liable for same. It was irrelevant that the defendant could not have anticipated the extent of the damage.

This approach differentiates between the test to determine whether liability exists (foreseeability) and the test for limiting the extent of liability (directness of consequence). In Re Polemis two workmen negligently dropped a plank into the hold of a ship. The impact caused a spark which ignited petrol vapours and caused an explosion which destroyed the ship. The owners sued the ship's charterers
(who employed the two workmen) and it was held that the charterers were liable for all the direct or natural consequences of their negligent act.

In the Wagon Mound the Privy Council described the Polemis approach as “fundamentally false”. Here the steamship Wagon Mound was taking in bunkering oil some 600 feet away from a wharf in Sydney Harbour. As a result of the carelessness of those on board, a large quantity of oil spilt into the bay. Some 60 hours later that oil ignited, and a fire spread rapidly and did considerable damage to the wharf and to ships adjoining the wharf. The outbreak of fire was since wind and tide had together earned under the wharf some inflammable debris, on top of which lay some cotton waste which was then set alight by molten metal falling from the wharf because of welding operations being carried out on it. These flames in turn set the floating oil afire. The Judicial Committee held that the test of remoteness of damage was reasonable foreseeability and on the facts the damage in question was not reasonably foreseeable at all.

The Privy Council stated that it was illogical and unjust to adopt two different standards, one for determining liability, the other for setting a limit on the damage recoverable. Instead there should be one uniform test of liability and remoteness, the reasonable foreseeability test. The Wagon Mound represents the majority opinion as to the current state of the law on this issue as is illustrated by cases such as Riordans Travel v. Acres & Co. (1979, HC), Burke v. John Paul & Co. (1967, SC) and Condon v. C.I.E. (1984, HC).

2.09 Economic Loss

We will now see that much of the theoretical debate concerning the test for the existence of a duty of care has centered on the issue of liability for pure economic loss (including the Anns litigation and the case law on liability for negligent misstatements). The general rule (regarding claims for pure economic loss) is that the common law duty to take care to avoid causing injury to others is restricted to physical injury either to person or to property. Any attempted deviation from this general rule becomes a duty of care issue.

In Anns v. Merton L.B.C. (House of Lords, 1978 AC 728) Lord Wilberforce enunciated what is
known as the "two tier" or "two step test". The first step is to ask whether, as between the alleged wrongdoer and the person who has suffered damage, there is a sufficient relationship of proximity or neighbourhoods, such that in the reasonable contemplation of the wrongdoer, carelessness on his part may be likely to cause damage to the person injured. If there is such a relationship of proximity, then a prima facie duty of care arises. The second step is only taken if such a prima facie duty of care exists. The question which is then asked is are there any considerations which would lead the court to deny the existence of a duty of care.

McMahon & Dinchy note that "Lord Wilberforce's two-step formula can be interpreted as merely expressing Lord Atkin's "neighbour" formula in more expansive language, without any implication of its embracing a wider scope of duty. On another view, Lord Wilberforce's formula hints at precisely this extension of scope of duty. The reference to a "prima facie duty of care" may suggest to some judges that the first step is one that should not give them cause to hesitate too long. Although the formula does not expressly state this, its overall effect may be to encourage the imposition of a duty of care in all situations, however novel, or, conversely, however strongly repudiated in earlier judicial precedents, unless there is some most unusual reason, based on judicial policy, not to do so or to do so only partially”. Anns was finally overruled by the House of Lords in Murphy v. Brentwood District Council a 1990 decision. This case concerned the liability of a local authority in connection with the approval of the plans of a house. On the facts it was held that the defendants did not owe a duty of care to the purchasers. Furthermore, the House of Lords emphatically denied the broad-based approach taken by Lord Wilberforce in determining the existence of a duty of care. “In the wake of this decision commentators have been waiting with hushed breath to see whether the Irish Courts would join the undignified retreated from the expansive approach to the duty of care which was articulated in Anns and endorsed by the Irish Supreme Court in Ward v. McMaster”. The decision of Flood J. in McShane Wholesale Fruit and Vegetables Ltd. v. Johnston Haulage Co. (1997) shows the Irish High Court staving faithful to the Anns ‘two steps' approach.

The plaintiff's factory had been brought to a standstill by the loss of electrical power caused by a
fire on the adjoining premises owned by the defendant. The plaintiffs sued for damages in negligence for the economic loss sustained by them. Flood J. endorsed the Anns approach despite its subsequent repudiation in Britain in holding that, as a preliminary issue, the fact that the damage is economic is no bar to recovery, so long as:

a) There is a sufficient relationship of proximity between the alleged wrongdoer and the person who has suffered damage.

b) The relationship is such that in the reasonable contemplation of the former carelessness on his part may be likely to cause damage to the latter - in which case a prima facie duty of care arises.

c) The existence of a prima facie duty of care is always subject to any compelling exemption based on public policy (which would prevent a duty from arising in the circumstances).

2.10 Negligent Misstatements

In common with and related to the approach taken by the English courts to pure economic loss, there has been a similar reluctance to uphold claims for damages arising out of negligent misstatements. We are now concerned with the modern law on liability for negligently made statements which cause economic loss. The harmful effects of a statement can carry further than the effects of an act, and it is probably easier to make a careless statement than commit a negligent act. This [area of liability] is therefore one where fairly stringent limitations have been placed on the notion of proximity, and it is said that there must be 'a special relationship' between the parties before a duty of care can arise. Indeed, until 1963 there was no duty at all in this area. In that year the House of Lords heard an appeal in the case of Hedley Byrne & Co. Ltd v. Heller and Partners Ltd.

The plaintiffs, Hedley Byrne & Co., were advertising agents who intended to engage in an advertising programme for Easipower Ltd. which would cost about £100,000. They asked their own bankers, National Provincial Bank Ltd., to obtain a reference about Easipower, and National
Provincial wrote to the defendants, Heller and Partners, who were Easipowers bankers. They replied in a letter which said that it was ‘For your private use and without responsibility on the part of the bank or its officials' and went on to say that Easipower was a 'respectably constituted; company, considered good for its ordinary business engagements. Your figures are larger than we are accustomed to see.' Easipower went into liquidation and the plaintiffs lost some 17,000. Held: dismissing the appeal, that there could be a duty not to make a statement carelessly which causes only economic loss; but that in the circumstances the disclaimer prevented a duty arising and the defendants were not liable.

It would obviously be too onerous a burden to hold a person responsible whenever he carelessly makes a statement which turns out to be wrong, and someone else has suffered loss as a result, for otherwise a person could be liable for a casual statement made at a party. The courts have established that special rules of proximity apply in this area, so that a special relationship must be established between the parties, and to a large extent this depends on the defendant knowing that the plaintiff is justifiably relying upon him for his special skill or expertise or knowledge.

The Hedley Byrne decision makes it clear that the duty extends to all relationships where the inquirer was trusting the other to exercise a reasonable degree of care and where the other knew or ought to have known that the inquirer was relying on him.

The 'special relationship' requirement can be divided into three elements:

1. That the plaintiff relied on the defendant's skill and judgement or his ability to make a careful inquiry,
2. That the defendant knew or ought reasonably to have known that the plaintiff was relying on him
3. That it was reasonable in all circumstances for the plaintiff to rely on the defendant.

It was noted as an example in the Hedley case that it would not be reasonable to rely on opinions expressed at social/informal occasions or even in a profession/business context unless it was clear that the plaintiff was seeking considered advice. The Irish courts acceptance of the Hedley
decision is illustrated by cases such as Wall v. Hegarty (1980, High Court, Harrington J.) and McSweeney v. Bourke (1980, High Court, Carroll J.) However, McMahon & Binchy cite the case of Macken v. Munster & Leinster Bank Ltd. (1959, Circuit Court, Judge Deale) as 'an Irish harbinger of Hedley Byrne'. Indeed, the facts of this case are similar to those which gave rise to the Hedley Byrne litigation, there was no liability on the facts since the bank managers opinion in that case did not cause the loss to the defendant. Again, in common with the Hedley Byrne case, it seems implicit from Judge Deale's decision that the plaintiff failed not because there could be no liability attaching to the bank but because, on the particular facts there was not.

2.11 Vicarious Liability

Vicarious liability is liability imposed on a master (employer) to a third party for the tort of his servant (employee) committed in the course of the latter's employment. This means that as a rule, the relationship of master and servant, as distinct from employer and independent contractor, must exist. Both Dias & Markesinis and McMahon & Binchy note that vicarious liability is an example of the imposition of strict liability in tort law (another and much more obvious example being the Rule in Rylands v. Fletcher.) Therefore, vicarious liability is an important departure from the fault principle which underlies most of tort law. Justifications for this departure include the control principle: 'which attributes to the master the ability to control the behaviour of his servant. However, this justification has an air of fiction about it', Dias & Markesinis. Another (perhaps more honest) justification is that employers have 'deeper pockets' and are therefore a better 'mark' for damages. Kidner notes that the principle of placing liability on the employer as well as on the individual tortfeasor is mainly justified by the concept of loss distribution, that is that the employer will usually be better able to distribute the loss, either through insurance or through his customers. Indeed, Lord Scarman (in the Court of Appeal decision Rose v. Plenty infra) said 'I think it important to realise that the principle of vicarious liability is one of public policy.' Another justification for imposing liability on masters for the torts of their servants is that the master was the factual cause of the tort. 'The master set the whole thing in motion' per Alderson B in Hutchinson v. The York, Newcastle and Berwick Railway (1850).
Traditionally a treatment of this area involves posing three distinct questions:

a) Is the tortfeasor a servant?

b) If he is, has the servant committed a tort?

c) If he has, was the tort committed during the course of his employment?

**Is the Tortfeasor a Servant?**

We have already studied the case-law used to determine whether a particular individual is or is not a servant/ an employee. However, it should be noted that vicarious liability is not limited to the relationship of master and servant, it extends to principles and agents, firms and partners and beyond. Irish courts have been ready to impose vicarious liability where the defendant had a high degree of control over the actions of another. This approach is vividly illustrated in the 1975 decision Moynihan v. Moynihan (Supreme Court). The plaintiff, who at the time of the accident was two years old, was injured when she pulled a pot of tea on herself in her grandmother's house. The plaintiff and her parents had been invited to a meal by her grandmother (the defendant); when the meal was over the defendant's daughter, the plaintiff's aunt, had left the freshly made tea under a brightly coloured teacosy on the breakfast room table. The plaintiff's father had left the house and her mother was assisting the defendant with the dishes in the kitchen.

The defendant's daughter who made the tea left the room hurriedly to answer the telephone, so that the plaintiff was alone and unattended in the breakfast room when the accident occurred. (The child pulled the tea-pot from the table and down on herself.) The trial judge withdrew the case from the jury on the grounds that the defendant could not be responsible for the negligence of her daughter. The plaintiffs appeal to the Supreme Court was upheld. The court held there was sufficient evidence on which a jury could have found that the defendant's daughter was negligent. Walsh J. held that the relationship between the mother and her daughter was sufficient to make the former vicariously liable for the negligence alleged against the daughter.

**Has the Servant Committed a Tort?**

In ICI v. Shatwell (a 1965 House of Lords decision) Lord Pearce stated that 'Unless the servant is
liable the master is not liable for his acts; subject only to this, that the master cannot take
advantage of immunity from suit conferred on the servant'.

Was the Tort Committed During the Course of His Employment?
It has been said that the phrase 'in the course of his/her employment' is the most litigated in the
English language. McMahon & Binchy note that the relationship of master and servant, when it
exists, has spatial and temporal limits. 'There will, of course, also be limitations imposed by the
nature of the employment and these we may call functional limitations.' For example, an
accountant would not be vicariously liable if a clerk, employed by him, agreed to do a 'nixer' for
an acquaintance and did so negligently (for example by understating his income tax liability,
which lead to the imposition of a fine by the Revenue Commissioners). From a spatial perspective
the work was carried on outside the office, from a temporal point of view it was earned out
outside office hours. Finally, from a functional point of view a clerk is not employed by an
accountant to solve actuarial problems.

In Compton v. McClure (1975, English High Court) the first named defendant was late for work
and, in an effort to 'clock in' in time, he drove onto the premises of his employer, the second
defendants, too fast and negligently injured the plaintiff. The High Court held that the employers
were vicariously liable. May J said "in cases such as the present, unless the circumstances of the
entry to the employer's premises are such as, for instance, to make it a frolic of the employee's
own, or unless the purposes of the entry were that he was merely coming back to collect a coat
which he had left behind, then in my judgment the course of the employment prima facie begins
and the conditions giving rise to vicarious liability are fulfilled when the employee comes on to
the employer's premises in order to start the work that he is employed to do."

In Keppel Bus v. Sa'ad bin Ahmad (a decision of the Privy Council, 1974) the plaintiff took
exception to a bus-conductor's treatment of another passenger and an altercation broke out,
each trying to hit the other. The other passenger got off, and the conductor began collecting
fares. He abused the plaintiff in Chinese 'using a very rude expression of which an English
translation has not been furnished'. The plaintiff objected, and the conductor hit him in the eye with his ticket punch. The Privy Council held that the defendant bus company was not vicariously liable for the tort committed by the employee bus-conductor. Lord Kilbrandon stated that "there is no evidence of circumstance\(^1\) which would suggest that what the manager actually did was, although wrongful, within the scope of his authority, express or implied, and thus an act of management."

By way of contrast, in Rose v. Plenty (a 1976 Court of Appeal decision) Christopher Plenty, a milkman employed Leslie Rose, aged 13, to help him on his rounds. This was notwithstanding a notice erected at the depot that 'Children and young persons must not in any circumstances be employed by you in the performance of your duties'. During the course of a delivery Rose was injured due to the negligent driving of Rose. The Court of Appeal (Lords Denning and Scarman) allowed Rose's appeal and held the employers to be vicariously liable.

Lord Scarman quoted with approval the words used by Diplock L.J in the earlier decision Ilkiw v. Samuels (1963): "the matter must be looked at broadly, not dissecting the servant's task into its component activities...-but asking: what was the job on which he was engaged for his employer?" Lord Denning said that 'in considering whether a prohibited act was within the course of the employment, it depends very much on the purpose for; which it is done. If it is done for his employer's business, it is usually done in the course of his employment, even though it is a prohibited act. But if it is done for some purpose other than his master's business, as, for instance, giving a lift to a hitchhiker, such an act, if prohibited, may not be within the course of his employment.'

However, in the Irish decision Boyle v. Ferguson (1911) a car salesman who in the company of two women was out for a "spin" at 7pm on a Saturday evening was nevertheless held to be acting within the scope of his employment. The Court was obviously impressed by the evidence which showed that the employer was paying for the petrol at the time, that the salesman had been given great latitude in his hours and methods of work and, lastly, that, while on the road in the
company of ladies who were interested in motors, and would be useful as patrons and supporters, the salesman was creating a good impression appropriate to a car salesman.

In **Johnson & Johnson v. C.P. Security** (a 1986 decision of the High Court, Egan J.) a security firm which undertook to protect the plaintiffs properly was held vicariously liable for the theft of the plaintiff's property by one of its security officers.

2.12  **Professional Negligence**

There is no distinct tort of "professional negligence". Instead this area consists of a group of cases concerning the conduct of professionals which have been decided on the basis of general negligence principles. The first question to be addressed is 'who is a professional?'. In Kelly v. St. Laurence's Hospital (1989, Supreme Court) it was decided that nurses are not 'professionals' in the eyes of the law. However, Blayney J., in Hughes v. J.J. Power Ltd. (1988, High Court), held that mechanics were persons "exercising and professing to have a special skill".

The practical importance of the label 'professional' is found in the emphasis which the courts put on professional customary practice. "By virtue of their traditions, their rules of self-regulation, and the high intellectual calibre of their members, professions are regarded by the courts as being substantially competent to determine and require a satisfactory standard of competence in the performance of professional duties. Thus, if a member of a profession can show that he or she adhered to the customary practice of his or her profession, this should normally be sufficient to relieve him or her of the accusation of negligence. However, the courts reserve to themselves the power to have the last word on the question, though it is a power they will exercise sparingly' in only the clearest of cases."

As noted by Salmond & Heuston "when the exercise of some special skill or competence, such as that of an architect, or doctor, is in question, the test of the man on the Clapham omnibus is somewhat unreal. [Instead] it is expected of such a professional man that he should show a fair, reasonable and competent degree of skill; it is not required that he should use the highest degree of skill, for there may be persons who have higher education and greater advantages than he has,
nor will he be held to have guaranteed a cure."

2.13 Legal Professional Negligence

Barristers

For many years it had been assumed that banisters could not be sued in respect of negligence in the course of their work. This approach was based on policy considerations, including the need to maintain the existence of a free and independent bar, the cab rank principal, and the fact that a barrister owes a primary duty to ensure the proper administration of justice. (The cab rank principal provides that a barrister cannot refuse a brief).

In *Rondel v. Worsley* (A 1969 House of Lords decision) the Law Lords held that barristers acting as advocates were immune from liability in negligence. No duty of care was owed to clients for advocacy work. (It is also presumed that solicitors acting as advocates enjoy the same immunity as barristers under the Rondel v. Worsley principle).

In that case the negligence; alleged against the defendant barrister related to the way he called witnesses for the plaintiff and the questions that he put to those witnesses. For non-advocacy work a barrister has the same liability as any other professional. This point is illustrated in the case *Saif Ali v. Sydney Mitchell & Company* where the defendant was guilty of negligence in failing to institute proceedings within the limitation period against certain defendants.

A doctor will not be liable for errors of judgement provided the error was not an unreasonable one. In *Daniel v. Heskins* the Supreme Court asserted that conduct falling short of perfection does not inevitably amount to negligence. The dangers of "being wise after the event" were noted. The court underlined the wide range of possible solutions and the element of emergency involved in some cases.

Solicitors

A Solicitor is in a contractual relationship with his client but is now liable in tort as well as in contract (Salmond notes that it has been settled for a century that a barrister cannot be sued by
his client for breach of contract; the fees which he receives are an honorarium). Professor Wylie in his text Irish Conveyancing law (2nd edition) states that professional negligence is the primary area where the courts are quite prepared to impose liability for pure economic loss. The result has been that numerous cases have come before the courts in which it has been recognised that a duty of care arose in the conveyancing transaction which, if it has been breached with consequent loss to the person owed the duty, would have involved substantial liability in damages. He goes on to note that reliance on counsel's 'expert opinion' probably remains a good defense in most instances for a solicitor. He cites the 1987 decision Park Hall School v. Overend as authority for this proposition. However, in the 1993 decision McMullen v. Farrell Barren J made the following remarks:

"A Solicitor cannot in my view fulfill his obligations to his client merely by carrying out what he is instructed to do. This is to ignore the essential element of any contract involving professional care or advice. The professional person is consulted by the client for the very reason that he has specialist or professional skill and knowledge. He cannot abrogate his duty to use that skill and knowledge to follow instructions blindly is to turn himself, into a machine" of a property was held to owe a duty of care to the purchaser as well as to their own client. See Article-Law

In Doran v. Delaney & Others (Supreme Court, March 9th, 1998) a conveyancing solicitor acting for the vendor of a property was held to owe a duty of care. Society Gazette, 'Little House of Horrors'. Barren J. (in Doran) stated that "the solicitor is not a conduit pipe. Once he is acting professionally, he warrants that so far as his own acts are concerned he has taken the care and applied the skill and knowledge expected of a member of his profession. He cannot therefore accept his client's instructions without question when it is reasonable to query them. That is the difference between innocent and negligent mis-statement. It is not enough that the solicitor was acting bona fide."

2.14 Medical Negligence

In Roe V. Minister of Health, the plaintiff had been injected with nupercaine, a spinal anaesthetic,
by a special anesthetist in order to undergo a minor operation. The nupercaine was contained in
glass ampoules, which were in turn kept in a jar of phenol. Some of the phenol percolated
through cracks in the ampoules and contaminated the nupercaine. As a result, the plaintiff was
permanently paralysed below the waist. The cracks in the ampoules were not detectable by
ordinary visual or tactile examination. This was a risk which was first drawn to the attention of
the profession in 1951: it would not have been appreciated by the ordinary anaesthetist in 1947.
In the words of Denning L.J. "Nowadays it would be negligence not to realise the danger, but it
was not then." Later in the same passage he said, "we must not look at the events of 1947 through
1954 (date of judgement) spectacles."

In 1957 the Bolam test was laid down by the Court of Appeal in Bolam v. Friern Barnet
Management Committee. This test provides that the standard of care to be achieved by
professional persons is that of the ordinary skilled person exercising and professing to have that
special skill, and a doctor or surgeon was not held to be negligent if he acted in accordance with
the practice accepted at that time as proper by a responsible body of medical opinion,
notwithstanding that other doctors adopted different practices.

Lord Denning in Crawford v. Board of Governors of Charing Cross Hospital (1953) stated that it
would be quite wrong to suggest a medical man is negligent because he does not at once put into
operation the suggestions which some contributor or other might make in a medical journal. This
is very much in line with the approach taken in Roe one year later.

In O'Donovan v. Cork County Council (1967) the Supreme Court made it clear that customary
practice will not will afford a defense when it has inherent defects. "Thus, it seems that a doctor's
defense that he or she followed one school of thought rather than another will not be efficacious
where the school of thought thus followed suffers from such inherent defects" (McMahon &
Binchy). Walsh J. in his decision in O'Donovan set out the test to be applied to specialists. He said
"a medical practitioner who holds himself out as being a specialist in a particular field is required
to attain to the ordinary level of skill amongst those who specialise in the same field. He is not
required to attain to the higher degree of skill and competence in that particular field."

2.15 Contributory Negligence

Contributory negligence comprises of the plaintiff's own want of care contributing to the damage suffered by him. McMahon & Binchy describe this partial defense as follows: "Contributory negligence essentially involves a lack of reasonable care for one's own safety or the safety of one's property.

An act may of course constitute both contributory negligence and negligence at the same time - a foolhardy lack of caution for one's safety, such as climbing a mountain without the proper equipment, may induce a rescue attempt, resulting in injury to the rescued. "A plaintiff's failure to exercise reasonable care for his own protection will not amount to contributory negligence in respect of damage unless that damage results from the particular risk to which his conduct exposed him. In other words, the fact that the plaintiff has been careless for his own safety in one respect will not assist the defendant unless that carelessness gave rise to a risk of injury that in fact transpire. Professor Binchy (Law Society Gazette, June 1998) states that "it is very difficult for a doctor to establish a defense of contributory negligence on the part of the patient. The courts tend towards the view that part of the professional duty of care which a doctor owes his or her patient is to take account of the particular patient’s foolish or contrary characteristics and to 'factor in' these elements in determining the treatment required and in monitoring it to ensure that the patient complies with it.

Reported cases are rare. Professor Michael Jones (Medical Negligence. 1996) could find no English examples of where contributory negligence lessened the damages payable to a plaintiff in a medical negligence action. A patient can be careless in many ways. He or she may intentionally or carelessly mislead the doctor about his or her symptoms. After the treatment has begun, he or she may depart from instructions on such matters as taking the prescription at the stated times in the correct amounts or act in foolhardy disregard of his or her medical condition. Prior to the Civil Liability Act 1961 contributory negligence was an absolute defense. Under
section 34(1) of that Act "Where, in any action brought by one person in respect of a wrong committed by any other person, it is proved that the damages suffered by the plaintiff was caused partly by the negligence or want of care of the plaintiff or of one for whose acts he is responsible (in this part called Contributory Negligence) and partly by the wrong of the defendant, the damages recoverable in respect of the said wrong shall be reduced by such amount as the court thinks just and equitable having regard to the degrees of fault of the plaintiff and defendant..."

Under section 34(2)(b) of the Civil Liability Act, 1961, a negligent or careless failure to mitigate damage is deemed to be contributory negligence in respect of the amount by which such damage exceeds the damage that would otherwise have occurred.

2.16 Product Liability

There exists both common law and statutory liability for defective products. As part of the harmonisation of the laws of the Member States, Article 19 of Council Directive 85 / 374 required Member States to bring the directive into force not later than July 25th, 1988. Ireland was three years outside this deadline when enacting the Liability for Defective Products Act 1991. The directive / Act is a radical departure from the existing law. It establishes a scheme of "no fault" liability on producers of defective products. Attention is focused on the condition of the product rather than the behaviour of the producer.

Background Reading

However, we will first turn to deal with the common law liability for defective products. We know from our study of the tort of negligence that prior to Donoghue v. Stevenson (1932) there was no duty of care owed by the producers of defective products to the ultimate consumer. This absence of duty was explained on the grounds of absence of privity of contract between producer and ultimate consumer. Plaintiffs could not sue the producer in tort where they had no action against him in contract. A number (three) of exceptions existed to this general rule against liability for manufacturers of defective products:

1. Whether the presence of fraud on the part of the manufacturer is established before
the court: Langridge v. Levy (1837). In this case the defendant sold to the plaintiff's father a defective gun on the basis of false and fraudulent representations as to its quality.

2. In Heaven v. Fender (1883) liability was recognised in the case of failure to give a warning when there was awareness of a defect.

3. In cases such as Longmeid v. Holiday (1851), Thomas v. Winchester (1852) and O'Gorman v. O'Gorman (1903) liability for "inherently dangerous things" was recognised.

In Purthill v. Athlone UDC (1968) a detonator was found to be inherently dangerous. In Watson v. Buckley (1940) hair dye containing 10% acid was held to be an inherently dangerous thing. The most important development in product liability in the form of the House of Lords decision in Donogue v. Stevenson took place in 1932 and made the aforementioned exceptions obsolete. Lord Atkin stated that

"a manufacturer of products, which he sells in such a form as to show that he intends them to reach the ultimate consumer in the form in which they left him with no reasonable possibility of intermediate inspection, and with the knowledge that the absence of reasonable care in the preparation or putting up of the products will result in an injury to the consumer's life or property, owes a duty to the consumer to take that reasonable care ".

On the Question 'Who Is a Manufacturer?'

In Power v. Bedford Motor Co. (1959) the Supreme Court stated that the term manufacturer as described by Lord Atkins also applies to persons doing work on an article which they could foresee would be used by others without. In this case liability was imposed on the defendant garage for the negligent repair of a car. On examination in Brown v. Cotterill (1934) liability was imposed on a monumental mason when a tombstone that he had erected fell on a little girl who was placing flowers on her grandmother's grave.
On the Question 'Who Is a Consumer?'
The courts have applied as broad an interpretation to the term ‘consumer' as they have to the term 'manufacturer v McMahori & Rinchy note that in the narrow sense of the word consumer means 'the user of a retail product'.
However, in the Power case it was held that the purchaser of a car from a third party could sue the defendant who had negligently carried out repair work for the former owner.In Barnett v. H .1 Packer (1940) a confectioner who was injured by a sweet which he was placing in a display tray was permitted to sue although quite clearly the goods in question had never reached the “ultimate consumer”.

On 'The Form in Which They Left Him'
The most important decision in this area is Grant v. Australian Knitting Mills (1936). Here the Privy Council held that the defendants were liable to the ultimate purchaser of some pants which they had manufactured, and which contained a chemical that gave the plaintiff a skin disease when he wore them. It was argued for the defendants that, as they dispatched the pants in paper packets of six sets there was greater possibility of intermediate tampering with the goods before they reached the user than there was with the sealed bottle in Donoghue's case. However, the court held that "the decision in that case did not depend on the bottle being stoppered and sealed; the essential point in this regard was that the article should reach the consumer or user subject to the same defect as it had when it left the manufacturer." In the words of Winfield & Jolowicz 'Mere possibility of interference did not affect their liability'.

On The "Possibility of Intermediate Examination"
'As originally formulated by Lord Atkin the principle applies where there is "no reasonable possibility of intermediate examination". These words have been subject to much analysis, "almost as if they formed part of a statute" (per Lloyd LJ in Aswan Engineering v. Lupdine (1987)) but the better view is that they do not constitute an independent requirement which the plaintiff must satisfy but rather are to be taken into account in determining whether the injury to the
plaintiff was foreseeable (under general negligence principles). In Best v. Wellcome Foundation (1991) it was held that the plaintiff had no possibility of examining the vaccine before it was administered.

In Griffiths v. Arch Engineering (1968) the plaintiff borrowed from the first defendants a portable grinding tool which had been lent to them by its owners, the second defendants. The tool was in a dangerous condition because an incorrect part had been fitted to it at some time by a servant of the second defendant, and the plaintiff was injured in consequence. Although the first defendants had an opportunity of examining the tool, the second defendants had no reason to suppose that an examination would be carried out and they were liable to the plaintiff. The fact that the first defendants were also liable to the plaintiff meant not that the second defendants had a defense to the plaintiff's claim but that the case was one for ultimate apportionment of liability between the defendants.

In Kubach v. Hollands (1937) a manufacturer sold a chemical to an intermediary with an express warning that it had to be tested before use. The intermediary was liable for the resulting injury, but the manufacturer was not. Under the Civil Liability Act 1964 in actions for damage caused by defective products the fact that reasonable probability or possibility of examination exists after the item has left the defendant's hands does not exclude his duty but may, if the court so decides, be taken as evidence that he wasn't negligent in parting with it in that condition. If the examination is carried out but unsuccessfully so as not to reveal the defect, in these circumstances the manufacturer can be exonerated. If a plaintiff discovers a defect before injury and despite this knowledge goes ahead and uses the product, this will amount to a voluntary assumption of risk on his part (volenti non fit injuria). In Denny v. Supplies & Transport Co. (1950) the defendant conveyed badly loaded timber to the plaintiff's premises. The plaintiff saw that the timber was badly loaded when it arrived but went on to unload it anyway. It was held that the defendant was liable because there was no safe way of unloading the timber, therefore despite his knowledge the plaintiff was obliged to incur the risk.
2.17 The 1991 Act

As we have already noted, the Directive (and the Act which implemented it in this jurisdiction) involved a radical departure from the existing law by establishing a scheme of no fault liability on producers of defective products. The Act covers defective products only; it provides no relief for defective services. Section 2.1 of the Act provides that: 'the producer of a defective product shall be liable in damages in tort for damage caused wholly or partly by the defect'.

The Act defines Consumer broadly as being an injured party. This includes not just someone who suffers damage because of a defect in a product, but also, on his death, his personal representatives or dependants. The Act goes on to define 'Product' as 'all moveables except primary agricultural products'. The term Product does not exclude agricultural produce which has undergone 'initial processing'. Similarly, the term Producer is defined as 'the manufacturer or producer of a finished product, raw material or of a component part of a product and produce of the soil, farming stock and game where same have undergone initial processing. The term producer includes the person who carries out such processing. The term is also applied to any person who puts his name to any distinguishing feature of the product or who holds himself out as a producer. The term also includes any person who imports a product into the Community in the course of his business for supply to another.

What Does a Plaintiff Have to Prove?

He does not need to prove fault. He must prove the damage, the defect and the damage. Damage is defined as death or personal injuries and damage to or destruction of property other than the product itself. The lower limit for claims under the Act is C350.00 (UK limit C275.00). Damage is limited to private use or consumption; therefore, the Act is not designed to compensate for damage to property in a trade or profession. Personal Injury is defined in s. I(l) as any disease or impairment of a person's physical or mental conduct. The Act is silent on the question of recovery for pain and suffering.
What Is a Defective Product?

Section 5 of the Act stipulates that a defective product is one that does not provide the safety which a person is entitled to expect taking all the circumstances into account including:

1. The presentation of the product.
2. The use to which it could reasonably be expected the product could be put.
3. The time when the product was put into circulation.

In addition, a producer ceased to have any liability in respect of a product on the expiration of 10 years after it was put into circulation (except if proceedings have been commenced before the 10-year period.)

In Duffy v. Rooney and Dunnes Stores (June 1997, Laffoy J., High Court) the learned Trial Judge rejected the plaintiff’s contention that the 1991 Act was applicable since it was 'common-case' that the coat in question had been purchased before the Act came into force. For a more expansive note on the Duffy decision see pages 745-752 of the 1997 Annual Review of Irish Law (common law principles considered).


The Development Risks Defense of the State-of-the-Art Defense. Section 6.3 of the Act provides that a 'producer is not liable if he proves that the state of scientific and technological knowledge at the time when he put the product into circulation was not such as to enable the existence of the defect to be discovered'. A disadvantage of the Development Risks Defense is that plaintiffs in, for example, cases against pharmaceutical companies may be deprived of the benefit of the Act/Directive and may have to rely on the defendant's common law liability (above). This (Development Risks) Defence was not included in the German legislation where the action concerns damage done by a pharmaceutical. If a producer can prove that he did not put the product into circulation or that the defect came into existence after he did so or that the product was not supplied in the course of a business, then he will not be liable under the Act. Section 9 of the Act makes provision for a reduction of the plaintiff's award where he was guilty of contributory negligence.
A manufacturer of a component can rely on the fact that the defect was attributable to the design of the product into which the component was fined. Section 7 of the Act provides that the limitation period shall be 3 years from the date the plaintiff became aware or should reasonably have become aware (1) of the injury or damage, (2) of the defect and (3) of the identity of the producer. Section 10 of the Act prohibits and prevents any contracting out of the Act’s provisions. Section 11 of the Act provides that the common law and other statutory rights e.g. Sale of Goods Act 1898, remain unaffected by the Act.

2.18 Defamation

Although the Irish law on defamation is partially statutory in the form of the Defamation Act 1961, no statutory definition of the concept is provided in the Act. In a 1991 Report the Law Reform Commission recommended the creation of a statutory definition. Defamation is the generic terms for the torts of Slander and Libel. In the 1971 decision Quigley v. Creation Ltd. (IR 269) it was laid down that defamation is committed by the wrongful publication of a false statement about a person, which tends to lower that person in the eyes of right thinking members of society or tends to hold that person up to hatred, ridicule or contempt or causes that person to be shunned or avoided by right thinking members of society. A similar common law definition is recognised in England in the form of Lord Atkin’s test set out in Sim V. Stretch (a 1936 decision). He said the conventional notion that defamation connoted exposing the plaintiff to hatred, ridicule or contempt was too narrow. "I think the test is: would the words tend to lower the plaintiff in the estimation of right thinking members of society generally". Obviously, the Quigley definition is more comprehensive in that it makes explicit the requirement of publication, the prerequisite that the statement be false as well as expanding on what lowers a person in the estimation of right thinking members of society generally. So, what is the distinction between libel and slander? The difference relates to the form in which the statement was made. If the statement was made in a 'permanent (defamatory) form' it is libel, if it is made in an impermanent or transient form it is slander.

This distinction has practical repercussions in that:
(i) Libel is a criminal offence as well as being a tort.

(ii) Libel is actionable per se whereas slander, subject to limited exceptions, is only actionable if accompanied by actual damage to the plaintiff.

The exceptional cases where slander is actionable per se are:

a. Slanders which impute unchastity or adultery to any woman or girl (pursuant to Section 16 of the 1961 Act),

b. Slanders affecting a person's reputation from an occupational perspective (Section 19 of the same Act),

c. Slanders imputing the commission of a crime punishable by a term of imprisonment

d. Slanders imputing a contagious disease.

**The Concept of Reputation**

As can be seen from the Common Law definitions noted at the beginning of this lecture, defamatory words attack reputation. This concept of reputation is inherently problematic. In the United Kingdom the Faulks Committee recommended the introduction of a statutory definition of defamation. It is well established that words can be defamatory even though they contain nothing which is actually to the plaintiff's discredit i.e. in Yousoufoff v. M.G.M Studios an allegation in a motion picture that the plaintiff, a Russian Princess, had been raped by Rasputin was held to defame her. The Court held it to be sufficient that the defendant had published material which might cause the plaintiff to be avoided or shunned by society. The same applies to allegations of insanity or other illness. Of course, this is nonsense and contradicts the heart of the basic definition, that is the requirement that the plaintiff be lowered in the minds of right thinking members of society. Walsh J. referred to this point in Quigley v. Creations Ltd. where it was said that community norms rather than value judgements are applied by the court in this regard. However, one thing is certain; the tort of defamation does not exist to protect the plaintiffs' feelings.

Verbal abuse, no matter how severe will not ground an action if the words were conveyed in
private between the plaintiff and the defendant without publication i.e. without being transmitted to another (third) party (we will return to the requirement of publication later). Even if there is publication the abusive language used may not of itself be defamatory. For example, where the phrase ‘old bastard, is used for colloquial emphasis.

**The Innuendo**

It is perfectly possible for words which are not on their face critical of the plaintiff to constitute defamation. This is known as innuendo. The classic case on innuendo is Tolley v. Fry. A caricature of the plaintiff, a well-known amateur golfer was juxtaposed (without his permission) with a humorous rhyme in which the plaintiff extolled the virtues of Fry's chocolate. This was held to be defamatory due to the innuendo or implication that Mr. Tolley had prostituted his amateur status.

The case of **Cassidy v. The Daily Mirror** concerned the publication of a photograph of Mr. Cassidy with Miss X with a caption underneath which stated that their engagement had been announced. This publication was held to have defamed Cassidy's wife, the innuendo being that she was living with Cassidy in immoral cohabitation and was misleading her neighbours and friends as to her marital status.

In Plumb v. Jeyes Sanitary Compounds (1937) a picture was published of a policeman on traffic duty some 8 years before. The caption inserted by the company read "Phew, I'm dying to get my feet into a soothing Jeyes Fluid bath". This publication was held to defame Mr. Plumb.

**John Reynolds v. Ellio Mallacco (Patrick Magazine), December 1998**

**The Requirement of Reference**

There must be reference to the plaintiff. The test is whether the ordinary sensible person would understand the words to refer to the plaintiff. There is no requirement that the defendant have intended to refer to the plaintiff, the only relevant issue is the understanding of the ordinary, sensible person. For example, in Hulton v. Jones a humorous article was published in a newspaper about a fictitious person, Artemus Jones. Notwithstanding the article's fictional content, the
House of Lords held that the plaintiff, a Mr. Artemus Jones, had been defamed by the publication. Another case illustrating this strict approach to reference is Newstead v. London Express Newspaper. Here reference was made to 'the bigamist Harold Newstead of Camberwell'. Unfortunately, there were two Harold Newsteads in Camberwell with only one being a bigamist. The Court stated that “the risk of coincidence has to borne by the published in whose hands the control of accuracy lay”.

In Sinclair v. Gogarty, the plaintiff was only referred to as "[a Jew] in Sackville Street". In Knupffer v. London Express Newspaper (1944, House of Lords) the Court held that where a class of people is defamed no individual can sustain a defamation unless he can prove that the statement was capable of reference to him and that it was in fact actually understood to refer to him. For example, the Spectator Magazine referred to the journalists covering criminal trials in the Old Bailey as "beer sodden hacks". The plaintiff journalists successfully sued the magazine. The defamatory statement was held to refer to each of the plaintiffs individually.

The onus on publishers generally and newspaper publishers in particular to avoid unintentional defamatory reference to the plaintiff is especially high but is mitigated somewhat by Section 21 of the Defamation Act 1961. This protects those who publish defamatory materially innocently and then make an offer of amends. Section 21(5) provides a publisher is innocent if he did not intend to publish the words about the plaintiff and did not know the circumstances by which they might be understood to refer to him or that the words were not prima facie defamatory and he, the publisher did not know the circumstances which made them defamatory.

However, in both cases the publisher; must have exercised all reasonable care in relation to the publication. If the offer of amends is accepted by the plaintiff, then no proceedings can be taken by the plaintiff based on the publication in question. If the plaintiff does not accept the offer the defendant has a defense to the action (provided the author was not actuated by malice- Section 21(7)) if he can show that:

1. The publication was innocent in so far as it related to the plaintiff
2. The offer was made as soon as possible after learning of the reference to the plaintiff and
3. The offer has not been withdrawn.

The offer of amends must include:

a. A correction of the words complained of,
b. An apology,
c. Where copies of the defamatory statement have been distributed then the taking of steps
to notify those to whom the defendant's statement has been distributed.

Not only does the person offering to make amends have to show the authors lack of malice to
establish the defense, if the plaintiff can show that he has suffered special damage (that damage
resulting from the particulars of the case above and beyond the ordinary) then this too will bar
the Section 21 defense.

The Requirement of Publication

It is not enough that the statement in question be made to the plaintiff. This is because the law
of defamation does not exist to protect feelings. The statement must be published to a person
other than the plaintiff, or, to put it in more proper terms, there must be publication. According
to McMahon & Binchy “Anyone who makes a statement, who distributes or disseminates a
statement, or who repeats a statement to a third person, publishes that statement for the
purpose of the law of defamation." For example, we saw in the Berry case that the Irish Times
was liable for publishing a photograph of a protestor holding a placard with a defamatory
message.

The Rule in Speight v. Gospay (1891) provides that the original publisher of a defamatory
statement is liable for its republication by another person where the republication of the words
to a third person was a natural and probable consequence of the original publication. Pursuant
to Section 14(2) of the 1961 Act publication can be by words, visual images, gestures or other
methods signifying meaning. The subsection goes on to provide that one is NOT deemed to be a
publisher if he or she is merely involved in the distribution of a libel provided that, as persons
carrying out their business properly, the distributor neither knew nor ought to have known that
the paper, book etc. contained a libel. The Mechanical Publishers Defence.

This defense is set out in cases such as Fitzgibbon v. Eason & Sons and Vizetelly v. Maudie's Select Library. While the general rule is that each fresh publication amounts to a fresh cause of action “Since 1910 (the Fitzgibbon_case) the Irish courts have recognised that, in the case of distributors of defamatory material who are not the first publishers of it, there is an exception to the general rule that each time another person becomes aware of a defamatory statement there is an actionable publication.

**Defenses to a Defamation Action**

1. **Justification**
   This is the defense that the statement is true, and it represents an absolute defense to an action in defamation. The rationale is that the freedom of truthful speech is more important than one's reputation. Malice on the part of the defendant has no effect in this defense. Even if the defendant believes the statement to be false when he makes it, but it subsequently turns out to be true, this also is a defense.

   The onus lies on the defendant to prove the justification, i.e. to prove the truth as alleged because the presumption lies in favour of the plaintiff that the statement is false when the plaintiff has proved the statement is defamatory in the first place. If the defendant fails to discharge proof of justification, aggravated damages may be awarded, because it is seen by the courts as persisting in the lie. If the defendant can show the statement is substantially true, then justification will be a good defense.
2. Privilege
   a. Absolute Privilege
   This arises where the law considers that the public interest and freedom of speech is best served by guaranteeing uninhibited expression. This is totally privileged in that it protects all statements made. Examples of absolute privilege include statements made in either House of the Oireachtas and statements made in a Court of Law.

   b. Qualified Privilege
   In some circumstances the law recognises the right of a person to communicate freely provided it is not done maliciously: such occasions are considered to be occasions of qualified privilege. Generally speaking, the person who makes the statement on such occasions is protected, provided he was not motivated by malice in making the statement. It is sufficient to say, by way of generalisation, that situations where the maker of the statement has a duty to speak or is obliged to protect an interest are normally considered to be privileged. In such circumstances the speaker may speak without fear from the tort of defamation, provided he does not speak out of malice. Examples include professional communications between a solicitor and his client and statements made in the performance of a duty or the protection of an interest.

3. Offer of Amends
   This section provides a defense to a defamation action where the defendants innocently published defamatory material about another and then went on to make an offer of amends for the publication.

4. Consent
   The general tortuous defense of volenti non-fit injuria is available to the defendant in a defamation action to the same extent as it is available in other torts. In view of Section 34(l)(b) of the Civil Liability Act 1961, as interpreted in O'Hanlon v. E.S.B. (1969), this would mean at least that the plaintiff cannot complain if he has consented to the publication under contract or if he has “agreed to waive his legal rights in respect of it, whether or not for value.”
5. **Fair Comment on Matters of Public Interest**

   To establish this defense, the defendant must show.
   
   a. That the comment was made on a matter of public interest
   b. That what he said was comment as opposed to fact; and finally
   c. That the comment was fair in the sense of being honest.

6. **Apology**

   It is not a defense to a defamation suit for the defendant to claim that he made or offered to make an apology to the plaintiff. Section 17 of the Defamation Act 1961, however, provides that an offer by the defendant of an apology made before the commencement of the action, or as soon afterwards as he had an opportunity of apologising, shall be admissible as evidence in mitigation of damages. An apology must be genuinely given in an appropriate form. If it is not to the plaintiff’s satisfaction, it really compounds the original defamation and smarts of insincerity, or if it is "half-hearted" or "mean-spirited", it may be rejected by the court.

**Conversion**

According to McMahon & Binchy "conversion consists of any act relating to the goods of another that constitutes an unjustifiable denial of his title to them, or, as is sometimes said, the wrongful assertion of dominion over them. Conversion may be committed by the wrongful taking possession of the goods, abusing possession already acquired, or otherwise denying the title of the other person to them, whether or not possession has been acquired."

When possession has been lawfully acquired, subsequent abuse of it may constitute conversion. Fawning another's goods or sale and delivery of them are examples of such abuse. However, the delivery of goods to some other third party may not constitute conversion in certain cases. In *Morgan v. Maurer & Sons* (1964) a watch repairer in Ennis sent a watch given in for repair to Dublin, without having been authorised to do so by the owner. The watch was lost in the post on the way back. The trial judge held that the defendant was not guilty of conversion.
Section 34(2)(d) of the Civil Liability Act 1961 provides that the plaintiffs failure to exercise reasonable care in the protection of his own property will, except to the extent that the defendant has been unjustly enriched, be deemed to be contributory negligence in an action for conversion of the property.

**Passing Off**

The tort of passing off involves one trader representing his goods or services as those of another, to likely mislead the public and involves an appreciable risk of detriment to the plaintiff. According to Hudd J. in Polycell Products v. O'Carroll (1959) conversion "injures the complaining party's right of property in his business and injures the goodwill of his business. A person who passes off the goods of another acquires to some extent the benefit of the business reputation of the rival trader and gets the advantage of his advertising."

The core aspects of the tort of passing off are threefold:

- Firstly, the plaintiff must have a commercial reputation associated with the particular aspect of marketing in question,
- Secondly, the defendant must make a misrepresentation to customers through use of the plaintiff's reputation,
- Thirdly, the misleading of customers must cause an adverse impact on the plaintiff's business.

In Erven v. Townsend & Sons (1979), Lord Diplock stated that:

The cases make it possible to identify five characteristics which must be present in order to create a valid cause of action for passing off: (1) a misrepresentation (2) made by a trader in the course of trade (3) to prospective customers of his or ultimate consumers of goods or services supplied by him, (4) which is calculated to injure the business or goodwill of another trader (in the sense that this is a reasonably foreseeable consequence) and (5) which causes actual damage to a business or goodwill of the trader by whom the action is brought or (in a quia timet action) will probably do so.

In C & A Modes V. C & A (Waterford) Ltd. (1976) the plaintiffs carried on business in the clothing
trade with stores in the U.K. and Northern Ireland. The plaintiffs advertised in the Republic but did not have any outlets here. However, there was evidence before the court that many shoppers from the Republic purchased the plaintiff’s products when visiting Northern Ireland. The defendant carried on a drapery business in Waterford and although he had no connection with the plaintiff, he adopted their labels, sign-writing, logo and shop-frontage for his own business. He then refused to voluntarily discontinue this practice and the plaintiffs then took this action to restrain the defendants' unlawful conduct. An injunction was granting to restrain the defendant from passing off his business as the business of the plaintiff.


In the recent decision Smithkline Beecham PLC v. Antigen Pharmaceuticals Ltd. (High Court. McCracken J., March 25th, 1999) the plaintiffs applied for an interlocutory injunction to restrain the defendant from passing off its product as the plaintiffs and from infringing the plaintiff’s trademarks. The plaintiffs distributed and marketed the product “Solpadine”, the defendant applied to register an analgesic under the name “Solfen”. The learned Trial Judge had to consider whether there was a serious question to be tried as to the likelihood of association of the defendant's sign with the plaintiffs registered trademark. He also considered whether there was a serious question to be tried on passing off grounds and whether damages would be an adequate remedy. Having regard to all these factors relief was refused.

2.19 The data Protection Act
This Act introduced safeguards in relation to information held on computer only and does not
apply to manually held data. Section 7 of the Data Protection Act 1988 imposes a statutory duty of care on data controllers and data processors, to the extent that tort law does not already provide, about the collection of personal data and their dealing with the data. The duty is owed to “the data subject concerned”. Under the Act there is a right to establish existence of personal data and a right of access to such data.

2.20 Damages

Damages are the most popular remedy for civil wrongs. Damages can be Ordinary, Exemplary, Aggravated, Contemptuous or Nominal in nature. The damages to which a plaintiff is entitled from the defendant in respect of a wrongful act must be recovered once and for all. He cannot bring a second action upon the same facts simply because his injury proves to be more serious than was thought when judgement was given. The only form of compensation permitted by the law is a lump sum award, in contrast to payments made under the social insurance system or to the law in certain Continental countries.

Ordinary Compensatory Damages

These damages are calculated to compensate the plaintiff for the harmful effects of a wrongful act and or the moneys lost or to be lost and or expenses incurred or to be incurred by reason of the commission of the wrongful act e.g. negligence running down action, personal injury and damage to the car ordinary compensatory damages can be studied under two distinct heads:

a) General and
b) Special damages

In a standard road traffic accident ordinary compensatory damages would include repairs to the car, loss of earnings, future projected loss of earnings, medical treatment for injuries present and future. For example, damages for pain and suffering are referred to as General Damages, Damages for actual loss e.g. repairs to u car arc referred to as Special Damages.

In Coiiley v. Strain (1988, High Court, Lynch .1) the trial judge addressed the issue of general
damages in the context of pain and suffering caused by the defendant's tortuous act. He noted that the plaintiff was a highly intelligent young man who had a full appreciation of his plight; for pain and suffering to date he awarded $60,000; for future pain and suffering he awarded $110,000; and for the loss of expectation of life to the age of fifty he awarded, as is usual, a relatively nominal sum of $4,000.

**Aggravated Damages**

Compensatory damages are awarded as compensation for, and are measured by, material loss suffered by the plaintiff. A distinct category is that of aggravated damages, which may be awarded when the motives and conduct of the defendant aggravate the injury to the plaintiff. Compensatory damages may be increased by reason of:

1. The manner in which the wrong was committed at the time. This may involve elements of oppressiveness, arrogance or outrage.
2. The conduct of the wrongdoer after the commission of the wrong e.g. refusal to apologise or to ameliorate the harm or the making of threats to repeat the wrong.
3. The conduct of the wrongdoer and/or his representatives in the defense of the claim of the wronged plaintiff up to and including the trial of the action that involves repetition of the false accusation and if the plaintiff succeeds will usually lead to defamation.

**Punitive/Exemplary Damages**

The purpose of compensatory damages is to compensate. It is not intended to punish the defendant. That is why punitive or exemplary damages are regarded as exceptional in civil actions. Punitive/exemplary damages arise where the extent of the wrong committed or the manner of its commission is such that the Court wishes to express its particular disapproval of the defendant or the Court wishes to be publicly seen to have punished the defendant e.g. by making an example of him (Remember that in civil cases the standard of proof is proof on a preponderance or balance of probabilities. Therefore, the notion of punitive damages does not fit easily into the general civil scheme of things. For that reason, the courts have issued guidelines as to when they may or may not be awarded.)
**Rookes v. Barnard** (1964, House of Lords)

In this leading English case the Law Lords laid down guidelines as to when a court should award punitive damages. They recognised three categories of case where such an award would be justified:

(i) Where there was oppressive, arbitrary or unconstitutional conduct by the servants of the Government.

(ii) Where the defendant's conduct has been calculated by him to make a profit for himself which may well exceed the compensation payable to the plaintiff.

(iii) Where a statute expressly authorities the award of such damages.

**Rookes v. Barnard** has been approved in this jurisdiction (although the Supreme Court in **Dillon v. Dunnes Stores Ltd.** (1968) 'gave no indication that it regarded the award of punitive damages as being subject to the Rookes v. Barnard limitations'). Lord Denning's attempt (in the Court of Appeal) to consider it decided per incuriam was firmly rejected by the House of Lords in **Cassell & Co. v. Broome** (a 1972 decision). The law prior to the Rookes decision was much more plaintiff friendly and many courts in other jurisdictions (such as Australia, Canada and New Zealand) have thought this considerable pruning operation was too severe. The question whether exemplary and punitive damages are the same thing is still unresolved.

**Kennedy v Ireland** (a 1988 High Court decision)

In this case Hamilton P. found difficulty in distinguishing between exemplary and punitive damages but he held that phone tapping should attract 'substantial damages'. He sought to draw a distinction between 'punitive' and 'exemplary damages on the basis of differences in drafting as between ss.7 and 14 of the Civil Liability Act 1961.

In **Garvey v. Ireland** the Court relied on **Rookes** and awarded damages in accordance with category (I). (In this case the Garda Commissioner removed from office and claimed inter alia wrongful dismissal).

The situation was clarified in two further cases:
In *Macintyre v Lewis* (1991) it was held that there was no real difference in meaning between punitive and damages. However, Flaherty J. declined to decide whether they could only be awarded along the lines of *Rookes v Bernard*. However, he adopted the three considerations which Lord Devlin set out in that case as always requiring to be borne in mind when awards of exemplary damages were being considered and they were: '

1. That the plaintiff cannot recover such damages unless he is the victim of the punishable behaviour.

2. The power to award exemplary damages constitutes a weapon but while it can be used in defense of liberty it could also be used against liberty. Thus, there is a need for restraint in the amount to be awarded for such damages.

3. The means of the parties are material in the assessment of exemplary damages. Everything which aggravates or mitigates the defendant's conduct is relevant. (This is very unusual in tort law).

In *Conway v I.N.T.O.* (1991, Supreme Court) Conway was an 8-year-old pupil at Drimoleague National School. A teachers' strike commenced in 1976. In August 1976 the INTO issued a directive to all teachers to refuse to accept any child from the plaintiff's school. The plaintiff was deprived of schooling until February 1977. The defendant's liability in conspiring for the directive was established in a related case - *Crowley v. Ireland* (1980). The plaintiff's action commenced in 1981 in the High Court. It was contested on the assessment of damages only. The gist of the plaintiff's case was that although she was a bright student the deprivation of schooling at a critical time was a handicap to her in her later educational prospects and achievements. The plaintiff was awarded #11,500 which included #1,500 for exemplary damages. The defendant appealed to the Supreme Court stating firstly that exemplary damages were not claimed in the statement of claim and secondly that such damages were inappropriate unless it was established by the defendant's actions that they had sought to profit by more than any likely compensation payable by them to the plaintiff (Category 2, *Rookes v. Barnard*).

The Supreme Court again stated that there was no difference between punitive and exemplary
damages despite the fact of occasional differences in statutory terminology. They went on to say that in an appropriate case exemplary or punitive damages as an effective deterrent must be awarded by the courts as custodian of the citizens individual rights in exercise of the ample powers required for the defense of the Constitution. They criticised *Rookes v Barnard* and were not permitted to follow the categorisation adopted in that case. The defendant's appeal was disallowed. In addition, the Supreme Court held that the plaintiff didn't explicitly have to plead exemplary damages in the statement of claim. The trial judge was entitled in the running of the case before him to consider exemplary damages.

McCarthy J. said that the purpose of awarding exemplary damages is to make an example of the wrongdoer to show others that such wrongdoing will not be tolerated and more to the point will not be relieved on payment of merely compensatory damages. He said that the very occasional windfall for a plaintiff is distinct from the courts overriding objective to mark its disapproval and punish the defendant. Nominal damages are awarded in recognition of the fact that the plaintiff has had his legal rights infringed where such infringement caused no actual damage to him. In *Constantine v. Imperial Hotels Ltd*; the defendants were guilty of a breach of their duty as common inn-keepers when they unjustifiably refused accommodation in one of their hotels to the plaintiff, a well-known West Indian cricketer. Although he was given accommodation elsewhere, he was awarded nominal damages of five guineas. In *Grealey v. Casey* (1901, Court of Appeal) the court awarded a farthing damages on the plaintiff having established a trespass to his person:

**Contemptuous Damages**

Contemptuous damages are awarded where the court has formed a very low opinion of the plaintiff's bare legal claim, or that his conduct was such that he deserved, at any rate morally, what the defendant did to him. Contemptuous damages are awarded where the court is of the view that the plaintiff; although technically entitled to a verdict, has no moral claim to damages.

McMahon & Binchy consider particular forms of damage under two general heads:

a) Pecuniary and
b) Non-pecuniary loss

**Pecuniary Loss**

On Proof of loss of earning capacity, the authors cite the decision of the Supreme Court in *Long v. O'Brien & Oonin Ltd.* (1972) where Walsh J provided “an excellent summary of the approach of the courts” in assessing future loss of earnings. The relevant criteria include:

i. **The plaintiffs former (pre-accident) earning capacity**;

ii. **The physical condition of the plaintiff**; the plaintiff's physical condition is particularly relevant if it excludes him from certain types of work, e.g. driving, surgery etc.

However, in *Forsyth v. Roe Quarry* (1958) Lavery J said, "the loss of an eye is a terrible affliction but its effect on ability to work is not, outside certain classes of work, so very great."

The Supreme Court in *Doherty v. Bowaters* Irish Wallboard Mills Ltd. established that plaintiffs who had suffered a decreased life expectancy were entitled to damages for the earnings of the "lost years". (It is important to keep this issue distinct from damages for loss of life expectancy simplicitir (see Conley v. Strain above).

- **The state of the labour market**: For example, in *Reddy v. Bates* (1984) the Supreme Court stressed that the high rate of unemployment “must inevitably lead to the conclusion that there is no longer any safe, much less guaranteed, employment”. The importance of actuarial advice cannot be over emphasised in this area. (*Sexton v. O'Keefe*, Supreme Court, 1966) but the evidence of the actuary cannot contravene the ultimate issue rule for the actuary is not the judge of the case" per Walsh J in *Swords v. St. Patrick's Copper Mines* (1966).

It is clear from the decision of Kenny J in *Clover V. B. L.N.* (No.2) (a 1973 decision of the High Court) that the plaintiffs award of damages for pecuniary loss is decreased to consider tax he
would have paid on the earnings had they arisen in the normal course of his occupation. This is, of course, effectively a hidden subsidy for defendants’ insurance companies. Kenny J. followed the decision of the House of Lords in British Transport Commission v. GourJey (1956) and has since been adopted by our Supreme Court in Cook v. Walsh (1984).

**Non-Pecuniary Loss**

No-pecuniary loss can be considered under three headings:

**Pain and Suffering**

The award of general damages for pain and suffering was considered at the beginning of this chapter under the heading ‘Ordinary Compensatory Damages’.

**Loss of Expectation of Life**

The High Court decision in Conley v. Strain (1988) was referred to earlier in the chapter. In this case the relatively nominal sum of £4,000 was awarded for loss of expectation of life to 50. McMahon & Binchy note that “Compensation for loss of expectation of life raises formidable legal and philosophical problems: the topic 'might seem more suitable for discussion in an essay on Aristotelian ethics than in the judgment in a court of law'. The existence of the right not to have one’s life span reduced by the tortious act of another was first recognised in England in 1935 and approved by the House of Lords two years later in *Flint v. Lovell*. In this jurisdiction, where a cause of action survives for the benefit of the estate of a deceased person, the damages recoverable for the benefit of his estate are not to include damages ‘for loss or diminution of expectation of life or happiness’. Thus, the problem here is limited to cases where the victim is still alive but his or her expectation of life has been reduced. In *O'Sullivan v. Dwyer*, the Supreme Court held that an award of about £10,000 in 1969 for the loss of expectation of between 16 and 20 years of life was excessive, and a new trial on the issue of general damages was ordered.

**Loss of Amenity**

Quill notes that “the assessment of damages for matters such as pain, suffering, loss of amenity and so forth is, necessarily an artificial exercise, as there can be no precise monetary
measurement of the plaintiff's personal interest in that which has been lost. Cane describes these awards as essentially arbitrary and inadequate in the sense that they are more in the nature of solace, than of recompense. The problem of assessment is most starkly evident in cases of serious, long term injury, as evidenced by the remarks of O'Higgins CJ in Sinnott v. Quinnsworth, where the plaintiff was rendered quadriplegic in a road traffic accident:

To talk of compensating for such a terrible transformation is to talk of assaying the impossible. Nevertheless, it is this impossible task which the court must attempt in endeavouring to determine, in terms of money, compensation for such an injury. The danger is that in doing so all senses of reality may not be lost. Since money cannot possibly compensate, [one] may question whether it matters what sum is awarded. It matters to the defendant, or his indemnifies, and, would be a legitimate ground for complaint, if the sum awarded were so high as to constitute a punishment for the infliction of the injury rather than a reasonable, if imperfect, attempt to compensate the injured. It also matters to contemporary society if, by reason of the amount decided upon and the example which it sets for other determinations of damages, the operation of public, policy would thereby be endangered.

The plaintiff's lack of awareness of his injuries or loss of amenity is a factor which can be used to reduce the level of general damages awarded. In Cooke v. Walsh, the Plaintiff's injuries were such as to leave him with a mental age of approximately one, with a long-term prognosis of a possible rise to two. The Supreme Court found an award of #125,000 genera) damages to be excessive, as 'compensation should be moderate', given that the plaintiff had been spared much suffering because of his Jack of appreciation of his condition."

2.21 Review Questions

1. Accountants and auditors owe a duty of care to their clients. They may also owe a duty of care to persons who are not their clients in the tort of negligent misstatement. Analyse and discuss the potential liability of accountants and auditors to non-clients where they give negligent advice or information causing financial losses.

2. What is the concept of "Reputation".
3. The primary function of the law of torts is to provide a method of redress for individuals who have suffered loss. In what ways can this be achieved.

4. Deconstruct how professional negligence affect the development of the nation?

Briefly distinguish Libel and Slander.