



Legislative Base for Integrated Risk Management Plans:  
Phase Three – Gap Analysis  
**Fire Research Report 12/2008**



Legislative Base for Integrated Risk Management Plans:  
Phase Three – Gap Analysis  
**Fire Research Report 12/2008**

Fire and Risk Management Support Services Ltd

August 2008  
Department for Communities and Local Government

The findings in this report are those of the authors and do not necessarily represent those of the Department for Communities and Local Government

**Copyright in the contents, the cover, the design and the typographical arrangement rests with the Crown. This document/publication is value added. If you wish to re-use this material, please apply for a Click-Use Licence for value added material at [www.opsi.gov.uk/click-use/system/online/pLogin.asp](http://www.opsi.gov.uk/click-use/system/online/pLogin.asp).**

Alternatively applications can be sent to:  
Office of Public Sector Information  
Information Policy Team  
Kew  
Richmond upon Thames  
Surrey TW9 4DU

E-mail: [licensing@opsi.gov.uk](mailto:licensing@opsi.gov.uk)

*This publication has been approved by Ministers and has official status. The contents of this publication may be reproduced free of charge in any format or medium for the purposes of private research and study or for internal circulation within an organisation. This is subject to the contents being reproduced accurately and not in a way that implies official status. Any publisher wishing to reproduce the content of this publication must not use or replicate the logo or replicate the official version's style and appearance, including the design, and must not present their publication as being an official publication as this may confuse the public. The reproduced material must be acknowledged as Crown Copyright and the title of the publication specified.*

Any other use of the contents of this publication would require a copyright licence. Further information can be obtained from [www.opsi.gov.uk](http://www.opsi.gov.uk)

Communities and Local Government  
Eland House  
Bressenden Place  
London  
SW1E 5DU  
Telephone: 020 7944 4400  
Website: [www.communities.gov.uk](http://www.communities.gov.uk)

© Queen's Printer and Controller of Her Majesty's Stationery office, 2008.

If you require this publication in an alternative format please email [alternativeformats@communities.gsi.gov.uk](mailto:alternativeformats@communities.gsi.gov.uk)

Communities and Local Government Publications  
PO Box 236  
Wetherby  
West Yorkshire  
LS23 7NB  
Tel: 08701 226 236  
Fax: 08701 226 237  
Textphone: 08701 207 405  
Email: [communities@capita.co.uk](mailto:communities@capita.co.uk)  
Online via the Communities and Local Government website: [www.communities.gov.uk](http://www.communities.gov.uk)

August 2008

Reference number: 08 RSD 05335

ISBN: 978-1-4098-0119-1

# Contents

<b>Executive Summary</b>	3
<b>Chapter 1: Methodology</b>	6
<b>Chapter 2: Gap Analysis Findings</b>	7
<b>Chapter 3: Conclusions</b>	12
<b>Chapter 4: Recommendations</b>	14
<b>Annex A: Liability for Defective Advice</b>	16



# Executive Summary

## Introduction

Any Integrated Risk Management Plan (IRMP), or supporting guidance, must be fit for purpose and should provide, as comprehensively as reasonably practicable, an overview of all associated Legislations/Codes/ Guides etc, or indicate, where appropriate, the need for further analysis or research to support the IRMP.

This Phase Three report reviews the findings of the Phase One and Phase Two reports. The outcome of this review will provide individuals who are preparing IRMPs on behalf of Fire and Rescue Authorities (FRAs) with an understanding of the range of the legislative requirements that they need to take into account. It is also considered essential that up to date and appropriate national standards, policy, guidance, etc, are also reflected in the IRMP and therefore this review also identifies some of the Standards, Codes, Guidance, and other Advice, that are considered to be essential supporting material.

This review will allow those individuals to undertake a comparison with their own knowledge base and processes and, where appropriate, to identify any 'gap' in the knowledge, processes, etc, relevant to their individual circumstances. The information in the review will also provide material that will support the development by FRAs of technical specifications used for the procurement of services and equipment; development of operational systems; or the formal guidance or enforcement notices issued.

## Research methodology

The project team have reviewed the evidence and research findings contained within the Phase One and Phase Two reports. The review has identified some of the potential issues, and subsequent impacts and consequences for the FRAs of failure by them to meet any legal obligations, or any subsequent legal challenge for failing to give due consideration to Legislation, Standards, Regulations, Codes, Guidance, Advice, etc when formulating IRMP.

## Findings

The Phase Three findings contained within this report illustrate the range and extent of 'risk' to the FRAs of any potential legal challenges.

Phase One attempted to identify the ‘legal requirements’ considered by FRAs in the development of their IRMPs. It became apparent that where national guidance has been issued by the lead Government Department (currently Communities and Local Government), or the Chief Fire Officers Association (CFOA), FRA reference holders have assumed that all relevant legal implications will have been considered and highlighted as necessary by the issuing body.

Phase One also identified that, in the majority of cases, the personnel responsible for developing IRMPs only seek advice on those issues that, from their own experience and knowledge base, they believe would benefit from further advice or clarification. It was also determined that the majority of FRAs only referenced the Legislation/Codes/Guides etc that were known or believed, by their reference holders, to have direct relevance to the IRMPs that they were developing. In addition, in the majority of cases where FRAs made use of their legal departments, the expertise available on FRS relevant matters may have been very limited.

It is considered that the specific legal analysis provided within the Phase Two report<sup>1</sup> will be very useful in:

- assisting FRAs in determining various elements of their IRMPs
- providing useful reference points for FRAs legal teams when providing legal advice
- complementing ‘in house’ guidance with the results of the documents that have been reviewed in the report.

However since Phase Two initially identified over 2,000 documents (Legislation/Codes/Guides etc) with potential relevance to the IRMP process it is unlikely that the advice received at a local level embraces the total combination of relevant matters since this would be dependent on the varying experience of the individuals and legal departments concerned, or the scope of the instructions from FRAs.

There is little evidence to suggest that robust systems are in place to create a knowledge base to identify, and subsequently store, information on the Legislation/Codes/Guides etc, that are relevant to the development of IRMPs. In addition it is apparent that there is a need for:

- central guidance on a number of issues including methodologies for audit and consultation utilising existing best practice; and
- a database that will enable FRAs to determine the extent and range of Legislation/Codes/Guides/ etc, that could impact upon the various elements of the IRMP process.

<sup>1</sup> Due to the constraints associated with the project the legal and other advice contained within the Phase Two report should be seen as indicative, identifying some of the ‘key’ documents and issues for consideration. It should not be considered to be a complete review covering all legal and other advice that needs to be considered as part of the IRMP process.

## Future considerations

The main implications and consequences come from the ability of FRAs to accurately identify forthcoming changes to Legislation, Regulations, Standards, Codes etc, and the impact that these developments will have on their IRMPs. In addition to the need for a database there is also a requirement for national representation on technical standard committees such as BSI and CEN to ensure the interests of the Fire & Rescue Service are considered. The resulting technical information would be interpreted centrally regarding policy and impact and the findings fed into the database for inclusion within local IRMPs.

Over 2,000 documents were initially identified as having an impact on IRMPs and over 200 have been reviewed from a legal perspective, and these will form the basis for the subsequent development of a national IRMP database. It is recommended that consideration is given to either reviewing the remaining documents and incorporating the findings into the IRMP database or advising other national bodies and/or local FRAs/FRSs of the additional documents that should be given consideration when formulating their IRMPs.

# Chapter 1

## Methodology

### 1.1 Gap analysis

The project team have reviewed the findings of Phases One and Two – what do FRAs currently do to ensure that they meet their legal obligations and what, in the view of the Project Team, is the knowledge base, and what are the processes, required to ensure that FRAs meet their legal obligations? Although it is called a gap analysis it also raises issues that were identified and considered to be relevant to maintaining the evidence base for IRMPs

In particular the project team identified the Legislation, Standards, Regulations, Codes, Guidance, Advice, and areas of Corporate Social Responsibility (CSR), that were considered by the team (including their legal and technical advisors) to be part of a knowledge base that would need to be taken into account by those developing IRMPs.

### 1.2 Legal consequences

In particular, consideration was given to both the individual and ‘corporate’ consequences, of not taking into account the legal issues and responsibilities identified in the findings of Phases One and Two. However this review was limited to consideration of generic issues within English law.

### 1.3 Future implications

The gap analysis process also required the project team to give consideration to future potential impacts, arising from any changes in Legislation, Codes, Guidance etc, that are anticipated between publication of the report and the year 2016. Any potential impacts have been considered from the generic viewpoint.

# Chapter 2

## Gap Analysis Findings

### 2.1 The use of 'in-house' legal teams

The Phase One scoping study identified that in developing their IRMPs, and in particular when considering the impact of Legislation, Regulations, Standards, Guidance, etc, (such as that issued by Communities and Local Government), the vast majority of FRAs relied principally on the understanding and knowledge of those personnel directly responsible for developing their IRMPs. From the information provided by the interviewees in Phase One in all but one large FRA, in-house legal teams were consulted only on an *ad hoc* basis, usually only when individual legal issues pertaining to IRMPs were identified by the personnel referred to above.

Legal teams without specialist knowledge of the range of matters which bear on FRS statutory functions, may not be fully conversant with linking legislation, regulations, codes, guidance, etc that could impact upon the respective topics which they examine with a view to advising their clients.

With the time and resource constraints of such a project as this it has been impossible to determine if in-house legal teams restrict their advice to the narrow issues relating strictly to their instructions, or whether the advice encompasses other primary and secondary Legislations, Regulations, Codes, etc, which have an oblique bearing on FRA statutory functions.

### 2.2 Knowledge management

Almost all FRAs stated that they were reliant upon departmental heads and their teams for having the knowledge and understanding of the legislation, regulations, codes, standards, etc, that needed to be taken into account in respect of their core function, and in the development of IRMPs. It was readily acknowledged that if the individual or team is lost, for whatever reason, it may take several years for the knowledge base to be re-established and that in the meantime it could well be that the organisation is at risk.

This knowledge base should be captured, as a minimum, within an appropriate policy document or ideally within an electronic format as this would offer more flexibility and functionality. This will ensure that not only is the knowledge captured and maintained but also enhanced. In addition having policies for managing information and the development of local IRMPs is crucial since, if the service were to face any legal challenge, it will not be sufficient to assert that there are sound policies and procedures in place: rather, it will be necessary to produce evidence of such matters.

## 2.3 Literature review findings

Phase One of the project highlighted that FRAs only gave consideration to Legislation, Regulations, Guidance, Codes, etc that either specifically referred to FRSs or that clearly could be seen to impact upon the FRS.

The initial analysis of the literature review in Phase Two identified approximately 900 documents (Legislation, Standards, Codes, etc) that it was considered needed to be taken into account within the IRMP process. However a subsequent review of this analysis identified 1,561 such documents with a potential impact on the IRMP process.

The project team were tasked with reviewing 10 per cent of the documents identified – ultimately 210 documents were reviewed. In addition to the outline of the general legal requirements, David Stotesbury (Barrister) provided an overview and analysis of sample 'key' documents likely to impact upon FRAs' statutory functions and the IRMP process. These documents and the sample legal analysis were discussed in detail in the Phase Two report.

The legal analysis provides reference points for FRAs when considering their local IRMPs and exemplifies significant issues in the sweeping range of matters that can be the determinants of legal advice. However due to the constraints of the project, this analysis should be considered to be indicative and not as a comprehensive review of all relevant documents.

## 2.4 Central database

No evidence has been received that any FRA has its own definitive list of Legislation, Regulations, Guidance, Codes, etc that is to be considered within the IRMP process, besides which there is over reliance upon individual reference holders using their experience. This potentially places organisations at 'risk', through not being able to rebut any challenge to the local IRMP process on the basis that it does not have due regard to applicable Regulations, Guidance, Codes, Standards, etc.

## 2.5 Communities and Local Government website and guidance

The current Communities and Local Government website was perceived as a good source of information by all FRAs, especially for personnel new to the IRMP process. However there are concerns as to whether the information remains, or will remain, current. There is, accordingly, a need to enhance and maintain the site to ensure it supports FRAs, by reflecting available and current information.

The majority of FRAs remain reliant upon Communities and Local Government, other government departments, and other lead partner organisations, to provide timely and relevant information for IRMP purposes; historically this has been achieved via Dear Chief Officer letters; Fire Service Circulars; Fire Precautions Act Circulars and latterly Fire & Rescue Service Circulars (FRSCs). These, and future FRSCs, will have a principal and ongoing role for some time to come.

Some FRAs consider that any central advice provided will have been fully considered from a legal perspective and as such can be implemented without further consideration, even if it is known that the guidance is out of date. However it is the responsibility of the FRA to have in place mechanisms to ensure that any guidance that the FRA follows, uses or issues, is fit for purpose. Failure to do so could result in future legal challenge.

To specifically address these issues the Barrister was asked:

**(a) What is the liability of a Fire & Rescue Authority where it continues to follow advice or guidance issued by an authoritative third party, although it now has good reason to believe that the advice or guidance is deficient or defective?**

and

**(b) What is the liability of an organisation that has issued advice or guidance and now has good reason to believe that the advice or guidance is deficient or defective?**

The detailed answers to these questions are given in Annex A, but are summarised as follows

(a) *".....reliance by fire and rescue authorities on Departmental advice is foreseeable; and it is also foreseeable that loss would be suffered if inadequate and/or outdated advice and guidance is made available to fire and rescue authorities. It is, moreover, arguable that a special relationship exists between central government and fire and*

*rescue authorities in respect of advice and guidance specifically directed to such authorities; and that the Department has assumed responsibility to the claimant.”*

and

- (b) *In respect of fire and rescue services which continue to follow advice or guidance issued by an authoritative third party, despite having good reason to believe that such advice or guidance is deficient or defective, such authorities will be unable to recover from the party which has provided the advice, under the Tort of Negligent Misstatement, since, ....., proving liability entails, inter alia, reasonable reliance by the recipient of the advice on the misstatement that resulted in loss; and knowledge that the advice was deficient or outdated clearly nullifies such reliance. Furthermore, if the advice received from an authoritative third party – such as Communities and Local Government – is then transmitted by fire and rescue authorities (which are aware of the defectiveness of the advice) to other individuals and organisations, the courts could hold that defendant authorities have assumed responsibility to the respective claimants who place reasonable reliance on such advice or guidance. It will, therefore, be prudent to fire and rescue authorities, too, to review advice received from (in particular) central government and identify and cull the advice and guidance that is no longer applicable, in order to prevent potential actions under the expanding Tort of Negligent Misstatement.*

## 2.6 Existing audit and review processes

The Phase One scoping study highlighted that some FRAs experienced limited feedback when conducting their IRMP consultation, and one even stated that they had never actually received any form of feedback.

The consultation process undertaken within the IRMP process reduces the risks to individual FRAs, however, this could place a duty of care upon the organisation/body providing the advice and guidance.

Currently FRAs are reliant upon external auditing, in respect of reviewing their IRMP arrangements, from either the CPA or Operational Assessment of Service Delivery. It is unlikely that any of the review teams from these external audit processes have, within current arrangements, the capacity or technical understanding to challenge or validate the legal aspects of the IRMP process.

## 2.7 Communities and Local Government experience

The stakeholder interview process with Communities and Local Government reference holders within Phase One highlighted that there were no agreed processes, or protocols, to provide guidance to reference holders as to the consultation processes that they should use, when consulting with their stakeholders.

Whilst a number of the reference holders were able to draw on their experience of many years in their respective posts to guide them in these unclear areas, a number expressed concern about the lack of guidance available to them.

A number of the reference holders acknowledged that their knowledge of likely future legal developments was restricted to those areas that they were directly involved with, and that as such they were unable to anticipate the impact of legal, or technical, developments in other areas.

Those with a technical background tended to have a good (although not complete) background of legal implications and 'good practice guidance'; whilst the knowledge base of others was understandably rather limited (however it must be acknowledged that those non-technical reference holders who had been in post for a considerable period of time had developed a good background of both legal and technical knowledge).

Of particular concern, and raised by both those with a policy and technical background, was the reduction in the direct technical involvement of departmental representatives in Standards and Guidance development and the perceived negative effect this was already having on their ability to reflect these implications in the future development of departmental policies or guidance.

# Chapter 3

## Conclusions

### 3.1 Knowledge management

Not having a structured policy has placed the FRA at unnecessary risk in the event of legal challenge. This is exemplified by claims under the Tort of Negligence against FRAs. Claimants will seek to ascertain whether the defendant FRA was acting in accordance with generally accepted practices at the time of the incident giving rise to the claim.

It is essential that FRAs have a robust policy highlighting the methodology and considerations that are the 'key' elements undertaken within the formularisation of local IRMPs, including their consultation, audit and review processes.

The House of Lords laid down in *Hedley Byrne v. Heller* (1964) AC 465, that where a special relationship exists between parties, the parties are under a duty of care to the other when giving advice or information. It would, accordingly, be essential to draw the attention of FRAs to the existence of the considerable body of residual documentation. Therefore consideration should be given to determining how best to inform FRAs of the large number of documents, identified in the Phase Two report that may have an impact upon the local IRMP.

### 3.2 Environmental scanning

Notwithstanding the provision of any central guidance or database, any legislative duties placed on a FRA will remain the responsibility of the FRA concerned to ensure compliance. Therefore FRAs should continuously conduct their own wide ranging scanning for relevant Legislation, Guidance, Standards, Codes, etc, taking into account not only primary but also secondary implications. Any 'documents' identified as being relevant, and the reasons, should be recorded to ensure a full audit trail, which can be referenced in the event of legal challenge.

Collectively across Communities and Local Government and its lead partner organisations it would be beneficial to conduct ongoing 'environmental' scans designed to assess future impacts on both the external and internal functions of FRAs. Once identified, issues should be assessed and scoping work conducted to ensure that respective FRAs are in the best possible position to address future challenges.

### 3.3 Audit and review processes

Before undertaking any audit or review of FRAs, national bodies and lead organisations must be adequately aware of the compendium of legislation, codes, standards, guidance, obligations, etc, including secondary factors.

Prior to issuing advice and guidance, appropriate legal advice should be sought to ensure that all material legal issues and consequences have been considered. This safeguard, although time consuming, will minimize the possibility of successful claims against lead organisation following legal challenge.

It would be advantageous if National Guidance was provided, to ensure that consultation exercises are robust and meaningful; and, therefore, yield effective results. IRMP documents within the consultation process should be fully supported with references to the appropriate Legislation, Guidance, Regulations, etc. as part of the background information. This will enable partner organisations and the public to assess the impact of local plans.

### 3.4 National scheme for sharing 'Best Practice'

Historically Communities and Local Government has provided guidance, advice and support to FRAs for development of the IRMP process. This has been supported by other National Bodies and locally through Regional Management Boards. Currently there is no National scheme for sharing local 'best practice' and identification and implementation of such schemes and initiatives is reliant upon the efforts of individual managers. With the immense changes within FRAs within recent years through the modernising agenda, focus should be re-directed to the important sharing of local 'best practice'.

# Chapter 4

## Recommendations

The introduction of a central database will support FRAs and enable fuller consideration of the wider implications of IRMP including primary and secondary influences. The Documents identified as part of the Legal Analysis in Phase Two will be an ideal basis for the database, which will provide excellent support to FRAs and their legal teams.<sup>2</sup>

**Recommendation 1:** A central database should be developed or designed to assist in the development of local IRMPs by highlighting the various documents, etc that are relevant to the issues identified within the IRMP.

Having policies for managing information and the development of local IRMPs is crucial since, if the service were to face any legal challenge, it will not be sufficient to assert that there are sound policies and procedures in place: rather, it will be necessary to produce evidence of such matters. Procedures which are systemic and transparent in the event of claims will assist FRAs materially both in fulfilling their statutory functions and evidencing this in the event of a claim.

**Recommendation 2:** Each FRA should capture its local knowledge base within an appropriate policy document (ideally within an electronic format as this would offer more flexibility and functionality). This will ensure that not only is the knowledge captured and maintained but also enhanced.

**Recommendation 3:** Central guidance should be developed on systems for local use to capture the skills, knowledge and understanding held by 'key' individuals, enabling sharing and building of the knowledge base. This will remove the associated risks of only individuals holding 'key' knowledge and understanding.

<sup>2</sup> Consideration should be given to issuing interim guidance for local 'environmental' scanning to identify Primary and Secondary Legislation, Standards, Codes, etc, prior to the introduction of the database. This should include a mechanism for reporting back to Communities and Local Government, to ensure that those FRAs which have identified actual and potential issues bearing on their functions share their findings - thus enabling national guidance where appropriate.

**Recommendation 4:** National bodies and lead organisations providing advice and guidance to FRAs should ensure that their own systems are developed to be soundly based, both technically and legally, and that those systems shift from reliance upon personal experience to a systemic foundation.

**Recommendation 5:** Systems should be developed to assess future impacts upon FRAs of Standards and Guidance development. This could be contributed to by enhancing / building partnership arrangements with National Bodies and private companies already involved within CEN, BSI and ISO committees; and, where appropriate, drawing up Memoranda of Understanding.

**Recommendation 6:** A forum should be developed for the promotion of local and national 'best practice' relating to IRMPs. This forum should be the mechanism for keeping FRAs informed of the outcomes of (a) any determinations undertaken under the Regulatory Reform Order, and (b) of any prosecutions or appeals under the Regulatory Reform Order.

# Annex A

## Liability for Defective Advice

- A1.1 The relevant area of Tort for liability in respect of defective advice and guidance is Negligent Misstatement; and, since 1964, the leading case has been the decision of the House of Lords in **Hedley Byrne & Co Ltd v Heller & Partners Ltd** [1964] A.C. 465. Before **Hedley Byrne**, the position with regard to negligent misstatement was that there could be no liability apart from contract or a fiduciary relationship, or, perhaps, in a case of physical damage to the person or to property. Pure economic loss was not recoverable for such statements. The facts of **Hedley Byrne** were that the claimants, who were advertising agents and had entered into advertising contracts with a company named Easipower, sought references from the defendants, Easipower's bankers, to determine whether they could extend credit in connection with an advertising contract. On two occasions, the defendants gave references favourable to Easipower; which were forwarded to the claimants by their bankers. The defendants were unaware who the claimants were, and had marked their communications to the plaintiffs' bankers "Confidential. For your private use . . . ." Nor did they know that the inquiry concerned an advertising contract: though they would have been aware that the references would be sent to a customer, as Lords Reid and Morris pointed out (*ibid.* pages 482 and 503 respectively).
- A1.2 Relying on these references, the claimants incurred expenditure regarding Easipower; and when the company went into liquidation, they suffered substantial loss. They sought to recover this from the defendants by alleging that the defendants' favourable references regarding Easipower was negligent. At first instance, McNair J. held that the defendants owed no duty to the claimants, this being affirmed in the Court of Appeal. The House of Lords held that the defendants were not liable; but they did so on the facts of the case: rather than any general rule that there was no liability for negligent misstatement. Rather, Lords Reid, Devlin and Pearce exonerated the defendants on the narrow ground that the references had been given "*without responsibility*". Lords Hodson and Morris considered that even without this disclaimer, there was no duty of care on the facts. However, they agreed that it was legally possible for a duty of care to exist in respect of statements.
- A2. **Hedley Byrne** left it unclear as to the precise circumstances which create liability for negligent misstatement. Notwithstanding that, it was a landmark case in holding that a duty of care may exist in some circumstances where information or advice is provided and there is 'special relationship' between the parties. It was, accordingly, accepted that there could be liability for 'words' as well as 'deeds': though the

general principles of Negligence in **Donoghue v Stevenson** [1932] AC 562 (HL) is not wholly relevant here. The rationale underlying the restriction in **Hedley Byrne** of liability for words to circumstances where there is a 'special relationship', was to prevent the floodgates being opened to actions. It was considered, as Cardozo J. had put it in the American case of **Ultramares Corporation v Touche** 255 N.Y.Rcp. 170 (1931), that if such a limitation was not set, there would be liability "*in an indeterminate amount for an indefinite time and to an indeterminate class.*"

- A3. As to what the criteria were for liability where negligent advice or information was provided, these were never laid down in **Hedley Byrne**. Instead, broad principles were identified; Lord Morris said:

*"... it should now be regarded as settled that if someone pos- sessed of a special skill undertakes, quite irrespective of con- tract, to apply that skill for the assistance of another person who relies upon such a skill, a duty of care will arise. The fact that the service is to be given by means of or by the instrumentality of words can make no difference. Furthermore, if in a sphere in which a person is so placed that others could reasonably rely upon his judgment or his skill or upon his ability to make careful inquiry, a person takes it upon himself to give information or advice to, or allows his information or advice to be passed on to, another person who, as he knows or should know, will place reliance upon it, then a duty of care will arise (ibid. p 514)."*

- A4.1 It can be seen from the above passage that: (a) the giver of information should possess a 'special skill'; and (b) the plaintiff must be able to place reasonable reliance on the defendant's judgement or skill, or ability to make careful enquiry. In **Mutual Life and Citizens' Assurance Co Ltd v Evatt**, (1971] A.C. 793, the matter of a special skill was developed by the majority of the Privy Council. They held that a precondition for a duty of care was the existence an ascertainable actual or purported skill, competence and diligence on the part of the defendant. If the defendant was not commercially concerned with supplying information or advice, he could not reasonably be expected to know the standard at which such information or advice had to be furnished; and could not be said to have accepted responsibility for providing advice or information at such a standard.
- A4.2 The facts of the case were that the plaintiff, who was a policy holder in the defendant company, sought advice from the company about the financial condition of an associated company, 'Palmer'. Relying on the information, the Plaintiff invested further sums in that company; which he lost due to the information being incorrect. The majority of the Privy Council held that the defendant company was not in the business of supplying information or advice, nor had it represented that it possessed the necessary skill to do so and would exercise due diligence to give reliable advice. Consequently, no liability existed.

- A5. A constellation of more recent cases have expanded on what constitutes a 'special relationship'. Two central tests have emerged from them: (a) whether the defendant has 'assumed responsibility' for the effect of his statements on the claimant; and (b) whether it is reasonable for the claimant to rely on the defendant's statements. Unfortunately, the law in this area is not entirely settled; there being considerable differences as to what gives rise to reasonable reliance, in the decisions arrived at by the courts.
- A6. In **Chaudhry v Prabhakar** (1989) 1 WLR 29 (CA), the claimant recovered in Negligence for the defendant's incompetent advice to her regarding the purchase of a particular second-hand car. The decision appears to be based on the general principle in Tort that if a person holds himself out as possessing a particular skill, he should work to a standard compatible with that claim. The court held that whether it was reasonable for a person to rely on another's claims of competence would depend on the circumstances of each case. However, on the facts of the case it was reasonable for the Claimant to do so.
- A7. **Chaudhry v Prabhakar** marks an extremely broad judicial view of liability; and in **Smith v Eric S Bush** (1990) 1 AC 831, the House of Lords drew in the boundaries. A valuer instructed by a mortgagee was held to have a duty of care to a Mortgagor when the valuation was materially wrong. The purported disclaimer of liability for negligence was only effective to the extent that it complied with the reasonableness test in **the Unfair Contract Terms Act 1977**. However, their Lordships held that whether it was reasonable for the claimant to rely on the valuation would be determined on the facts of each case. If a modest house was being purchased, then the buyer might reasonably be expected to rely on the valuation of the lender's surveyor. If the property was in the more expensive part of the market, reliance became less reasonable.
- A8. The important case of **Caparo v Dickman** (1990) 2 AC 605, was also decided by the House of Lords. The defendant auditor provided a statutory audit of a company, which investors relied on in deciding whether to purchase company shares. However, the auditors' report failed to clearly disclose that the company was making a loss; and the investors sued the auditors in Negligence for damages, these being pure economic loss, not normally recoverable. The claimants argued that the facts came within the scope of **Hedley Byrne**, which, they asserted, enabled recovery of pure economic loss flowing from Negligent Misstatement. The leading speech was that of Lord Bridge. He said that in order to identify whether a duty of care exists, if the facts of any given case is covered by precedent holding the existence of a duty of care, the duty can be attributed without further analysis. However, if the facts are sufficiently novel to fall outside precedent, the initial test is whether the loss was foreseeable. If so, there should be an examination of whether there was a sufficient relationship of proximity between the parties. If the answer

is affirmative, the subsequent question is whether it is 'fair, just, and reasonable' to impose liability. In **Caparo** the loss was foreseeable, and it could be argued that there was sufficient proximity between the parties. However, the claimants failed on the next part of the test. It was held that the auditors were carrying out a duty to the company directors; and, while they could have foreseen that their report would be viewed by the investors, it was not reasonable for investors to place reliance on it.

- A9.1 The decision in **Caparo** emphasized whether it was 'fair, just, and reasonable' to impose liability, a formulation that has become important in other areas of negligence as well.
- A9.2 In **Henderson v Merrett** (1995) 2 AC 145, action was brought against insurance underwriting agents by 'names' at Lloyds, who had suffered serious losses, which they alleged was due to the agents' negligent advice. The agents argued that they had no liability because there was no contractual relationship between them and the claimants, and because their liability was defined by the contract and excluded liability in tort. Lord Goff's speech indicates that the test of whether it was 'fair, just, and reasonable' to impose liability for negligent advice was not a separate test from whether the defendant had assumed responsibility to the claimant. If there was an assumption of responsibility, and it was reasonably foreseeable that the claimant would rely on the defendant's advice, it was automatically fair, just, and reasonable to assume a duty of care.
- A10. Following **Henderson v Merrett Syndicates Ltd**, it is now clear that contractual and tortious duties can exist on the same facts. Consequently, there may be liability in tort even where the parties are in a contractual relationship, although the existence of any duty may be determined by the allocation of responsibility between parties under the contract
- A11.1 The application of Hedley Byrne was again considered by the House of Lords in **White v Jones** (1995) 2 AC 207 (HL), which concerned professional services, rather than a negligent misstatement. The facts were that a solicitor was instructed by his client to modify the client's will. The solicitor failed to act on this before the client died; and the beneficiaries under the will sued the solicitor in negligence, to recover the money they would have obtained under a properly attested will. By a bare majority, the House held that the defendant was liable. Lord Goff said that **Hedley Byrne** and **Henderson** were not applicable. Despite the solicitor having 'assumed responsibility' to his *client*, he had not assumed responsibility to the *claimants*, who were uninvolved in the transaction. However, the Claimants could succeed on the basis that the solicitor's assumption of responsibility to his client could be 'transferred' to the beneficiaries under the principle laid down by the House of Lords in **Linden Garden v Lenesta Sludge Disposal** (1993), where the lessee of a building contracted with the defendants that they would remove asbestos,

then assigned his lease to the claimant. Though the claimant had no contractual relationship with the defendant, the defendant was held to have assumed a responsibility to him on the basis that the original lessee's assignment of the lease was foreseeable.

- A11.2 Disagreeing with Lord Goff, Lord Browne-Wilkinson took the view that the claimants in **White v Jones** should succeed under **Hedley Byrne**. He said that the defendant solicitor had assumed responsibility for attesting the will, and reliance had been placed on this. The assumption of responsibility to persons who had no direct connection with the solicitor's professional duties, when they were being carried out, was indeed an extension of the **Hedley Byrne** principle. However, it was said to be only an incremental extension of it. Lord Browne-Wilkinson identified the important features in Hedley Byrne as being that special relationship which existed between the claimant and the defendant, and that the relationship was founded on the assumption of responsibility to the claimant on the part of the defendant. However, he said that the category of 'special relationships' was not closed and, applied to the facts of **White v Jones**, it could be extended to catch situations in which a professional person should foresee that inadequate performance of his duties will cause economic loss to a person who later had good reason to rely on his actions.
- A11.3 In dealing with the point that the extension of liability would result in opening the 'floodgates' of pure economic loss claims, Lord Browne-Wilkinson argued that there were brakes on such claims; since, in order for cases such as **White v Jones** to succeed, it must be shown that: (a) it was reasonably foreseeable that the defendant's services would be relied on, and (b) it was also foreseeable that loss would be suffered if they were performed inadequately. Reasonable foreseeability in isolation, therefore, would not ground liability.
- A12. In summary, therefore, the constellation of cases show that pure economic loss might be recoverable (i) where the defendant has assumed responsibility to the claimant, and (ii) it is reasonably foreseeable that the claimant would rely on the services of the defendant. Such an assumption of responsibility can be direct or (as in **White v Jones**) oblique. In addition, (iii) it must also be foreseeable that loss would be suffered if the defendant's services were performed inadequately. The liability may stem from negligent statements, as in Hedley Byrne; or the provision of services in **Henderson**, and **White v Jones**. Omissions, as well as acts, can ground liability, as the latter case establishes.

## Exclusion of liability by disclaimer

A13. The reminder must be added that in **Hedley Byrne** the defendants were not liable because they had introduced a disclaimer which excluded liability. Currently, a contractual term which seeks to exclude liability for misrepresentation must, under s.3 of the **Misrepresentation Act 1967** (as amended), meet the requirements of reasonableness, as set out in s.11 of the **Unfair Contract Terms Act 1977** (UCTA). In respect of negligent misstatement, s.2 of UCTA shows that any disclaimer must also satisfy the test of reasonableness. As the constellation of cases, discussed above, with varying circumstances, shows, this will need to be determined on the facts of each given case.

## Contributory negligence

A14.1 **The Law Reform (Contributory Negligence) Act 1945** provides as follows:

### **“ 1. Apportionment of liability in case of contributory negligence**

**(1) Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the court thinks just and equitable having regard to the claimant’s share in the responsibility for the damage...**

### **4. Interpretation**

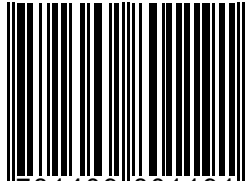
**“fault” means negligence, breach of statutory duty or other act or omission which gives rise to a liability in tort or would, apart from this Act, give rise to the defence of contributory negligence. ”**

A14.2 Since an ingredient of an allegation of negligent misstatement is the assertion that there was reasonable reliance on the misstatement that resulted in loss, contributory negligence will generally not be applicable.

## Summary

- A15. Applying the above principles to the existence of guidance from the Department which is deficient, reliance by fire and rescue authorities on Departmental advice is foreseeable; and it is also foreseeable that loss would be suffered if inadequate and/or outdated advice and guidance is made available to fire and rescue authorities. It is, moreover, arguable that a special relationship exists between central government and fire and rescue authorities in respect of advice and guidance specifically directed to such authorities; and that the Department has assumed responsibility to the claimant.
- A16. As regards parties (other than fire and rescue authorities) who receive the advice given by central government to fire and rescue authorities, as **White v Jones** shows, Lord Browne Wilkinson’s speech indicates that, in his view, the category of “special relationships” is not closed and, it could be extended to cover situations in which a professional person should foresee that inadequate performance of his duties will cause economic loss to someone who later had good reason to rely on his actions.
- A17. In the light of the unsettled law and the trend of extending **Hedley Byrne** liability for negligent misstatements, it would be prudent for the Department of Communities and Local Government to review its advice and withdraw those items that are no longer current or are deficient in other ways. In addition, a system could usefully be followed for the revision of advice, and the timely withdraw of such items that no longer reflect extant law and best practice.
- A18. In respect of fire and rescue services which continue to follow advice or guidance issued by an authoritative third party, despite having good reason to believe that such advice or guidance is deficient or defective, such authorities will be unable to recover from the party which has provided the advice, under the Tort of Negligent Misstatement, since, as seen above, proving liability entails, *inter alia*, reasonable reliance by the recipient of the advice on the misstatement that resulted in loss; and knowledge that the advice was deficient or outdated clearly nullifies such reliance. Furthermore, if the advice received from an authoritative third party – such as Communities and Local Government – is then transmitted by fire and rescue authorities (which are aware of the defectiveness of the advice) to other individuals and organisations, the courts could hold that defendant authorities have assumed responsibility to the respective claimants who place reasonable reliance on such advice or guidance. It will, therefore, be prudent to fire and rescue authorities, too, to review advice received from (in particular) central government and identify and cull the advice and guidance that is no longer applicable, in order to prevent potential actions under the expanding Tort of Negligent Misstatement.

ISBN 978-1-4098-119-1



9 781409 801191

ISBN: 978-1-4098-0119-1