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Promotion of Volunteering Bill

Bill 18 of 2003-4

This Private Member's Bill was presented by Julian Brazier MP on 7 January 2004 and published on 27 February 2004. It aims to reduce the burden of regulation and the risk of litigation to those who volunteer. It would introduce a "statement of inherent risk" which would be presented to people undertaking activities managed by volunteers or voluntary organisations. Courts would have regard to this in proceedings for negligence or breach of statutory duty.

The Bill would also: remove voluntary organisations from the scope of the *Financial Services Act 1986* in relation to the sale of insurance, or advice about insurance; amend the *Data Protection Act 1998* with respect to certain disclosures by voluntary organisations; and introduce a "good Samaritan" clause to remove liability for unintentional harm for people who assist those who are injured or suffering.

The Bill is due to receive its second reading on 5 March 2004.

EDITED BY PAT STRICKLAND

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Summary of main points

- This Bill is a Private Member's Bill, presented by Julian Brazier MP. It had its first reading on 7 January 2004, was published on 27 February [1]and is due to have its second reading on 5 March 2004.

- The Bill arises because of Mr Brazier's concerns that the fear of litigation and problems with bureaucracy are threatening participation in volunteering, and that this could have a number of adverse effects, including on the health and fitness of children and young people.

- The central provision is contained in **Clause 2.** The intention would be to protect volunteers from being sued; if they were sued, the court would have to take sufficient account of special factors such as the relationship between a volunteer and a person for whom the volunteer is providing a service, and the risks inherent to certain activities. Under current law, a volunteer's liability might arise in a number of ways. The Bill particularly refers to actions for negligence or breach of statutory duty.

- **Clause 3** deals with the provision of insurance, or advice about insurance, by voluntary organisations. It is very common for sports groups to be able to offer members cheap insurance products. The FSA has decided that this type of relationship falls within the category of 'advice' which requires regulatory guidance, and is proposing new rules, to require all organisations which do this to be authorised under the terms of the *Financial Services Act 1986.* Clause 3 of the current Bill attempts to remove voluntary bodies from the scope of this part of the Act.

- **Clause 4** of the Bill covers the way voluntary and other organisations are affected by the *Data Protection Act 1998*. It would allow disclosure of contact details for voluntary organisations and the names of their officers without a requirement to abide by the "processing" conditions in Schedule 2 of the 1998 Act. It would also afford exemption from prosecution for any volunteer who discloses data in the belief that disclosure is in the public interest.

- The intention of **Clause 5** of the Bill is to protect members of the public who offer assistance to those who are suffering or injured or at imminent risk of harm from later being sued under common law for accidental injury. Clause 5 is described by Julian Brazier as the 'good Samaritan' clause.

- The Bill extends to England and Wales only.

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This Research Paper has been produced by a number of Library staff. The relevant subject specialists are as follows:

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Voluntary Sector policy	Pat Strickland
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Data Protection	Philip Ward
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I Background

A. Why the Bill is being introduced

Following the ballot for Private Members' Bills, in which he secured fourth place, Julian Brazier made it clear that he wished to promote a bill to reduce the burden of legislation and the risks of litigation for charities and voluntary organisations, and invited such groups to send him suggestions.[2] Shortly before the publication of the Bill, Mr Brazier issued a press release setting out the background:[3]

> Volunteering has always been a crucial part of the British way of life. Today 10 million people volunteer each week and 22 million are involved each year. 60 per cent of volunteers say volunteering gave them an opportunity to learn new skills and 90 per cent of people agree with the notion that a society with volunteers shows a caring society.
>
> Many of these are involved in sports or adventure training. Yet today one third of youngsters between the ages of two and 15 are overweight, including one in six who are clinically obese. Of all the 26 major countries in the developed world, Britain is now the third worst in clinical obesity after the United States and Mexico, with roughly one quarter of the population now obese.
>
> A variety of organisations have welcomed Julian's bill who are concerned with every aspect of health and fitness – activities that are largely, but not exclusively, for young people. Margaret Talbot from the Central Council for Physical recreation, which co-ordinates all the sporting organisations from the FA to the RFU, Randall Williams from Campaign for Adventure, the umbrella group for adventure training organisations from the Youth Hostels Association and YMCA to the Girl Guides, Stephen Studd from Skills Active, the body which sets standards for employers in the sport and leisure industry and Peter Lambert of Business in the Community.
>
> In a recent presentation the Campaign for Adventure demonstrated that the threat of litigation and the growth of bureaucratic red tape are making it harder and harder for volunteers to offer challenges, especially to young people. At the same time Sport England has issued a joint press release with the Central Council for Physical Recreation (CCPR) pointing to the threat to volunteering from the same two factors.
>
> "Sport will die without volunteers and the clubs in which they work according to new research published today…the research revealed that sports volunteers are

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2 Julian Brazier TD MP, *Invitation to the Voluntary Sector – Send me your problems says MP*, 4 December 2004, http://www.julianbrazier.co.uk/

3 Julian Brazier TD MP, *Give volunteers a chance say MPs in Private Member's Bill*, 26 February 2004, http://212.241.164.3/julianbrazier/pressshow.asp?ref=202

> coming under increasing pressure. Threats to people taking up volunteering… include; (top two items)
>
> • Risk, fear of blame and the threat of litigation.
>
> • Increasing bureaucracy with new rules and regulations, such as police checks for working with children and health and safety obligations."

The Sport England/Central Council for Physical Recreation joint press release referred to in Mr Brazier's press release (above) followed the publication of two research reports. The first, prepared for Sport England by the Leisure Industries Research Centre, aimed to quantify the contribution made to English sport by volunteers and to look at the challenges, benefits and support for them.[4] This identified the main challenges as being: shortages of volunteers; a problem in recruiting new volunteers; and the consequent overloading of those volunteers that do participate.[5] It also highlighted risk aversion as a problem:[6]

> Society is becoming more averse to certain types of high profile risks, in particular sporting injuries or other dangers to young competitors. This leads to legislation conditioning organisations and their activities. Examples of new legislation that has created more work for volunteers are child protection and food hygiene. This is compounded by an increasing tendency to take legal action against organisations or individuals deemed to be 'negligent'. As noted above, risk aversion and fear of litigation applies especially to sports where young people are involved.

The second report, by Geoff Nichols at the University of Sheffield for the Central Council for Physical Recreation, analysed existing research data to evaluate the contribution of voluntary sector sport and recreation to the objectives of the Government's Active Community Unit.[7] Further information on the Active Community Unit and on Government policy towards the voluntary sector in general can be found in a separate Library Standard Note.[8] The report concluded:[9]

> The voluntary sector in sport makes a massive contribution to the agenda of the ACU through voluntary sector clubs and the structure and support provided by

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4 Sport England, *Sports Volunteering in England in 2002*, October 2003, http://www.sportengland.org/downloads/Volunteering-in-England.pdf

5 paragraph 54

6 paragraph 74

7 CCPR, *Citizenship in Action Voluntary Sector Sport and Recreation*, 2003, executive summary available at http://www.ccpr.org.uk/dyncat.cfm?catid=4262

8 SN/HA/1443, *Voluntary Sector*, 12 February 2004 available at http://hcl1.hclibrary.parliament.uk/notes/has/snha-01443.pdf

9 CCPR, *Citizenship in Action Voluntary Sector Sport and Recreation*, 2003, executive summary available at http://www.ccpr.org.uk/dyncat.cfm?catid=4262, executive summary, p 5/

> the national governing bodies of sport. Volunteering in sport is the most significant single area of formal volunteering. Voluntary sports clubs make a substantial contribution to social capital through both providing the structure which provides the opportunity for active citizenship to be expressed through volunteering, and the opportunities for social interaction, both for volunteers and participants. Voluntary sports clubs exhibit a remarkable degree of stability as social institutions and are a valuable social resource.

Sport England and CCPR's joint press release identified the following "headline issues" from the two reports:[10]

> - The value of the time contributed by sports volunteers in England each year is estimated at over £14 billion. This is the value of replacing all the sports volunteers with paid labour. (Sport England research).
> - There are approximately 151,000 voluntary sports clubs in the UK, providing opportunities for an estimated 10 million players and participants. Voluntary sector provision represents a return on investment of £30 for every £1 invested. (CCPR research).
> - Volunteers contribute 1.2 billion hours each year to sport, equivalent to 720,000 additional full time paid workers. (Sport England research).
> - The sporting sector makes the single biggest contribution to total volunteering in England, with 26% of all volunteers citing sport as their main area of interest. (Sport England research).
> - 46% of voluntary sports clubs have existed for more than 30 years and 34% for more than 50 years – a major continuous contribution to communities. (CCPR research).
> - Volunteering in 'sports clubs organised by its members' captures 6.6% of the adult population – the most important arena for formal volunteering and active citizenship. (CCPR research).
>
> (…)
>
> The Research revealed that sports volunteers are coming under increasing pressure.
> Threats to people taking up volunteering or continuing to volunteer include:
> - Risk, fear of blame and the threat of litigation.
> - Increasing bureaucracy with new rules and regulations, such as police checks for working with children, and health and safety obligations.
> - Pressures from other commitments such as work and family are squeezing the time available for volunteering.
> - Retaining volunteers is increasingly difficult and currently there is one 'lapsed' volunteer for every two active volunteers.
> - Fragile infrastructure and variable support and investment across the country.

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[10] Sport England/CCPR Press Release, *Sport will die without volunteers new research shows*, 8 December 2004, http://www.ccpr.org.uk/nlstory.cfm?ID=6522&NLID=50264

- Volunteers feeling beleaguered and under threat in an age when sports officials are given less and less respect.
- Poor communication between national, regional and local levels.
- Many people are put off volunteering as they are not given a clear picture of what might be required of them as volunteers.

B. The extent of volunteering: statistical summary

1. National Survey of Volunteering 1997

The Institute for Volunteering Research's *National Survey of Volunteering 1997* was an in-depth study of the prevalence and nature of volunteering and the characteristics of volunteers.[11]

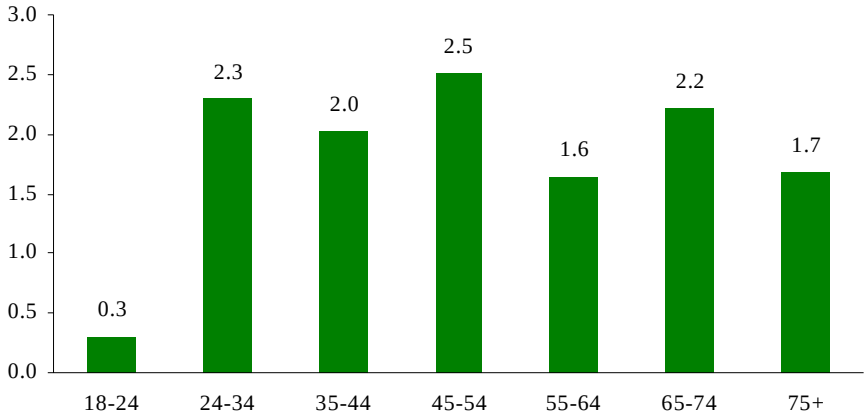
For the purposes of the survey, volunteering was defined as "any activity which involves spending time, unpaid, doing something which aims to benefit someone (individuals or groups) other than or in addition to close relatives, or to benefit the environment." The survey is primarily concerned with formal volunteering, defined as that "carried out for, or through, an organisation or group of some kind." However, it also noted that 74 percent of the population had taken part in informal volunteering (outside an organisational context) within the past year.

To summarise the survey's findings regarding formal volunteering in the UK:

- 48 percent of the adult population had taken part in a formal voluntary activity during the past year, equivalent to around 22 million people
- The average volunteer spent 4.0 hours per week on formal voluntary work, an increase of 1.3 hours compared to 1991. This means that around 90 million hours of formal voluntary work take place each week.
- People aged 45-54 are the most likely to volunteer, while the longest hours of formal volunteering are put in by elderly volunteers. The distribution of volunteering activity by age is summarised in the chart below, which shows average weekly hours of voluntary activity per person:

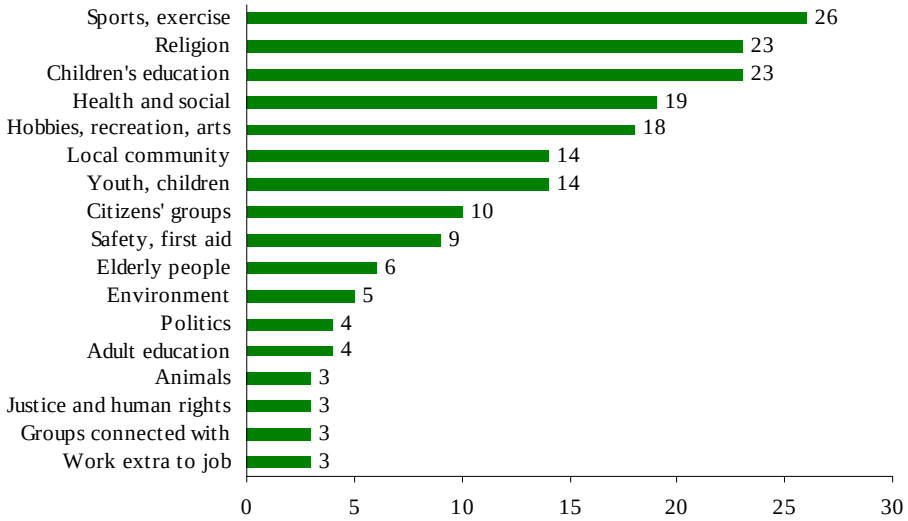
[11] Justin Davis-Smith, *The 1997 National Survey of Volunteering*, Institute for Volunteering Research 1998

Formal voluntary activity: weekly hours per person by age group
UK, 1997. Incorporates volunteers and non-volunteers.



- Men and women are equally likely to volunteer. However, there is considerable variation by social group. Those with high incomes, in professional/managerial socio-economic groups, the highly educated, those married or cohabiting, and those in paid employment are disproportionately likely to be current volunteers.
- The most common type of voluntary task was raising or handling money (66 percent of current volunteers), followed by helping to run an event (55 percent), serving on a committee (36 percent) and providing transport (26 percent).
- The chart below summarises voluntary activity in 1997 by field of interest. Note that around half of respondents had volunteered in more than one field, so figures do not sum to 100 percent:

Voluntary activity by field of interest
% of current volunteers, UK, 1997



- People volunteer for a mix of altruistic and self-interested reasons.
- One third of current volunteers believed that they were covered by the organisation's insurance policy, with similar proportions believing they are not or unsure.

- The table below summarises the reasons given for no longer volunteering. Again, more than one reason was frequently given.

Reasons for stopping volunteering: UK 1997
Percentage of former volunteers

	Yes, definitely/to some extent
You no longer had time to do it	50
It was getting too much for you	49
Things could have been much better organised	34
Your efforts weren't always appreciated	24
You got bored or lost interest in it	23
Too much work was expected of you	17
The organisation wasn't really going anywhere	16
You didn't get asked to do the sorts of things you'd like to do	15
Your help was not really wanted	9
You were finding yourself out of pocket	7

Source: Institute for Volunteering Research, *The 1997 Survey of Volunteering* , table 14.1

2. Issues in volunteer management

Further to the *National Survey of Volunteering*, in 1998 the Institute for Volunteering Research conducted a survey of volunteer management.[12] The major findings were as follows:

- 80 percent of volunteer-involving organisations have a designated volunteer coordinator/manager.
- 94 percent of such organisations have systems in place for supporting volunteers. 90 percent have means of supervising volunteers, while 85 percent have a written volunteer policy or practice and procedures handbook. 74 percent have disciplinary procedures for volunteers.
- 77 percent of organisations make insurance arrangements for volunteers. 17 percent provide advice on general legal issues.
- 41 percent of organisations believed it would become harder to recruit volunteers over the next five years.
- The top three policy issues for volunteer-involving organisations were a) criminal record checks and vetting procedures for volunteers, b) the New Deal drawing potential volunteers away from voluntary work and c) funding. The impact of the contract culture and legal issues were also raised.

[12] http://www.ivr.org.uk/issues.htm

3. The economic value of volunteering

The Institute for Volunteering Research estimate that formal (through an organisation) volunteering in Great Britain is worth around £40 billion per year, up from approximately £25 billion in 1993. This is calculated on the basis of hours volunteered derived from the *National Survey of Volunteering 1997* and the 1997 average hourly wage.[13]

The Office for National Statistics adopt an alternative approach based on time-use diary survey data.[14] On this basis, they estimate that the value of formal voluntary activity in the UK fell by 26 percent in real terms to £13.2 billion between 1995 and 2000. This is the result of an estimated fall of one-third in hours spent doing voluntary activities.

C. Government policy on volunteering

The following PQ sets out the Government's plans for reducing burdens on volunteers:[15]

> **Lord Patten** asked Her Majesty's Government:
> What plans they have to reduce burdens of liability and regulation that fall upon individuals undertaking voluntary work. [HL859]
>
> **The Minister of State, Home Office (Baroness Scotland of Asthal):** The burdens of liability and regulation that fall upon individuals undertaking voluntary work have been the subject of close interest by this Government for some time. Formal representations on these issues have rightly been directed to the Home Office, which is responsible for the voluntary and community sector, to the Department for Work and Pensions (DWP), which is leading a government review of the employers' liability insurance system, and the Department for Constitutional Affairs (DCA), which is leading a government review of regulatory issues.
>
> The Active Community Unit in the Home Office set up the Insurance Cover Working Group (ICWG) in July 2002, to look into insurance difficulties for the voluntary and community sector and advise on practical solutions. The ICWG engaged consultants Alison Millward Associates to undertake a study into the current position regarding the provision of insurance for the voluntary and community sector, including employers' liability, public liability and professional liability, and to make practical recommendations that will bring relief to the problems. The consultants' report was delivered to the ICWG in June 2003.

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[13] http://www.ivr.org.uk/economic.htm

[14] Perry Francis and Harminder Tiwana, *Unpaid household production in the United Kingdom*, 1995–2000 in ONS *Economic Trends*, January 2004

[15] HL Deb 9 February 2004 c128-9WA

> The DWP-led review of employers' liability aimed to assess the case for reforming employers' liability compulsory insurance (ELCI) and to identify the objectives and options for such reform. The second stage of its report was published at the end of 2003. The Better Regulation Task Force, acting for the DCA, aims to publish its findings later this year.
>
> Action is already being taken following the publication of the DWP review and following careful consideration and wide consultation, a cross-departmental response to the consultants' proposed action plan is being drafted by the ICWG. This will be published at the beginning of March. All the accepted practical recommendations of these reports will be implemented in partnership with the voluntary and community sector, the insurance industry, local authorities and government departments.

More generally, the *Active Community Unit* at the Home Office is responsible for the promotion and development of the voluntary and community sector and for encouraging people to become actively involved in their communities, including increasing community participation by 5% by 2006[16]. Government initiatives include:

- The development of a partnership agreement, "the Compact", published in November 1998, between the Government and the voluntary and community sector setting out what to expect from each other.

- A "Cross Cutting Review" by the Treasury as part of the Spending Review 2002 of the role of the voluntary and community sector (VCS) in service delivery, published in September 2002.

- The setting up of a new investment fund, "*future*builders"[17], to provide £125 million to assist voluntary and community sector organisations in their public service work.

- Infrastructure funding, initially of £6.25 million for development work, to improve capacity and communications in areas with very little or no voluntary and community sector infrastructure, and to develop ideas and proposals on building and sharing good practice.[18]

A pilot website[19] gives information on grants available to voluntary and community sector organisations from the following government departments:

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16 http://www.homeoffice.gov.uk/inside/org/dob/direct/acomu.html

17 *The role of the voluntary and community sector in service delivery: a cross cutting review*, p32

18 Home Office Press notice, £*6.25m boost for voluntary sector infrastructure scheme*, 10 December 2003 http://www.homeoffice.gov.uk/pageprint.asp?item_id=734

19 http://www.governmentfunding.org.uk

- Department for Education and Skills
- Department of Health
- Home Office
- Office of the Deputy Prime Minister

Details of other sources of funding are given on the Home Office 'Active Communities' site.[20]

Further details of these Government initiatives are given in Library Standard Note SNHA/1443 available on the Library intranet at:
http://hcl1.hclibrary.parliament.uk/notes/has/snha-01443.pdf.

D. Overweight and obesity in children and young people

The Bill has been prompted partly by concern over rising levels of obesity, particularly in young people. In a press release accompanying the presentation of the Bill, Mr Brazier set out his desire to "roll back the tide of obesity".[21]

1. Incidence of obesity

Obesity is defined as a disorder in which excess body fat has accumulated to an extent that health may be adversely affected.[22] The most commonly used measurement of obesity is the body mass index(BMI), which is defined as the persons weight in kilograms divided by the square of their height in metres . Overweight is defined as a BMI between 25 and 29.9. Obesity is defined as a BMI greater than 30. For children these BMI standards require adjustments for age and gender, and specific charts for children from birth up to 20 years are available in the UK.[23]

Childhood obesity presents significant health risks. There has been a rapid increase in the prevalence of obesity in all age groups during the past 20 years. The latest figures for childhood obesity are given below.[24]

- Obesity in 2-4 year old children has nearly doubled from 5-9%, between 1989 and1998.
- Obesity in 6-15 year olds nearly trebled from 5-16% between 1990 and 2001.

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20 http://www.homeoffice.gov.uk/comrace/active/grants/index.html
21 Julian Brazier TD MP, *Brazier to launch Private Members' Bill*, 6 January 2004
22 Royal College of Physicians, *Storing up Problems Report of a Working Party*, February 2004
23 WHO Regional publications, *Food and health in Europe*, 2004
24 Norwich, *Health Survey for England 2002*, 2003

2. Problems of obesity

Concerns raised by childhood obesity include:

Medical problems:

- The incidence of type 2 diabetes is rising in children. This disease had previously been a condition associated with adults.[25]
- Early damage to the cardiovascular system is caused, secondary to a rise in blood pressure, and increased blood cholesterol levels.[26] This increases the chance of developing cardiovascular disease as an adult.

Persistence of obesity into adulthood:
Overweight young people have a 50% chance of becoming overweight adults, with the associated morbidity and mortality from diseases such as ischemic heart disease and type 2 diabetes.[27]

Social problems:
The most common consequence of obesity in children is psychological. Bullying, low self esteem and depression are all more commonly encountered in obese children than children of normal weight.[28]

3. Prevention of obesity

Obesity is caused by an imbalance of food intake against energy expenditure. In practice, this means that obese children are eating too much for the amount of physical exercise they are taking. Tackling the problem of obesity involves addressing both the issues of nutrition and physical activity.

a. Nutrition

The recent National Diet and Nutrition Survey (2002) showed that people are eating too much of the wrong type of food.[29] The intake of salt, sugar, and saturated fats are all above recommended figures. Children between 4 and 18 are only eating one quarter of the fruit and vegetables needed for a healthy diet.[30]

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25 WHO Regional publications, *Food and health in Europe*, 2004
26 "Overweight in Childhood and Adolescence", *New England Journal of Medicine*, February 26, 2004
27 Royal College of Physicians, *Storing up Problems Report of a Working Party*, February 2004
28 Royal College of Physicians, *Storing up Problems Report of a Working Party*, February 2004
29 Norwich, *The National Diet and Nutrition Survey* 2002
30 Royal College of Physicians, *Storing up Problems Report of a Working Party*, February 2004

b. Physical activity

Only 70% of boys and 61% of girls are reaching the recommended levels of physical activity.[31] It has also been found that children exercise progressively less as they become older.[32]

E. Children's trips

1. Background

In recent years a number of tragedies which have taken place during organised children's outings have received extensive publicity. For example:

- In 1993 four children died during a canoeing trip in Lyme Bay. The company running the trip was fined and the managing director was sentenced to three years imprisonment which was reduced to two years on appeal.[33] As a result of this tragedy, the *Activity Centres (Young Persons' Safety) Act 1995, w*hich is the legislation regulating activity and outdoor pursuit centres, was introduced as a Private Members' Bill by David Jamieson who came second in the Ballot that session. Regulations under the 1995 Act prescribe minimum safety standards covering the provision of activities and the maintenance and use of equipment and premises. More details about this legislation are available in Library Standard Note SN/SC/2935, *Activity Centres*.

- In October 2000 two girls, Rochelle Cauvert and Hannah Black, drowned during a school trip to the Yorkshire Dales. At the inquest the teachers, the school and the education authority were criticised over their contributions to the incident.[34]

- An 11 year old British schoolgirl, Bunmi Shagaya, was found drowned in Lake Caniel near Dieppe in July 2001, during a school trip.[35]

- In 2002, Max Palmer, a 10 year old schoolboy, was swept away by a swollen stream. Paul Ellis, a geography teacher, was jailed for his manslaughter.[36]

- A 13 year old, Gemma Carter drowned while paddling on a beach off Le Touquet in June 1999. The teacher who organised the trip, Mark Duckworth, was given a

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31 Royal College of Physicians, *Storing up Problems Report of a Working Party*, February 2004

32 WHO Regional publications ,*Food and health in Europe*, 2004

33 Further details about the Lyme Bay tragedy are set out in Library RP 95/12, *Activity Centres (Young Persons' Safety) Bill [Bill 9 of 1994/95]*,

34 "Teachers blamed for school trip deaths", *BBC News*, 8 March 2002

35 "Bunmi's parents to sue over school trip", BBC News, 30 November 2001 http://news.bbc.co.uk/1/hi/education/1685122.stm

36 "School trips under threat as teacher is jailed for boy's death", *Guardian*, 24 September 2003.

six-month suspended sentence for involuntary homicide by a French court, but he was acquitted on appeal.

The Bill would not relieve any defendant from criminal liability in such cases. Furthermore, it would not intend to relieve from liability any commercial organisation providing activity courses for gain. The Bill seeks to protect volunteers whose conduct is not criminal and for whom the fear of litigation might act as a deterrent from offering their services as a volunteer.

2. Policy and guidance on school trips

The responsibilities of those involved in school trips including local education authorities (LEAs), school governing bodies, head teachers, group leaders and teachers are set out in DfES guidance. The guidance, which was revised following a number of fatal accidents on school trips, is contained in *Health and Safety of Pupils on Educational Visits*, issued in 1998; *Health and Safety: Responsibilities and Powers*, sent to all schools and LEAs in December 2001; and in three supplementary good practice guides: *Standards for LEAs in Overseeing Educational Visits*, *Standards for Leading Adventure Activities*, and, *A Handbook for Group Leaders*, all published in 2002. There is also a leaflet on the website on *Group Safety at Water Margins*.[37]

The 2002 guidance received a mixed response. Although it was generally welcomed as setting out responsibilities more clearly,[38] the National Association of Head Teachers (NAHT) expressed concern about creating excessive bureaucracy for schools[39] and the National Association of Schoolmasters and Union of Women Teachers (NASUWT) predicted that many teachers would not want to take responsibility for school trips.[40]

The guidance provides a set of standards for LEAs and schools to follow when overseeing school trips. *Standards for LEAs in Overseeing Educational Visits* regards it as good practice for LEAs to appoint an LEA Outdoor Education Adviser and for every school to have an Educational Visits Co-ordinator (EVC). The EVC may be the head teacher but could also be a teacher, or other member of school staff, acting on behalf of the head teacher. The EVC will be involved in the planning and management of school trips. The general functions of the EVC are to:

- liaise with the employer to ensure that educational visits meet the employer's requirements including those of risk assessment;

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37 http://www.teachernet.gov.uk/visits

38 "Educational visits", *Child Right*, July/ August 2002, pp 5 to 8; "School trips", *Education Journal*, Issue 64, 2002-6, p7

39 "NAHT comments on DfES guidance on health and safety of pupils on educational visits", *NAHT Press Release*, 6 August 2002

40 "The right way to take a trip", *TES*, 29 September 2002, p31

- support the head and governors with approval and other decisions;
- assign competent people to lead or otherwise supervise a visit;
- assess the competence of leaders and other adults proposed for a visit. This will commonly be done with reference to accreditations from an awarding body. It may include practical observation or verification of experience;
- organise the training of leaders and other adults going on a visit. This will commonly involve training such as first aid, hazard awareness etc;
- organise thorough induction of leaders and other adults taking pupils on a specific visit;
- make sure that Criminal Records Bureau disclosures are in place as necessary
- work with the group leader to obtain the consent or refusal of parents and to provide full details of the visit beforehand so that parents can consent or refuse consent on a fully informed basis;
- organise the emergency arrangements and ensure there is an emergency contact for each visit;
- keep records of individual visits including reports of accidents and 'near-accidents' (sometimes known as 'near misses');
- review systems and, on occasion, monitor practice.[41]

Risk assessment and risk management are legal requirements, and many LEAs issue detailed guidance on school trips including risk assessment. Although the employer[42] is legally responsible for risk assessments, in practice they are usually carried out by the group leader. The guidance categorises risk assessment into three levels, and notes what should be involved in each case:

- Generic activity risk assessments, which are likely to apply to the activity wherever and whenever it takes place. These are usually prepared by the LEA or LEAs, and are not normally delegated to schools.

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41 *Standards for LEAs in Overseeing Educational Visits*, paragraph 6

42 The employer is the LEA for community, community special and voluntary controlled schools; for foundation, foundation special and voluntary-aided schools it is the school governing body; and, for independent schools it is the proprietor.

- Visit/site specific risk assessments which will differ from place to place and from group to group. These are usually undertaken by the school for each venue and may be amended for different groups.

- Ongoing risk assessments that take account of, for example, illness of staff or pupils, changes of weather, availability of preferred activity. The group leader or other responsible adult should reassess the risk as the need arises during the visit.[43]

Paragraphs 82 to 86 of *Standards for LEAs in Overseeing Educational Visits* relate to Criminal Record Bureau checks, required as necessary depending upon the nature of the contact with pupils.

There have been a number of court cases involving school teachers following accidents on school trips. The Press Notice[44] issued by Julian Brazier on his Private Member's Bill highlighted the case of Simon Chittock, who was seriously injured on a school skiing trip. The school was successfully sued despite the fact that the student had skied off-piste after warnings and reprimands. Although the Court of Appeal overturned the original judgement, the case prompted teacher union comment in the press and a discussion about teachers' responsibilities in such circumstances. This case is covered in more detail on pages 30-31 of this Research Paper.

In September 2003, a teacher, Paul Ellis, was found guilty of manslaughter and jailed after a boy drowned while on a school trip.[45] This followed other cases where teachers have been prosecuted.[46] These and other cases where children have died on supervised trips, have fuelled a debate over whether teachers should continue to take children on trips.[47]

a. An argument against continuing to take children on school trips

The NASUWT has advised its members not to take children on school trips:

> *"In an increasingly litigious society which no longer appears to accept the concept of a genuine accident, our first responsibility must be to protect our members' interests."*

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43 *Standards for LEAs in Overseeing Educational Visits*, paragraphs 17 to 25

44 Julian Brazier TD MP, *Give volunteers a chance say MPs in Private Member's Bill*, 26 February 2004, http://212.241.164.3/julianbrazier/pressshow.asp?ref=202

45 "Is jail the answer for fatal negligence", *Guardian*, 25 September 2003, G2, p5;

46 e.g. "Anger at growing burden of school trip red tape", *Scotland on Sunday*, 11 January 2004, p12

47 e.g. "Jailing of teacher may spell the end of school trips, *Times*, 24 September 2003, p1; "Despite the tragedy, the trips go on", *Times Educational Supplement*, 26 September 2003, p8; "Teachers' fear of being branded a criminal puts school trips at risk", *Daily Telegraph*, 24 September 2003, p4; "Life cannot be made risk-free", *Guardian*, 25 September 2003, (letters) p29; "Let children play", *Daily Telegraph*, 20 February 2004, p29; "Puttnam calls school trip fears 'barking'", *Guardian*, 3 February 2004, p9

> Announcing the issue to all members of updated NASUWT guidance on taking school trips, Eamonn O'Kane**,** General Secretary of NASUWT, said:
>
> "It is highly regrettable NASUWT has been forced to advise members against taking school trips.
>
> "In recent high-profile cases teachers have been heavily penalised. Some have lost their jobs as a result of alleged misjudgements.
>
> "In an increasingly litigious society which no longer appears to accept the concept of a genuine accident, our first responsibility must be to protect our members' interests."[48]

b. Statements stressing the value of school trips

Ministers and the unions representing head teachers have stressed the importance of educational visits and have underlined the support and guidance available to LEAs and teachers to help them organise and oversee such visits safely. A DfES Press Notice summarised these comments as follows:

> School Standards Minister David Miliband said:
>
> "Teachers should not abandon schools visits - safely conducted and properly supervised, they are an important part of any child's education. We value, and are committed to support, the professional competence of teachers who supervise educational visits, many of whom do so in their own spare time."
>
> Skills and Vocational Education Minister Ivan Lewis added:
>
> "We have issued a wealth of good practice guidance which helps ensure that the vast majority of school visits are carried out safely. Many schools across England already have staff trained as Educational Visits Co-ordinators, who liaise with the outdoor education adviser in the local education authority, and help teachers to assess and manage the risks of a visit."
>
> David Hart, General Secretary of the National Association of Head Teachers said:
>
> "The Paul Ellis case should not deter teachers from continuing to lead school visits. Pupils benefit greatly from these visits, and the overwhelming majority take place without any cause for concern whatsoever.

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[48] NASUWT website, 18 February 2004
http://www.teachersunion.org.uk/Templates/Internal.asp?NodeID=70431

> "If the DfES guidance is followed by all those involved with the organisation of these educational activities, there is no reason why teachers and support staff should be at risk."
>
> Dr John Dunford, General Secretary of the Secondary Heads Association, said:
>
> "Parents can be reassured about the precautions taken by head teachers to ensure that school visits are safe. Schools now take such care in the planning and risk assessment for all school visits that children are probably safer and more closely supervised on a school trip than on a family holiday.
>
> "School visits are important in broadening the education of children, especially those from less privileged backgrounds who have few opportunities to go away with their families. I hope very much that teachers will continue to volunteer to lead school visits, so that children's horizons can be widened in this way."[49]

F. The 'compensation culture'

1. Commentary

Citing the research discussed on pages 8-10 of this Research Paper, Julian Brazier identifies "risk, fear of blame and the threat of litigation" as one of the top two threats to people taking up volunteering. [50]

It has been variously argued that factors such as the lifting of laws banning solicitors from advertising, allowing class actions, the growth of accident management companies, increased awareness about the right to claim compensation and the availability of 'no-win, no-fee' agreements, have given rise to some perception of there being a 'compensation culture'. This was defined in a recent report as:

> The desire of individuals to sue somebody, having suffered as a result of something which could have been avoided if the sued body had done their job properly.[51]

In a recent case, Lord Hobhouse stated:

> [I]t is not, and should never be, the policy of the law to require the protection of the foolhardy or reckless few to deprive, or interfere with, the enjoyment by the remainder of society of the liberties and amenities to which they are rightly entitled. Does the law require that all trees be cut down because some youths may

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49 DfES Press Notice 2003/0193, *Educational Visits – Statement*, 25 September 2003

50 Julian Brazier TD MP, *Give volunteers a chance say MPs in Private Member's Bill*, 26 February 2004, http://212.241.164.3/julianbrazier/pressshow.asp?ref=202

51 The Institute of Actuaries, *The Cost of Compensation Culture*, http://www.actuaries.org.uk/files/pdf/giro2002/Lowe.pdf

> climb them and fall? Does the law require the coastline and other beauty spots to be lined with warning notices? Does the law require that attractive waterside picnic spots be destroyed because of a few foolhardy individuals who choose to ignore warning notices and indulge in activities dangerous only to themselves? The answer to all these questions is, of course, no. ...In truth, the arguments for the claimant have involved an attack upon the liberties of the citizen which should not be countenanced. They attack the liberty of the individual to engage in dangerous, but otherwise harmless, pastimes at his own risk and the liberty of citizens as a whole fully to enjoy the variety and quality of the landscape of this country. The pursuit of an unrestrained culture of blame and compensation has many evil consequences and one is certainly the interference with the liberty of the citizen. [52]

The comments of three professional bodies on the so-called compensation culture are set out below:

a. Institute of Actuaries

In its report, *The Cost of Compensation Culture*, the Institute of Actuaries estimated the cost of compensation in the UK as approximately £10b per year, over 1% of GDP. They stated that:

> This cost has been increasing at 15% per year recently and is set to continue rising at over 10% per year. Over a third of the total is legal and administration expenses. This seems a fundamentally inefficient way of delivering compensation. [53]

The Report set out their findings about public attitudes on the subject:

> The majority of the "public" believe attitudes to compensation have changed in the last five years and that this is a bad thing. However, most of them would happily make a claim against the NHS or Local Authorities, but were less keen to claim against their employer or neighbour.[54]

Generally, the Working Party thought that a more litigious society would be a bad thing 'because the costs to society, both financial and in terms of restricting activities, outweigh the benefits of providing better compensation to accident victims'.

In the context of claims against schools, the Report points out:

> Whilst one might argue that if the desire to avoid being sued leads to more stringent controls over school trips and improved safety, particularly "adventure

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52 *Tomlinson v Congleton Borough Council* [2004] 1 AC 46 at 96-97

53 http://www.actuaries.org.uk/files/pdf/giro2002/Lowe.pdf

54 *Ibid*

> activities", this is a good thing. However, there have been claims which have stretched the defintion of "proximity" and "forseeability" and risk curtailing almost any activity. For example the case of Dowling v. London Borough of Barnet and Bowman's Farm in January 2000. In this case the Borough of Barnet was found liable for multi-million pound damages after a pupil contracted E-Coli on a school trip to a farm (suffering brain damage and paralysis). Whilst terribly sad for the individual concerned, there are many people who would argue that it's not reasonable for a school to be liable for a disease one of their pupils catches whilst visiting a farm, park or other outdoor area.[55]

b. Association of Personal Injuries Lawyers

Patrick Allen, Vice President of the Association of Personal Injuries Lawyers (APIL), has been quoted as rejecting claims of a compensation culture. He said that people are simply claiming what is rightly theirs.

> There has been no change in the law that allows frivolous claims. If someone has been injured - which must be proved in a personal injury case - as a result of someone else's fault, they are due compensation.[56]

The APIL also specifically refuted the reference to the case quoted in the Institute of Actuaries' Report:

> The local education authority had sent out a circular to schools warning of the risks of e-coli and setting out extra precautions to be taken. The claimant's case proceeded on the basis that relevant staff had not seen this circular, the suggested precautions were not taken and parent helpers on the trip were not aware of the risk of e-coli or of the extra precautions required. Most importantly of all, however, this was not a case where an aberrant judge extended the boundaries of the tort of negligence. The defendant admitted liability.
>
> [...]
>
> Someone has to pay for the consequences of injuries to accident victims – to compensate them for pain, suffering and loss of amenity, the inability to work and to earn a living and the expense of providing care. There are only three possibilities: the individual, the state or the wrongdoer.
>
> If the individual is expected to insure himself against all risks in advance, but can expect no additional support from the state and is forbidden from seeking compensation from the wrongdoer, the better off could afford personal insurance (although they might not much like paying for it). The poor will not be able to afford it, will not take out personal insurance and will be risking an accident

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55 *Ibid*

56 BBC News, *Compensation culture: Who's to blame?*, 15 November 2000, http://news.bbc.co.uk/1/hi/uk/1024540.stm

> plunging them into destitution – a real return to 'Victorian values'. This is not a realistic option for society today.[57]

c. The Law Society

The Law Society pointed to the discrepancy between statistics and public perception:

> New figures reveal the perception of an increasing trend of people bringing injury claims is not backed up by facts.
>
> The statistics come just one week after the Better Regulation Taskforce announced its review into the impact of the fear of litigation and whether the compensation system is accessible for everyone. Latest Government statistics from the Compensation Recovery Unit, the Department of Work and Pensions, show that between 2000/2001 and 2002/2003:
>
> The number of disease claims fell by 26 percent.
>
> Employers' liability claims went down by 16 percent.
>
> The number of solicitors undertaking personal injury work has decreased from 28 percent of the profession in 1999 to 21 percent in 2002. Commenting on the new figures, Peter Williamson, Law Society President, said:
>
> "These findings indicate that overall the number of compensation claims is not rising. Contrary to popular belief there is no incentive for lawyers to bring frivolous claims as if a case is lost the solicitor does not get paid. It is important to remember that behind every successful claim is a victim as a result of someone else's negligence."
>
> Mr Williamson continued: "Nevertheless, we remain concerned by the activities of unregulated claims advisers some of whom cold call and pressurise people into making claims. In some cases it appears that claims managers collude with ill-founded claims. This fuels the impression that an unhealthy compensation culture is developing in England and Wales. We therefore welcome the Government's decision to include the activities of claims management companies within the forthcoming review of the regulation of legal services."
>
> The new figures support findings in a Datamonitor Report 2001, which found that compensation claims had dropped by 7.4 percent in the previous 12 months. Also, in a recent comparison of compensation costs of industrialised nations, the UK came bottom of the league table with 0.6 percent of our GDP being paid in compensation costs. In the US the level is 1.9 percent, Italy 1.7 percent and Germany 1.3 percent.[58]

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[57] *APIL response to 'cynical' Actuaries Report,* January 2003, http://www.apil.com/pdf/pressreleases/AP205.pdf

[58] The Law Society, *Compensation Culture,* 28 July 2003,

2. Legal background

The intention of the Bill's central clause, **Clause 2,** is to protect volunteers from being sued. If they were sued, the court would have to take sufficient account of special factors such as the relationship between a volunteer and a person for whom the volunteer is providing a service, and the risks inherent to certain activities. Under current law, a volunteer's liability might arise in a number of ways. The Bill particularly refers to actions for negligence or breach of statutory duty.

This part of the Research Paper sets out a brief summary of how liability might arise under current law in a case of negligence or breach of statutory duty. However, the definition of 'volunteer' includes farmers and other landowners and so a brief consideration of the liability of owners and occupiers of land is also included. **Clause 2** would oblige parents/guardians to acknowledge the risks inherent in activities undertaken by their children, and so this part of this Research Paper summarises the concept of parental responsibility in other contexts.

a. Negligence

Liability

Not every careless act gives rise to a claim under the tort of negligence. In order for a claim to be successful, three elements must be present:

- There must be a duty to take care. This is decided in relation to the facts at issue in a particular case, or in other words, did *this* defendant owe a duty of care to *this* claimant. It has been held that, in addition to the foreseeability of damage, in any situation giving rise to a duty of care it is also necessary that there should be sufficient "proximity" between the parties, and that the situation should be one in which the court considers it fair, just and reasonable that the law should impose a duty of a given scope upon one party for the benefit of the other.[59]

- There must be a breach of that duty. Here, it is the conduct which is relevant rather than the intention, so that the question of whether a person intended the breach of duty is not necessarily relevant. It has been held that 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.[60]

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http://www.lawsoc.org.uk/dcs/fourth_tier.asp?section_id=7630

59 *Caparo Industries plc v Dickman* [1990] 2 AC 605

60 *Blyth v Birmingham Waterworks Co.* (1856) 11 Ex 781 at 784

- There must be actual damage caused as a result of the breach of the duty to take care. The damage must not be too remote a consequence of the breach of duty.

Lord Atkin commented on the liability in negligence as follows:

> [I]n English law there must be, and is, some general conception of relations giving rise to a duty of care, of which the particular cases found in the books are but instances. The liability for negligence, whether you style it such or treat it as in other systems as a species of "culpa," is no doubt based upon a general public sentiment of moral wrongdoing for which the offender must pay. But acts or omissions which any moral code would censure cannot in a practical world be treated so as to give a right to every person injured by them to demand relief. In this way rules of law arise which limit the range of complainants and the extent of their remedy. 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 likely 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.[61]

This is an area of law governed mainly by common law, and, as such, it has evolved largely through a series of court judgments. Although there are precedents, new situations arise constantly and so it is often difficult to predict how a case will be decided. Indeed, this is often why cases reach court, and are not settled by negotiation between the parties. When considering the nature of a particular duty of care, and the liability of any party, several factors may need to be considered, including for example:

- the age of the persons concerned,
- the experience and expertise, or any other relevant characteristics, of the persons concerned,
- the dangers of the particular activity,
- the risks of the injury occurring,
- the foreseeability of the particular accident occurring, and
- whether adequate steps were taken to prevent the incident.

In its *Health and Safety Update, Assess the risks: school trips*, the firm of solicitors, Osborne Clark, said:

> Teachers, and in particular the group leader must constantly assess and respond to incidents during the course of the visit. Central to the risk assessment process is

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[61] *Donoghue v Stevenson* [1932] AC 562 at 580

> an understanding of its fluid nature and the need to review the assessment in light of changing circumstances.[62]

The defence of voluntary assumption of risk

Even if a claimant successfully proves all the elements of a claim for negligence, the claim may still fail if the defendant shows that (s)he is entitled to rely on a specific defence. One of these is the defence of *volenti non fit injuria*, also known as voluntary assumption of risk, or consent, which effectively means that a defendant cannot bring a claim in respect of harm suffered as a result of something to which (s)he consented, for example a lawful surgical operation. In other words the defendant will not succeed if (s)he voluntarily assumed the risk.

The extent of the defence was considered by Lord Denning:

> Knowledge of the risk of injury is not enough. Nor is a willingness to take the risk of injury. Nothing will suffice short of an agreement to waive any claim for negligence. The plaintiff must agree, expressly or impliedly, to waive any claim for any injury that may befall him due to the lack of reasonable care by the defendant: or, more accurately, due to the failure of the defendant to measure up to the standard of care that the law requires of him.[63]

However, a leading textbook on tort states:

> [There] are certainly cases in which *volenti* has been regarded as applicable even though there has been no communication or even opportunity of communication between the parties and which, therefore, support the view that it is the claimant's consent to run a risk rather than the agreement, that is at the basis of the defence.[64]

The textbook also comments on the fact that knowledge of a risk does not necessarily imply assent:

> The claimant must have information that indicates, at least in a general way, the risk of injury from the defendant's negligence. The mere fact that he is aware that the activity in which he participates carries risks does not mean that he has licensed the defendant to be negligent. [65]

In another case, the extent of any consent given was considered in the context of participation in a sport:

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62 http://www.osborneclarke.com/publications/text/h&s4a.htm
63 *Nettleship v Weston* [1971] 2 QB 691 at 701
64 Winfield and Jolowicz, *Tort*, 16th edition, 2002, p854
65 *Ibid* p855

> By engaging in a sport... the participants may be held to have accepted risks which are inherent in that sport... but this does not eliminate all duty of care of the one participant to the other.[66]

An express agreement to relieve a defendant of liability for future negligence operates in effect as an exclusion notice and is therefore subject to the *Unfair Contract Terms Act 1972.*

Section 2 of the *Unfair Contract Terms Act 1977* provides:

> (1) A person cannot by reference to any contract term or to a notice given to persons generally or to particular persons exclude or restrict his liability for death or personal injury resulting from negligence.
>
> (2) In the case of other loss or damage, a person cannot so exclude or restrict his liability for negligence except in so far as the term or notice satisfies the requirement of reasonableness.
>
> (3) Where a contract term or notice purports to exclude or restrict liability for negligence a person's agreement to or awareness of it is not of itself to be taken as indicating his voluntary acceptance of any risk.

However, section 2 of the Act only applies to situations where there is a liability for breach of duty arising from things done in the course of a business or from the occupation of premises used for the business purposes of the occupier.

Burden of proof

The burden of proof of the defendant's negligence is upon the claimant, who must prove, on a balance of probabilities, that the defendant was negligent. This burden of proof is considerably lower than that in criminal cases where the defendant's guilt must be proved beyond all reasonable doubt.

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[66] *Rootes v Shelton* [1968] ALR 33 at 34

Recent cases

- *C v W*[67]

This case was highlighted in the Press Notice issued by Julian Brazier on his Private Member's Bill.[68] The claimant, Simon Chittock, a 17½ year old pupil, went on a school skiing trip principally intended for younger pupils. His parents signed a consent form which included a declaration that their son was to be allowed to ski unsupervised by teachers with two fellow pupils of a similar age. He was observed by teachers to be skiing competently and sensibly. However, a number of incidents arose during the holiday including two occasions where he skied off-piste. On the first occasion, the teacher accepted his explanation that he had lost his way because of bad weather. After the second off-piste incident, the teacher gave him a severe reprimand and he assured the teacher that he would not ski off-piste again. The following day, the claimant had an accident while skiing on the piste which left him permanently paralyzed.

In the High Court, it was held that the school had a duty to take reasonable care for the safety of the claimant as a pupil of the school, and their staff had a duty to show such care as would be exercised by a reasonably careful parent, notwithstanding that the skiing was to be unsupervised. The decision of the teacher in charge merely to reprimand the claimant on witnessing him skiing off-piste on the day before the accident was not an appropriate or reasonable reaction. The boy's conduct demonstrated that he could not be trusted. In failing to impose appropriate and substantial sanctions, the teacher had failed in his duty of care, with the result that the boys were able to ski on their own on the piste on which the accident occurred. It was further held that while the accident was primarily caused by the claimant skiing too fast and paying insufficient attention, had he been required as a result of the previous incident to stay with the junior group or to give up his ski pass, the accident would probably not have happened. However, on the evidence, the claimant and the defendants were held to share equal responsibility.

In the course of his judgment the judge said:

> I readily accept that skiing is a challenging physical activity carried out in a potentially dangerous environment and contains within it inherent hazards and the risk of injury (even in the best ordered of worlds).[69]

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67 *C (A Child) v W School* [2002] PIQR P13. This case was called *Chittock v Woodbridge School* when it reached the Court of Appeal.

68 Julian Brazier TD MP, *Give volunteers a chance say MPs in Private Member's Bill*, 26 February 2004, http://212.241.164.3/julianbrazier/pressshow.asp?ref=202

69 *Ibid* at paragraph 22

On appeal, the Court of Appeal held that the school was not liable. The Court noted that the accident had nothing to do with skiing off-piste or with deliberately irresponsible behaviour. Instead it was cause by carelessness. The Court considered that in order to succeed in establishing a breach of the school's duty of care, the claimant had to establish that the teacher's decision was one that no reasonable teacher in that position could have reached:

> AULD LJ said that the supervising teacher and his fellow teachers on the skiing trip owed a duty to the claimant to show the same care in relation to him as would have been exercised by a reasonably careful parent credited with experience of skiing and its hazards and of running school ski trips, but also taking into account of the claimant's known level of skiing competence and experience, the nature of the conditions of the particular resort and the teachers' responsibilities for the school group as a whole. That could, in appropriate circumstances, include a duty to take positive steps by way of supervision or otherwise to protect the claimant from doing himself harm. It was not a duty to ensure the claimant's safety against injury from skiing mishaps such as those that might result from his own misjudgment or inadvertence when skiing unsupervised on-piste but a duty to take such steps as in all the circumstances were reasonable to see that he skied safely and otherwise behaved in a responsible manner. Where there were a number of options for the teacher as to the manner in which he might discharge his duty, he was not negligent if he chose one which, exercising the test of *Bolam* v *Friern Hospital Management Committee* [1957] 1 WLR 582, would be within a reasonable range of options for a reasonable teacher exercising that duty of care in the circumstances. The duty of care of organisers of school skiing trips should be considered in the context of any available appropriate guidance for such activity. The standard of care should reflect the particular circumstances in which the claimant went on the trip, including the understanding with his parents that he should be allowed to ski unsupervised, but also an implicit assumption by the school of responsibility for general oversight of his skiing and other activities at the resort, backed, where necessary, by appropriate discipline to safeguard him and others from reasonably foreseeable harm. The judge's finding that the supervising teacher's decision was not within the range of reasonable responses for a teacher in his position, acting as a reasonably careful parent in the sense described, was wrong in that it "exceeded the generous ambit within which a reasonable disagreement is possible".[70]

- *Simonds v Isle of Wight Council*[71]

In this case it was held that playing fields could not be made free of all hazards and the mere fact that a school had diagnosed a possible or potential hazard did not mean it was duty bound to take further steps to make access or use impossible. The claimant, then aged 5, had had a picnic lunch with his mother during his primary

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[70] *Chittock v Woodbridge School* [2002] EWCA Civ 915, http://www.lawreports.co.uk/civjunb0.4.htm
[71] 2003 EWHC 2303

> school sports day at playing fields in a neighbouring village. Having told him to return to his teachers, she left the field; instead of returning he had gone to play on nearby swings, jumped off and broken his arm. It was held that this was simply an accident and the school was held not to be liable. Balancing the element of risk, it was not reasonable to impose a legal duty on a school to immobilise the swings any more than it would be to rope off a tree on the field.

- *Vowles v Evans and Another*[72]

The claimant was an amateur rugby player who was injured during a match refereed by the first defendant. The Court of Appeal held that the referee was in breach of his duty of care to the claimant and was liable for his injuries.

The Court held that the role of a rugby referee was to enforce the rules, some of which were designed to minimise the danger to the players of an inherently dangerous sport. It was fair, just and reasonable for the players to rely on the referee to exercise reasonable care in performing his role as referee, and since the relationship between a player and the referee of the game was sufficiently close and it was reasonably foreseeable that a failure by the referee to exercise reasonable care might result in injury to a player, a referee owed a duty of care to the players. The standard of care depended on all the circumstances, including the nature of the game, and in a fast moving game the threshold of liability was high. The relevant rule required the referee to satisfy himself that a replacement front row player was suitably trained and experienced to play in the front row safely. In leaving the decision to the captain of the team when the game had been stopped and there was time for reflection the referee abdicated his responsibility for deciding whether it was necessary to insist upon non-contestable scrums, which constituted a breach of his duty to exercise reasonable care for the safety of the players. Accordingly, it was held that the referee was in breach of his duty of care to the claimant and was liable for his injuries.

As a postscript, Lord Phillips of Worth Matravers MR added:

> Mr Leighton Williams suggested that, if we upheld the judge's finding that an amateur referee owed a duty of care to the players under his charge, volunteers would no longer be prepared to serve as referees. We do not believe that this result will, or should, follow. Liability has been established in this case because the injury resulted from a failure to implement a law designed to minimise the risk of just the kind of accident which subsequently occurred. We believe that such a failure is itself likely to be very rare. Much rarer will be the case where there are grounds for alleging that it has caused a serious injury. Serious injuries are happily rare, but they are an inherent risk of the game. That risk is one which those who play rugby believe is worth taking, having regard to the satisfaction that they get from the game. We would not expect the much more remote risk of

[72] [2003] 1 WLR 1607

> facing a claim in negligence to discourage those who take their pleasure in the game by acting as referees.[73]

b. Breach of statutory duty

A breach of a statutory duty may also give rise to a claim in tort. In some cases there may be an overlap with the tort of negligence, because the existence of a statutory duty may indicate that a risk ought to have been foreseen. However, if a statute imposes a strict liability,[74] the defendant may be liable even if (s)he has not been negligent.

c. Occupiers' liability

Under the *Occupiers' Liability Act 1957* an owner or occupier is responsible for taking such care as in all the circumstances of the case is reasonable to see that a visitor will be reasonably safe in using the premises for the purpose of which he is invited to be there. However, the Act does not impose any obligation on an owner or occupier to a visitor who willingly accepts risks.

It may be sufficient, in some circumstances, to discharge the duty to visitors by erecting warning signs, but this will depend on the facts of the case and on whether in all the circumstances this was enough to enable the visitor to be reasonably safe. The provisions of the *Unfair Contract Terms Act 1977* may restrict the occupier's ability to exclude or restrict his liability for negligence.[75] The definition of negligence expressly includes breach of the common duty of care imposed by the *Occupiers' Liability Act 1957*. However, as stated above, section 2 of the Act only applies to situations where there is a liability for breach of duty arising from things done in the course of a business or from the occupation of premises used for the business purposes of the occupier.

The *Occupiers' Liability Act 1984* gives a more limited protection to trespassers. It also enables a business occupier to exclude liability to those whom he allows on to his land for recreational or educational purposes, provided that it is not part of his business to grant access for such purposes.

In *Tomlinson v Congleton Borough Council,*[76] the claimant suffered a broken neck as a result of diving into a lake in a council-run country park. Swimming in the lake was prohibited, and the defendants displayed prominent notices reading "dangerous water: no swimming" and employed rangers with the duty of giving oral warnings against swimming and handing out safety leaflets. Reversing the decision of the Court of Appeal,

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73 *Ibid* at p1625

74 Strict liability means that liability is conferred simply by carrying out a particular action, or being in a particular place; an intention to act, or any blameworthy conduct, does not have to be shown.

75 See pages 28-9 of this Research Paper above

76 [2004] 1 AC 46

the House of Lords held that any risk of the plaintiff suffering injury had arisen not from any danger due to the state of the defendants' premises or to things done or omitted to be done on them within section 1(1)(a) of the *Occupiers' Liability Act 1984,* but from the plaintiff's own misjudgment in attempting to dive in too shallow water; that that had not been a risk giving rise to any duty on the defendants; and that, in any event, it had not been a risk in respect of which the defendants might reasonably have been expected to afford the plaintiff some protection under section 1(1)(c). The council was not legally obliged to safeguard irresponsible visitors against obvious dangers. Lord Hoffman said:

> I think it will be extremely rare for an occupier of land to be under a duty to prevent people from taking risks which are inherent in the activities they freely choose to undertake upon the land. If people want to climb mountains, go hang-gliding or swim or dive in ponds or lakes, that is their affair. Of course the landowner may for his own reasons wish to prohibit such activities. He may think that they are a danger or inconvenience to himself or others. Or he may take a paternalist view and prefer people not to undertake risky activities on his land. He is entitled to impose such conditions, as the Council did by prohibiting swimming. But the law does not require him to do so.[77]

d. Parental responsibility

The *Children Act 1989* placed on the statute book the term "parental responsibility", and defined it as "all the rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to the child and his property". The Act only gave further details of what this entails in regard to the administration of a child's property (section 3(2)).

The guidance to the Act adds that parental responsibility is "concerned with bringing the child up, caring for him and making decisions about him, but does not affect the relationship of parent and child for other purposes. Thus, whether or not a parent has parental responsibility for a child does not affect any obligations towards the child, such as a statutory duty to maintain him (section 3(4)(a)), nor does it affect succession rights (section 3(4)(b))".

Although the Act does not give a precise definition of the matters to which the term "parental responsibility" applies, the courts have set out some aspects of parental responsibility such as determining the child's education, consenting to the child's medical treatment, consenting to the taking of blood for testing, and protecting and maintaining the child.

Hershman and McFarlane's *Children Law and Practice (CL&P)* states that parental responsibility should be seen in the context of a House of Lords decision that the parental right to control the child derived from the parental duty and existed for the child's

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[77] At pp84-85

protection, adding that "it follows that such parental rights are not absolute but subject to the principle that the child's welfare is the paramount consideration". In particular, *CL&P* cited the case of *Re A (Conjoined Twins: Medical Treatment)* in which the Court of Appeal held that an operation to separate conjoined twins, the result of which would be the death of one of the twins, was lawful despite it not being in the best interests of the weaker twin and against the wishes of the parents.

G. The legal position of a "good Samaritan"

The intention of **Clause 5** of the Bill is to protect members of the public who offer assistance to those who are suffering or injured or at imminent risk of harm from later being sued under common law for accidental injury. Clause 5 is described by Julian Brazier as the 'good Samaritan' clause; for the purposes of the Bill a 'good Samaritan' is taken to mean anyone who voluntarily assists or rescues (or tries to assist or rescue) an injured or imperilled stranger.

This part of the Paper sets out a brief summary of the legal obligations and liabilities of a good Samaritan under the common law of negligence. For completeness, it also provides a commentary on the duty of care legally owed to a good Samaritan. Against this backdrop, clause 5 of the Bill is considered.

1. No legal duty to be a good Samaritan

In the absence of a special relationship or specific assumption of a duty of care, the current law of negligence does not impose a general duty to come to the rescue of others. There are various reasons for this:

- First, it may be difficult to identify the proper defendant. For example, at the scene of an accident it may be impossible to single out one defendant who failed to help when there were many other observers who were equally reluctant to get involved.

- Second, the courts have been reluctant to infringe individual liberty by imposing duties to act in an affirmative way.

This contrasts with French law, which imposes a legal duty to rescue an individual in peril if it can be done without danger to the potential rescuer.[78]

[78] Article 62 of the French Penal Code states: "any person who wilfully fails to render or to obtain assistance to an endangered person when such was possible without danger to himself or others, shall be subject to [punishment]". Failure to act may result in criminal liability.

2. A good Samaritan should act carefully and conscientiously

There is no legal duty to act as a good Samaritan and, consequently, no liability for failing to act. However, it is the essence of the law of negligence that if one decides to act one should act carefully and conscientiously.

In general terms, if a person is witness to an incident and decides to get involved, he is under a duty to act carefully so as not to make a bad situation worse. It follows that if, as a direct result of a good Samaritan's unreasonable or reckless acts, a victim's condition or situation worsens, there may be grounds for a claim of negligence against him (in addition to a claim against the negligent individual).[79] However, in the case of *Wilsher v Essex Area Health Authority 1986* Mustill LJ held that in the event that rescue takes place in an emergency situation, the courts are able to take into account the following:

> …full allowance must be made for the fact that certain aspects of treatment may have to be carried out in what one witness …called 'battle conditions'. An emergency may overburden the available resources and, if an individual is forced by circumstances to do too many things at once, the fact that he does one of them incorrectly should not be lightly taken as negligence.[80]

Arguably the risk of exposure to a possible negligence claim (however limited in scope), acts for some people as a deterrent to getting involved. There is also a fear that an allegation may be made that the plaintiff's damage is wholly attributable not to a negligent individual's breach of duty which caused the incident, but to the good Samaritan's interference; that the good Samaritan's actions may be viewed as an intervening event (known in law as a '*novus actus interveniens*') which breaks the chain of causation. In other words, even though the damage would not have occurred 'but for' the individual's negligence, the extent of the damage may still be regarded as falling outside the scope of the risk created by the original fault.

In practice, much would depend on the extent to which the good Samaritan's conduct departed from a 'reasonable' standard of care. In looking at the question of what amounts to a '*novus actus*', the courts will often consider whether the intervening conduct was within the ambit of the risk created by an individual who has acted negligently. The act of a good Samaritan who goes to assist another put in danger by a negligent individual is obviously within the risk created by that negligence and is not, therefore, a '*novus actus'*.[81] If, however, the good Samaritan's unreasonable or reckless conduct makes the situation considerably worse (for example, by performing an unnecessary and dangerous roadside operation when there is no imminent risk) the extent of the damage may be

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79 In certain specific circumstances, a rescuer may also have a claim against another who unsuccessfully attempts a rescue if that has led to an increased danger

80 Per Mustill LJ, *Wilsher v Essex Area Health Authority* [1986] 3 All ER 801, 812

81 *Haynes v Harwood* [1935] 1 KB 146, CA

regarded as falling outside the scope of the risk created by the original fault. In short, the Samaritan may be liable.

3. A duty of care may be owed to the good Samaritan

Where an individual has negligently created a situation endangering life or property, such that a rescue attempt is reasonably foreseeable, he owes a duty of care to the rescuer and may be liable to him if the rescuer suffers injury as a direct result of attempting a rescue.[82] It makes no difference that the person rescued is the negligent person himself rather than a third party.[83]

In the case of *Haynes v Harwood 1935*, the Court of Appeal affirmed a judgment in favour of a policeman who had been injured in stopping some runaway horses in a crowded street. The defendant had left the horses unattended on the highway and they had bolted. The policemen, who was on duty, not in the street but in a police station, rushed out and was crushed by one of the horses. The Court held that the defendant was liable for the policeman's injuries. The policeman's act was that of a normally courageous man in the same circumstances, and, therefore, was both the direct and foreseeable consequence of the defendant's unlawful act. According to the court, a reasonable man "*must be endowed with qualities of energy and courage, and he is not to be deprived of a remedy because he has in a marked degree a desire to save human life when in peril*". The rescuer's act need not be instinctive in order to be reasonable *"for one who deliberately encounters peril after reflection may often be acting more reasonably than one who acts upon impulse"*.[84]

The legal principle of *Hayes v Harwood* applies to the rescue of property as well as to the rescue of a person provided the good Samaritan acted reasonably.[85] In either case, it is necessary for the court to consider the relationship of the rescuer to the property in peril, or to the person in peril, and also to consider the degree of danger. According to the court, the only difference between the life and property cases is that a rescuer would not be justified in exposing himself to as great danger in saving property as he would in saving human life.[86]

However, the principle does not sanction any foolhardy or unnecessary risks. To be successful in a claim for negligence, the good Samaritan must satisfy the following four-pronged test:

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82 *Haynes v Harwood* [1935] 1 KB 146, CA; *Ward v TE Hopkins & Son Ltd* [1959] 3 All ER 225 at 230; *Baker v T E Hopkins & Son Ltd* [1959] 1 WLR 966 at 972

83 *Harrison v British Railways Board* [1981] HC 1981

84 *Haynes v Harwood* [1935] 1 KB 146, CA;

85 *Hyett v G.W. Ry* [1948] 1 K.B 345

86 *Haynes v Harwood* [1935] 1 KB 146, CA

1. the act or omission of the defendant (i.e. the negligent person) directly caused the accident;

2. this negligence imperilled others;

3. this endangerment of others could reasonably have been foreseen; and

4. it could also have been reasonably foreseen that someone would attempt to help or rescue a person in peril and might either suffer injury or lose his life.[87]

This test was endorsed in a subsequent case, *Chadwick v British Railways Board 1967*.[88] The standard is: "what is reasonable" in all the circumstances. It is clear that a good Samaritan can only make a claim for his losses where the rescue attempt is reasonably foreseeable.[89]

In England and Wales, there is no rule of law to prevent a claim by a member of the emergency services (i.e. a 'professional' rescuer). The House of Lords case of *Ogwo v Taylor 1988* involved a fireman injured whilst fighting a negligently started fire. The court held that whilst some fires may present no foreseeable hazard to a trained fireman acting with skill and care, if the risk is unavoidable the fireman should not be disadvantaged because of his profession.[90]

The duty owed to a good Samaritan is wholly independent of any duty owed by the defendant to the party rescued. In the case of *Videan v British Transport Commission 1963*, Lord Denning MR ruled that the duty owed to the rescuer arises separately from that owed to the victim. In this case, a driver of a railway trolley negligently failed to observe warnings given to him by the railway stationmaster and a porter that the stationmaster's young son was on the railway line. The stationmaster dived onto the line in an attempt to save his son's life. He saved his son (who was injured), but died himself. His widow brought an action in respect of the death of her husband and on behalf of her injured son. The son's action failed because he was a trespasser. The action in respect of the death of the husband, however, succeeded. Lord Denning MR held:

> The right of the rescuer is an independent right and is not derived from that of the victim. The victim may have been guilty of contributory negligence – or his right may be excluded by contractual stipulation – but still the rescuer can sue…Foreseeability is necessary, but not foreseeability of the particular emergency that arose. Suffice it that he ought reasonably to foresee that, if he did not take care, some emergency or other might arise…As it happened, it was the

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87 Per Morris LJ, *Baker v TE Hopkins & Son Limited* [1959] 1 WLR 966, 972, CA

88 Per Waller LJ, *Chadwick v British Railways Board* [1967] 1 WLR 912, 912A-D, CA

89 *Ogwo v Taylor* [1988] AC 431, 1987 3 All ER 961, HL and *Ward v TE Hopkins & Son Ltd* [1959] 3 All ER 225

90 *Ogwo v Taylor* [1988] A.C 431

> stationmaster trying to rescue his child; but it would be the same if it had been a passer by. Whoever comes to the rescue, the law should see that he does not suffer for it. It seems to me that, if a person by his fault creates a situation of peril, he must answer for it to any person who attempts to rescue the person who is in danger. He owes a duty to such a person above all others. The rescuer may act instinctively out of humanity or deliberately out of courage. But whichever it is, so long as it is not wanton interference, if the rescuer is killed or injured in the attempt, he can recover damages from the one whose fault has been the cause of it. [91]

For various reasons, the principle of 'voluntary assumption of risk'[92] would not generally be an adequate defence to a good Samaritan's claim for damages:

- First, it is already established that the rescuer's claim is derived from a duty owed directly to him by the defendant, and is separate from any duty of care owed to the person at danger.[93]

- Second, a rescuer acts under the impulse of duty (whether legal, moral or social) and he does not, therefore, exercise that freedom of choice which is essential to the success of the defence.[94]

- Thirdly, it is in the nature of a rescue case that the defendant's negligence precedes the rescuer's act of running the risk. In other words, the claimant does not assent to the defendant's negligence at all, and, indeed, may be wholly ignorant of it at the time. He may only know that someone is in a position of peril which calls upon his intervention as a rescuer.[95]

It can also be difficult to use the defence of contributory negligence in good Samaritan cases.[96] The case of *Brandon v Osborne, Garrett & Co. Ltd 1924* illustrates some of the difficulties involved.[97] In this case, X and his wife were in a shop as customers. Owing to the negligence of the defendants who were repairing the shop roof, some glass fell from a skylight and struck X. His wife, who was unharmed herself, but who reasonably believed X to be in danger, instinctively clutched his arm and tried to pull him from the spot, and thus injured her leg. Swift J. held that there was no contributory negligence on her part,

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91 Per Lord Denning MR, *Videan v British Transport Commission* [1963] 2 QB 650, CA

92 As explained in pages 28-9 of this Paper, this maxim embodies the principle that a person who expressly or impliedly agrees with another to run the risk of harm created by that other cannot thereafter sue in respect of damage suffered as a result of the realisation of that risk. The defence is also known as *volenti non fit injuria* and, if successful, prevents recovery of losses.

93 Per Lord Denning MR, *Videan v British Transport Commission* [1963] 2 QB 650, CA

94 *Frost v C.C. South Yorkshire* [1999] 2 A.C 455 at 509

95 *Baker v T.E. Hopkins & Son Ltd [1959]* 1 W.L.R 966 at 976, per Morris LJ

96 A plaintiff in a negligence case is expected to show an objective standard of reasonable care. A plaintiff is guilty of contributory negligence (and will consequently have his damages refused or reduced) if he ought reasonably to have foreseen that, if he did not act as a 'reasonable man', he might hurt himself.

97 *Brandon v Osborne, Garrett & Co. Ltd* [1924] 1 K.B.548

provided, as was the case, she had done no more than any reasonable person would have done "…b*earing in mind that danger invites rescue, the court should not be astute to accept criticism of the rescuer's conduct from the wrongdoer who created the danger"*.

This does not mean that a rescuer will never be found guilty of contributory negligence. For example, in the case of *Harrison v British Railways Board 1981* the rescuer (the plaintiff) was found to be contributory negligent for not following established work procedures designed to deal with the specific emergency.[98]

[98] *Harrison v British Railways Board* [1981] HC 1981

II The Bill

A. Interpretation

In UK law, there is no single definition of a "volunteer"or of a "voluntary organisation" although there are various definitions in legislation, including, for example, for social security benefit purposes, and for the national minimum wage.

In clause 1 of the Bill, the definition of volunteer is restricted to a "natural person" (i.e. an individual), as distinct from, for example, a corporation. It covers people, other than employees, who provide services to, or on behalf of any "voluntary organisation or volunteering body". That service must be without payment or the expectation of payment other than reasonable expenses. However, the definition goes beyond this to cover "a farmer or other land owner" who allows the public access to land for voluntary or educational activities. Land owners are not restricted to "natural persons", so it might be arguable that it could include, for example, local authorities. Army, Navy and Air Force and police cadet instructors are also included within the definition.

A "voluntary organisation" is defined as either a charity or "an institution other than a charity which is established for benevolent or philanthropic purposes".

In addition, clause 1 defines a third term, "volunteering body". This covers institutions, including commercial organisations, which provide services other than for commercial gain. This would cover, for example, companies who release staff to participate in voluntary activities in the community. "Volunteering body" also covers "any school or institute of further or higher education providing out of school hours learning activities, including school sports and adventure training".

B. Statements of inherent risk

Clause 2 of the Bill would aim to protect volunteers, employees, volunteering bodies and voluntary organisations[99]. In this part of the Research Paper such individuals and bodies are referred to collectively as "volunteers".

Under Clause 2, it is intended that volunteers would be able to present a written "Statement of Inherent Risk" (SIR) to anyone taking part in activities which are administered, managed or under the control of the volunteer. If the person taking part is a minor, the SIR would be presented to his/her parent or guardian. The SIR would set out the principal risks which are inherent to the activity involved, including risks of personal injury or harm or risks to property.

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[99] Each of these terms are defined in Clause 1 of the Bill

Julian Brazier commented on such certificates:

> The Bill would establish a certificate of 'Recognition of Inherent Risk' to help protect volunteers and organisations from unreasonable litigation, where sensible safety standards had been adhered to. This would not apply in cases of criminal liability.[100]

If the adult participant or the parent/guardian of the child participant accepted and agreed to the SIR, he or she would share responsibility for the safe conduct of the activity. Although there is no express provision requiring the acceptance and agreement to be in writing, Julian Brazier has confirmed that an amendment to this effect would be made during the passage of the Bill.[101] It may, of course, be difficult for a parent/guardian who may not be physically present to share responsibility, in any practical or literal sense, for the safe conduct of an activity over which they have no control and about which they possibly have no knowledge. However, the Bill would provide that in law they would be regarded as sharing the responsibility. Julian Brazier has confirmed that the intention behind the provision is to ensure that all parties are aware of the need for teamwork in relation to safety. This includes recognizing the importance of obeying any rules set out by the volunteer, but also goes beyond this so that all parties would be required to work together in difficult circumstances. It is intended that parents/guardians should impress the importance of these requirements upon minor participants. Julian Brazier has confirmed that, if considered necessary, a drafting amendment may be made during the passage of the Bill to clarify this intention.[102]

Clause 2(3) would include further details about SIRs. They would include only those risks which are intrinsic or incidental to the activity undertaken. It is intended that the volunteer would decide which risks fall into this category when drawing up the statement, but also that umbrella organisations might produce specimen statements.[103] It is possible that a participant might be required to sign more than one SIR in relation to the same activity. For example, the parent of a child playing a game of football might be required to sign SIRs by the landowner on whose land the game is to be played, the junior football club for which he is a player, and the local league in accordance with whose rules the game is to be played. It is not clear whether in each case the SIR would need to be signed at each match.

The SIR would not apply to any activity which the participant is obliged to undertake. For example, if an employee is obliged, under his contract of employment, to undertake a particular activity, the SIR would not apply, whereas if the same person chooses to undertake the same activity, the SIR would apply. Julian Brazier has explained that one

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[100] Julian Brazier TD MP, *Give volunteers a chance say MPs in Private Member's Bill*, 26 February 2004, http://212.241.164.3/julianbrazier/pressshow.asp?ref=202

[101] Personal communication, 1 March 2004

[102] Personal communication, 1 March 2004

[103] Personal communication, 1 March 2004

reason for this distinction is that he has been advised that it would not be possible to restrict the liability of a volunteer to someone who is obliged to undertake an activity, because this might cause problems in relation to the European Convention of Human Rights.[104]

The SIR would not relieve a defendant from any criminal liability, such as a manslaughter charge. Furthermore an SIR would not relieve from liability any commercial organisation providing activity courses for gain.

Clause 2(4) would provide for the effect of an SIR. In determining the liability of a volunteer in any subsequent proceedings for negligence or for breach of statutory duty, the Court would have to take account of the SIR in various ways:

- The Court would have to have regard to the SIR "so as to recognise that certain risks are inherent to activities and that accidents may occur without negligence". This is a requirement to consider a general premise beyond the particular facts at issue in the case before the court. Julian Brazier has confirmed that he considers this requirement to be fundamental to the purpose underlying the Bill because he feels that it is a premise which can be overlooked.

- The Court would have to take note of the SIR in determining whether the participant or his/her parent/guardian (as the case might be) knowingly accepted that there were risks involved. This appears to relate to a general recognition of risks being involved, not necessarily to recognition of the particular risk which has given rise to the claim being pursued. Julian Brazier has confirmed that it is not intended that the SIR should have to list every potential risk. He wishes to avoid creating a situation where the volunteer's position is made worse as a result of being penalised for omitting any particular risk. The SIR would therefore be illustrative rather than exhaustive. This does, however, raise the possibility that a participant or his/her parent/guardian (as the case might be) might be treated as being aware of a risk which was wholly beyond their contemplation when the SIR was accepted.

- The Court would be directed only to uphold a claim for negligence or breach of statutory duty where it would 'manifestly be unreasonable' not to do so. Julian Brazier has confirmed his intention that this sub-clause would create a new burden of proof in such cases, closer to (but not necessarily equivalent to) the current burden of proof in criminal cases (beyond all reasonable doubt) than the usual civil burden of proof (the balance of probabilities). It is not entirely clear what the word 'manifestly' might mean in this context or what guidance (if any) would be given to help establish the exact burden of proof. Julian Brazier intends that this clause would make it more difficult to sue a volunteer and the clause seems to

[104] Personal communication, 1 March 2004

> envisage circumstances where a claimant might prove all the elements normally required to establish the defendant's liability in negligence, but that nevertheless the claim might be rejected. What is reasonable from the point of view of one of the parties might well appear to be unreasonable from the point of view of the other party, and the circumstances which would need to be established to relieve the defendant of liability are not specified. Again, Julian Brazier has confirmed that the wording of this provision may need to be discussed in Committee to ensure that the clause achieves his stated intention.[105]

An SIR would not contain an express waiver of a right of action in respect of any of the risks set out in the SIR.

C. Training for the Judiciary

The Judicial Studies Board provides training and instruction for all full-time and part-time judges in the skills necessary to be a judge. It also has an advisory role in the training of lay magistrates and of chairmen and members of tribunals.

The Department for Constitutional Affairs website includes the following comment on the training received by judges:

> The Judicial Studies Board (JSB), which was established in 1979, is responsible for judicial training and for advising on the training of lay magistrates. It is chaired and directed by senior judges but includes lay magistrates, lawyers, administrators and academics. One of the main activities of the JSB is to run induction courses to enable newly appointed part-time judges to develop the skills required. No newly appointed Recorder, Deputy District Judge or Deputy District Judge (Magistrates' Courts) can sit as a judge without first having attended an induction course run by the JSB. The courses are residential and last for four or five days. They are very intensive and concentrate on the practical aspects of sitting as a judge and running a court. Emphasis is placed on practical exercises such as, if appropriate, sentencing, directions to the jury and summing up. The newly appointed judges must also sit-in for at least a week with an experienced judge and, if they are to hear criminal cases, they must also visit local prisons and the Probation Service.
>
> The JSB also organises 'refresher' seminars to which both full-time and part-time judges are invited. The subjects covered include changes in the law and topics of current importance. In addition to the standard induction and refresher courses the JSB also arrange training on subjects of special interest and they issue books and other guidance for use by judges. The JSB publish an Annual Report each summer.

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[105] *Ibid*

> Tribunals have their own local arrangements for training, but again an induction course has to be attended and satisfactorily completed before any member can undertake sittings.[106]

Clause 2(5) to **(7)** of the Bill would give the Secretary of State power to make regulations providing for training courses for members of the judiciary on the subject of volunteering including, in particular, sport and adventure training, and about the workings of the Act. Examples of the bodies who might establish such training courses would be included. The Secretary of State would be obliged to report annually to Parliament about the number of, and attendance at, such training courses.

In his press release, Julian Brazier drew attention to a case where a judge disagreed with a mountaineering instructor's judgment:

> In another case highlighted by Roy Amlott QC, adviser to the Campaign for Adventure, a judge ruled against a mountaineering instructor despite, once again, accepting the facts of the case, on the grounds that he, the judge, disagreed with the mountaineering instructor's judgment as the to the best way to handle a landslip. That is why so many voluntary organisations are losing volunteers.[107]

He also commented on the training provisions in the Bill which he says would:

> provide for encouragement for the judiciary to undertake training to fully understand the implications of the Act and better comprehend the inherent dangers associated with adventure sports; it would require The Lord Chancellor to report to both House of Parliament the numbers of judges attending such courses.[108]

D. Voluntary organisations and insurance

Clause 3 of the bill amends the *Financial Services Act 1986.* Paragraph 2 of the clause states:

In section 45(1) there is inserted –

> "(ja) any voluntary organisation in respect of the sale of, the provision of advice in connection with, taking out or purchasing, a contract of insurance.

The background to the inclusion of this provision is the possible impact of forthcoming rules to be enacted by January 2005 by the Financial Services Authority.

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[106] http://www.dca.gov.uk/judicial/judges/faqs.htm#24

[107] Julian Brazier TD MP, *Give volunteers a chance say MPs in Private Member's Bill*, 26 February 2004, http://212.241.164.3/julianbrazier/pressshow.asp?ref=202

[108] *Ibid*

It is very common for 'affinity groups' – activity groups such as sports clubs, walking clubs, sailing clubs caving clubs etc- to be able to offer members cheap insurance products. Some organisations, for example the Rugby Football Union, require insurance from all affiliated clubs. The most frequent arrangement is that the national body, say the RYA, has come to an arrangement with an insurer to provide a standard level of cover for a favourable rate, reflecting the volume of business generated and the fact that much of the 'selling costs' are indirectly met by the national body itself.

The FSA has decided that this type of relationship falls within the category of 'advice' which requires regulatory guidance. The proposal has not yet made it into the FSA rule book; currently it can be found in a 'near final' text form in the latest edition of Consultation Paper 174. A copy of this can be found on the FSA website.[109]

The impact of the new rule will be that all organisations which carry out this role will need to be authorised under the terms of the Act. Clause 3 of the current Bill attempts to exclude voluntary bodies from what it regards as the excessive bureaucracy involved in being authorised when insurance is such a minor and subsidiary part of their overall activity, but a part which is a 'public good' and which should be encouraged.

E. Data protection

The *Data Protection Act 1998* (the *DPA*) regulates the use of personal information held on computer and, in some cases, in manual form by both the public and the private sector throughout the United Kingdom. The person or organisation holding the data (known as the "data controller") must abide by eight "data protection principles" contained in Schedule 1. The first principle requires personal data to be collected, held and used "fairly and lawfully" and not to be "processed" in any way unless at least one of the conditions specified in the Act has been met. "Processing" is defined as

> obtaining, recording or holding the information or data or carrying out any operation or set of operations on the information or data, including […] (c) disclosure of the information or data by transmission, dissemination or otherwise making available […][110]

The conditions, at least one of which must be met for processing to be lawful, are as follows:

> 1. The data subject has given his consent to the processing.
> 2. The processing is necessary-
> (a) for the performance of a contract to which the data subject is a party, or

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[109] FSA - Prudential and other requirements for mortgage firms and insurance intermediaries - Feedback on CP174 and 'near final' text

[110] *Data Protection Act 1998* section 1

> (b) for the taking of steps at the request of the data subject with a view to entering into a contract.
> 3. The processing is necessary for compliance with any legal obligation to which the data controller is subject, other than an obligation imposed by contract.
> 4. The processing is necessary in order to protect the vital interests of the data subject.
> 5. The processing is necessary-
> (a) for the administration of justice,
> (b) for the exercise of any functions conferred on any person by or under any enactment,
> (c) for the exercise of any functions of the Crown, a Minister of the Crown or a government department, or
> (d) for the exercise of any other functions of a public nature exercised in the public interest by any person.
> 6. - (1) The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject.
> (2) The Secretary of State may by order specify particular circumstances in which this condition is, or is not, to be taken to be satisfied.[111]

Part III of the *DPA* sets out exemptions from data protection requirements. For example, section 35 covers disclosures required by law or made in connection with legal proceedings. Section 36 exempts personal data processed by an individual only for the purposes of that individual's personal, family or household affairs from the Act's requirements.

Clause 4(1) of the Bill would insert a further exemption into Part III of the 1998 Act and allow disclosure of contact details for voluntary organisations and the names of their officers without a requirement to abide by the "processing" conditions in Schedule 2.

Clause 4(2) affords exemption from prosecution for any volunteer who discloses data in the belief that disclosure is in the public interest. This is essentially a widening of the provision that already exists under section 55 of the 1998 Act. *DPA* section 55 makes it an offence for a person, knowingly or recklessly, without the consent of the data controller, to disclose personal data. However, there is an exception from liability for this offence where the person can show that the disclosure was justified as being in the public interest. The *Promotion of Volunteering Bill* takes this principle further by providing a defence in the event of innocent breaches. It would apply, for example, to a situation where someone running a small voluntary organisation did not realise that, since he held personal data in what the *DPA* calls a "relevant filing system", he is required to register as a "data controller" with the Information Commissioner. As the law stands, it is an offence

[111] Ibid, Schedule 2

to process data without notification.[112] This is a "strict liability offence": it assumes liability without fault, that is, without the usual *mens rea* or knowledge needed for criminal offences. The maximum fine is £5,000. Fines have usually been lower (up to £3,000) and prosecutions are not common.[113]

There are precedents for ignorance of the law being a defence. A legal textbook comments:

> English criminal law appears to pursue a relatively strict policy against those who act in ignorance of the true legal position, but the maxim *ignorantia juris neminem excusat* (ignorance of the law excuses no one) is too strong a description.[114]

Ignorance or mistake as to civil law can certainly form the basis of a defence. For example, section 1 of the *Defamation Act 1996* provides a defence for any defendant who can show that

> (c) he did not know, and had no reason to believe, that what he did caused or contributed to the publication of a defamatory statement.

Even in criminal law the *Contempt of Court Act 1981* (section 3) recognises a defence of innocent publication or distribution:

> 3(1) A person is not guilty of contempt of court under the strict liability rule as the publisher of any matter to which that rule applies if at the time of publication (having taken all reasonable care) he does not know and has no reason to suspect that relevant proceedings are active.
> 3(2) A person is not guilty of contempt of court under the strict liability rule as the distributor of a publication containing any such matter if at the time of distribution (having taken all reasonable care) he does not know that it contains such matter and has no reason to suspect that it is likely to do so.

Under earlier legislation, the *Data Protection Act 1984*, unincorporated members' clubs enjoyed an exemption from registration requirements. The 1998 Act was introduced to bring UK law into compliance with an EU Directive[115] and the Government took the view that it could not retain the clubs exemption under the new Act (although clubs may still maintain paper records without the need to register).[116] Article 18.2 of the Directive allows Member States to provide for the simplification of, or exemption from, the notification requirements where:

- the processing is unlikely to affect adversely individuals' rights and freedoms; and

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[112] *Data Protection Act 1998* section 21(1)
[113] *Tolley's data protection handbook*, 2nd edn, 2002, pp494-6
[114] Andrew Ashworth, *Principles of criminal law*, 4th edn, 2003, p237
[115] 95/46/EC
[116] See Library Standard Note SN/HA/1860, *Data protection: small clubs etc.*

- the Member State specifies certain conditions on the use of such data (including to whom the data may be disclosed and the length of time the data may be stored).

In 1996 the then Conservative government made clear that it intended to make full use of the scope offered by Article 18.2 for easing still further the burden of registration.[117] Any legislation seeking to create further exemptions to the Act would have to take into account the broader context of European law. The European dimension of the *DPA* is explored further in the Library briefing produced for Second Reading of the Bill.[118]

F. The "good Samaritan"

The purpose of **clause 5** is to protect members of the public who offer assistance to those who are suffering or injured or at imminent risk of harm from later being sued under common law for accidental injury.

Specifically, clause 5 states:

> Any person who –
>
> (a) without payment or the expectation of payment, assists any other person, and
>
> (b) has reasonable grounds for believing that the other person is suffering or injured or faces imminent serious injury,
>
> shall not as a consequence of any action performed by him in good faith be liable at common law for any harm caused to that person unless he intended to cause harm.

The intention behind clause 5 is to move the law forward considerably; it purports to exclude liability for *any* action performed in *good faith* by a good Samaritan who voluntarily offers assistance to a suffering or injured or imperilled person. The test is one of 'good faith' rather than one of 'reasonableness'. This means that provided the good Samaritan believes he is helping and has no malicious intent he will not be liable for his actions under this provision. This would be a major departure from current law where there are grounds for bringing a negligence claim against a good Samaritan if (regardless of his good intentions) his actions are reckless, unreasonable or out of all proportion to the circumstances and serve only to make the situation worse.

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[117] *Consultation Paper on the EC Data Protection Directive (95/46/EC)*, Home Office, March 1996, para 5.2

[118] *The Data Protection [HL]: Bill 158 of 1997-8*, Library Research Paper 98/48, 17 April 1998, p28. This paper includes as an Appendix the full text of the EU Directive.

However, on a strict interpretation, the wording of clause 5(a) might suggest that an exemption would only apply if the acts of the good Samaritan actually 'assists' the injured or imperilled person. If, rather than being of help, his conduct had the effect of causing further damage it is questionable whether the clause would apply.

Clause 5(a) makes it clear that this exemption is for a genuine 'good Samaritan', someone who acts without payment or the expectation of payment. It follows that the exemption would not apply to members of the emergency services who assist an injured person whilst 'on duty' and in accordance with the terms of their employment. Arguably, it might apply to a member of the emergency services who assists a stranger whilst 'off duty'.

Clause 5(b) also makes it clear that for a good Samaritan to be exempt from liability under common law he must have intervened because he had *reasonable* grounds for believing that a person was suffering or injured or faced *imminent* serious harm. It is unclear, therefore, whether the exemption would also apply in circumstances where there is no imminent risk but the good Samaritan (acting in good faith) decides to help anyway rather than wait for the emergency services.

Under clause 5(b), to avoid liability a good Samaritan must be acting in 'good faith', although no definition of what would constitute good faith is provided in the Bill. It is clear, however, that a person who deliberately intends to cause harm to an injured or suffering person (i.e. who acts in 'bad faith') would still be liable for his actions under common law.

The exemption outlined in clause 5(a) of the Bill is only concerned with protecting a good Samaritan who, in good faith, assists an injured, suffering or imperilled person. It does not extend to the acts of a good Samaritan who, in good faith, intervenes to rescue property in peril.