



Government  
Office for Science

# **Scientific advice to government: legal liability**

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## Introduction and background

1. The details of the L'Aquila earthquake and the subsequent conviction of Italian geophysicists are well documented. In brief, in October 2012 six Italian scientists and one local emergency official were found guilty of manslaughter following the earthquake in L'Aquila in Italy in 2009 and sentenced to six years in prison. In his written reasoning of the verdict, the judge made it clear that it that the scientists were not convicted for failing to predict the earthquake, but rather, for their complete failure to analyse and explain the threat. "The deficient risk analysis was not limited to the omission of a single factor," he writes, "but to the underestimation of many risk indicators and the correlations between those indicators." The judge ruled that this failure had specifically led to the deaths of 29 of the 309 people killed in the quake and the injuries of four others. Of course, the prosecution of the Italian scientists and local official was conducted under the Italian jurisdiction and turned on the facts peculiar to that case.

## Scope and purpose of this note

2. In the light of concerns raised in the wake of the L'Aquila case, this note sets out, for the benefit of government scientists, the Government's views on the potential for liability in negligence of government scientific advisers arising from advice given by them. **This note is not a definitive statement of the law as this can only be provided by the courts.** This note discusses general principles of the law of negligence which would be applied by the courts in deciding liability with reference to factual examples drawn from existing case law or devised to illustrate those principles. It covers both civil courts, which can award damages for negligent advice, where a duty of care exists, and criminal courts, where *gross* negligence can result in prosecution. It is intended to be of generic application to government scientists and does not condescend to the detail of industry or sector specific legal obligations.
3. It is assumed that advice is given honestly and in good faith. Unsurprisingly, advice that is not may very well give rise to legal liability. It does not deal with actions for breach of contract. Implicit in any contract for scientific advice will be an implied term that the advice is given with reasonable care and skill but it is open to the parties to a contract to agree upon a higher standard. This note deals with the law in England and Wales and Scotland. The position in Northern Ireland is broadly similar to that in England and Wales.

## Potential civil liability

### Negligence

4. The law of negligence, in general terms, exists to compensate a claimant who has suffered loss or damage as a result of an act or omission by a defendant who owed the claimant a duty of care. The theory is that A must take reasonable care to avoid acts or omissions which he can reasonably foresee would be likely to injure B, where B is someone who is so closely and directly affected by A's act that he ought to have B in mind when carrying out that act.<sup>1</sup> This is known as the "neighbour principle".
5. As negligence falls within the common law, it has been developed by the courts and as such is: 1) dependent upon various judicial formulations, which may apply in slightly different contexts, and 2) subject to change, albeit in accordance with the principles already in existence. **Hence while the principles can be clearly identified, their application must always be on case-by-case basis.**
6. Simply put, in order for a government scientist to be liable (or for their employing department or authority to be vicariously liable for them), there would have to be the following elements:
  - (a) a duty of care must be owed by the scientist to the injured party;
  - (b) that duty must have been breached;
  - (c) the loss or damage must be of type for which a court would consider awarding compensation;
  - (d) for that loss or damage to have been caused in a legal sense by the breach; and
  - (e) for that loss or damage to have been reasonably foreseeable.

### Duty of care

7. There is a tripartite test for the existence of a duty of care set out in the leading case of *Caparo v Dickman*.<sup>2</sup> In order for a duty of care to exist, the following three elements must be present:
  - (a) foreseeability of damage;
  - (b) a sufficiently proximate relationship between the parties; and
  - (c) it must be fair, just and reasonable for a duty to be imposed by law.

These are not strict or separate categories; there is overlap between them. However, the court will still generally consider each limb of the test separately where a question of the presence or absence of a duty of care arises.

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<sup>1</sup> *Donoghue v Stevenson* [1932] AC 562

<sup>2</sup> [1990] 2 AC 605.

### **Foreseeability of damage**

8. This criterion relates to knowledge that the prospective tortfeasor (in this case, a government scientist) would be expected to have regarding the consequences of their acts or omissions. The more easily potential harm can be foreseen, the more likely it is that this criterion will be satisfied. If the risk of harm is far-fetched, a duty will not arise.

### **Proximity**

9. Proximity is a more difficult hurdle for a claimant to overcome, and one that is more relevant (and helpful) when considering the position of government scientists. One does not, in general life, owe a duty of care to everyone, as one has no relationship whatsoever with the majority of people. Proximity depends also on the activity being carried out: a driver will have such a relationship with another driver, but not with a bystander who witnesses the aftermath of a collision. A duty must be owed to the claimant themselves, or to the claimant as part of a defined class of persons.
10. An incident may involve both persons to whom one owes a duty, and persons to whom one does not. Only the former may sue for damages. In other words, if a duty is owed to a third party and the claimant sustains damage or injury as a result of the breach of that duty, but the claimant was not him or herself owed a duty, he or she will be unable to recover damages. Two classic examples of cases where proximity was not established are:
- i. When employees of a railway company assisted a passenger onto a train and negligently knocked a package he was holding. The package contained fireworks which exploded, causing a weight machine some 25 feet away to fall on top of the claimant. Although a duty was owed to the owner of the parcel, it was not owed to the claimant.<sup>3</sup>
  - ii. When a pregnant woman alighted from a tram, and was disturbed by the noise of a road collision. She was in no danger herself, but having seen the aftermath of the collision, she suffered a stillbirth. No duty was owed.<sup>4</sup>
11. An important case on this issue for government scientists concerns a geological study of Bangladeshi water which was undertaken by the National Environment Research Council (NERC). The study tested for most relevant poisonous chemicals, but not for arsenic. The claimant became ill with arsenic poisoning and sued. It was held (at House of Lords level) that the NERC did not owe a duty to the claimant or any other citizen of Bangladesh as there was no proximity of relationship. NERC had no control over or responsibility for the provision of safe drinking water to the citizens of Bangladesh.<sup>5</sup>
12. Hypothetically, it is difficult to see how a government scientist responsible for, for example, weather forecasts affecting millions of people and which are made available to the world at large could be said to be in a sufficiently proximate relationship with a member of the public relying upon that forecast. The famous failure accurately to predict the 1987 hurricane did not lead to catastrophic legal liability.

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<sup>3</sup> *Palsgraf v Long Island Railroad Co* (1928) 162 NE 99.

<sup>4</sup> *Bourhill v Young* [1943] AC 92.

<sup>5</sup> *Sutradhar v National Environment Research Council* [2006] UKHL 33; [2006] 4 All ER 490.

### **Fair, just and reasonable**

13. This important consideration allows for judicial consideration of legal and public policy. It is a test of ordinary reason and common sense. At its narrowest, it focuses on justice and fairness between the parties. At a broader level, it considers reasonableness from the perspective of legal policy, focussing on the operation of the legal system and its principles.<sup>6</sup> A common judicial concern is the fear that “floodgates” will be opened: that is to say that if a duty is imposed on the facts of one case then the duty will be similarly imposed in a range of similar situations, and that the burden of the imposition of that duty would not be proportionate to the conduct which it seeks to regulate.
14. A significant policy factor is the need to allow professionals to operate without the constant fear of litigation. As a matter of policy, certain relationships automatically give rise to a duty: doctor/patient, lawyer/client, and road users, one to the other. There has been resistance to imposing duties on certain classes of professional on the grounds that it would lead to defensive decision making in, for instance, policing<sup>7</sup> and social services<sup>8</sup>. However, those classes are by no means immune from liability: as a general rule, the closer the connection to the individual harmed, the more willing a court will be to find a duty. Thus there is no general duty on police to protect the public at large, but there can be towards particular individuals (such as employees).

### **Breach of duty and the standard of care**

15. Where a duty of care does exist, whether that duty has been breached depends on whether it has been performed to the required standard of care. The standard of care imposed on scientific advisers is to exercise reasonable care and skill. What amounts to reasonable care and skill is determined by references to members of the profession concerned. Often decisions are tested against what a hypothetical “reasonably competent” member of the profession concerned might have done. Authoritative sources suggest that what is required is that degree of skill and care which is ordinarily exercised by reasonably competent members of the profession, who have the same rank and profess the same specialisation (if any) as the defendant.<sup>9</sup> This can include following a respected body of professional opinion within a field,<sup>10</sup> in cases where there are divergent opinions, so long as that approach is also logically defensible.<sup>11</sup>

### **Actionable loss or damage**

16. Injury and damage to property are the most common claims arising in the courts. The courts have no difficulty in finding these to be actionable. Such damage will be actionable at common law.
17. More complex is the question of economic loss. The basic position is that economic losses flowing from a physical injury or damage to property for which the tortfeasor is liable will be recoverable. Thus if the injury means that one requires medical treatment, one can claim for the cost of undergoing that treatment.

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<sup>6</sup> *Charlesworth & Percy*, 8-17.

<sup>7</sup> *Hill v Chief Constable of West Yorkshire* [1989] AC 53.

<sup>8</sup> *X v Bedfordshire CC* [1995] 2 AC 633.

<sup>9</sup> *Jackson & Powell*, 2-131

<sup>10</sup> *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582

<sup>11</sup> *Bolitho v City and Hackney Health Authority* [1998] AC 232.

18. However, if there is ‘pure’ economic loss – in essence where the only loss is potential profits not made – it is not recoverable in law, unless there exists a special relationship between the parties.<sup>12</sup> The two most significant (and presently pertinent) principles in determining the existence of such a relationship are:
- (a) There will generally not be liability to an indeterminate class of persons, or in respect of an indeterminate class of transactions;<sup>13</sup>
  - (b) Where a professional undertakes to provide advice or information for a client knowing that the client intends to use that information or advice to induce a third party to act in a manner which will be to his detriment if the professional is negligent, the professional may owe a duty to the third party.<sup>14</sup>
19. The courts have been reluctant to find public authorities liable for pure economic loss, as their activities should generally be focused elsewhere (See for example, *VL v Oxfordshire CC* [2010] EWHC 2091.) When the Institute for Animal Health and the government department with regulatory responsibility for its activities, and that of a co-located private laboratory, DEFRA, were sued in relation to the 2007 outbreak of foot and mouth disease, the claim failed at an early stage essentially because the damages claimed were held to be pure economic loss.<sup>15</sup>

## Causation

20. The test for legal causation is a complex area of law, a full exploration of which is beyond the scope of this note. A useful starting point is usually to ask whether “but for” the negligent act or omission the damage would have occurred. This tests whether the damage was as a matter of fact caused by the negligence. For example, in the case of the 1987 hurricane, trees would have been blown over regardless of whether the weather forecast was accurate or not.
21. Normally, legal causation will not follow if the damage has not in fact been caused by the wrong, although the courts have made exceptions to this general rule in certain exceptional circumstances. Legal causation will often but does not automatically follow factual causation. For example, legal causation does not arise where certain types of intervening act form part of the chain of causation.

## Foreseeability of damage

22. The type of damage which occurs must be within the scope of the duty. It must be reasonably foreseeable as a consequence of the breach.<sup>16</sup>

<sup>12</sup> *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465.

<sup>13</sup> *Caparo v Dickman* [1990] 2 AC 605.

<sup>14</sup> *JEB Fasteners Ltd v Marks Bloom & Co* [1981] 3 All ER 289.

<sup>15</sup> *Pride & Others v Institute for Animal Health & Others* [2009] EWHC 685, QB

<sup>16</sup> *Overseas Tankship (UK) Ltd v Morts Dock & Engineering Co (The Wagon Mound No. 1)* [1961] AC 388; *Hughes v Lord Advocate* [1963] AC 837.

## Negligence, statutory powers and duties

23. It will often be the case that government scientists are, in one way or another, acting under statute, whether that be in the discharge of a statutory function or exercising statutory powers. The interaction between the law of negligence where the alleged wrongdoer is discharging a statutory function or exercising a statutory power is complex.
24. According to the leading legal authority,<sup>17</sup> there are three classes of potential claims that might result in liability against public bodies discharging statutory duties:
- (a) actions for breach of the statutory duty simpliciter;
  - (b) actions based on a common law duty of care arising either from the imposition of a statutory duty or from the performance of it; and
  - (c) misfeasance in public office.
25. The first two of these will briefly be addressed in turn. The last involves an element of bad faith and is therefore outside the scope of this note.

### Actions for breach of statutory duty only

26. The question as to whether the breach of a statutory public duty gives rise to a private law cause of action for damages depends on the circumstances. Normally, unless the legislation expressly provides for a private law remedy a statutory duty will not give rise to the same. The overarching question is whether Parliament meant to confer on members of the protected class of persons a private right of action for breach of the duty. The smaller and better defined the class of persons to which the duty relates, and the more limited and specific the duty, the more likely a duty will be imposed for the benefit of that class. Another potentially significant factor is whether the statute provides for any other sanction for breach of the duty, and whether the claimant has alternative remedies.
27. In general, however, a statutory body whose purpose is designed to give benefit to society at large will not be liable to individual persons in respect of the way in which that body performs its statutory function.

### Common Law duty of care arising either from the imposition of a statutory duty or from the performance of it

28. A distinction is made between the exercise of statutory discretions, and the manner in which the statutory duty, or a decision taken pursuant to such a duty, is implemented. In the case of the former, it is a precondition of liability that the exercise of the discretion was outside the ambit of the discretion altogether.
29. Whether there is a duty of care arising from the manner in which a statutory duty is performed is determined in accordance with the usual 3-stage test laid down in *Caparo v Dickman* and discussed above. The statutory context though may be very important to the application of the *Caparo* test. A common law duty of care cannot be imposed on a statutory duty if the observance of such common law duty of care would be inconsistent

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<sup>17</sup> *X v Bedfordshire CC* [1995] 2 AC 633.



with, or have a tendency to discourage, the due performance by the authority of its statutory duties.

30. There are previous cases, not relating to scientists, but where it has been held that an educational psychologist who negligently assesses a pupil's needs, although acting under a statutory authority, still owes a common law duty to carry out those assessments with reasonable skill and care.<sup>18</sup> A further example is that although a fire authority owes no duty of care to put out a fire (in the exercise of its statutory duty), its employees owe a common law duty not to make the situation any worse.<sup>19</sup>

## Regulatory bodies

31. A class of statutory body which is often reliant on the work of government scientists is the regulatory body, such as the Civil Aviation Authority, or the Health and Safety Executive. There are several cases where actions have been brought against such regulators. These cases are the best measure of the courts' likely approach if asked to attribute liability on the basis of the actions or advice of government scientists in similar circumstances. The fact that there are cases which have gone both ways illustrates how fact sensitive liability in such cases is.
32. The following cases all involve regulatory bodies. The first and last are of particular interest because of the scientific expertise which lay behind the decisions in question:
- (a) *Aeroplanes*: where an air safety authority governed by the Civil Aviation Act 1982 had inspected an aircraft and verified it as airworthy, and that plane had crashed, causing personal injury to the claimant, the defendant authority was liable.<sup>20</sup>
  - (b) *Dangerous Sport*: where the body which regulated boxing in Britain failed to take all reasonable steps to ensure that a boxer received immediate and effective medical treatment for injuries sustained in a fight, and he consequently sustained permanent brain damage, the body was liable.<sup>21</sup>
  - (c) *Food Standards*: where the owners of a guesthouse were negligently threatened with closure unless they undertook certain works, and having undertaken those works discovered that 90 per cent had been unnecessary, the officer who acted negligently was liable, and the local authority which employed him was vicariously liable.<sup>22</sup>
  - (d) *Health & Safety*: where a business which suffered economic loss failed to recover damages after an HSE inspector took enforcement action.<sup>23</sup>
  - (e) *Geological surveys*: where a body incorporated by royal charter and responsible for national environmental research undertook hydrogeological work in Bangladesh for the purpose of testing the efficiency of artesian wells, it was not liable when a Bangladeshi man became ill from arsenic poisoning.<sup>24</sup>

<sup>18</sup> *Phelps v Hillingdon LBC* [2001] 2 AC 619.

<sup>19</sup> *Gorringe v Calderdale MBC* [2004] UKHL 15; [2004] 1 WLR 1057.

<sup>20</sup> *Perrett v Collins & Ors* [1999] PNLR 77 (CA).

<sup>21</sup> *Watson v British Boxing Board of Control Ltd and another* [2001] QB 1134 (CA).

<sup>22</sup> *Welton v North Cornwall DC* [1997] 1 WLR 570 (CA).

<sup>23</sup> *Harris v Evans & HSE* [1998] 1 WLR 1285

<sup>24</sup> *Sutradhar v NERC*, *op. cit.*

## Potential criminal liability

### Gross negligence manslaughter

33. Grossly negligent scientific advice could expose a government scientist to a prosecution for gross negligence manslaughter. However, it is emphasised that mere negligence would not be enough to found such a prosecution. The ordinary principles of the law of negligence apply to determine whether the defendant was in breach of a duty of care towards the victim, and if so, whether it should be characterised as gross negligence and therefore a crime; it is eminently a jury question to decide whether, having regard to the risk of death involved, the defendant's conduct was so bad in all the circumstances as to amount to a criminal act or omission.<sup>25</sup> The maximum sentence is life imprisonment.
34. An equivalent offence of 'lawful act' culpable homicide exists in Scotland. Unlike in England, it is not a highly aggravated example of civil negligence. Instead, where a death has occurred due to otherwise-lawful conduct of an individual, that conduct is examined. If the individual has acted with "an utter disregard" for the consequences, showing "recklessness so high as to involve an indifference to the consequences for the public generally", the offence has been committed<sup>26</sup>. The focus is thus instead on the attitude of the individual. In principle scientific advice could be given in such a state of mind, giving rise to a criminal offence. It should be emphasised that the test is a very high one.

### Corporate manslaughter

35. By virtue of the Corporate Manslaughter and Corporate Homicide Act 2007, where a corporate body commits a gross breach of a relevant duty of care, as a result of which the person to whom the duty is owed is killed, that corporate body is guilty of an offence, and may be subject to a fine. The concept of 'relevant duty of care' is restricted by the Act, but includes any goods and services provided by the organisation (whether on a commercial basis or not) and also other commercial activities, though not where these activities are carried out in exercise of an exclusively public function.
36. The Act applies to many crown bodies, including the Department for Environment, Food and Rural Affairs, the Department of Health and the Forestry Commission, to name but a few which have government scientists in their employ. Such prosecutions are by definition brought against the corporate body and not an individual.
37. In Scotland, this offence is called 'corporate homicide'.

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<sup>25</sup> Archbold, Criminal Pleading, Evidence and Practice, Sweet & Maxwell, 2013 at 19-123 & *R v Adomako* [1995] 1 AC 171

<sup>26</sup> *Transco plc v HM Advocate* 2004 JC 29

## Health and Safety at Work etc Act 1974

38. Section 7 of the Health and Safety at Work etc Act 1974 (“HSWA”) imposes a duty on every employee while at work: “(a) to take reasonable care for the health and safety of himself and of other persons who may be affected by his acts or omissions at work; ...”. This section appears to be wide enough to cover a situation in which an employed scientist gives careless advice which affects the health and safety of his or her colleagues or other persons who are affected by it. Breach is punishable by a fine.<sup>27</sup> To put this duty into perspective though it is important to recognise that it applies to every employee in the country in relation to their acts and omissions at work.
39. A self-employed scientist providing advice to a government body is not subject to s.7 HSWA because he or she is not an employee. However, the self-employed scientist will owe a wide-ranging duty under s.3(2) HSWA which imposes a general duty on the self-employed owed to persons other than their employees: “It shall be the duty of every self-employed person to conduct his undertaking in such a way as to ensure so far as is reasonably practicable, that he and other persons (not being his employees) who may be affected thereby are not thereby exposed to risks to their health or safety”. Breach of this duty is a criminal offence and in the most serious cases can result in a sentence of imprisonment. Again though it is necessary to put the duty into perspective. It is owed by every self-employed person in the country in relation to the conduct of his or her undertaking.
40. The Crown is immune from prosecution under the HSWA, but may be subject to Crown censure by the Health and Safety Executive for a wide range of health and safety offences. It is possible to envisage a scenario where the censure of a government body might arise as a result of a failing by a government scientist. If a finding of guilt is made, the censure becomes a matter of public record.

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<sup>27</sup> Section 37 provides for a more serious personal offence for directors, managers, company secretaries, or similar officers of a body corporate where the body commits an offence with the consent or connivance of, or as a result of the neglect of the person in question.

## Conclusion

41. It is important that government scientists at all times act professionally, honestly and in good faith. Those who do so and at the same time give advice which is at least reasonably competent have nothing to fear from the law of negligence. However, serious criminal consequences could follow death occasioned by *grossly* negligent advice or advice given with utter disregard for the consequences; or in the case of a self-employed scientist a very serious breach of s.3(2) HSWA. Relatively minor criminal consequences might follow careless advice given by employed scientists which affects the health and safety of other persons.
42. Civil liability can arise from negligent scientific advice but it is usual for compensation claims to be brought against the employer rather than the individual scientist. It is essential for the self-employed to be adequately insured. Government scientists are advised to refer to the terms of any indemnity provided by the government body or bodies to which they provide advice and to ascertain its precise scope.
43. What amounts to negligent advice is a complex legal question, as outlined in this note, but it should be noted that the courts are alive to the need not to stifle, or discourage, valuable research nor to impose duties so wide as might lead to liability for indeterminate amounts to indeterminate persons.

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**URN GS/14/1210**