Chapter 2: The Duty of Care

Outline

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Aims of this Chapter

This chapter will enable you to achieve the following learning outcomes from the CILEx syllabus:

2. Understand the tests for establishing a duty of care in cases of physical personal injury and physical damage to property
3. Understand the concept of public policy, particularly in the context of duty of care in negligence

2.1 Introduction

Remember that, to establish a claim in negligence, a claimant needs to establish that a duty of care exists, that it has been breached, and that the defendant’s breach has caused damage to the claimant.

The definition of negligence given in Chapter 1 begins with the defendant owing a duty of care to the claimant. It is therefore vital, in any potential negligence claim, to establish at the outset whether such a duty exists.

As noted at 1.4.1, there is no need to discuss whether a duty of care exists if the parties are in a relationship where there is an established duty of care. If there is no established duty, the court will apply the three-stage test developed in Caparo Industries plc v Dickman [1990]. This is discussed in 2.3. This includes consideration of the neighbour test created in Donoghue v Stevenson [1932], which is discussed in 2.2.

There are some novel circumstances where the law will presume a duty should exist. In Robinson v Chief Constable of West Yorkshire Police [2018] it was found that for positive negligent inflictions of harm, Caparo may not be necessary. The Caparo control mechanisms are more appropriate for omissions (see 2.3.1).
Public policy is an important consideration in determining whether a duty of care exists. The principles relating to this are discussed in 2.4, and its application in cases involving psychological harm is the subject of 2.5.

2.2 The neighbour test

One of the most famous cases in English law, memorable for its gruesome facts as well as its legal importance, is *Donoghue v Stevenson [1932]*. Mrs Donoghue went to a café with a friend. The friend bought ginger beer, which was in an opaque bottle. Mrs Donoghue drank some of the ginger beer and then poured the remainder from the bottle into her glass. Out of the bottle, along with the ginger beer, came the decomposing remains of a dead snail. Mrs Donoghue subsequently suffered from shock and severe gastro-enteritis. She was unable to sue the café owner in contract because her friend had bought the ginger beer, so she sued the manufacturer of the ginger beer. The House of Lords held that the manufacturer was liable to Mrs Donoghue.

The wider importance of the case is that Lord Atkin formulated a general principle to govern the existence of a duty of care. It is known as the neighbour test or neighbour principle. He said:

“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.” (Emphasis added.)

The case is important not only because it established the liability of manufacturers to consumers with whom they did not have a contractual relationship, but also because it articulated a general principle which forms the basis of the law of negligence. As new situations have arisen, the courts have been able to apply the neighbour principle to help determine whether a duty of care exists.

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**Self-assessment Question**

(7) Can you recite the bold part of the extract from *Donoghue v Stevenson [1932]* while this book is closed? If not, keep memorising it until you can!

2.3 The three-stage test from Caparo Industries plc v Dickman [1990]

The neighbour principle has been updated to reflect more explicitly the important role of public policy in the law of negligence.
The current test to determine whether a duty of care exists is governed by the House of Lords’ decision in *Caparo Industries plc v Dickman [1990]*. This involves the court asking three questions:

1. Was the risk of injury or harm to the claimant reasonably foreseeable?
2. Was there sufficient proximity between the parties?
3. Is it fair, just and reasonable, on public policy grounds, to impose a duty of care?

The answer to all three of these questions must be “yes”; if a court finds that a proposed duty of care fails any one of these criteria then there is no duty. We can put this test in context as follows:

![Diagram showing the relationship between duty of care, negligence, breach of duty, causation of damage, established duty, proximity of relationship, foreseeability of harm, and fair, just and reasonable impose duty]

2.3.1 Reasonable foreseeability

The neighbour principle from *Donoghue v Stevenson [1932]* relies on the claimant proving that it was reasonably foreseeable that, if the defendant did something negligent, there was a risk that the claimant would suffer injury or harm.

The test is *objective*: the court will ask whether a reasonable person in the defendant’s position would reasonably have foreseen that the claimant might be injured or harmed. If a reasonable person could not have foreseen the risk of injury or harm to a person in the claimant’s position, no duty of care is owed to the claimant.

A post-*Donoghue* case that illustrates the necessity of the risk of damage being foreseeable is *Smith and Others v Littlewoods Organisation Ltd [1987]*. Littlewoods purchased a cinema and closed it down, intending to demolish it and build a supermarket on the site. While it was derelict, some children broke into it and started a fire which damaged neighbouring buildings. It was established that Littlewoods had been unaware that the building was no longer secure and that there had previously been two small fires inside it. The House of Lords held that, given its ignorance of these facts, Littlewoods could not reasonably have foreseen the risk of the damage that occurred. It is noteworthy
that two Law Lords specifically mentioned that, had Littlewoods known of the additional facts, it was possible that it would have been held to have a duty of care to the owners of the damaged buildings.

**Smith v Littlewoods** is also authority for another important principle relating to the duty of care in general and foreseeability of harm in particular. As a general rule, a defendant will not be liable for an omission to act (i.e. the absence of doing something). Omissions are contrasted with positive acts.

An example of a positive act is careless driving. Injury to pedestrians is a reasonably foreseeable consequence of negligent driving. By contrast, it is difficult to anticipate the consequences of an omission to act. The occurrence of fire as a result of failure to anticipate the random acts of ruffians is not a reasonably foreseeable harm when taking ownership of an old building.

However, there are some circumstances where a duty of care can be imposed in respect of omissions, often where there is additional proximity between the parties – see 2.3.2.

The concept of reasonable foreseeability is used in several different ways when analysing a claim in negligence. For instance, at 3.3, foreseeability is one consideration in deciding whether a defendant has breached their duty of care.

### 2.3.2 Proximity

A case such as **Smith** could be decided merely by reference to foreseeability, but some cases cannot be decided on this basis alone. There may be situations where the risk of harm could be foreseen, but it would not be appropriate to make the defendant liable. A second criterion must be applied: the degree of proximity between claimant and defendant. “Proximity” in this context means not physical closeness, but any form of relationship between the parties. The court will ask whether the claimant was a member of the group to which a duty of care was owed.

Proximity in its simplest sense is physical, so neighbours owe each other duties of care by virtue of their physical proximity.

Legal proximity may be physical in this sense. In **Nettleship v Weston [1971]** a learner driver owed a duty of care to their instructor. However, proximity can also be about closeness of relationship even if the litigants are not physically close. At 2.5.1 we examine **Chadwick v British Railways Board [1967]**. Chadwick was a window cleaner who suffered shock after rescuing passengers in a rail crash. He was not physically close to the British Railways Board, but they were clearly responsible to him.

Lord Atkin’s neighbour principle leans heavily upon this idea. Look again at the quotation in 2.2, taken from his speech in the House of Lords. This is the idea of legal proximity – who the defendant should have in mind as being liable to be affected by their potential carelessness.