Chapter 2: Negligence: The Duty of Care – General Principles and Public Policy

Outline

Aims of this Chapter

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

4 Understand the law of negligence

2.1 Introduction

Negligence is the most important modern tort. In the words of Alderson B in ***Blyth v Birmingham Waterworks Co [1856]***:

"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."

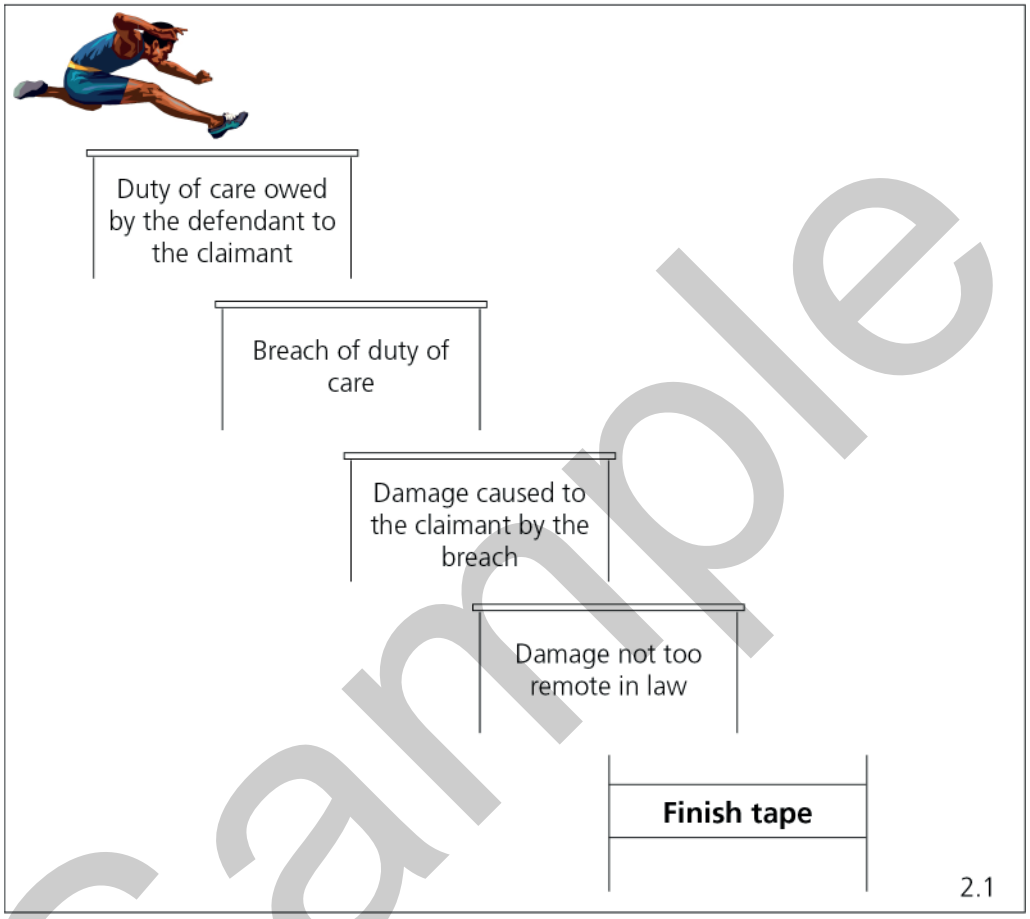
While other torts are signified by a particular interest of the claimant which is protected (e.g. defamation protects reputation, private nuisance protects use and enjoyment of land, and so on), the tort of negligence protects many interests including those of the claimant's person, property and some economic interests. That said, certain of those interests continue to create problems for the courts, in the sense that it is not always clear how far the law should attach liability to the negligent infliction of certain kinds of damage. The extent to which compensation for psychiatric damage and pure economic loss can be recovered in the tort of negligence is considered separately in **Chapter 3** and **Chapter 4**. As Lord Bridge stated in ***Caparo Industries plc v Dickman [1990]***: *"It is never sufficient to ask simply whether A owes B a duty of care. It is always necessary to determine the scope of the duty by reference to the* ***kind of damage*** *from which A must take care to save B harmless"* (emphasis added).

In order to succeed in a negligence action, the claimant must prove that:

- the defendant owed the claimant a duty of care;
- the defendant was in breach of that duty;
- the claimant suffered damage, which was caused by that breach of duty; and
- the damage was not too remote.

The claimant may have certain defences raised against them, for example, that the claimant was contributorily negligent.

Any claimant in a negligence action must overcome certain legal "hurdles" in order to establish/prove that the tort of negligence has been committed. If the claimant knocks over any of the hurdles – in other words if they cannot prove each element of the negligence sequence – their claim fails.



2.1

Laura met some friends on a Friday night and had a good few drinks. She decided to drive home, even though she knew that she was drunk. On the way, she lost control of her vehicle and crashed into her neighbour's parked car. In this example, it is clear that Laura owes a duty to all road users, including people who have their cars parked in the street, to take care not to damage their property. Laura is in breach of that duty because she failed to exercise the level of care that a reasonably prudent driver would have exercised. The neighbour's damage was caused by Laura's breach and it is one of the kinds of damage that tort law generally compensates (the other kind, of course, is personal harm). So Laura will be liable to her neighbour in negligence.

To be actionable in tort, the defendant's lack of reasonable care must occur in the context of a **duty to take care**.

Many duty relationships have been recognised by the courts for a very long time – for example, one highway user to another, doctor to patient, employer to employee and manufacturer to those affected by its product. In the main, such duties of care have been identified in the courts with Parliament playing a very limited role.

This chapter will focus on the duty of care and its interaction with key concepts including:

- **reasonable foreseeability** by the defendant of the damage to the claimant;
- sufficient legal **proximity** (closeness) between the defendant and the claimant;
- whether it is **just and reasonable** for a duty of care to exist between the claimant and defendant; and
- **public policy** – whether it is in the wider interests of society as a whole for the duty of care to exist.

Note also how the duty of care fits into the wider framework of the underlying principles of negligence.

Self-assessment Question

(5) What must every claimant prove in a negligence action?

2.2 The way to Donoghue v Stevenson [1932]

Not every negligent act will result in liability in negligence. There has to be some control device in order to determine when liability is capable of arising. This function is performed by the **duty of care**. When a case reaches court, the judge may have to determine whether the defendant owed the claimant a duty to take reasonable care in the circumstances in which the claimant alleges the defendant was negligent.

Before 1932, there was no recognised general test for determining whether a duty existed in circumstances which had not previously come before a court. Courts would find a duty of care only when a claim fell squarely within precedent, or by analogy with established case law. The use of analogy allowed for some incremental (i.e. gradual) extension of duties of care, but courts were generally cautious in relying upon it. This display of judicial conservatism was particularly frustrating in the light of the rapid speed of change brought about by the Industrial Revolution in the 19th century. The proliferation of industrial production increased social and individual welfare, but it also increased the incidence and seriousness of accidents. However, for a long time, courts would

persist in finding a duty of care only in a small number of situations, and mainly when there was already a contract between the two parties. An early attempt to extend duties of care more widely (or to bring tort law out of the shadow of contract) occurred in ***Heaven v Pender [1883]***, but the most famous, and famously successful, attempt came in ***Donoghue v Stevenson [1932]***. The date of the case is significant as it marks a step away from the conservative idea that people owe duties of care only towards those with whom they have a contract and those that case law has explicitly recognised as being owed such a duty, towards a more principled approach. However, as we will see below, the more conservative/incremental approach has been making a return recently.

2.2.1 Donoghue v Stevenson [1932] and the "neighbour principle"

In ***Donoghue v Stevenson***, a friend of the claimant purchased a bottle of ginger beer in an opaque bottle. The claimant poured half of the ginger beer into a glass and drank it. She then poured the remainder into the glass and saw what she claimed to be the remains of a decomposed snail drain out from the bottom of the bottle. She claimed to have suffered illness as a result. She sued the manufacturer of the ginger beer in negligence as she had no contract with either the retailer or the manufacturer. The House of Lords (by a bare majority of 3:2) established that a manufacturer of products owed a duty to take reasonable care to the ultimate consumer of the product. Lord Atkin stated his famous "neighbour principle" test as a device to determine when a duty of care is owed.

"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."

This statement of legal principle forms the basis of the modern law of negligence. It is an attempt to provide a test which both explains why duties of care have been recognised in the past and enables judges to deal with novel situations in the future.

Self-assessment Question

(6) What is the "neighbour principle"?

2.2.2 From Donoghue to Anns v Merton LBC [1978]

The test based on reasonable foreseeability of damage did not find immediate acceptance with the judiciary and expansion of duty areas was limited until the 1960s.

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