

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

Outline	2.1	Introduction	2.5	The influence of the Human Rights Act 1998
	2.2	Donoghue v Stevenson [1932]		
	2.3	The three-stage test: foreseeability, proximity and “fair, just and reasonable”	2.6	Summary
	2.4	Complex duty cases involving policy considerations		



Aims of this Chapter

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

- 4 Understand the law of negligence

2.1 Introduction

Negligence is the most important modern tort. Its unifying factor is the conduct of the defendant which is labelled negligent. This requirement was famously described by Alderson B in *Blyth v Birmingham Waterworks Co [1856]* as follows:

“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.”

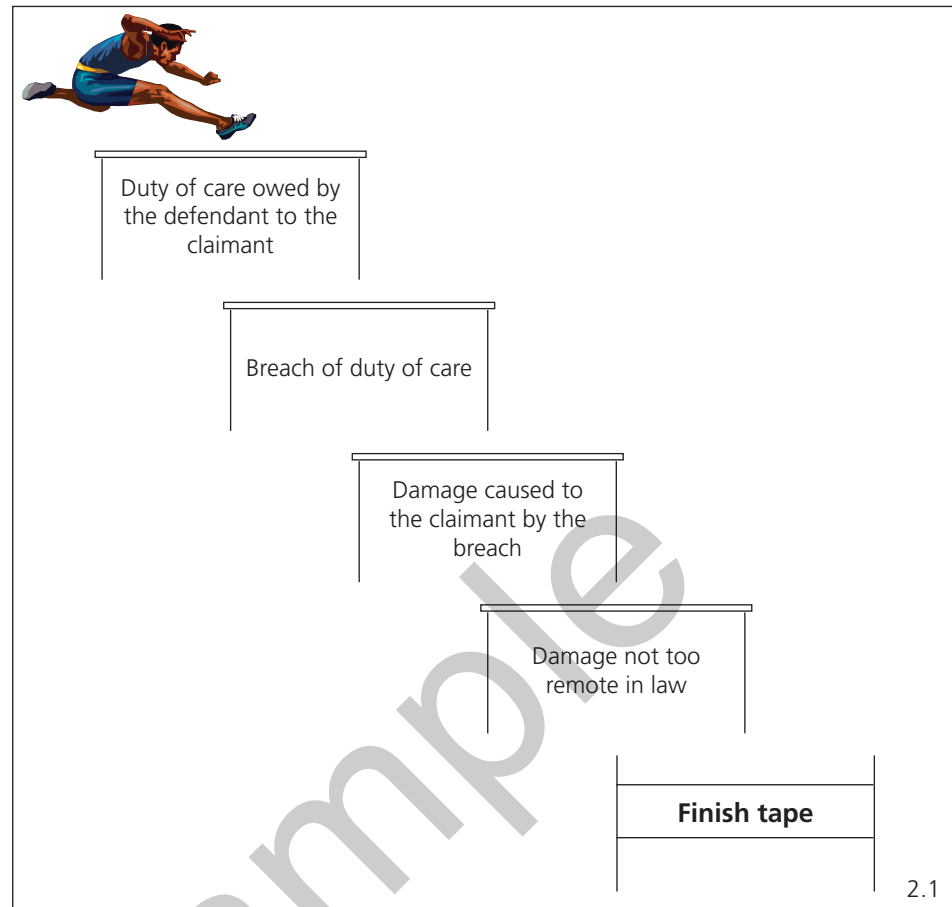
Other torts are signified by a particular interest of the claimant which is protected – for example, defamation protects reputation; private nuisance protects use and enjoyment of land. Negligence protects many interests including those of the claimant’s person, property and some economic interests. Certain types of harm, even if caused by the defendant’s negligence, however, continue to create problems for the courts. 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 him 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
- that the damage was not too remote.

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

Any claimant in a negligence action must overcome certain legal “hurdles” in order to establish that the tort of negligence has been committed. If the claimant knocks over any of the hurdles, his claim fails!



This process can be illustrated by a simple example involving personal injuries. X drove his car while drunk and skidded off the road striking Y, a pedestrian. X owes Y a duty of care as one road user to another. X is in breach of the duty by driving whilst drunk and failing to exercise the care of a reasonably prudent driver in controlling the car. Y's damage is caused by the breach of duty and it is the type of damage X could have expected. Had Y also been drunk and stumbled into the road just before X struck him, then Y's damages could be reduced by the proportion by which he was adjudged to be responsible for the accident and his own injuries.

In an increasingly litigious society, many claimants try to find a culpable defendant to recompense them for injuries sustained. An extreme example of such an attempt can be found in ***Vellino v Chief Constable of Greater Manchester [2002]***. The claimant, who was well known to the police, had a history of trying to escape from his flat by jumping out of a window whenever the police came to arrest him. On one such occasion he sustained serious physical injuries which he claimed were attributable to a breach of the duty of care on the part of the arresting officers, by failing to prevent him from jumping out of the window! The Court of Appeal came to a majority decision – one of the judges preferring the argument that a known risk created a duty to take steps to guard against it happening. The majority held that no duty of care existed in these circumstances. In addition, the claimant could be met with the defence of *ex turpi causa* (see 7.5) because the attempt to escape from custody was a criminal offence in itself.

To be actionable in tort, the defendant's lack of reasonable care must occur in the context of a **duty to take care**. In English law there is no code or individual statute to which a judge can turn, which will inform him whether the law recognises the existence of such a duty of care between the defendant and the claimant who are the parties to the action he is asked to judge.

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 his product. In the main, such duties of care have been identified in the courts with Parliament playing a very limited role. The content of this chapter is dominated by the development of the common law through judicial reasoning.



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

2.2 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. Although the rapid speed of change brought about by the Industrial Revolution in the 19th century made such a test necessary, the dominance of contract law at that time meant that the development of tort was subdued. An early attempt to develop a test occurred in *Heaven v Pender [1883]*, but the most famous attempt came in *Donoghue v Stevenson [1932]*. The date of the case is significant as it marks a step away from the *laissez-faire* basis of contract law to the more collectivist approach of tort.

2.2.1 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.

2.2.2 Developments after 1932

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.

In ***Home Office v Dorset Yacht Co Ltd [1970]*** the House of Lords expressly approved Lord Atkin’s statement and gave impetus to the development of negligence. Lord Reid said that, although the neighbour principle would “require qualification to meet new circumstances . . . the time has come when we can and should say that it ought to apply unless there is some justification or valid explanation for its exclusion”. This was confirmed by the House of Lords in ***Anns v Merton London Borough Council [1978]***. Lord Wilberforce approached the question whether a duty should be recognised in two stages (see the chart at **2.3**).

This two-stage test proved to be the “high-water mark” of negligence. Its use led to a considerable expansion in the areas covered by negligence and, in particular, took the tort into the area of recovery of pure economic loss caused by negligent conduct which had previously been thought to be the exclusive province of the law of contract (see **Chapter 4**). Inevitably, this expansion provoked criticism and the judiciary itself questioned the value of the test. A good example of this critical approach can be found in the words of Lord Keith of Kinkel in ***Yuen Kun Yeu v Attorney-General for Hong Kong [1988]***: “Their Lordships consider that for the future it should be recognised that the two-stage test in *Anns* is not to be regarded in all the circumstances as a suitable guide to the existence of a duty of care.” It should also be noted that ***Anns*** itself has been overruled by ***Murphy v Brentwood District Council [1990]***.

One of the criticisms of Lord Wilberforce’s “two-stage” test was that it appeared to enable the claimant to establish a *prima facie* duty of care very easily by reference to foreseeability of harm. It could then be argued that the second stage presented the defendant with the task of producing policy reasons to convince the judge to reject or limit that duty. Although the word “policy” is not one which Lord Wilberforce used in his statement of the test, it is usually regarded as implicit. The influence of various policy considerations is considered in **Chapter 3** and **Chapter 4**.



(6) What is the “neighbour principle”?

© 2011 Copyright ILEX Tutorial College Limited

All materials included in this ITC publication are copyright protected.

All rights reserved.

Any unauthorised reproduction or transmission of any part of this publication, whether electronically or otherwise, will constitute an infringement of copyright. No part of this publication may be lent, resold or hired out for any purpose without the prior written permission of ILEX Tutorial College Ltd.

WARNING: Any person carrying out an unauthorised act in relation to this copyright work may be liable to both criminal prosecution and a civil claim for damages.

This publication is intended only for the purpose of private study. Its contents were believed to be correct at the time of publication or any date stated in any preface, whichever is the earlier.

This publication does not constitute any form of legal advice to any person or organisation.

ILEX Tutorial College Ltd will not be liable for any loss or damage of any description caused by the reliance of any person on any part of the contents of this publication.

Published in 2011 by:
ILEX Tutorial College Ltd
College House
Manor Drive
Kempston
Bedford
United Kingdom
MK42 7AB

British Library Cataloguing in Publication Data

A catalogue record for this manual is available from the British Library.
ISBN 978-1-84256-564-3