

# Chapter 2: The Duty of Care

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## Aims of this Chapter

This chapter will enable you to achieve the following learning outcomes from the ILEX 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

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.

If there is an **established duty** (see **1.4 (1)**), no further discussion is required. If a case with **similar facts** has previously been decided, the courts will use the principle of judicial precedent and follow the decision in that case. If there has **not** been a similar case, 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**.

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**. 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 opened the way for the future expansion of the tort of negligence by creating a general principle of liability for negligence: the **neighbour principle**. As new situations have arisen, the courts have been able to apply the neighbour principle to determine whether a duty of care exists.



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 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 loss to the claimant **reasonably foreseeable**?
- (2) Was there sufficient **proximity** between the parties?
- (3) Is it **just and reasonable**, on public policy grounds, to impose a duty of care?

### 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 he would harm the claimant.

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. If a reasonable person could not have foreseen injury or damage to a person in the claimant's position, no duty of care is owed to the claimant. This is illustrated by *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 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.

## 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 possibility 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.

As mentioned in **Chapter 1**, there are some situations where it is **established** that people owe duties to others. These include (this list is not exhaustive):

- road users, who owe a duty of care to all other road users;
- doctors, nurses and other healthcare workers, who owe a duty of care to patients;
- employers, who owe a duty of care to their employees.

In *Caparo Industries plc v Dickman [1990]*, the defendants made an error in preparing a set of accounts. The claimants, who already owned shares in the company, bought more shares on the strength of the accounts, and suffered loss as a result. The House of Lords held that the defendants were not liable because their duty was to the company and its shareholders, not to **potential** investors. The fact that the claimants were both shareholders and potential investors presumably meant that it was highly foreseeable that they would use the information in the way they did but, because of a lack of proximity between auditors and potential investors, there was no liability. Although the case passed the foreseeability test, it failed on the proximity test.

Reasonable foreseeability and proximity were both used to reach a decision in *Home Office v Dorset Yacht Co [1970]*. Boys escaped from a borstal (an early version of a young offenders’ institution) on an island after their guards had negligently left them unsupervised. In their attempt to leave the island, the boys damaged a yacht belonging to the Dorset Yacht Company. The Home Office, which employed the guards, was held liable. The House of Lords held that it was foreseeable that the boys might use the yacht to try to escape. This established proximity between the guards and the yacht owners, so a duty of care was owed.

In *Topp v London Country Bus Ltd [1993]*, the defendant left one of its unattended buses unlocked, with the keys in the ignition, at a bus stop for nine hours. The bus was stolen by a “joy-rider”, who struck and killed the claimant’s wife. Two of the three judges in the Court of Appeal held that there was not sufficient proximity between the defendant and the victim for liability to be imposed.

### 2.3.3 Just and reasonable

Sometimes, even where loss or damage is foreseeable, and there is a sufficient degree of proximity between claimant and defendant, the courts refuse to impose a duty of care as a matter of policy. If, for example, a bank robber escaping from the scene of his crime is injured through the careless driving of his accomplice, his injury would be foreseeable and there would be proximity of relationship between the parties, but an action in negligence would fail on the grounds of public policy. It would not be “just and reasonable” to impose liability. Public policy is a complex topic, and is discussed in more detail at 2.4.

In *L and Another v Reading Borough Council and Others* [2007], social workers had made allegations, which later proved to be unfounded, that a father had sexually abused his daughter when she was very young. He had therefore been prevented from seeing her for many years. His claim for damages was rejected by the Court of Appeal because, following the reasoning in *D v East Berkshire Community Health NHS Trust* [2005], no direct duty of care was owed to the father because it would not be just and reasonable to impose this form of liability on the council.

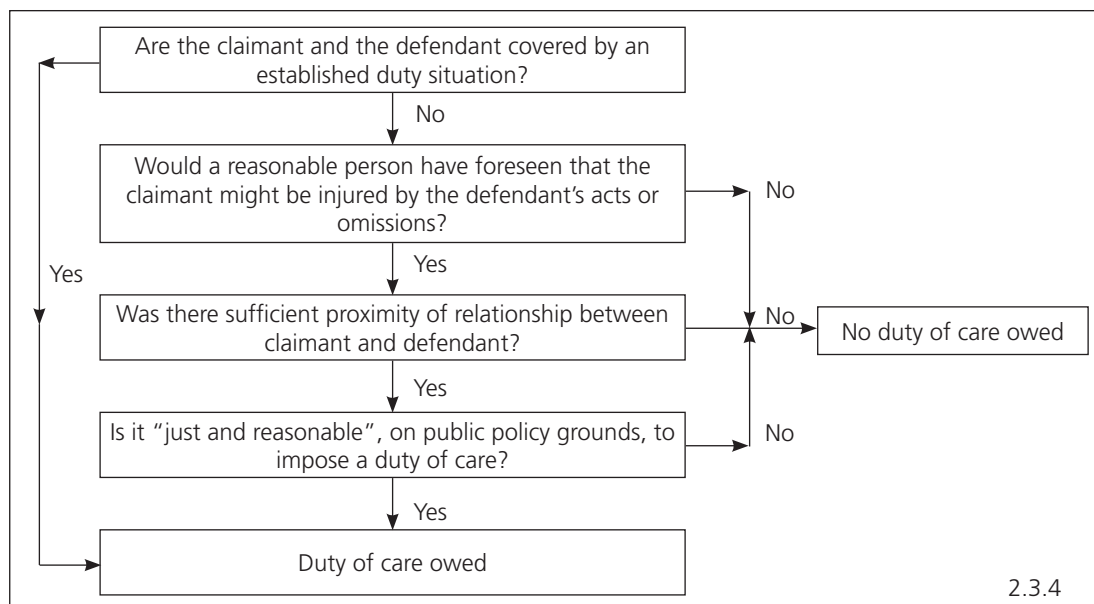


Apply the three principles from *Caparo Industries plc v Dickman* [1990] to Adam's accidents. Identify the potential defendant in each case, and determine which, if any, of the principles is likely to prove problematic in respect of:

- Adam's broken tooth;
- Mischa's whiplash injury;
- Adam's broken arm; and
- Pauline's post-traumatic stress disorder.

### 2.3.4 Overview

This diagram provides an overview of the test established by *Caparo Industries plc v Dickman* [1990].



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