

## Negligence

The topic of negligence is part of Paper 2 section B. It can come up as a 25-mark essay or 25-mark scenario.

### Definition of Negligence

Set out the definition by Baron Alderson in **Blyth v Birmingham Waterworks Co**

Birmingham Waterworks Co were responsible for laying water pipes and other infrastructure around the Birmingham area. They installed a water main on the street where Blyth lived. 25 years after it was installed, the water main sprung a leak due to extreme frost. There was no evidence that Birmingham Waterworks Co had been negligent in installing or maintaining the water main. Blyth, whose home was damaged by the leak, sued in negligence. The Court held that Birmingham Waterworks Co had done everything a reasonable person would have in the situation. There was no negligence as there had been no breach of duty; it was simply an accident.

'failing to do something which the reasonable person would do or doing something the reasonable person would not do' - according to his definition, negligence can come from either an act or an omission.

Explain the difference between an act and an omission.

Omission is the failure to act. An act is something you've done; it covers omissions or states of affairs that is the prohibited conduct in an offence

### Proving Negligence

Explain the role of a claimant and defendant.

The claimant must prove the defendant was at fault and was below the standard of care and to blame for the injuries or damage. The defendant must prove that his behaviour was correct and the way he performed his job would've caused no difference and he wasn't at fault for it

Who has the burden of proof? What is the standard of proof?

The burden of proof is on the claimant. If the case goes to court, the claimant must provide evidence to show the fault. The standard of proof is on a balance of probabilities.

What evidence is required for the claim?

From experts, oral evidence of witnesses who saw the incident or medical reports of the injuries

What 3 factors need to be proved to find the defendant liable?.

He or she owes the claimant a duty of care

- . He or she breaches this duty
- . And the breach causes reasonably foreseeable injury or damage

## **Duty of Care**

This duty must be proved to show there was a legal relationship between the parties (claimant and defendant) as without it the claim will fail. Lord Atkin in **Donoghue v Stevenson** created a test when a person would be under a duty of care to another. Set this out:

Set out a test for when a person would be under the duty to another. He said – ‘you must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour.

Mrs Donoghue and a friend went to a café. The friend bought Mrs D a drink. Contents couldn't be seen due to the dark glass. After drinking some and pouring the rest out. She spotted the drink contained a dead and decomposing snail. She suffered physical had mental injuries. She wanted to claim compensation but as she had not bought the drink, she couldn't use the law of contract to sue. Instead she sued the manufacturer for negligence saying that they were at fault in the manufacturing process and they owed her a duty of care

A duty of care is based on the neighbour principle. Set out Lord Atkin's definition of a neighbour.

People who are so closely and directly affected by my act that I ought reasonably to have them in my contemplation as being affected when I am directing my mind to the acts or omissions in question

## **The Caparo Test**

Judges used the neighbour principle from Donoghue until it was replaced by a 3 - part test in **Caparo v Dickman**. Set out the 3 - part test:

- a) was damage or harm reasonably foreseeable?
- b) is there a sufficiently proximate relationship between the claimant and defendant?
- c) is it fair, just and reasonable to impose a duty ?

Caparo Industries purchased shares in Fidelity Plc in reliance of the accounts which stated that the company had made a pre-tax profit of £1.3M. In fact, Fidelity had made a loss of over £400,000. Caparo brought an action against the auditors claiming they were negligent in certifying the accounts.

It was held that no duty of care was owed. There was not sufficient proximity between Caparo and the auditors since the auditors were not aware of the existence of Caparo nor the purpose for which the accounts were being used by them.

The first 2 parts of the test are similar to Donoghue, but the third part involves flexibility as it is a matter of what is fair in the circumstances of a particular case. The Caparo case involved economic (financial) loss rather than physical harm but the test applies to all types of harm.

### **Damage or reasonable foreseeability of harm**

The basic requirement of foresight is simply that the defendant must have foreseen the risk of harm to the claimant at the time they were alleged to have been negligent. Despite the wording the test for foreseeability is objective i.e. what the reasonable person foresees rather than the defendant. This is illustrated in **Kent v Griffiths**

Ambulance was called to take the claimant to hospital as he was suffering an asthma attack. For no obvious reason the ambulance failed to arrive within reasonable time and as a result the claimant suffered a respiratory arrest. The court decided it was reasonably foreseeable that the claimant would suffer further illness if the ambulance did not arrive promptly and no good reason was given as to why it failed to do so. A duty of care was owed by the ambulance service when they accepted the call and failed in their duty therefore, they were liable to pay compensation

### **Proximity of relationship**

Proximity is a major factor in identifying the existence of a duty of care. Proximity overlaps with the concept of foreseeability. The more proximate (close) you are to someone the more foreseeable it is that their actions will harm you. This is illustrated in **Bourhill v Young**. What was the reasoning of the court in making its decision?

A pregnant woman heard an accident as she got off a tram. Accident was caused by a motorcyclist who died in the accident. After a short while she approached the scene and saw blood on the road. She suffered such shock she later gave birth to a still born baby. She sued the relatives of the dead motorcyclist. Under the neighbour's test as the time she had to prove she was proximate or close to the motorcyclist so that he owed her a duty of care. The House of Lords decided that he could not anticipate that if he was involved in an injury, it would cause mental injury to a bystander and so he did not owe her a duty of care

Proximity is not just physical but also whether the relationship between the parties is proximate /close enough. This is illustrated in **McLoughlin v O'Brien**. Explain why Mrs McLoughlin was successful in her claim compared to Mrs Bourhill. Is this fair?

Whilst she was home, the claimants' husband and children were involved in a serious road accident. The accident was caused by the negligence of the defendant lorry driver. One of the children was killed at the scene and the other family members were taken to hospital. She saw her family before they had been treated and as a result, she suffered

severe shock, organic depression and a personality change. She claimed against the defendant for the psychiatric injury she suffered. The House of Lords decided that the lorry driver owed her a duty of care and extended the class of persons who would be considered proximate to the event to those who came within the immediate aftermath of the event

### **Fair, just and reasonable to impose a duty**

This in fact identifies that there must be a limit to liability and no duty will be imposed unless it is just in all the circumstances. The courts in deciding this factor will make a decision based on public policy (protection of the public rather than individual claimants). The courts are reluctant to impose a duty on those providing public services such as the police, hospitals, rescue (emergency) services and local councils. The courts are aware of the financial burden on these public bodies and if a claim is successful then monies will have to be diverted from essential services and may impact the public generally. This could open 'the floodgates. Therefore, in these cases even though harm is foreseeable there is not always a duty owed.

In **Hill v CC of West Yorkshire** what was the reasoning behind the House of Lord's (now Supreme Court) decision to refuse to impose a duty on the police?

A serial killer aka Yorkshire Ripper had been attacking and murdering women in Yorkshire and across the north of England. The claimant's daughter was the killer's last victim before he was caught. By the time of her death the police already had enough information to arrest the killer, but they had failed to do so. The mother claimed that the police had a duty of care to her daughter. It was decided by the House of Lords that the relationship between the victim and the police was not sufficiently close for the police to be under a duty of care and that it was not fair, just or reasonable for the police to owe a duty of care to the general public. The police knew that the killer might strike again but they had no way of knowing who the victim might be

Complete activity on Michael v CC of South Wales 2015 (handouts)

Do judges have too much power in deciding whether a duty of care exists? Are they creating decisions that are too favourable to public bodies?

Research the decision of Z and others v UK 2001 to see how the Human Rights Act 1998 affects public bodies and whether they owe a duty of care.

Read the orange activity on page 227 and explain whether Sam owed a duty of care to Tanya.