Breach of Duty

The standard of care and the reasonable person

Having established a duty of care is owed the next element to prove is that the claimant has to prove a breach of that duty. This refers to the standard of care expected in that situation and a breach of duty occurs when the defendant (D) has not taken sufficient care i.e. has been negligent. This is an objective test and the courts will consider what a reasonable person would have done in the same situation.

Set out Baron Alderson's definition of negligence and the reasonable man (now person) from **Blyth v Birmingham Waterworks Co**.

'failing to do something which the reasonable person would do or doing something which the reasonable would not do' a reasonable person is the ordinary person in the street or doing the same task

It is a reasonable person in the particular circumstances D is in i.e. the ordinary person performing the task competently for example the reasonable pilot, reasonable landlord, reasonable doctor etc.

The question is whether the same standard is applied to everyone for example would a trainee doctor be compared to a qualified doctor or would a child be compared to an adult?

The standard of care and different types of defendant

The standard of care is measured objectively (reasonable person) but the courts have examined whether the standard may differ according to the type of person who owes the duty. Where D acts in a professional capacity the standard expected is that of a person in that line of work. Where D is not acting in a professional capacity the standard expected is that of a 'reasonably competent' person doing that job, not a professional. **Wells v Cooper 1958**
When Cooper repaired the handle to his back door, who was he compared to?

1. Professionals judged by the standards of the profession as a whole For professionals D is compared to a person in that same profession, so the standard expected is higher. If a professional makes a mistake the court will consider whether other professionals in the same area of expertise might have done the same thing. If they would have then D will not be in breach.

Bolam v Friern Barnet HMC Test used for medical considerations Set out the 2-part test that needs to be satisfied.

1. Does the defendant's conduct fall below the standard of the ordinary competent member of that profession?

2. Is there a substantial body of opinion within the profession that would support the course of action taken by the defendant?

Montgomery v Lanarkshire Health Board Test used for value judgments. Claimant gave birth but due to complications during delivery, her baby was born with cerebral palsy. She claimed against doctors who were responsible for her care. Her appeal to the supreme court focused on the doctor's failure to disclose the risks and obtain informed consent. Court decided that the doctor was under a duty to disclose the risks of a major obstetric emergency which involves significant risks to the mother's health The SC held that the Bolam test did not apply in these circumstances because the doctor's views that, caesareans are not in maternal interests (interest of the mother) was a value judgment. This means that where the issue is one of telling a patient of the risks of a medical procedure rather than a purely medical decision then the Bolam test does not apply. The patient should have been told of the risks so she could make up her own mind, regardless of what any reasonable medical opinion may be. There was a good chance that had she known of the risks she would not have opted for a natural birth. The SC allowed the patient's appeal as the Doctor had breached the duty of care owed.

Is the decision in **Montgomery** sensible?
If a patient has been told of the risks (fully informed consent) and decides to go ahead with an operation and complications occur will the doctor be in breach of their duty? Would your answer be different if medical opinion would have suggested an alternative procedure?

2. Learners are judged at the standard of the competent, more experienced person. Nettleship v Weston
Mrs Weston arranged with her neighbour Nettleship to give her driving lessons. She was on her third lesson with him and failed to straighten up after turning a corner. She hit a lamppost which fell onto the car injuring Mr Nettleship. The court decided that Mrs Weston should be judged at the standard of the competent driver and not at the standard of an inexperienced driver
Thus, a trainee driver should show the standard of care expected of a competent driver and that the standard will be judged against the opinion of other responsible drivers (Bolam).

Is this test fair?

3. Children and young persons (subjective consideration)
The test is based on a reasonable person of the defendant's age at the time of the accident.

Mullins v Richards 1998
Two girls aged 15 were play fighting with plastic rulers at school. One of the rulers snapped and fragments entered Teresa's eye resulting in her losing her eyesight. The court decided that Heidi had to meet the standards of a 15-year-old girl and not of a

reasonable adult. As she had reached the required standard, she had not breached her duty of care

Is this test fair?

Determining the standard of care

Judges through case law have developed a number of rules that should be taken into account to determine the standard by which the defendant's behaviour should be measured.

In **Daw v Intel Corp Ltd**

An employer was negligent in failing to take steps to obviate the risk of an employee, who complained of being overworked and stressed and who had a history of depression, from suffering from a nervous breakdown.

the Court of Appeal stated the factors that apply in establishing a breach of duty by an employer are failure to take the steps which are reasonable in the circumstances, bearing in mind the magnitude of the risk of harm occurring, the gravity of harm which may occur, the costs and practicability of preventing it and the justifications for taking the risk.

What did Daw suffer from and was she successful in her claim?

Risk factors:

1. The magnitude / size of the risk.

The greater the risk of harm, the greater is the obligation on D to take precautions.

a) However, no breach will have occurred if the risk was impossible to foresee. **Fardon v Harcourt-Rivington.**

The defendant and his wife went to a market. Leaving their dog inside their car. After some time, the dog become excited broke the back glass. A broken glass went into the plaintiff's eye and then he lost his eye. It was held that the defendant was not liable on
the ground of negligence. People must guard against reasonable probabilities, but they are not bound to guard against fantastic possibilities and because of inevitable accident there is no liability.

Here the House of Lords held there was no duty to guard against 'fantastic possibilities. What did the dog do? Was the claimant successful?

b) Whether something is foreseeable is judged at the time of the incident. If the risk of harm is unknown there can be no breach. Future knowledge cannot be applied to past incidents.

Roe v Minister of Health – Lord Denning "We must not look at the 1947 accident with 1954 spectacles".

Two claimants had been given an anaesthetic for minor operations. The anaesthetic had been contaminated with a sterilising fluid. This resulted in both claimants becoming permanently paralysed. The anaesthetic had become contaminated during storage. The

anaesthetic was stored in glass ampoules which were emerged in the sterilising fluid. It transpired the ampoules had minute cracks which were not detectable with human eye. At the time it was not known that the anaesthetic could be contaminated in this way and the hospital followed a normal procedure in storing them this way. It was held that there was no breach of duty. The risk was not foreseeable as it was an unknown risk at the time. c) Where the magnitude of the risk is low there is unlikely to be a breach providing that D has done all that was expected of them.

Bolton v Stone

A cricket ball hit a lady passer-by in the streets outside a cricket ground. There was a 17ft high fence around the ground and the wicket was a long way away from the fence. There was also evidence that the cricket balls had only been hit out of the fence a total of 6 times in the last 30 years before the accident. Because of the number of times balls had been hit out of the ground, it was found that the cricket club had done everything it needed to lower the risk and it had not breached its duty of care

d) The higher the risk of injury then the standard of care is higher.

Hayley v LEB

The electricity board dug up a trench for its cables and following its standard practice; it only put out warning signs; it did not put any barriers around the trench. The claimant was blind and was injured when he fell into the trench. As it was known that the particular road was used by blind people, greater precautions should have been taken, and the defendant had breached its duty of care

2. The gravity of the potential harm

A higher standard of care may be required where although the risk is small, the consequences may be serious as the claimant has special characteristics.

Paris v Stepney BC

The claimant only had sight in one eye due to in injury sustained in the war. During the course of his employment as a garage hand, a splinter of metal went into his sighted eye causing him to become completely blind. The employer did not provide safety goggles to workers engaged in the type of work the claimant was undertaking. The defendant argued there was no breach of duty as they did not provide goggles to workers with vision in both eyes and it was not standard practice to do so. There was therefore no obligation to provide the claimant with goggles. There was a breach of duty. The employer should have provided goggles to the claimant because the seriousness of harm to him would have been greater than that experienced by workers with sight in both eyes. The duty is owed to the particular claimant not to a class of persons of reasonable workers. Why was there a duty on the employers to take greater care and provide goggles to the claimant when it was not required for other workers?

3. The cost and practicality of taking precautions

The D may argue that avoiding a risk altogether would be too expensive. The courts are unlikely to accept this argument, but it may tip the balance when considering the other risk factors.

Latimer v AEC Ltd

A factory became flooded. The floor was very slippery with water and oil. The workers were evacuated. Sawdust was spread over the floor to minimise the risk of slipping and the workers were required to go back in. Despite the sawdust, one worker slipped and fell. The court held that there was no breach of the duty of care. The factory owners had taken reasonable steps to reduce the risk of injury. The was no need to incur expense to eliminate every possible risk

4. Whether the risk was justifiable

Even when the other factors are present, the taking of a risk may be justifiable in certain circumstances.

a) A risk that has some benefit to society may be acceptable even though it was foreseeable. In emergency situations greater risks can be taken and a lower standard of care can be accepted as it is fair, just and reasonable (duty of care).

Watt v Hertfordshire CC Day v High Performance Sports The claimant was a fire-fighter. There was a road accident a short distance from the fire station and the fire service was called to release a woman trapped underneath a lorry. A jack was needed to release the woman but the normal vehicle for carrying the jack was not available. A flatbed truck was found but there was no way of securing the jack. The claimant was injured when the jack slipped and fell on him on the way to the incident. The court decided that the fire service had not breached its duty of care to the claimant because of the emergency and the fact that the utility of saving a life outweighed the need to take precautions.