Discuss the extent to which the rules for proving negligence are both consistent and just

The definition of negligence as set out by Baron Alderson in Blythe v Waterworks Co is 'failing to do something which the reasonable person would do or doing something the reasonable person would not do' so according to his definition, negligence can occur through either an act and/or an omission. Most of the law on negligence has been developed through judicial precedent rather than Parliament. It is better that Parliament make the law instead of judges because if judges are making the law then they are taking too much power as they are unelected. It is the Parliaments job to make law therefore it should remain that way as they have more experience.

To successfully prove a claim for negligence, 3 factors need to be present to find the defendant (D) liable. The D must owe the claimant a duty of care to show there was a legal relationship between the parties. This was originally set out in Donoghue v Stevenson and was modified in Caparo v Dickman as the Caparo test which is a three-part test. A) was the damage or harm reasonably foreseeable? The D must've foreseen the risk of harm e.g. Kent v Griffiths where an ambulance was called as the claimant was having an asthma attack and the ambulance failed to arrive in reasonable time without a valid reason and as a result, the claimant suffered respiratory arrest. B) is there a sufficiently proximate relationship between the claimant and defendant? The proximate relationship can be how close you were to the D, physical e.g. Bourhill v Young where the claimant saw the blood from the accident but not the D therefore no relationship was found. Restrictions are needed so that there if no floodgate otherwise everyone would start making claims so the law on this must be strict. The relationship can also be family e.g. Mcloughlin v O'Brien where her family was in a car accident, she saw her family before they had been treated and as a result she suffered severe shock, depression and personality change and lastly, a legal relationship. C) is it fair just and reasonable to impose a duty. The courts are reluctant to impose this duty on public services such as the police e.g. Hill v CC of West Yorkshire where the police had enough evidence to arrest the serial killer and they didn't, and the killer murdered the claimant's daughter. Mother claimed that the police owed a duty of care to her daughter, but the House of Lords decided that the relationship was not sufficiently close, and it was not fair, just and reasonable for the police to owe a duty of care to the general public. The courts are aware of the financial burden on the public bodies and if a claim is successful then monies will 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 isn't always a duty owed.

Breach of duty must also be proved. The standard of care is measured objectively but the courts examine whether the standard may differ according to the type of person owing the duty. An objective standard is used so consistency in the law is achieved. It is a test that is simply measured and applies to all. Where the D acts in a professional capacity, the standard is expected is of a person in the same work and where the **D isn't acting in a professional capacity then the standard expected is of** a 'reasonably competent' person doing the job, not a professional. An objective standard also means that every defendant is equally treated but this can be harsh as well as just. In this respect there is no lowering of the standard for those who lack experience e.g. Nettleship v Weston an inexperienced driver will be compared to a reasonably competent driver. However, in sports an amateur is treated differently to a professional as in McCord v Swansea AFC Ltd compared to Pitcher v Huddersfield Town FC Ltd. This may create fairness, but the rules are being applied inconsistently. There is a completely different method of measuring the breach in the case of medical professionals as shown in the 2-part test in Bolam v Friern Barnet HMC where 1) **does the D'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?

However, there is flexibility and some variation with standards with regards to different groups such as children as in Mullins v Richards. This can be considered fair and just as they are a vulnerable group. The legal profession liability for negligence outside of court was established in White v Jones and negligent advocacy at court in Hall v Simons. This eventually brought the legal profession in line with other professions making the rules consistent and fair. This was achieved by judges going against established precedent on the grounds of public policy and creating fairness. Factors that may be considered to determine whether there has been a breach of the duty of care are the size of the risk of harm Roe v Minister of Health and Haley v LEB this is fair and just as the bigger the size of risk, then there is greater obligation for the D to take precautions therefore the D will be found liable. It is also fair as no breach would have occurred if the risk was impossible to foresee however, this would be unfair to the claimant. the gravity of the potential harm Paris v Stepney BC, the cost and practicability of any possible precautions Latimer v AEC. This Is unfair as regardless of the cost of taking precautions, it must be carried out to ensure safety. It being too expensive isn't valid because at what cost are you going to pay for the injuries **you've** caused. Lasty, the social usefulness of the **defendant's actions (justifiable risk) i.e.** the extent to which the defendant acted in an emergency Watt v Hertfordshire CC.

To prove negligence, the damage caused by the defendant's breach is considered, which is reasonably foreseeable and there is a causal link both in fact and law. Causation is a two-part test. Having a 2-part test ensures that only those defendants that are truly to blame are liable which creates certainty and makes the law more just and fairer. Factual causation is the but for test where **if it wasn't for the D's actions then the consequences would've never occurred** as defined by Lord Denning in Cork v Kirby McLean Ltd. If the evidence does not support liability, then it is only fair that D is not responsible. Only if factual causation is proven then legal causation will be considered. If there is no new intervening act then the D will be liable, which is fair. However, if the damage is too remote then D will not be liable as illustrated in The Wagon Mound. The thin skull rule set out in Smith v Leech Brain is unfair to the D because even though they didn't know that the claimant/victim was suffering from a disability or a pre-existing condition and that their actions had resulted in serious harm even if a person without that condition **wouldn't have been seriously harmed,** they would still be charged **which is unjust as the risk wasn't** foreseeable.

The claimant must prove that the D was at fault which is unjust. The issues with proving fault is that it is a costly process to prove the claim based on the requirements of eyewitnesses and experts who need to be paid. However, most defendants will have insurance so the claimant if they win will be assured that they will receive compensation. On the other hand, negligence claims, particularly those involving insurance companies can take months and even years to deal with. This puts an emotional and financial strain on claimants, which is unjust and can cause the claimant to drop their claim meaning they won't get the justice they deserve. Furthermore, personal injury claims often have massive delays. A personal injury claim needs to be issued at court within 3 years but there is no time limit for the case to be completed (except Fast Track cases). These cases will normally require the claimant to instruct a lawyer as the evidence required to prove fault is technical. Going to court is a costly process and even if the claimant has a conditional fee arrangement, they will still need to pay the insurance premium (before or after the event). In any event unless the lawyer believes the claimant has a 75% chance of winning, they will not take the case. This is denying the claimant access to justice which is unfair. Finally proving negligence in the adversarial court system does not help a claimant, as confrontation will not usually lead to an early settlement and can lead to greater delays and costs. This has been recognised as an unfair system and

therefore the Compensation Act 2006 introduced ADR for personal injury claims. It is also proposed that mediation is extended for personal injury claims. A more just solution to proving negligence is a state-run benefit scheme, which pays all victims of accidents without proof of fault e.g. in Canada this is used for accidents at work. This would ensure anyone who is injured is compensated, without any delays and no need for lawyers. This would deal with the unfairness of the current system. An alternative proposal is the no fault accident compensation scheme available for all injuries which is used in New Zealand. Money is raised from government and non- government sources and a range of benefits are payable to victims. This was recommended by the Pearson Commission for the UK in 1975 but never implemented. However, the **first step towards this is the 'rapid resolution and redress' scheme for clinical negligence during maternity** care.

In conclusion, the rules for proving negligence is inconsistent and unjust as the claimant must prove that the defendant was at fault, which is an expensive, lengthy process which heavily impacts whether they decide to take the case to court as it is emotionally and financially straining. Furthermore, there are many factors the claimant must prove to present the D as guilty and that the rules that apply to these factors depends e.g. the Caparo test where public services are not likely to be found guilty even if they were which denies the claimant of their justice. In addition to this, proving breach of duty and the standard of care seems to fluctuate a lot. It is picking and choosing as to who a person can be compared to e.g. a learner driver will be compared to a fully licenced driver and a junior doctor will be compared to a fully qualified professional doctor which is unfair because it is clear these people are learning and are not fully qualified, yet they are being compared to them as if they are. On top of this, Judges are there to apply the law. They are not in the courts to decide what the law should be. Government and Parliament are there as elected officials to forward our democracy. The courts read legislation and apply it into cases; they should not be there to change and deviate from the law if they do not want to or agree with it so law making should be left to Parliament instead of the law on negligence being built up by judges.