

Chapter 3 Negligence: duty of care and breach of duty

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Introduction

This chapter introduces the first two elements in establishing an action in the tort of negligence. Did the defendant owe the claimant a duty to take care? Was the defendant in breach of that duty?

Learning outcomes

By the end of this chapter and associated readings, you should be able to:

- explain the concept of duty of care and its purposes
- identify the various tests that have been suggested for the existence of a duty of care
- discuss the duty concept in the context of some particular situations, namely, controlling others, duty of lawyers and duty to unborn children
- describe the standard of care required of defendants both in general and in respect of particular skills

Essential reading

- Markesinis and Deakin, pp.85–95, 167–184
- Murphy, pp.171–181, 231–263
- Winfield and Jolowicz, pp.103–134, 190–208
- Lunney and Oliphant, pp.90–100, 107–129, 139–187.

3.1 Duty of care

The duty of care concept has at least two purposes. The first is to provide an overall framework for the huge variety of situations in which liability may arise. For centuries the law has recognised relationships in which one person owes a duty to another. What was lacking was a **general principle** of which the various cases

were illustrations. The second purpose is one of **limitation**, setting the boundaries within which one person could be liable to another for the consequences of careless behaviour.

3.1.1 Finding a general test

A number of attempts have been made to expound such a general test. We will look at four of the most influential.

a. The neighbour principle

Donoghue v Stevenson [1932] AC 562 was important in two respects.

- First, by a majority, the House of Lords recognised a new relationship as giving rise to a duty of care, that between manufacturers and the ultimate consumers of manufactured products (in this particular case a bottle of ginger beer). This is sometimes called the **narrow rule** in *Donoghue v Stevenson*: it still survives but has in practice been superseded by a new kind of liability established in the Consumer Protection Act 1987 (see Chapter 8).
- Secondly, Lord Atkin enunciated a broad principle of liability. A duty was owed to ‘persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected...’ He described such people as ‘my neighbours’: so his definition of the duty is called the ‘neighbour principle’.

b. A revised test

There were many developments in the law of negligence in the years following that decision. These led Lord Wilberforce to redefine the neighbour principle. He turned it into a two-stage test in *Anns v Merton London BC* [1978] AC 728 at 751.

The first question was whether there was a sufficient relationship of proximity or neighbourhood such that in the reasonable contemplation of the defendant carelessness on his part may be likely to cause damage to the claimant. If so, a *prima facie* duty of care arose. The second question was whether there were any considerations which ought to negative or reduce or limit the scope of the duty of care or the class of persons to whom it was owed.

This test came under criticism in the following years as being too expansive and indeed the *Anns* case was itself overruled in 1991 (see Chapter 5).

c. The current test: foresight, proximity and fairness

The test is now stated in this form. The claimant has to show three things if there is to be a duty of care:

- It was reasonably foreseeable that a person in the claimant’s position would be injured.
- There was sufficient proximity between the parties.
- It is fair, just and reasonable to impose liability.

There is no single case identified with this test, but one of its best expositions is in *Caparo Industries v Dickman* [1990] 2 AC 605. There is a particularly helpful discussion of the test by Bingham LJ in the Court of Appeal in the same case: *Caparo Industries v Dickman* [1989] QB 653 at 678-680. Notice that the decision of the

Four tests:

- The neighbour principle
- A revised test (Lord Wilberforce)
- The current test: foresight, proximity and fairness
- An alternative test: assumption of responsibility

‘BC’ = Borough Council, an administrative division, particularly in London.

Court of Appeal in that case was overruled by the House of Lords. For details, see Chapter 5.

These three tests are very similar. In particular, notice that:

- They are very general. It is possible to understand what they mean in practice only after studying a number of illustrative cases.
- Policy considerations are explicit in the second and third tests, but are implicit in Lord Atkin's test as well. Notice his use of 'ought' and 'reasonably'. There is a large **moral component** to his test. It is not just about what can be foreseen, but about what 'ought' to be foreseen.
- These tests are of most use when the law is uncertain. These are concepts that judges use when deciding whether or not a duty of care ought to be recognised in new situations. Once a duty situation is recognised, the test in a sense drops out of the picture. So, in an examination context, there is no need to go through the *Caparo* test unless either the situation is a novel one, where there are no clear precedents, or you are trying to argue that the law ought to be changed (as was done by the House of Lords in respect to the liability of lawyers; see below at page 21). If the question you are answering is about a motorist knocking down a pedestrian, the duty of care is established by many previous cases and there is no need to go through the tests for establishing a duty afresh.

d. An alternative test: assumption of responsibility

For some purposes, an alternative test has been developed, namely whether there had been a voluntary assumption of responsibility by the defendant for the claimant. This test is particularly used in cases of liability for omissions, for mis-statements and for economic loss as discussed in Chapter 5.

3.2 Functions of the duty concept

Traditionally the duty concept has been seen as serving two separate functions:

- Is there a duty at the abstract level (the notional duty or duty in law): e.g. does a motorist owe a duty of care to other road users? Or do barristers owe a duty of care to their clients?
- Is the particular claimant within the scope of the duty of care (duty in fact or the problem of the unforeseeable claimant): e.g. was this particular road user owed a duty by this particular motorist?

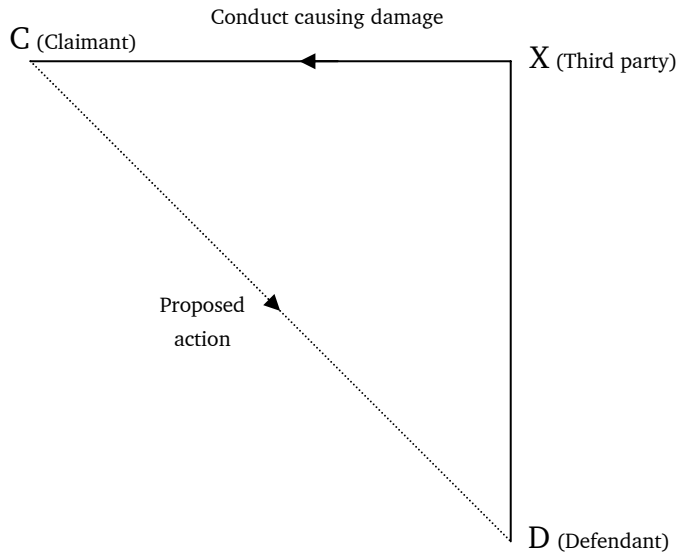
Notice that many commentators prefer to treat the second question – duty in fact – either as a matter of breach of duty or as a matter of remoteness of damage.

Some cases then are clear. Users of machinery, etc., on the roads, on building sites, in workplaces owe a duty of care to those likely to be affected. So do doctors, nurses, dentists, hairdressers, etc., providing services to the public. Below there is a series of illustrations of the application of the concept of duty of care, in situations where there has been doubt. More complex and developing examples are discussed in Chapter 5.

3.2.1 Duty at the abstract level

Is there a duty to prevent X injuring C?

An important problem is how far the defendant owes a duty to stop or prevent another person (X) injuring the claimant. This can be illustrated thus:



Examples of this problem would include the following:

a. Should a school (or a parent) owe a duty of care to passing motorists to see that a child does not run out of the school and cause an accident?	b. Should a host at a party owe a duty of care to prevent a guest driving home drunk and injuring a pedestrian?	c. Should a car owner owe a duty of care to keep it locked up to prevent a thief stealing it and knocking down a pedestrian?
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In the diagram above X is the child, the guest and the thief.

As a general rule English law does not impose a duty, reasoning that the fault is that of X and not that of D. But exceptionally a duty may arise. In deciding whether a duty of care arises, it is relevant to ask:

- What is the relationship between X and D? Does D have some responsibility over X?
- What is the relationship between C and D? Does it involve some obligation on D's part to protect C against harm?

See *Home Office v Dorset Yacht Co* [1970] AC 1104; *Carmarthenshire County Council v Lewis* [1955] AC 549; *Topp v London Country Bus (South West) Ltd* [1993] 1 WLR 976; *Attorney-General of British Virgin Islands v Hartwell* [2004] UKPC 12; [2004] 1 WLR 1273.

The issues discussed in this paragraph are similar to, and overlap with, issues discussed later in this guide: (a) whether the act of X

amounts to a new and intervening cause breaking the link between C and D (see Chapter 4); (b) whether D can be liable for an omission to act where he fails to take steps that would prevent X from causing harm (see Chapter 5).

The issues discussed in this paragraph must be distinguished from the question of **vicarious liability** (see Chapter 13). This paragraph concerns the primary liability of defendants for their own tort in failing to control others. In vicarious liability the defendant is liable for a tort committed by someone else. In the *Dorset Yacht* case both ideas are present. The Home Office were **vicariously** liable for the torts of the borstal officers. But the borstal officers were not vicariously liable for the torts of the boys: they were **primarily** liable for their own torts in allowing the boys to escape and cause harm. In the *Hartwell* case both vicarious liability and primary liability were considered as alternative causes of action.

A very similar problem arises where in effect C and X are the same person. In the examples given on page 20 would the school, host or car owner owe a duty of care to the child, guest or thief? How far should defendants have to protect claimants against their own folly? Of course there are many cases where the defendant has specifically accepted responsibility for the safety of others, but the principle may extend further than that. See: *Jebson v Ministry of Defence* [2000] 1 WLR 2055.

Duties of lawyers

Lawyers of course owe a duty of care to their clients, but until recently it was thought that no duty was owed by barristers (and later solicitors also) in respect of work closely connected with the presentation of their case in court. Putting it in terms of the *Caparo* test, it would be said that, while there was foresight and proximity, it was not fair, just and reasonable to impose liability.

The House of Lords has now decided that in contemporary conditions there are no policy reasons sufficient to justify this immunity and it should be abolished: *Arthur J. S. Hall v Simons* [2002] 1 AC 615.

The circumstances in which a duty is owed and the scope of the duty are considered by the House of Lords in *Moy v Pettman Smith (a firm)* [2005] UKHL 7: [2005] 1 WLR 581.

Activity 3.1

Examine the reasoning of the House of Lords in *Hall v Simons*. What policy reasons previously were thought to justify the immunity? Why are those policy reasons no longer thought enough to justify it?

Feedback: see page 29.

Duty of care to unborn children

A doubt as to whether the common law recognised a duty of care to unborn children in respect of damage done before birth was resolved by statute: the Congenital Disabilities (Civil Liability) Act 1976. The Act originally envisaged a child being born with

disabilities as the result of damage to the mother (or sometimes the father) occurring during pregnancy or sometimes before conception. Typical examples were physical injuries to a pregnant woman in, say, a car crash, or the side effects of drugs. It had to be amended in the light of advancing medical technology to deal with damage to stored sperm or eggs: Human Fertilisation and Embryology Act 1990.

These Acts impose liability only where the damage **caused the disability** from which the baby suffers when it is born. They do not allow an action where the negligence caused the baby to be born, but did not cause the disabilities. A doctor may, for example, negligently carry out a sterilisation procedure on either a man or a woman, or may fail to recommend an abortion: any child born as the result of this negligence has no claim.

You should think about the ethical reasons for the child's inability to claim negligence and for the reluctance in most cases to allow the parents to claim.

These ethical reasons do not apply where the claim is by the father or mother (or both) who have to bring up the child. For a time the courts seemed likely to allow such claims. The ethical issues (together with a wide-ranging review of how these issues are decided round the world) are discussed:

- where the child is healthy and is being raised in a loving family (*McFarlane*)
- where the child is disabled (*Parkinson*)
- where the child is healthy but the mother did not want children because of her own disability (*Rees*).

See *McFarlane v Tayside Health Board* [2000] 2 AC 59; *Parkinson v St James and Seacroft University Hospital NHS Trust* [2001] EWCA Civ 530; [2002] QB 266; *Rees v Darlington Memorial Hospital NHS Trust* [2003] UKHL 52; [2004] 1 AC 309.

Novel situations

Other examples of cases where the courts have had to decide in novel situations whether they should hold that there was a duty of care are: *Mulcahy v Ministry of Defence* [1996] QB 732 (liability of injuries to soldiers on active service; *Vowles v Evans* [2003] EWCA Civ 318; [2003] 1 WLR 1607 (liability of rugby referee to injured player).

3.2.2 Scope of the duty of care

Even if the defendant owed a duty of care to some people, there remains the question of whether the particular claimant was within the scope of that duty. See *Bourhill v Young* [1943] AC 92; *Palsgraf v Long Island Railroad Co* (1928) 248 NY 339; *Haley v London Electricity Board* [1965] AC 778; *Urbanski v Patel* (1978) 84 DLR (3rd) 650; *Goodwill v British Pregnancy Advisory Service* [1996] 2 All ER 161.

In the last case (*Goodwill*) the points made about the woman claimant's position are still of interest, although the court's assumptions about the position of her partner have been undermined by the cases referred to in 3.2.1.

Activity 3.2

(a) How do the tests of a duty of care in *Donoghue v Stevenson*, *Anns v Merton London Borough Council* and *Capro Industries v Dickman* differ? In what respects are they similar?

(b) D is gardening at the front of her house. She goes into the house to pour herself a drink and leaves a spade lying in the garden. X, a passer-by, picks it up and attacks C, D's neighbour. Is D liable to C? (In answering this question, think about various possibilities as to who X is, which might affect your answer.)

(c) To what extent is there (and should there be) liability:

- (i) if a person negligently injures a pregnant woman and the child is born dead
- (ii) a doctor negligently fails to identify a risk that a foetus has been damaged and does not suggest an abortion: the child is born disabled
- (iii) a mother takes drugs throughout pregnancy: the child is born with a severe problem of drug dependency.

(d) Clarissa thinks that she may be pregnant and consults a pregnancy advisory service. They confuse her records with those of another client and inform her that she is not pregnant. By the time she discovers that she is pregnant, it is too late for an abortion. Advise her.

Feedback: see page 29.

Summary

There is no liability in negligence unless there is a duty to take care. This establishes the necessary link between the claimant and the defendant. Such duties are widely recognised. In cases of doubt the modern test is whether there was foreseeability and proximity and it was fair, just and reasonable to impose the duty.

3.3 Breach of duty

The next question is whether there has been a breach of the duty of care. Has the defendant actually been negligent?

As a practical matter, this is very important. It will often be a major issue between the claimant's advisers and the defendant's advisers or insurers in attempting to reach a settlement. If there is a trial, much time may be spent on deciding what actually happened and whether that amounted to negligence on the defendant's part. In that end this is a question of fact. It is however a question of fact that has to be answered within a structure of legal rules. You cannot be expected to decide in an examination answer whether or not the defendant was in fact negligent, but you can be expected to identify in a question the respects in which the claimant could argue that the defendant has been negligent and also explain how the question will be approached within the structure of legal rules.

3.3.1 The basic rule

The basic rule is that the defendant must conform to the standard of care expected of a reasonable person.

'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

reasonable and prudent man would not do.’ (*Blythe v Birmingham Waterworks* (1856) 11 Exch 781)

Ordinary person in ordinary circumstances

One of the few cases in which the House of Lords has had to consider the behaviour of an ordinary person in ordinary circumstances (not involving special skill or knowledge) is *Glasgow Corporation v Muir* [1943] AC 448. Lord Macmillan highlighted two important aspects of the test:

- (a) ‘The standard of foresight of the reasonable man is, in one sense, an impersonal test. It eliminates the personal equation and is independent of the idiosyncrasies of the particular person whose conduct is in question.’
It is an objective test. (For a situation in which it may be appropriate to take a more subjective view of the defendant’s conduct, see 5.3.1 and the case of *Goldman v Hargrave*.) The abstract reasonable person is put into the shoes of the defendant, who is expected to have the same general knowledge and understanding of risks (say, that icy roads are slippery or that children may get up to mischief) as the reasonable person. The actual defendant may be stupider or more ignorant, or may be cleverer or more knowledgeable, but is still judged by this abstract impersonal standard.
- (b) ‘It is still left to the judge to decide what, in the circumstances of the particular case, the reasonable man would have had in contemplation. Here there is room for diversity of view. What to one judge may seem far-fetched may seem to another both natural and probable.’
The outcome is therefore to that extent unpredictable even in the tiny minority of cases that are resolved in court.

The *Glasgow Corporation* case is a good illustration of the point made in Chapter 2 about the artificiality in many questions of looking separately at the three issues of duty, breach and damage. In this case there was only one simple question. Should Mrs Alexander, the manageress of a teashop, have told her child customers to stand outside while two people carried an urn of hot tea through the shop? The answer depends on what dangers a reasonable person would have expected and what steps (if any) such a person would have taken to avoid them. Lord Macmillan’s words are appropriate whether you think of this primarily as a question of breach of duty or as a question of remoteness of damage.

3.3.2 Defendant with special skills or qualifications

Most of the difficult reported cases however involve defendants with special skills or qualifications. It would be silly to ask whether a reasonable ‘person’ would have driven the car, removed the appendix or designed the building in the same way as the actual motorist, surgeon or architect who is being sued. In such cases the defendant is to be compared to a reasonable person with the relevant skill or qualification. This is not always as easy as it might be.

- For one thing, there is sometimes doubt as to exactly what skill or qualifications the defendant professes to have.
- For another, there may be doubt as to whether a large group (say car drivers or doctors) should be sub-divided into smaller categories for the purpose of comparison with reasonable members of the group.

In the examples that follow it is more important to understand the reasoning and how it might be applied in other contexts than to know whether a particular defendant was or was not held to be negligent on a particular set of facts.

Defining the group

In these cases the problem was one of defining the group to which the defendant belonged: *Phillips v Whiteley* [1938] 1 All ER 566.

Did the defendant, who had pierced the claimant's ears, have to show the care of a reasonable surgeon or of a reasonable jeweller?

In *Shakoor v Situ* [2000] 4 All ER 181 there is an interesting analysis of how to treat a practitioner of traditional Chinese medicine working in England. Was he to be compared to a reasonable orthodox doctor, a reasonable traditional doctor practising in China or a reasonable traditional doctor practising in England?

Ask yourself what conclusion the judge reached, and why he did so.

Many cases involve car drivers. The only standard of care is that of a reasonable driver, whether the actual driver is highly experienced, newly qualified or even just a learner. It is irrelevant that the learner driver defendant was doing as well as she could, given her lack of experience, if a reasonable driver would have done better: *Nettleship v Weston* [1971] 2 QB 691.

Medical negligence

A large number of the cases involving special skills concern medical negligence. The defendant is to be compared with a reasonable person of the same specialism and status: a general practitioner is not judged by the same standards as a consultant cardiologist and so on.

You should read and make notes on:

- *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582
- *Bolitho v City and Hackney Health Authority* [1998] AC 232

There is a special problem with medical defendants (and to some extent with members of other professions). There is often no single 'right' way of proceeding. Faced with a particular patient, one doctor might recommend surgery, but another might recommend treatment with drugs. The courts do not insist that one of these approaches must be right and the other wrong: they require that the defendant has acted in a way that would be supported by 'a body of respectable medical opinion'. This is sometimes called the '*Bolam* test' as set out in that case. This test allows the medical profession to some extent to determine appropriate standards for itself, but the courts reserve the right to strike down a medical practice as unreasonable (as explained in *Bolitho*).

Other examples of the application of this principle are: *Whitehouse v Jordan* [1981] 1 WLR 246; *Maynard v West Midlands Regional Health Authority* [1984] 1 WLR 634; and *Wilsher v Essex Area Health Authority* [1987] QB 730. (This is the decision of the Court of Appeal. The case went to the House of Lords, but only on the issue of causation and not on the issue of breach of duty (see Chapter 4).)

The most controversial application of the *Bolam* test occurs where it is alleged that the doctor failed to give the patient sufficient warning of the risks of the proposed treatment (or possibly of the risks of not having the treatment). English law in principle applies the *Bolam* test and asks whether the information given was in accordance with what a respectable body of medical opinion would have done, but Australian courts have taken a view more generous to the patient and ask what a reasonable patient would expect to be told. See *Sidaway v Governors of Bethlem Royal Hospital* [1985] AC 871 and *Rogers v Whitaker* (1992) 175 CLR 479.

The English approach is sometimes criticised as showing a 'doctor knows best' attitude and ignoring the autonomy of the patient. The professional bodies now encourage greater openness and encourage

doctors to explain the advantages and disadvantages of particular treatment unless there is a good reason for not doing so. It will now be more difficult for a doctor to argue that a reluctance to be open about the advantages and risks of treatment is in accordance with medical opinion. For a more recent example, although it is principally concerned with causation issues (see 4.1.1), see *Chester v Afshar* [2005] UKHL 1 AC 134.

If you are considering a claim for the consequences of medical treatment, you should think of different ways of presenting the argument. Most cases are based on the idea that the individual doctor (or nurse, etc.) is negligent and that the health authority or private hospital is vicariously liable. For the details of vicarious liability, see Chapter 13. In some cases it may be appropriate to consider arguing whether the health authority or hospital is itself negligent, e.g. by entrusting a procedure to an inappropriately junior doctor, or by overworking its staff so that they are too tired and make mistakes.

The approach described in medical cases would certainly apply to professions similar to medicine, such as dentistry or physiotherapy. The extent to which the courts will be willing to defer to professional opinion in other professions is less certain, although it is likely to apply in all cases where different members of the profession might reasonably take different views. For the example of solicitors, see *Edward Wong Finance Co Ltd v Johnson, Stokes and Master* [1984] AC 296, and of rugby referees, see *Vowles v Evans* [2003] EWCA Civ 318: [2003] 1 WLR 1607.

3.3.3 Related issues

Children

Children may be liable in negligence and are judged by what might be expected of a reasonable child of the defendant's age, and the courts appear to be indulgent towards high spirits and horseplay: *Mullin v Richards* [1998] 1 All ER 920 and *Blake v Galloway* [2004] EWCA Civ 814: [2004] 3 All ER 315.

Defendant unable to perform competently

A defendant may be liable even if he was doing his incompetent best. But if his behaviour was the result not of inexperience or incompetence, but of illness or other external forces, then he may be found not liable. See *Mansfield v Weetabix Ltd* [1998] 1 WLR 1263. (But the result would have been different if the driver had known of the medical condition.)

Eliminating harm must be proportional to the danger

A defendant is not required to eliminate all risk of harm even when it is foreseeable: to do so might be out of all proportion to the danger. The defendant must do something only if a reasonable person would have thought it right to do so. In deciding what precautions have to be taken to minimise a perceived risk, the following guidelines may be taken into account:

- (a) How likely was it that injury would occur?
- (b) How serious was the injury likely to be if it did occur?
- (c) How difficult and/or expensive would it be to eliminate the risk?

(d) How important or urgent was the action of the defendant?

See: *Bolton v Stone* [1951] AC 850 (explained by Lord Reid in *Wagon Mound (No. 2)*) [1967] 1 AC 617 at 642; *Latimer v AEC* [1952] 2 QB 701; *Paris v Stepney BC* [1951] AC 367; *Watt v Hertfordshire CC* [1954] 2 All ER 368.

It is important to remember that the defendant is to be judged by how a reasonable person with the same skill, etc. would have behaved at the same time and in the same circumstances. The defendant must not be judged with the benefit of hindsight (making use of knowledge not available at the time of the alleged tort) and allowance must be made for any special circumstances affecting the defendant (e.g. having to act under pressure or with limited time for full consideration). For examples, see: *Roe v Minister of Health* [1954] QB 66; *Luxmoore May v Messenger, May-Baverstock* [1990] 1 All ER 1067; and *Moy v Pettman Smith* [2005] UKHL 7: [2005] 1 WLR 581.

3.3.4 Are decisions on breach questions of fact or law?

Everything in the last few paragraphs involves propositions of law which are binding on the courts. Once these principles have been applied, however, the decision on the particular facts of a case does not constitute a binding precedent. The fact, say, that it was held in a particular case that an employer was negligent in failing to ensure that an employee wore a particular kind of safety equipment does not mean that all other employers will also be held negligent if they behave in the same way. The issue will have to be decided in the light of the particular facts each time it occurs. See *Qualcast v Haynes* [1959] AC 743.

This approach is not very helpful to potential defendants such as building contractors, who do not want to know that they have to take reasonable care, but do want to know exactly what instructions, equipment and so on they have to supply. So it is very common for regulations under the authority of various Acts of Parliament to set out detailed rules on such matters. The basis of liability for breaches of such regulations is explained in Chapter 7.

3.3.5 Proving breach of duty

Very often the claimant may not be able to find out what happened. A parked car, for example, may have moved off without warning down a hill. All the claimant can do is show that such a thing does not normally happen unless there has been negligence. The claimant can then make use of a rule of the law of evidence called *res ipsa loquitur* (the facts speak for themselves). You must ask yourself:

(a) when it is legitimate to use the maxim

(b) what the effect of invoking it is. See *Scott v London & St. Katharine's Dock* (1865) 3 H. & C. 596; *Henderson v Henry E. Jenkins* [1970] AC 282; *Ng Chun Pui v Lee Chuen Tat* [1988] RTR 298.

You should be warned that this doctrine applies only exceptionally. You should not make use of it in answering questions unless there is a clear suggestion that there is no explanation for what has

happened and the only inference is that the defendant must have been negligent.

Summary

The actual defendant is to be compared with how a reasonable person would have acted in the same circumstances. Where a particular skill (driving for example) or professional expertise (medical for example) is involved, the appropriate comparison is with a person with the same skill or expertise.

Activity 3.3

(a) What is the level of the duty of care to be shown by:

- a newly qualified solicitor
- a learner driver
- a 12-year-old child?

(b) What standard of care would have to be shown by Deirdre, an ambulance driver, (i) when taking a seriously ill patient to hospital and (ii) when driving her family to the seaside in the family car?

(c) D is a general practitioner. He prescribes certain tablets for his patient C, who is very fat. A recent article in a specialist journal of cardiology has suggested that there may be some risks in giving these tablets to overweight patients. C has a heart attack. Is D liable?

(d) D parks his car on a hill and walks away. Shortly afterwards, the car moves off downhill and strikes C. It is not clear why this has happened. Advise C.

Feedback: see page 29.

General examination advice

All claimants in a negligence action must establish that there has been a **breach of a duty of care**. This does not mean that all examination questions require an extended discussion of these topics. If a problem involves a driver of a car hitting someone while proceeding at 80 mph down a one-way street in the wrong direction, then these issues can be disposed of in two sentences. A problem question may involve only issues discussed in this chapter, but is likely also to involve topics from other chapters. An essay question of a general kind on the duty of care will almost certainly require information and ideas from Chapter 5 as well as this chapter.

Feedback to activities: Chapter 3

Activity 3.1 All the judges refer to these reasons, although there are differences of emphasis. You should have identified among the reasons for having the immunity: (i) the fact that lawyers in court owe a duty to the court that may sometimes conflict with the duty to their clients; (ii) that the prospect of being sued in negligence might adversely affect the quality of their argument by e.g. raising every conceivable point in their clients' interests; (iii) that suing the lawyer would to some extent reopen the correctness of the original decision. The House of Lords thought these reasons no longer applied in 2002 (although there was a disagreement about whether the immunity should remain in criminal cases). A main reason was that the public would not understand why lawyers had an immunity that other professions did not enjoy.

Activity 3.2

(a) No feedback provided

(b) You should have considered what was said in *Home Office v Dorset Yacht* and other cases. Normally in such a case there would be no liability, but you consider exceptional cases, e.g. if X was another neighbour who was known to be violent and aggressive where it is arguable that the result might be different.

(c) (i) Remember to consider that, although there is no liability to the estate of the dead child, there may be liability to the mother and the damages would include the suffering sustained by the loss of her baby; (ii) neither the Congenital Disabilities Act nor the common law allows an action by the child: for the claim by the parents see *McFarlane* and later cases; (iii) the Congenital Disabilities Act does not allow a claim by the mother. Ask yourself why mothers are not generally liable for damage to their unborn children, but are liable if they injure them by careless driving.

(d) No doubt the advisory service has a duty of care. Do you think that the reasoning in *McFarlane* etc. applies also to these facts? (In *McFarlane* etc. the negligence caused the pregnancy and not the failure to terminate it).

Activity 3.3

(a) On learner drivers see *Nettleship v Weston* and on children see *Blake v Galloway*. You will have to think about these cases and general principles would apply to the case of a newly qualified solicitor.

(b) When driving to hospital she still has to drive 'with reasonable care'. In an emergency it may be legitimate to drive in a way that is not ordinarily acceptable, but it still has to be reasonable in the circumstances. On going to the seaside, she is judged by the standards of an ordinary driver. She is not penalised because, as a highly trained driver, she might have been expected to do better in the circumstances.

(c) Examine the cases on standard of care to be shown by medical practitioners. You might note the following elements in the facts: (i) as a general practitioner, should he know about things discussed in a specialist journal? (some help perhaps from *Shakoor v Situ*,

though only by analogy); (ii) should he tell the patient about the risks? (consider *Chester v Afshar* and decide whether the facts are in any respects different).

(d) This might be one of the exceptional situations in which the maxim *res ipsa loquitur* can be applied.