THE LAW OF TORTS AND PROFESSIONAL NEGLIGENCE

TORT AND OTHER WRONGS

- The law gives various rights to persons.
- When such a right is infringed the wrongdoer is liable in **tort.**

TORT

- A tort is a civil wrong and the person wronged sues in a civil court for compensation or an injunction.
- The claimant's claim generally is that they have suffered a loss such as personal injury at the hands of the defendant and the defendant should pay damages.

Tort is distinguished from other legal wrongs:

- It is **not a breach of contract,** where the obligation which is alleged to have been breached arose under an agreement between two parties.
- It is **not a crime,** where the object of proceedings is to punish the offender rather than compensate the victim.

TYPES OF TORT

The two main types of tort:

- **'Passing-off'** is the use of a name, mark or description by one business that **misleads a consumer** to believe that their business is that of another. This tort often occurs when expensive 'designer' products such as watches or clothing are copied and sold as 'originals' to unsuspecting customers.
- **Negligence:** In simple terms, negligence is the **carelessness** of an individual or company which causes damage (physical or financial) to the claimant. Negligent acts tend to be **inadvertent** or **reckless**, but not normally intentional.

THE TORT OF NEGLIGENCE

There is a distinct tort of negligence which is causing loss by a failure to take reasonable care when there is a duty to do so. This is the most important and far reaching modern tort.

Negligence is the most important modern tort. To succeed in an action for negligence the claimant must prove that:

- The defendant had **a duty of care** to avoid causing injury, damage or loss
- There was **a breach of that duty** by the defendant
- **In consequence** the claimant suffered **injury, damage or loss**

LIABILITY

- Any **legal person** can commit and therefore be **liable for a tort** providing the three stage test is passed.
- This includes, for example, a car driver who injures a pedestrian, or a company that causes death or injury to a customer.
- Also, an employer can be **vicariously** liable for the acts of an employee.
- This means an employer may be liable for loss or damage caused by an employee, providing the acts were committed whilst the employee was performing the duties they were employed to do.

DUTY OF CARE

- In the landmark case of Donoghue v Stevenson 1932 the House of Lords ruled that a person might **owe a duty of care to another with whom they had no contractual relationship at all.**

- The doctrine has been refined in subsequent rulings, but the principle is unchanged.

DONOGHUE V STEVENSON 1932

The facts: A purchased a bottle of ginger beer for consumption by B. B drank part of the contents, which contained the remains of a decomposed snail, and became ill. The manufacturer argued that as there was no contract between himself and B he owed her no duty of care and so was not liable.

Decision: The House of Lords laid down the general principle that every person owes a duty of care to his 'neighbour', to 'persons so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected'.

THE BASIC RULE

The question of whether or not a duty of care exists in any situation is generally decided by the courts on a **case by case basis,** with each new case setting a precedent based on its own particular facts.

DEVELOPMENT OF THE DOCTRINE

For any duty of care to exist, it was stated in Anns v Merton London Borough Council 1977 that two stages must be tested:

1. Is there sufficient **proximity** between the parties, such that the harm suffered was **reasonably foreseeable**?
2. Should the duty be **restricted** or **limited** for reasons of economic, social or public policy?

DEVELOPMENT OF THE DOCTRINE

The latest stage in the doctrine's development came in Caparo Industries plc v Dickman 1990 that established a three stage test for establishing a duty of care that still stands:

1. Was the harm **reasonably foreseeable**?
2. Was there a relationship of **proximity** between the parties?
3. Considering the circumstances, is it **fair, just and reasonable** to impose a duty of care?

THE BASIC RULE

- Breach of duty of care is the second issue to be considered in a negligence claim.

- ***The standard of reasonable care requires that the person concerned should do what a reasonable man would do, and should not do what a reasonable man would not do: Blyth v Birmingham Water Works 1856.***

FACTORS SHOULD BE CONSIDERED WHEN DECIDING IF A DUTY OF CARE HAS BEEN BREACHED:

- **Probability of injury** It is presumed that a reasonable man takes **greater precautions** when the risk of injury is high: Bolton v Stone 1951.
- Therefore when the risk is higher the defendant must do more to meet their duty.
- In Glasgow Corporation v Taylor 1922 a local authority was held to be negligent when children ate poisonous berries in a park.
- A warning notice was not considered to be sufficient to protect children.

FACTORS SHOULD BE CONSIDERED WHEN DECIDING IF A DUTY OF CARE HAS BEEN BREACHED:

- **Seriousness of the risk** The young, old or disabled may be prone to more serious injury than a fit able-bodied person.

- The 'egg-shell skull' rule means that you must take your victim as they are.

- Where the risk to the vulnerable is high, the level of care required is raised: Smith v Leech Brain & Co 1962.

PARIS V STEPNEY BOROUGH COUNCIL 1951

The facts: P was employed by K on vehicle maintenance. P had already lost the sight of one eye. It was not the normal practice to issue protective goggles since the risk of eye injury was small. A chip of metal flew into P's good eye and blinded him.

Decision: There was a higher standard of care owed to P because an injury to his remaining good eye would blind him.

FACTORS SHOULD BE CONSIDERED WHEN DECIDING IF A DUTY OF CARE HAS BEEN BREACHED:

- **Issues of practicality and cost** It is not always reasonable to ensure all possible precautions are taken.

- Where the **cost** or **disruption** caused to eliminate the danger far **exceeds the risk** of it occurring it is likely that defendants will be found not to have breached their duty if they do not implement them.

LATIMER V AEC LTD 1952

The facts: The defendants owned a factory that became flooded after a period of heavy rain. The water mixed with oil on the factory floor causing it to become very slippery. Sawdust was applied to the majority of the areas affected, but the claimant slipped on one of the few areas that was not treated.

Decision: The defendant did all that was necessary to reduce the risk to its employees and was not held liable. The only other option was to close the factory, however no evidence could be provided that would indicate a reasonable employer would have taken that course of action. Closing the factory would have outweighed the risk to the employees.

FACTORS SHOULD BE CONSIDERED WHEN DECIDING IF A DUTY OF CARE HAS BEEN BREACHED:

- **Common practice:** Where an individual can prove their actions were in line with **common practice** or **custom** it is likely that they would have met their duty of care.

- This is unless the common practice itself is found to be negligent.

FACTORS SHOULD BE CONSIDERED WHEN DECIDING IF A DUTY OF CARE HAS BEEN BREACHED:

- **Social benefit** Where an action is of **some benefit** to society, defendants may be **protected** from liability even if their actions create risk.

- For example, a fire engine that speeds to a major disaster provides a social benefit that may outweigh the greater risk to the public.

FACTORS SHOULD BE CONSIDERED WHEN DECIDING IF A DUTY OF CARE HAS BEEN BREACHED:

- **Professions and skill Persons** who hold themselves out to possess a particular skill should be judged on what **a reasonable person possessing the same skill** would do in the situation rather than that of a reasonable man.

- Professions are able to set their own **standards of care** for their members to meet and therefore members should be judged against these standards rather than those laid down by the courts.

RES IPSA LOQUITUR

- The thing speaks for itself'.
- If an accident occurs which appears to be most likely caused by negligence, the court may apply this maxim and infer negligence from mere proof of the facts.
- The burden of proof is reversed and the defendant must prove that they were not negligent.

RES IPSA LOQUITUR

The **claimant must demonstrate** the following to rely on this principle:

- The thing which caused the injury was under the **management and control** of the defendant.

- The accident was such that it would not occur if those in control used **proper care.** Therefore in Richley v Faull 1965 the fact that a car skidded to the wrong side of the road was enough to indicate careless driving.

CAUSALITY AND REMOTENESS OF DAMAGE

Finally the claimant must demonstrate that they suffered injury or loss as a **result** of the breach.

DAMAGE OR LOSS

This is the third element of a negligence claim. A claim for compensation for negligence will not succeed if **damage** or **loss** is not proved.

A person will only be compensated if they have suffered actual loss, injury, damage or harm as a **consequence** of another's actions.

Examples of such loss may include:

- Personal injury
- Damage to property
- Financial loss which is directly connected to personal injury, for example, loss of earnings
- Pure financial loss is rarely recoverable

THE 'BUT FOR' TEST

- To satisfy the requirement that harm must be caused by another's actions, the **'But for' test** is applied.

- The claimant must prove that if it was not 'but for' the other's actions they would not have suffered damage.

- Therefore claimants are **unable** to claim for any harm that would have happened to them **anyway** irrespective of the defendant's actions.

BARNETT V CHELSEA AND KENSINGTON HMC 1969

The facts: A casualty doctor sent a patient home without treatment, referring him to his own doctor. The patient died of arsenic poisoning.

Decision: Whilst the doctor was held negligent, the negligence did not cause the patient's death because he would have died anyway.

NOVUS ACTUS INTERVENIENS

- Courts will only impart liability where there is a cause of events that are a **probable** result of the defendant's actions.
- Defendants will not be liable for damage when the chain of events is broken.
- There are **three types** of intervening act that will break the chain of causation.

NOVUS ACTUS INTERVENIENS

Act of the claimant: The actions of the claimant themselves may **break** the chain of causation.

The rule is that where the act is **reasonable** and in the **ordinary course of things** an act by the claimant will not break the chain.

MCKEW V HOLLAND, HANNEN AND CUBBITTS (SCOTLAND) LTD 1969

The facts: The claimant had a leg injury which was prone to causing his leg to give way from time to time. Whilst at work he failed to ask for assistance when negotiating a flight of stairs. He fell and was injured as a result.

Decision: The fact that the claimant failed to seek assistance was unreasonable and was sufficient to break the chain of causality.

NOVUS ACTUS INTERVENIENS

- **Act of a third party** Where a third party intervenes in the course of events the defendant will normally only be liable for damage until the intervention.

For example, in Knightley v Johns 1982 the defendant caused a road traffic accident.

- A police inspector negligently handled traffic control following the accident.
- This negligence led to the claimant, a police officer, being killed.
- The defendant who caused the accident successfully argued that the negligent handling by the police inspector broke the chain of causation between his negligence and the death of the officer

LAMB V CAMDEN LBC 1981

The facts: The defendant negligently caused a house to be damaged, and as a result it had to be vacated until it could be repaired. During the vacant period, squatters took up residence and the property suffered further damage.

Decision: Intrusion by squatters was a possibility that the defendant should have considered, but it was not held to be a likely event. Therefore the defendant should not be liable for the additional damage caused by the intervening actions of the squatters

NOVUS ACTUS INTERVENIENS

Natural events The chain of causality is **not automatically** broken due to an intervening natural event.

In situations where the breach puts the claimant at risk of **additional** damage caused by a natural event the chain will not be broken.

However, where the natural event is **unforeseeable**, the chain will be broken.

CARSLOGIE STEAMSHIP CO LTD V ROYAL NORWEGIAN GOVERNMENT 1952

The facts: A ship owned by the claimants was damaged as a result of the defendant's negligence and required repair. During the trip to the repair site the ship was caught in severe weather conditions that resulted in additional damage being caused and therefore a longer repair time was required. The claimants claimed loss of charter revenue for the period the ship was out of action for repairs caused by the original incident.

Decision: The House of Lords held that the defendants were liable for loss of profit suffered as result of the defendants' wrongful act only. Whilst undergoing repairs, the ship ceased to be a profit-earning machine as the weather damage had rendered her unseaworthy. The weather conditions created an intervening act and the claimants had sustained no loss of profit due to the ship being out of action as it would have been unavailable for hire anyway due to the weather damage.

REMOTENESS OF DAMAGE

- Even where causation is proved, a negligence claim can still fail if the damage caused is 'too remote'.
- The test of **reasonable foresight** developed out of The Wagon Mound (1961). Liability is limited to damage that a **reasonable man** could have foreseen.
- This does not mean the exact event must be foreseeable in detail, just that the eventual outcome is foreseeable.

THE WAGON MOUND 1961

The facts: A ship was taking on oil in Sydney harbour. Oil was spilled onto the water and it drifted to a wharf 200 yards away where welding equipment was in use. The owner of the wharf carried on working because he was advised that the sparks were unlikely to set fire to furnace oil. Safety precautions were taken. A spark fell onto a piece of cotton waste floating in the oil, thereby starting a fire which damaged the wharf. The owner of the wharf sued the charterers of the Wagon Mound.

Decision: The claim must fail. Pollution was the foreseeable risk: fire was not.

DEFENCES TO NEGLIGENCE

- The amount of damages awarded to the claimant can be reduced if it is shown that they **contributed** to their injury.
- The defendant can be **exonerated** from paying damages if it can be proved that the claimant **expressly** or **impliedly** consented to the risk.
- In employment situations, an employer may be held **vicariously liable** for the actions of their employee.

CONTRIBUTORY NEGLIGENCE

A court may **reduce** the amount of damages paid to the claimant if the defendant establishes that they **contributed** to their own **injury** or **loss**, this is known as **contributory negligence**.

SAYERS V HARLOW UDC 1958

The facts: The claimant was injured whilst trying to climb out of a public toilet cubicle that had a defective lock.

Decision: The court held that the claimant had contributed to her injuries by the method by which she had tried to climb out.

VOLENTI NON FIT INJURIA

- ***Where a defendant's actions carry the risk of a tort being committed they will have a defence if it can be proved that the claimant consented to the risk.***
- Volenti non fit injuria literally means the **voluntary acceptance of the risk of injury**.
- This defence is available to the defendant where both parties have **expressly** consented to the risk (such as waiver forms signed by those taking part in dangerous sports), or it may be **implied** by the **conduct** of the claimant.
- An **awareness** of the risk **is not sufficient to establish consent.** For this defence to be successful the defendant must **prove** that the claimant was **fully informed** of the **risks** and that they consented to them.

ICI V SHATWELL 1965

The facts: The claimant and his brother disregarded safety precautions whilst using detonators, resulting in injury to the claimant.

Decision: The court upheld the defence of volenti non fit injuria. The claimant disregarded his employer's statutory safety rules and consented to the reckless act willingly.

VICARIOUS LIABILITY

- In employment situations, an employee can avoid liability for negligence if they were acting on their employer's business at the time of the incident.
- For the employer to be vicariously liable, the employee must have been following their employer's instructions, even if the manner of how they were carrying them out was not how the employer told them to.
- In Limpus v London General Omnibus Co 1862 a bus company was found vicariously liable for a bus driven negligently by a bus driver against their instructions.

LISTER AND ORS V HESLEY HALL LTD 2001

The facts: The warden of a boarding school was found guilty of abusing children resident there.

Decision: The school was vicariously liable. The nature of the warden's work created a sufficient connection between the acts of abuse which he had committed and the work which he was employed to do.

PROFESSIONAL ADVICE

Professional individuals and organisations have a special relationship with their clients and those who rely on their work.

This is because they act in an **expert capacity.**

DEVELOPMENT

- We shall now turn our attention to how the law relating to negligent professional advice, and in particular **auditors**, has been developed through the operation of precedent, being refined and explained with each successive case that comes to court.

- It illustrates the often step-by-step development of English law, which has gradually refined the principles laid down in Donoghue v Stevenson and Anns v Merton London Borough Council to cover **negligent misstatements** which cause **pure financial loss**.

THE SPECIAL RELATIONSHIP

- According to Lord Denning, to establish a special relationship the person who made the statement must have done so in some professional or expert capacity which made it likely that others would rely on what they said.
- This is the position of an adviser such as an accountant, banker, solicitor or surveyor.
- It follows that a duty could not be owed to complete strangers, but Lord Denning also stated at the time: 'Accountants owe a duty of care not only to their own clients, but also to all those whom they know will rely on their accounts in the transactions for which those accounts are prepared.'
- This was to prove a significant consideration in later cases.

HEDLEY BYRNE & CO LTD V HELLER AND PARTNERS LTD 1963

The facts: HB were advertising agents acting for a new client, Easipower Ltd. HB requested information from Easipower's bank (HP) on its financial position. HP returned non-committal replies, which expressly disclaimed legal responsibility, and which were held to be a negligent misstatement of Easipower's financial resources.

Decision: While HP were able to avoid liability by virtue of their disclaimer, the House of Lords went on to consider whether there ever could be a duty of care to avoid causing financial loss by negligent misstatement where there was no contractual or fiduciary relationship. It decided (as obiter dicta) that HP were guilty of negligence having breached the duty of care, because a special relationship did exist. Had it not been for the disclaimer, a claim for negligence would have succeeded.

THE CAPARO DECISION

The **Caparo case** is fundamental to understanding professional negligence. It was decided that **auditors do not owe a general duty of care to the public at large** or to **shareholders increasing their stakes in the company in question.**

CAPARO INDUSTRIES PLC V DICKMAN AND OTHERS 1990

The facts: Caparo, which already held shares in Fidelity plc, bought more shares and later made a takeover bid, after seeing accounts prepared by the defendants that showed a profit of £1.3m. Caparo claimed against the directors and the auditors for the fact that the accounts should have shown a loss of £400,000. The claimants argued that the auditors owed a duty of care to investors and potential investors in respect of the audit. They should have been aware that a press release stating that profits would fall significantly had made Fidelity vulnerable to a takeover bid and that bidders might well rely upon the accounts.

Decision: The auditor's duty did not extend to potential investors nor to existing shareholders increasing their stakes. It was a duty owed to the body of shareholders as whole.

CAPARO INDUSTRIES PLC V DICKMAN AND OTHERS 1990

In the Caparo case the House of Lords decided that there were two very different situations facing a person giving professional advice.

1. Preparing information in the knowledge that a **particular person** was contemplating a transaction and would rely on the information in deciding whether or not to proceed with the transaction (the 'special relationship').
2. Preparing a statement for **general circulation,** which could forseeably be relied upon by persons unknown to the professional for a variety of different purposes.

CAPARO INDUSTRIES PLC V DICKMAN AND OTHERS 1990

In MacNaughton (James) Papers Group Ltd v Hicks Anderson & Co 1991, it was stated that it was necessary to examine each case in the light of the following.

- Foreseeability
- Proximity
- Fairness

NON-AUDIT ROLE

- The duty of care of accountants is held to be higher when advising on takeovers than when auditing.

The directors and financial advisors of the target company in a contested takeover bid owe a duty of care to a known takeover bidder in respect of express representations made about financial statements prepared for the purpose of contesting the bid on which they knew the bidder would rely: Morgan Crucible Co plc v Hill Samuel Bank Ltd and others 1991.

THE LAW SINCE CAPARO

A more recent case highlighted the need for a cautious approach and careful evaluation of the circumstances when giving financial advice, possibly with the need to issue a disclaimer.

ADT LTD V BDO BINDER HAMLYN 1995

The facts: Binder Hamlyn was the joint auditor of BSG. In October 1989, BSG's audited accounts for the year to 30 June 1989 were published. Binder Hamlyn signed off the audit as showing a true and fair view of BSG's position. ADT was thinking of buying BSG and, as a potential buyer, sought Binder Hamlyn's confirmation of the audited results. In January 1990, the Binder Hamlyn audit partner attended a meeting with a director of ADT. This meeting was described by the judge as the 'final hurdle' before ADT finalised its bid for BSG. At the meeting, the audit partner specifically confirmed that he 'stood by' the audit of October 1989. ADT proceeded to purchase BSG for £105m. It was subsequently alleged that BSG's true value was only £40m. ADT therefore sued Binder Hamlyn for the difference, £65m plus interest.

Decision: Binder Hamlyn assumed a responsibility for the statement that the audited accounts showed a true and fair view of BSG which ADT relied on to its detriment. Since the underlying audit work had been carried out negligently, Binder Hamlyn was held liable for £65m. The courts expect a higher standard of care from accountants when giving advice on company acquisitions since the losses can be so much greater.

BCCI (OVERSEAS) LTD V ERNST & WHINNEY 1997

The facts: In this case, the defendants audited the group holding company's accounts, but not those of the claimant subsidiary. The claimant tried to claim that the defendants had a duty of care to them.

Decision: No duty of care was owed to the subsidiary because no specific information is normally channelled down by a holding company's auditor to its subsidiaries.

EXTENSION OF LIABILITY TO THIRD PARTIES

- Although the Caparo case states that **no general duty** is owed by auditors to third parties, a number of cases have found that an **auditor can owe a duty in limited circumstances.**

In Royal Bank of Scotland v Bannerman Johnstone Maclay 2005 it was held that a third party can be owed a duty of care where auditors know their identity, the use to which the information would be put and that the third party intends to rely on it.

In 2000, the **Limited Liability Partnerships Act 2000** (TSO, 2000) was passed, and limited liability partnerships have been permitted under law since 2001.

This **protects the partners** of accountancy firms from the financial consequences of **negligent actions** as their liability to third parties (previously unlimited) can now be limited.