Tort Revision Guide

Establishing the basic tortious liability

1. Duty of Care

a. The standard test

The three part test for establishing a duty of care; ***Caparo v Dickman*** (extended the neighbour test from Donoghue and Anns v Merton) **- *Lord Bridge**

1. **Is it foreseeable the defendant's negligence might cause injury, damage or loss to the claimant**?
   - An example being ***Donoghue v Stevenson*** – if you manufacture ginger beer badly, it is foreseeable a loss will occur to anyone who drinks it.
2. **Is there is a relationship of sufficient proximity between C and D?**
   - There needs to be some sort of pre-existing link; ***Watson v BBBC*** – so C+D are in the same physical space; something one person controls and the other is effected by; and voluntary assumption of responsibility.
3. **Is it fair, just and reasonable to impose liability**?
   - Factors the court may take into account are:
     i. Which party is in the better position to buy insurance (loss allocation)
     ii. Whether the duty will prevent accidents in the future
     iii. Whether the new duty will discourage people from undertaking normal activities for fear of being sued (s.1 Compensation Act 2006)
     iv. Whether the claimant should have responsibility to look after himself
   - Example is ***Hill v CC West Yorkshire;*** where ***Lord Keith** said the police owed no duty of care to the last victim of the Yorkshire Ripper because of policy considerations such as;
     i. Fear of a flood of claims, he feared that everyone would come forward saying that the police have not acted soon enough.
     ii. Recognition that an investigation is based on educated guess work – he didn't want to prevent future investigations by police officers worrying whether they will be found negligent.
     iii. Limitation of police resources, they can only pursue several lines of enquiry at one time, not every single line to the full.

b. Problems with the standard test: Failed sterilisations

MacFarlane v Tayside – A man had a vasectomy, however ended up having a kid, he attempted to sue for the upbringing of the kid **Lord Steyn*** said that the doctor undertakes a duty to prevent pregnancy, it does not follow that the doctor should also pay for the raising of the child, he said it was not a result of public policy, but merely application of positive law.

Rees v Darlington – again there was a sterilisation, and again it failed and she ended up having a kid, court stuck with the decision of MacFarlane and said that no duty of care was owed to pay for the child's upbringing – however awarded a nominal sum of £15,000 as an 'autonomy damage' (lacks legal basis) which was specifically denied in MacFarlane.

2. Breach of Duty

Before a defendant's conduct may be said to be legally at fault, two determinations must be made:

1. The standard of care which he is expected to observe must be defined
2. The defendant must be shown to have fallen short of the required standard.

a. The standard of care

The standard is an objective standard; ***Nettleship v Weston*** - 'Has the defendant acted as the reasonable person would have done in the same circumstances?'

Different standard for:

a) **Children –** If the defendant is a child, then the court will use the standard of a reasonable child of the same ages as the defendant; ***Mullin v Richards***
   - This rule only applies if the defendant has undertaken an activity suitable for a child

b) **Learners –** The defendant must act with the same skill and experience as a qualified or competent undertaking the same activity, even if it is the first time that the defendant has carried out this activity; ***Nettleship v Weston***

c) **Drivers with medical conditions –** if you are unaware of the medical condition, then it will not be taken into account; ***Mansfield v Weetabix*** (**Legatt LJ –** to take into account the condition would be to impose strict liability)

d) **Reasonable Parent –** does not have to constantly supervise a child; ***Perry v Harris***

e) Professionals – A skilled person 'professing to have a special skill' is held to the standard of a person exercising that skill.
   - A professional is not negligent if he acts in accordance with a practice accepted as proper by a reasonable body of opinion within his particular area; ***Bolam v Friern Hospital Management Committee***
   - Lack of experience in the post is not an excuse; ***Wilshire v Essex Area Health Authority***
     i. Wilshire states that junior doctors are held to the same standards as fully qualified doctors… i.e. lack of experience is no excuse
   - A professional is not negligent if they are following the set standard of their profession; ***Bolitho v City and Hackney Health Authority – LBW***** said (note) an entire profession can be negligent, and the court ask;
     i. Whether a generally accepted practice has a **logical basis** (if illogical it can be negligent)
     ii. Whether the profession had weighed up the risks and benefits of the practice and reached a proper conclusion
   - **Lay people –** ***Wells v Cooper***; a lay person does not break his duty of care if;
     i. He takes the care that a reasonable lay person would take
     ii. It was reasonable for him to be undertaking the job in the first place
   - Bolam only applies to diagnosis and treatment, it does not apply to advice and disclosure; ***Montgomery v Lanarkshire Health Board –*** two part test as to whether the risk should have been disclosed:
     i. There must be full disclosure of material risks: material risks are any risks to which the reasonable patient would attach significance **(Lord Kerr)**

ii. Note: doctors do not have to disclose if they think the risk would be seriously detrimental to the patients' health **(Lord Kerr)**

- Alternative Medicine; ***Shakoor v Situ*** (Chinese Herbalist is not the same standard as a NHS doctor, he did not hold himself as a practitioner of orthodox medicine therefore was held to the same standard as a Herbalist and found not liable)

b. Has the defendant fallen below the standard of the reasonable person?

This is a balance of four factors; *****Wagon Mound (No 2)* – Lord Reid*** attempted to balance the four factors

- The probability of the harm occurring was low
- There was lack of justification for taking the risk (no social utility)
- The seriousness of harm was high
- And would have cost nothing to prevent

1. **The magnitude of the likely harm**
   - ***Paris v Stepney BC –*** the more serious the consequences will be, the higher the defendants duty of care.
2. **The probability of it occurring**
   - ***Bolton v Stone –*** The less likely an accident is to happen, the more justified the defendant is in ignoring it (does not take precautions against flukes).
3. **The cost of the precautions necessary to avert the harm**
   - ***Latimer v AEC –*** The RP does not take every last precaution, but does take reasonable precautions.
4. **The social utility of the defendant's conduct.**
   - ***Watt v Hertfordshire CC*** – if what the defendant is doing is socially justifiable it may justify him taking extra risks (RP does take risks in an emergency).

Compensation Act 2006, s.1 - Court considering a claim in negligence or breach of statutory duty should consider whether liability would tend to prevent **desirable activities** from being undertaken

Social Action, Responsibility and Heroism Act 2015 (SARAH) – applies when determining breach of statutory duty s.1

- S.2 the court must take into account whether they were acting in the benefit of society or any of its members
- S.3 the court must take into account whether they were predominantly responsible approach towards protecting the safety or other interests of others
- S.4 The court must have regard to whether the alleged negligence or breach of statutory duty occurred when the person was acting heroically by intervening in an emergency to assist an individual in danger.

c. Res Ipsa Loquitor

Does not reverse the burden of proof, it reverses the evidential burden so that the claimant does not have to bring evidence to show that the defendant was negligent, but the defendant must bring evidence to show that they were not negligent.

It is a two part test recognised in ***Scott v London and St Catherine Dock***

1. The claimant must show that what happened would not normally have happened unless negligence was involved.
2. The claimant must also show that it was under the control of the defendant at the relevant time.

Ward v Tesco – established RIL, however D can only escape liability if he can show that negligence in fact was not present

RIL & Medical Negligence

Mahon v Osborne – no issues, clear cut and the swab could only get in there from negligence so RIL applies.

Ratcliffe v Plymouth and Torbay Health Authority – not very useful when the facts are less clear cut, and there is an explanation other than negligence (was not clear if it was surgery, or an underlying problem)

3. Causation

a. Preliminary test

The test is the 'but for' test: but for the defendants breach would the loss have occurred?

- ***Barnett v Chelsea and Kensington Hospital –*** even with proper medical care, he would still have died from arsenic poisoning
- There is no need to show that D's breach of duty was *the* cause of the injury. It is sufficient to show that it was *a* cause of the injury. This must be shown on the balance of probabilities.
- Hypothetical acts are also assessed on the balance of probabilities; ***McWilliams v Sir William Arrol Co Ltd***
- ***Chester v Afshar***
    - Advice as to a back problem, doctor advises surgery, without disclosing a small inherent risk, surgery goes ahead and the risk materialises. Argued she would have delayed surgery, but still had it another day if informed of the risk.
    - The same inherent risk would have existed.
    - **Lord Bingham (Minority):** Dissenting applied the 'but for' test, but said it was not satisfied. Argued it was inherent in surgery, no matter who performed it, and when it was performed, so 'but for' the failure to disclose, the harm could still have occurred.
    - **Lord Hoffman (Minority):** He treated the failure to advice as a duty to warn. The role of which is to make the claimant safer, and the doctor did not make her any less safe. He said it was outside of the duty of care (too remote), and therefore not a 'but for' cause at all.
    - **Lord Steyn, Hope, Walker (Majority):** argued the 'but for' test was satisfied, the doctor owed a duty, and by failing to warn her broke that duty, and it was established as good practice that patients should be fully informed.