

Chapter 2: Negligence I: Duty of Care Extra Questions

Question 1

Aaron, a car driver, drives negligently and hits Barry's car. Barry is not physically injured but suffers a recurrence of a mental illness he has suffered from in the past. Catherine, Barry's grandmother watches the incident from her house. She suffers a mental illness from fear that her grandson will be injured.

Advise Aaron.

Answer guidance

There are two victims here – consider whether they are primary or secondary victims.

Remember that you are advising the defendant here.

Barry suffers psychological harm only from Aaron's negligence. He was in the area of physical harm and was in danger of this, which means he is a primary victim. The principle in *Page v Smith* [1995] 2 WLR 644 applies here, as all that Barry needs to prove to establish liability is that he suffered a recognised mental illness (*Hinz v Berry* [1970] 1 All ER 1074). We are told that he suffers a recurrence of a previous mental illness, which meets this requirement. The facts of *Page v Smith* are exactly on point.

Catherine is a secondary victim as she fears for the safety of another. State the relevant case authority and then detail each element that needs to be established for liability for a secondary victim to succeed and fully apply each element to the problem that you have. The law relating to secondary victims was established in the landmark case of *McLoughlin v O'Brian* [1982] 1 All ER 298, and was developed in *Alcock v Chief Constable of South Yorkshire* [1991] All ER 907. Following *McLoughlin* and *Alcock* a claimant has many pre-requisites in order to establish that D owes a duty of care with regard to psychological harm.

Question 2

Critically discuss whether the law relating to psychiatric damage applies coherent principles by reference to relevant authorities.

Answer guidance

Think about what 'coherent' means; consider consistency, clarity, and so on.

'By reference to relevant authorities' means that you will need to refer to case law explicitly in your answer.

It is widely agreed by both academic commentators and judges that the law in this area has developed in an unsatisfactory way. Lord Steyn has described this area of law as 'a patchwork

quilt of distinctions which are difficult to justify' (*White* at 500). Similarly, Lord Hoffmann remarked in *White v Chief Constable of S. Yorkshire* [1998] 3 WLR 1509 that 'the search for principle' in this area of law has been 'called off'. Even the Law Commission recognised that the law in relation to recovery for negligently caused psychiatric injury has 'taken a wrong turn' ([4.2]). Too much appears to turn upon the 'primary'/'secondary' victim distinction, and the restrictive approach to actions by those deemed to be in the latter category has, arguably, led to unjust results.

A basic answer will then go through the additional hurdles necessary to establish liability and will discuss the reasons given as to why these are required. It should also examine the Law Commission recommendations and whether these would make the law more or less 'coherent' and ways in which the courts have attempted to address this in the subsequent (i.e. post-Hillsborough) case law.

Stronger answers will consider whether we can justify placing limitations on recovery for those who suffer *psychiatric* injury considering that we do not apply such or similar limitations in respect of *physical* injuries. Even if we do consider that psychiatric injury does require a different approach (for example, for the reasons given by Lord Steyn in *White*), there is still a question of whether English law is correct in imposing the hurdles it does, where it does

Question 3

Critically evaluate the rationale for imposing liability for economic loss caused by negligent misstatements and how the courts determine such liability.

Answer guidance

You will need to identify the relevant test and then look at its justification and evaluate it.

Hedley Byrne & Co Ltd v Heller & Partners Ltd [1964] AC 465: Assumption of responsibility test – explain why the test was needed; explain what is required for the test and consider whether it is justified.

Policy Factors – people take less care in social settings; Words can spread very far and fast to unintended audiences.

Expansion of the application of the test – Explain how the test was used in cases involving the negligent provision of services, evaluate whether this is justifiable or are these instances of assumption of responsibility too far removed.

3-stage test – Highlight the criticisms of the assumption of responsibility test from the likes of Lord Griffiths in *Smith v Eric S Bush* [1990] 1 AC 831. Outline the other test that has been developed and compare this to the assumption of responsibility test.

How have the courts dealt with the two tests? – See the view of Lord Mance in *Her Majesty's Commissioners of Customs and Excise v Barclays Bank Plc* [2006] UKHL 28, explain the guidance given by Lord Bingham in the same case: 'I think it is correct to regard an

assumption of responsibility as a sufficient but not a necessary condition of liability, a first test which, if answered positively, may obviate the need for further enquiry. If answered negatively, further consideration is called for.'

Question 4

Thor loses control of his lorry as he turns a corner. He narrowly misses a cyclist, Famka, and ploughs on to the pavement and into a shop. Two shoppers, Brunhilda and Asha, are hit by the lorry and rushed to hospital. Bjorn, a customer in the shop, immediately takes pictures of the accident and those involved, and then posts them on his Facebook page. Brunhilda's husband, Anders, sees the pictures and rushes to the hospital where she has been taken. Anders sees Brunhilda, covered in blood, before she is taken to the operating theatre. Asha is permanently disabled following the accident and her mother Sif becomes her carer.

Anders and Famka suffer mental illnesses. Sif is depressed and some months later suffers a mental breakdown. How far does Thor owe a duty of care in tort for the harm he has caused?

Answer guidance

Consider whether the victims are primary or secondary.

Identify the test for duty of care.

Thor owes a duty of care to those physically injured under the principle in *Caparo Industries v. Dickman* [1990] 1 All ER 568. With regard to Famka, under the principle in *Page v Smith* [1995] 2 WLR 644 she is a primary victim as she is within the range of foreseeable physical harm and as she suffered a recognised mental illness a duty of care is owed to her. Anders and Sif are secondary victims so the rules in *Alcock v Chief Constable of South Yorkshire* [1991] All ER 907 apply. Anders comes on to the aftermath of the accident in the hospital as Brunhilda is still covered in blood. It is likely that as Brunhilda's husband he will have sufficient ties of closeness also, so a duty of care will be owed to him. Re Sif, it is not clear that she suffers a recognised mental illness nor that if she did the illness was as a result of the accident immediately so there is less likelihood of a duty of care being owed.

