Chapter 3: Negligence II: Breach of Duty
Extra Questions

Question 1

What is the reasonable man test and what factors do the courts take into account when deciding what the reasonable man might have done?

Answer guidance

Consider what the 'reasonable man test' means and where it is set out.

The traditional formula here is to ask whether the defendant has performed, as a `reasonable man' would have done. Failure to have done so indicates that the duty of care owed by the defendant to the claimant has been breached (*Blyth v. Birmingham Waterworks* [1865] 11 Exch). The reasonable man test is the standard of care generally measured according to an objective method of testing, and is the standard that would be adopted by a 'reasonable man' confronted by the same circumstances as the defendant. He is, according to *Hall v Brooklands Auto-Racing Club* [1933] 1 KB 205: "the man on the Clapham omnibus; the man on the street; the man who takes magazines at home and in the evening pushes the lawnmower in his shirtsleeves". The test is therefore that of the reasonable man placed in the defendant's position.

The courts have to balance the burden of avoiding the risk and comparing it to how much the risk is likely to be reduced by making that expense or taking that precaution. As was stated by Lord Reid in: *The Wagon Mound No.2* [1967] 1 AC 617: "a reasonable man would only neglect such a risk if he had some valid reason for doing so, e.g. it would involve considerable expense to eliminate the risk. He would weigh the risk against the difficulty of eliminating it… it is justifiable not to take steps to eliminate a real risk if it is small and if the circumstances are such that a reasonable man, careful of the safety of his neighbour, would think it right to neglect it." Whenever we owe a duty to another we must all guard against the risk of doing harm. The degree of caution we must exercise will be dictated by the likelihood of the risk. The magnitude of the risk then can be balanced against the extremes that must be taken in order to avoid it.

Bolton v Stone [1951] AC 850 - Ms Stone was standing outside a cricket ground when hit by a cricket ball hit out of the ground. She was 100 yds. away from the batsman and the ball had gone over a 17 foot high fence, balls had been struck out of the ground only 6 times in 28 years. There was no negligence as the cricket ground had done everything reasonably possible, to avoid it. There has to be therefore, a balance between the likely severity of the accident and the cost of putting it right. However, the D must take into account any factors that might increase the risk of harm occurring.

The more severe that the harm is that will occur from the D's act the greater level of care to prevent it will be expected from the D. This can be seen in the case of: *Paris v Stepney BC* [1951] AC 367 - The C was already blind in one eye when he was employed at the D's garage. Naturally if something were to happen to his other eye the magnitude of that would be

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greater as then he would be completely blind. In the case he was welding when a piece of metal flew into his eye leaving him blind. Ds were HELD to be liable, although they would not have been liable to a man with normal sight – as they had not provided goggles to the men who did that work.

A D can sometimes escape liability in a case because it is possible to show there was a justification for taking the risk or can show social utility of the activity. The Social Utility of the D's actions: The court will look at the wider public interest or social utility of the D's conduct in determining the standard of care which should have been exercised e.g. emergency situations - *Watt v Hertfordshire CC* [1954] 1 WLR 835. The Financial Cost of taking precautions: The reasonable man only has to do what is reasonable in order to avoid risks of harm. This means that there is no obligation to go to extraordinary lengths, particularly if it is a small risk.

Question 2

In your opinion, is the objective standard employed effective in assessing breach of duty?

Answer guidance

The question clearly indicates that you need to give your own point of view by using 'in your opinion'.

You will need to identify the test for a breach of duty.

There is no obligation on the D to guard against risks other than those that are within her reasonable contemplation. It would be unfair to make a D responsible for the unforeseeable. Also, because the test to meet a standard of care is objective, no account is usually taken of individual disabilities or differences; but, there are special cases whereby there are characteristics of the D which may affect the standard of care. These are in relation to the unskilled, the incapacitated and children. In all of these situations, the difficulty is in applying an objective standard of reasonableness to those who have difficulty. These cases indicate that `fault' as it has come to be used within the standard of care is not synonymous with blameworthiness.

Lack of special skill/inexperience: If a person carries out a task requiring a specialist skill he will be judged according to the standard of person reasonably competent in the exercise of that skill. This does not mean that an amateur will be expected to show the same degree of skill as a professional: In *Phillips v Whitely* [1938] 1 All ER 566, the court decided that people who did not possess special skills are not expected to exercise the same standard of care as skilled people. So a jeweller carrying out the procedure for piecing ears did not have the same degree of care as a surgeon. He took all reasonable steps in the circs and the appropriate standard of care was that of a jeweller.

The standard will not necessarily reduce because of a lack of expertise, as shown in *Nettleship v Weston* [1971] 3 All ER 581 (found liable despite being a learner driver), and a doctor who lacks experience must still possess the standard appropriate to the doctor or training

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professing to possess the skill in question. The argument in the case of *Wilsher v Essex AHA* [1986] 3 All ER 801 that the standard of care should be reduced because it was a junior doctor that made the mistake leading to a baby becoming blind was rejected by the HL. If that argument had been accepted then the care a patient receives would depend on the experience of the doctor who treated them. That was unacceptable and negligence was found.

The Incapacitated: *Roberts v Ramsbottom* [1980] 1 All ER 7 - A driver crashed into a stationary vehicle after suffering a stroke. He continued to drive after the seizure and the court felt he was negligent in doing so. The court accepted the D would have a defence if his actions were entirely beyond his control, but that here, the driver should have stopped immediately.

Children: Traditionally, there was little case law involving the standard of care owed by children. Such case law as there is indicates a child was not expected to have the same skill or understanding as an adult and therefore the standard of care owed is that appropriate to the age of the child in question. *Gough v Thorne* [1966] 1 WLR 1387 - 12 year old injured after crossing the road, not held to be contributorily negligent for her injuries by negligent driver.

Question 3

Critically discuss the Bolam principle by reference to relevant authorities.

Answer guidance

You need to start your answer by showing that you know what the Bolam principle means.

Experts are expected to demonstrate the same high standard of care as other experts in the field. This applies to people of all professions, but the case law demonstrates that members of the professions may be able to escape liability by relying on the Bolam principle, established in *Bolam v Friern Hospital Management Committee* [1957] 2 All ER 118: A doctor is not guilty of negligence if he has acted in accordance with a practice accepted as a proper by a responsible body of medical men skilled in that particular art. Putting it another way round, a doctor is not negligent if he is acting in accordance with such a practice, merely because there is a body of opinion that takes a contrary view. It does not matter if there is an alternate body of opinion that would have acted in a different manner. This has been described as a judicial tendency to defer to professional standards.

All professionals are covered by the Bolam principle: *Luxmore May v Messenger May Baverstoke* [1990] 1 All ER 1067 - Auctioneers sold paintings at auction for £840. Some months later the paintings were sold for £88k. It was alleged the auctioneers were negligent in failing to recognise they were the work of a famous artist. CA held the auctioneers' should be judged according to the standards of a competent body of opinion skilled in the profession of auctioneers. In the event, they were not negligent because it was shown that there could be divergence of opinion on the origins of the paintings.

The Bolam test has been criticised on the following grounds:

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- Unfair to Claimants and protective of professionals.
- The rule allows the professions to set their own standards, without the possibility of review by the courts.
- It is a descriptive test, whereas negligence is normally based on a normative test.
- It allows treatments which are only marginally acceptable to meet an acceptable standard of care.
- The test does not define a `responsible body'.
- The rule is another example of professions protecting each other.

The Bolam test has been modified in the case of *Bolitho v City and Hackney HA* [1997] 3 WLR 1151. The courts and not the professionals ultimately decide what is reasonable. The body of opinion must be shown to be reasonable, responsible or respectable with the court satisfied the body behind the opinion have directed their minds to the question of comparative risks and benefits in reaching their conclusion – Bolitho. If it cannot do that, then reliance on the opinion by the D can amount to negligence.

Question 4

Ali has recently bought a car, but cannot yet drive. His friend, Misha, offers to give him a driving lesson in his new car. Once they start driving, however, Ali is unable to control the car. Ali crashes the car. Misha is trapped in the wreckage of the car with a broken leg.

A fire engine from Hazard County fire service arrives at the scene to remove Misha from the wreckage. However, due to cutbacks, the fire service has not been supplied with proper lifting equipment, as this is very expensive. As Misha is removed from the car, she suffers a back injury. A subsequent inquiry reveals that proper lifting equipment involved would have made Misha's back injury much less likely.

When Misha arrives at the hospital, the surgeon, who is treating her, attempts to assist her using a radical new pain-management technique. However, this new technique fails, leaving her with an uncomfortable skin condition.

Pedro, Misha's husband, rushes to the hospital to see her. As he walks past the building, a stretcher falls from the roof and hits him.

Discuss the issues of breach of duty involved in this case.

Answer guidance

You are not advising a particular party here, but instead considering the facts from the point of view of Claimant and Defendant alike.

Ali - whilst he is a learner driver, her has a duty of care to other road users and to Misha. His standard of care is not reduced by the fact he is a learner driver (as shown by the case of *Nettleship v. Weston* [1971] 3 All ER 581). Michelle may be contributorily negligent for her injuries, see also Nettleship case.

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Fire service – The court will look at the wider public interest or social utility of the defendant's actions determining the standard of care that should have been exercised. Here the standard of care expected by the law while in the course of an emergency may be adjusted accordingly (*Ward v London County Council* [1938] 2 All ER 341). See the case of *Watt v Hertfordshire County Council* [1954] 1 WLR 835 whereby it was determined there was no negligence as the situation was an emergency and justified the risk. The Claimant fireman was called to an accident where a woman was trapped in a car crash. A jack used for such situations was taken to the scene unsecured in the vehicle (as the vehicle it would normally be taken in, was elsewhere), and when the driver braked sharply, the jack injured the fireman. Determined there was no negligence as the situation was an emergency and justified the risk.

Surgeon – The Bolam principle as modified by Bolitho applies here. See above, so surgeon will not be negligent if can show acted in accordance with an accepted practice – however – some doubt here if a new procedure. Will be negligence if cannot show the body of opinion he is relying on is reasonable, responsible or respectable and have directed their minds to the question of the comparative risks in reaching their conclusion (Bolitho).

Also, if it were not known that the procedure could cause this skin complaint – then again, the surgeon may not be liable as he can only guard against those risks that are within his reasonable contemplation and it would be unfair to make a defendant responsible for the unforeseeable. See *Roe v Minister of Health* [1954] 2 WLR 915. A patient became paralysed as a result of being injected with a drug seeping thru hairline cracks and contaminating the drug the patient was injected with. At that time it was not known that the drug the syringe was stored in, could get thru the hairline cracks. As a result the Ds were not found to be negligent.

Pedro – this is an exception to the rule that the claimant has the burden of proving the D was negligent, due to the maxim Res Ipsa Loquitor. This doctrine allows the court to infer that a breach of duty has taken place when the facts "speak for themselves". It raises a prima facie presumption of negligence and the D is then required to rebut this presumption by introducing evidence to show he was not negligent in the circs. *Scott v London & St Katherine's Dock Co.* (1865) 3 H&C 596 - The Claimant was standing outside the D's warehouse when several large bags of sugar fell on him. There was little or no explanation for the incident and no evidence that could be introduced that would show that any particular person had been negligent. Erle CJ explained the application of the maxim: "where a thing is shown to be under the management of the D or his servants, and the accident is such that in the ordinary course of things could not happen if those in management use proper care, it affords reasonable evidence, in the absence of explanation by the Ds that the accident arose from want of care".

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