Chapter 4: Negligence III: Causation and Remoteness of Damage
Extra Questions

Question 1

Critically discuss in what circumstances the courts would not use the 'but for' test.

Answer guidance

It is important to note that the emphasis here is on the circumstances where the courts would **not** use the 'but for' test.

In most cases, the 'but-for' test presents no difficulties, but in certain situations if you were to rely on it, it would lead to nonsensical results.

Where the cause is uncertain or unknown:

If the law is traced through case law above it can be seen that the court in *Bonnington v. Wardlaw* [1956] AC 613 insisted on the 'material' contribution to the damage approach although the court interpreted this widely and very much in the claimant's favour. In the case of *McGhee v. N.C.B.* [1973] 1 WLR 1 the court appeared to be changing the test to make it much more claimant centred i.e. `material contribution to the risk of damage' was sufficient to establish causation. The House of Lords in *Wilsher v. Essex Area Health Authority* [1988] AC 1074 overruled the Court of Appeal decision in the case, which had applied the *McGhee* formula. There was a return to the stricter test of *Bonnington*.

If there are a number of possible causes:

In 2002, the case of *Fairchild v. Glenhaven Funeral Services Ltd* [2002] 3 WLR 89 resurrected the *McGhee* test but only in limited circumstances. In this case, employees developed mesothelioma - a virulent form of cancer - from contact with asbestos at work. One fibre of asbestos inhaled can be enough to cause the disease. Each claimant could establish duty of care and breach of duty for their successive employers but the problem was in establishing which employment had resulted in the illness. It was simply impossible to prove.

On a strict application of the test in *Wilsher*, such a case is always doomed to failure and indeed the case failed in the Court of Appeal. The House of Lords, however, overturned the Court of Appeal decision as they considered that the result was unjust. Rules were not to be applied mechanically where this was not appropriate. But Lord Bingham made it clear that the *McGhee* test was not appropriate for all cases, and considered that on its facts *Wilsher* would be decided the same way today.

Therefore, the principle in *Fairchild* is not a general principle but is an exception of strictly limited applicability, a point which was reiterated in the case of *Barker v Corus UK Ltd* [2006] UKHL 20.

Question 2

Del and Pierre work for Cement Bros Ltd in a builder's yard. Del has previously been told to wear special gloves when cutting bricks. Del is always careful to keep to the safety rules. One day there is a rush job and gloves are not available. Del is ordered to work without them. He does so and cuts his hand. Pierre has worked for several builders firms before his current job. He develops a lung disease, which his doctor says is caused by having inhaled brick dust at some time.

Advise Cement Bros Ltd of their liability in tort to Del and Pierre.

Answer guidance

Here you are asked to advise the Defendant. It is important to know what the test is here and explain this at the start of your answer.

Del:

Answer to the hypothetical question, what would the C have done if the equipment had been provided or the instruction or advice given? This can only be a matter of inference to be determined in all the circumstances. Although the question is a hypothetical one, it is well established that the C must prove on balance of probability that he would have taken action to obtain the benefit or avoid the risk. Once proven, he is entitled to recover in full. Del has always worn the equipment, this time not available. In cases where the Ds have omitted to do something the courts have to speculate as to what might happen or have occurred had the D behaved in a different way e.g. *McWilliams v. Sir William Arrol* [1962] 1 WLR 273. Here looks like Del would have worn. Therefore entitled as can show causation using but for test.

Pierre:

Question: is this a divisible disease? The general rule at common law is that a person suffering injury must show on the balance of probabilities that the D's tort caused the injury or condition i.e. ‘but for’ D's wrongdoing, C would not have suffered the damage. There is an important exception to this rule. In the case of a "divisible" disease such as pneumoconiosis, the amount of dust inhaled operates cumulatively to cause the disease and determine its severity. If exposure to the dust is partly due to D's negligence and partly not, D will be liable to the extent that his breach of duty has materially contributed to the disease. If there is more than one D, liability can be apportioned.

This approach, however, causes difficulties in mesothelioma claims because, unlike pneumoconiosis or asbestosis, mesothelioma is an "indivisible" disease. It is still uncertain whether its contraction or its severity can be related to the amount of asbestos fibres ingested, or even which fibres triggered the disease. Following Fairchild, a D to a mesothelioma claim is liable if the negligent exposure materially increased the risk of C developing the disease. This exception to normal causation principles applied whether there

was a single D or multiple Ds. As a result, all of the employers could be held jointly liable for causing the disease.

Question 3

Critically discuss how consistently the courts apply the thin skull rule.

Answer guidance

'Critically discuss' means that you must take a critical approach in your answer, discussing the law and offering your own opinion.

First discuss briefly the original approach to remoteness – outline the requirements and operation of the test in *Re Polemis & Furness Withy & Company Ltd* [1921] 3 KB 560. Discuss what problems arose through the test's use. What is the modern approach? – Look at *Overseas Tankship (UK) Ltd v Morts Docks & Engineering Co Ltd (The Wagon Mound No 1)* [1961] AC 388 and consider why the approach changed. Have there been adverse consequences because of the change? How does the thin skull rule fit in with the modern approach? – What is the rule? How does it operate? Is it compatible with the modern approach? Does it have merit?

So long as the type of damage sustained is reasonably foreseeable, it does not matter that it is in fact more serious than could reasonably have been foreseen. Therefore, defendants will be liable even if the reason why the damage is more serious than could be expected is due to some weakness or infirmity in the claimant - *Smith v. Leech Brain and Co Ltd* [1961] QB 405.

The traditional view in *Liesbosch Dredger v. SS Edison* (1933) AC 449 was that a defendant was not liable to pay for any extra losses caused by the claimant's lack of money. However, in *Lagden v O'Connor* [2004] 1 All ER 277 the HL confirmed that the thin skull rule now applies to economic weakness as well as to physical. Inconsistent or justified on the basis of the different remoteness tests applicable at the time of these decisions?

Liesbosch was decided at a time when the test for remoteness was direct consequences. The law had moved on since then and, as the test was now reasonable foreseeability, that meant defendants had to take claimants as they found them, including their financial situation.

Question 4

Arnold is repairing Nelson's roof. He drops a number of tiles accidentally. One smashes through the bedroom and into a computer kept there. A spark ignites and the bedroom is destroyed. Nelson's wife, Heloise, is hit by another tile. Her arm is cut and the wound turns septic as she is allergic to the sticking plaster used by the hospital and she is left with a weakness in her arm. The fire brigade arrive too late to save the bedroom but they unnecessarily pour water on to the adjoining bedroom such that Nelson's collection of old stamps is destroyed. Heloise is desperate to take up her old hobby of gymnastics. Heloise visits the gym and swings on some parallel bars. Her arm gives way and she permanently loses feeling in it.

How far can Arnold be held responsible for all of the above damage?

Answer guidance

There is a lot going on here, with multiple claimants, so it is best to approach this question by breaking your answer down as follows.

In order to succeed in a claim against A, N and H must prove:

- (a) A owed either/both of them a duty of care;
- (b) A breached the duty of care;
- (c) A's breach caused the damage, and
- (d) the damage was not too 'remote'.

You need to work through this step by step, stating the law, citing relevant cases and applying the law to the facts given in the question.

(a) Apply the 3 part test from *Caparo Industries v. Dickman* [1990] 1 All ER 568: Is it foreseeable? On the facts and in the circumstances is it just and reasonable to impose a duty of care? Is there proximity? It may be that there is an obvious duty of care situation e.g. Doctor/patient, employer/employee but explain and apply the tests anyway. Likely that A owes a duty to both N and H.

(b) Apply the reasonable man test from *Blyth v. Birmingham Waterworks* [1865] 11 Exch. Consider any other factors: Was it likely that harm would happen? If harm occurred was it likely to be serious? How easy/difficult/expensive etc. would it be to prevent the harm? Is this one of the special cases? Unlikely, however *res ipsa loquitor* may allow the court to infer that a breach of duty has taken place here, where the facts speak for themselves (see requirements of rule under *Scott v London & St Katherine Docks Co* [1865] 3 H&C 596 - such things don't happen without negligence, what actually happened is not known to C, what happened was under D's control). Explain that if this rule comes into play it is a significant advantage to N and/or H as it shifts the burden of proof re: breach of duty to A, who must prove he was not negligent (difficult!).

(c) Explain and apply causation in fact - The 'but for' test (see *Barnett v Chelsea & Kensington Hospital* [1969] 1 QB 428). Courts likely to insist on the stricter 'material contribution to the damage' test under *Bonnington v. Wardlaw* [1956] AC 613, except in the limited circumstances envisaged by *Fairchild* where the more claimant-centred *McGhee v. N.C.B.* [1973] 1 WLR 1 test applies i.e. 'material contribution to the risk of damage' is sufficient to establish causation. Ultimately, however, A's liability to both N and H is likely to depend on whether intervening acts break the chain of causation and remoteness of damage.

(d) Explain the test of remoteness of damage under *Overseas Tankship (UK) Ltd v Morts Docks & Engineering Co Ltd (The Wagon Mound No 1)* [1961] AC 388 - the rule is that damage is not too remote if it is of a type that would be expected, even if the way in which it comes about is unusual, or if the damage is more severe than would usually be expected (see *Hughes v The*

Lord Advocate (1963) AC 837). A is unlikely to escape liability for the spark that ignites and destroys the bedroom (see *Scott v Shepherd* [1773] 96 Eng. Rep. 525). A is likely to be liable for the weakness in H's arm suffered as a result of his actions under the 'thin skull rule' - A takes his victim as he finds her e.g. *Smith v. Leech Brain and Co Ltd* [1961] QB 405. However under *McKew v Holland and Hannen and Cubitts (Scotland) Ltd* (1969) 3 All ER 1621 swinging on parallel bars while injured is likely to constitute a *novus actus interveniens* which breaks the chain of causation for a claim in respect of the permanent loss of feeling in H's arm. Further damage caused by fire brigade can't be attributed to A and it may be possible to claim against them under *Capital & Counties plc v Hampshire County Council* [1997] 3 WLR 331.