

## Practice questions for Chapter 14 – The tort of negligence

### Essay question

To what extent can a person be liable in tort for a negligently made statement? When developing the law in this area, to what extent do you think the courts were concerned with limiting the number of potential claims? Have the courts developed this area of the law in an effective and consistent manner?

### Introduction

- Tortious liability for negligently made statements is a relatively recent development. Liability for negligently made statements has long been recognized by the law of contract via the law relating to misrepresentation (although, prior to 1964, negligent misrepresentation did not exist as a distinct form of misrepresentation, and all misrepresentations were classified as fraudulent or innocent).
- Discuss why, prior to 1964, a claimant could only recover damages if he was the victim of a negligent act, namely:
  1. Imposing liability for negligent statements could result in widespread and unpredictable liability as a statement could be heard by a large number of persons. Negligent acts tend to result in more predictable liability – as Lord Pearce stated in *Hedley Byrne*, '[w]ords are more volatile than deeds. They travel fast and far afield ... Yet they are dangerous and can cause vast financial damage.'
  2. Negligent statements tend to result in pure economic loss only, and the courts have historically been reluctant to impose liability for pure economic loss.
- Damages could be recovered in tort for a deceitful statement (via the tort of deceit), but could not be recovered for a negligent statement. This changed in 1964 with the case of *Hedley Byrne & Co Ltd v Heller & Partners Ltd*.<sup>1</sup>

### The development of the law

- The case of *Hedley Byrne* needs to be discussed in some detail, as it will be seen that the law established in it is far from clear. The facts of the case are not overly helpful in answering the question (in any case, the defendant was not found liable). The House of Lords, for the first time, established that a person could be liable for a negligent statement. However, the House, conscious to keep such liability within controllable bounds, was not prepared to extend the general duty of care in tort to cover negligent misstatements. Clearly, the House was concerned with opening of floodgates of litigation and therefore limited the instances where the defendant would owe the claimant a duty of care, by establishing that there must be a 'special relationship' between the maker of the statement and the recipient of the statement.
- Unfortunately, the House did not define precisely what would amount to a 'special relationship' and, in fact, the judgments of the majority judges are somewhat inconsistent. Lord Morris said that in order for a special relationship to arise, two requirements must be met, namely (i) that the defendant must possess a special skill, and (ii) the claimant must rely on that skill. As a result of this, it is clear that a duty of care will primarily be owed in situations where the defendant is some sort of professional advisor.

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<sup>1</sup> [1964] AC 465 (HL).

- However, the other judges in the case (Lords Devlin and Reid) stated that a third requirement was needed, namely that the defendant must voluntarily assume responsibility to the claimant. The confusion evidenced in *Hedley Byrne* is evidenced in later cases. In 1990, Lord Griffiths stated that the requirement of a voluntary assumption of responsibility was not 'helpful or realistic.'<sup>2</sup> Lord Goff, in 1995, stated that an assumption of responsibility is required in order to establish a duty of care.<sup>3</sup> In 2006, Lord Bingham described the requirement as 'sufficient but not necessary.'<sup>4</sup>
- As a result of this, subsequent courts have struggled to apply the law consistently. For example, in *Mutual Life and Citizens' Assurance Co Ltd v Evatt*,<sup>5</sup> Lord Diplock stated that the duty of care would not arise in cases where the maker of the statement was not acting in the course of a business or professional activity. However, in *Chaudhry v Prabhakar*,<sup>6</sup> a young man who gave advice to his friend regarding which car she should buy, had to pay over £5,500 in damages when it transpired that the car purchased based on his advice was unsatisfactory.
- The lack of consistency has led to McHugh J, a judge of the High Court of Australia, to state that '[s]ince the decision in *Hedley Byrne & Co Ltd v Heller & Partners Ltd*, confusion bordering on chaos has reigned in the law of negligence.'<sup>7</sup> Given the unsatisfactory state of the law, it was unsurprising that the House of Lords would seek to provide some clarification.
- In *Caparo Industries plc v Dickman*<sup>8</sup> (the case which established the modern tortious duty of care), the House sought to set out clearly when a special relationship would exist, namely:
  1. The advice is required for a purpose, which is made known to the adviser at the time the advice is given
  2. The adviser knows that his advice will be communicated to the advisee
  3. It is known that the advice is likely to be acted upon by the advisee for the stated purpose
  4. It is so acted upon by the advisee to his detriment.
- However, questions still exist. The requirement for a voluntary assumption of responsibility was not mentioned by the House in *Caparo*. However, the principles established in *Hedley Byrne* have been applied to cases that do not concern the provision of advice (these cases come under the heading of 'extended *Hedley Byrne* liability' and notably concern the provision of services), and in these cases, the courts have stated that the assumption of responsibility is an important (though not a necessary) condition for liability.

## Conclusion

- The law relating to negligent misstatement is still far from clear and settled and the principles laid down in *Hedley Byrne* are being extended to situations that the House in *Hedley Byrne* could not have envisaged.

## Problem question

Mark parks his car outside his house. He opens the car door without looking to see if anyone is in the road, and opens the car door into Amy, who is riding her bicycle. She is knocked into the path of an oncoming car, being driven by Alan. Alan manages to swerve to avoid Amy, but in doing so, he crashes

<sup>2</sup> *Smith v Eric S Bush* [1990] 1 AC 831 (HL).

<sup>3</sup> *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145 (HL).

<sup>4</sup> *Customs and Excise Commissioners v Barclays Bank plc* [2006] UKHL 28.

<sup>5</sup> [1971] AC 793 (PC).

<sup>6</sup> [1989] 1 WLR 29 (CA).

<sup>7</sup> *Woolcock Street Investments v CDG Pty Ltd* [2004] HCA 16.

<sup>8</sup> [1990] 2 AC 605 (HL).

into a wall. He suffers minor physical injuries only as the collision with the wall was at a relatively low speed, but an hour later, he has a heart attack and dies. The autopsy reveals that, unknown to Alan, he suffered from a heart condition and the stress of the crash caused this condition to exacerbate, causing Alan's death. Ross, a passer-by, witnesses the crash and, seeing Alan in a confused state following the crash, reaches into Alan's car and steals Alan's laptop.

Following the accident, Amy is suffering from pain in her left leg. She goes to the hospital and is told by her attending doctor, Debbie, that she is suffering from a pulled muscle. A week later, Amy goes back to the hospital as the pain has become worse and has spread to her foot. It is discovered that Debbie has sustained severe and permanent damage to the tendons in her leg and to the bones in her foot. Had these injuries been discovered at Amy's first visit, they could likely have been treated and Amy would have made a full recovery. Amy now needs to walk with the aid of a stick, and will do so for the rest of her life.

Amy and Alan are seeking your advice regarding obtaining compensation for the losses they have sustained.

### Introduction

- You will need to identify which tort(s) the question involves. Clearly, as chapter 14 of *Card & James'* discussed the law relating to negligence, this question involves a discussion of negligence, but in many assessments, you will not be told which area of the law the question relates to.
- The first and most important issue to determine is whether Mark's initial act amounts to negligence. In many questions of this type, it is likely that the defendant will be negligent – after all, were he not, there would be little to discuss – but do not assume that negligence has taken place.
- Mark's alleged act of negligence has caused both Amy and Alan to sustain loss. Therefore, you need to discuss both cases.

### The losses sustained by Amy

- In order to establish that the defendant is negligent, four requirements will need to be met, namely:
  1. The defendant owed the claimant a duty of care
  2. The defendant must have breached that duty
  3. The defendant's breach of duty must cause the claimant loss, and
  4. The loss must not be too remote.

### Duty of care

- The first issue to determine is whether or not Mark owes Amy a duty of care. In *Caparo Industries plc v Dickman*,<sup>9</sup> the House of Lords established a three-stage test:
  1. Foreseeability of damage
  2. Proximity, and
  3. The imposition of a duty must be fair, just and reasonable
- That drivers of vehicles owe a duty of care to pedestrians, other drivers and persons on bicycles is well-established and it will not be necessary to spent too long discussing whether a duty is owed,

<sup>9</sup> [1990] 2 AC 605 (HL).

unless the facts of a case indicate that a duty may not be owed. You may, however, wish to briefly establish why Mark owes a duty to Amy using the three tests laid down in *Caparo*.

### *Breach of duty*

- The second requirement is that the defendant breached his duty of care. Depending upon the idiosyncrasies of the case, this can be a complex issue. Fortunately, our case is relatively straightforward, so do not spend too long discussing breach of duty.
- A breach of duty will occur where the defendant has breached the standard of care he owes. First, you need to determine what is the standard of care. The standard of care is one of reasonableness and the defendant will be required to meet the standard of a reasonable man.<sup>10</sup> This standard may be altered depending on the defendant (e.g. if the defendant is a child), but there is nothing in our case to indicate that special rules apply.
- It is clear that Mark has breached his duty. Parking a car and opening a car door without looking to see if anyone is approaching would clearly breach the standard of care and it is something that a prudent and reasonable man would not do.

### *Causation*

- The third requirement is that the defendant's breach of duty caused the loss in question. This is a slightly more complex due to the actions of Debbie and casts doubt on whether or not Mark is liable for the injuries that Amy ultimately suffered.
- Causation is established by satisfying the 'but for' test – that is, would Amy have suffered the losses but for Mark's breach of duty. The problem that arises is that Amy's ultimate injuries are caused by Mark's alleged act of negligence and the negligent actions of Debbie, who failed to correctly diagnose the full extent of Amy's original injuries. Do Debbie's actions affect the liability of Mark?
- Applying the 'but for' test is problematic where there are successive causes. Under the 'but for' test, it is likely that Debbie's actions will not affect Mark's liability as her negligence has not caused greater loss to be sustained.<sup>11</sup> Should Amy encounter problems in obtaining compensation from Mark, she could commence proceedings against Debbie, on the ground that Debbie's actions have resulted in the loss of a chance to avoid recovery. However, the courts are reluctant to award damages for loss of a chance to avoid loss, as can be seen in the case of *Hotson v East Berkshire Area Health Authority*<sup>12</sup> (which also related to the failure to correctly diagnose injury).

### *Remoteness*

- The final requirement is that the loss sustained by the claimant was not too remote. Amy can only claim for losses that were a reasonably foreseeable consequence of Mark's breach of duty.<sup>13</sup> Clearly, there would be little problem in establishing this.

### **The losses sustained by Alan**

- It should be noted that, as Alan has died, any action would be brought by his next of kin or representatives.

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<sup>10</sup> *Blyth v Birmingham Waterworks Co* (1856) 11 Ex 781.

<sup>11</sup> *Performance Cars Ltd v Abraham* [1962] 1 QB 33 (CA).

<sup>12</sup> [1987] AC 750 (HL).

<sup>13</sup> *Overseas Tankship (UK) Ltd v Morts Dock & Engineering Co (The Wagon Mount (No 1))* [1961] AC 388 (PC).

- As with Amy, the four requirements will need to be met in order to show that Mark has acted in a negligent manner towards Alan. For reasons discussed above, establishing that Mark owes Alan a duty of care and that the duty was breached, so there is no need to discuss these again.

#### Causation

- Mark may try to argue that Alan's death was not caused by his breach of duty, but was caused by Alan swerving to avoid Amy. Mark may argue that this amounts to an intervening act (*novus actus interveniens*), which breaks the chain of causation. There is no doubt that the acts of the claimant himself can amount to a *novus*, but only if the acts of the claimant were unreasonable.<sup>14</sup> Clearly, Alan's actions were reasonable given the circumstances, so causation will be established.
- Mark will argue that the loss of the laptop was not caused by his breach of duty, but was caused by Ross. Mark will argue that Ross' actions constitute a *novus*. There is no doubt that the acts of a third party can amount to a *novus*. It is well established that if the third party's act constitutes a legal wrong (such as a tort), it will be regarded as a *novus*.<sup>15</sup>

Ross' theft will amount to the crime of theft as well as the tort of conversion. Accordingly, it is likely that Ross' actions will amount to a *novus* and so Mark will not be liable for the loss of the laptop.

#### Remoteness

- The final requirement is that the loss sustained by Alan was not too remote. The loss of the laptop need not be discussed as Mark will not be liable for this loss. The problem that arises in this case is that, due to an undiscovered heart defect, the loss Alan has sustained (that is, death) is greater than would normally be the case. Is Mark liable only for the loss that would likely be sustained, or is he liable for the losses that actually occurred?
- It is almost certain that Mark will be liable for Alan's death (that is, the loss is not too remote). This is due to what is known as the 'eggshell skull' rule, which provides that, where the injury suffered by the claimant is greater than could be expected (usually due to some defect or condition of the claimant, such as an undiscovered heart condition), then the defendant is fully liable for the injury sustained. You may wish to provide a case by way of example (e.g. *Smith v Leech Brain & Co*).<sup>16</sup>

#### Conclusion

- Based on the above discussion, it would appear to be the case that Mark's actions do amount to negligence. He is likely liable for the injuries sustained by Amy and Alan, but he will probably not be liable for the loss of Alan's laptop.

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<sup>14</sup> *McKew v Holland & Hannen & Cubitts (Scotland) Ltd* [1969] 3 All ER 1621 (HL).

<sup>15</sup> *Knightley v Johns* [1982] 1 WLR 349 (CA).

<sup>16</sup> [1962] 2 QB 405 (QB).