Duty of Care

Tort Law

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Lect#2,3,4,5,6,7,8 **DUTY OF CARE**

First official chapter

Essay question in exam

Three types of essay can be asked

i. **Tests**
ii. **Public authority police.**
iii. **Omissions.**

Chapter outline

1. **Basic intro and scope of duty of care**
2. **Historical evolution of test of duty of car**
   - **1st test: Donoghue v Steveson (neighborhood principal)**
   - **2nd test: Anns v Merton (two stage test).**
   - **3rd test: Murphy v Brentwood. (Incremental approach)**
   - **4th test: Caparo industries (three stage test) current law.**
   - **5th test: Woodland (five stage test of non-delegable duty)**
3. **Detail study of Caparo three stage tests.**
   - **1st stage: Reasonable forcibility.**
   - **2nd stage: Proximity.**
   - **3rd stage: Just fair and reasonable.**
4. **Duty of care and special categories of persons. (when they ow a duty and upto what extent, each have their own cases)**
   i. **Advocates**
   ii. **Police**
   iii. **Public authorities**
   iv. **Fire brigade**
   v. **Ambulance**
   vi. **Rescuers**
   vii. **Unborn child**
5. **Duty of care and omissions**
   i. **General rule (four exceptions)**

THREE ELEMENTS TO PROVE NEGLIGENCE:

- Duty of care
- Breach of duty
- Causation

Intro:

Tort law is branch of civil law in which the claimant can sue the defendant in order to acquire compensation for defendant's negligence. The purpose of tort law is not to punish the offender but to compensate the innocent party. In tort law the conduct of the defendant is to be evaluated on reasonable men standards and negligence is any conduct that falls below the standards of reasonability. Tort law is largely based on insurance policies and policy considerations. The burden of proof in tortious claim is balance of probabilities and tort law covers damages for physical injuries, psychiatric injuries, property damages and also damages for personal discomfort. Policy considerations are those considerations which are in the interest of public at large and while delivering judgements the courts look upon insurance policy, future impact of judgment, conduct of claimant, ECHR development, flood gates of cases, taxation policies and deeper pocket theories.

Cases:

1. **Hill vs Chief Constable of West Yorkshire:**

   Action was brought by the mother of the victim against the police for not chasing the serial killer. It was **held** that police was not held liable for negligence arising in the course of their operational duties. The reason for this non-liability was to prevent the police from being indulged in defensive practices.

2. **Vowels vs Welsh Rugby Union:**

   It was held that if he defendant is insured then it would be fair and just to impose liability.

3. **X vs Bedfordshire CC**
   It was held "while imposing liability on public authority you need to evaluate the impact of imposing liability on their efficiency or work. For the purpose of being jus fair and reasonable, it is important to evaluate the future impact of liability on statutory authorities or bodies carrying out social utilities.

<u>Definition:</u>

Lord Wright in **Lochgelly v Mc Mullen** "stated negligence means mere then a heedless or careless conduct whether in omission or commission, it properly contains the complex concept of duty, breach and causation".

"Negligence is the conduct falling below the standards of reasonability required for the protection of others against unjustified risk of harm"

Academic Articles:

Deakin and Johnson: duty of care determines whether the law recognizes in principal the possibility of liability in a given situation.

Conaghan and Mansell: duty of care is an essential factor in determining whether it is proper to redistribute the claimant's loss to defendant. This is informed by the assumption that individuals should bear their misfortunes alone, unless there is good reason for shifting loss on to someone else.

Historical Evolution of Duty of Care:

DUTY OF CARE—First time claim of negligence was in 1932, In simple terms, duty of care is an obligation imposed by law. It includes responsibility towards others and reasonable behaviors of individuals. Before 1932, there was no general principle for determining duty of care and law only recognized certain relationships in which one person owes a duty to other person so development in this area of negligence were very limited.

- **1st development—CASE: Donoghue vs. Stevenson**

Donoghue Case:

1. Defined neighborhood principal.
2. Allow third parties to sue.
3. The duty of manufacturer to ultimate consumer.

Lord Atkin for the first time in history attempted to define duty of care. Appellant claimed that she had been poisoned by drinking ginger beer manufactured by the defendant. The beer was purchased by her friend and contained decomposed snail. In this case Atkin defined duty of care Recognized new head of liability (liability of manufacturer to the ultimate consumer)—there was no direct link between manufacturer and the friend who bought the drink, but DOC was raised. The new head of liability destroyed privities of contract fallacy—before 1932, the 3rd party could not claim privities of contact, but now they can. In this case, the appellant was sick and brought claim against the manufacturer and thus, destroyed the privities of contact. Lord Atkin defined duty of care (neighbor principle) as: you must take reasonable care to avoid acts of omissions which you can reasonably foresee would be likely to injure your neighbor. Who then in law is your neighbor? The answer seems to be persons who are so closely and directly affected by your act that you ought reasonably to have them in contemplation as being so affected when you are directing your mind to the acts of omissions which are called into question. Subsequently, courts soon came to the conclusion that its scope was limited to personal injury and damage to property.

3 types of losses: physical injury, property damage and economic loss

2nd Development Case: ECONOMIC LOSS— Hedley Byrne & Co. vs. Heller: Hedley (a firm) wanted to know whether it was advisable to extend credit to a customer, Easipower. Hedley asked Heller whether it would be advisable. Heller advised Hedley that it was appropriate to extend credit, which Hedley did and Easipower went out of business. Hedley sued Heller.

Issue: Did Heller owe Hedley a duty of care? Hedley's claim failed as Heller had given a disclaimer which, in the court's opinion, was sufficient to protect them from liability. By this case, for the first time, financial or economic loss were allowed to be compensated. Thereby, this case is an established possibility of an action in tort of negligence for financial loss since the neighbor principal was very wide in scope so policy considerations come into play.

3rd Development Case: CASE #3: Anns vs. Merton London Borough Council: The claimants were tenants in a block of flats. The flats suffered from structural defects due to inadequate foundations which were 2ft 6in deep instead of 3ft deep as required. The defendant Council was responsible for inspecting the foundations during the construction of the flats. The House of Lords held that the defendant did owe a duty of care to ensure the foundations were of the correct depth. Lord Wilberforce introduced a two stage test for imposing a duty of care. **Lord Wilberforce** redefined the neighbor principle by laying down the **two-stage test:**

i. Whether there was a sufficient relationship of proximity or neighborhood between the claimant and defendant from liability. If so, a prima facie duty of care rises.
ii. Whether there was any consideration which negates and absolves the defendant from liability. **E.g**. when companies do business together, you cannot destroy the others' business. If I have a franchise of McDonald's, another cannot come in the same radius as mine, because that would mean destroying. **Pre-tort = proximity and policy consideration = defendant justification.** By establishing the first element of prima facie, the duty of care may arise. However, this test was criticized as being too expansive and was overused in 1991 by virtue of **Murphy vs. Brentwood DC. Lord Keith,** in determining duty of care, used the **incremental approach**—he looked at previous cases and drew an analogy between them. **Lord Wilberforce's two-stage test** was rejected since it was indefinable.

4th Development Case: CASE #4: Caparo Industries vs. Dickman: Caparo industries purchased shared in Fidelity PLC in reliance of the accounts which stated that the company had made a pre-tax profit of $1.3M. In fact, Fidelity had made a loss of over $400,000. Caparo brought an action against the auditors claiming they were negligent in certifying the accounts.

HELD: No duty of care was owed. There was not sufficient proximity between Caparo and the auditors since the auditors were not aware of the existence of Caparo nor the purpose for which the accounts were being used by them.

This case replaced Anns two-stage test and introduced a three-stage test. In establishing duty of care, claimant must show:

i. It was reasonably foreseeable that person in claimant's position would be injured.

ii. There was a sufficient proximity between parties.
iii. It is just, fair and reasonable to impose liability upon the defendant (policy consideration). E.g. can't ask for $10k from a poor man.

In other words, if you want to establish duty of care, there are 3 criteria:

i. Foreseeability of damage.
ii. Proximity.
iii. Was it just, fair and reasonable? OR policy consideration

DETAIL STUDY OF PRESENT CAPARO TEST FOR DETERMINING DUTY OF CARE

To determine, we need to first distinguish between the different types of damage (personal, economical, psychological). In cases of personal injury, by establishing foreseeability, you do not need to prove proximity as it is automatically presumed (you have to be close to the person to cause injury). The authority for it is **Murphy vs. Brentwood DC.** For example, liability can arise between two strangers using the highway, under which reckless driving by one stranger causes foreseeable damage to the other. In cases other than those of personal injury (mental or economic loss), proving proximity becomes important in addition to foreseeability and nature of relationship between the parties has to be explained. **By Murphy case, it was held that proving foreseeability is required in every case but proving proximity is not important in all the cases.** By foreseeability, we mean that defendant should have foreseen the possibility of damage to the victim at the time of his alleged negligence.

1. **Foreseeability of damage:** in personal, establish foreseeability. in mental, establish all three—foreseeability, proximity and policy consideration.

CASE #1: Bournhill vs. Young: The claimant was a pregnant fishwife. She got off a tram and as she reached to get her basket off the tram, the defendant drove his motorcycle past the tram at excessive seed and collided with a car 50 feet away from where the claimant was standing. The defendant was killed by the impact. The claimant heard the collusion but did not see it. A short time later, the claimant walked past where the incident occurred. The body had been removed but there was a lot of blood on the road. The claimant went into shock and her baby was stillborn. She brought a negligence claim against the defendant's estate.

HELD: No duty of care was owed by the defendant to the claimant. There was no sufficient proximity between the claimant and defendant when the incident occurred. The motorcyclist who was killed in an accident brought about by his own carelessness owed no duty of care to the pedestrian in the vicinity of the accident who suffered nervous shock and a terminated pregnancy as a result of hearing the sound of the crash. The claimant's injury should be foreseeable at the time of alleged negligence. The woman's claim was not successful because she was not present at the accident spot thereby her injury was not foreseeable—in other words, no proximity so no foreseeability.

Case#2 Lamb vs Camden LBS: lord Denning stated it is not every consequence of wrongful act which is subject of compensation and lines have to be drawn somewhere.

Case#3 Al-Kandari V Brown: it is a question of policy for judges to decide. Court organizes its judgement under the headings of duty of care breach and causation; a single set of facts can be analyzed in different ways.

2. **Proximity** is not a new concept to the law of negligence as mentioned by Lord Atkin in Donoghue and Lord Wilberforce in Anns case. Generally, proximity is the presence of pre-tort relationship of some kind between the claimant and the defendant arising prior to the infliction of damage. Proximity varies from case to case, in personal injury, proximity is distance. In psychological injury cases, proximity is the relationship of love and affection between the parties, while In economic loss cases; it is some sort of a special relationship between the two parties. That is, a relationship involving reliance (e.g. relying on the doctor's skill to carry out operation successfully)

   CASE #1: Bishara vs. Sheffield Hospital: Sedley Lord Justice stated assumption of responsibility is simple one of the cases in which the necessary degree of proximity may arise.

   CASE #2: Parrett vs. Collins: It was held just as there is an overlap between foreseeability and proximity, similarly there is a considerable degree of overlap between proximity and question of just, fair and reasonable.

   Case#3: Sutradhar v NERC: duty of care is not owed in all cases in which it is forceable that in the absence of care someone may suffer physical injury. There must be proximity in a sense of a measure of a control and responsibility for potentially dangerous situations.

3. **Just fair and reasonable:** In relation to just, fair and reasonable, a question to be asked is whether the defendant is in a position to pay the liability?
   CASE #1: Vowels vs. Evans and Welsh Rugby Union Ltd. "Mr. Vowels is confined to a wheelchair as a result of an injury sustained while playing rugby. Mr. Evans was the referee of the match and Welsh had appointed Evans as the referee of the match.
   ISSUE: Could the referee be liable for the injury?
   HELD: "Yes, the defendant was insured and there existed a controlling relationship between the referee and the player, therefore, responsibility was assumed."
   If defendant is insured, it would be reasonable, fair and just to impose liability, but it is not that the court would be reluctant to impose liability." If the imposition of a liability results in the defendant being indulged in defensive practices (scare using their authority), then it might not be reasonable to impose liability.

   CASE #1: Hill vs. Chief Constable of West Yorkshire: Jacqueline Hill was the final victim of Peter Sutcliffe. He had killed 13 people over five years. Jacqueline's mother made a claim against the Chief Constable on the grounds that the police had been negligent in their detection and detention of Sutcliffe. The defendant applied to have the claim struck out on the grounds that there was no cause of action since no duty of care was owed by the policy in the detection of crime.

HELD: No duty of care was owed. Police was not held to be liable for negligence arising in the course of operational performance of their statutory responsibility as to avoid extra burden on police and liability was not imposed because of a policy consideration that is defensive practice—policy already actively trying, so why be charged?

CASE #2: X vs. Bedfordshire County Council: Appeal against the council by children who suffered parental abuse or neglect.

ISSUE: Did the council have a common law duty to take care of these children?

HELD: No, where there is statutory discretion imparted upon the authority, this discretion is not actionable at common law. While imposing liability on public authority, you need to see the impact of imposing liability on their efficacy or work. For just, fair, and reasonable, it is important to study the future impact of liability imposition on statutory bodies carrying out social utilities (law always sides with police to encourage them).

Application of CAPARO Test:

Customs and excise commission vs Barclays Bank: "there must be specific enquiry considering precise facts and its results in ruling that would be applied analogy incrementally.

Bishop Rock Marine Marcrich: "number of policy factors pointed in favour of cargo owners the classification of societies were independent nonprofit making enteritis working for collective welfare and finding of liability may lead to classification of societies adopting defensive position"

Woodland vs Swimming Teachers Association: "common law develops and adopts to meet new situations so; court must proceed with caution incrementally by analogy with existing categories"

5th test: Goodland V Swimmer Teacher's Association: council was liable for harm suffered by 10 years old child when independent contractor engaged to provide swimming lesson failed to ensure her safety. The child has been entrusted into school's care and control and swimming tuitions was and integral part educational activities.

Lord Sumpson provided for a **five** stage test for when **non-delegable** duties applies.

1. The subject matter of duty is child, patient or other vulnerable person.
2. There must be a relationship of control between defendant and claimant.
3. Claimant must have no control over how defendant performs their obligations.
4. Defendant must have delegated to third party the functions which defendant has a legal duty to perform.
5. Third party is negligent in performance of functions which defendant has legal duty to perform.

Types of defendants and claimants/duty of care and special categories of persons

This portion is highly influenced by policy considerations.

1. **Advocates:** Whether you hold advocates liable: for test for poor advocacy, poor representation, negligent court procedure and negligent counseling.

   CASE #1: Rondel vs. Worsley" Claimant was charged and convicted of grievous bodily harm (GBH). The defendant was the barrister who represented him at trial. The claimant brought a negligence action against him claiming that he had not asked all the questions he had asked him when cross examining witnesses and had not put all the evidence before the court. The High Court struck out the claim as disclosing no cause of action because barristers cannot be sued by their client for negligence or lack if skill in presenting their case in court. The claimant appealed and the court of appeal dismissed it. The Appellant appealed to the House of Lords." HELD: Barristers are immune from negligence suits for their conduct of a case in court. " A barrister does not owe duty of care to his clients and the primary duty of the --- is towards courts and not towards the claimant. The reason for the immunity was flood gate arguments and defensive practices.

   CASE #2: Saif Ali vs. Sydney Mitchell" The immunity enjoyed by the lawyers did not apply where lawyer's negligence prevented the correct defendant from being sued and the case is never brought to trial.

   CASE #3: Arthur JS Hall vs. Simmons" This case involved three conjoined appeals concerning claims against solicitors. Each solicitor relied on the immunity rule relating to advocacy in negligence claims. At first instance, the trail judge had struck out each claim. The Court of Appeal held that the claims were wrongly struck out. The House of Lords was invited to reconsider the immunity of legal professionals when conducting advocacy in court."

   HELD: The rule relating to immunity of an advocate in respect of and relating to conduct of legal proceedings should no longer be maintained." This case overruled the Rondel case. If a convicted person is successful, then he/she can sue his lawyer under the tort of negligence. You can hold the lawyer if he is negligent (you can sue the barrister on poor advocacy skills).

   CASE #4: Moy vs. Pettman Smith" This case guides us about the standard of care applied to lawyers. While determining that lawyer is acting reasonable, you must keep in mind the challenges of that particular profession. "E.g. there may a strike during a long case. This case says keep in mind these challenges that judges may face.

   CASE #5: Rowley vs. Secretary of State" Dyson LJ held that a solicitor owes a duty of care in tort because like any professional person, he/she voluntarily assumes responsibility towards an individual client. "An advocate is a professional, so if you can hold a doctor or carpenter liable, why not an advocate?

2. **POLICE**

   Case# Brooks v commissioner of police of the metro polis: lord Steyn "it is desirable that police officers should treat victims and witnesses properly and with respect, but to convert that ethical value into general legal duty of care on police towards victims and witnesses would be going too far"

   CASE #: Hill vs. Chief Constable of West Yorkshire: Jacqueline Hill was the final victim for Peter Sutcliffe, who had committed 13 murders over 5 years. Jacqueline's mother made a claim against the Chief Constable on the grounds that police had been negligent in their detection and detention of Sutcliffe.

   ISSUE: Police applied to have the claim struck out on the grounds that there was no cause of action since no duty of care was owed by the police in the detection of crime.

HELD: Police was not held liable for negligence assisting in the course of operational performance of their statutory duties as to avoid extra burden on police and main reason behind it was public policy (police revenue and taxation). Their Lordship stated" general duty of care to protect all members of public from consequences of crime would be impracticable and on grounds of public policy deeply damage police operations"

CASE #: Osman vs. Ferguson: Osman developed an unhealthy attachment with his teacher. The police was informed but no action was taken. The teacher shot Osman and the father, and was convicted of manslaughter on the grounds of diminished responsibility. Osman brought action against the police for inadequate protection.

ISSUE: The defendant applied to have the claim struck out as disclosing no reasonable cause of action. Court of Appeal held that immunity was applied in this case where the police failed to provide protection against a known and identified individual. The court accepted that there was a sufficient relationship of proximity between plaintiff and the investigating officer and it was foreseeable that harm would result. But the police immunity applied even if there is a sufficient relationship of proximity.

CASE #: Osman vs. UK The argument raised was that this immunity enjoyed by the police and rejection of the case after preliminary hearing violated Article 6 of ECHR.

ECtHR held that the UK courts provided police with the blanket immunity so it violated Article 6 of ECHR. However, discrepancy raised is that the Caparo test is substantive law while Article 6 is a procedural law (says not to give police blanket immunity, so it doesn't have absolute power).

CASE #: Barrett vs. LBC: It was decided that it was appropriate to strike out the claim on the basis that it was not just and reasonable to impose a duty without hearing the evidence because of the effect of the decision in Osman case. Barrett says to look into the impact of the decision.

CASE #5: Individual vs. UK ECtHR held that there is no breach of Article 6 of ECHR when the English court held that there was no duty of care owed by legal authority on public policy ground. **PUBLIC AUTHORITY IS NEVER HELD LIABLE**.

CASE #: Swinney vs. Chief Constable of North Umbria: Mr. & Mrs. Swinney were managers of a pub. They came across info relating to the identity of a person responsible for the unlawful killing of a police officer. They passed the info on to DC Dew who recorded the info. The document containing the info was later stolen for an unattended police car. Subsequently, Mr. & Mrs. Swinney received violent threats and suffered psychiatric injury as a consequence.

ISSUE: They brought a negligence claim against the police for the psychiatric injury suffered. The claim was struck out by the district judge.

HELD: By accepting the information, knowing of its confidential and sensitive nature, the police had assumed responsibility to deal with the information in an appropriate manner. There were no policy reasons for denying the existence of a duty of care. Police can be held liable for negligence where a special relationship that is assuming responsibility of keeping the claimant's name confidential between police and claimant exists. In this case, police assumed responsibility, but did not perform. Therefore, it was held liable.

----------End lect#6----------

3. **FIRE BRIGADE**

Duty of care is not established when they pick up the phone, but when they arrive and say that they take responsibility. Fire brigade does not owe a duty simply by picking up a phone call of someone needing them. In order to establish duty of care, you have to show proximity of relationship between parties. Proximity includes expressed assumption of responsibility by the brigade over and above their public duty/function.

CASE #1: John Munroe vs. London Fire and Civil Defense Auth: A special effects technician caused an explosion on wasteland which adjoined the claimant's land which contained industrial premises. Burning debris from the explosion caused small fires to break out. The fire brigade were called and extinguished the fires on the wasteland but failed to check the claimant's premises.

CASE #2: Capital Counties vs. Hampshire County Council: A fire broke out in the building owned by the claimant. The fire brigade arrived and turned off the sprinkler system. They then had difficulty in locating the seat of the fire during which time the fire became out of control. The entire building was destroyed, but if the sprinkler were on, some of it would have been saved. Fire brigade was held liable for negligence as order to turn off sprinkler was a positive act and the brigade had assumed responsibility over and above their public duty. Duty of care was owed since the fire brigade's action in turning off the sprinklers increased the damage.

4. **AMBULANCE**

In this, the moment the phone call is received, duty is assumed.

CASE #1: Kent vs. Griffiths: The claimant was having an asthma attack. The operator said that the ambulance will arrive in 10 minutes, but it actually took 40 minutes. The claimant then suffered respiratory arrest. Had she known of the delay, she would've had her husband driver her to the hospital. An ambulance owes a duty of care to the claimant the moment they receive a call from a person who needs help. The policy reason was that in this care, personal injury was involved, not mere property damage. Hence, person's life is at stake.

<u>As a public authority, will damages payable comes out of public point:</u>

Public authority has a difficult job in balancing conflicting interest and imposing duty of care lead to public authorities being confronted by defensive practices by and flood gates of cases. An appropriate course of action is that we may go against public authority under judicial review mechanism, claim under HRA and complain to ombudsman.

Home office vs Mohammad, Statutory function will seldom (very rare application) if ever bring about the sought of proximity between the citizen and public authority which would satisfy the second limb of Caparo test.

Connor vs Surrey CC, There may be between public authority and the claimant a pre-existing duty of care, so that either improper or omission to properly exercise power may be a breach of that duty. (Where there are statutory or common law grounds for that duty)

Barrett vs Enfield LBC, Public authority may be treated as having assumed responsibility to a particular individual, reasonable level of proximity between the defendant and the claimant.

Impact of HRA 1998 on public authorities:

The relevant provision of ECHR in this area involves; right to life (article 2), protection from torture and degrading (article 3), right of liberty (article 5), right of privacy (article 8). As per section 6 of HRA 1998, public authorities are under an obligation to carry out their public functions in line with ECHR.

Smith vs Ministry of Defence, UKSC held although decisions about training procurement or conduct of operation at high level of command are closely link to exercise on political judgement and policy issue, but positive obligation under article 2 ECHR should be given effect.

The doctrine of combed immunity was given narrow definition and restricting it to the acts of war and armed conflicts.

Van Colle vs Chief Constable of Hertfordshire, Smith vs Chief constable of Sussex Police, Issue was whether court of appeal had been correct to find that police were not immune from negligence liability. For the liability police knew or ought to have known at the time of the shooting of a real and eminent risk to live of an identified individual from criminal act of third party, in the absence of special circumstances police owed no common law duty of care to protect individual against the harm caused by criminals.

Mitchell vs Glasgow CC, although local authority had been aware that victims neighbor might resort to violence the required element of relationship of responsibility was absent and it would not be fare just and reasonable to impose duty on public authorities.

X vs London Borough of Hounslow, restrictive approach to liability in Mitchell was followed by COA which held that special assumption of responsibility by words or deeds by part on local authority had not been shown/addressed.

Law commission consultation paper no 187: (Administrative redress: public bodies and the citizen 2008) provided comprehensive review of liability of public authority liability including new tort where there is "really serious fault", however law commission 322 (2010) abandoned this.

5. UNBORN CHILD

Does law recognize duty of care to an unborn child in respect to the damage done before birth? For this, we need to consider Congenial Disability Act 1976 and not Caparo test.

2 types of claims: 1st is Common law deals with unwanted child e.g. sterilizing surgery, but did not work. So cover cost relating to raising child. **Secondly** CDA 1976 deals with unwanted child but due to defendant's negligence, child is disabled, so cover damage.

CASE #1: McKay vs. Essex Area Health Authority (AHA): A mother suffered an infection while pregnant, and issued a claim against the doctor for not issuing abortion advice when a serious disability was diagnosed.

ISSUE: Mother wanted damages recovered for the child.

HELD: Court rejected the claim on the basis of public policy as it was challenging the sanctity of life. One cannot calculate damages for value of life. However, parents may bring an action for the pain and suffering of giving birth to an unwanted child.

CASE #2: Emeh vs. Kensington & Chelsea & Westminster AHA: Plaintiff had undergone abortion and followed negligent sterilization operation. She ended up conceiving an unwanted child but she came to know at the last stage. She gave birth to a congenial disabled child.

ISSUE: She claimed damages for (1) pain and suffering during birth, (2) loss of future earnings, and (3) cost of raising child.

HELD: By refusing an abortion, the chain of causation was not broken and claimant was able to recover damages of above three kinds. Moreover, the defendant's claim that the refusal of the abortion broke the chain of causation was rejected by the court.

CASE #3: McFarlone vs. Tayside Health Board (present Law): Husband arranged a negligent vasectomy and ended up conceiving an unwanted healthy child.

ISSUE: He wanted recovery of damages for pain suffering and the cost of raising the child.

HELD: The wife was entitled to the damages for the pain and suffering for unwanted pregnancy and birth but she was not allowed the cost of upbringing since the child was born healthy.

CASE #4: Parkinson vs. St. Jones & Seacraft Hosp NHS Trust (present Law): A negligent sterilization operation resulted in the birth of a disabled child.

ISSUE: Parents claimed for recovery of damages of raising a disabled child.

HELD: Parents were entitled to recover only the additional costs associated with the child's disability. If it were a normal child, only pain and suffering cost would have been covered.

CASE #5: Rees vs. Darlington Memorial NHS Trust: A wrongfully born healthy child was born to a disabled mother.

ISSUE: Mother claimed for the costs of raising child.

HELD: disabled mother could recover the additional costs which she incurred as a result of her disability.

CONGENITAL DISABILITIES ACT 1976: Section 1 (2) describes injury causing situation to which this act applies:

6. Conduct affected parent's ability to have healthy normal child (time prior to conception).
7. Conduct affected mother during her pregnancy.
8. Conduct affected moth or child in the course of birth (during delivery).
9.

Section 1 (3) states that the duty owed to the child by the defendant is primarily derived from the duty owed by the defendant to the parent. Defendant does NOT owe a separate duty of care to the child. The duty owed to the child is greater than the duty owed to the parents.

Section 2 (liability of parents) states that if a woman is negligently driving knowing that she is pregnant, then she is under duty of care of safety of her unborn child. If she breaches the duty and the child is born with disabilities, then those disabilities are regarded as damage resulting for her wrongful act. If doctor is negligent, and so is mother, then damages can be lessened.

Section 1 (4) states that the defendant does not owe a duty of care to the child if at the time of conception; either or both parties knew the risk of their child being born disabled. If they passively consented to disability.

EXCEPTION: If the child's father is the defendant and he knew the risk of disability while the mother did not, then section 1 (4) does not apply. E.g. father knew, didn't tell.

Section 1 (7) states that if it is shown that the parents shared responsibility for their child being born disabled, the damages are to be reduced to whatever court thinks just.

OMISSION AND LIABILITIES OF THIRD PARTIES (essay Question in Exam)

Total 5 points one rule and 4 sub-headings given by Lord Goff in Smith v Littlewoods organization

Outline:

1. **General rule of non-liability for omissions**
   Four exceptions:
   - **i. Special relationship between claimant and defendant.**
   - **ii. Voluntary assumption of duty.**
   - **iii. Where a person committing injury is control of the defendant.**
   - **iv. Where defendant in knowledge of the danger and failed to take steps to negate it.**

As a general rule, one must take care not to cause injury to others. However, there is no general duty to act for the benefit of others. As a general rule, you can owe a duty of care for your positive act (misfeasance), but not for omissions (nonfeasance). Generally, omission does NOT have duty of care. E.g. if someone is drowning and you are present, you don't owe a duty of care. If you are a lifeguard, then you do. Negligence will only protect against misfeasance.

General rule CASE #1: Smith vs. Littlewoods Organization: The defendant owned a disused cinema which they purchased with the intention of demolishing it and replacing it with a supermarket. Some vandals broke into the building but Littlewoods was not informed about it. Later on, they came again and put the property on fire which spread to the neighboring properties. The owners of the properties brought an action in negligence claiming that Littlewoods owed them a duty of care to prevent the actions of the vandals.

ISSUE: Can we hold Littlewoods liable for the act of the vandals and not locking the property?

HELD: Littlewoods was not liable. The chain of causation (Novus actus intervenes) broke as the vandals initiated an act which caused the neighboring property on fire. Littlewoods were not required to provide 24 hour surveillance and were unaware of previous incidents.

Lord Mackay stated that third party intervention does not absolve the defendant from liability. However, in most cases, the chances of harm being caused by a third party are little therefore it is not reasonable to expect defendant to take precautions against harm occurring.

EXCEPTIONS TO THE GENERAL RULE: (by Lord Goff)

- **Special relationship:** Where there is a relationship between the claimant and the defendant.
- **Undertaking:** by the defendant (assumption of responsibility).
- **Control of 3rd party who causes damage:** Where the defendant has control over the third party who causes damage or defendant negligently causes/permits a source of danger to be created which is then interfered by the third party.
- **Control of land or dangerous things:** When the defendant knew that a third party was creating danger on his property, and fails to take reasonable steps to abate it (passive reaction).

1st EXCEPTION: SPECIAL RELATIONSHIP BETWEEN CLAIMANT AND DEFENDANT.

The following are the relationships recognized by law in which one person's duty of care is well established to another:

- Employer and employee
- Parent/school and child.
- Captain of a ship and passengers of ship.
- Referee and player.
- Organizer of dangerous competition and drunk competitors.
- Occupier (state of premises) and visitors.
- Police and prisoners with suicidal tendencies
- Boxer and body controlling rules of boxing
- Doctors and patients

2ND EXCEPTION: UNDERTAKING/VOLUNTARY ASSUMPTION OF DUTY

CASE #1: Stansbie vs. Troman: Decorator was working on claimant's premises. Claimant asked defendant to lock the house once he is done, but the defendant did not do so and later on, there was a robbery. The claimant succeeded in an action against the defendant.

ISSUE: Was the defendant liable?

HELD: Yes, he had assumed responsibility to lock the door.

CASE #2: Barrett vs. Ministry of Defense: The claimant's husband was in the Navy stationed in Norway. On his birthday, which was arranged by the ministry of defense, he drank heavily and fell into coma. He was put in bed unattended and died after a few hours.

ISSUE: Was the ministry of defense liable?

HELD: Yes, MOD was held liable for negligence as they left him alone. Until the man became unconscious, he alone carried the legal responsibility for his own actions. However, once the senior officer assumed a responsibility for him by putting him in bed, his duty of care did arise. He was in breach of duty by failing to ensure the deceased received the appropriate supervision.

CASE #3: Jebson vs Ministry of Defence: "ministry of Defence was held liable as they failed to supervise drunken soldiers in a truck and owed duty to them to reach barracks safely. Ministry of Defence only had to pay 25% of damages and 75% damages reduced due to contributory negligence as soldiers were drunk heavily."

CASE #4: Griffiths vs. Brown & Lindsey: Taxi driver dropped a passenger (claimant) at the asked place but later on while crossing the road, the passenger was hit by another car and got injured.

ISSUE: Did the taxi driver cause damage?

HELD: No duty of care was owed by the taxi driver as he took him to the asked place safely and the claimant injured himself later. Taxi driver only assumed responsibility of taking to the asked place and not of what happens later.

In the case below, **liability of highway authority was under question**. Highways Act 1980 confers certain powers on highway authority to maintain the highways. Does NOT owe duty of care to general public. Owes DOC to individual claimant, only if he/she is identifiable and authority assumes responsibility.

CASE #1: Stovin vs. Wise: Mr. Stovin suffered serious injuries when he was knocked of his motorcycle by a car driven by Mrs. Wise. She was turning right at an acute intersection and her view was blocked by an earthen bank which the Norfolk highway authority had earmarked for removal but since neglected. **ISSUE:** The trial judge held that Mrs. Wise was 70% to blame for the accident and that Norfolk County Council were 30% to blame because they knew the junction was dangerous and had been negligent in not taking steps to make it safe. The council appealed.

HELD: The council did not owe a DOC to the claimant as failure to remove the bank is an omission and not a positive act. There was no public law duty on the highway authority to remove the danger and no duty was assumed by the authority. There had only been three accidents in twelve years which was not enough to render the junction a 'cluster site' under the Council's policy for prioritizing funding which required accidents in three years.

Lord Hoffman stated that drivers must take the highway as they find it. It is their primary duty to take due care and if they not, there is no compulsory insurance to provide compensations to the driver. Non liability of highway authority was due to policy consideration; public funding, conduct of drivers, floodgate arguments (everyone will blame authority if they get into an accident), discretionary powers of the executive.

Lord Nicholls dissented that public authorities could be liable in negligence for an omission to exercise statutory power.

Academic:

Francois du Bois stated "tort law is not a suitable vehicle for determining whether liability should be imposed for breaches derived specifically from public authority. ----------**End lect#8**----------

3rd EXCEPTION CONTROL OF 3RD PARTY WHO CAUSES DAMAGE

CASE #1: Carmarthenshire County Council vs. Lewis: A truck driver was killed in collision by saving four-yearold student wandering on a busy road from school, and claim was brought against the school authority.

ISSUE: Does the school authority owe duty of care?

HELD: Yes, the school was held liable for having failed to install a more effective gate to keep children inside during school hours.

CASE #2: Home Office vs. Dorset Yacht Co Ltd: Some young offenders were doing supervised work on Brown Sea Island under the Borstal regime. One night, the Borstal officers retired for the evening leaving the boys unsupervised. Seven of them escaped and stole a boat which colluded with a yacht owned by the claimant.

ISSUE: Did the Home Office owe a duty of care?

HELD: Yes, they did for their omission as they were in a position of control over the 3rd party who caused the damage and it was foreseeable that harm would result from their inaction.

4th EXCEPTION: CONTROL OF LAND OR DANGEROUS THINGS

CASE #1: Smith vs. Littlewoods Organization

CASE #2: Haynes vs. Harwood: The defendant left a horse-drawn van unattended in a

crowded street. The horses bolted when a boy threw a stone at them. A police officer tried to stop the horses to save a woman and children who were in the path of the bolting horses. The police officer was injured.

ISSUE: Police brought claim against defendant.

HELD: Defendant owed a DOC as he had created a source of danger by leaving his horses unattended in a busy street

CASE #3: P. Perl (Exporters) Ltd. Vs. Borough of Camden: Camden LBC owned two adjoining buildings. One of them was leased to the claimant, and the other was empty. The empty building had no lock on the door. Thieves entered empty premises, made hole in the wall and burgled the claimant's property.

ISSUE: Did local authority owe DOC to claimant?

HELD: No, because there was a lack of proximity between the parties. Mere foreseeability is not enough to prove DOC. It was so unexpected that chain of causation broke.

CASE #4: Topp vs. London Country Bus: The defendant bus company left a mini-bus in lay-by overnight. It was unlocked and the keys left in the ignition. The driver who was expected to pick the bus did not turn

up for his shift, and the bus was stolen. The bus knocked a woman off her bicycle and killed her. **ISSUE:** Her husband brought an action for damages.

HELD: The bus company did not owe a duty of care for the act of the third party. It was not foreseeable that thieves would take the bus and run a woman off her bicycle. This act broke the chain of causation. Also, there was noproximity between the bus company and the woman.

CASE #5: Goldman vs. Hargrave: A tree on the defendant's land was struck by lightening and caught fire. The following morning, the defendant contacted a tree feller to cut down the tree instead of throwing water on it. Over the next few days, the weather became very hot and reignited the fire which spread to neighboring property.

ISSUE: Was the defendant liable?

HELD: Yes. The defendant was liable for the naturally occurring danger that arose on his land as he was aware of the danger and failed to act to abate it.

----------**end of omissions----------**

LIABILITY OF RESCUERS AS CLAIMANTS (it is part of duty of care) un-official rescuers.

Anyone initiating act to save another**,** there is no responsibility on rescuers to initiate rescue. Court regards voluntary initiation of rescue.

CASE #1: Haynes vs. Harwood: "The defendant owed duty of care of the policeman (rescuer) because he initiated rescue operation and initiation of rescue in dangerous situation is likely.

CASE #2: Bakers vs. T.E. Hopkins & Son Ltd. "Hopkins, the defendant, employed two others to clean out a well. The two employees went down the well and were overcome by fumes. A doctor, the claimant, also arrived on the scene and went down the well. All three died of carbon monoxide poisoning

ISSUE: Was defendant liable?

Held: "Yes, because he initiated rescue and it was his negligence that created a dangerous situations.

Important points to remember:

i. For a rescuer's claim to be recognized there must be a real threat of danger.

Cutler vs. United Dairies: There was a violent horse running in an empty field which belonged to the defendant. The claimant was injured when he entered a field the field to calm the horse. His claim for compensation was unsuccessful as the horses presented no immediate danger to persons or property and there was no need for him to intervene.

ii. The duty owed to the rescuers is independent of the duty owed to the victim.

Videan vs. British Transport Commission: A 2-year-old child was trespassing on a train track as a train was approaching. The father of the child, attempted to save her. The defendant, the head of the railways, did owe duty of care to the rescuer as the rescue was foreseeable but child was trespassing.

iii. The foreseeability of a particular emergency is not necessary, provided some emergencies (e.g. horse) foreseeable.

iv. If someone negligently impaired himself or his property and it is foreseeable that there may be an attempt at a rescue then duty of care will arise on the part of victim (victim intentionally puts himself in the situation).

Harrison vs. British Railways Board: A misguided train guard attempted to assist a passenger who was trying to join a moving train by signaling the driver to stop. The driver misunderstood the signal and accelerated the train. He then tried to pull the passenger into the train but both fell out. The guard sued the passenger for negligence.

The court held that the passenger did owe the guard a duty of care when he put himself in a situation of danger in which it was reasonable foreseeable that someone would intervene to help. However, a

reasonable guard would have applied the emergency brake. On this basis, the guard's damages were reduced by 20%.

LIABILITY OF RESCUERS AS DEFENDANTS

- Situations where rescuers can be held liable.
- When rescuers by his conduct in commencing the rescue deters or prevents others from attempting a rescue will be held liable to the claimant on the principle of detrimental reliance.
- That is, victim has relied on rescue to his detriment.

Zelenko vs. Gimbel Bros" Plaintiff's intestate took ill in defendant's store. D tried to help but to no avail. Plaintiff argued that if D had left the intestate alone, someone would have summoned an ambulance. "General rule: if a D does not owe plaintiff a duty, then refusal to act is not negligence." But, the D intervened when he didn't have to, so decision was made in plaintiff's favor.

Other situations are where the rescuer worsens the condition of accident, and then rescuer becomes liable to the victim. For example, in carrying out rescue, the rescuer gets hit by a car or rescuer negligently deals with the victim. So, rescuer will be held liable.

----------END OF DUTY OF CARE----------