

Business Law (6th edn)

James Marson and Katy Ferris

p. 269 11. The Tortious Liability of Businesses in Negligence and Nuisance



James Marson, Reader in Law and Head of Research for Law, Sheffield Hallam University and Katy Ferris, Associate Professor in Business Law, Nottingham University

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Abstract

This chapter first discusses one of the most important torts—negligence—which may be commonly seen in instances of personal injury. This is followed by a discussion on acts of private and public nuisance. Torts law is particularly relevant to businesses as they need to be aware of the extent of their potential liabilities to workers, visitors to business premises, other businesses, and to the general public. This extends to ensuring that safe systems of work exist and appropriate insurance is maintained. Contrary to civil law, torts law imposes obligations on parties who wish to undertake duties freely and agree to be legally bound via contracts without, necessarily, prior agreement. The duty is to take reasonable care and not intentionally or negligently cause harm or damage.

Keywords: torts law, negligence, personal injury, nuisance, safe systems of work, appropriate insurance, civil law

Whilst the civil law places obligations on those parties who wish to undertake duties freely and agree to be legally bound via contracts, torts law imposes the obligation without, necessarily, prior agreement. The duty is to take reasonable care and not intentionally or negligently cause harm or damage. ‘Torts’ derives from the French word ‘wrong’ and is essentially a civil wrong that entitles the injured party to the remedy of compensation. This remedy has the aim of placing the victim back into the position they were (as far as money can) before the tort was committed.

Business Scenario 11

The straight boundary at Middleshire County Cricket Club's ground is 85 yards from the wicket. The fence between the ground and an adjoining road, 5 yards beyond the boundary, is 4 feet high. Cricket balls have been struck into the road over the fence on 19 occasions in the last 10 years.

Vihaan, a visiting player from the West Country, who has never played on the ground before, but who is renowned for his big hitting, strikes the ball into the road. The ball hits Mavis off her bike, causing her minor cuts and bruises. She lands on the recently sprayed grass at the roadside and contracts a serious skin infection as a result of contact with weed killer to which she is allergic.

Learning Outcomes

- Explain the meaning of the term 'tort' (11.1–11.4)
- Differentiate between liability in contract and liability in tort (11.4)
- Explain the three tests to establish liability in negligence (11.5–11.5.3.2)
- Explain the facts and the court's reasoning in *Donoghue v Stevenson* (11.5.1)
- Identify the defences to a negligence claim (11.6–11.6.4)
- Identify the remedies available in claims of tortious liability (11.7)
- Assess where a business or individual may commit an act of nuisance and available defences to such actions (11.8–11.8.2.3).

p. 270 11.1 Introduction

One of the most important torts is negligence (which may be commonly seen in instances of personal injury) and this tort is considered first in the chapter before acts of private and public nuisance are addressed.

11.2 Fault liability

The law imposes a duty to take reasonable care to not negligently or intentionally cause damage. Many claims of negligence involve fault liability: someone is at fault and this enables the injured party to seek compensation for the resultant loss/injury. As such, situations of damage that are determined 'acts of God' will generally not be compensatable as there is no party from which to claim. This is in contrast to liability in contract that is strict (e.g. the retailer is responsible for goods not being of a satisfactory quality despite the fact that, often, they would have no way of knowing this or have been personally responsible for the (lack of) quality).

Note also that in other situations relevant to this topic, tortious liability may be imposed in the absence of fault. Under the doctrine of vicarious liability, one person may be held liable for the torts of another (such as an employer being held liable for the torts of their employees, or the principal being liable for torts of their agent). Fault is also removed in claims under the Consumer Protection Act 1987 where the liability is strict.

11.3 Time limits

There exists a limitation period in which claims of negligence must be brought against the perpetrator of the tort (the **tortfeasor**). Under the Limitation Act 1980, s. 2, actions in tort must be brought within six years of the date giving rise to the right of action. Claims for personal injury, however, must be brought within three years of either the date on which the tort was committed, or from when the injury attributable to the tortfeasor became known (s. 11).

In the case of a death, where the deceased person's representatives wish to bring an action on their behalf, the claim must be brought within three years of the date of the death, or three years from the date on which they obtained this knowledge (ss. 11(5) and 12).

Protection is also afforded to minors (under the age of 18), and the time limits above do not apply until the claimant becomes 18. There is also protection to claimants who are suffering a mental disorder, as provided for in the Mental Capacity Act 2005, and who are incapable of managing their affairs. In such a situation the time limits do not apply.

11.4 The distinction between contractual and tortious liability

Tortious liability differs from contractual liability in that the obligations undertaken in contracts are entirely voluntary. No one can be forced into a contract against their will and consequently the parties have the ability to be aware of the extent of their liability, and the possible consequences in the event of breach. In contrast to this, tortious liability is imposed on persons and organizations (sometimes) without their knowledge or the awareness of the potential extent of this liability. The law sometimes requires compulsory insurance to protect against claims of liability in negligence or other torts (e.g. employers' liability and public liability), but it may be prudent for businesses to carry insurance for their property and possessions in the event of claims against them. Do remember that there may be several claims involving the same scenario, such as a breach of contract claim *and* a negligence action (e.g. in *Grant v Australian Knitting Mills*—see 9.2.1); and the scenario may involve a criminal action and a tort claim (such as an employee in a factory being injured through the use of dangerous and faulty equipment). Where the claimant has suffered a loss and injury, as in *Grant*, it is for the claimant to elect to pursue each element of their claim.

11.5 Negligence

The law requires that those who are deemed to owe others a **duty of care** act responsibly and take necessary precautions to avoid injury and loss to others. The remedy primarily provided by the law is a damages payment to put the injured party back in the position they were before the tort had taken place—this can prove very expensive for businesses. Fundamentally to those in business, knowledge of the law and of responsibilities enables positive steps to be made to minimize the risk of negligence claims. When reading through the cases and judgments that follow, consider whether you would have acted as the business did, and whether you would have considered that liability would be imposed by the courts.

A definition of negligence is the breach of a duty to take care, owed in law by the defendant to the claimant, causing the claimant damage. In order to establish a successful claim in negligence, three tests must be satisfied. Each of these will be discussed in turn (**Figure 11.1**).

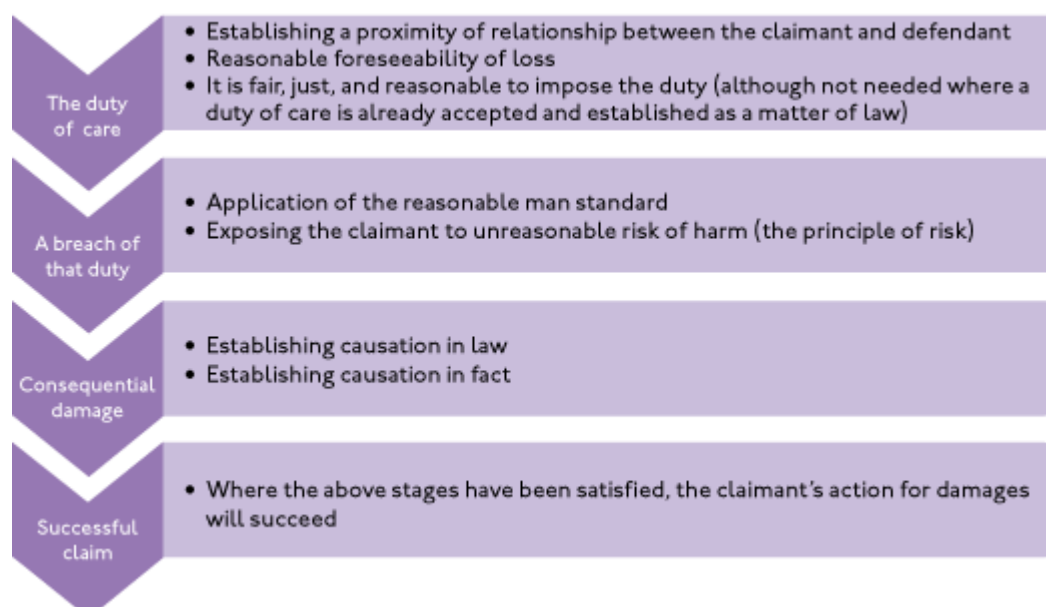


Figure 11.1 Negligence liability: an overview

p. 272 ↩

Consider

For Mavis to be successful in her claim she must establish that Vihaan (the cricketer) owes her a duty of care. In each sub-test mentioned in the following section, consider the facts of the case, its authority, and which of these are met in the case of Mavis or which authority may be distinguished.

11.5.1 The Duty of Care

Before proceeding to identify each of the ‘three tests’ necessary to establish a duty of care, it should be noted that these are separated, somewhat artificially, to demonstrate how they appear in the facts of the case and are identified by the courts. To establish liability in negligence, it must first be determined that the respondent owed the claimant a duty to take reasonable care.

11.5.1.1 Proximity of relationship

Here the claimant and defendant must have a closeness (proximity) of relationship.

Donoghue v Stevenson (1932)

Facts:

A friend and Mrs Donoghue visited a café in Paisley, Glasgow on 26 August 1928, where the friend purchased a bottle of ginger beer for Donoghue. The drink was served in a dark, stone, opaque bottle and, unknown to the purchaser, the retailer, or Donoghue, contained the remains of a snail. This only became apparent when the greater part of the contents of the bottle had been consumed and the remainder was poured into a glass. At the sight of the snail, Donoghue claimed she suffered from shock and severe gastro-enteritis. On the basis of this illness Donoghue brought her action for damages against the manufacturer of the ginger beer (David Stevenson). Donoghue contended that the claim should be made against the manufacturer as the ginger beer was bottled by Stevenson, labelled by him, and he sealed the bottle with a metal cap.

A key element in establishing negligence is the proximity between the parties, which led Lord Atkin to state: ‘You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be —persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.’

Authority for:

In establishing that the defendant owes the claimant a duty to take care, there must be proximity of relationship between them. This is identified through Lord Atkin’s ‘neighbour principle’.

p. 273 *Donoghue v Stevenson* is the seminal case in the establishment of the tort of negligence. The House of Lords determined that the claimant must establish that the defendant owes the claimant a duty of care, and in establishing this there must be proximity between the parties. ‘Proximity’ is the closeness of relationship between the parties that creates the duty to take care. Here, the manufacturer of a product was held liable for

damage sustained by anyone who could have used, and consumed, its product. The case established that proximity is not restricted to a physical 'closeness' but can be extended to anyone who may reasonably be seen as being likely to be affected by the defendant's actions.

Consider

Mavis has been struck by the cricket ball whilst standing outside of her house. It would seem that there is a proximity of relationship between her and Vihaan. The next sub-test is of reasonable foreseeability. Should a cricketer have reasonably foreseen that by striking the ball in the manner he did, it may leave the ground and cause damage?

11.5.1.2 Reasonable foreseeability of loss

Having established the proximity between the parties according to the authority in *Donoghue*, the next stage in demonstrating the duty of care is whether the defendant's action could reasonably have been foreseen to cause the loss or damage.

Bourhill v Young (1943)

Facts:

Mr Young had been riding his motorbike and collided with a motorcar on 11 October 1938, in which accident he died. Mrs Bourhill (a 'pregnant fishwife') was a passenger on a tram. At the stop she alighted and was in the process of removing her fish-basket when the accident occurred. It was discovered that Young had been travelling at an excessive speed and was thrown onto the street as a result of the collision, where he died. Bourhill did not witness the crash (her view being obstructed by the tram), but became aware of it on hearing the noise of the impact (she was some 45–50 feet away). Young's body had been removed from the scene, and when Bourhill approached the point of the crash she observed the blood left on the roadway. In her evidence she claimed to suffer damage to her back and 'very severe shock to her nervous system', although she acknowledged that she did not fear for her own personal safety. The House of Lords held that a motorcyclist owed a duty of care to other road users and those he could reasonably foresee might be injured by his failure to take reasonable care, but Bourhill did not fall into this category as she was not in any area of potential danger. Young did not owe her a duty of care as it was not foreseeable that she may be injured in the incident, and there was a lack of proximity between the parties.

Authority for:

For a duty of care to be established, the defendant must have reasonably foreseen that their actions may cause injury or loss to the claimant.

p. 274 The case demonstrated how the courts will deal with the issue of proximity of relationship and the link with foreseeability. As the courts find one single definition of ‘proximity’ ← unrealistic (as noted by the Lords in *Caparo*) the examples provided in the cases presented in this chapter enable common features to be drawn and considered for application in similar scenarios.

Consider

Once a cricketer strikes a ball and it leaves the confines of the venue where they are playing, do they have any control over it? It is common sense that the ball will land beyond the cricket ground. Given that the cricketer and the owner of the ground have little control over the movement of pedestrians and vehicles, and there is only five yards between the fence and the road, the ball will strike something when it lands—perhaps just the ground, but it is reasonable that it could be a person or property.

11.5.1.3 Fair, just, and reasonable

The final element in the duty of care test was extended from a case involving economic loss. *Caparo v Dickman* established the threefold test of proximity; foreseeability; and whether it was fair, just, and reasonable to impose a duty of care (albeit that this case was largely decided on its facts rather than a ‘true’ application of legal principle).

Caparo Industries Plc v Dickman and Others (1990)**Facts:**

Caparo had accomplished a takeover of Fidelity Plc and it began an action against the directors of that company (Steven and Robert Dickman) claiming a fraudulent misrepresentation, and an action against its auditors (Touche Ross & Co.) claiming it was negligent in carrying out an audit of the company. The basis of Caparo’s claim was that it began purchasing shares in Fidelity a few days before the annual accounts had been published and made available to the shareholders. In reliance on these accounts, it made further purchases of the shares in order to take over the company, and claimed the auditors owed a duty of care to the shareholders and any potential investors. The audit had projected Fidelity’s profits unrealistically high, which Fidelity should have realized; and the share price had fallen significantly, causing substantial financial loss to Caparo. The House of Lords had to consider

whether the auditors did in fact owe Caparo a duty of care. The Lords held that this case involved a negligent misstatement, but protection in such cases was limited to those who had obtained specific advice and used it for a reason made known to the provider of the information. The audit was a requirement of the Companies Act 1985 and therefore did not impose a duty of care on the auditors to the shareholders or potential investors. Consequently, Caparo's claim failed as there was a lack of proximity between the auditors and Caparo.

Authority for:

The imposition of liability for negligence should only take place where it is 'just and reasonable' to do so. Importantly, as this was a novel case, the law should develop liability in such cases incrementally and restrict/limit the imposition to those whom a duty is owed.

p. 275 ← The issue of proximity has been addressed in *Donoghue*; foreseeability has been demonstrated in *Caparo* as a similar test to that used in contract of whether it should have been foreseeable to the defendant what the consequences of their action would be and the possible results; and 'fair, just, and reasonable' is an argument based on public policy. It enables the court the discretion to consider the wider implications of establishing liability and has been referred to as the 'floodgates' argument. If establishing liability would 'open the floodgates' to numerous claims, then the court may decide that the liability should not be imposed. The courts also use this requirement to protect potential defendants such as public bodies (the emergency services, local authorities providing education services, and so on) from excessive claims and a diminution of public funds (compare the judgments in *John Munroe (Acrylics) Ltd v London Fire Brigade & Civil Defence Authority*) and *Kent v Griffiths and Others*).

The House of Lords later held in *Marc Rich & Co. v Bishop Rock Marine* that the requirement of establishing this 'threefold' test would be applicable to novel claims (such as in *Caparo*). However, where an accepted duty that had been previously held to exist (such as the duty imposed on drivers to other road users from carelessly causing injury), it was unnecessary to subject these claims to the *Caparo* threefold test when the question of duty has already been determined.

Darnley v Croydon Health Services NHS Trust (2018)

Facts:

Mr Darnley, following an assault, attended his local Accident and Emergency department complaining of a worsening headache after having been struck on the head. Darnley and his friend both informed the receptionist of his need for immediate medical attention but they were told that Darnley would have to wait for four to five hours to be seen by a doctor. After about 20 minutes, and feeling sufficiently unwell to stay in the department, Darnley went home. He did not inform anyone in the hospital that he was leaving. Darnley was taken to his mother's house and later that same day, an ambulance was called as his condition had worsened. At hospital, Darnley was diagnosed as having a

large extradural haematoma, he was operated on, but suffered permanent brain damage. Negligence was argued against the receptionist and the hospital generally for failing to properly assess a patient as a high priority need. The judge at the first trial, as agreed with by the Supreme Court, found there was a duty of care on the receptionist to guard patients against harm as occurred here and to avoid this they should be expected to provide accurate information (about the waiting time to be seen by a doctor). Had Darnley been given accurate information, he would not have left the hospital without telling anyone, and even if he did quickly become unwell whilst waiting to be examined, he would have been treated rapidly and would, likely, have made a full recovery.

Authority for:

The case established that, in relation to casualty departments, the duty of care is already accepted and established. The *Caparo* test of fair, just, and reasonable has no place in these deliberations. Further, all staff in hospitals (medical and non-medical) have the duty. Issues surrounding their training and expected knowledge are relevant for consideration as to whether a breach has been committed, but are not needed when establishing whether a duty of care exists.

p. 276 ↩ Questions relating to the development of the fair, just and reasonable test have been considered recently by the Supreme Court in *Steel v NRAM Ltd* and *Robinson v Chief Constable of the West Yorkshire Police*. In *Steel v NRAM Ltd*, the Supreme Court explained how the rules established in *Caparo* are out of date and have probably been misapplied for years in respect of negligent misstatements and economic loss (see **Chapter 12**). In relation to *Robinson*, the courts have typically not wanted to impose a duty of care on the police as a matter of public policy (the floodgates arguments) but in some cases it is necessary to impose a duty:

***Robinson v Chief Constable of the West Yorkshire Police* [2018]**

Facts:

In the course of arresting a suspected drug dealer, and the ensuing scuffle during this event, an elderly woman was knocked to the ground and suffered injuries. She brought a claim against the police for recovery of damages due to these injuries.

Authority for:

The Supreme Court, in allowing the claim for damages to proceed against the police, wanted to stop the formulaic approach that had been established in *Caparo v Dickman*. Rather, the approach to be taken was to identify novel situations where they exist, compare any precedents which had been established, and thereby allow the law to develop incrementally. Whether a duty is fair, just, and reasonable requires a balancing between the reasons for and against the imposition of liability. Thus, the existing case law should be applied in 'standard' cases, whilst novel cases should be determined on their own facts with reference to the full range of precedents in the area.

11.5.2 Breach of the Duty

Having established that the defendant owed the claimant a duty of care, the next step in determining liability is to establish the defendant's breach of this duty. Essentially, this means that the defendant fell below the standard required by law. The tests outlined in the following paragraphs, like the tests to prove the existence of a duty of care, are guidelines that have been developed through the courts, rather than an attempt to establish a single set of criteria that will or will not establish a breach of the defendant's duty of care. They will often overlap and each draws on elements of the other, but they are used to demonstrate the issues the courts will consider in attributing liability.

Consider

If we believe the cricketer owes Mavis a duty of care, the next stage is to determine if he has acted in breach. Think about the nature of the cricket ground, the distance of the boundary fence, its height, whether it is well maintained and so on. What would be the standard expected of the reasonable cricketer and the reasonable ground owner?

p. 277 11.5.2.1 The 'reasonable man' standard

When determining if a breach of the duty of care has occurred, it is important to note that the courts will apply the 'reasonable man' test objectively. This means that whilst the defendant must take into account the shortcomings of others (e.g. vulnerable people such as children), there is no allowance to be made for lack of experience/intelligence.

Nettleship v Weston (1971)

Facts:

Mr Nettleship gave driving lessons to Miss Weston, who was a careful learner. However, on the third lesson Weston failed to straighten following a left turn and drove into a street lamp, which led to Nettleship breaking his kneecap. Weston was convicted of driving without due care and attention, and Nettleship brought an action for negligence due to his injuries.

Authority for:

The Court of Appeal held that the fact that the driver was a learner was no defence to the negligence action; the test applied to a learner was the same, objective test, as applied to a careful driver.

Breach of the defendant's duty of care will often follow their failure under the 'reasonable man' test. In *Blyth v Birmingham Waterworks Co.*, Alderson B commented that 'Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do.' There is an obligation to display appropriate (professional) levels of skill.

Bolam v Friern Hospital Management Committee (1957)

Facts:

Mr Bolam sustained fractures of the acetabula during the course of electroconvulsive therapy treatment administered whilst he was a voluntary patient at the defendants' hospital. Bolam initiated a damages action against the hospital alleging that the defendants were negligent in failing to administer any relaxant drug prior to the passing of the current through his brain, and they had failed to warn him of the risks involved in the treatment. The hospital produced expert witnesses who each agreed that there was a firm body of medical opinion opposed to the use of relaxant drugs. Further, it was the practice of the defendants' doctors not to warn their patients of the risks of the treatment (which they believed to be small) unless asked.

Authority for:

The High Court held that even if a warning as to the result of the treatment was provided, this would not have affected the outcome of the case, and the hospital had complied with professional standards. Therefore, the claim failed and the hospital was not negligent.

p. 278 **11.5.2.2 Actual breach committed**

The claimant, in asserting that the defendant has breached their duty of care, will, as a general rule, have to demonstrate to the court's satisfaction that the defendant committed a breach. This places the burden of proof on the claimant.

1. *The principle of exposing the claimant to unreasonable risk of harm:*

The nature of the 'unreasonableness' of the risk of harm is demonstrated in the following cases.

Bolton v Stone (1951)

Facts:

A woman, standing outside her house, was struck by a cricket ball hit from an adjoining cricket club. She sought to recover damages for her injuries but the House of Lords refused.

Authority for:

The club had reasonably minimized the risk of harm through erecting a fence some 17 feet high at the perimeter of the ground. The fact that balls had only ever been struck over the fence six times in 28 years led to the judgment that the claimant had not been exposed to an unreasonable risk of harm.

The case reflected on the main elements to consider when assessing a breach of duty of care. Those are:

- the 'reasonable man' standard;
- the principle of risk (exposure to unreasonable risk of harm);
- the social utility and desirability of the defendant's actions;
- the cost/practicality of the measures to reduce the risk of harm.

The failure of Miss Stone to establish a breach of duty that prevented her successful claim can be compared with the case of *Miller v Jackson*.

Miller v Jackson (1977)**Facts:**

The case involved a cricket ground (the Lintz Cricket Club) in County Durham, whose Chairman, Mr Jackson, was sued for negligence (and another tort action under nuisance) by Mr and Mrs Miller. Mr Miller had bought his house in the summer of 1972, and the garden was only 102 feet from the centre of the cricket ground. Miller claimed that cricket balls were struck from the club into his garden, which had caused damage to his property, and were so intrusive that he and his wife spent time away from the property during matches, and would not enter the garden for fear of being hit by stray cricket balls. This was despite a six-foot concrete wall at the end of the garden, and the cricket ground erecting a fence of 14 feet 9 inches (the fence could not be made higher due to stability problems). In 1975, six balls went over the fence into the neighbouring houses; in 1976 nine balls went over the fence.

Authority for:

In the first case the court held that there had been a breach of the cricket club's duty to take reasonable care.

p. 279

Consider

The facts of the cases above allow the breach of the reasonable man standard to be determined in accordance with appropriate authority. The fence in the question is only five feet high and balls are leaving the ground approximately twice a year. Unless there is a satisfactory reason why the owners of the ground cannot raise its height they will have failed to do something the reasonable man would have. Further, even if a satisfactory reason is present, the owners of the ground would be expected to inform the cricketers to modify their play to minimize the risk of balls passing the boundary fence.

The more likely it would be that the defendant's action would lead to injury or loss, the more likely it would be that they had breached their duty to take reasonable care.

Brett v University of Reading (2007)

Facts:

Mr Brett died as the result of contracting mesothelioma attributed from working with asbestos. A claim was brought against one of his former employers, as during his employment as a Clerk of Works, he oversaw the demolition of the old library, which it was considered in evidence, probably caused asbestos to be released, despite the university hiring competent contractors to undertake the works. The claimant could not demonstrate that the university was negligent in the hiring of the contractors or that the university had breached any statutory duty.

Authority for:

The Court of Appeal held that it could not be proved that this employer, rather than others, had led to Brett contracting the disease, and as it had taken reasonable precautions to ensure his safety, the claim for damages had to fail.

Risk is accepted as part of most day-to-day activities (such as merely getting up in the morning and travelling to work), but it is in the unreasonable exposure to risk that will establish a potential breach.

Paris v Stepney BC (1951)

Facts:

The Council employed Mr Paris to undertake inspection and repairs of its vehicles. Paris had already lost an eye and was working on a job that was not considered by the employer to be sufficiently serious to warrant the use of safety goggles. During this job, when Paris hit a bolt with a hammer a piece of metal struck his good eye and he was blinded as a result.

Authority for:

The House of Lords held that due to the potential for injury, the employer did owe Paris a duty of care to provide the correct safety equipment, and due to this failure, he was entitled to succeed in damages for his injury.

2. *The social utility and desirability of the defendant's actions:* Of course when considering the risk the claimant was exposed to, the courts have to perform a balancing act between this risk and any benefit or valuable objective that the defendant was attempting to achieve. If an action is desirable and of social importance, the risks that correspond with the actions may be acceptable, whereas in other situations it would have led to unreasonable levels of risk (and damages in negligence).

Watt v Hertfordshire CC (1954)

Facts:

A fireman was injured by a jack that was not correctly secured in the lorry that was used to transport it to the scene of an emergency. The lorry had not been designed to carry such a large piece of equipment. However, the jack was required as it was used to save the life of a woman who had been trapped following an incident with a motor vehicle.

Authority for:

Per Denning LJ: 'It is well settled that in measuring due care you must balance the risk against the measures necessary to eliminate the risk. To that proposition there ought to be added this: you must balance the risk against the end to be achieved.' Consequently, the Court of Appeal held that there was no finding of liability on the Council because of the wider implications of the risk undertaken.

3. *The cost and practicality of measures to minimize the risk of harm:* Likewise, in point 2 above, the courts will assess the risk faced by the claimant in terms of the defendant's actions and the costs involved in attempting to minimize or remove these altogether.

Latimer v AEC Ltd (1953)

Facts:

A factory had suffered flooding following a period of heavy rain with the consequent mixing of the water with oil that was present on the factory's floor. In response, the owners of the factory (AEC) spread sawdust on the floor. However, Mr Latimer slipped on a patch of oil that had not been covered and sustained injury. Latimer claimed damages under negligence for his injuries but the claim failed as AEC had taken all reasonable precautions to minimize the risk of injury. Latimer had argued that the floor was unsafe and AEC should have closed the factory down until it could be made safe.

Authority for:

The House of Lords felt the argument for the closure of the factory would have been disproportionate to the inherent risk.

p. 281

Consider

The balancing for the court will be, on the one hand, the cricket ground provides a social function, and this allows young people to take part in the sport and to bring the community together. However, the costs of raising the fence may not be sufficiently significant nor impractical to warrant the owner adapting the fence to reduce the risk. Therefore the court is likely to hold that the duty has been breached as the cricketer and owner are aware of the risks and have not taken appropriate, reasonable, measures to minimize these.

Situations also exist where the most likely explanation for an accident/injury to the claimant is that the defendant must have been negligent. Here, the burden of proof is reversed and the onus is on the defendant to demonstrate that they were not negligent. This is known as *res ipsa loquitur* ('the facts speak for themselves'), and it will apply where the event that had caused the claimant loss was within the control of the defendant; and the event would not have occurred had the defendant exercised proper care and attention.

Drake v Harbour (2008)

Facts:

The claimant sought damages for the alleged negligent rewiring of her property that had led to fire damage. Albeit that the claimant did not have positive or scientific proof that the poor rewiring had led to the fire, the Court of Appeal held that what was required was a matter of judgement in each case having considered all of the available evidence. The evidence provided by the defendant, on the balance of probabilities, regarding alternative causes of the fire were improbable and where, as in this case, it was demonstrated that the defendant was negligent and the loss sustained was consistent with such negligence, it was not necessary for the claimant to positively prove the exact and technical reason.

Authority for:

The court is entitled to infer the loss as caused by the proven negligence.

p. 282 A private duty to take reasonable care is not derived from a wider, statutory duty. ←

Gorringe v Calderdale MBC (2004)

Facts:

Calderdale Council had a statutory obligation to maintain the roads and ensure safety under the Highways Act 1980. The claimant in the case had caused an accident whilst driving along a country road by driving too fast towards the brow of a hill and, when she could not navigate the turn, colliding with a bus, as a consequence suffering severe injuries. The claimant's argument was that the Council had the responsibility for protecting the users of the highway and in this respect, it should have highlighted the danger of the particular road through signage such as marking the word 'slow' on the road before the hill. As such, the claimant contended that this public duty created a private duty to the users of the road, enabling her claim to succeed.

Authority for:

The court held that this did not impose such a duty on a local authority, as a private duty could not in this sense 'emerge' from a wider public duty. The Council had not taken any positive action in the accident and hence the claim failed.

The Compensation Act 2006 has had the effect of restraining the 'compensation culture' that was alleged to have crept into the English legal system. The courts would expect claimants to have been vigilant in protecting themselves and to appreciate obvious risks. This is not to say that it removes the legal obligations imposed on the defendant, but it has, particularly since the Compensation Act 2006, attempted to introduce a balance between the ability of claimants to seek damages for losses, and protection of those involved in providing desirable activities.

11.5.3 Consequential Damage

An essential component for a successful negligence claim is that the claimant has suffered loss, this loss must be of a type recognized by the law, and there must be a causal link between the breach and the loss suffered (consequential loss). For example, where an out-of-town shopping mall is built, the effects of this may be to cause economic damage to shops in the local town (as occurred when the Meadowhall development was built in Sheffield). However, despite this damage to their business through lost profits, the law does not allow the injured shop owners to bring a claim for damages against the developer of the shopping mall/the shopkeepers for any financial losses. Other torts exist that may enable a claim where the claimant has not suffered any damage. In claims of trespass, for example, the court will often award nominal damages even where no losses have been sustained.

11.5.3.1 Causation in fact

The court will examine the facts of the case and ascertain whether the defendant had caused or contributed to the claimant's injury or suffering. A test developed by the Court of Appeal in the case of *Cork v Kirby Maclean* is the 'but for' test. This test was defined in the following way: 'If the damage would not have happened but for a particular fault, then that fault is the cause of the damage—if it would have happened just the same, fault or

p. 283 not fault, the fault is not the cause of damage.' ↩

Barnett v Chelsea and Kensington Hospital Management Committee (1969)

Facts:

A watchman sought medical attention following a bout of vomiting at work. He attended hospital where the on-duty nurse consulted a doctor, who advised the watchman to go home and seek advice from his own doctor the following morning if his symptoms had not improved. However, later in the day the watchman died, which was attributed to arsenic poisoning. A claim was brought against the hospital for the negligence of the doctor in failing to examine the watchman, but this failed. The watchman had such a high concentration of arsenic in his system that he would have died regardless of any intervention, such as administering an antidote, even if his condition had been diagnosed in a doctor's examination.

Authority for:

Despite the existence of a duty to take care, and this had been breached, as the damage sustained was not a consequence of the breach, the claim failed.

Consider

‘But for’ Vihaan striking the ball outside of the ground, Mavis would not have been hit and injured. There is causation in fact.

11.5.3.2 Causation in law

The defendant is not liable for every consequence of their wrong. If there is some intervening act that causes the damage to the claimant then the (first) defendant will not be held responsible in negligence. If the damage sustained was too remote, then it would be unreasonable to hold the defendant responsible.

- *Remoteness of damage*: Remoteness of damage involves the test of reasonable foreseeability. If the reasonable man could not foresee the consequences of the action, then the claim will be defeated.

Overseas Tankships (UK) Ltd v Morts Dock & Engineering Co. Ltd (The Wagon Mound) (1961)

Facts:

The defendants were the owners of a ship named the *Wagon Mound* and had been negligent in allowing oil to spill from the ship into Sydney Harbour. There was welding taking place in the Harbour at the time, and the oil had spread into the wharf owned by the claimant. The claimants stopped the welding, due to the potential risk of a fire, and sought clarification as to the danger, but were informed it was safe to continue their welding activities. Floating in the Harbour at the time was refuse, including cotton, onto which the molten metal from the welding fell and which caught fire causing the oil on the water to ignite. This fire quickly spread, resulting in substantial damage to the claimant's property, and led to the action against the owners of the *Wagon Mound*.

Authority for:

The Privy Council held that the defendants were only liable for the oil that had spilled into the Harbour and not the fire that had been caused. It could not be reasonably foreseen that the oil would have caught fire due to its high ignition point (compare this decision with *Hughes v Lord Advocate*).

When the claim involves the negligence of the tortfeasor, the causal link is vital to impose liability. This link (or chain of events) may be broken by a new act (a *novus actus interveniens*). If a new act, independent of the defendant's action, occurs and is sufficiently independent, it may stop the imposition of liability on the (first) defendant. If, however, the action occurs as a consequence of the initial breach by the defendant, and the actionable event was foreseeable, the defendant will still be liable. Foreseeability can be seen in the following case.

Lamb v Camden London BC (1981)

Facts:

The Council had caused damage to the water main that had led to Lamb's house being flooded. The house was uninhabitable and was vacated by Lamb whilst remedial work was carried out. When the house was left empty, squatters moved in and caused damage. Lamb brought an action against the Council for its negligence that resulted in this increased damage.

Authority for:

The Court of Appeal held that the Council was not liable as it was not foreseeable that the damage would have occurred, and the Council was under no obligation to secure the property whilst the repairs were being undertaken.

Attempts to mitigate losses will not, in most cases, result in the chain of causation being broken.

Corr v IBC Vehicles Ltd (2006)

Facts:

The claimant was the wife of a man who had committed suicide following injuries sustained during an accident at work. The employer had agreed that it had breached its duty of care (and statutory duty) towards the employee, and the employee had suffered post-traumatic stress and depression, leading to his suicide six years after the accident.

Authority for:

The Court of Appeal held that the depression suffered by the employee was foreseeable, and that it was further foreseeable that severe depression may result in suicide. Therefore, the claim was successful as the employee's suicide did not break the chain of causation between the defendant's negligence and the consequences of the suicide. In 2008, the House of Lords subsequently upheld this decision.

- *The eggshell skull rule*: There exists an obligation to take appropriate care to avoid causing damage that may lead to a negligence claim. However, there is also an obligation to ‘take your victim as you find them’. This principle is known as the ‘eggshell skull’ rule and means that if the victim has a pre-existing condition that is exacerbated by the act of negligence, insofar as the damage is one which the law recognizes, there is no defence to claim that another person would not have been so badly injured. This can be seen in the case of *Smith v Leech Brain & Co.*

Smith v Leech Brain & Co. (1962)

Facts:

A workman employed by Leech Brain had been hit on his lip by molten metal whilst welding work was taking place. He suffered a relatively minor burn, which was expected and clearly foreseeable. However, he had a pre-cancerous skin condition. This was not known to anyone but was triggered by the burn he received, and he died three years later of the cancer. Smith’s widow claimed against the employer.

Authority for:

Even though the burn would not have caused the death of most victims, the eggshell skull rule was invoked and consequently Leech Brain were held liable in negligence.

Consider

Mavis has a condition which would be unknown to the tortfeasor. However, the eggshell skull rule means that they will be liable for her skin condition requiring treatment (which presumably would not have been an issue for someone without the allergy). Vihaan struck the ball which hit Mavis, the owners of the ground did not incorporate a sufficiently high fence to prevent the balls from leaving the ground and without these actions Mavis would not have fallen from her bike and onto the treated grass. This is why the tortfeasor must take their victim as they find them.

The concept has also been applied to cases of psychiatric injuries. If the reasonable man would have suffered nervous shock, and the claimant’s disposition exacerbates the injury they have actually suffered, then they will be able to claim for this greater injury, and not be reduced to the injury that would have been suffered by the reasonable man. Lane J in *Malcolm v Broadhurst* described it as the ‘eggshell personality’.

11.6 Defences to a claim of negligence

In the event of a claim of negligence being made against a business, the business may wish to mount a defence. Defences to negligence claims may be complete defences whereby the business asserts it has no liability at all, or they may be partial defences where the business accepts some liability for what occurred, but asserts that the claimant was also partially responsible (the defendant will still have to pay a percentage of the award). Avoiding negligence actions in the first instance appears to be the best solution.

Consider

Imagine an extension to the question presented at the start of the chapter. If a cricketer seeing the danger had yelled a warning, but Mavis, wearing her stereo headphones, had not heard, would this affect your answer as to liability?

In order to avoid the legal responsibility that a successful negligence claim may provide, the defendant may attempt to raise a defence, the choice of which depends on the nature of the action. The most common forms of defence are:

1. illegality;
2. consent (*volenti non fit injuria*: no actionable injury/no injury is done to a consenting party);
3. contributory negligence;
4. necessity.

11.6.1 Illegality

Where the claimant has committed an illegal act they may be prevented from raising a negligence action (this is specific to the circumstances of the case).

Ashton v Turner (1980)

Facts:

The claimant was unsuccessful in seeking damages against the co-participant who drove the getaway car following a burglary. The car crashed and the claimant was seriously injured.

Authority for:

It was held that public policy would not allow the perpetrator of a crime to claim compensation against a co-participant for any injuries sustained in the course of the criminal activities.

p. 287 ← However, illegality is a difficult defence to successfully rely upon, especially when involving companies rather than individuals.

Moore Stephens (a firm) v Stone & Rolls Ltd (in liquidation) (2009)**Facts:**

A company's liquidator alleged that its auditors had been negligent in failing to identify that the company had been used to perpetrate a fraud. The claim failed, and was struck out by the court, as it was being made by the company itself (through the liquidator) and was relying on its own illegal act when seeking damages. This was, in part at least, because the fraudulent director was the 'controlling mind and will' of the company and hence it would be unfair to allow a claim to succeed where a fraudster would benefit by claiming against auditors who failed to detect their own deception.

Authority for:

The House of Lords, in a split 3 to 2 majority, agreed with the Court of Appeal's decision to strike out a claim for damages and accepted an illegality defence.

11.6.2 Consent

Consent is a complete defence to an action in tort but is closely linked with the partial defence of contributory negligence. The defence is available where there has been an express agreement to the particular risk of damage or it may be implied from the conduct of the claimant due to the actions of volunteering (such as acting as a rescuer) or by accepting entering into a situation involving risk (*Morris v Murray*). Examples of express and implied consent may be seen where a patient is undergoing surgery and they sign a consent form. This express agreement allows the surgery team to perform the procedure without committing the tort of trespass to the person.

Implied consent may be demonstrated in the context of sporting pursuits such as playing contact sports like rugby, or photographing sporting events in close proximity with the participants. However, merely participating in a regulated, physical sport such as rugby does not necessarily mean that the participant agrees to suffer injury and not seek a remedy.

Condon v Basi (1985)

Facts:

The claimant played football for a lower league club and during a match suffered a broken leg in the course of a tackle with an opponent. He claimed damages as a result of this injury.

Authority for:

The defendant player was in breach of his duty due to the recklessness of the tackle. Whilst a physical contact sport naturally involves the participants accepting a risk of injury, this does not extend to risks of injury which occur outside of the rules of the game. The court continued that the standard of care required of the participants is objective, but the objectivity will depend upon the circumstances. Thus, a higher degree of care is required of a player in the higher league divisions than those in lower league matches.

p. 288 ← Recklessness is a test also applied in horseplay with friends.

Blake v Galloway (2004)

Facts:

Horseplay between four teenage friends led to the claimant suffering injury when a piece of bark struck his eye when the friends were throwing twigs at one another.

Authority for:

The Court of Appeal held that for the defendant to breach their duty of care in unregulated horseplay the defendant's conduct must amount to recklessness or sufficient carelessness or error of judgement.

The defence of consent is not available simply because a party (typically, in a business context, an employee) is aware of the risk of injury at the workplace, and continues to carry out their duties.

Smith v Baker & Sons (1891)

Facts:

The claimant was injured whilst at work. Next to his work space, other workers were engaged with placing stones into a crane which happened to swing above the head of the claimant. During the course of this activity a stone fell from the crane and struck the claimant on the head, causing him injury. The employers attempted to avoid liability by claiming *volenti*—the claimant knew the workplace was dangerous and he continued his work regardless.

Authority for:

The House of Lords held that whilst the claimant may have been aware of the danger, this did not mean he consented to the employer's lack of care for his safety. The claimant was entitled to recover damages.

The courts will not imply consent in such circumstances but will require an outward sign of consent in relation to the inherent risk. The defence is also unlikely to be successful in situations where the claimant has taken action to prevent harm or perform a rescue and has been injured in the process, particularly when this involves some psychiatric injury.

Chadwick v BRB (1967)

Facts:

Mr Chadwick was at the scene of the Lewisham train disaster of 1967 and attempted to provide care to the victims. He suffered a psychiatric injury (commonly referred to as nervous shock) and this, claimed his widow, eventually led to his own death.

Authority for:

The claim for damages succeeded. The court considered that where a rescuer is involved in the immediate aftermath of a particularly upsetting incident, it may be reasonably foreseeable that the rescuer will suffer some form of psychiatric injury.

The defence requires the claimant to have acted reasonably in the circumstances.

Haynes v Harwood (1935)

Facts:

The defendant had left his horse-drawn vehicle untethered in a crowded street. The horses bolted after a child threw a stone at them and in order to protect pedestrians on the street, an off-duty police officer attempted to stop the horses. In so doing he was injured and attempted to recover damages.

Authority for:

The horses were a source of danger and the owner had breached his duty of care by leaving them unattended on a busy street. It was reasonably foreseeable that a loose horse in an area with members of the public could cause injury. Further, it was also reasonable to expect a police officer to protect the public by intervening (therefore a *volenti* defence was unavailable) and he may get injured as a result.

Volenti may be a defence in employment situations where a deliberate act has been undertaken against the express orders of the employer.

ICI v Shatwell (1965)

Facts:

The claimant and a colleague, qualified shot-firers, made a test of an electrical circuit for firing explosives without taking the appropriate cover. They were injured and a claim was made for damages.

Authority for:

The House of Lords held that *volenti* enabled a complete defence by the employer, on both vicarious liability by one claimant and breach of a statutory duty by the other. The individuals had agreed to take this action knowing the danger and the action was contrary to the employer's instructions and statutory regulations. Therefore the claim had to fail.

11.6.3 Contributory Negligence

Section 1(1) of the Law Reform (Contributory Negligence) Act 1945 provides:

p. 290

Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage ↵ shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage.

Contributory negligence is a partial defence to a claim where injury has been caused and the claimant seeks damages. It is not only applicable to claims of negligence but is applicable where there is 'fault' (with the exception to the torts of conversion and deceit). Contributory negligence is only applicable where the claimant was (at least in some part) responsible for their damage. A most common example of the defence of contributory negligence is where a person has been involved in an accident whilst driving, and they were not wearing a seat belt, or had failed to secure a crash helmet whilst riding a motorcycle (in *Capps v Miller* the claimant's damages were reduced by 10 per cent by the Court of Appeal). In the event that the courts hold the damage was the other driver's fault, the injured party who has suffered substantial injury, when they would not have sustained such a level of injury had they been wearing a seat belt, will have contributed to their own injury. This provides the court with an option to determine at what level of contribution the claimant was responsible, and can reduce any damages awarded. Guidance was provided in *Froom v Butcher*. Where injuries would have been altogether prevented by wearing the seat belt, the damages should be reduced by 25 per cent. Where the injuries sustained would have been 'a good deal less severe' the reduction should be 15 per cent.

In contributory negligence, the claimant is referred to as having 'contributed to their own misfortune' and if they have been at fault in any activities that have led to their injury, then the court will reflect this in the damages awarded.

Jackson v Murray and Another (2015)

Facts:

The Supreme Court had to consider the contribution of a 13-year old schoolgirl who was hit by a speeding motorist. The judge at first instance considered that the driver had demonstrated a lack of regard for the possibility of the danger of school children crossing his path when they alighted from a school bus. However, the judge considered the principal cause of the accident was the girl's recklessness of attempting to cross the road in the manner she did and held her 90 per cent responsible. At appeal, this contribution was reduced to 70 per cent due to her age and the consequent lack of experience she would have as to the danger, and the court's failure to fully assess the actions of the driver. The girl appealed this decision to the Supreme Court arguing there should be no imposition of contributory negligence. Whilst the court rejected the submission, on a majority decision, the girl's contribution was reduced to 50 per cent as the judge at first instance had failed to fully explain the reasoning for the apportionment of fault and that the driver must have been at least equally at fault as the girl.

Authority for:

The significance of the case lies in the different views on the facts of the case by the appeal courts. It is generally thought that appeal courts do not interfere with the court at first instance's assessment of the facts as it has the benefit of examination of all the facts and the witnesses. However, here appeal courts were willing to arrive at different conclusions ← than the first court, and also to reduce the victim's contribution to the damage sustained on two occasions. Perhaps, in similar circumstances, parties may be inclined to appeal future cases where they feel a decision is unjust and gamble on the prospect of an appeal court challenging the factual decision-making of the court at first instance.

p. 291

Consider

Mavis was wearing her stereo headphones and therefore limited her capacity to hear a warning call about the imminent danger of being struck by the ball. As such, the court may reduce the compensation awarded to her to take into account her contribution to her own misfortune.

11.6.4 Necessity

A defence may be available to an action for negligence where the tortfeasor had acted in a way so as to prevent a greater harm occurring. To be successful the defendant must demonstrate that there was imminent danger to a person or to property and the actions taken were reasonable in the circumstances. These are subjective tests that will be assessed by the court.

Esso Petroleum Co. Ltd v Southport Corporation (1955)**Facts:**

The defendant's oil tanker had run aground due to its heavy load, mechanical failures, and the weather conditions. The person in charge of the vessel discharged 400 tonnes of oil in order to free the tanker. This oil caused damage to the claimant's land and a lake which had to be closed until it had been cleaned—at substantial cost to the claimant.

Authority for:

The defendant argued the discharge of the oil was for reasons of necessity. Had the vessel not been moved, the rough seas could have driven it into the coastline wall. The defence was accepted, however, necessity cannot succeed as a defence where the situation leading to the emergency was caused by the defendant.

11.7 Remedies

The remedies that may be awarded for successful claims of tortious conduct include damages and injunctions. The aim of damages is to place the injured party, as far as money can, in the position they were before the tort was committed (i.e. compensatory). Damages for personal injury suffered may incorporate any direct losses
 p. 292 incurred such as loss of earnings, medical expenses, and travel expenses (such as not being able to drive and
 ↵ having to make alternative travel arrangements). Further losses that may be compensatable include damages for pain and suffering, and loss of amenity. These damages are not subject to taxation. Where the tortious act involves no real loss to the claimant (such as in trespass to land where no loss or damage has occurred) the court may award nominal damages.

Where the injured party has died as a result of the tort the claim for damages is different from those above (Law Reform (Miscellaneous Provisions) Act 1934). If the deceased had been financially supporting their family, then the dependants may claim for the lost earnings. The claim will also incorporate the funeral expenses. Further, the Fatal Accidents Act 1976, s. 1A(3) provides that spouses, and the parents of a deceased minor, may make a statutory claim of £11,800.

In terms of damage to property, the damages awarded will be to compensate the claimant for loss, and this will involve the cost of restoration and may involve an element of compensation where a replacement of the goods/property was difficult to achieve. Awards of damages are subject to a requirement for the injured party to mitigate their losses where this is reasonable (even where the mitigation leads to an increase in the losses sustained).

Injunctions may be awarded at the discretion of the court and will involve a court order requiring the subject to stop committing the tort. There are a number of tools to provide injunctive relief, which will be awarded depending upon the requirement of the particular tortious act. A prohibitory injunction requires that the defendant ceases the action that is causing the tort; and a mandatory injunction requires the defendant to act to prevent the tort being committed. The claimant may also wish to obtain an interim injunction to prevent a tort being committed and any (further) damage being sustained until the case comes to court. The power of an injunction, as was outlined in the contract chapters, is that it is a court order, and failure to comply constitutes a contempt of court that may lead to a fine or imprisonment.

11.8 Nuisance

When a person unlawfully interferes with another's land, or the quiet enjoyment of the land, then the innocent party may have a claim under the tort of nuisance. In this respect, the claim is of private nuisance as it is concerned with private parties. The reason why this is important for businesses is because the nature of the offence is in creating a nuisance to those affected by it. By way of example, a business may have a manufacturing plant that produces rubber tyres. The business is not unlawful, the activity of producing rubber tyres is not unlawful, but if it makes unreasonable noise, smoke, vibrations, and so on, then these may be considered unlawful as they could affect another's use of their land. In order to bring a successful claim of nuisance the following features must be present:

- The interference affects the enjoyment of land/premises. This action may be brought by a person with an equitable interest in it, a tenant (*Hunter v Canary Wharf*), or a person with exclusive possession of land but with no title to it (*Foster v Warblington UDC*).
- There must be an element of damage associated with the nuisance. The term 'damage' in this area of law is not restricted to physical loss or damage, but can amount to the claimant losing their enjoyment of the premises (*Leeman v Montagu*). The law has to balance competing interests when dealing with claims of nuisance, the right for the owner/occupier of land to quiet enjoyment of the property, and the business that has to make some noise/disruption in the processing of the product. The courts will attempt to strike this balance by looking at the unreasonableness of the defendant's behaviour, taking into account such factors as the position of the premises that is causing the nuisance, when it is being conducted, for what duration the nuisance is caused, and what steps have been taken to minimize the disruption. For this reason, many such businesses have located themselves in industrial estates where their activities are unlikely to cause a nuisance in the same way that they would do in a residential area or in the centre of a busy city.
- It must be noted that the motives of the defendant are often relevant considerations in assessing nuisance, and as such, where the defendant has deliberately acted to cause a disturbance, the court will be more likely to hold this action as a nuisance.

p. 293

Christie v Davey (1893)

Facts:

The claimant was a music teacher who provided lessons at her own home. She lived in a semi-detached house adjoining the defendant's property who complained on several occasions about excessive noise. The complaints went unanswered and the defendant resorted to banging on the walls, shouting, and beating trays to create noise in retaliation.

Authority for:

An injunction was granted to restrain the defendant's actions as they were motivated by malice and therefore constituted a nuisance.

- The court will look towards the reasonable foreseeability of the defendant's action in determining whether a nuisance has been committed.

Cambridge Water Co. v Eastern Counties Leather (1994)

Facts:

During the course of the defendant's leather tanning business, small quantities of solvents seeped through the floor of the building and into the ground beneath. From there the solvents found their way into a borehole owned by the claimant and this contaminated water supplying local residents. Consequently the claimant had to stop using the borehole and brought an action for damages in nuisance and negligence.

Authority for:

The House of Lords held exercising all reasonable care not to cause a nuisance may not, of itself, remove liability from the defendant. However, the defendant was not liable as the damage was too remote and not reasonably foreseeable.

- Unusually sensitive (hypersensitive) claimants will not generally succeed in an action for nuisance where another person would not have been adversely affected.

p. 294 **11.8.1 Defences to a Nuisance Claim**

Defences exist where a claimant has alleged a nuisance and the defendant can point to a statutory authority, the consent of the claimant, or where the act has continued for over 20 years.

11.8.1.1 Statutory authority

Where a statute authorizes an act that is then subject to a claim of nuisance, the courts will assess whether the claim of nuisance is able to proceed.

Allen v Gulf Oil Refining Ltd (1981)

Facts:

A statute was passed to build an oil refinery on land to ensure a supply of oil was available, and this was in the public interest. In the building of the refinery, and its operation, local residents complained of the noise and smell arising from these activities.

Authority for:

The House of Lords held that no nuisance had been caused as the statute required that the oil refinery be built and operated, rather than merely giving the right for the erection and operation of such a venture.

However, simply because a statute gives a right to perform some action, does not remove potential liability of the defendant.

Barr v Biffa Waste Services (2012)**Facts:**

The claimants, a group of local residents, brought the action against the defendant for nuisance as a result of odour being emitted from one of its landfill sites. The defendant had previously been prosecuted by the Environment Agency for breaches of its operating permit with regards to such emissions.

Authority for:

The Court of Appeal held that merely because the defendants were carrying out activities in a manner consistent with the terms of their licence did not, of itself, provide a complete defence. The court held that there was no principle of law that meant compliance with a statutory scheme curtailed common law rights to seek damages.

11.8.1.2 Consent

If a party consents to a nuisance, they are unlikely to succeed in an action. This is a complete defence if the defendant can establish that the injured party had accepted the danger of the noise, smell, vibration, or other nuisance, having been aware of its existence. ← This is a grey area, as merely occupying land in the knowledge of a nuisance will not establish an effective defence of consent. It is the willingness to accept the possibility of the nuisance that is the key element.

11.8.1.3 Prescription

Here, a defence is available where the nuisance has been committed for over 20 years without complaint.

***Sturges v Bridgman* (1879)**

Facts:

The defendant operated the business of a confectionery shop which involved the use of a pestle and mortar that caused significant noise. This function had been conducted for over 20 years without complaint. However, this was because during its operation there had been no neighbouring property. Afterwards, the claimant built a consulting room adjacent to the shop and brought an action in nuisance to prevent the continuation of the noise. The defendant attempted to defeat the claim for an injunction on the basis of the Prescription Act.

Authority for:

The defence failed. For it to be accepted, it is important that the nuisance has been committed for 20 years, rather than simply the carrying out of that activity for the period of time.

11.8.2 Remedies in Nuisance

The main remedies provided in claims of nuisance are a damages action, and an injunction to prevent the nuisance being committed in the future.

11.8.2.1 Damages

The claim in nuisance, as opposed to negligence where damage/loss has been sustained, may not have actually caused any physical loss. As such, the claim is generally concerned with the loss of the enjoyment of the land that the claimant has suffered, or in terms of any devaluation of the land. That is not to say that there will be no claim for physical loss (see *Cambridge Water Co. v Eastern Counties Leather* above). Therefore, as long as the damage is of a type recognized in law, and it was foreseeable, then damages may be awarded for losses suffered.

11.8.2.2 Injunctions

These are a particularly effective mechanism to prevent the defendant from continuing the nuisance. Injunctions are equitable remedies, used at the discretion of the courts, and in cases of nuisance, may be used in addition to, or instead of, a damages award. When an injunction is granted, it is usually suspended to provide the defendant with an opportunity to refrain from further acts of nuisance.

11.8.2.3 Abatement

p. 296 This is an (exceptional) remedy enabling the injured party to take action to stop the nuisance. It is allowed where to initiate a legal action may be inappropriate, or where immediate action is required. This is commonly seen where an owner of land lops the ↵ trees on a neighbour's property. As long as the injured party does not have to go onto the neighbour's land, and they, in this example, cut only the trees interfering with their land, and returns the trees that have been cut, then this will be an acceptable remedy.

Conclusion

The chapter has considered the torts of negligence and nuisance. Claims of negligence involve the three tests of duty of care, breach of that duty, and consequential damage. Having established these, the courts will then consider the level of damages to be awarded, having taken into account any defences asserted, and the vulnerability of the victim. Nuisance protects the claimant from unlawful interference with their property and is a significant factor for businesses running manufacturing/industrial processes. The next chapter discusses equally relevant and important torts to businesses (that can involve very significant claims), including liability for economic loss in negligence, negligent misstatements, and the liability for psychiatric losses.

Summary of main points

Tortious liability

- Liability is imposed through the civil law and requires, in certain circumstances, the party to take reasonable care not to negligently or intentionally cause harm.
- Many torts involve establishing 'fault' liability (blame) in order for a claim to proceed. Exceptions to this general rule include vicarious liability and claims under the Consumer Protection Act 1987.
- The Limitation Act 1980 outlines the time limits within which actions must be initiated. Generally, tort actions must be brought within six years of the date giving rise to the action and personal injury claims must be made within three years. The time limits do not begin until a minor reaches the age of majority (18), and further protection is given to those suffering mental disorders.

Negligence

- Negligence involves a breach of a duty to take care, owed in law by the defendant to the claimant, causing the claimant damage.
- The three elements to substantiate a claim consist of a duty of care, breach of that duty, and consequential damage.

- Where a duty of care has previously been held to exist, the threefold test from *Caparo* is unnecessary. This is also the approach to be taken in novel cases. In other circumstances, the three sub-tests establishing a duty include proximity of relationship between the parties; foreseeability of loss; and whether it is fair, just, and reasonable to impose the duty.
- A breach of duty involves falling below the 'reasonable man' standard and exposing the claimant to unreasonable risk of harm.
- The third element in establishing negligence is assessing the consequential damage suffered by the claimant.
- There must exist a causal link between the injury suffered and the breach of duty.
- The damage suffered must be one that is recognized by law.
- Not all claimants have to demonstrate loss/damage. Claims under trespass, for example, will often involve the award of nominal damages as no 'real' loss has been sustained.
- To assess causation of damage, the courts will use the 'but for' test—if the damage would not have occurred but for the actions of the defendant, then their action is the cause of the damage.
- Not every consequence of a defendant's wrongful action will lead to liability. Intervening acts may remove responsibility if the damage is too remote.
- The 'eggshell skull' rule provides that the defendant must take the claimant as they find them. Hence, if the claimant had a pre-existing condition exacerbated by the defendant's actions, the defendant cannot escape liability by asserting that another person so affected would not have experienced the same level of damage.

p. 297

Defences

- The most common defences to tort actions are illegality, consent, contributory negligence, and necessity.
- Illegality may prevent a claim of negligence where the claimant suffered loss or damage during the course of performing an illegal act.
- Consent provides a complete defence where the injured party has consented to a risk, either expressly or through implication.
- Contributory negligence is a partial defence where the claimant who has been partially at fault for their injury (with the defendant being partly at fault) will have any award of damages reduced according to their level of responsibility.
- Necessity may provide a defence where the tortfeasor acted to prevent a greater harm, insofar as there was imminent danger and their actions were reasonable in the circumstances.

Remedies

- Remedies include damages and injunctions.

- Damages awarded for personal injury include compensation for direct and indirect losses. The aim is to place the injured party in the position they were in before the tort had been committed (insofar as money can).
- Injunctions are used to prevent the commission of a tort (available at the discretion of the courts). Injunctions are issued on the basis of the particular tort and the injunction may be prohibitory, mandatory, or interim.

Nuisance

- Private nuisance involves unlawful interference with another person's enjoyment of their land/property.
- The claimant must have suffered some form of loss/damage due to the nuisance.
- Where the defendant intended to cause the disturbance, the courts will be more inclined to hold that action as nuisance.
- It must have been reasonably foreseeable that loss/damage would have been the result of the defendant's action to enable a damages claim.
- There are several defences to a nuisance action including statutory authority, consent, and prescription.
- The remedies available are damages, injunction, and abatement.

p. 298 Summary questions

Essay questions

1. Cases such as *Bolton v Stone* and *Miller v Jackson* provide examples of the different approaches taken by the judiciary in relation to determining whether a defendant has breached their duty to take reasonable care. Describe the tests used to establish the negligence of a defendant and explain how the law has developed to make the exercise of these tests more relevant in the modern era.
2. Critically assess the defences available to a claim of nuisance. Do you feel they are fair or at least adequate and what suggestions could you make for improvements? Justify your answer through a critique of the case law.

Problem questions

1. All Bright Consumables (ABC) Ltd has recently diversified its business into supplying and fitting quality kitchens and bathrooms. Part of this business involves the company manufacturing its own tiles and furniture to offer the full bespoke service that it believes customers want. Dora is employed by ABC Ltd as a wood machinist operating a bench mounted circular saw. Today, while operating the circular saw Dora caught her right (dominant) hand in the saw's blade, severed four fingers and sliced the top off her thumb. On the day in question, she had worked a 12-hour shift and for the last six hours of her shift, her supervisor, Abe, asked her to lend her push stick (which she had been told she should use for feeding small pieces of wood into the machine)

to a colleague. At the time of the accident, she was working on an urgent job which had to be completed that day for fitting by ABC's bathroom firm the next. Dora admitted that while working she had been distracted and had been chatting animatedly to another colleague. Consider the negligence liability (if any) of ABC Ltd.

2. Alain is employed by Tasty Butchers (TB) Ltd to deliver meat to various retailers. Alain is expressly told not to race or drive dangerously in his company vehicle. However, today Alain ignores this instruction and decides to race against the driver of their rival company, Crusty Butchers Ltd, when the two drivers meet each other at traffic lights.

During the race Alain damages the car of Delia, which further causes the sealed door on the refrigeration unit of his company vehicle to be broken and the meat begins to thaw. At the end of the day Alain returns to TB Ltd's base and is told about cases of sickness being reported by customers at the shops he has delivered meat to. The view is that the meat has gone bad and caused food poisoning.

The manager of TB Ltd has also seen the damage to the company vehicle and been contacted by Delia who blames Alain for causing damage to her car.

Outline the potential liability of the parties in the above situation.

You can find guidance on how to answer these questions **here** <https://oup-arc.com/access/content/marson6e-student-resources/marson6e-chapter-11-indicative-answers-to-end-of-chapter-questions?options=name>.

Further reading

Books and articles

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Online Resources

Visit the online resources https://oup-arc.com/access/marson6e-student-resources#tag_chapter-11 for further resources relating to this chapter, including self-test questions, an interactive glossary, and key case flashcards.

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