Law case studies for Delict DEBBIE GUNN
CASE STUDY 1

Q1) *What is a duty of care?*

A duty of care can be defined as a legal obligation, to give a level of care towards another individual, to avoid injury or harm to that individual or their property. It is that 'a person should take reasonable care to avoid acts or omissions that they could reasonably foresee to harm their neighbour'. This can be defined as say a father had a duty of care to a sick child to get that child to a doctor, if that father had done so he had acted to help that child so had acted in his duty to care, had he failed to do so and not have called the doctor to help then this would have been classed as an 'omission' or failure to act. In Danny's case he did not take reasonable care

Under the law of Delict negligence is harm caused unintentionally and negligence claims come about because the person who is at fault or caused the harm owed a duty of care and has breached this by causing harm, loss or damage to the pursuer. In order to succeed when bringing a negligence claim the pursuer must show that the defender owed him/her a duty of care and the defender was in the position to cause harm which they failed to prevent occurring and the pursuer must also show that it was the defenders breach of duty that was the main cause for the loss or harm caused by him/her.

The legal precedent for establishing duty of care can be found in the Donoghue v Stevenson case (1932), where Mrs Donoghue and her friend went into a Paisley café owned by Mr Minchella. Mrs Donoghue's friend ordered two ice creams and two bottles of ginger beer. The bottles of ginger beer were not of the clear glass type where it was possible to see the contents. Mrs Donoghue poured the contents of her bottle of ginger beer over the ice cream and to her horror the remains of a decomposed snail slid out from the ginger beer bottle. Mrs Donoghue later claimed that she suffered gastro-enteritis as a result of consuming parts of the snail. Mrs Donoghue also claimed that she suffered a psychiatric injury as a direct result of her experience. The question then arose as to whom Mrs Donoghue could bring a civil action for damages against. She did not have a contract with Mr Minchella, the café owner, as her friend has purchased the ginger beer. Furthermore, Mr Minchella was not aware of any impurities contained in the bottle as it has been sealed from the time that it has left the manufacturer's factory and it was not in a clear glass bottle. Mr Minchella could hardly be blamed for Mrs Donoghue's unpleasant experience. Who then could Mrs Donoghue sue? The manufacturer of the product was the most obvious target. Mrs Donoghue

argued that a manufacturer of goods owed a duty of care to anyone who used their products. This was held as the manufacturers owed a duty of care to anyone who might use their products and suffer loss, injury or damage as a direct result. Manufacturers must make sure that their products are safe when they left the factory. The ginger beer manufacturers did not have to predict that Mrs Donoghue personally would have used their product, but they knew someone would have used it and would be harmed if it contained impurities like the remains of a decomposed snail.

The theory of this case was; the manufacturer owed a duty of care to the consumer, to take care that there were no harmful substances in his product. To successfully pursue a claim in the delict of negligence, there are three elements which need to be fulfilled, these are; a legal duty of care, a breach of that duty and damage suffered as a result of that breach.

Q2) what standard of care should Mrs McGregor have been entitled to expect from Danny*?*

A standard of care is defined as: the watchfulness, attention, caution and prudence that a reasonable person in the circumstances would exercise. If a person's actions do not meet this standard of care, then his/her acts fail to meet the duty of care which all people (supposedly) have toward others. Failure to meet the standard is negligence, and any damages resulting there from may be claimed in a lawsuit by the injured party if the pursuer can show that he is owed a duty of care and this was breached. The defender can try escaping liability by demonstrating that he took the appropriate standard of care which the law expects of him in order to reduce the risk of loss or injury being suffered by the pursuer. The standard of care which is expected of the defender is one of reasonable care. Reasonable care is the standard of care expected of the 'hypothetical' reasonable man or woman who is a person of ordinary care and prudence and who is neither overcautious nor overconfident. So, the standard of care that Mrs McGregor should have been entitled to from Danny is that she brought her car to him with brake problems and his duty of care was to fix her brakes and the standard of care was to take the time to fix them properly and to make sure that they were fixed before handing the car over to her before letting her drive it away. He owed her a standard and duty of care. As in a speech by Lord Atkin with what is known as the 'neighbourhood principle' is 'you must not injure your neighbour and must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. In this although Danny does not owe a duty of care to absolutely everyone he did owe it to Mrs McGregor.

A standard of reasonable care of a reasonable person can be seen in the following case where an employer's negligence had fallen short of that of a standard of reasonable care. It is *Paris V Stepney Borough Council (1951)* where a mechanic due to active service during the Second World War was blind in one eye. His employer was not aware of this disability but it was lately discovered during a medical examination. His employer after this still did not give him protective goggles to protect his good eye, so while during his course of work and while hammering on a piece of metal, a splinter came off and lodged itself into his good eye and left him blind in both eyes. When taken to court it was heard that it was not normal practice to supply goggles to employees, so it was questioned whether or not the council was negligent for failing to protect someone who they knew was vulnerable. This was held by the House of Lords in that the employer had been negligent as had fallen short of the standard of reasonable care which would be expected of a reasonable man or woman.

Q3*) Can Mrs McGregor sue Danny in respect of injuries and damage caused to her car?*

Two things which may need to be found are: Would the damage still have occurred, even if the defendant had not broken the duty of care, if so then the breach did not cause the damage **or** should the damage not have occurred but for the defendants breach of duty, if so then the breach of duty is the cause of damage.

Danny yes has been negligent and this in itself under *'Damnum injuria datum'* is sufficient to establish his liability if there is found there has been a link between Danny's negligence and the brakes failing. As for *Damnum Injuria Datum* this means; there must be a loss *(damnum)* and there must be wrong doing *(injuria)* and their must finally be a link, causation *(datum)* between the two. If it cannot be shown that the wrongful act of one resulted in or contributed to the loss of the other then there can not be a case of delict. *But under 'Causation'* where there has been an alleged breach of duty of care, the actual breach must be the direct cause *(causa causans)* of harm to the pursuer. This means that the pursuer *(Mrs McGregor)* must be able to show, on the balance of probabilities, that the defender's *(Danny)* negligence caused her to suffer loss or injury. The Defender will be able to escape liability if he *(Danny)* can show that his negligence should be regarded as the causa sine qua non. This means that Danny may have behaved negligently but his actions should not be regarded as the direct cause of the loss or injury suffered by *Mrs McGregor*. The *Causa sine qua non* should be seen as part of the background and not a primary cause of harm to the pursuer. This can be demonstrated in the following cases where it is not always obvious whether the defender caused the pursuer to suffer loss or injury. The

first is negligence but that in itself did not cause the persons death, it is Barnett V Chelsea & Kensington Hospital (1969) it is where a man drank a cup of tea and began to vomit and was rushed into hospital. The doctor who dealt with the man told him to go home and see his own doctor in the morning, but the man died as a result of the poison given to him. The doctor in no doubt had been negligent in the way he had treated the man and even though he had given him a proper medical examination it would still not have prevented his death as it was a strong poison and there was no antidote. This was found that although the doctor had been negligent it was not him that caused the death it was the nature of the poison which caused the death and any medical attempts to save him would have been in vain. The next related case is in relation to if the defender/s were to be found liable for the loss or injury if the negligence was seen to be reasonably foreseeable in the fact that they knew that acting in the way they did or not acting caused or would cause the situation to be negligent this is Home office V Dorset Yacht Co Ltd (1970) – a group of borstal boys (who are known to be young offenders today) were camping on an island. The boys were accompanied on the island by their guards. A chain of events then unfolded with the result in the end being entirely foreseeable and predictable. The guards went to their beds and soon fell asleep leaving the boys completely unsupervised, the boys decided to escape from the island. They couldn't swim from the island as it was too far from the mainland, so they decided to steal a yacht. None of the boys had ever sailed a yacht before and it ended up colliding with another yacht owned by Dorset Yacht and a substantial amount of damage was caused as a result. The outcome of this was the House of Lords decided that the guards had failed in their duty of care to supervise the boys properly. The failure resulted in damage to property which was entirely foreseeable and would not have happened if the boys had been supervised properly.

CASE STUDY 2

Q1) What kind of liability applies to the keeper of an animal?

The liability that applies to the keeper of an animal is governed by the Animals (Scotland)Act 1987 and Section 1 of the Act states that " if an animal belongs to a species who members generally are, by virtue of their physical attributes or habits, likely (unless controlled or restrained) to injure severely or kill persons or animals, or damage property to a material extent, the keeper of the animal is (strictly) liable for any injury or damage caused by the animal and directly referable to these physical attributes or habits".

It means that if you are the owner of any animal that is covered in Section 1 of the Act and the animal causes injury or death to any other persons or animals then you will be strictly liable for the harm caused. Liability cannot be escaped by showing that you took reasonable care and negligence does not have to be shown by the pursuer. Strict liability means that you must have taken effective precautions to stop the injury occurring in the first place.

(Introduction to Scots law, Wyllie & McCrossan, page 266 liability for animals)

It means that if you are the owner of any animal under section 1 of Animals (Scotland) Act 1987 and your animal cause's distress, injury or death to other persons or animal then you are strictly liable for harm caused.

Owner's liability for animals can be shown in the following relevant cases *B*urton *V* Moorhead (1881) this is where an extremely dangerous dog attacked the pursuer and injured him. The keeper of the animal tried to defend himself by stating that a strong chain was used for restraining purposes and this chain normally did the trick. Unfortunately the keeper's defence that he thought the chain was more that adequate to restrain the dog was simply not good enough. The keeper was fully aware of the dog's nature and with this knowledge he should have taken special precautions (not reasonable care) to make sure that the dog was prevented from harming passers-by. This case shows that if you know that your animal is of an aggressive nature then precautions above the normal should be taken so that the animal cannot harm others. The next case deals with the mistake of thinking you can trust an animal because it is well trained, *B*ehrens *V B*ertram Mills *C*ircus (1957) – this is where the pursuer a circus performer was injured by a circus elephant and sued the circus. The circus claimed that the animal was extremely well trained, but the court felt that the circus should be judged according to the burden of strict liability. The circus should have taken special precautions to prevent the elephant from causing harm. The fact that the animal had not previously injured anyone was not enough to allow the circus to escape liability to the pursuer. This case shows that no matter how much you think you know your animal or no matter how well trained they are they can still be unpredictable and the owner should still always take enough reasonable care and precaution to make sure that this does not happen.

Q2) **What** precautions should Mark have taken when going for a walk in the country with Tricky?

The precautions Mark should have taken when going for a walk in the country are

- When near livestock, hens, horses, sheep, cattle, ensure Tricky was always on a lead or tied up.
- Never left tricky unattended - as it only takes a matter of seconds for a dog to run after livestock no matter how well behaved he was dogs or animals are very unpredictable and you cannot trust them not to be well behaved at all times, it is a dogs nature to run after anything moving creatures.
- Familiarize tricky to livestock before visiting rural, animal-populated areas.
- Training tricky in the six commands of basic obedience - stay, come, sit, heel, wait and down - will give him confidence that you will be able to control tricky.
- Reward tricky with a pat on the head or a special treat when he reacts mutely to livestock. Eventually tricky will recognize the link between the treat and good behavior.
- Remain relaxed when tricky becomes excited around livestock; otherwise the dog will recognise it as an attention seeking technique.

Q3) Will Mark be able to justify his failure to have Tricky on a lead?

In the Case Study it does not mention the kind of dog that Tricky is as it states under section 1 of Animals (Scotland) Act 1987 that if the dog belonged to a 'species' that are by virtue of their physical attributes or habits, likely (unless controlled or restrained) to injure severely or kill persons or animals, or damage property to a material extent. Mark may be able to justify his failure to have Tricky on his lead as under Section 1 of the Animals (Scotland) Act 1987, tricky may not belong to the 'species' of dog known to be dangerous. As, as far as he was concerned Tricky was a good behaved dog and not a dangerous dog, he has witnesses who know Tricky that can say that he is a good behaved dog. But to be honest he may find that he is strictly liable for the injuries caused and the damage caused by Tricky running after the lambs as regardless of how well behaved Tricky is anyone who is responsible knows when passing through fields where there is livestock it is irresponsible and negligent to not put your dog on a lead so it does not run off especially if they are newly born lambs. So it won't matter how much he tries to justify it he would be found negligent and strictly liable for damages to the owner of the truck or the owner of the lambs for the loss of them.

CASE STUDY 3

Q1) *List 5 defences available to a defender in a negligence action.*

Five defences available to a defender in negligence action are:

1. *Contributory negligence*
2. *Volenti non fit injuria*
3. *prescription and limitation*
4. *compliance with statutory authority*
5. *necessity* –
6. *Damnum fatale*
7. *Criminality*

Q2) *In the 3 situations which defence to the pursuers delictual action will the defender attempt to rely upon in order to escape liability.*

a) F*or the first situation the pursuers delictual action that the defender will rely on is a under criminality where the pursuer may be unable to claim damages because Jaimsie was involved in the illegal activity with Rab. Under ex turpi causa non oritor actio (from an honourable cause an action does not arise) is the legal doctrine in which any action may not be founded on in illegality. In law of delict the principle would prevent a criminal from bringing a claim against a fellow criminal i.e.: Jaimsie against Rab. There is also under contributory negligence as Jaimsie knew what he was letting himself in for getting into a get away car, knowing that it would have to be driven at speed to get away from the scene of the crime, which would reduce the damages. If Ex turpi causa non oritor actio may fail, also is Volenti non fit injuria where Jaimsie knew the risk when getting into a get away car. A relevant case for this would be* **Ashton V Turner (1981)** – this is where Philip Ashton and Kevin Turner were involved in a plan to break into a house. Mr Turner was to drive the getaway car, but he drove the car dangerously and Mr Ashton was injured as a result. Philip Ashton sued Kevin turner for damages. The court refused to award the damages to the pursuer because he had been involved in a criminal activity when he has suffered the injury caused by the defenders dangerous driving.

b) For the Second situation is would be under contributory negligence, the bus driver could argue that Margaret failed to make reasonable care for her own safety by putting her seatbelt on, the driver could say that if she had worn her seatbelt then her injuries may not have been that severe and she would not have went through the windscreen. He is still definitely liable for taking the chance and going through the lights when

not at green as he knew the chance he took could end up In a car coming the other way when lights went to green, he also had a duty of care to any passengers he had and to go through lights this way was negligent on his part, but he can by going with contributory negligence try and reduce the damages awarded to the pursuer. A relevant case for this is **Hanlon V Cuthbertson (1981) –** which involved a claim by a female passenger in a taxi who was injured as a result of an accident and the taxi's negligence. The taxi driver argued contributory negligence because she was not wearing a seatbelt which would otherwise have protected her in an accident. This was held as that as a result of contributory negligence, the pursuer should have her damages reduced by 10% despite this reduction she was still awarded £14,584 + interest.

For the third situation the Knockbuckle player could try with Volenti non fit injuria where Gavin knew the risks of playing rugby with full knowledge of the facts and accepted the risk of injury by playing in the game. Even though the player owed Gavin a duty of Care the chain of causation has been broken by Gavin voluntarily undertaking the risk by playing rugby which is a severely contact support and anyone who knows about rugby knows that injuries happen all the time with it, but if Gavin can prove intentional conduct (where someone deliberately hits someone or deliberately causes harm) like the player did then all damages can be claimed if this is proven and it was shown that the player lost his temper because their team was losing and kicked Gavin in the face during a scrum so this may not apply if it was proved to be malicious. In normal circumstances in Rugby this would stand as a defence as Gavin knows the risk of playing, but it will be down to Gavin to prove that the player did this maliciously through temper not just through a normal practise of the scrum and for the player to prove that he did not do it maliciously. A relevant case for this is **ICI V Shatwell (1965)** – the pursuer and his brother were explosives experts who, contrary to instructions issued by their employer, agreed to test their detonators before returning to the safety of their shelter. There was an explosion and one man was injured while his brother was killed. It was held that the employer could successfully plead Volenti as the pursuer and his brother had agreed to run the risk of injury by not returning to the safety of the safety shelter.

Q3) do you think that the defender will be able to plead successfully the appropriate defence in each situation?

a) Yes I think Rab may be able to plead successfully as under Criminality Jaimsie is unable to claim damages because he was involved in the

illegality of being the driver of the getaway car in a break in, also Under *ex turpi causa* non oritor actio (from an honourable cause an action does not arise) is the legal doctrine in which any action may not be founded on in illegality. In law of delict the principle would prevent a criminal from bringing a claim against a fellow criminal i.e.: Jaimsie against Rab.

b) this could go either way but to be honest under contributory negligence, the bus driver could argue that Margaret failed to make reasonable care for her own safety by putting her seatbelt on, the driver could say that if she had worn her seatbelt then her injuries may not have been that severe and she would not have went through the windscreen. He may win a reduced balance of damages as Margaret should have worn her seatbelt and here injuries would have been less but he will not win the case as he is still very liable for skipping the green light and taking the chances as it was foreseeable that an accident may or could happen if he did this he also has a duty of care to any passengers he has on his bus so to drive through this way is pretty negligent on his part. He would still be liable for damages and causing the accident.

c) If he can prove that the player did this maliciously then Gavin may win his case under intentional conduct where the player did it on purpose to cause harm to him, but the player if putting in the defence Volenti non fit injuria and there were no witnesses to this and it may in the end be that it is Gavin's word against the players and if this is the case Gavin may lose and the player will win as everyone knows rugby is a contact sport where you play it voluntarily and sustain many injuries as a result it will all come down to if Gavin can prove he did it on purpose and the player to prove he didn't and was an accident.

Some relevant cases to go with other defences for the defender

COMPIANCE WITH STATUTORY AUTHORITY - LORD ADVOCATE V NORTH BRITISH RAILWAYS (1894) – This was regarding waste that was being disposed of under statutory authority was left near an army barracks. Compliance with the statute could have been achieved by disposing of the waste not at the army barracks , but at another more suitable location. As a result North British railways could not use the defence against the accusation that it was causing a nuisance.

DAMNUM FATALE – CALEDONIAN RAILWAY CO V GREENOCK CORPORATION (1917)- the defenders argument was that freakishly heavy rainfall in Greenock, but not for the rest of Scotland should be considered as an act of god failed to impress the House of Lords and the defender was found liable for causing damage to the pursuer's property.