LW1008
OBLIGATIONS 1

Negligence in tort has various meanings. It may refer to the tort of negligence or it may refer to careless behaviour. A person who totally disregards the safety of others but does not injure them is not guilty of negligence, although they may be morally reprehensible. On the other hand, the person who tries their best but fall below the standard set by the court and causes any damage will be liable.[1] Negligence is judged by an objective standard set, where the court will look at what a 'responsible man or woman' would have done in the defendant's position. An example of this is in the case of **Nettleship v Weston (1971)**[2] , the defendant was a learner driver who was given lessons by the plaintiff. The plaintiff was injured as a result of the defendant's negligent driving. It was held that all drivers, including learning drivers, would be judged by the standards of the average competent driver.

Duty, breach, causation and damage are the elements that together make up any successful negligence claim. If the claimant wants to win in a negligence action, some certain points must be proven such as that the defendant owed them a duty of care; that the defendant was in breach of that duty; and that the claimant suffered damage caused by the breach of duty, which was not too remote. In negligence, it has to be proven by the claimant that there has been some kind of loss or injury as a result of the defendant's negligence.

The elements of liability in the tort of negligence are the defendant must owe the plaintiff a duty of care. A duty of care is a legal obligation to take care to avoid causing damage. An example of duty of care owed is in the case of **Grant v Australian Knitting Mills (1936)**[3], the plaintiff contracted dermatitis because of excessive sulphites in his underwear by the defendants during the manufacturing process. The defendant's were held liable in negligence because it was held that a duty of care was owed to him even though the illness he suffered was extremely rare.

Duty is about relationships, and it must be shown that the particular defendant stood in the required relationship to the claimant such that he came under an obligation to use care towards him. This relationship is sometimes referred to as 'proximity'. In cases of personal injury, the necessary relationship is established if the defendant ought to have foreseen damage to the claimant. Duty means 'proximity' in the legal sense, and proximity means the level of closeness of relationship required for the particular kind of damage. Foresight of damage is required in all cases of negligence and there is a policy element, which is expressed by the view that it must be just and reasonable to impose a duty in that class of case.

Prakash does owe a duty of care to Shamilla. He was in breach of his duty towards Shamilla because he was riding his bike despite two days prior he injured his arm whilst riding his bike. Due to his arm injury, he was not able to steer his bicycle

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[1] John Cooke, 2001: pg 10
[2] 2 QB 691
[3] AC 85

correctly and, therefore, he collided with Shamilla. Prakash was expected of what a prudent man or reasonable man would do.

Once it has been established that there is a sufficient relationship between the parties to establish a duty, the question then arises whether the defendant has been in breach of this duty. The standard of care expected of a particular defendant is usually set by the law, but the question of whether the defendant fell below that standard is to be determined by looking at all the circumstances of the case. The standard that the law requires a person to attain must be objectively determined. A person will be regarded as negligent if he fails to act according to that standard. The reason is that we are all entitled to expect a certain level of protection from the act of others.

The concept of the 'reasonable man' judges whether the defendant was careless, amd also defines the level of safety a claimant is entitled to expect. The classic statement was given by Alderson B in, **Blyth v Birmingham Waterworks Co (1856), '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.'**

The significance of Shamilla's pre-existing illness that she suffers from a bone disorder, which causes her injuries to be much greater than they would have been otherw. Finally as regards the Egg shell rule, this means that the wrongdoer must take his victim as he finds him. This means that if you injure someone you are liable to whatever harm he suffers even if greater than expected. The greater damage might be due to the victim having a weak heart, thin skull or as in Smith v Leech Brain & Co. Ltd 1962 a pre malignant cancer triggered off by a splash of molten metal. The latter case of Robinson v Post Office 1974 concerned the plaintiff cutting his leg as he came down an oily ladder. When his leg was treated he was given an anti-tetanus injection. He was allergic to it and the result was brain damage. The Post Office was held liable as it was foreseeable that the dangerous ladder would cause some injury. It was also foreseeable that such an injury would require medical treatment so the Post Office were liable for all the consequences of the treatment. Thus it will not absolve Baljeer from liability just because of the inherent frailties that Judith has.

If negligence is alleged against a general practitioner, the claimant can sue the doctor directly, as general practitioners are independent. If the patient has been referred to a hospital or has been admitted for emergency treatment. They may be able to proceed against the negligent individual, the relevant health authority or both.

The negligence action against a doctor is no different to any other negligence case. The claimant must prove that a duty of care was owed to them, that this was broken and that reasonably foreseeable damage was caused as a result. The question of whether duty of care exists is not in dispute. The only problem is what the duty is, i.e. what did the doctor undertake to do, and when the duty came into existence.

Dr Green has fallen below the standard of care required of him. As Dr Green was a junior doctor, he would still be expected to comply with the duties of a docto r.

Shamilla was Dr Green's patient and so he had a duty towards his patient to look after him and give him the right treatment. Dr Green was expected what a reasonable doctor would do in the situation.

The treatment must be in the patients 'best interests'. The best interests test remains the most appropriate standard for providing treatment for patients who are incompetent and have left no ascertainable views as to how they wish to be treated. To identify what is considered to be in the patients 'best interest', the **Bolam Test** comes into practice.

The Bolam Test originates from, **Bolam v Friern Hospital Management Committee [1957][4].** The principle stated in this case is according to which a professional person will not be guilty of negligence if he can show that he has acted in accordance with practices accepted by a substantial, responsible body of persons skilled in his field. The test applies to all who exercise or profess to exercise a particular skill, and its application does not depend on the actual possession of a relevant qualification. This test acts on what is considered in the patient's 'best interests', therefore an objective test.

The starting point for looking at whether the defendant's breach of duty is a factual cause of the claimant's damage is the 'but for' test. This basic test is whether damage would not have occurred but for the breach of duty. This can be seen in the case of **Barnett v Chelsea and Kensington Hospital (1969);** the plaintiff's husband went to the defendant's hospital and complained of vomiting.

Dr Green opted not to carry out an allergy test before giving an anti-tetanus injection. In **Capital and Counties v Hants CC [1997][5],** Stuart-Smith J considered the duty of care owed by practitioners to their patient's as *obiter*: 'There is no doubt that once the relationship of doctor and patient or hospital authority and admitted patients exists, the doctor or the hospital owe a duty to take responsible care to effect a cure, not merely to prevent further harm.'

The claimant must prove that their damage would not have occurred, but for the defendant's breach of duty. In practice, medical negligence cases present problems in causation, as medical science may not be able to identity the precise cause of the claimant's damage.

In the case **Wilsher v Essex Area Health Authority (1988),** the plaintiff was

An event which occurs after the breach of duty, and which contributes to the claimant's damage, may break the chain of causation, to render the defendant not liable for any damage beyond this point. Where this occurs, the event is known as a novus actus interveniens.

The Oxford dictionary of Law defines novus actus interveniens as **"An act or event that breaks the causation connection between a wrong or crime committed by**

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[4] [1957] 1 WLR 582
[5] **[1997] 2 All ER 865**

the defendant and subsequent happenings and therefore relieves the defendant from responsibility for these happenings."

The law will regard any damage occurring after the intervening cause as being "too remote" and therefore the defendant will not be liable for this damage.

A novus actus may take three forms; the first is an intervening act of the claimant where the claimant's injury was not caused by the defendant's negligence but by his own act. The second is an intervening act of nature, if an act of nature causes the claimants damage and this act is independent of the defendant's negligence, then the defendant will not be liable. The third is an intervening act of a third party where a defendant will not be liable if a third party's intervening act is the real cause of the damage. Therefore, on the grounds of equity and policy, the court can hold that in light of following events the defendant is not liable for consequences that were beyond his control.

Shamailla's brain damage is not legally the fault of Prakash because these circumstances resulted after the incident with Prakash. Referring to novus actus interveniens, Shamilla's brain damage occurred after the intervening cause and so would be regarded by the law, as being "too remote" and therefore Prakash will not be liable for Shamilla's brain damage. This view can be supported by the case of **Knightley v Johns (1982),** the negligence of the defendant caused an accident and blocked a road tunnel. A police officer negligently sent the plaintiff, another police officer, into the tunnel, against the traffic flow. The defendant was held not liable for the injury to the plaintiff. The court stated that 'negligent conduct is more likely to break the chain of causation than conduct which is not'.

The limitation periods, which apply to Prakash or Dr Green if any action is brought against them, will come under section 2 of the Limitation Act 1980. The basic rule is that a tort action must be brought within six years of the accrual of the cause of action. Where the damages claimed by the claimant consist of or include a claim for damages or personal injuries, the limitation period is three years under section 11 of the Limitations Act 1980.

However, in **Cartledge v E Jobling & Sons Ltd (1963),** the plaintiff contracted pneumoconiosis as a result of the defendant's breach of duty. He did not know he had the disease until well after the three-year time period has expired. It was held that his action was statute barred. The damage occurred when the lung issue was scarred, although a medical examination might not have revealed the damage at that stage. The obvious injustice of this decision was almost immediately reversed by statute (now the Limitation Act 1980 s 11(4)). This allowed the plaintiff to claim within three years of the date of knowledge.

Knowledge may either be actual or constructive (s 14 (3)). If the claimant has symptoms of an illness and fails to seek medical advice, then they will have constructive knowledge. However, if they have sought medical advice but the doctor has failed to ascertain the appropriate facts and diagnose the condition, and then time will not run out against them.

The court is given a power to disapply the provisions relating to personal injuries or death (s 33).

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