

# Tort Law Q&A



**Private Law Tutor Publishing**

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## Chapter 1 - Welcome/Introduction/Overview

This book provides you with basic information as a basis for you to form your own critical opinions on this area of law. Once you have mastered the basics, you will be inspired to question principles in your essays and apply them in mock client advisory scenarios. Again, for your convenience, we have provided you with examples of how to answer such questions and how to apply your knowledge as effectively as possible to help you get the best possible marks. This aid is a fully-fledged source of basic information, which tries to give the student comprehensive understanding of how to answer questions for this module.

The aim of this Book is to:

- Provide an introduction to anyone studying or interested in studying Law to the key principles and concepts that exist in this module.
- To provide a framework to consider the law in this module within the context of examinations or written work.
- Provide a detailed learning resource in order for legal written examination skills to be developed.
- Facilitate the development of written and critical thinking skills.
- Promote the practice of problem solving skills.
- To establish a platform for students to gain a solid understanding of the basic principles and concepts of in this module, this can then be expanded upon through confident independent learning.

Through this Book, students will be able to demonstrate the ability to:

- Demonstrate an awareness of the core principles;
- Critically assess challenging mock factual scenarios and be able to pick out legal issues in the various areas of this module;

- Apply their knowledge when writing a formal assessment;
- Present a reasoned argument and make a judgment on competing viewpoints;
- Make use of technical legalistic vocabulary in the appropriate manner; and
- Be responsible for their learning process and work in an adaptable and flexible way.

### **Studying this module**

This question and answer series covers core subjects that the Law Society and the Bar Council deem essential in a qualifying law degree. Therefore, it is vital that a student successfully pass these subjects to become a lawyer. The primary method by which your understanding of the law will develop is by understanding how to solve problem questions. You will also be given essay questions in your examinations. The methods by which these types of question should be approached are somewhat different.

### **Tackling Problems and Essay Questions**

There are various ways of approaching problem questions and essay questions. We have provided students with an in-depth analysis with suggested questions and answers.

## Chapter 2 - Duty of Care

### Question

*'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.'*  
(Lord Atkin in *Donoghue v Stevenson* [1932] AC 562, p. 580).

Critically review Lord Atkin's famous dictum and assess to what extent the English courts have developed the law on the duty of care in the modern law of negligence.

### Answer

The best modern definition of Tort comes from Percy H Winfield in *The Province of the Law of Tort* as '*Tortious liability arises from the breach of a duty primarily fixed by the law: such duty is towards persons generally and its breach is redressible by an action for unliquidated damages.*'<sup>1</sup>

The Neighbour test was developed by the courts and represents the first test applied in order to assess the presence of a duty of care. Judges started moving towards the formulation of a general principle of duty of care.<sup>2</sup> The quote in the question by Lord Atkin in *Donoghue v Stevenson*<sup>3</sup> was the first legal formulation of duty of care to identify negligence: The Neighbour's test. The principle established that a manufacturer owed a duty of care to the ultimate consumer. The absence of a contract between the parties did not exclude the presence of duty of care against the manufacturer.

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<sup>1</sup> Percy, H., Winfield, *The Province of the Law of Tort* (first published 1931, CUP, 2013): 32

<sup>2</sup> *Heaven v Pender* [1883] 11 QBD 503

<sup>3</sup> Lord Atkin in *Donoghue v Stevenson* [1932] AC 562, p. 580

There has been a significant development of the concept of duty of care, which stemmed from the Neighbour test. There was an introduction of the concept of duty of care in relation to economic loss caused by negligent misstatement.<sup>4</sup> There was an introduction of the concept of duty of care in relation to tortious actions committed by a third party.<sup>5</sup> There was a modern reformulation of Lord Atkin's 'Neighbour principle' in Anns v London Borough of Merton.<sup>6</sup> Lord Wilberforce attempted to lay down an approach which could be applied in all situations in order to determine the existence of a duty of care. A two-stage test was reformulated: 1) between the parties involved there must be a sufficient relationship of proximity or neighbourhood that will likely cause damage to another person; and 2) are there any policy reasons why no duty of care should be considered to be owed?

The Anns test opened the floodgates. It was applied to the very close relationship between two parties which may cause the presence of a quasi-contractual relationship that justifies the presence of duty of care.<sup>7</sup> A better explanation was provided by the court on the element of 'proximity' to reduce the scope of duty of care and avoid floodgates.<sup>8</sup> The court decided to adopt a narrower approach in order to avoid floodgates. The courts held a claim in negligence requires the person to be the legal owner or the possessor in title of the property at the time of the damage.<sup>9</sup> Finally the two-stage test in Anns was rejected to restrain the identification of duty of care.<sup>10</sup> The courts said foreseeability of harm is a necessary ingredient of a duty of care relationship. *'Otherwise there would be liability in*

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<sup>4</sup> Hedley Byrne & Co. Ltd v Heller and Partners [1963] AC 465

<sup>5</sup> Home Office v Dorset Yacht Co. [1970] AC 1004

<sup>6</sup> Anns v London Borough of Merton [1978] AC 728

<sup>7</sup> Junior Books v Veitchi Co. Ltd [1983] 21 BLR 66

<sup>8</sup> Sutherland Shire Council v Heyman (1985) 60 ALR 1 (Australian case)

<sup>9</sup> Leigh & Sullivan Ltd v Aliakmon Shipping Co Ltd [1986] AC 785

<sup>10</sup> Yuen Kun-Yeu v Attorney-General of Hong Kong [1987] 2 All ER 705

*negligence on the part of one who sees another about to walk over a cliff with his head in the air, and forbears to shout a warning*'. It was in the context of the retreat from *Anns* that emphasis was placed in a number of cases on the concept of "proximity", and on the idea that it must be fair to impose a duty of care on the defendant.<sup>11</sup>

In order to avoid a floodgate of claims and to give structure to the identification of duty of care, the court moved away from the position in *Donoghue* and *Anns* whereby foreseeability of damage was enough to make a claim in negligence. They introduced the Caparo three-stage test.<sup>12</sup> The Caparo-three stage test represents the actual state of the law in identifying duty of care. Three elements are needed to identify a duty of care: 1) Foreseeability – was the loss caused by the Defendant to the Claimant reasonably foreseeable? 2) Proximity – Is there legal closeness between the parties at the time the Defendant was negligent? and 3) Fair, just and reasonable – Is it fair, just and reasonable to impose a duty to the Defendant? The last question has been seen as a residual discretion left to the court in deciding the imposition of a duty). Lord Bridge noted that decisions after *Anns* had emphasised "*the inability of any single general principle to provide a practical test which can be applied to every situation.*"<sup>13</sup>

The 'incremental approach' represents the main theory applied by the courts to identify the existence of duty of care. Accordingly a duty of care exists in those situations that can be regarded as analogous to one in which a duty of care has already been recognised. In order to establish the presence of duty of care firstly, it has to be checked whether there is any existing legal authority for a duty of care in circumstances similar to the one under examination. If there is a duty recognised by earlier cases, then the court can follow them.

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<sup>11</sup> Lord Oliver of Aylmerton, Judicial Legislation: Retreat from *Anns*, presented at The 3rd Sultan Azlan Shah 12 Law Lecture, p 53, 1988 September 12

<sup>12</sup> Caparo Industries plc v Dickman [1990] UKHL 2; [1990] 2 A.C. 605

<sup>13</sup> [1990] 2 A.C. 605, p.617

However, when recognising and developing an established category, the courts are being influenced by policy considerations.<sup>14</sup> If there is no existing legal authority, then the Caparo three-stage test should be used.

In order to establish the presence of duty of care all the three following requirements are necessary: i) foreseeability, ii) proximity and iii) fair, just and reasonable policy considerations.<sup>15</sup> The law attributes a duty of care between employers and their employees.<sup>16</sup> Even if the damage is foreseeable and there is proximity between the parties, the imposition of duty of care must be fair, just and reasonable.<sup>17</sup>

It was in any event made clear in Michael v Chief Constable of South Wales Police<sup>18</sup> that the idea that Caparo established a tripartite test is mistaken. Properly understood, Caparo thus achieves a balance between legal certainty and justice. In cases where the question whether a duty of care arises has not previously been decided, the courts will consider the closest analogies in the existing law, with a view to maintaining the coherence of the law and the avoidance of inappropriate distinctions. They will also weigh up the reasons for and against imposing liability, in order to decide whether the existence of a duty of care would be just and reasonable.

In Robinson v Chief Constable of West Yorkshire<sup>19</sup> Mrs Robinson was walking down a street. In the same street Police officers were detaining a suspected drug dealer. The suspect put up resistance and moved up the street. The Claimant was knocked to the ground and injured. The Court of Appeal

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<sup>14</sup> Lord Reid, 'The Judge as Lawmaker (1972)' *Journal of the Society of Public Teachers of Law* 12 (1995), 22

<sup>15</sup> Watson v British Boxing Board of Control Ltd [2001] QB 1134

<sup>16</sup> Spring v Guardian Assurance plc & Others [1995] 2 AC 296

<sup>17</sup> Marc Rich & Co AG v Bishop Rock Marine Co Ltd (The Nicholas H) [1996] AC 211

<sup>18</sup> [2015] UKSC 2; [2015] AC 1732

<sup>19</sup> Robinson v Chief Constable of West Yorkshire [2014] EWCA Civ



dismissed the Claimant's arguments. It had not been fair, just and reasonable to impose a duty of care. The interest of the public may outweigh the interests of the single individual. The case was appealed to the Supreme Court.<sup>20</sup> The Supreme Court made significant inroads into the principle that the police cannot be sued in negligence save in exceptional circumstances as a result of alleged failures in their core operational duties. The Court stressed that there is no single definitive test that should be used to assess whether a duty of care will arise in any particular case. Rather, what is required is: "[A]n approach based, in the manner characteristic of the common law, on precedent, and on the development of the law incrementally and by analogy with established authorities".

The Court reviewed the evolution of the law on the imposition of duties of care. It is thus essential reading for tort lawyers. It is self-evident that any case which includes express reference to (amongst others) Donoghue v Stevenson, Hedley Byrne v Heller, Anns v Merton, Murphy v Brentwood, Caparo v Dickman, Stovin v Wise is going to be of importance.

The Supreme Court went on to say "[I]t is neither necessary nor appropriate to treat Caparo as requiring the application of its familiar three-stage examination afresh to every action brought. Where the law is clear that a particular relationship, or recurrent factual situation, gives rise to a duty of care, there is no occasion to resort to Caparo, at least unless the court is being invited to depart from previous authority".<sup>21</sup> What the *Supreme Court* is saying is where the lower courts have already determined whether a duty of care should be imposed in particular circumstances, there is no need for this issue to be reconsidered in subsequent cases. It is surprising that the court would impose on the police in this case a duty of care, given the long and consistent line of high authority which appeared to have been stated in firm terms that no such duty arises should be imposed on the police public policy

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<sup>20</sup> Robinson v Chief Constable of West Yorkshire Police [2018] UKSC 4

<sup>21</sup> Robinson v Chief Constable of West Yorkshire Police [2018] UKSC 4, 100

grounds. However, the reassurance inherent in the incremental approach assumes that the existing law is properly understood. In *Robinson*, the Supreme Court decided that various statements of the law in this area – including from the Supreme Court itself – were not correct, or at least had not been properly understood.

## **Conclusion**

Tort law bases on the idea that a person owes a duty of care to another individual. The breach of this duty may give rise to liability. A legal duty to take care is where care should be taken to ensure a person should not be exposed to “*liability in an indeterminate amount for an indeterminate time to an indeterminate class*”. First, you have to prove the existence of a duty of care. The Neighbour test represents the first test applied in order to assess the presence of a duty of care. There was a significant development of the concept of duty of care, stemmed from the Neighbour test. The court decided to adopt a narrower approach due to the avoidance of floodgates. In order to avoid a flood of claims and to give structure to the identification of duty of care, the court introduced the Caparo three-stage test. According to the so-called ‘incremental approach’ a duty of care will exist in a situation which can be regarded as analogous to one in which a duty of care has already been found. In cases where the question whether a duty of care arises has not previously been decided, the courts will consider the closest analogies in the existing law, with a view to maintaining the coherence of the law and the avoidance of inappropriate distinctions.

## Chapter 15 - Trespass to a Person

### Question

In response to an advertisement in a magazine, Heidi and Rebecca booked, paid for and went to a Murder Mystery weekend. The event was held at the Forest Lodge Hotel in Littlestow. They arrived on Friday evening and met 2 gentlemen for dinner who introduced themselves as Rupert Green and Stephen Sarler. They were also taking part in the Murder Mystery Weekend. After dinner, all the guests who were taking part in the Murder Mystery Weekend's activities gathered in the residents' lounge for a briefing about the event. Rupert and Stephen bought Heidi and Rebecca a drink and they all had a pleasant chat before Rupert and Stephen announced they were going for a walk before going to bed.

Heidi and Rebecca decided to have one final drink before going to bed and had nearly finished when suddenly the lights went out. It was not part of the planned activities as they were not due to start until the next day. Heidi saw a dark figure enter the room and heard a shot fired. Rebecca fainted and collapsed on to the floor. Heidi thought Rebecca had been shot by the intruder. Heidi then saw the dark figure coming towards her and was terrified that she too was about to be shot.

Suddenly the lights went on and Stephen was standing by the door. The intruder turned out to be Rupert who had fired the gun which in fact was a toy gun that could make a loud noise imitating the sound of gunshots. Rupert had decided to play a practical joke in the hope that Heidi and Rebecca would believe the Murder Mystery Weekend had started early.

Whilst Heidi and Rebecca lay on the settee to recover from their ordeal, Jeeves, the night porter, put his hand round the doorway to switch off the lights and to lock the door which he did every night at midnight. He did not see Heidi or Rebecca as they were lying down and he could not see past the back of the settee from his position standing by the door. Heidi and Rebecca were forced to sleep on the settee all night and were

released from the lounge at 7.00am the next morning when Jeeves opened the door.

Advise Heidi and Rebecca on their rights, if any, in the law of tort.

## Answer

### Introduction

This essay advises Heidi and Rebecca on their rights, if any, in the law of tort. It will discuss the tort of assault on both girls through the practical joke. It will examine any possible defences that can be raised. It will then discuss the operation of the rule in **Wilkinson v Downton** [1897] 2 QB 57. Lastly, this paper will discuss a possible claim for false imprisonment.

Trespass to the person is an element of tort law which covers wrongs done to an individual. Both Heidi and Rebecca will have a cause of action against Rupert for the tort of assault, because Rupert had decided to play a practical joke in the hope that Heidi and Rebecca would believe the Murder Mystery Weekend had started early. In the law of tort, an assault occurs when a person apprehends immediate and unlawful physical contact. In other words, fearing that you are about to be physically attacked makes you the victim of an assault. It is also necessary that an attack can actually take place. If an attack is impossible, then despite a person's apprehension of physical contact, there can be no assault. Thus if the apprehension of an immediate battery is not possible this will bar an action as in **Thomas v National Union of Mineworkers**, where the picketing miners held back by police and posed no threat of physical contact. This is similar to brandishing an unloaded pistol. This would not be assault, because the Defendant could not have intended battery "There must be the means of carrying the threat into effect" this was highlighted by Tindal CJ in **Stephens v Myers** (1830) C & P 349. But later in the criminal case of **R v St George** (1840) 9 C&P 483 it was stated that this is an assault. Thus the gist of the tort is to cause a reasonable person to apprehend battery (reasonable person would not know that the gun is unloaded)

on an objective test. It can be argued that the girls did not know this was a joke and for them it was very real. Rebecca fainted and collapsed on to the floor. Heidi thought Rebecca had been shot and was terrified that she was also about to be shot. Thus the tort of assault should be actionable.

Moreover, the rule in **Wilkinson v Downton** [1897] 2 QB 57 states where an intentional act (intended to cause distress) causes unintentional consequences, liability may be found (Townshend-Smith: 299). This was approved in **Janvier v Sweeny** [1919] 2 KB 316 where the Defendant pretended to be the military authorities with intention of fright; the Claimant suffered severe shock and lost her job. Rupert had decided to play a practical joke in the hope that Heidi and Rebecca would believe the Murder Mystery Weekend had started early. Therefore they could be able to recover compensatory damages as a result of the loss they have sustained.

False imprisonment is the unlawful restraint of a person, which restricts that person's freedom of movement. In order to bring an action under this tort, the victim needs not to be physically restrained from moving. It is sufficient that they are prevented from choosing to go where they please, even if only for a short time (Glasbeek: 77). This includes being forced to stay somewhere, such as in Heidi and Rebecca's situation. A person can also be restrained, even if they have means of escape but it is unreasonable for them to take it, for example, if they have no clothes or they are in a first floor room with only a window as a way out. False imprisonment can also be committed if the victim is unaware that they are being restrained, but it must be a fact that they are being restrained. The ingredients for false imprisonment are complete restraint e.g. it will not be complete if the claimant can leave or is able to escape as in **Wright v Wilson** [1699] 1 Ld Raym 73. The restraint must be intentional, but malice is not necessary as in **R v Governor of Brockhill Prison (No 2)** [2001] 2 AC 19. It is not necessary that the Claimants are imprisoned. Confinement of some type will suffice. **Burton v Davies** considered the issue of assault and false imprisonment and whether or not a woman was assaulted and falsely imprisoned, when the Defendant drove at high speed which prevented her from

exiting the vehicle. By using this case, we can advise that the girls were forced to sleep in the bar area, with no exit, which will meet the criteria required. Actual knowledge by the Claimant of detention is not necessary. Only proof of total restraint is required as per **Murray v Ministry of Defence** [1988] 2 All ER 521. Both girls seem to have an action for false imprisonment. Jeeves, the night porter, locked the door. Heidi and Rebecca were forced to sleep on the settee all night and were released from the lounge at 7.00 am the next morning when Jeeves opened the door. The length of time of their restraint will not matter, it will be actionable “for however short a time” as said in **Bird v Jones** (1845) 115 ER 668.

### **Endnote**

The whole book may be purchased on our [website](#). We hope you found the example interesting and that it was of use to you. [Private Law Tutor Publishing](#)'s mission is to provide legal education tools that are simple to use and comprehensive for students of all levels, with no consideration for profit. We utilise the proceeds from our books to fund the development of new materials. Private Law Tutor is authored and published by a group of barristers who are also [law tutors](#). They have banded together to assist legal students worldwide.