THE TORT OF

RELEVANT TO ACCA QUALIFICATION PAPER F4 (IRL), (SCT) AND (UK)

If there's one area of the F4 syllabus that students appear to struggle with, it's the tort of negligence. (For Paper F4 (SCT) a tort is a delict.) The examiners' reports indicate that students do not understand the subject very well – in particular, the various elements that a claimant must prove in order for the defendant to be found negligent. This article addresses each of the key elements in turn, but we begin with an explanation of why tort developed.

Torts are legal wrongs that one party suffers at the hands of another. Negligence is a form of tort which evolved because some types of loss or damage occur between parties that have no contract between them, and therefore there is nothing for one party to sue the other over.

In the 1932 case of *Donoghue v Stevenson*, the House of Lords decided that a person should be able to sue another who caused them loss or damage even if there is no contractual relationship. Donoghue was given a bottle of ginger beer by a friend, who had purchased it for her. After drinking half the contents, she noticed that the bottle contained a decomposing snail and suffered nervous shock as a result. Under contract law, Donoghue was unable to sue the manufacturer because her friend was party to the contract, not her.

TORTS ARE LEGAL WRONGS THAT ONE PARTY SUFFERS AT THE HANDS OF ANOTHER. NEGLIGENCE IS A FORM OF TORT WHICH EVOLVED BECAUSE SOME TYPES OF LOSS OR DAMAGE OCCUR BETWEEN PARTIES THAT HAVE NO CONTRACT BETWEEN THEM.

However, the House of Lords decided to create a new principle of law that stated everyone has a duty of care to their neighbour, and this enabled Donoghue to successfully sue the manufacturer for damages.

Let's consider a hypothetical case and use it to demonstrate how the tort of negligence works.

Harry is involved in an accident in which his car is hit by one driven by Alex. As a consequence of the accident Harry breaks a leg and is unable to work for two months. Can Harry sue Alex for damages?

On the face of things the answer seems obvious. Harry was injured as a result of Alex driving into his car and so it seems fair that he should be able to sue him. However, think of the situation from Alex's point of view, is it fair that Harry should be able to sue him just like that? People have accidents everyday – should they all be able to sue each other for every little incident? If they are then the courts would be overwhelmed with cases.

Thankfully, in order to prove negligence and claim damages, a claimant has to prove a number of elements to the court. These are:

- the defendant owed them a duty of care
- the defendant breached that duty of care, and
- they suffered loss or damage as a direct consequence of the breach.

Even if negligence is proved, the defendant may have a defence that protects them from liability, or reduces the amount of damages they are liable for.

Element 1 – The duty of care

As we saw earlier, the concept of a duty of care was created in the Donoghue case. The House of Lords stated that every person owes a duty of care to their neighbour. The Lords went on to explain that 'neighbour' actually means 'persons so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected'. This is a very wide (and complicated) definition that could include almost anyone – if still in operation today the courts would most certainly be overrun with cases.

The later cases of *Anns v Merton London Borough Council* (1977) and *Caparo Industries plc v Dickman* (1990) restricted the definition a little by introducing 'proximity' and 'fairness'.

Studying Paper F4?

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NEGLIGENCE

Proximity simply means that the parties must be 'sufficiently close' so that it is 'reasonably foreseeable' that one party's negligence would cause loss or damage to the other. Fairness means that it is 'fair, just and reasonable' for one party to owe the duty to another.

What does this mean for Harry? I think you'll agree that Alex owes him a duty of care. There is sufficient proximity (ie Alex drove into Harry's car); it is reasonably foreseeable that a collision between the cars could cause Harry some injury, and it seems fair, just and reasonable for Alex to owe a duty of care to Harry (and indeed all other road users).

Element 2 – Breach of duty of care

In many cases brought before the courts it is evident that a duty of care exists between the defendant and the claimant. The real issue is whether or not the actions of the defendant were sufficient to meet their duty. To determine this, the court will set the standard of care that they should have met. This standard consists of the actions which the court considers a 'reasonable person' would have taken in the circumstances. If the defendant failed to act reasonably given their duty of care, then they will be found to have breached it.

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This 'reasonable' standard may be adjusted given the actual circumstances of the case. For example, if the claimant is vulnerable, such as being disabled or frail, it is reasonable to expect the defendant to have paid them special attention or taken extra care over them as compared to someone who is fit and healthy.

Other circumstances which may be taken into account include whether:

- The actions the defendant took are in line with common practice or industry recommendations. If they were, then it is likely that the defendant will be found to have met their duty unless the common practice itself is found to be negligent.
- There was some social benefit to the defendant's actions. If there was, then the court may consider it inappropriate for them to be found to have breached their duty.
- The defendant's actions had a high probability of risk attached to them. If they did, then the court will expect them to show they took extra precautions to prevent loss or damage.
- There were practical issues that prevented reasonable precautions being taken, or unreasonable cost would have been involved in taking them. If there were, then the court is unlikely to expect the defendant to have taken them in order to meet their duty of care.
- The defendant is a professional carrying on their profession. If they were, then the court will judge their actions against a reasonable professional in their line of work, rather than just any ordinary person. If professional guidelines are in place then the court will judge the defendant's actions against these rather than its own expectations.

Back to the case of Harry and Alex. In determining whether or not Alex broke his duty of care, a court will consider whether or not, given the circumstances, he drove as a reasonable person would have. For example, if it was foggy or wet at the time, he would be expected to show that he drove cautiously. In determining whether Alex's actions were reasonable, evidence may have to be taken from witnesses and expert analysis of the crash may be required. For now, let's assume Alex was not driving reasonably.

Res ipsa loquitur

In extraordinary cases, the facts may be so overwhelmingly in favour of the claimant that the court decides the defendant should prove that they were not negligent. The legal term for this is *res ipsa loquitur* (meaning the facts speak for themselves). It applies in circumstances where the cause of the injury was under the control of the defendant and that the incident would not have occurred if they had taken proper care. It is often applied in medical cases, for example in *Mahon v Osborne* (1939), a surgeon had to prove it was not negligent to leave a swab inside a patient.

Element 3 – Loss or damage as a result of the breach

In this element the claimant simply has to prove that the loss or damage was a direct consequence of the defendant's breach of duty of care. In other words that there is a chain of causality from the defendant's actions to the claimant's loss or damage. A simple test, called the 'but for' test is applied. All the claimant has to prove is that if it were not 'but for' the actions of the defendant then they would not have suffered the loss or damage.

Where there is more than one possible cause of the loss or damage, the defendant will only be liable if it can be proved that their actions are the most likely cause.

A good case which illustrates how the 'but for' test operates is *Barnett v Chelsea and Kensington HMC* (1969) – another medical case. A casualty department doctor negligently sent a patient home – the patient died. However, the doctor was not found liable for damages because the patient was suffering from arsenic poisoning and would have died no matter what the negligent doctor could have done.

The loss itself must not be 'too remote'. It is an important principle that people should only be liable for losses which they should have reasonably foreseen as a potential outcome of their actions. The *Wagon Mound* (1961) is a case often cited in explanation of this principle. Oil leaked out of the defendant's boat within Sydney harbour and came into contact with some cotton waste which had fallen into the water. The oil was of a particular type which would not foreseeably catch fire on water. However, the cotton ignited and this in turn set the oil ablaze causing damage to the claimant's wharf. The defendants were not found liable for fire damage as the actual cause of the fire was held too remote.

IN EXTRAORDINARY CASES, THE FACTS MAY BE SO OVERWHELMINGLY IN FAVOUR OF THE CLAIMANT THAT THE COURT DECIDES THE DEFENDANT SHOULD PROVE THAT THEY WERE NOT NEGLIGENT. THE LEGAL TERM FOR THIS IS *RES IPSA LOQUITUR* (MEANING THE FACTS SPEAK FOR THEMSELVES).

Novus actus intervieniens

Other events, which are outside the control of the defendant, may intervene in the chain of causality – adding some confusion to the outcome of a case. The good news is that there are some simple rules to remember that deal with them.

At all times you should bear in mind that the defendant will only be liable if their actions are the most probable cause of the loss or damage. They will not be liable if an intervening act becomes the real cause. Examples of intervening acts which remove liability from the defendant include:

- Actions of the claimant which are unreasonable, or outside what the defendant could have foreseen in the circumstances.
- Actions of a third party which become the real cause of the loss or damage. The defendant is only liable for damages up until the point when the third party intervened.
- Unforeseeable natural events – natural events which the defendant could have reasonably foreseen do not affect things.

Let's return to Harry and Alex. It is entirely possible for the accident to be caused by a third party driving into Alex, forcing him into Harry. It is also possible that Harry himself was an intervening factor – maybe he was driving erratically. Either of these factors could mean that Alex's breach of duty is not the real cause of Harry's injuries.

For now, let's assume that no third party is involved and that any actions Harry took are not enough to take the blame for the cause of the accident away from Alex. The court will therefore find Alex liable for negligence to Harry.

Defences

There are two defences a defendant can use where they are found liable for negligence. One will exonerate them completely; the other reduces the level of damages they are liable for.

Volenti non fit injuria simply means the voluntary acceptance of the risk of injury. If a defendant can prove the claimant accepted the risk of loss or damage, they will not be liable. Acceptance can be express (usually by a consent form being signed) or implied through the claimant's conduct.

Contributory negligence takes part of the blame away from the defendant if it can be proved the claimant contributed in some way to their loss or damage. The defendant is still liable, but will face a reduced damages payout.

In Harry and Alex's case, *volenti* is not an issue – in no way did Harry consent to the accident. However, if his actions contributed in some way to his injuries, maybe by not wearing a seatbelt, then he may find the amount of damages he receives is reduced.

Use of cases in exam answers

Finally, a brief word about using cases in exam answers. Students are often concerned about how many cases they should quote, or what happens if they cannot remember a case name. The simple fact is that students fail this exam because they do not know the law – not because they cannot remember a case name.

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My advice on cases is:

1. **Get to grips with the principles of law first**, then learn case names if you have time. By learning the law you will probably find that you remember the major cases anyway.
2. **Don't try to learn every case in your textbook** – the majority are there to illustrate how the law was applied in a particular set of circumstances. Instead, go for the major ones in each syllabus area and learn those.
3. **All you need to learn is the case name and the principle of law it created** – you do not need to learn and regurgitate all the background to the case in the exam.
4. **If you forget a case name in the exam**, don't let this stop you from explaining the principle of law, just write 'In a case it was decided that...' and continue with the principle.

As an example, consider this article – only six cases were mentioned. See if you can remember their names.

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