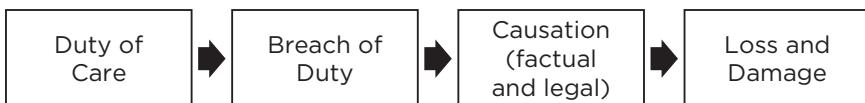


# Negligence: Duty of care and breach

## ■ MAKE SURE YOU KNOW

This chapter will cover two of the four main elements of negligence – duty of care and breach of duty. You are required to know the elements of negligence and apply the legal principles and rules appropriately and effectively to realistic client-based ethical problems and situations for your SQE1 assessment. The figure below highlights the four elements which need to be present to successfully bring a claim in negligence.



*Elements of negligence*

## ■ SQE ASSESSMENT ADVICE

As you work through this chapter, remember to pay particular attention in your revision to:

- the steps required in establishing negligence
- situations where there is an established duty of care
- situations where there is no established duty of care
- what breach of duty entails and the standard of care applied.

## ■ WHAT DO YOU KNOW ALREADY?

Have a go at these questions before reading this chapter. If you find some difficult or cannot remember the answers, make a note to look more closely at that during your revision

- 1) What are the necessary elements to successfully bring a claim in negligence?

[Introduction to negligence, page 2]

2 Negligence: duty of care and breach

2) In which of the following examples is there an established duty of care?

- doctor and patient
- driver and pedestrian
- teacher and pupil
- solicitor and client

**[Establishing a duty of care, pages 5-8]**

3) What are the two approaches the courts use when they are considering whether a duty of care is owed?

**[Establishing a duty of care, pages 5-8]**

4) What test do the courts use in establishing the general standard of care?

**[Standard of care, pages 15-18]**

5) What are the special situations where the court applies a different standard of care?

**[Standard of care: special situations, pages 18-20]**

## INTRODUCTION TO NEGLIGENCE

The everyday use of the word **negligence** conjures up the notion of a failure to take proper care of something. The law recognises this concept and seeks to provide a remedy to those that are caused injury by a wrongdoer failing to take proper care. The tort of negligence concentrates on the link between the wrongdoer's act or omission and whether that risk ought to have been foreseen.

Negligence is a large topic and will be covered in three chapters. This first chapter will deal with duty and breach. The second chapter will deal with causation, remoteness and loss. The third chapter will deal with remedies, claims for economic loss and psychiatric injury.

### Key term: negligence

Negligence relates to an act or omission which breaches a duty of care owed by one party (defendant) to another (claimant) and as a consequence causes loss and damage to that party (claimant).

### Revision tip

The SQE1 Assessment Specification does not require you to know case names but it will assist with your understanding and revision if you know the case name and the legal principle.

## DUTY OF CARE

When looking at negligence as part of your SQE revision, the first element you need to prove in establishing a claim in negligence is to show that there was a legal **duty of care** owed by the defendant to the claimant. **Figure 1.1** shows the steps involved in establishing liability in negligence.

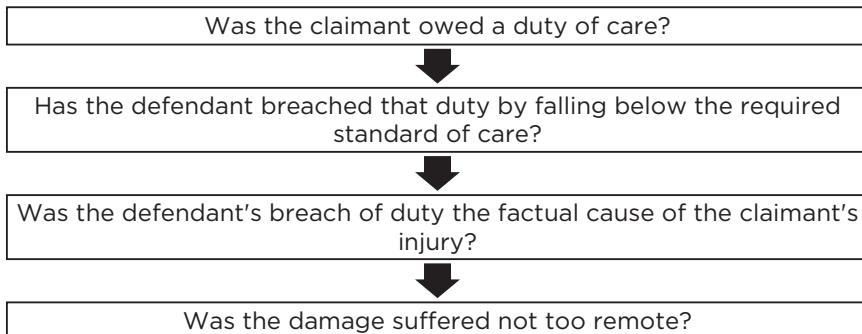


Figure 1.1: Duty of care

There are established categories of relationships where a duty of care exists and there are situations where the common law has developed duties of care. **Table 1.1** highlights some examples of situations where a duty of care has been established.

Table 1.1: Examples of established duty of care situations

Duty owed by:	Duty owed to:
Doctor	Patient
Dentist	Patient
Road user (motorists, cyclists etc)	Road user (pedestrians, motorists, cyclists etc)
Teacher	Pupil
Lecturer	Student
Employer	Employee
Manufacturer	Consumer

### Key term: duty of care

Duty of care relates to the obligation owed by the defendant to the claimant to take care to avoid causing the claimant injury or loss.

Look at **Practice example 1.1** below and think about whether a duty of care exists here.

### Practice example 1.1

You and your friend decide to meet for a drink in a café. You order and pay for both drinks. The café owner brings you the drinks. Your friend's drink is in an opaque bottle and the café owner pours half of the drink into your friend's glass. As she finishes the glass, she pours the residue of the bottle into her glass. It is then she sees what appears to be the remains of a snail and realises she has ingested whatever was in the bottle already. She becomes ill with gastroenteritis.

Do you think the café owner or the manufacturer of the drink owes your friend a duty to take care, namely a duty not to allow the bottled drink to become contaminated and make her ill?

These were the facts in *Donoghue v Stevenson* [1932] AC 562 (HL). Mrs Donoghue could not bring a claim in contract against the café owner as she had no contract with him as her friend paid for the drink. She brought an action against Stevenson, the manufacturer of the ginger beer drink. The House of Lords had to decide whether a duty of care existed. Did the manufacturer owe a duty to ensure the drink did not contain elements that would make the ultimate consumer ill? The House of Lords found that the manufacturer owed a duty to ensure that the drink did not contain material which would make the consumer of the drink ill. Donoghue was able to successfully seek damages for her injuries.

*Donoghue v Stephenson* established the **neighbour principle**. Lord Atkin stated that:

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.

Each case which comes before the courts turns on its own facts, meaning that the court will look at the facts and decide whether as a starting point there is a duty of care.

## Establishing a duty of care

In 1990 the courts developed a legal principle for establishing whether a duty of care exists following the case of *Caparo Industries plc v Dickman* [1990] 2 AC 605 (HL). The case involved investors (Caparo) relying upon accounts prepared by auditors (Dickman) relating to Fidelity plc. Once Caparo had bought shares in Fidelity they realised that Fidelity's accounts were in a poor state, which caused Caparo to incur financial losses. The Court had to decide whether Dickman owed a duty of care to Caparo.

The House of Lords stated that courts should use two approaches when considering whether there was a duty of care owed:

- incrementally and by analogy, or
- a three-stage test.

### *Incrementally and by analogy*

This first approach taken by the courts means that if a duty of care has been found to exist previously, looking to precedents decided by the courts, or where the situation is analogous to one in which a duty of care has been found to exist, the court will use that to decide the case without any need to refer to the *Caparo* three-stage test.

### *Caparo three-stage test*

The second approach to establishing a duty of care means you must establish the following:

- Reasonable foresight that the defendant's failure to take care could cause damage to the claimant; and
- That there was a relationship of proximity (ie, some connection) between the claimant and the defendant; and
- It is fair, just and reasonable that the law should recognise a duty on the defendant to take reasonable care not to cause that damage to the claimant.

**Table 1.2** gives an overview of the *Caparo* three-stage test and highlights examples of how the courts have considered the test. In considering whether there is a duty of care, these examples will help you to understand how the test can be applied.

The *Caparo* three-stage test will only be used in a small number of cases where the court will have to decide whether a new category of duty of care exists. It is not a prescriptive test but it allows the courts to consider whether it is fair to impose a duty of care.

## 6 Negligence: duty of care and breach

Table 1.2: Overview of Caparo three-stage test

Legal principle	Examples of cases to demonstrate the principle
Reasonable foreseeability  The claimant must fall within a class of individuals put at foreseeable risk by the defendant's action	<p>Children playing in the loading bay of the defendant's premises and developing mesothelioma in adult life. It was reasonably foreseeable that the plaintiffs would be exposed to the risk of lung damage.</p> <p><i>Evelyn Margereson v JW Roberts Ltd</i> [1996] 4 WLHK 21</p> <p>A pregnant pedestrian suffering shock and stillbirth following the sight of the aftermath of a cycling accident. It was not reasonably foreseeable that all people on the street where the negligent driver drove would suffer injury.</p> <p><i>Bourhill v Young</i> [1943] AC 92</p>
Proximity  Before a duty of care can arise, there needs to be a certain type of relationship or connection between the parties	<p>A boxer collapsed during the final round of a fight. Resuscitation equipment was not available at the ring side and as a result he suffered brain damage. The Board, as the only body in the UK which could license professional boxing matches and control what medical assistance was available at the ringside, had a relationship of sufficient proximity. Boxers should be able to rely on the defendant to look after their safety.</p> <p><i>Watson v British Boxing Board</i> [2001] 2 WLR 1256</p> <p>A surveyor employed by a landlord of shop premises (Maison Blanc) failed to notify the owners who were renting the shop that the sign above the shop was defective. When the sign fell and injured the claimant the surveyors were not liable.</p> <p>There was insufficient proximity between the surveyor and Maison Blanc (shop proprietor), or between the surveyor and the general public, to establish a duty of care.</p> <p><i>Harrison v Technical Sign Co Ltd and Active Commercial Interiors v Cluttons</i> [2013] EWCA Civ 1569</p>

Overview of *Caparo* three-stage test (continued)

Legal principle	Examples of cases to demonstrate the principle
Fair, just and reasonable  Policy considerations are taken into account to prevent a 'flood' of claims	A claim for compensation for wrongful birth following a negligently performed sterilisation operation on the father failed. Whilst it is fair and reasonable to impose a duty of care on the doctor performing the operation it was unfair to extend it to the costs of raising the child (pure economic loss). The pleasure of raising a child outweighed the financial burden.  <i>McFarlane v Tayside Health Board</i> [2000] 2 AC 59
	It was fair, just and reasonable to impose a duty of care on a rugby referee in an amateur adult match to minimise dangers to players as players' safety was dependent upon the rules of the game being enforced.  <i>Vowles v Evans</i> [2003] 1 WLR 1607

**Figure 1.2** explains the steps the court can consider when dealing with new cases and establishing whether a duty of care exists.

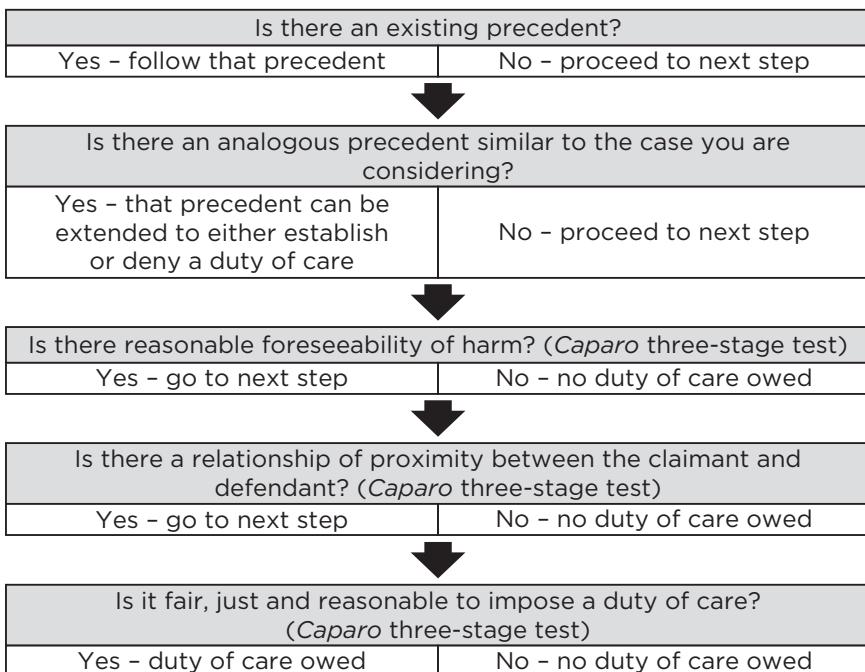


Figure 1.2: Establishing a duty of care - new cases

### Revision tip

Remember that if you are presented with a series of facts where there is an established duty of care you will not need to consider the three-stage test.

### Special duty of care problems (omissions and third parties)

In considering whether there is a duty of care, there will be occasions when the harm has been caused due to:

- a party failing to act (omissions) or
- where the incident has been caused by a third party.

The courts have developed these 'special duty' problem areas by modifying the *Caparo* test in certain situations. What follows is a consideration of these special areas.

#### *Omissions*

In the law of negligence there is no positive duty to act outside tortious or contractual relationships between parties. This means that there is no duty owed in respect of omissions (failing to act) and the law does not impose liability. If you walk past a person choking on food and do not stop and perform first aid you will not be held liable in negligence. There is no positive duty to stop and perform first aid. **Practice example 1.2** considers omissions and failure to positively act.

### Practice example 1.2

A local authority is aware of a dangerous obstruction at a junction. It has discretionary statutory power (Highways Act 1980 s 79) to have the obstruction removed and there have been three previous accidents at the same junction. The local authority fails to remove the obstruction and a further serious accident occurs.

Would the local authority be liable for their failure/omission to positively act and remove the obstruction?

These were the facts in *Stovin v Wise* [1996] AC 923 (HL). The Court found that a statutory power did not give rise to a common law duty of care and the local authority had not acted unreasonably in failing to proceed under that power. Even if the work ought to have been carried out, it could not be found that a public law

duty gave rise to an obligation to compensate those suffering loss due to its non-performance. The creation of a duty of care in the circumstances posed an unacceptable risk to local authority budgetary decision making in an area where road users themselves were subject to compulsory insurance requirements.

Remember that the law does impose obligations for omissions where there is an established relationship. These 'relationships' are the exceptions to the rule that there is no positive duty to act to prevent harm. **Table 1.3** shows some examples where a duty of care is imposed for omissions due to an established relationship.

*Table 1.3: Examples of liability for omissions*

Relationship	Case example
<p>Control</p> <p>Situations where the defendant exercises control over the claimant and as such a duty of care for omissions should be imposed.</p>	<p>A teacher who had allowed a child to run onto the road (causing the death of a lorry driver when he swerved and hit a telegraph pole in trying to avoid the child) in the process of attending to another pupil owed the same duty of care as a careful parent. The teacher was not to blame for the accident, but the school (Council) was liable for their omission – in not having a precaution to prevent the child getting onto the street.</p> <p><i>Carmarthenshire County Council v Lewis</i> [1955] AC 549 (HL)</p>
<p>Assumptions of responsibility</p> <p>Situations where the defendant has assumed responsibility for the claimant's safety/wellbeing.</p>	<p>A naval pilot celebrating his birthday became so drunk he collapsed and the officer in charge ordered he be put to bed. He later died due to choking on his own vomit. The Court found that the duty was not owed to prevent the deceased from drinking too much. The duty was however owed for a different omission, namely, the officer on duty's failure to have someone stationed to watch him whilst he slept.</p> <p><i>Barrett v Ministry of Defence</i> [1995] 1 WLR 1217 (CA)</p>

*Examples of liability for omissions (continued)*

Relationship	Case example
<p>Creating/adopting risks</p> <p>Where the defendant creates a dangerous situation there will be a positive duty to act to deal with the danger.</p>	<p>A tree was stuck by lightning and caught fire (in Western Australia). The owner of the land had a tree-feller cut the tree down but omitted to extinguish the fire and allowed it to burn out. The fire spread to neighbouring land. The landowner was negligent in omitting to extinguish the fire with water. In omitting to take any further steps to prevent the fire from spreading he had adopted the risk of it spreading and was liable when it did.</p> <p><i>Goldman v Hargrave</i> [1967] 1 AC 645 (PC)</p>

*Third parties*

There is no general duty of care in relation to the acts of third parties. The law does not recognise a duty to prevent other people from causing harm. However, there are exceptions to this rule, similar to the exceptions discussed in respect of omissions. The exceptions originate from a relationship between the parties. **Practice example 1.3** highlights one of these exceptions.

**Practice example 1.3**

A supermarket chain purchases a cinema with a view to demolishing it and building a supermarket. A few weeks after purchase a fire breaks out, thought to be started by the act of a third party – intruders. The fire destroys the cinema and adjoining properties. Is the supermarket chain liable to the owners of the adjoining properties? Did the supermarket owners owe a duty of care to the property owners to ensure that the cinema was kept locked, preventing vandals from breaking in and starting a fire?

These were the facts in *Smith v Littlewoods; Maloco v Littlewoods* [1987] AC 241 (HL) 271. The supermarket owners had no knowledge

of any previous attempts and as such the court found that it was not reasonably foreseeable by them that the fire would be started nor that it would engulf the building.

In *Smith* Lord Goff stated that a duty of care could arise in four circumstances:

- where there was a special relationship between the claimant and defendant
- where there is a special relationship between the defendant and a third party, such as a relationship of control or supervision
- where someone creates a source of danger and it is reasonably foreseeable that the third party would interfere
- where there is a failure to take steps to stop the danger created by a third party.

**Table 1.4** gives examples of cases where liability for third parties was established by the court.

*Table 1.4: Examples of liability for third parties*

Exceptions	Examples
Special relationship between claimant and defendant	Defendant (decorator) and claimant (homeowner). Duty on defendant to lock premises when he left.
A relationship such that there is 'proximity' between the parties.	<i>Stansbie v Troman</i> [1948] 2 KB 48 (CA)
Special relationship between defendant and third party	Supervisors of young offenders (who escaped and caused damage to boats) owed a duty of care to owners of the boats.
The more 'proximate' the relationship between the parties the more likely there will be a duty of care imposed.	<i>Home Office v Dorset Yacht Co Ltd</i> [1970] AC 1004 (HL)
Creation of a source of danger	Defendant owed a duty of care to a police officer who was injured in the process of trying to control the defendant's untethered horses after they bolted due to children (third party) throwing stones.
A duty of care may be imposed on the defendant where the third party's actions make the situation worse.	<i>Haynes v Harwood</i> [1935] 1 KB 146 (CA)

*Examples of liability for third parties (continued)*

Exceptions	Examples
<p>Failure to prevent a known danger</p> <p>A duty of care may be imposed where the third party creates the danger (as opposed to where the defendant creates the danger).</p>	<p>Defendant (local authority) liable to owners of adjoining premises in failing to prevent the spread of fire by third party intruders. The local authority knew of the danger and failed to prevent it.</p> <p><i>Clark Fixing Ltd v Dudley Metropolitan Borough Council</i> [2001] EWCA Civ 1898</p>

**Revision tip**

Remember that if you are presented with a series of facts relating to an act or an omission in one of these special categories the duty of care will be modified.

The courts have also considered whether there should be liability for criminal acts of third parties. For example, the courts have decided that the owner of a hotel with adequate security would not owe an absolute duty to prevent an attack on one of the hotel guests (*Al-Najar and others v The Cumberland Hotel (London) Ltd* [2019] 1 WLR 5953).

Consider **Practice example 1.4**.

**Practice example 1.4**

Following neighbour disputes in local authority housing, a resident repeatedly behaving in an anti-social manner is advised by the local authority that they have commenced eviction proceedings against him. The resident then returns home and attacks and kills the person whom he believes to be the cause of the complaint.

Did the local authority have a duty of care to warn or protect the deceased from the criminal acts of a third party?

These were the facts in the case of *Mitchell v Glasgow City Council* [2009] UKHL 11. The court applied the test of fairness and public

policy (*Caparo*) and held that it was not just, fair and reasonable that the local authority should be held liable. The court set out examples where there would be a duty to warn another person that he was at risk of loss, injury or damage as a result of the criminal act of a third party:

- where the person was under a duty to supervise the acts of the third party and fails to do so (*Dorset Yacht*)
- where a person specifically creates a risk of injury (eg, if he arms someone with a weapon)
- where a person assumes specific responsibility for the claimant's safety and then carelessly fails to protect him
- where an employer is vicariously liable for his employee's crime (see **Chapter 5**).

### Summary: duty of care

WHAT is duty of care?	A duty of care is the obligation owed by the defendant to the claimant to avoid causing the claimant loss or damage.
WHEN is duty of care established?	<p>There are situations where an established duty of care exists. For example, the duty of care owed by road users to other road users, by doctors to patients, and by teachers to pupils.</p> <p>For new cases consider whether there is an existing precedent and follow that. If not, if there is an analogous precedent follow that.</p> <p>If not, use the three-stage <i>Caparo</i> test (foreseeability of harm, proximity between the parties and whether it is fair, just and reasonable to impose a duty of care).</p>
HOW does it relate to negligence?	Once a duty of care is established the first element of a potential claim in negligence has been proved. This is the first hurdle to cross in bringing a claim in negligence. Once a duty of care has been established, the second hurdle to establish is whether the duty of care has been breached - covered in the next section.

## BREACH OF DUTY

When considering scenarios relating to negligence in the SQE assessment, you will need to consider whether a duty of care is established. Once this is established the next element to prove is that the duty of care was breached. There will be a **breach of duty** when the defendant falls below the particular standard of care required by the law. The burden for proving a breach of duty is on the claimant. The court has to be satisfied 'on balance of probabilities' that the duty of care has been breached. We can understand this by using percentage terms. If the court finds that it is 50% likely the claimant's case occurred as the claimant states then the court will find for the defendant. However, if the court finds that it is 51% likely the claimant's case occurred as the claimant states then they will find for the claimant. Whether a breach of duty has occurred depends upon the particular facts of the case. Each case turns on its own facts. **Figure 1.3** can be used to help you establish whether there has been a breach of duty.

### Key term: breach of duty

Breach of duty is where one party's behaviour has fallen below the standard expected and required by the law.

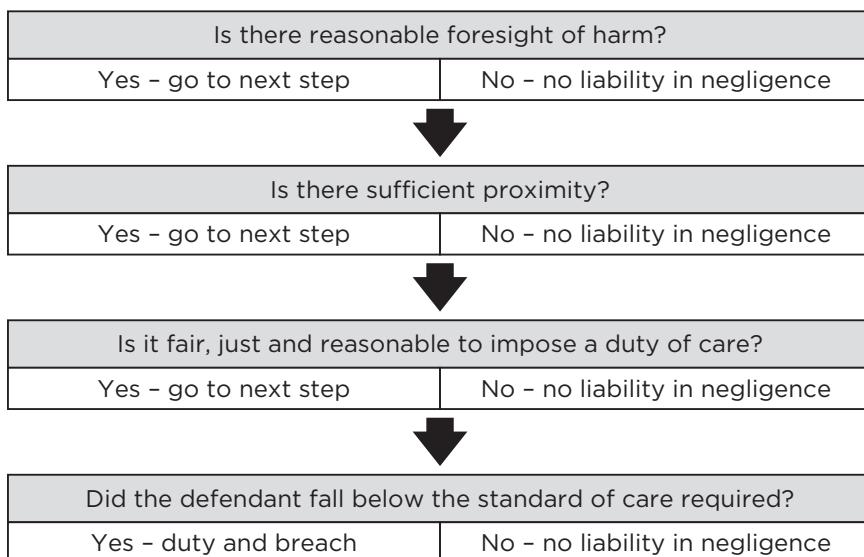


Figure 1.3: Establishing breach of duty

## Standard of care

You need to be aware of the different standards of care used by the courts. They are as follows:

- general standard of care
- professional standard of care
- special standard of care.

### *Standard of care: general*

The courts use an objective test to measure what the defendant has done compared to what a 'reasonable man' would have done. If the defendant's actions reflect those actions of a reasonable person then they will not have breached their duty of care. If the defendant's actions do not reflect those of a reasonable person they will have breached their duty of care. Their actions will have fallen below the **standard of care**.

#### **Key term: standard of care**

The standard of care relates to tests the court will use to assess whether the defendant's actions are those of a reasonable person, in all the circumstances.

There are significant cases where the court has tried to define the reasonable person. **Table 1.5** identifies these cases. Remember that the SQE1 Assessment Specification will not require you to recall the names of the cases but it is important that you understand the principles.

*Table 1.5: Reasonable person – case law*

Who is the reasonable person?	Examples – case law
'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.' (Lord Alderson)	<p>The defendant's water main burst, flooding the claimant's house. The defendant had acted in accordance with the average temperatures in previous years, not the severe unexpected temperature of 1855. A reasonable man would have done no different.</p> <p><i>Blyth v Proprietors of the Birmingham Waterworks (1856) 11 Ex Ch 781</i></p>

*Reasonable person – case law (continued)*

Who is the reasonable person?	Examples – case law
'Some persons are by nature unduly timorous and imagine every bath beset by lions. Others, of more robust temperament, fail to foresee or nonchalantly disregard even the most obvious dangers. The reasonable man is presumed to be free both from over-appreciation and from over-confidence.' (Lord Macmillan)	<p>The defendant was not liable when an employee spilt hot tea on the child claimant whilst carrying an urn. The defendant had assumed the urn would be carried carefully. The reasonable man would not be so apprehensive of danger.</p> <p><i>Glasgow Corporation v Muir</i> [1943] AC 448 (HL)</p>
<p>'The man on the Clapham Omnibus.'</p> <p>'The man who in the evening pushes his lawn mower in his shirtsleeves.'</p> <p>(Lord Greer)</p>	<p>The defendants were not liable to race track spectators killed in an accident the reasonable person could not foresee.</p> <p><i>Hall v Brooklands Auto-Racing Club</i> [1933] 1 KB 205 (CA)</p>
<p>'... commuters on the Underground.'</p> <p>(Lord Steyn)</p>	<p>The reasonable person would not agree that a doctor/hospital should compensate the parents for the cost of bringing up a healthy but unwanted child, following negligent sterilisation surgery.</p> <p><i>McFarlane v Tayside Health Board</i> [2000] 2 AC 59</p>

In conclusion, for the SQE1, when considering scenarios relating to negligence, you need to be aware that the reasonable person is the 'average person', and in considering the standard of care, it is this average objective test the courts use.

*Standard of care: professional*

The courts recognise a different standard of care in respect of certain categories of defendants.

Defendants purporting to possess a skill or profession will be judged by a reasonable person with that same skill or trained in the same profession. Consider **Practice example 1.5**.

### Practice example 1.5

A hospital patient undergoes electroconvulsive therapy in an attempt to treat severe depression. The treatment involves passing an electric current through the patient's head, which causes seizures. During treatment the patient sustains double hip and pelvis fractures.

Is the doctor negligent in failing to provide the claimant with muscle relaxants or restraints which may have prevented the injuries? Should the doctor have warned the patient about the risks associated with the treatment?

These were the facts in *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582 (QBD). The court had to decide whether the reasonable doctor would have administered relaxants, restrained the claimant and warned the claimant about the risks of the treatment. The court accepted that there was a responsible body of experts opposed to the use of relaxant drugs and restraint. Further that the experts would only have warned the claimant had he enquired about the risks (which were small) of the treatment.

The *Bolam* test established that a doctor would not be deemed to have breached their duty of care if they acted in accordance with a competent body of medical opinion. In these cases, expert evidence from others within the profession is used to determine whether the defendant's actions were reasonable in the circumstances. The *Bolam* test was modified in *Bolitho v City and Hackney Health Authority* [1998] AC 232 (HL). In *Bolitho* the claimant suffered brain damage as a result of the failure of a doctor to attend to the claimant and intubate (place a tube down the patient's throat to assist with breathing). The court accepted that there were differing medical opinions as to whether the claimant should have been intubated. The court had to satisfy itself that the 'responsible body of medical men' could state a logical basis for the opinion they supported (not intubating the claimant).

When dealing with these types of scenarios in the SQE1 assessment, remember that when presented with skilled medical professionals the standard of care is as follows:

- Did the doctor act in a manner accepted by a responsible body of medical professionals?
- If so, is there a logical basis for their acting in such a manner?

*Bolam* and *Bolitho* deal with treatment. There has been a departure from the *Bolam* test in respect of the disclosure of pre-treatment information, which you should also ensure you understand. **Practice example 1.6** illustrates further development of the legal principle relating to warning patients of material risks.

### Practice example 1.6

For insulin-dependent diabetic pregnant women there is a 9–10% risk of shoulder dystocia during birth. A diabetic pregnant woman of small stature is not advised of this risk and during the birth of her baby there are complications which lead to oxygen deprivation and the child being born with cerebral palsy. The doctor chose not to advise his patient of the risks as he knew them to be small and that most women would opt for a caesarean had he done so. Had his patient known the risks she would have opted for a caesarean. Is the doctor negligent in not advising the patient about the risks?

These were the facts in *Montgomery v Lanarkshire Health Board* [2015] UKSC 11. The Court held that a duty of care extended to warning patients about material risks. The court established that rather than being a matter of clinical judgement it was a matter for the patient to make a decision in respect of their treatment knowing the material risks involved. Whether a risk is a material risk is determined by whether a reasonable person in the patient's position would be likely to attach significance to the risk. In other words, the doctor should disclose risks that they know or ought to know the patient would view as significant.

The court does not recognise that junior professionals may have less experience than their senior colleagues. It is no defence to a claim to cite lack of experience. This was established in the case of *Wilsher v Essex Area Health Authority* [1988] AC 1074.

### Standard of care: special situations

There are certain situations where the courts apply a different standard of care. **Table 1.6** highlights these special situations.

Table 1.6: Standard of care: special situations

Special standard of care	Examples – case law
Children  Children are judged by the standard of those of a similar age.	Two 15-year-old schoolgirls were fencing with plastic rulers during class when one of the rulers snapped and a fragment of plastic caused damage to the claimant's sight. The defendant was not liable as an ordinary 15-year-old would not have foreseen the risk.  <i>Mullin v Richards</i> [1998] 1 WLR 1304 (CA)
Sporting activities  Duty only where there is a reckless disregard for safety.	An experienced horse rider injured a photographer at a horse show when he lost control of his horse. There was no breach of duty as there was no 'reckless disregard' for the safety of the spectator, only an error of judgement by the defendant.  <i>Wooldridge v Summer</i> [1963] 2 QB 43 (CA)
Unskilled defendant  Judged to a reasonably competent standard.	A learner driver collided with a lamp post, injuring her driving instructor. The defendant was liable as she was judged to the standard of a reasonably competent driver, not the learner driver she was.  <i>Nettleship v Weston</i> [1971] 2 QB 691
Illness  On occasion modified, the standard of care of a reasonably competent (driver).	The defendant suffered a stroke as his journey began but carried on driving and had three collisions. He was liable as he should have stopped the moment he felt ill.  <i>Roberts v Ramsbottom</i> [1980] 1 WLR 823  The defendant driver suffered low blood sugar, causing lack of glucose to the brain, and crashed his lorry. He was not liable as he had no knowledge or warning of his condition.  <i>Mansfield v Weetabix</i> [1998] 1 WLR 1263

*Standard of care: special situations (continued)*

Special standard of care	Examples - case law
<p>Emergency situations</p> <p>The duty is to exercise such care and skill as was reasonable in all the circumstances.</p>	<p>The fire service had to transport equipment in order to respond to an emergency. They did not have the means to secure the equipment and the claimant fire fighter was injured when he had to travel with it in the back of the truck. The defendant was not liable - there was not a breach of duty as the benefit of saving a life outweighed the need to take precautions.</p> <p><i>Watt v Hertfordshire County Council</i> [1954] 1 WLR 835 (CA)</p> <p>A police officer who injured the suspect he was pursuing at high speed owed the same standard of care to the suspect as to everyone else.</p> <p><i>Marshall v Osmand</i> [1983] 3 WLR 13</p>
<p>State of knowledge</p> <p>Judged at the time of the incident.</p>	<p>Patients suffered paralysis following contaminated anaesthetic injections. At the time it was not known that the vials storing the anaesthetic could develop cracks allowing bacteria to form. The court judged the case by the state of knowledge at the time (1947) of the incident.</p> <p><i>Roe v Minister of Health</i> [1954] 2 QB 66 (CA)</p>

**Revision tip**

The SQE1 Assessment Specification expects you to understand the general standard of care and the professional standard of care. Ensure you understand the difference between everyday situations (eg, road traffic accidents) and those involving professionals or people with a particular set of skills (eg, doctors, dentists, solicitors etc). **Table 1.1** highlights examples of established duty of care situations.

## Other relevant factors when considering the standard of care

Before we move on to the next element of negligence which must be proved in order to successfully make a claim, it is important to be aware that the court also takes into consideration other relevant factors when considering the standard of care. Other relevant factors are:

- cost of precautions
- social value
- likelihood of harm
- seriousness of injury.

**Table 1.7** covers these other relevant factors with case examples to explain what the court takes into consideration.

*Table 1.7: Standard of care - other relevant factors*

Other relevant factors relating to the standard of care	Case example
<p><b>Cost of precautions:</b> If the defendant could have avoided breaching their duty of care by taking low-cost precautions the court is more likely to find that the defendant fell below the standard expected and breached their duty to the claimant.</p>	<p>Owners of a factory that had sustained flooding after severe rainstorms had done all that was reasonable (spreading sawdust on the floor) to prevent employees slipping. It was unreasonable to send the employees home as it would mean shutting the factory, which would be very costly.</p> <p><i>Latimer v AEC Ltd</i> [1952] 2 QB 701 (CA)</p>
<p><b>Social value:</b> The courts may apply a lower standard of care where the defendant's behaviour is in society's interest.</p>	<p>Playing a game in the dark added no social value, only excitement, and the Scout Association were liable for the scout's injuries sustained when playing the game.</p> <p><i>Scout Association v Barnes</i> [2010] EWCA Civ 1486</p>

*Standard of care – other relevant factors (continued)*

Other relevant factors relating to the standard of care	Case example
	<p>The Compensation Act 2006 allows the court to take into consideration whether the steps the defendant may have taken relating to a socially desirable activity would have discouraged those from taking part or prevented them from doing so. It reinforces the common law by reassuring people that they should not be deterred from taking part in risky activities if they are for the greater good.</p> <p>Also, the Social Action, Responsibility and Heroism Act 2015 (SARAH) complements the Compensation Act and seeks to provide protection for those that seek to help in emergency situations. When considering the breach of duty, the court is required to have regard to whether the person was acting for the benefit of society, whether they demonstrated a responsible approach and whether they were acting heroically by intervening in an emergency to assist an individual in danger.</p>
<p><b>Likelihood of harm:</b> The court will take into account the probability of the injury occurring. The more likely it is that the injury will occur, the more likely the court will find the defendants liable on the basis that they could have avoided it.</p>	<p>Whilst it was probable that a cricket ball could clear the perimeter fence from the cricket ground, the likelihood of it hitting a pedestrian (which it did) was a precaution an ordinary careful man would not take.</p> <p><i>Bolton v Stone</i> [1951] 1 All ER 1078 (HL)</p>
<p><b>Seriousness of injury:</b> The more serious the injury the more likelihood that the court will find that the defendant has fallen below the required standard of care.</p>	<p>The employer of a garage hand who was blind in one eye should have taken into account the seriousness of the consequences for the claimant of injuring his healthy eye by providing safety goggles.</p> <p><i>Paris v Stepney Borough Council</i> [1951] AC 367 (HL)</p>

You should now understand the main principles of the standard of care and how to address it in your revision. **Figure 1.4** illustrates the elements to be considered when revising standard of care.

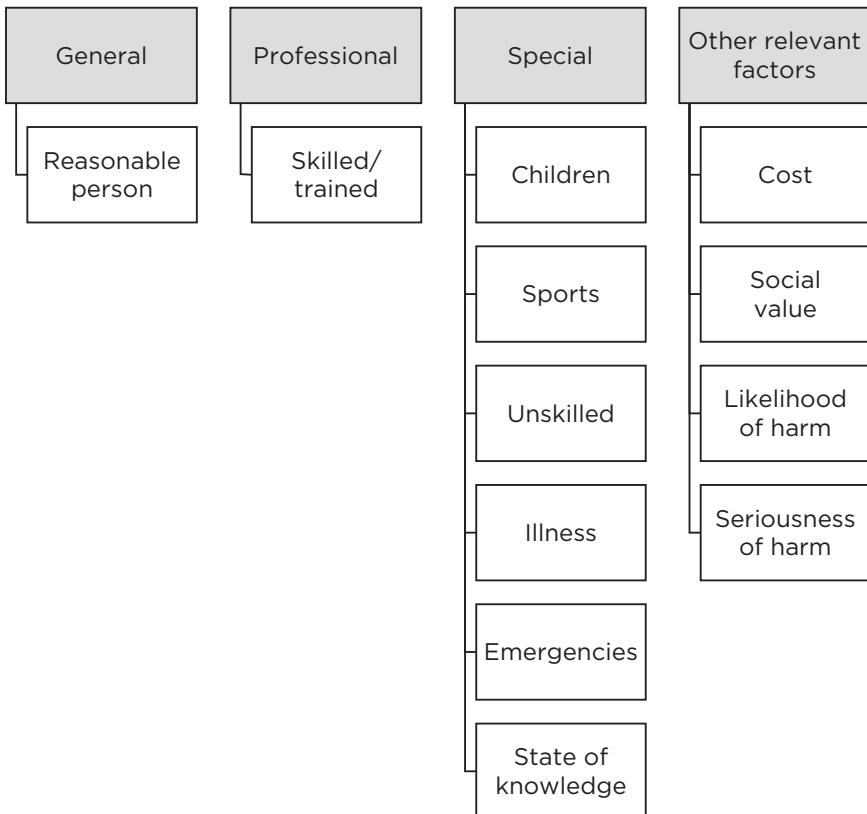


Figure 1.4: Standard of care

## ESTABLISHING BREACH OF DUTY

When deciding cases before them, the courts will look at the facts and the evidence and conclude whether the defendant owed a duty of care, whether the duty was breached and whether the breach was both the factual and legal cause of the damage and loss. We will look at causation (factual and legal) in the following chapter.

## Res ipsa loquitur

It is important to be aware of the concept of res ipsa loquitur, which is a Latin term meaning 'the thing speaks for itself'. Res ipsa loquitur can be used by the claimant in cases where the actual occurrence of the incident is evidence of negligence. This helps the claimant where it is difficult to prove with evidence that the defendant was negligent. It does not reverse the burden of proof. If the claimant relies upon it then it is up to the defendant to argue that the accident could have occurred without negligence. It is often used by claimants in road traffic accidents. The equivalent of arguing 'the fact you ran me over whilst I was crossing, using a pedestrian crossing, is evidence by itself that you were driving negligently'. In that example if the defendant had not been driving negligently, they would not have run over the pedestrian.

In order to rely on res ipsa loquitur there must be the following present:

- Control - whatever caused the damage must be under the control of the defendant or those that the defendant is responsible for; for example, the operator of heavy machinery which injures employees.
- The damage would not normally occur without negligence; for example, a plane would not normally crash without negligence (whether that be pilot or mechanical error).
- The cause of the accident must be unknown; for example, if a vehicle loses control and passengers in the vehicle are injured.

Remember that if the cause of the accident is known the court will not allow the claimant to rely upon the principle of res ipsa loquitur. In the example of a car losing control, if there are no witnesses, evidence or explanation for the accident the principle may apply. If, however, road conditions were icy and witnesses state they saw the car's brake lights engage and then witnessed the car skid, it is clear that the accident has been caused by the defendant's failure to drive in an appropriate manner for the road conditions.

## Civil Evidence Act 1968

Under the Civil Evidence Act 1968 criminal convictions can be used in evidence in civil proceedings (s 11) if the offence the defendant is convicted of involves negligent conduct. This can assist a claimant as a conviction in a criminal court will be taken as proof by the civil court that the defendant did commit the offence. The burden of proof will shift to the defendant to prove that they were not negligent. The most common examples are driving offences. If a defendant motorist

who collides with a pedestrian is convicted under s3 of the Road Traffic Act 1988 for driving without due care and attention, it will be up to the defendant to prove that their negligence did not cause the accident. Similarly, if a doctor is convicted of the criminal offence of gross negligence manslaughter due to their grossly negligent medical treatment which exposed their patient to risk of death, it would be up to the defendant to prove that the claimant's death was not caused by their negligence.

<b>Summary: breach of duty</b>	
WHAT is breach of duty?	If the defendant owes the claimant a duty of care and the defendant's behaviour has fallen below the standard expected and required by the law, they will have breached their duty of care owed to the claimant.
WHAT is the standard expected by the law?	The standard of care relates to the test the court will use to assess whether the defendant's actions are those of a reasonable person, in all the circumstances. <ol style="list-style-type: none"> <li>General standard of care – judged by the actions of a reasonable person.</li> <li>Professional standard – judged by a reasonable person with that same skill/ trained in the same profession.</li> <li>Special situations – modified to take into account the different standard expected.</li> </ol>
WHO is the reasonable person?	The reasonable person is the average person, neither too cautious nor too brave.

## ■ KEY POINT CHECKLIST

This chapter has covered the following key knowledge points. You can use these to structure your revision around, making sure to recall the key details for each point, as covered in this chapter.

- Negligence is a tort which seeks to provide a remedy where loss or damage is caused to an injured party by a wrongdoer's acts or omissions.
- In order to establish a claim in negligence one must first establish that the defendant owed a duty of care to the claimant.

- The courts recognise situations where there is an established duty of care. Where there is no established duty of care the court may use previous precedents for similar circumstances or analogous circumstances. If there are no relevant precedents the court may use the *Caparo* three-stage test.
- The standard of care relates to the test the court will use to decide whether the defendant's actions were those of a reasonable person. If the defendant's acts or omissions fall below the standard of care expected the court will find that the defendant breached their duty of care.
- The courts recognise a different standard of care in respect of certain categories of defendants.
- The courts use an objective test to measure what the defendant has done compared to what a 'reasonable person' would have done. If the defendant's actions reflect those actions of a reasonable person then they will not have breached their duty of care. If the defendant's actions do not reflect those of a reasonable person they will have breached their duty of care. Their actions will have fallen below the standard of care.
- Defendants purporting to possess a skill or profession will be judged by a reasonable person with that same skill or trained in the same profession.
- In deciding whether the defendant breached their duty of care the court will also take into consideration other relevant factors such as cost of precautions, social value, likelihood of harm and seriousness of injury.
- The burden of proof is on the claimant to prove that on balance of probabilities the defendant breached their duty of care owed to the claimant.
- The claimant can be assisted by the doctrine of *res ipsa loquitur* if the cause of the damage/loss is unknown, would not normally have occurred without negligence and the defendant had sufficient control.
- Where a defendant has been convicted of a criminal offence which involves negligent conduct the claimant can seek to rely upon the conviction and the defendant will need to prove that they were not negligent.

## ■ KEY TERMS AND CONCEPTS

- negligence ([page 2](#))
- duty of care ([page 3](#))
- breach of duty ([page 14](#))
- standard of care ([page 15](#))

## ■ SQE1-STYLE QUESTIONS

### QUESTION 1

A man drives his vehicle along a dual carriageway intending to take the first exit at the roundabout leading off the dual carriageway. When he gets to the roundabout there is a queue of stationary traffic. The traffic moves off slowly and he follows the car in front. Checking the roundabout, he sees it is clear and accelerates onto it. The car in front has stopped as the traffic has slowed down and is now stationary and as a result the man drives his vehicle into a collision with the rear of this vehicle.

**Is the man likely to be in breach of his duty of care?**

- A. No, the car in front should have moved onto the roundabout.
- B. Yes, but only if it can be proved that it is fair and reasonable.
- C. No, whilst the man owes a duty of care, he has not breached his duty as there is no proximity between the parties.
- D. Yes, road users owe other road users an established duty of care and by failing to concentrate and colliding with the vehicle in front the man has breached that duty.
- E. No, the collision was not reasonably foreseeable and as such there is no breach of duty.

### QUESTION 2

A group of children (aged 13 years) are playing on skateboards at a skate park. One group of children (skaters) are taking it in turns to skate down the ramps at the park whilst another group of children (runners) run in front of them. The aim of the game is for the 'runners' to get from one side of the park to the other without the 'skaters' having to stop or swerve out of the way. One of the runners collides with a skater, causing the skater to fall and fracture his left leg and right arm.

**In assessing the negligence of the child that caused the injury, which of the following is the most accurate statement of what the court will consider?**

- A. Whether a reasonable person would have foreseen the likelihood of harm.
- B. Whether a reasonable prudent adult would have realised that there was risk of injury.

- C. Whether a reasonable 13-year-old would have realised that there was risk of injury.
- D. Whether a reasonable prudent child would have realised that there was risk of injury.
- E. Whether the risk of injury was such that a child, irrespective of their age, would have foreseen the likelihood of harm.

### **QUESTION 3**

The fire service is responding to an emergency call. The employee of the fire service driving the fire engine is travelling at 50mph in a 30mph zone. The fire engine is displaying sirens and lights to alert other road users of its presence. The fire engine is travelling on a long straight carriageway at the end of which is a traffic light-controlled junction. The lights are on red for the approaching fire engine. As the road appears clear the driver of the fire engine does not slow down but continues through the red light. Suddenly a vehicle enters the junction from the right and collides with the fire engine.

**Which of the following is the most accurate statement as to what the court will take into consideration in determining the standard of care owed by the fire service's employee?**

- A. The social value of responding to an emergency.
- B. The experience of the fire service's employee.
- C. The cost of taking precautions.
- D. The seriousness of the claimant's injuries.
- E. The liability of the other driver.

### **QUESTION 4**

A patient attends the accident and emergency department of the local hospital complaining of symptoms of a blood clot in his lungs. The treating doctor (newly qualified and in his first week at the hospital) examines the patient but does not identify that he has suffered a blood clot in his lungs. The doctor fails to administer medication which would treat the condition and, as a consequence, the patient dies.

**In considering whether the treating consultant was negligent, which of the following is the most accurate statement of what the court will consider?**

- A. Whether the patient gave the requisite consent for the treatment.

- B. Whether a majority of medical professionals would have identified the patient's condition.
- C. Whether a responsible body of medical experts would have identified the patient's condition.
- D. Whether a responsible body of newly qualified doctors would have identified the patient's condition.
- E. Whether a majority of newly qualified doctors would have identified the patient's condition.

### QUESTION 5

The court is dealing with a claim brought in negligence. When considering whether the claimant owed a duty of care to the defendant it is accepted that there are no analogous or similar precedents in respect of the circumstances involved.

**Which of the following is the most accurate statement as to what the court will take into consideration in deciding whether there is a duty of care owed by the defendant to the claimant?**

- A. Whether it is fair, just and reasonable.
- B. Whether the parties have proximity.
- C. Whether damage was foreseeable.
- D. Foreseeability, proximity and whether it is fair, just and reasonable.
- E. Whether failure to take care caused damage.

## ■ ANSWERS TO QUESTIONS

**Answers to 'What do you know already?' questions at the start of the chapter**

- 1) The necessary elements required to bring a successful negligence claim are (i) duty of care, (ii) breach of duty, (iii) causation (factual and legal) and (iv) loss and damage.
- 2) There is an established duty of care in all of the examples. Doctors must do their patients no harm. Road users must abide by the Highway Code. Teachers are said to be 'in loco parentis' (meaning instead of a parent). Solicitors are professionals regulated by their governing body and must act in the best interests of their clients.

- 3) The two approaches the court takes into account when considering whether there is a duty of care owed is the *Caparo* three-stage test or incrementally and by analogy.
- 4) The courts use the reasonable person test when assessing the defendant's (general) standard of care.
- 5) The situations where the court applies a different standard of care are children; sporting activities; unskilled defendants; illness; emergencies and state of knowledge.

### Answers to end-of-chapter SQE1-style questions

#### Question 1:

The correct answer was D. This is because there is an established duty of care between road users. By failing to keep a safe distance and not concentrating on the vehicle in front the court will likely find that the driver has breached his duty of care. Watch out for situations where there is an established duty of care. There is no need to consider the *Caparo* three-stage test.

A is wrong because the traffic was queueing and it was not possible for the car to proceed.

B is wrong because there is an established duty of care between road users and whether it is fair and reasonable relates to a situation where there may not already be an established duty of care.

C is wrong because as there is an established duty of care between the parties there is no need to consider proximity.

E is wrong because there is an established duty of care and foreseeability in respect of that duty of care is not relevant.

#### Question 2:

The correct answer was C. This is because the court would consider the standard of care expected by a child of similar age, ie. 13 years old. This is one of the categories where there is a special standard of care.

A is wrong because the court will take into consideration the child's age and not that of a 'reasonable person'.

B is wrong because the child is not a reasonably prudent adult.

D is wrong because the court will always take into consideration the child's age.

E is wrong because the court will consider the standard of care expected by a 13-year-old child.

#### Question 3:

The correct answer was A. This is because there is social value in attending to an emergency. Even though the court will take this into

consideration, they are unlikely to conclude that the fire service's driver was reasonable in failing to slow down at the traffic light-controlled junction. The benefit of getting to the emergency quicker does not outweigh the risk of causing the collision. So, whilst the court will consider the social value, they may still find the defendant liable.

- B is wrong because the standard of care (road user driving an emergency vehicle) is not affected by the experience of the claimant.
- C is wrong because cost of taking precautions is not relevant to the issues.
- D is wrong because seriousness of injuries is not taken into consideration when deciding whether the claimant owed a duty of care.
- E is wrong because the question asks about the duty of care owed by the fire service's employee not the fault of the other driver.

#### Question 4:

The correct answer was C. This is because the court considers whether a responsible body of medical experts would have identified the patient's condition. If so, the doctor will have fallen below the standard of care and be in breach of his duty of care. Watch out for the level of experience. Remember that the court will judge a junior doctor to the same standard of care as a fully qualified senior doctor if that is what the role at the hospital purports to be.

- A is wrong as, irrespective of whether the patient consented to any treatment, the doctor fell below the standard of care expected.
- B is wrong because the test does not refer to a 'majority' of medical professionals.
- D is wrong because the court will not take into account the doctor's lack of experience.
- E is wrong because the court will consider whether a responsible body of medical experts would have ascertained the claimant was suffering with a blood clot.

#### Question 5:

The correct answer was D. This is because if there is no analogous precedent or similar case the court uses a three-stage test – the court will consider whether there was reasonable foresight that the defendant's failure to take care could cause damage to the claimant; and whether there was a relationship of proximity between the claimant and the defendant; and whether it is fair, just and reasonable that the law should recognise a duty on the defendant to take reasonable care not to cause damage to the claimant.

A, B and C are wrong because they are only individual elements of the three-stage test.

E is wrong because the court will consider whether to impose a duty of care before then going on to consider whether the breach/failure to take care caused the damage.

## ■ KEY CASES, RULES, STATUTES AND INSTRUMENTS

The SQE1 Assessment Specification does not require you to know case names, but it is helpful to know the names of the cases for memory recall purposes.

- *Donoghue v Stevenson* [1932] AC 562 (HL) (*neighbour principle*)
- *Caparo Industries plc v Dickman* [1990] 2 AC 605 (HL) (*Caparo three-stage test*)
- *Bolitho v City and Hackney Health Authority* [1998] AC 232 (HL)
- *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582 (QBD) (*Bolam test*)
- *Montgomery v Lanarkshire Health Board* [2015] UKSC 11