

Causation and remoteness of damage annotated problem question

Stefaan and Gavin spend the evening drinking in the pub. Stefaan offers Gavin a lift home in his car, assuring Gavin that this will be fine as he is 'probably only just over the limit'. Driving home, Stefaan swerves to avoid a fox and crashes the car. The paramedics who arrive at the scene find that Gavin has broken his arm but otherwise only has minor cuts and bruises. Gavin is taken to hospital to be checked by a doctor.

There is no problem establishing duty here and it seems likely that breach is easily established. Can we say that 'but for' S's negligence, G would not have suffered these injuries? See **Barnett [1969]**.

At the hospital Gavin is seen by Cheryl, the doctor on duty. Cheryl disagrees with the paramedics' opinion and, deciding Gavin's arm is not broken but only sprained, puts it in a sling, without setting it in a cast. As she was so busy that evening, she decided not to bother sending him for an X-ray first. Gavin returns to hospital the following month with pain in his arm. It transpires that his arm was in fact broken and, because it was not set in the proper cast, the bones have fused together wrongly, resulting in a permanent disability. An expert witness says that there was a chance this might have happened anyway, even if Cheryl had not been negligent. Gavin has to have an operation to try and re-set the bones, but this will not improve his arm to the condition it was in before the accident.

Is this harm a foreseeable consequence of (a) a car accident and (b) negligent treatment for a broken arm? What has to be foreseeable (see **The Wagon Mound (No 1) [1961]**)?

A week later Gavin is knocked down by a speeding motorist who fails to stop and cannot be traced. His right arm is so badly injured that it has to be amputated.

Advise Gavin in relation to the claims in negligence he may bring.

How does this affect the claims to be made against (a) S and (b) C? The motorist cannot be sued as he is untraceable. See **Baker [1970]** and **Jobling [1982]**.

The question, in trying to establish factual causation, is 'how much chance'? If it was more than 50 per cent likely that the permanent disability would have originated from the original break, then C is not the 'but for' cause of this harm (see **Barnett [1969]** and **Hotson [1987]**). However, unlike in these cases, there is a previous act of negligence: does this mean that S will remain the 'but for' cause, even for these 'extended' injuries? What happens if it was less than 50 per cent likely that this injury would have resulted from the original accident? Could C's actions (if negligent) break the chain of causation back to S?

Whatever the outcome of G's claims, will any of the defendants be able to raise a defence? (See **Chapter 10**.) Should he have got into the car?

All this raises the question whether any of these actions fell below the standard of care expected by a doctor and, as such, analysis will be guided by the **Bolam [1957]** and **Bolitho [1998]** tests, as now supplemented by **Montgomery v Lanarkshire Health Board [2015]**.

This raises a causation question about what would have happened had she not acted negligently. See **Bolitho [1998]** for similar points.