

## NEGLIGENCE

### Introduction

1. Negligence can be defined as failure to act with the prudence that a reasonable person would exercise under the same circumstances.
2. It is a reasonably flexible concept developed to ensure justice in appropriate situations. As the law of negligence is judge-made there are very few statutes and regulations covering it and, consequently, the relevant principles are to be found in case-law.
3. It is possible that a person or body could be concurrently liable both in the law of contract and in the law of negligence. If I pay a builder to do some work, for example, a contract will arise under which I will expect the builder to do a reasonable job. Additionally, however, the builder will also have a duty to ensure that he carries out the work with reasonable care, if he does not, he may be sued for breach of contract or sued in negligence.
4. The law of negligence assumes more importance where there is no contract between parties. For example, when driving my car, there is no contract between the other drivers and me but they have a duty of care towards me and, if they do not take care and my car is damaged as a result, I will be able to sue them in negligence.
5. To bring a claim in negligence a party (the Claimant) would have to prove each of the following ingredients:
  - a) that the Defendant owed the Claimant a duty of care;
  - b) that the Defendant breached the duty of care;
  - c) that the breach caused the Claimant's damage;
  - d) that the damage caused was foreseeable.

Each of the ingredients will be examined separately.

### The Duty of Care

6. In all negligence claims the Claimant must prove that the Defendant owed him a duty of care. The House of Lords explained the basis of a duty of care in *Donoghue v*

*Stevenson* (1932) AC 562 as relating to someone who may be affected by our actions (the neighbour principle). Following this principle the courts have been willing to decide that local authorities owe a duty of care to a variety of individuals or organisations in many situations. The following examples have been taken from cases decided within the last few years and although many of them are not directly relevant to parish councils, they do highlight basic principles. Councils have been found to have a duty of care:

- to an adopting family to ensure that the terms of its confidentiality undertaking as to the adopting family's identity were respected by its employees((1) *B (2) B v A County Council* (2006) [2006] EWCA Civ 1388);
- to ensure that a manhole cover was not dangerous (*Annette Atkins v Ealing London Borough Council* [2006] EWHC 2515 (QB));
- to supervise young school children playing on a slide (*Jasmine Spowart v Nottinghamshire County Council* (2006) (unreported));
- to identify and ameliorate the effects of dyslexia (*Skipper v (1) Calderdale Metropolitan Borough Council (2) Crossley Heath School Governors* [2006] EWCA Civ 238);
- to prevent damage to a neighbouring property by water penetration (*Emmanuel Sanju Allison v Brighton & Hove City Council* [2005] EWCA Civ 548);
- to prevent injury caused by a single pane of glass in a door (*Jeanette M Nimmo (or Kerr) v East Ayrshire Council* (2005)(unreported) ); and
- to prevent children playing on a roof (*Young v Kent CC* [2005] EWHC 1342 (QB).

## Breach of Duty

7. A local council will only be liable in negligence if its conduct falls below a reasonable standard. This means that a council would not be liable just because someone suffers an injury. The Claimant would need to prove that he was injured because the council failed to take proper care. Councils need to take reasonable steps but are not required to guard against all possible risks, however remote.
8. In *Roe v Minister of Health* [1954] 2 QB 66 (CA)), surgeons were held not to have breached their duty of care when two patients became severely injured during operations on the same day. The anaesthetic injected into the patients had been contained in glass ampoules kept in a solution of phenol. Unbeknown to anyone, the phenol had contaminated the anaesthetic by seeping through tiny invisible cracks in the ampoules. The tiny cracks were not noticeable even on close inspection and no reasonable surgeon would have spotted them. Accordingly, the surgeons had not fallen below the standard reasonably to be expected of competent surgeons.

9. The courts also appear to take account of a number of “public policy” factors when setting the level of the duty of care in certain circumstances. In the case of *Cole v Davis-Gilbert and Others* [2007] EWCA Civ 396 as part of a Mayday fete, a Maypole was placed into a hole on the village green. At the end of the fete the hole was filled with soil and stones and subsequently with a bung. Two years later, the hole had become exposed and the claimant, while walking across the green, stepped into it and broke her leg.
10. It was unclear how the hole had become exposed and, accordingly, the court held that the council had not breached its duty of care. The Court of Appeal stated that there was a danger in setting too high a standard of care as it could lead to inhibiting consequences, namely the reduction in or prohibition of traditional activities on village greens.

### **Causation**

11. If B is injured by A’s breach of a duty of care he will only be able to bring a claim against A if he can prove that A’s breach of duty caused his injury. To take another medical example, a doctor may negligently fail to diagnose and treat a patient’s condition, following which he dies. The doctor would escape liability if he could show that the patient’s condition was untreatable and that he would have died from it no matter how much care had been taken. This is because, although negligent, the doctor did not cause the patient’s death; his illness did.
12. In some instances a breach of duty may not cause a problem but it may make the problem worse in which case the negligent party will be responsible for the additional damage caused by their negligence. In the example above if the doctor’s failure to diagnose the condition had led to a worsening of the patient’s existing back injury then the doctor would be liable for the extra pain and disability caused by the worsening of the condition but not for the underlying back injury.

### **Foreseeability**

13. A person will not be liable to another unless any damage he causes was “reasonably foreseeable”. Thus, courts will sometimes dismiss legal claims because the damage caused was “too remote”. The duty of care carries a responsibility to avoid acts or omissions a person “could reasonably foresee would be likely to injure” and the law does not require that steps are taken to eliminate all risk however small. An example of damage which was not held to be reasonably foreseeable occurred in *Overseas Tankship (UK) Ltd v Morts Dock & Engineering Co Ltd (The Wagon Mound)* [1961] AC 388 (PC) where a Claimant was repairing a ship in Sydney Harbour using welding

equipment. The defendant negligently released bunkering oil into the harbour 200 metres away. At the time it was not reasonably foreseeable that oil could ignite on water. Unfortunately that is exactly what happened and the resulting fire damaged the claimant's wharf. The court held that the defendants were not liable, as they could not reasonably have foreseen that the oil would catch fire.

## **Insurance**

14. As the cases set out above demonstrate, local authorities have been found to be negligent in a number of circumstances. Claims can run into hundreds of thousands, or even millions of pounds. It is fair to say that the courts sometimes impose a higher duty on local authorities than they would on individuals and this is especially so in respect of injuries suffered by employees. One factor may well be the depth of the pockets of some local authorities and the fact that they have, or should have insurance. It is a legal requirement for employers to have employers' liability insurance (Employers' Liability (Compulsory Insurance) Act 1969). Other compulsory insurances in respect of councils are Fidelity Guarantee Insurance (section 114 of the Local Government Act 1972) and Motor Vehicle Insurance if the council owns or leases motor vehicles (Road Traffic Act 1988).
15. Public Liability Insurance is intended to cover the council against liabilities owed to those who are not employed by them. The purpose of public liability insurance is to meet any claims made against the council in respect of death, personal injury or damage to property in circumstances where the council is (held to be) liable. Such insurance is essential if the council owns, manages, occupies or uses any land or premises (see Legal Topic Note 42 – Occupiers Liability and Legal Topic Note 23 - Health and Safety) such as village greens, recreation grounds, village halls, meeting rooms, open spaces, burial grounds, car parks etc. Consequently, NALC recommends that all local councils should have an adequate level of public liability cover for the activities which are undertaken. Councils should refer any claims made against them to their insurers immediately, to avoid the risk of invalidating the policy.
16. Public liability insurance does not cover all liability in every situation. Public liability insurance may not cover the council's liability in respect of nuisance (see Legal Topic Notes 66 and 67). In order to ascertain the cover a specific policy provides, the council should first consult the policy itself (read the small-print) and if the council has any further questions concerning the policy, it should contact the insurer or insurance broker. A local council is advised to consult a reputable insurance broker about its insurance needs generally.

**Other Legal Topic Notes (LTNs) relevant to this subject:**

LTN	Title	Relevance
23	Health and Safety	Considers Health and Safety obligations owed to employees and non employees and the need for adequate insurance cover.
40	Local Councils' documents and records	Sets out the considerations for retaining insurance documentation.
41	The Responsibility of Councils as Landowner	Sets out other responsibilities of councils as owners of land.
42	Occupiers Liability	Sets out the responsibilities of councils as occupiers of land and the need for public liability insurance.
66	Nuisance (Public and Statutory)	Sets out the general law of public and statutory nuisance.
67	Nuisance (Private)	Sets out the general law of private nuisance.

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