

Awarding damages and mitigating loss

If a defendant has broken their duty of care, and it has caused loss, they will be liable for a claim in damages. Damages are money that the defendant must pay to the claimant as compensation for the loss or injuries they have suffered.

Aim of damages

Damages are for the value of any goods destroyed or for their repair to return them to the condition they were in before the incident.

The general aim of damages in negligence is to put the successful claimant in the same position as they would have been in if the negligence had not occurred.

Distinctions

Damage is a legal concept which is the loss or injury suffered as a result of a breach of duty.

Damages is the amount of money that is awarded to compensate the victim for their loss or injury.

Damages

Damages can be divided into **special** and **general** damages.

Special damages are losses that can be calculated at the time of the trial, for example:

- repair of car or value of car immediately before an accident if it has been written off
- loss of earnings up to the date of the trial
- any expenses that have been incurred as a result of an accident.

General damages are all other forms of financial compensation, for example:

- loss of future earnings
- pain and suffering
- loss of amenity (ability to do things)
- future medical expenses.



General damages and special damages are explored in more depth on page 36.

Mitigation of loss

The claimant is required to take reasonable action to keep their losses to a minimum and defendants cannot be forced to pay for avoidable losses. This means you must keep your losses to a minimum and follow the original aim of compensating you so far as possible to put you in the position you were in before the negligence. For example, if your kitchen has been damaged, it might not be reasonable to eat in a 5-star restaurant every day until your kitchen appliances have been replaced.

Keeping it fair

If your car is badly damaged and cannot be driven, hiring an expensive car is not reasonable if you have another car or if the car repairer has a courtesy vehicle available.

If you are self-employed doing limousine trips to airports and cannot work for some weeks, it is probably more cost effective to hire another driver for those few weeks rather than lose the business and goodwill of regular customers. Getting the alternative driver would be an example of you mitigating your loss.

Now try this

Explain whether the following damage resulting from the defendant's negligence are special or general damages:

- 1 An injury meaning the claimant cannot continue as a professional tennis player
- 2 Clothes ruined in an accident
- 3 Physiotherapist's fees to help rehabilitate the claimant
- 4 Wages lost before the trial of a claim
- 5 Future loss of earnings.

It might help to draw up a table when you answer the question with three columns headed 'question'; 'special or general'; 'explanation'.

Damages

Remember that 'damages' means money that the defendant must pay, if they are found liable, to the claimant as compensation for the loss or injuries they have suffered. Damages can be 'special' – pecuniary – or 'general', including compensation for pain and suffering, loss of earnings, loss of amenity and future medical expenses.

Special damages: pecuniary

Pecuniary means monetary. This relates to damages awarded for financial losses such as damage to goods and lost earnings, and also any expenses incurred as a result of an accident, such as those relating to travel.

Non-pecuniary damages relate to non-financial ones, such as injuries. Remember: non-pecuniary damages are part of general damages as they cannot be easily quantified.

Pain and suffering

Calculating pain and suffering is challenging as every case is different. The amount will vary with the individual but will take into account medical reports. This, and loss of amenity, often use calculations based on awards in previous cases.

Lawyers also look at the Judicial College's (formerly Judicial Studies Board) Guidelines as they give an indication of the likely amount to be awarded.

Loss of earnings

Special damages for loss of earnings up to trial are relatively easy to calculate. Future losses are more difficult to calculate as they can only be estimated. However, the calculations used are designed to reflect an appropriate amount.

If you were a professional football coach, and you lost both your legs in a car accident that was not your fault, you could claim damages for loss of future earnings.

Loss of amenity

This term is the legal term used to describe the impact of the injury on the claimant's enjoyment of life. It can cover compensation for being confined in hospital and/or being left with a disability that stops you from doing things you could do before the injury occurred.

Future medical expenses

Again, this is an estimate based on cases where people have sustained similar injuries. Some injuries are such that the claimant requires professional nursing care and future medical treatment.



Where there is a severe brain injury, the amount of damages awarded may be very large, reflecting both the level and intensity of care required.

Heads of damage

The expression 'heads of damage' is used to describe the constituent parts of a claim for damages. This means what the amount of damages is made up of.

Guidelines for the level of damages awarded for specific injuries, and levels of injury, are available at the link here: www.rcsolicitors.co.uk.



Now try this

Review the Judicial College's Guidelines for the assessment of general damages on the internet. Select three different types of injury and explain their typical awards.

Contributory negligence

Contributory negligence occurs when the claimant is found to be partly responsible for the damage they suffered.

The principle

If a claimant has contributed to the losses they have suffered, then a proportion of the damages will be lost. The amount lost depends on the degree to which the claimant's own acts are negligent. The reduction can be between 0% and 100%.

The Law Reform (Contributory Negligence) Act 1945

This Act of Parliament sets out the law. The court can reduce damages:

'to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage.'

In practice

In a theoretical example where the claimant was to be awarded £1000 damages, but was found to be 10% contributorily negligent, they would actually receive £900.

The 10% reduction has been taken off the £1000.

Their £900 is then seen as the true value of their claim, bearing in mind the claimant's fault with respect to the accident.



Sayers v Harlow Council 1958

Scenario: Mrs Sayers was found to be partly the author of her own downfall when she attempted to climb out of a toilet cubicle; the door lock had failed, locking her in. She stepped first on to the toilet and then on to the toilet-roll holder, which gave way, causing her to fall and sustain injuries.

Outcome: The court reduced the damages by 25% since she had been contributorily negligent in the way in which she tried to escape from the locked cubicle.

Automatic contributory negligence

There are a number of examples where contributory negligence is seen automatically. One of them is the failure to wear a seatbelt in a vehicle fitted with one.

However, the court still takes into account whether the seatbelt would have:

- 1 prevented injury, or
- 2 reduced the severity of the injury, or
- 3 made no difference to the injury.

Typically the three circumstances above would result in a 25% reduction, a 15% reduction and no reduction in the damages awarded.

Now try this

Many lawyers specialise in personal injury cases. Find a website and select two examples where there may have been contributory negligence.

Make brief notes to explain the facts of the case and the outcome.

Try searching on the internet for the case of **Smith v Finch [2009] EWHC 53 (QB)**, for example.

Search for 'contributory negligence' at www.farrarsbuilding.co.uk/.



How damages are paid

Damages are usually paid as a lump sum. However, some larger awards are paid through a structured settlement.

Payment of damages

Damages are compensation and therefore need to be paid in such a way that the claimant is not advantaged or disadvantaged. For example, a claimant is potentially advantaged if a very large sum is paid up front to cover future needs, but those needs never occur because the claimant dies shortly after they receive the sum. This would not reflect the costs and losses to the claimant as a result of the accident and could encourage some to hasten the death of the claimant in order to inherit the money.

Lump sums

A lump sum means that the damages are paid all at once. In most cases, this is not problematic as most claims are settled by insurance companies. However, if not paid through an insurer, the claimant may have difficulty getting the payment from the defendant.

Special damages are always paid by a lump sum.

Structured settlements

In large personal injury and medical negligence claims, a structured settlement is an alternative to receiving a lump sum.

A structured settlement may include:

- interim payments – to cover expenses already made
- regular instalments – usually paid through an **annuity** so there is a regular income throughout the injured person's life
- a further lump sum payment to cover extra costs that are not covered by the annuity payment.

Why a structured settlement?

A structured settlement may be used so that:

- 👍 the injured person does not have to manage a large sum of money
- 👍 there is less chance of the claimant 'blowing' the money and becoming destitute
- 👍 there is less risk of running out of money for care
- 👍 the claimant will get compensation and not more than they need
- 👍 life expectancy is not an exact science so finances are certain for the future
- 👍 family and friends cannot exploit the injured person and do not 'get a bonus' on the death of a claimant.



Walton v Calderdale NHS Trust 2005

Scenario: The claimant, born in July 1995, suffered from cerebral palsy as a result of being deprived of oxygen during birth. Liability for negligence was admitted and the case revolved around the amount of payments to be made. The claimant was severely handicapped and required a large level of care and assistance in most aspects of daily living. He had greatly reduced ability to communicate. However, his intellectual capacity and life expectancy were largely unaffected.

Outcome: The Trust paid the claimant – who had a life expectancy of 70 years when the settlement of the case was reached – an annual payment of £50,548, index linked, in respect of his annual care costs, rather than a lump sum.

Now try this

Using the facts of **Walton v Calderdale NHS Trust**, above, suggest two reasons why a lump sum was not appropriate in the case.

Research the case further on the internet.

The burden of proof and *res ipsa loquitur*

The burden of proof explains who has to prove their case in a negligence claim – either the claimant or the defendant.

The burden of proof

The claimant must prove their case on a balance of probabilities.

This standard means that the court must be satisfied that the event in question is more likely to have occurred than not.

However, the burden of proof moves to the defendant if *res ipsa loquitur* applies.

Key term

Res ipsa loquitur is a Latin expression meaning 'the thing speaks for itself'.

The principle has been developed for situations where negligence can only be inferred from what happened and the exact cause cannot be proved by the claimant. Typically, this is because the injured person was unconscious at the time of, or as a result of, the incident.

Testing for *res ipsa loquitur*

The test to see if *res ipsa loquitur* applies requires three things to be proved by the claimant:

- 1 The thing that caused the damage was under the sole control of the defendant.
- 2 The incident is one that would not have happened unless someone had been negligent.
- 3 There is no other obvious reason as to why the incident occurred.

The effect

The burden of proof shifts from the claimant to the defendant if the principle of *res ipsa loquitur* applies. This means that the defendant would have to show they were not negligent by explaining how the incident happened.



Key study

Scott v London & St. Katherine Docks Co 1865

Scenario: A customs officer was passing a warehouse and six sacks of sugar fell onto him from a crane operated by the warehouse.

Outcome: The defendant was held liable as *res ipsa loquitur* was found to apply:

- 1 The crane and sacks of sugar were under the sole control of the warehouse.
- 2 Sacks of sugar do not fall from cranes unless someone has been negligent.
- 3 How else could this have happened? There was no other obvious reason as to why the incident occurred.

Now try this



Key study

Mahon v Osborne 1939

Scenario: The claimant died following a routine surgical operation. A post mortem established that the cause of death was peritonitis as a result of a surgical swab being left inside his body when he was stitched up following the operation.

Outcome: *Res ipsa loquitur* applied.

Explain why *res ipsa loquitur* applied in this case.

Apply each of the three rules for *res ipsa loquitur* set out above.

Your Unit 1 set task

Unit 1 will be assessed through a task, which will be set by Pearson. In this assessed task, you will need to research the law of negligence. You will then be assessed on your ability to explain, analyse and apply to a scenario the law of negligence that you have researched.

Your assessed task could cover any of the essential content in the unit. You can revise the unit content in this Revision Guide. In this skills section, you can review extracts from responses to tasks similar to those you may be given as part of your assessment. This will help you to revise the essential skills you will need for your assessed task.

Research and making notes

Revise research and note-making skills on page 41.

Outlining and applying – responding to stimulus material
Practise this skill on page 42.

Explaining and analysing – responding to stimulus material
Practise this skill on page 43.

Evaluating – responding to stimulus material
Practise evaluating skills on page 44.

Set task skills

Case file notes

Practise skills for writing these notes on page 47.

Solicitors' letters

Revise skills for letter writing on page 46.

Making presentation slides

Practise your presentation skills on page 45.

Workflow

The process of preparing for your assessment should help you to explain, analyse and apply the law of negligence to a scenario, and might follow these steps:

- ✓ Read about cases involving the main aspects of negligence, including establishing a duty of care, what amounts to a breach of duty, and what loss or damage amounts to.
- ✓ Research aspects of law relating to duty, breach and damage.
- ✓ Make notes that will be useful in your assessment. Refer to the Pearson website for guidance on what notes you can take into your assessment.
- ✓ Read any further information provided about a particular scenario involving current law relating to negligence.
- ✓ Produce documents for members of the legal profession or for clients in relation to the current law relating to negligence for a particular scenario.

Check the Pearson website

This section is designed to demonstrate the skills that will be needed in your assessed task. The details of your actual assessed task may change from year to year so always make sure you are up to date. Check the Pearson website for the most up-to-date **Sample Assessment Material** and **Mark Scheme** to get an idea of the structure of your assessed task and what this requires of you.

Now try this

Visit the Pearson website and find the page containing the course materials for BTEC National Applied Law. Download the latest Unit 1 Sample Assessment Materials and make a note of:

- the structure of your set task, and whether it is divided into separate parts
- how much time you are allowed for each section of the task
- what briefing or stimulus material may be provided to you
- any notes you might have to make and whether you are allowed to take selected notes into your supervised assessment
- the activities you are required to complete and how to format your responses.

Research and making notes

As part of your assessment you will be asked to produce certain documents. You may be given some time to prepare for this in advance by carrying out some research on a particular area of law relating to negligence. As a starting point for your research, you may be provided with a case or relevant case law to review.

Apply the three-stage test to Joshua's case.

Consider who the case is against – the player or the team.

You have been given the file of a client Joshua Adam. Joshua was professional rugby player until he sustained life-changing injuries during a game. Joshua believes he has a case for negligence against his opponent who caused his injury.

What is the risk of harm? Were reasonable precautions taken?

Research notes

During your research, it would be helpful to write clear notes that you can use to help you later on.

- 👍 DO use bullet points.
- 👍 DO make sure your notes are relevant – they should relate to the scenario you have been given.
- 👍 DO refine the information that will be most helpful, for example, key facts and legal principles.
- 👎 DON'T write pages and pages – the amount of notes you can use in supervised assessment may be limited.
- 👎 DON'T copy large chunks of information – you won't be able to pick out the key points.

Preparatory notes

You may be allowed to take some of your preparatory notes into your supervised assessment time. If so, there may be restrictions on the content, length and type of notes that are allowed.

Check with your tutor or look at the most up-to-date Sample Assessment Material on the Pearson website for information.

Sample notes extract

Case notes

- **Caparo v Dickman 1990** – 3-stage test for showing duty of care – proximity of relationship, foreseeability of harm, it is fair just and reasonable to impose a duty of care.
- **Bolton v Stone 1951** – woman injured when cricket ball hit out of ground – the greater the possibility of harm, the more precautions should be taken. Claim failed as all appropriate precautions taken.
- **Barnett v Chelsea & Kensington Hospital 1969** – worker suffered stomach pains and was turned away from A&E. Later died from arsenic poisoning. Hospital not liable as he would have died anyway. D has to have caused injury or loss to C.

Note-taking can be in shorthand. For example, DofC for 'duty of care', C for Claimant, D for Defendant.

It will be less useful for you to write lots of facts about a case. The important thing is the point established by the case – the legal principle.

The task may require you to advise a client or other members of the legal profession. Think about the reader and the relevant terminology to use.

Ensure the cases you write notes on are relevant to the area of the law that may have been specified for you.

Now try this

Research another case relating to duty of care, such as **Hill v Chief Constable of West Yorkshire 1988**, and make notes on it using the tips given above.

Outlining and applying

You may need to use the skills of outlining or applying as part of the externally assessed task you are set. It is likely that you will be given a new scenario to which you will need to apply the information you have previously researched. Below is an example of a new case, and how previous research could be applied.

Clara was cycling along her local high street when she was hit by an advertising board being installed on a nearby building. She was knocked unconscious and suffered several broken bones. Clara was unable to work for several weeks and she has been advised that she has a claim.

This is a civil tort case between Clara and the installers of the advertising board. It will be a claim of negligence which has caused personal injury, damage and loss to Clara. Think about what has to be proved in a negligence claim and what can be claimed by Clara if she is successful.

In your assessment, you may be asked to 'outline' which requires you to give a summary, overview or a brief description of an aspect of law or procedure.

You may also be asked to 'apply' your knowledge, which requires you to apply the law to the facts of a scenario and to reach a decision about a possible result.

In this extract from a letter – to the person who caused the accident – the writer has **outlined** clearly the basis of their client's case and claim.

Sample response extract

It outlines briefly and concisely why a claim has arisen.

It is written in clear terms using professional language.

As a result of your negligence, our client has suffered injury, damage to her bicycle and loss of earnings. We have advised her to make a claim against you for her losses and unless we hear from you within seven days accepting responsibility for the accident we intend to issue a court claim for damages.

It sets out what they want the recipient to do.

The consequences of not replying within a given time limit are clearly given.

This is an extract from a note for legal office files **applying** the rules on damages to Clara's case.

Sample response extract

The law is clearly applied by stating the purpose of the award of damages in tort and what can be claimed.

The writer also sets out what the next steps in the case should be – collecting relevant evidence.

I advised Clara that the purpose of the award of damages in tort is to put her back in the position she was in before the accident. As a result, she should be able to claim for the damage to her bicycle, and her loss or earnings as these directly resulted from the other driver's negligence. I asked her to get a written estimate for repairs to the bike and a letter from her employer confirming the amount of her loss of earnings.
I advised Clara that she will have to have a medical report to assess the severity of her injuries and the firm would be contacting a specialist to arrange this.

The outcome Clara should expect is well defined and clearly presented.

This is a good answer as any reader of the note will be able to clearly see what advice Clara has been given and the purpose of the award of damages.

Now try this

Clara has now been awarded damages. You have been asked to write to her outlining the two ways in which damages could be paid. Plan the structure and content of your letter.

Explaining and analysing

You may need to provide an explanation or an analysis as part of the externally assessed task you are set.

Explaining requires you to give clear details of an area of law or procedure and to give reasons and/or evidence to support an opinion, view or argument.

Analysing requires you to present the outcome of methodical and detailed examination of relevant law and procedure to the facts of a scenario and to reach a decision about a possible result.

This is an extract from a letter to a client in which the writer has been asked to **explain** the types of damages that can be claimed following a car accident.

Before you start writing, make a note of the points you want to cover and then see if they can be linked together.

Sample response extract

There are two forms of damages that can be claimed. Special damages cover specific amounts that have been lost or damaged. This can be damage caused to your car or lost wages while you were in hospital. General damages cover unspecified matters such as the pain and suffering you endured after the accident, any future medical expenses that you might have to pay and 'loss of amenity' to compensate you as you may not be able to play tennis in the future.

The points are presented in a logical order.

The learner writes in clear terms using professional language.

This response clearly explains the two main types of damages that can be claimed with relevant examples of the type of losses that may apply.

In this extract, the writer has **analysed** the relevant law in a case file note.

Sample response extract

Both road users were in proximity to each other on the road. It is foreseeable that if one road user is careless then other road users may be injured. It is fair, just and reasonable that a careless road user should be legally responsible to others. In this case a duty of care can be shown as both our client and the defendant were road users at the time of the accident and it is well known that one road user owes another a duty of care. This duty has been broken as the defendant has driven carelessly by exceeding the speed limit meaning that there is a high risk of someone being injured. This excessive speeding led directly to the accident as our client had no opportunity to get out of the road in time to avoid being hit.

The learner has used their research and notes (see page 41) about the principles of showing a duty of care to show that all three elements of a duty are satisfied.

When analysing, don't focus your answers on explaining the law or procedure. Instead, focus on whether the specific requirements of relevant law or procedure are satisfied in the scenario.

This is a good answer as it covers each of the three requirements of negligence in a logical order, justifying each in turn.

Now try this

Using the case of **Wells v Cooper 1958**, explain how this is an example of the reasonable person test in a file note.

Evaluating

You may need to provide an evaluation as part of the externally assessed task you are set.

Evaluating involves considering strengths and weaknesses of a case or identifying any advantages and disadvantages and looking at alternatives. You will need to form a judgement based on the points you have raised and this will usually be in the form of a conclusion.

Sample response extract

Using the civil courts is the traditional way of resolving a dispute as a final decision will be reached by a legally qualified judge after hearing all the evidence from both sides. Usually the result of the case can be predicted as judges have to use precedents from previous cases.

However, it may not be the best way of dealing with a dispute. Courts are expensive to use as it is likely that lawyers will represent both sides. These lawyers cost money and there is no guarantee that even what is thought to be a strong case will be won. Also, the loser of the case will have to pay the winner's costs as well as any compensation.

There are some alternatives that may be quicker, cheaper and less confrontational as there is less need for lawyers to be involved. These alternatives include negotiation, mediation or possibly arbitration. For some claimants they may be an attractive alternative to deal with a claim more speedily and cheaply.

However, it has to be remembered that if a case is taken without using legal advice the claimant may not receive as much compensation as they would be awarded using the courts and the case cannot be heard a second time. The result cannot always be predicted as precedent is not often used.

The alternatives to traditional courts provide useful options for dispute resolution in certain cases but they are not necessarily suitable in every case.

This is an extract from a presentation in which the speaker has been asked to provide an evaluation of the routes of dispute resolution.

The first two paragraphs summarise the advantages and disadvantages of using court-based resolution.

Facts are clearly presented.

Opinions are well laid out and supported by examples.

The third and fourth paragraphs summarise the advantages and disadvantages of using alternative dispute resolution methods.

Alternative ways of solving disputes are clearly explained.

Opinions are well laid out and supported by examples.

The final paragraph concludes with an overall summary.

Now try this

Using the case example of **Paris v Stepney B.C. 1951**, plan your evaluation of the likelihood of success for Mr Paris, the injured claimant, with a justified conclusion.