

Law 2480
Business and Corporation Law
Part 2

- Company Law
- Corporate Governance & Directors Duties
- Relations with Outsiders
- Financing Companies
- Security Interests & Insolvency
- Tort of Negligence

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Bases of Criminal Corporate Liability

Corporations are a separate legal entity but can only act through the intervention of humans.

Directors are formally accountable to the shareholders and are the *'directing mind and will of the corp., the very ego and centre of the personality of the corporation'*

<p>Lennard's Carrying Co Ltd Asiatic Petroleum Co Ltd (1915)</p> <p><i>* Famous decision by the House of Lords – expanded upon Salomon v Salomon & Co and first introduced the 'alter ego' theory of corporate liability.</i></p> <p><u>RECAP: Salomon v Salomon (1897)</u></p> <ol style="list-style-type: none">1: Company's property is company's property2: Company's debt is company's debt3: Companies can contract with their members, directors and outsiders (and vice versa)4: Companies can commit torts and crimes	<p>A ship owned by Lennard's Carrying Co was transporting some goods to the Asiatic Petroleum Company, a joint venture of the Shell and Royal Dutch oil companies. The ship sank and the cargo was lost due to the negligent acts of Mr Lennard in violation of the Merchant Shipping Act 1894. Asiatic sued the company for negligence under the Act. At issue was whether the guilty acts of a director would be imposed upon the corporation.</p> <p>→ The House of Lords held that liability could be imposed on a corporation for the acts of the directors by virtue that the directors are the controlling minds of the company.</p> <p>Prior to this case the primary means of imposing liability on a corporation was through vicarious liability, however, that only applied to employees of the company, which excluded the act of the directors. After the Lennard case, the alter ego theory has become the most powerful method of imposing liability on a corporation.</p>
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1. **Vicarious liability** – general tort law (control, now expanded to criminal law. Principal liability is imposed without any knowledge of the organisation (only for employees)
2. **Attributed primary corporate liability** - Acts or omissions of key individuals or groups, the directing mind & will of the company are attributed to the company
3. **Strict liability** – No men's rea requirement – failure to meet a standard of conduct – usually by legislation
4. **Primary corporate criminal liability** – organic theory of the corporation – who is the person in the company responsible for that function or role.

3. Anti-Corporate activism and CSR

Multinational Corporations

Own or control production or services facilities in one or more countries other than the home country.

The first MNC was the Knights Templar founded in 1120.

Then the East India Company in 1600

Dutch East India Company in 1602

- **Concerns with Multinational Corporations:**

1960s	<i>Americanisation of culture</i>
1970s	<i>MNC interests identified with home state</i>
1980s	<i>Privatisation of government utilities</i>
1991	<i>Collapse of the Soviet Union</i>
1990s	<i>Removal of Trade Barriers</i>

Boston Tea Party (1773):

In Boston Harbor, a group of Massachusetts colonists disguised as Mohawk Indians board three British tea ships and dump 342 chests of tea into the harbor.

The midnight raid, popularly known as the “Boston Tea Party,” was in protest of the British Parliament’s Tea Act of 1773, a bill designed to save the faltering East India Company by greatly lowering its tea tax and granting it a virtual monopoly on the American tea trade. The low tax allowed the East India Company to undercut even tea smuggled into America by Dutch traders, and many colonists viewed the act as another example of taxation tyranny.

When three tea ships, the Dartmouth, the Eleanor, and the Beaver, arrived in Boston Harbor, the colonists demanded that the tea be returned to England. After Massachusetts Governor Thomas Hutchinson refused, Patriot leader Samuel Adams organized the “tea party” with about 60 members of the Sons of Liberty, his underground resistance group. The British tea dumped in Boston Harbor on the night of December 16 was valued at some \$18,000.

Parliament, outraged by the blatant destruction of British property, enacted the Coercive Acts, also known as the Intolerable Acts, in 1774. The Coercive Acts closed Boston to merchant shipping, established formal British military rule in Massachusetts, made British officials immune to criminal prosecution in America, and required colonists to quarter British troops. The colonists subsequently called the first Continental Congress to consider a united American resistance to the British.

Anti Globalisation & Anti-capitalism

Occurred at most inter-government meetings since Seattle 1990.

- Over-consumption, environment poverty, cultural identity, human rights
- MNCs are increasingly stateless
- CSR: Shift from market-centred to people-centred

<p align="center">Shell v Ken Saro Wiwa</p>	<p>Shell financed, armed and otherwise colluded with the Nigerian military forces that used deadly force and conducted massive brutal raids against the Ogoni with a motive of restarting oil operations on Ogoni Territory. Shell was also involved in a strategy that resulted in the executions of nine Ogoni leaders who were working for environmental justice and human rights, including internationally-acclaimed writer and activist Ken Saro-Wiwa.</p> <p>→ Shell agreed to a settlement of all three lawsuits filed against it with the Plaintiffs. The settlement, whose terms are public, provided a total of \$15.5 million to compensate the plaintiffs, establish a trust for the benefit of the Ogoni people, and cover some of the legal costs and fees associated with the case.</p>
<p>Kiobel v Royal Ducth Petroleum Co</p>	<p>The Kiobel case was filed by Nigerian plaintiffs and brings claims for extrajudicial killing, torture, and crimes against humanity, and prolonged arbitrary arrest and detention. The plaintiffs allege that the company collaborated with the Nigerian government to commit these violations to suppress their lawful protests against oil exploration.</p> <p>The petition for certiorari was granted by the U.S. Supreme Court on October 17, 2011. Oral argument took place on February 28, 2012. A week later, on March 6, the Court requested supplemental briefing on the question of whether the statute encompasses violations committed outside the territory of the United States. Supplemental briefs were filed with the Court in the summer of 2012, and re-argument took place on Oct. 1, 2012.</p> <p>On April 17, 2013, the Supreme Court issued its decision. The Court held that a presumption against extraterritorial application of the ATS applied to the facts of the Kiobel, and affirmed the judgment of the Second Circuit court of appeals.</p>

Growth of corporations has lead to:

Mergers and acquisitions

Deregulation

Political influence

Activist Tactics

- Boycotts
- Corporate Campaigns
- Target image of the company
- CSR is engaged so company acts to enhance broader society
- CSR-conscious companies vulnerable
- Lawsuits
- Advocacy Science

Enron	→ Donated 6 million to republicans → Deregulation of electricity networks - Influence over political process. Debate between power of corporations vs. power of government.
Nike	Sweatshop labour, child labour. Rapid growth lead to exploitation.

Week 11: Tort of Negligence & Negligent misstatements

As a general businessperson you need to be aware of the consequences of causing harm to others.

Tort Law: relates to any civil wrong that unfairly causes someone to suffer loss or harm resulting in legal liability for the person who commits the tortious act (*tortfeasor*).

NEGLIGENCE

Conduct that falls **below the standard of care** demanded for the protection of others against the unreasonable risk of harm.

- Most acts that cause harm to other people are the result of **carelessness** rather than intent

ESSENTIAL ELEMENTS OF NEGLIGENCE

1. Duty of care owed by defendant to plaintiff
2. Defendant has breached that duty of care
3. The breach caused the foreseeable harm
4. Go through defences

Objective: To compensate for loss suffered and not to punish.

To establish a claim for negligence, the plaintiff must prove:

1. The defendant owed the plaintiff a **duty of care**
2. The defendant **breached** the duty of care
3. The plaintiff suffered damage **caused** by the breach
4. The damage was not too remote

<p>Donoghue v Stevenson (1932)</p>	<p>While attending a store, Ms May Donoghue was given a bottle of ginger beer, which had purchased for her by a friend. The bottle was later discovered to contain a decomposing snail. She later fell ill and a physician diagnosed her with gastroenteritis. Donoghue subsequently took legal action against Mr David Stevenson, the manufacturer of the ginger beer. She lodged a writ in the Court of Sessions, Scotland's highest civil court, seeking £500 damages.</p> <p>Donoghue could not sue Stevenson for breach of contract, because a friend had purchased the drink for her. Instead, her lawyers claimed that Stevenson had breached a duty of care to his consumers and had caused injury through negligence – an area of civil law, which at the time was largely untested. Stevenson's lawyers challenged Donoghue's action, on the basis that no precedents existed for such a claim. They referred to an earlier action by Donoghue's lawyer, Mullen v. AG Barr, where a dead mouse was found in a bottle of soft drink; judges in this case dismissed it because of a lack of precedent. Donoghue's initial action failed, however she was granted leave to appeal to the House of Lords, which at the time still had the judicial authority to hear appellate cases. The leading judgement, delivered by Lord Atkin in 1932, established that Stevenson should be responsible for the well-being of individuals who consume his products, given that they could not be inspected. The case was returned to the original court; Stevenson died before the case was finalised and Donoghue was awarded a reduced amount of damages from his estate.</p> <p>The outcomes of Donoghue v. Stevenson established several legal principles and precedents.</p>
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REQUIREMENT 1: DUTY OF CARE

In most cases the establishment of the existence of a duty of care will be relatively straightforward, provided that the relationship between the parties falls within the established categories of duty of care.

Categories of relationships established by law

- Accountants & Lawyers to their clients
- Doctors, nurses and hospitals to their patients
- Manufacturers of products to consumers of those products
- Car drivers to surrounding car drivers
- Owners and occupiers of property to entrants
- Employers to employees

If no relevant precedent category → **TWO TESTS**

NEIGHBOUR TEST (reasonable foreseeability) → **Donoghue v Stevenson (1932)**

And

REASONABLENESS (Neighbourhood, includes proximity – physical, causal or circumstantial closeness, vulnerability or reliance)

Occupiers Liability

- An occupier of premises owes a duty of care to all persons entering the premises to ensure that the premises are safe → **Australian Safeway Stores Pty Ltd v Zaluzna (1987)**
- Does an occupier also owe a duty of care to people who are on their premises without their permission? → **Hackshaw v Shaw (1984)**

If the relationship does not fall within one of the established categories, the plaintiff must establish that **two tests are satisfied**:

- 1) Must be shown that at the time of the incident it was **reasonably foreseeable** that the defendant's conduct could cause harm to someone in the plaintiff's position.
 - **Donoghue v Stevenson (1932)**
 - **Bourhill v Young (1943)**
- 2) The plaintiff must show that the **salient features of the case** are consistent with the existence of a duty of care.

This means the court will consider the relationship between the parties and other features of the case and then compare those features with the features of other cases where a duty of care has been found to exist.

→ **Sullivan v Moody (2001)**

REQUIREMENT 2: BREACH OF DUTY

To establish a breach of duty it must be shown that the defendant failed to do what a reasonable person would have done in the same circumstances.

The court will take into account:

The probability of harm Bolton v Stone (1951)	Ball hit out of cricket ground, injured plaintiff. No liability because risk of injury 'negligible' & only way to avoid was to stop cricket. Reasonable person would not take this precaution to avoid such a small risk.
The risk of injury/likely seriousness of the harm Paris v Stepney Borough Council (1951)	Employer's failure to take precautions against risk of one-eyed employee losing that eye, was not reasonable, given seriousness of consequence: blindness
The burden of taking precautions/ eliminating risk Rowe v McCartney (1976)	Standard expected in a given context. E.g. driving.
Common practice/ conformity with established standards Mercer v Commissioner for Road Transport and Tramways	Although an indicator, that "usual practice" may not be good enough, if this is below objectively determined standards of care

DEFENCES

Even if the plaintiff has established all three elements of the tort of negligence, the defendant can still avoid liability, either completely or partially, if they can establish the existence of one or more defences.

1. **DEFENCE 1: CONTRIBUTORY NEGLIGENCE**

Manley v Alexander (2005): Drunk person lay down on road and was carelessly driven over by defendant and injured – **both** parties caused the harm.

→ Affects the way damages are apportioned

2. **DEFENCE 2: VOLUNTARY ASSUMPTION OF RISK (VAR)**

If it can be established that the plaintiff was fully aware of the risk at the time the harm was caused and they voluntarily assumed that risk, the defendant is relieved of all liability.

Agar v Hyde (2000): People who play rugby assume the risk of injury

Other Principles:

3. **'Thin skull principle'** → You take the victim as you find them

4. **Vicarious liability** → Employer is liable for negligent acts or omissions of employees.

Tests:

i) The Control test

ii) The integration test as to whether someone is independent contractor or employee

REMEDIES IF NEGLIGENCE PROVEN

DAMAGES – to compensate plaintiff, returning them to position they were in prior to the negligence.

Can be claimed for:

a) **Property Damage**

b) **Personal Injury** – both pecuniary (\$\$) loss & non-pecuniary loss

i) Loss of earning capacity

ii) Medical and related expenses

iii) Pain and suffering

iv) Loss of enjoyment of life and faculties

c) **Economic Loss**

i) From physical damage to person or property

ii) From physical damage to person or property of a third party

iii) Pure economic loss

Non-compensatory (compensation = \$\$)

- **Nominal damages:** Awarded where judge &/jury consider plaintiff did not really suffer any damage. Not awarded in negligence cases.
- **Aggravated damages:** Where the defendant has failed to reduce the level of damage or has increased the level of damage
- **Exemplary damages:** Damages are punitive (severe)

NEGLIGENT MISSTATEMENT FACTORS

When a person is giving advice, they owe a duty of care:

- 1) The advice is of a business or serious nature
- 2) They know or should know that the other person intends to rely on the advice
- 3) It is reasonable in the circumstances for the other person to rely on the advice

The person giving advice may owe a duty of care even if they are not a professional adviser such as a lawyer or accountant.

Case authority for negligent mis-statement:

<p>Hedley Bryne & Co Ltd v Heller & Partners Ltd (1964)</p>	<p>HB was an advertising agency and placed advertising for client E. HB asked its bankers H to check financial status of E. H wrote letter saying yes. Based on letter HB placed order but E went into liquidation & thus HB lost \$\$.</p> <p>Issue: Could HB claim loss from H on account of bad advice? (Even though E caused the loss)</p> <p>HELD Not liable as disclaimer in letter. But H owed a DoC to HB because of their knowledge of E and they knew their opinion would be relied on. If no disclaimer then H would have been liable.</p>
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Negligent misstatement vs. general negligence

The same elements have to be proved: Duty of care, breach of standard, damages.

THE DIFFERENCE IS THE **LEVEL** OF DUTY OF CARE:

For the defendant (person making the statement) to owe a duty of care to the plaintiff (person receiving statement) → there must be a ***'special relationship'***.

GENERAL SUMMARY OF WHEN DUTY OF CARE IS OWED

Hedley Byrne & Co Ltd v Heller & Partners Ltd (1964)

- The advice or information provided concerned a business or professional transaction the nature of which makes clear the importance and influence attached to the answer
- The defendant either has some special skill or ability so others could reasonably rely on his/her judgment, skill or ability
- The plaintiff reasonably relies on the advice or information given by the defendant and suffers loss as a result of such reliance
- Damage would arise to the plaintiff if the defendant failed to exercise a standard of care sufficient to discharge the duty of care arising from the relationship.

DUTY OF CARE: GIVING ADVICE/INFORMATION

A duty will arise if 'special relationship of confidence' exists:

- If speaker gives information/advice on serious matter, e.g. matter of business – Speaker realises (or ought to) that he or she is trusted (especially where recipient believes speaker has info or capacity to exercise judgment, give the best info/advice
- It is reasonable for the recipient to seek/accept that info/advice and rely on it – no need to be in the business of giving advice: Shaddock v Paramatta CC – Irrelevant whether advice/info is requested or volunteered

STRUCTURE OF ANSWER TO ANSWER PROBLEM QUESTIONS

Was the plaintiff owed a duty of care?

Donoghue v Stevenson “neighbour” test (if its not recognised relationship)

Was the damage foreseeable? (Reasonable foreseeability)

- Proximity in relationship
- Salient features
- If yes, what is the standard of care required? E.g. was a professional involved? Is there a breach of standard of care?

Did harm or damage occur and what type of damage?

- E.g. property or economic loss

Was the Damage actually caused by the breach?

- Causation → use ‘But for’ test
- Was damage too remote? - exception of the “thin skull/eggshell” principle
- Could it have been reasonably foreseen?

Are there any defences available to the defendant?

- Voluntary assumption of risk
- Contributory negligence

If defendant is found to be negligent, what are the appropriate remedies?

- Consider nature of tort, e.g. negligence vs. trespass to property.

TORT/NEGLIGENCE: PG. 62

SAMPLE QUESTIONS/ANSWERS

ISSUE 1

Lily is a student at RMIT. The toilets at RMIT have recently been cleaned and Lily slips on a very wet floor in the wash room and breaks her leg. She has incurred significant medical expenses and is out of her part time work for four months.

(a) What legal action could Lily take against RMIT or the cleaners of the toilets and how likely will she be to succeed?

(b) Is the situation different if Lily suffered her injury after breaking into RMIT when its closed with the intention of stealing a Business & Commercial Law examination?

ANSWER

DUTY OF CARE

Firstly, does RMIT owe Lily a duty of care?

- Recognised category? - Eg dr/patient, Owner/invitee, Accountant/client, Architect/Users of building, Parent/child
- If recognised category you don't have to prove a DoC
- If no recognised category you do have to prove DoC using
 - Reasonable proximity
 - Salient features

DoC is owed to Lily because she was invited to enter RMIT, so RMIT owes Lily a DoC to take reasonable care to avoid foreseeable risk of injury.

Australian Safeway Stores Pty Ltd v Zaluzna → direct case authority for the duty owed by occupiers to entrants on the occupier's premises

IDENTIFYING BREACH OF DOC (Factors)

Test is what 'reasonable person' would have done in relation to:

- **probability of harm** –
 - Bolton v Stone* - risk low (outdoor cricket)
 - Woods v Multisport Holdings* – risk obvious (indoor cricket)
- **likely seriousness of the harm**
 - Paris v Stepney Borough Council* – blind in one eye
- **burden of taking precautions**
 - Latimer v AEC* – need to close factory? Cost of eliminating risk
- **social utility of the D's activity**
 - Watt v Hertfordshire CC* – fireman
- **lower duty of care?**
 - McHale v Watson* – standard was that of a child

APPLYING BREACH OF DOC



- probability of harm
wet polished floor - high
- likely seriousness of the harm
fairly serious – hard floors, hit head on basin/tap
- burden of taking precautions
low – warning sign, close while cleaning
- social utility of the D's activity
high – what if no toilets at RMIT!!
- lower duty of care
no

It is very likely that a person could get injured if there is a slippery floor & people are not made aware of the risk. The cost of eliminating such risk of people slipping is low and thus not a hard risk to eliminate or at least minimise. As none of this has occurred, it seems RMIT has not acted as the reasonable occupier/owner of premises. Lily has suffered harm so the elements have been made out.

Note the eggshell plaintiff – those who cause harm have to find their victims as they are, so pre-existing condition is no excuse for tortfeasor

DEFENCES AND OTHER PARTIES

Having made out Lily's negligence claim, we should then consider:

- **Voluntary assumption of risk**
- **Contributory negligence**

Even trespassers are owed a duty of care: **Hackshaw v Shaw** – There may be some reduction in damages award on the basis of a defence such as contributory negligence especially if she broke in at night when it was dark.

Cleaner → vicarious liability

Loss of earnings

'But for' test → a link between the breach and Lily's injury however,

The seriousness of this injury (hereditary condition) may be grounds to limit the extent of damages as too remote (i.e not reasonably foreseeable consequence of Lily's negligence), **however**

- "Thin skull shell" principle is an exception to the remoteness argument. It extends the defendant's liability to cover those injuries, which are idiosyncratic (peculiar) to the plaintiff's individual medical condition particularly when in unsafe workplace

- Loss of earnings from employment is not too remote a damage to suffer if reasonable care has not been taken and a physical injury results.