

LEGAL EXAM

1. NEGLIGENCE

Mainly **tort law** (Tort of negligence is under common law)

A. Introduction

The tort of negligence (aim: prevent harm to others) provides monetary compensation for foreseeable harm to property, the person and certain economic interests where such harm is caused by the failure of another to take reasonable care.

1. Can apply without any consent or contract
2. Apply to the community
3. Downside: common law does not protect you from yourself, based on the presumption that you are a rational adult.

B. Elements (cumulative)

Analysis should be based on **the balance of probabilities**.

i. Damage

1. **Threshold Requirement: some harm must be suffered for which the law provides compensation**
2. **Examples: (legally recognized harm; follow general rule)**
 - a. Personal injury (*O'Dwyer v. Lea Baring Pro Ltd 1966*)
"The court held that this kind of damage was reasonably foreseeable" p.249
 - b. Damage to property

ii. **Duty of care** (no need to prove there is duty of care, but **why it exists, i.e. which recognized categories**)

1. **Definition: an obligation on the defendant (the party being sued) to take reasonable care to prevent the harm to the plaintiff (the party bringing the lawsuit) that is being complained of from occurring**

2. **Some recognized categories**

- a. Doctor and patient
- b. Solicitor and client (cf barrister and client: *D'Urqu-Ekeniele*)
- c. Motor vehicle driver to other road users
- d. Landlord and tenant
- e. Occupier to visitors (*Alibon*)
- f. Manufacturer to consumer (*Dunoghue*)

l. 'No reasonable chance or expectation that the product would be examined owed the duty of care to a consumer to take reasonable care in the production of its goods because it was reasonably foreseeable that if it did not use reasonable care, a consumer could be injured' p. 246

g. **Supplier to consumer (Grant 'woolen underwear case')**

reasonable person would not take reasonable steps to avoid the harm in the circumstances

- a. e.g. Paris: providing a safety glass is a fairly easy thing to do and it can prevent the harm that is not likely to occur but if occur, very serious. -> cost of harm itself=cost to avoid the harm -> the defendant is negligent, as a reasonable person would take reasonable steps to avoid the harm in the circumstances.
- c. *Caledonian Collieries*: The plaintiff was killed by an out of control train carriage which could have been stopped by catches on the railway line. The burden of taking precautions not big therefore it should have been done.

ii. Industry or common practice

1. Established standards (e.g. common accounting standards) are relevant to the question of what a reasonable person in the defendant's position would have done under the circumstances, but **they are not determinative of the issue**. (i.e. not rely on the established standards) (*Mercer, Rogers*)
2. The whole industry may be negligent. -> following the standards, you are negligent
e.g. auditing standards is only a guide, which you follow does not necessarily mean you will not be negligent; however, if you don't follow, you are definitely negligent.
3. Should be kept up with standards change.

iii. Mandatory rules legal rules

1. The fact of the defendant's compliance or non-compliance with applicable mandatory rules is relevant to the question of whether the defendant has exercised reasonable care under the circumstances, but **it is not determinative of the issue**. (*Duckert; Pacific Acceptance Corporation*)
2. If a reasonable person should do more than the rule under certain circumstance, but you don't, you are negligent. -> you don't break any legal rule does not guarantee that you are not negligent.
e.g. the maximum speed is 100km/h. You drive at this speed **when it's rainy**, and cause an accident, you will be negligent.

iv. **Expertise, or lack thereof (Level of expertise= level of duty of care)**

1. The standard of care owed to a plaintiff by a defendant with a certain level of skill may depend on whether the plaintiff is aware of that defendant's particular level of skill. (can be adjusted up or down) (*Loeb*) "the standard of care owed by a learner driver, to someone who was voluntarily instructing them, should be expressed as a lower standard than that owed to other road users".
2. e.g. Learner driver:
 - a. With an 'L' and he doesn't comply with the skilled driver standard, so you are aware of his level of expertise, you cannot sue him owing to his lower level of duty of care owed to you.
 - b. Without an 'L' and he doesn't comply with the skilled driver standard, so you are not aware of his level of expertise, you can sue him owing to his same level of duty of care as skilled driver.
3. e.g. Doctor:
 - a. If patient has a choice and chooses the inexperienced doctor, so patient is aware of his level of expertise, you cannot sue him owing to his lower level of duty of care owed to you.
 - b. If patient has no choice (under emergency), so the inexperienced doctor owes the patient the same level of duty as an expert.

1.1 The 'neighbour principle' provides that:

- 1) Reasonable care should be taken to avoid acts or omissions which you can reasonably foresee may injure your neighbour; and
- 2) Your neighbour is someone who is so closely affected by what you do that you ought reasonably have them in contemplation when doing or omitting to do an act.

These are now incorporated in s 48 *Wrongs Act 1958* (Vic). **General principles**

(1) A person is not negligent in failing to take precautions against a risk of harm unless—

- (a) the risk was foreseeable (that is, it is a risk of which the person knew or ought to have known); and
 - (b) the risk was not insignificant; and
 - (c) in the circumstances, a reasonable person in the person's position would have taken those precautions.
- (2) In determining whether a reasonable person would have taken precautions against a risk of harm, the court is to consider the following (amongst other relevant things)—
- (a) the probability that the harm would occur if care were not taken;
 - (b) the likely seriousness of the harm;
 - (c) the burden of taking precautions to avoid the risk of harm;
 - (d) the social utility of the activity that creates the risk of harm.

(3) For the purposes of subsection (1)(b)—

- (a) **insignificant risks** include, but are not limited to, risks that are far-fetched or fanciful; and
- (b) risks that are **not insignificant** are all risks other than insignificant risks and include, but are not limited to, significant risks.

Factors court takes into account when identifying 'neighbour'

- 1) Defendant's knowledge that their act/omission may cause loss to the plaintiff.
- 2) Defendant's control over the plaintiff.
- 3) Plaintiff's reliance on the defendant.
- 4) Position of the defendant that requires them to be protective of the plaintiff.

Note: Neighbor principle is a principle of English law which says that a person should take reasonable care to avoid acts or omissions that s/he can reasonably foresee as likely to cause injury to the neighbour. Neighbor includes all persons who are so closely and directly affected by the act that the actor should reasonably think of them when engaging in the act or omission in question.

iii. Breach of duty (WA s 48(1)(2))

1. *The Defendant Needs to Have Been 'Negligent', in the Sense of Having subjective purpose* (see *Woods v. Esdaile*)
 - a. **done something which a reasonable person in the position of the defendant would not have done under the circumstances (more common)**

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b. If patient has no choice (under emergency), so the inexperienced doctor owes the patient the same level of duty as an expert.

(3) A higher standard of care is expected where a person holds **themselves** out as an expert or professional: e.g. a medical practitioner

In this context s 58 of *Wrongs Act 1958* (Vic) provides:

In a case involving an allegation of negligence against a person (the **defendant**) who holds himself or herself out as possessing a particular skill, the standard to be applied by a court in determining whether the defendant acted with due care is, subject to this Division, to be determined by reference to—

- (a) what could reasonably be expected of a person possessing that skill; and
- (b) the relevant circumstances as at the date of the alleged negligence and not a later date.

v. Advances in knowledge

1. Assessment is made according to the standard of knowledge **at the time of the alleged negligence** (*Thompson*)
2. 'We must not look at the 1947 accident with 1954 spectacles' (*Roe*) 'The defendant doesn't know the container is broken and he knows the contaminated medicine would cause harm to patient' -> the defendant does not have the standard of knowledge at that time. -> he is not negligent. -> now, we can change the color of the liquid around the container to prevent this situation, but if the same situation happens again, then the defendant is negligent.
3. 'Law marching with medicine, but in the rear and limping a little' (*Puay*)

iv. Causation

1. *Viewed from the perspective of 'common sense', the defendant's failure to take reasonable care must have caused the plaintiff's loss (i.e. breach of duty causes loss)* (*March*)
2. *Onus of Proof*
Burden is on the plaintiff to establish causation on the 'balance of probabilities' (ie more likely than not; quantitative) (Talamackes; Millar) "It must carry a reasonable degree of probability ... If the evidence is such that the tribunal can say: "We think it more probable than not," the burden is discharged, but, if the probabilities are equal, it is not"
3. *Logic: Show if the defendant does what they should do as a reasonable person, the loss can be avoided (need to show the outcome would more likely be different if the defendant had done reasonably. If the harm will still be suffered even if there was no breach, not a cause.)*
 - a. *Did the defendant's negligence materially contribute to the plaintiff's harm?* (*Bannington; Gemlen*)
 - b. *Would the harm have been suffered if the defendant had taken reasonable care?* ("but-for test") (*Bazars; Bazars*) "The plaintiff would not have undergone her surgery had she been advised of the risk to the left eye, even though the risk of that complication was of the order of about 1 in 14,000 procedures." -> causation
 - c. *e.g. an unqualified doctor doesn't diagnose the cancer of the patient, and the patient dies, can the patient sue the doctor for negligence?*
If the cancer can be cured if diagnosed, then there is a causation.
BUT if the cancer cannot be cured, there is a breach of duty but NO causation.

v. Remoteness

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b. **failed to do something which a reasonable person in the position of the defendant would have done under the circumstances**

- ➔ Failing to act doesn't normally constitute a BOD.
 - c. a **minimalist standard of conduct**, as the question is not what a 'caring' or 'careful' person would have done.
2. **Two stage approach**
- a. *whether there was a material risk of harm arising from the kind of conduct that is being complained of (whether the risk of injury or loss was reasonably foreseeable, that is, one that is not 'far-fetched or fanciful') A reasonable person would not ignore a foreseeable risk (Wyang)* "The risk was that the ambiguity of the sign might induce people to believe that the water was deep and therefore safe for water skiing. This is a foreseeable risk."
- exam 'easy to satisfy'
 - b. *The risk may be reasonably foreseeable, but it is necessary to ask how a reasonable person in the position of the defendant would have responded to this risk (whether the response to the risk was reasonable in the circumstances)*

l. 'Calculus' of Negligence

1. Probability & Gravity (**expected cost of harm itself**)

a. *Probability: Likelihood of the harm occurring (Bolton v Stone) p. 261*

The risk of harm is very unlikely. -> not meet probability. The lower the probability of risk or injury occurring, the less likely defendant has breached the duty of care.

-> 'Bolton': The plaintiff who lived opposite a cricket ground was struck by a ball. The House of Lords held that the risk, although foreseeable, was so small that reasonable person in the position of the defendant would have ignored the risk and batted on.

b. *Gravity: Seriousness of the harm if it does occur (Paris v Stepney Borough Council) p. 262*

Even though the risk of harm happens is very unlikely, but once it happens, will lead to serious situation/have significant impact. -> meet gravity.

The more serious the harm that may occur the higher the standard of care that is required.

-> 'Paris': Paris was already blind in one eye while he worked as a fitter. His other eye was struck by a small piece of metal due to the safety glasses not provided by the council. The House of Lords held that a reasonable person would have taken actions because of the potential gravity of the injury were it to occur. Paris was in a more perilous position of being blind in one eye.

c. *1 & 2 are 'cost-benefit-principle', i.e. balance Probability and Gravity to against Practicability*

2. Practicability (costs to avoid the harm)

The ease with which the defendant might have taken steps to deal with the risk (*Caledonian Collieries Ltd v Smeirs*)

The lower the cost of precautions to avoid the risk of loss or injury, failing to take those precautions is more likely to be a breach.

a. e.g. Bolton: practicability is low, as it is not easy to avoid the harm. -> Cost to avoid the harm=cost of harm itself -> the defendant is not negligent, as a

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1. *The harm that is caused by the defendant's negligence must be of the class, kind or type of harm that is reasonably foreseeable from the defendant's negligence (Hogan; Mounie; contra Dalmeida)* "The court held that the damage caused by the defendant's negligent spillage was not reasonably foreseeable" However, if it happened for the second time, it was reasonably foreseeable that the oil might ignite then it is also reasonably foreseeable that ship moved to the wharves might be damaged by fire. p. 269

2. *So Long as the Class, Kind or Type of Harm is Reasonably Foreseeable, it Matters Not That a. the actual way in which the harm came about might not have been foreseen (Lughes)* "The harm that can be foreseen is falling down in the gap, but actually the plaintiff was burned by the smoke."

b. *the extent of the harm actually suffered is greater than what might have been foreseen, because the plaintiff is especially vulnerable (ie as an 'egg-shell skull'); the defendant must take the plaintiff 'talem quale' (ie as is) (Dulieu; Stephenson; Wadler)*

l. The eggshell skull rule (or thin skull rule or you take your victim as you find him rule of the common law) is a well-established legal doctrine used in some tort law systems, with a similar doctrine applicable to criminal law.

In the judgment, the egg-shell skull question is discussed as part of the court's inquiry into the issue of legal causation. With regards to legal causation it is held that a rigid approach should not be followed, but rather a more flexible approach. This flexible approach should be based on reasonableness and fairness and each case should be dependent on its own facts. The fact that the Plaintiff's damage was partly caused by his own financial vulnerability, is merely one of the factors to be considered when establishing whether or not the damage suffered was sufficiently relevant to the wrongdoer's conduct.

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