

2.1 Negligence

Scope of the tort of negligence

- Negligence emerged as an independent tort following *Donoghue v Stevenson (1932)*
- Tort of negligence has assumed prime importance in the law of torts
- Unlike other torts, negligence does not involve a specific type of conduct
 - negligence is about careless behaviour and can therefore be applied to any form of human activity
- Damages available for
 - i. Negligent infliction of physical and psychological injury
 - ii. Property Damage
 - iii. Economic Loss

Civil Liability Reform (Statutory): General Principles

- These principles apply to any claim for damage for harm resulting from negligence, regardless of whether the claim is brought in tort, contract, under statute, or otherwise
 - Purpose of civil liability reform: limit the scope of potential liability for negligence and reduce the amount of damages that can be awarded to a plaintiff for personal injuries in a negligence action
- A. No negligence unless...
 - i. Risk was foreseeable
 - ii. Not insignificant
 - iii. A reasonable person would have taken precautions
 - B. Factors for the courts to consider:
 - i. Probability of harm
 - ii. Likely seriousness of harm
 - iii. Cost of taking precautions
 - iv. Social utility

Negligence Criteria

1. Does D owe a duty of care to P?
 - Reasonable foreseeability
 - Proximity
 - Broader policy considerations
2. If so, has D breaches that duty of care?
 - Was it a foreseeable risk?
 - If yes, how would a reasonable person in D's position have responded
3. Was damage caused by the breach? CAUSATION
 - But for test, factual causation
4. Is the damage too remote? REMOTENESS
 - Reasonable foreseeability test
5. Are there any defences?
 - Contributory negligence
 - Voluntary assumption of risk

Defendant is only liable if plaintiff can prove:

1. Defendant owed the plaintiff a duty of care
2. Defendant was in breach of this duty of care
3. The defendant's breach of duty was the cause of the plaintiff's loss ("Causation")
4. The damage suffered by the plaintiff was not too remote ("Remoteness of damage")

Other Considerations

1. Whether either of the two defences (Contributory Negligence, Voluntary assumption of risk) or mitigating factors to a negligence claim are relevant

2. Whether the civil liability reforms are relevant

Criteria 1: Does a duty of care exist?

- Birth of the law of negligence → Case: *Donoghue v Stevenson*
 - House of Lords accepted that a duty of care could arise in any context where loss or injury was “**reasonably foreseeable**” and where the parties were in a sufficiently close “**proximity**” that it required one party not to cause harm to the other

Case: *Donoghue v Stevenson (1932)***Topic: Birth of the Tort of Negligence**

- May Donoghue and a friend ordered and paid for an ice-cream drink in a café
 - the friend ordered so there was no contract between May and the café
- The waiter poured ginger beer from an opaque bottle onto the ice cream
- After drinking some, the friend poured the remained of the ginger beer into the bottle
- A snail dropped out of the bottle
- May later had stomach pain and her doctor diagnosed her as having gastroenteritis and being in a state of nervous shock
- There was no contract between May and the café owner, so she could not sue for breach of implied term in contract that quality must be good
 - this is because her friend has ordered the drink, so there was only a contract between her friend and the café, hence May could not sue for breach of contract
- Instead, she sued the manufacturer Stevenson in tort of negligence
- She claimed the manufacturer owed her a duty of care about the ginger beer
- A writ like this had never been issued before, up to this point, a manufacturer was not liable to a consumer for negligence
- House of Lords decision: Majority vote agreed with Donoghue and she received damages
 - Lord Atkin: “Neighbourhood Principle”
 - A manufacturer of products owes a duty to the consumer to take reasonable care

Neighbourhood Principle

- You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour
- Who is my neighbour by law?
 - persons who are closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my minds to the acts or omissions that are called in question

Reasonable foreseeability

- The plaintiff must prove it was reasonably foreseeable to a person in the defendant’s position that harm would result from the conduct in questions
- Example: a manufacturer of food and drink
- Case: *Tame v New South Wales*

Proximity

- The plaintiff and defendant must be in some form of relationship to one another

→ Both Reasonable foreseeability and Proximity must exist for there to be a duty of care

Case: *Tame v New South Wales (2002)***Topic: No duty of care: Not reasonable foreseeability**

- Tame was involved in a car accident and was tested for alcohol in his blood
- A police officer incorrectly reported the reading as too high
- It was soon corrected and never acted upon by anybody
- Tame however became obsessed by the error and was diagnosed as having developed psychotic depressive illness because she believed that the community would believe she had been drunk when the accident occurred
- Tame sued the police for negligence
- High Court decision: claim was dismissed
 - The respondent did not owe a duty of care
 - The police officer could not reasonably have been expected to foresee the harm it would cause to Tame

The duty of care in specific situations

1. Duty of care and acts causing physical harm
 - Reasonable foreseeability
 - Proximity
 - Broader Policy factors
2. Duty of care and acts causing mental harm
 - Reasonable foreseeability
 - Limits on proximity
3. Liability for omissions
 - Law limits duty to act- but see duty to warn/public authority cases
4. Acts causing pure economic loss
 - Caltex/Apand/Johnson Criteria
5. Statements causing pure economic loss
 - Two party
 - Third party

Duty of care and acts causing physical harm

- Physical harm:
 - i. Injury to the plaintiff
 - ii. Damage to his/her property
- The existence of a duty of care is well established
- Depends on whether the harm suffered by the plaintiff was reasonably foreseeable by an individual involved in the event (Proximity)
 - Objective Test
- Criminal behaviour of third party does not form a duty of care
 - Case: *Modbury Triangle Shopping Centre Pty Ltd v Anzil*

Case: *Australian Safeway Stores Pty Ltd v Zaluzna (1987)***Topic: Duty of Care and acts causing physical harm**

- Zaluzna entered the foyer of the appellant's supermarket
- It was raining so the vinyl-tiled floor became wet in the foyer
- Zaluzna slipped and fell heavily, sustaining personal injury
- High Court decision: A duty of care existed
 - reasonably foreseeable that wet floor can cause injury
 - Proximity: the respondent was a lawful entrant upon the land of the appellant, so a relationship was established between them

Case: *Modbury Triangle Shopping Centre Pty Ltd v Anzil (2000)***Topic: Not duty of care: criminal behaviour of a third party**

- The appellant owned the shopping centre
- Anzil was the manager of a video shop that leased premises in the shopping centre
- The shopping centre had an outdoor carpark and the lights were not on at night
- Anzil was attacked by criminals and injured after closing the store at night
- High Court decision:
 - reasonably foreseeable, but the appellant's duty as an occupier of land did not extend to taking reasonable care to prevent physical injury from the criminal behaviour of a third party

Case: *Donoghue v Stevenson (1932)***Duty of care and acts causing mental harm**

- In the past, nervous shock was only considered to give rise to a duty of care when directly related to physical injury or at least for the plaintiff to have to be within the area of possible injury
- Today, courts recognise nervous shock as a kind of damage in its own right
- Exceptions:
 - a. Claimants who experienced "normal" rather than pathological grief as a result of their loved one's death or injury
 - b. Claimants that have not personally experienced-with eyes or ears- the "immediate aftermath" of the event
 - must see or hear the aftermath with their own senses!
 - informing someone on the phone does not count (unless they instantly go see the damage)
 - watching live footage on TV does not count
 - c. Claimants who were only bystanders or curious onlookers
- Test for reasonable foreseeability takes into account:
 - i. The relationships between the parties
 - ii. The plaintiff's physical and temporal proximity to the event that causes the mental harm
 - iii. What the expected response of a person of normal fortitude might be

Case: *Jaensch v Coffey (1984)***Topic: Duty of care and acts causing mental harm**

- The plaintiff's husband had a motorcycle accident due to negligent driving by Mr Jaensch
- The plaintiff was brought to the hospital by police, where she saw her husband in severe pain
- She saw the direct aftermath of the accident
- When she left, she thought Allen was going to die and therefore suffered severe anxiety and depression
- Her psychiatric condition caused gynaecological problems and a hysterectomy was later performed
- High Court decision: Plaintiff could recover damages for "nervous shock"
 - Damage to plaintiff in the form of psychiatric injury was reasonably foreseeable by the defendant
 - there was sufficient proximity (she was closely and directly affected by the act, because although she was not at the accident, she experienced the direct aftermath at the hospital)

Case: *Annetts v Australian Stations Pty Ltd (2002)***Topic: Duty of care and acts causing mental harm: Did not see immediate aftermath**

- Mr and Mrs Annett's son when to work as a Jackeroo as a 16 year old
- They were worried and contacted his workplace to ensure that he did not work before safety arrangements were put in place and they ensured that he would be under constant supervision
- Several weeks later he went missing after being sent off on a job alone
- The parents were informed over the phone and Mrs Annett collapsed
- Court decision: Mrs Annett could NOT recover damages, did not see the immediate aftermath

Case: *Tame v New South Wales (2002)***Topic: No duty of care, not reasonably foreseeable**