

Topic 4

The Law of Torts: Liability for Negligent Acts

- **P:** Plaintiff, institutes the legal action for negligence
- **D:** Defendant

Overview of Torts and Negligence

What Is A Tort?

- 'Tort' is a Latin word meaning 'twisted', 'crooked' or 'wrong'.
- Tort law is concerned with legally binding obligations that arise when one person's wrongful conduct infringes another person's rights, and loss or damage is caused
- Wrongful interference with an individual's person or property
- Torts are 'civil wrongs' (contrast with 'criminal wrongs' = crimes)
- Creates corresponding 'duties' and 'rights'
- Protects general rights enjoyed by all individuals
- Not dependent on a contractual agreement between the parties involved
- The rights and duties exist and are imposed by the law (common law and legislation)

Examples of Torts

Protect Rights

- Tort Of Battery: Right to be safe from intentional physical harm to your body
- Tort Of Defamation: Right to enjoy a good reputation
- Tort Of Trespass: Right to enjoy property free from interference – land and personal items
- Tort Of Nuisance: Right to peacefully enjoy land
- Tort Of Negligence: Right to be safe from unreasonable, careless conduct of others

Overview Of Negligence

- An action for negligence is about careless behaviour and can, therefore, be applied to any form of human or business activity. It does not involve a specific form of conduct
- Negligence law requires members of society (including those engaged in business activities) to adhere to minimum standards of conduct, to avoid injury to others
- Not about perfection – but about reasonable conduct
- Negligence May Cause:
 - Physical Harm: Includes injury, illness and property damage
 - Psychological Harm
 - Economic Loss: Financial loss, includes loss of income, medical expenses
- If the plaintiff is successful in establishing negligence, damages are recoverable to compensate the plaintiff for the injury/losses = the defendant is liable
- **Policy Issue**
 - When someone is injured, who should bear the loss? The tort of negligence is about finding fault (i.e. 'negligence') in the person who caused loss.
 - Legislation has created compulsory compensation schemes; under these schemes no-fault liability arises, the question is only whether you were injured, NOT whether the employer/other driver was at fault.
 - For injuries at work, WorkCover and for road accidents Transport Accident Commission –
 - Part 3-5 ACL – strict liability for manufacturers of goods with safety defects that injure (could sue under both areas of law (negligence and ACL) – but only compensated once)
- **Common Law**
 - The common law principles governing negligence liability have been reformed by legislation.
 - E.g. Modifying common law principles (breach / damage) and caps on liability
 - Despite the legislative reforms, basic common law principles still underpin the law of negligence

- **Legislation**
- Wrongs Act 1958 (Vic)

Elements of Negligence

- Steps 1-3 must be established by the Plaintiff to succeed in their claim
- The Defendant raises any applicable defence (step 4)

Elements of Negligence – Duty of Care

Step 1: Establishing A Duty of Care

- Does D owe P a duty of care?
- **Donoghue v Stevenson**
- 'Snail in the bottle' case
- May Donoghue and a friend went to a café.
- The friend ordered and paid for an ice-cream drink.
- The café owner poured the ginger beer into a glass containing the ice cream.
- Donoghue drank some of the ice-cream drink and lifted the bottle to pour the remainder of the ginger beer into the glass.
- The remains of a decomposed snail dropped out of the bottle into the glass.
- Donoghue later complained of stomach pain and the doctor diagnosed her as having gastroenteritis and being in a state of nervous shock
- Manufacturer → Retailer → Friend → May Donoghue
- Who Could May Donoghue Sue?
- Her friend who bought her the ginger beer?
- The café owner who sold it to her friend? But there is no contract between May and the retailer
- The manufacturer who made it? But there is no contract between May and the manufacturer

Duty of Care

- You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your 'neighbour' ('reasonable foreseeability of harm' test)
- **Who Is Your Neighbour in Law? Who Does the Duty Of Care Extend To?**
- Those who are 'so closely and directly affected' by the Defendant's act that the Defendant should have foreseen the consequences to the Plaintiff ('neighbour/proximity test')
- **Why Limit Scope of The Tort of Negligence in This Way?**
- If injury is not foreseeable and there is no neighbour test, liability is too broad
- Duty of care can arise in any context where loss or injury was 'reasonably foreseeable' and where the parties were in sufficiently close 'proximity' that it required one party not to cause harm to the other. Established negligence as a tort, independent of contract.

Result

- Applied the broad principle/rule to the specific facts in the case.
- Narrower principle also established:
- A manufacturer owes a duty of care to consumers to take reasonable care when manufacturing products to protect consumers from reasonably foreseeable injury to their person or to their property.
- Must not allow foreign objects to enter items for consumption! Doing so is failing to take reasonable care and is negligent.
- Donoghue won the case and was awarded damages.

Acts Causing Physical Harm

- Does D owe a duty of care to P?
- **Reasonable Foreseeability of Harm Test**
- Was it reasonably foreseeable that the D's acts or omissions could cause harm to others?
- **Proximity/Neighbour Test**

- Does P belong to a class of people that D should have regarded as being “at risk” of being injured or suffering loss? Is the P closely and directly affected by D’s acts? Are the parties in sufficiently close proximity?

Case Examples

- Manufacturers Owe A Duty Of Care To Consumers. Must Take Reasonable Care To Protect Consumers From Injuries (To Person Or Property) That Are Reasonably Foreseeable - Ensure Product Is Safe For Use Or Consumption By Consumers.
- **Donoghue v Stevenson**
- **Grant v Australian Knitting Mills**
- Dr Grant and his underpants
- Severe dermatitis (rash) due to chemicals in the
- Underwear – nearly died
- Manufacturer breached duty to take reasonable care in the production of the underwear to not cause injury to Grant
- Note overlap with rights in the ACL under consumer guarantees
- Occupiers Of Premises Owe A Duty Of Care To Those Who Lawfully Enter The Premises. Must Take Reasonable Care To Ensure That The Premises Are Safe – E.g. Clean, In Good Condition, Free From Hazards And Not In A State Of Disrepair.
- **Australian Safeway Stores v Zaluzna**
- Customer slipped over on wet floor
- General duty of care exists
- Foreseeability of harm and customer is in a relationship
- Of close proximity with the supermarket (occupier)
- **Argo v Al Kammesy**
- Clean and check floors often
- **Modbury Triangle Shopping Centre v Anzil**
- Car park lights not on – manager of shop attacked at night in the car park
- Duty does not extend to taking reasonable care to prevent physical injury resulting from the criminal behaviour of third parties (unfair burden)

Acts Causing Mental Harm

- Mental harm by itself (not associated with physical harm to P)
- Test from the High Court of Australia: **Tame v NSW, Annetts v Australian Stations**
- Reasonable Foreseeability Taking Into Account:
- Relationship between the parties
- P’s physical and temporal proximity to the event that causes the mental harm
- What the expected response of a person of normal fortitude might be
- Victoria – Wrongs Act reforms: Must be a recognised psychiatric illness or disorder and other limitations in certain circumstances

Liability For Omissions

- No liability for omissions or for failing to act except where there is a positive duty to act. Look for a relationship that establishes a duty
- In What Circumstances Is There A Positive Duty To Act?
- Where the parties are in a pre-existing relationship that contains elements of reliance or dependence, or where the defendant is in a position of control:
- Parent And Child
- School Authority And Student
- Employer And Employee
- Doctor And Patient: **Rogers v Whitaker**: Doctors have a duty to warn patients of the risks associated with a surgical procedure – needed to warn patient might go blind in the other eye)
- Occupier And Visitor: **Nagle v Rottneest Island**: Need to warn visitors of shallow water)

Negligent Acts Causing Pure Economic Loss

- Includes negligent professional advice. May be very relevant to your future professional careers – as accountants, financial advisers, auditors, etc
- **What Is 'Pure Economic Loss'?**
- Financial loss that is not a result of personal injury or damage to property
- If financial loss flows on from injury (e.g. Loss of income, medical expenses), or property damage (e.g. Loss of profits due to negligent fire) this is not a case of pure economic loss – this financial loss is clearly recoverable
- **General Principle:** Courts are reluctant to find a duty of care is owed in circumstances where D's negligent act results in P suffering a pure economic loss.
- Why? Indeterminacy of liability: Ultramares
- To establish a duty of care, more than reasonable foreseeability of harm and proximity is required
- Note Key Factors To Consider: 'Salient Features' Test: **Perre v Apand**
- **Reasonable Foreseeability:** Yes
- **Indeterminacy of Liability:** No, growers could be identified within a particular area
- **Individual Autonomy:** No, unreasonable interference here
- **Vulnerability to Risk:** Yes, P totally dependent on D and could not protect self (compare with **Johnson v Esso; Marsh v Baxter**)
- **Defendant's Knowledge of The Risk and Its Magnitude:** Yes, aware of break out of disease and repercussions
- Decision: Duty of care owed. (compare with **Johnson v Esso; Marsh v Baxter**)

Elements of Negligence: Breach of Duty of Care

Step 2: Has D Breached the Duty of Care?

- Test: Has D met the standard of care required by the law of negligence?
- What Is the Standard of Care Expected Of Someone Who Owes A Duty Of Care?
- Perfection? No (D does not "guarantee" safety of P or P's property)
- Reasonable Behaviour? Yes
- The principles to consider to determine whether D has failed to exercise the proper level of care are set out in s.48 of the Wrongs Act (Vic)

To Determine Breach: Two Step Approach, Need to Consider:

- **Step 1: Reasonably Foreseeable Risk: S.48(1) Wrongs Act (Vic)**
- Is the risk one which requires a reasonable person to respond?
- A person is **not** negligent in failing to take precautions against a risk of harm unless:
- **Step 2: Reasonable Person's Response: S.48(2) Wrongs Act (Vic)**
- How would a reasonable person respond to the risk?
- The standard of care expected is that of a reasonable person.
- What would a reasonable person, in the position of the D, do by way of response to the risk?
- This is assessed objectively; it is an impersonal test.
- The reasonable person is equipped with the same skills and expertise expected of a person exercising a particular trade or profession
- Consider in context of the circumstances at that time (without the benefit of hindsight): **Argo v Al Kammessy**