

The Law of Tort

Tort Lecture 2

MGT388 Lecture 8

Remember to do your IP Pre-test this week!



The tort of negligence

“The defendant is liable for all damage caused by his breach of duty to take reasonable care, provided that the damage is not too remote.”

The essential components of negligence:

- 1) A duty of care exists (see Tort lecture 1)
- 2) There is a breach of that duty
- 3) There is damage/harm done to the claimant
- 4) There is a causal link between that damage and the breach of duty
- 5) The damage must not be too remote



1) Duty of care (recap)

- Must be a relationship by which a duty of care is owed - carelessness alone does not give rise to liability
- A duty of care is a legal obligation which is imposed on an individual requiring adherence to a standard of reasonable care in the performance of an act that could foreseeably cause harm to others
 - e.g. duty of care owed by employer not to cause employee physical injury
- When does a duty of care exist?
 - Precedent (found to exist in previous cases regarding similar circumstances)
 - By analogy to those duties of care found in previous cases (e.g. nursery/childminder)
 - If new circumstances fulfil the requirements of the 'Caparo Test'
- Note: special rules for cases regarding pure economic loss and pure psychiatric injury tort



2) Breach of duty of care

- A defendant is only liable if he can be shown to be at fault
 - How should the defendant have behaved in the circumstances? (a question of law – see next slide)
 - How did defendant actually behave? (a question of fact/evidence)
 - If the defendant's actual behaviour is below that which the law defines as a minimum standard then a duty of care owed will be breached
- “Negligence is the omission to do something which a reasonable man would do, or doing something which a prudent and reasonable man would not do [in the circumstances]” (*Blyth v Birmingham Waterworks Co.*)
 - Minimum standard = what is (i) reasonable (ii) in the circumstances



Breach of duty – standard of care

(i) What is reasonable?

- What level of care would be expected of the reasonable person in the position of the defendant in all the circumstances?
- Reasonable person = an objective legal test
 - What level of care and skill did the activity that the defendant was undertaking require? (Nettleship v Weston)
- Exceptions i.e. where a characteristic of defendant has been incorporated in test:
 - Where illness has affected functioning of brain and was unbeknown to defendant (*Mansfield v Weetabix*)
 - Children – “what can be objectively expected of a child of that age” (*Orchard v Lee*)
 - Special skills i.e. Professionals acting in their capacity as professionals and exercising a special skill/competence – “an ordinary skilled person professing to exercise that skill” (*Bolam v Friern Hospital Mgt*)



Breach of duty – standard of care (cont.)

(ii) In the circumstances?

- Magnitude of risk
 - Probability that injury will occur (*Bolton v Stone*)
 - Seriousness of injury (*Paris v Stepney BC*)
- Cost of eliminating the risk
 - i.e. cost of taking precautions
- Conformity with standard practice
 - Generally “neglect of duty does not by repetition cease to be neglect of duty”
 - Exception – In the consideration of professionals acting in their capacity as professionals exercising a special skill/competence (*Bolam v Friern Hospital Mgt*)
- Social value of activity
 - Emergency/rescue situation (*Watt v Herts CC*)
 - Sporting events - in the heat of the moment (*Blake v Galloway*)



3) Damage/Harm done to the claimant

- ‘Proof of damage is an essential element in a claim in negligence’ (*Lord Hoffman, Rothwell v Chemical and Insulating Co Ltd*)
- Claimant must suffer actual harm/damage
- e.g. harmless ‘neural plaques’ in lungs from exposure to asbestos were not classed as such as they “do not give rise to any symptoms, nor do they lead to anything else which constitutes damage.” (*Lord Hoffman, Rothwell v Chemical and Insulating Co Ltd*)



4) Causation

- Causation in fact
 - ‘but for’ the negligence would the harm/damage have occurred? (*Barnett v Chelsea & Kensington Hosp Mgt cttee.*)
- Standard of proof
 - must show that negligence caused the harm on ‘the balance of probabilities’
- Multiple causes
 - i.e. harm is caused by multiple causes, one of which was the defendant’s negligence
 - Courts will consider whether negligence ‘materially contributed’ to the harm (e.g. *McGee v National Coal Board*)
- *Novus Actus Interveniens* (a ‘new intervening act’)
 - Did a second negligent act (by a different party) break the chain of causation? (*Knightley v Johns*)



5) Remoteness

- “The essential factor in determining liability is whether the damage is of such a kind as the reasonable man should have foreseen”
(*Viscount Symmonds, The Wagon Mound, No. 1*)
 - i.e. the type of damage which resulted from the negligence must be reasonably foreseeable
- So long as the type of damage is reasonably foreseeable:
 - It is not necessary for the manner by which it came about nor its extent to be reasonably foreseeable (*The Wagon Mound, No. 1*)
 - Defendant takes his victim in the physical condition he finds him – ‘thin skull rule’ (*Smith v Leech Brain & Co.; Page v Smith*)



An overriding factor of public policy?

- “All these three, - duty, remoteness and causation, are all devices by which the courts limit the range of liability for negligence. Sometimes it is done by limiting the range of persons to whom a duty is owed. Sometimes it is done by saying there is a break in the chain of causation. All these devices are useful in their way. But ultimately it is a question of policy for the judge to decide.” (Denning MR, *Lamb v Camden LBC* [1981] QB 625)



Defences to negligence

- Volenti (voluntary assuming the risk)
 - Claimant consents to the risk of harm
 - Claimant consents (or is treated as such) to defendant's exclusion of liability
- Illegality
- Contributory negligence (partial defence)
 - Did the claimants own negligent actions contribute to the harm caused by the defendant's negligence? (e.g. injuries worsened as not wearing seatbelt)



Remedies for negligence

- Principle remedy for negligence is an award of damages
 - Aim of damages in tort is: to try to put the claimant back in the position that they were in before the tort was committed (contrast this aim with that of contract)
- Limitations on award of damages in tort:
 - Duty to mitigate
 - Unreasonable inaction (e.g. if claimant refused offer of help following harm)
 - Unreasonable expense incurred in attempting to mitigate
 - Contributory negligence

