

# Tort of Negligence (I)

## Part 2: The Australian Legal Environment for Business

Unit 6: Week 8 Tutorial

### Learning Objectives

At the end of this tutorial, you should be able to:

- Define negligence.
- Understand and apply the elements required to establish negligence.
- Understand and apply the relevant provisions of the *Civil Liability Act 2002* (NSW).
- Apply the IPAC method to resolve a legal problem.
- Develop critical thinking and collaboration skills through group work and presentations.

**Before** this tutorial, you should have:

- Attended Unit 6 lecture
- Read the assigned Readings
- Completed the Tutorial Questions
- Read the In-Class Collaboration and Presentations questions

**During** this tutorial, you will:

- Demonstrate an understanding of the topic in the unit
- Participate in tutorial activities by:
  - Contributing to group discussions
  - Asking questions
  - Listening actively
  - Working collaboratively with other students
- Complete the In-Class Collaboration and Presentations activity

**After** this tutorial, you should:

- Consider attending one of the scheduled consultations and attempt to resolve any questions that you have as soon as possible.



## Readings

### Tort of Negligence

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The tort of negligence protects the person, property and economic interests from damage caused by another person who has not taken reasonable care. The legal word 'tort' comes from the French word meaning 'wrong'. A tort is a civil wrong, other than a claim for breach of contract. There is an injury or a loss but no crime has been committed. The injured party may have a civil action for compensation.

Tort of negligence was established in the successful test case of *Donoghue v Stevenson* in 1932 involving the plaintiff getting sick after consuming a contaminated drink (the snail in the bottle case).

The law of negligence is a primarily shaped by case law decisions. It has been affected by legislation, such as the Civil Liability legislation which was designed to reduce claims for personal injury. In NSW, the *Civil Liability Act 2002* (NSW) governs various aspects of civil liability, particularly in negligence cases. It aims to clarify and reform the law related to torts and liability to reduce the cost of insurance and promote access to justice.

### *Civil Liability Act 2002* (NSW)

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Claims for personal injuries under the common law of negligence have now been limited by the *Civil Liability Act* which was enacted in 2002 in New South Wales. The *Civil Liability Act 2002* (NSW) promotes personal responsibility – that you are responsible for your own acts and that you take some of the risks and responsibility for the decisions you make.

### Suing for Negligence

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There are four pre-requisites for an action in negligence:

- (1) *Duty of care* – there is a duty owed by one person to another because of the relationship between them which might cause injury.
- (2) *Breach of duty of care* – this involves consideration of whether the defendant has met the required standard of care? The standard expected is that of the 'reasonable person'.
- (3) *Causation* – there must be actual damage to the person who the duty of care was owed to. The damage to the person to whom the duty of care was owed to must have been caused, or contributed to, by the breach of the duty of care.
- (4) *Remoteness* – the damage caused must not be too remote.

### Pre-requisite 1: Establishing a Duty of Care

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The fact that someone has been injured in an accident does not mean that someone is going to be liable for negligence. To be liable for negligence to another person, a person must owe a legal duty of care to that other person.

## 'Neighbour' test

The test of when there is a duty of care is the "neighbour" test. The "neighbour" test is set out in *Donoghue v Stevenson* [1932] AC 562:

*"The rule that you are to love your neighbor becomes, in law, **you must not injure your neighbour**; and the lawyer's question, **Who is my neighbour?** receives a restricted reply. **You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour.** Who, then, in law is my neighbour? The answer seems to be – **persons who are so 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 mind to the acts or omissions which are called in question.**"*

(Lord Atkin at 580, emphasis added)

### **Donoghue v Stevenson [1932] AC 562**

#### **Facts**

Donoghue was in a café having afternoon tea with her friend. The friend purchased a bottle of ginger beer for Donoghue, which came in an opaque (not able to be seen through; not transparent) ceramic bottle. Donoghue poured herself a glass of ginger beer, drank it. The café owner then poured her a second glass. When her glass was refilled, the decomposed remains of a snail slipped from the bottle.

Donoghue became ill and sued Stevenson, the manufacturer of the ginger beer, for compensation. The court had to decide whether or not Stevenson owed Donoghue a duty of care.

#### **Decision**

The court held that Stevenson did owe Donoghue a duty of care. Where the manufacturer of a product intended for human consumption sends it out in a form which shows that he means it to reach the ultimate consumer in the form in which it left his factory, with no reasonable possibility of intermediate examination by the retailer or consumer, and with the knowledge that want of reasonable care on his part in the preparation of the product may result in injury to the consumer, the manufacturer owes a duty to the consumer to take such care, and will be liable to the latter, in damages if he suffers injury through the failure to take such care.

## Understanding the "neighbour principle"

To establish the existence of a duty of care, the plaintiff must show that at the time of the incident it was **reasonably foreseeable** that the defendant's conduct (act or omission) could cause harm to someone in the plaintiff's position.

#### *For example:*

Johnny is driving his car on the road. Johnny owes a duty of care to those people he can reasonably foresee as likely to be affected by his conduct. While driving his car Johnny owes a duty of care to those people he can **reasonably foresee as likely to be affected by his driving (act)**: the passengers in his car, the other motorists on the road, pedestrians and cyclists.

If harm to a person in the plaintiff's position was not reasonably foreseeable by the defendant, the defendant will not owe the plaintiff a duty of care.

Note that it is not necessary to show that the defendant actually foresaw that his conduct could harm the plaintiff; it need only be shown that a reasonable person in the defendant's situation would have foreseen the possibility of harm. It does not need to be shown that the harm actually suffered by the plaintiff was

reasonably foreseeable in this step, only that some kind of harm to someone in the plaintiff's position could be caused by the defendant's conduct.

## Pre-requisite 2: Breach of Duty of Care

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Just because the defendant owed the plaintiff a duty of care, it does not mean that the defendant is responsible for the plaintiff's loss. It must be established that the defendant has breached the duty of care that was owed to the plaintiff.

The defendant will have breached the duty of care if the risk of harm was foreseeable and not insignificant, and they failed to do what a reasonable person would have done in the circumstances.

### What is the standard of care required?

The defendant does not breach duty of care unless he fails to do what a reasonable person would have done in the circumstances; this is known as the **reasonable person test**. In applying the reasonable person test, the court compares the conduct of the defendant with that of the ordinary, reasonable and prudent person. If the defendant's conduct falls below the **standard of the reasonable person**, he has breached his duty of care.

Therefore, being negligent is doing something (act) that a reasonable person would not have done in the circumstances, or not doing something (omission) that a reasonable person would have done.

The *Civil Liability Act 2002* (NSW) now provides the test for breach.

#### Section 5B of the *Civil Liability Act 2002* (NSW)

- (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.

Deciding what is the **standard of care** involves balancing the size and probability of the risk of harm with the costs (the expense, difficulty and inconvenience) of taking preventative measures. This includes weighing the probability that harm would occur if care were not taken, the consequences (effects) of the defendant's actions, the seriousness of the defendant's actions on people to whom the defendant owes a

duty of care, and whether the defendant was doing something that was socially useful. (See the factors in section 5B of the *Civil Liability Act*)

### Probability of harm

If the risk of injury was so small that a reasonable person would not have done anything about it, the defendant has not breached his duty of care.

#### ***Bolton v Stone [1951] AC 850***

##### **Facts**

During a cricket match, a cricket ball was hit out of the cricket ground and struck Stone on the head. Stone lived opposite the ground and she had just stepped from her home on to the pavement. Stone sued the Cheetham Cricket Club for damages under negligence.

The evidence showed that it was foreseeable that someone on the road might be hit – a cricket ball had been hit out of the ground about six to ten times in the preceding 30 years, however, nobody had been hit previously. To hit a pedestrian walking by the ground, the ball had to pass over a two-metre fence (the top of the fence was about 15 metres above the level of the wicket because of the upward slope of the ground) and also travel about 90 metres.

##### **Decision**

The court decided that the risk of a ball actually striking someone on the road was so small that a reasonable person would have been justified in disregarding it.

### Likely seriousness of harm

If the possible harm arising from a careless act is not very significant then the defendant will owe a low standard of care, but if the possible harm is very serious then the defendant will have breached his duty of care by failing to take those precautions.

#### ***Paris v Stepney Borough Council [1950] UKHL 3***

##### **Facts**

Paris, an employee at a garage (owned by Stepney Borough Council), who had lost the sight in one eye in an earlier injury, hit a rusted "U" bolt with a hammer to loosen it while working under a motor vehicle. This caused a chip of metal to fly off and hit him in his good eye, blinding him. Paris sued his employer, Stepney Borough Council, for negligence.

##### **Decision**

The court decided that since the possible harm to Paris was more serious than the possible harm to a worker with sight in both eyes, the standard of care owed to Paris was higher than usual. A reasonable person in the position of Stepney Borough Council would have insisted that Paris wear protective goggles. Stepney Borough Council failed to do what a reasonable person would have done in the circumstances, and had therefore breached its duty of care.

### Pre-requisite 3: Causation

Establishing that the defendant has breached his/her duty of care is still not enough to make him/her liable for the plaintiff's loss or injury. It must be established that the defendant's breach of duty caused the harm suffered by the plaintiff.

In deciding that a breach of duty caused particular harm, the court must be satisfied that the breach of duty was a necessary condition of the occurrence of the harm.

#### Section 5D of the *Civil Liability Act 2002* (NSW)

(1) A determination that negligence caused particular harm comprises the following elements:

- (a) that the negligence was a necessary condition of the occurrence of the harm ("factual causation")
- (b) that it is appropriate for the scope of the negligent person's liability to extend to the harm so caused ("scope of liability").

### The 'but for' test

The defendant is only responsible for harm that was actually caused by the breach of duty. A test often used by the courts is the 'but for' test: the court asks whether *but for* the defendant's carelessness, the plaintiff would not have suffered the harm, then the harm was caused by the defendant's breach.

However, the 'but for' test will not be appropriate where the harm suffered by the plaintiff has a number of causes.

### Damage must be caused

The law of negligence only compensates actual damage. There are different types of harm that could be suffered by the plaintiff as a result of a negligent act or omission.

#### (1) **Damage to property or person**

Damage may be damage to property. Property damage may result in economic (financial) loss, e.g. repair expenses. Damage may be damage to the person (such as the physical illness of Mrs Donoghue after drinking the contaminated ginger beer.) Physical injury may result in economic (financial) loss, e.g.:

- loss of earning capacity
- medical expenses (e.g. hospital, physiotherapy)
- rehabilitation expenses (e.g. wheelchairs)
- personal care expenses (e.g. nursing home)

#### (2) **Economic damage**

- Damage may be financial – financial harm that is a consequence of damage to property or person.

(3) **Pure economic loss**

Economic loss may be purely financial loss where there is no damage to person or property, where there is loss which occurs independently of any other type of injury and where there is no resulting physical damage.

(4) **Psychiatric damage**

Psychiatric damage (including “nervous shock”) may be compensated.

### **Pre-requisite 4: Remoteness**

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Having established (1) a duty of care, (2) breach of that duty, and (3) damage was caused by that breach, is the defendant liable for all the damage suffered? The answer is no.

The defendant is not liable for every consequence of his carelessness: the court must decide that it is appropriate for the scope of the defendant’s liability to extend to the harm actually suffered by the plaintiff. (See section 5D(1)(b) above)

### **Foreseeability of damage**

Only foreseeable damage is recoverable. The question is whether the actual loss or injury suffered by the plaintiff was too remote. In other words, if the actual loss or injury was not reasonably foreseeable (too remote), then the defendant will not be liable for that harm.

### **References**

Ciro, T, Goldwasser, V & Reeta V 2014, *Law and Business*, Oxford University Press, South Melbourne, Victoria, Australia.

James, N 2021, *Business Law*, John Wiley, Brisbane, Australia.

Latimer, P 2016, *Australian Business Law 2016*, CCH Australia, Sydney, NSW, Australia.



## Tutorial Questions

Students must complete the following questions before coming to class

### Terms and Concepts

The following terms and concepts must be understood in the context of the tutorial.

Provide written explanations of these terms and concepts in the space provided.

Terms/Concepts	Explanation
Tort	
Negligence	
Damage to property	
Damage to person	
Economic damage	
Pure economic loss	
Psychiatric damage	

## Tort of Negligence Summary

1. Prepare a summary of the elements of the tort of negligence by completing the following scaffold.

Statutory provisions		Common law
	Duty of care	
	↓	
	Breach of DOC	
	↓	
	Causation	
	↓	
	Remoteness	
	=	
	A successful action of Negligence	
	↓	
	Consider Defences (Unit 7)	

## Negligence

2. Read the given facts below. Use the IPAC method to analyse the case.

Anne was walking through the carpark of Eastfield Shopping Mall ("Eastfield") late in the evening when he tripped over an uneven surface and fell due to poor lighting conditions. The carpark was dimly lit, making it difficult for Anne to see the hazard. Eastfield's management had been aware of the poor lighting for several months, having received multiple complaints from patrons about the lack of visibility in the carpark.

The mall management had considered upgrading the lighting system to brighter, more energy-efficient, and environmentally friendly light bulbs. While the initial cost of the upgrade would have been higher, it would not have resulted in any significant loss of income as the light bulbs were easy to replace.

As a result of the fall, Anne suffered a serious head injury and was unable to work for a month, leading to a loss of income. Anne has decided to sue Eastfield Shopping Mall for negligence, claiming that the mall management failed to take reasonable steps to ensure the safety of the carpark, despite being aware of the poor lighting conditions.

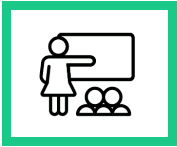
**Discuss Anne's case in terms of all the elements he needs to establish to be successful in a negligence action against Eastfield.**

In your answer, you must consider and apply any relevant statutory provisions and decisions from any relevant cases you have studied.

Issue/s:

Principle/s and Application:

Conclusion:



# In-Class Collaboration and Presentations

Students must read the following questions before coming to class.

## Negligence

In this activity, you are required to analyse a given fact scenario using the IPAC method (Issue, Principle, Application, Conclusion) and present your answer to the class in small groups.

### Instructions:

#### 1. Form small groups:

- Your tutor will divide the class into small groups of 3-5 students.

#### 2. Understand the fact scenario:

- Carefully read the provided fact scenario.

#### 3. Use the IPAC method to analyse the scenario:

- **Issue:**
  - What is the main legal question or problem that needs to be resolved?
  - Identify the specific issue in dispute.
- **Principle:**
  - What are the relevant laws or legal principles that apply to this issue?
  - State the rules or legal principles that govern the issue. This includes relevant statutes and/or case law.
- **Application:**
  - How do the legal principles apply to the facts of the case?
  - Analyse how the legal principles interact with the specific facts. Clearly explain how each fact relates to the legal principles you have identified.

*Integrating Principles and Applications: Immediately follow the principle with an application. For each new principle, repeat the process.*
- **Conclusion:**
  - What is the outcome based on your analysis?
  - State the final decision. Conclude whether the issue is resolved in favour of one party or another based on the application.

#### 4. Prepare your presentation:

- Assign roles within your group (e.g., who will present each part of the IPAC method).
- Create a clear and concise presentation that covers each part of the IPAC method.

#### 5. Present to the class:

- Each group will have 5-10 minutes to present their analysis.
- Ensure that each member of the group participates in the presentation.
- Be prepared to answer questions from your classmates and your tutor.

### Fact scenario

LuxuryStay Hotel, a renowned hotel chain, prides itself on offering premium accommodations to its guests. However, unbeknownst to its patrons, one of the hotel's older buildings had been experiencing structural issues, including signs of water damage that had weakened parts of the building, particularly the ceilings in some rooms.

Despite these warning signs, the hotel management decided to delay necessary repairs due to the costs involved, opting instead for temporary fixes. They assured themselves that the ceilings would hold up until the next major renovation.

Emma, a guest at LuxuryStay Hotel, was staying in one of these rooms when, in the middle of the night, the ceiling above her bed suddenly collapsed. Emma was struck by heavy debris, suffering significant injuries, including a head concussion and multiple bone fractures. She required immediate hospitalisation, surgery and faced a lengthy recovery period, which impacted her ability to work and led to considerable financial losses.

Emma is now considering suing LuxuryStay Hotel for negligence, arguing that the hotel failed to ensure the safety of its guests by neglecting necessary repairs.

**Discuss Emma's case in terms of all the elements she needs to establish to be successful in a negligence action against LuxuryStar Hotel.**

In your answer, you must consider and apply any relevant statutory provisions and decisions from any relevant cases you have studied.

Issue/s:

Principle/s and Application:

Conclusion: