

Foundation Studies

Business Environments

Part 2: The Legal Environment of Business

Unit 6

Tort of Negligence (I)

Lecturer:

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Overview

- Introduction to tort law
- Tort of negligence
 - *Civil Liability Act 2002* (NSW)
 - Elements of negligence
 - Duty of care
 - Breach of duty of care
 - Causation
 - Remoteness

Legislation and Cases in this unit

Legislation

Civil Liability Act 2002 (NSW)

- Sections 5B and 5D(1)(a) and (b)

Cases

Donoghue v Stevenson

Bolton v Stone

Paris v Stepney Borough Council

Introduction to the Law of Tort

- The legal word 'tort' comes from the French word meaning 'wrong'.
- The word tort in modern law now refers to conduct which is a civil wrong – other than a claim for breach of contract – which gives rise to a civil action for compensation.
- Rights are given by law to individuals in the absence of contractual relationship
- Purpose of tort: **Compensation** (not to punish)
- The wrongdoer – the person who commits the tort or tortious act – is called the tortfeasor.

Tort of Negligence

Concept of negligence

- Negligence 'is a failure to exercise reasonable care and skill towards others'.
 - The omission to do something which a reasonable person would do, or doing something which a reasonable person would not do

Suing for Negligence

There are four prerequisites for an action in negligence:

1. A **duty of care** was owed by the defendant to the plaintiff
2. There was a **breach of the duty of care** — what is the standard of care?
3. **Causation**: The plaintiff suffered damage as a result of the breach
4. **Remoteness**: The damage must not have been too remote

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Duty of Care

The defendant owed plaintiff a duty to take reasonable care



Duty of Care

- 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.
 - A plaintiff in a negligence action must prove that the defendant owed the plaintiff a duty of care.
 - That duty may be proved to exist by showing that the defendant owed a duty of care to a class of persons of whom the plaintiff was one.

Duty of Care

Donoghue v Stevenson [1932] AC 562

Facts

- Mrs Donoghue visited a café with a friend. Her friend purchased ice cream and a bottle of ginger beer manufactured by Stevenson for Mrs Donoghue.
- The ginger beer came in an **opaque** bottle; its contents were not visible from the outside.
- Mrs Donoghue drank some of the ginger beer and then poured the remainder into her glass. The decomposed remains of a snail fell out from the bottle.
- As a result of consuming the contaminated ginger beer, Mrs Donoghue suffered from gastroenteritis and severe shock.
- Mrs Donoghue did not have a contractual relationship with the café owner or the manufacturer since her friend had purchased the drink. Therefore, she brought a claim against the manufacturer, Stevenson, for negligence.



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Duty of Care

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

Issue

- Whether Stevenson owed a duty of care to Mrs. Donoghue, a consumer with whom he had no direct contractual relationship?

Decision

- Duty of care owed. Why? See 'neighbour principle' – Test of reasonable foresight.

Duty of Care

'Neighbour principle' in *Donoghue v Stevenson*:

"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 conduct that I ought reasonably to have them in contemplation* as being so affected when I am directing my mind to the acts and omissions which are called in question."

– Lord Atkin

Duty of Care

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

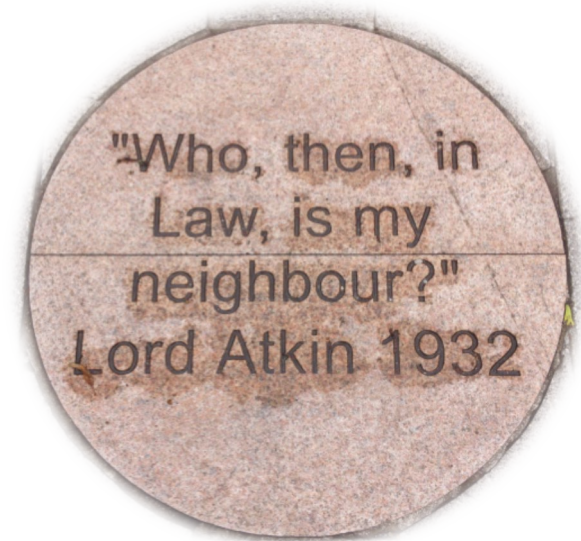
Decision

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.

Duty of Care

Significance of *Donoghue v Stevenson*

- Established tort of negligence
- Established the general principle of the duty of care concept in law – the 'neighbour principle'



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Breach of Duty of Care

The defendant did not meet the standard or level of care under that duty



Breach of Duty of Care

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, 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.

Breach of Duty of Care

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s 5B(1) sets out **three preconditions** that must co-exist before a liability in negligence arises.

Breach of Duty of Care

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A **risk** of which the person **knew/ought to have known**

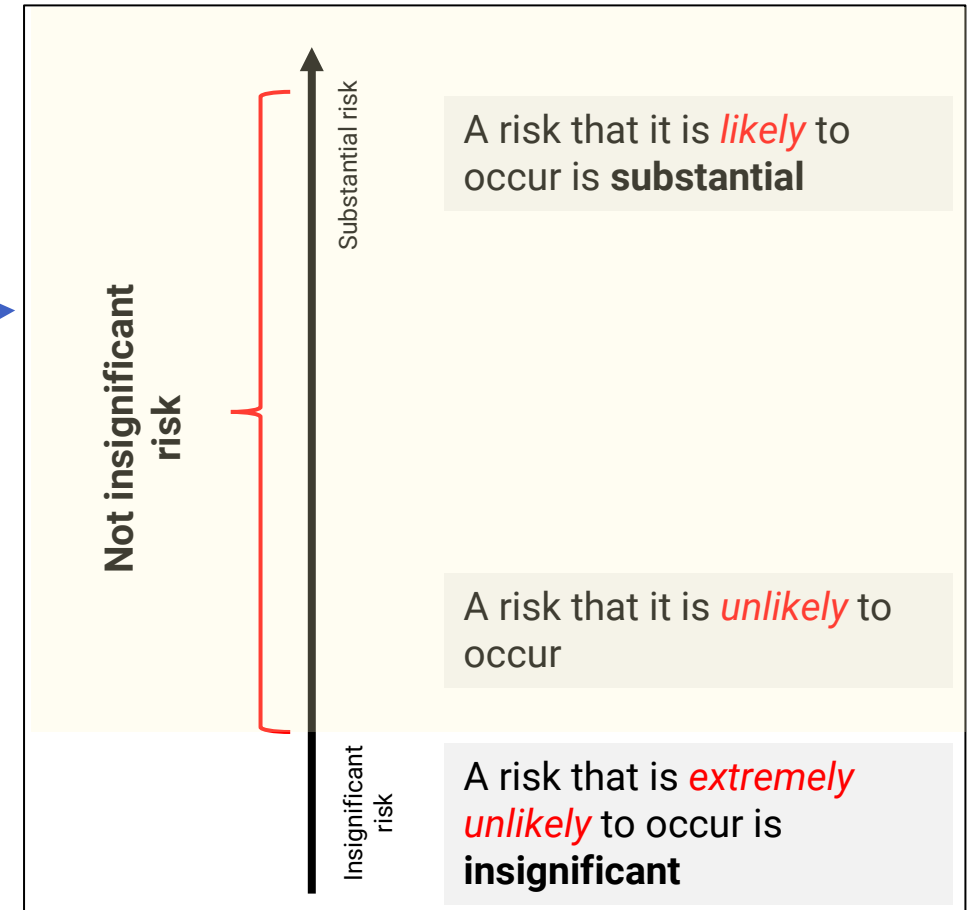
Breach of Duty of Care

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A consideration of the **probability of the materialisation of the risk**.

!! A risk may be *unlikely* to occur (5B(1)(b)), yet be reasonably foreseeable (5B(1)(a)).



Breach of Duty of Care

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In deciding whether the precondition in s 5B(1)(c) exists, the court is required to take into account the list of factors in **s 5B(2)**.

(See Slide 22)

Breach of Duty of Care

What is the standard of care required?

- The level of care required is that of a reasonable person
- How would a reasonable person have responded to the foreseeable risk? (See Section 5B(2))
- Breach of duty is not measured by defendant ensuring that a particular event will not occur.

Breach of Duty of Care

- **What is the standard of care required?**
- What is the standard of care required to decide whether there has been a breach of the duty of care? What did the wrongdoer do?
- The standard of care is the standard (level) that the wrongdoer's (the tortfeasor's) conduct is measured against:
 1. The general standard of care is 'reasonable care in all the circumstances' – doing what the ordinary, reasonable and prudent person would do
 2. Being negligent is doing something (an act) that a reasonable person would not have done in the circumstances, or did not do (an omission) what a reasonable person would have done in the same circumstances – where risk was foreseeable and not insignificant.
 3. 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 consequences (effects) of your actions, the seriousness of their effect on people who you owe a duty of care to, and the probability that harm would occur if care were not taken.

Breach of Duty of Care

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

(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.

Breach of Duty of Care

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

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- (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.

can consider other factors

Each factor is not conclusive

→ These factors are to be considered with each other and any other relevant factors.

See *Bolton v Stone*

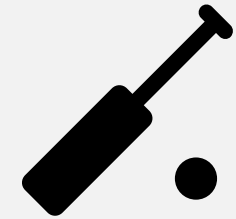
See *Paris v Stepney Borough Council*

Breach of Duty of Care

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

Facts

- Stone struck on head by a cricket ball who lived opposite the cricket ground and who had just stepped from her home on to the pavement.
- Fence surrounding the cricket ground (4-5 metres).
- Distance from the wicket to the boundary (80 metres).
- Past 30 years, 6-10 cricket balls went over the fence, but nobody had been hit.
- To hit a pedestrian, 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 travel about 90 metres.



Breach of Duty of Care

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

Issue

- What is the standard of care?

Decision

- A reasonable person would not have taken further precautions.
- 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.

Breach of Duty of Care

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

Facts



- Paris lost the sight in one eye in an earlier injury.
- Paris hit a rusted 'U' bolt with a hammer to loosen it while working under a motor vehicle while working at the council garage, causing a chip of metal to fly off and hit him in his good eye, blinding him.
- No safety goggles were provided by the employer.

Breach of Duty of Care

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

Issue

- Whether the employer meet the necessary standard of care when it did not provide safety goggles to Paris. What precautions would the ordinary reasonable and prudent person take?

Decision

- There is a breach of duty by failure to provide safety goggles
- If an employer knows that an employee is suffering from a disability which increases the risk of serious injury if there is an accident, then that increased risk is relevant in determining what precautions the employer should take to fulfil its duty of care to its employee. This is so even if the disability does not increase the risk that an accident will occur while the employee is working.

3

Causation

**The plaintiff suffered loss, damage or injury
that was caused by the breach**



Causation

Damage must be caused – The law of negligence only compensates actual damage:

- Damage to property or person (such as physical illness)
- Economic damage
- Damage may be economic (financial)
- Damage may be purely economic (pure financial loss)
- Psychiatric injury (psychiatric damage, including 'nervous shock')

Causation

- There must be some **causal connection** between the breach of duty of care and the damage suffered.
- The breach may be only one of several causes which contributed to that damage.
- The breach of duty must be a **necessary condition** of the occurrence of the harm.

Causation

'But for' test

"Would the harm have occurred but for (if not for) the defendant's conduct?"

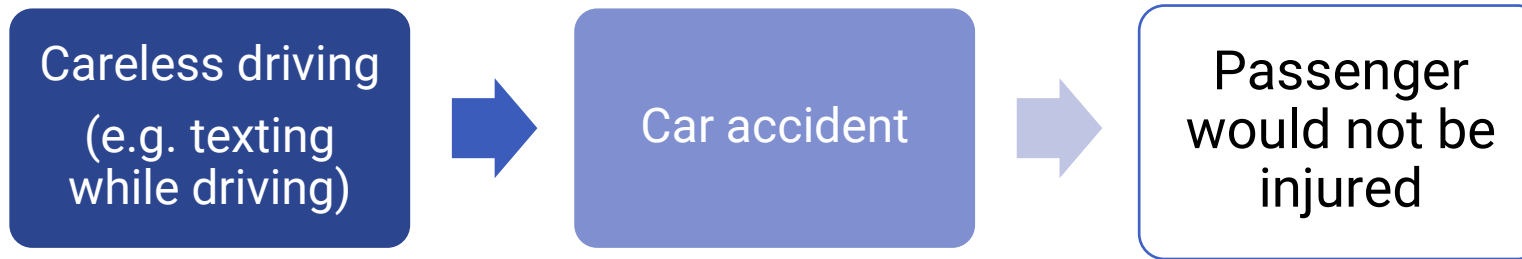
- If NO
 - Causation is established
- If YES
 - Causation is not established

Causation

- The 'but for' (if not for) test is a negative test of causation
- However, it is not the only test of causation in negligence cases.
- It excludes from liability conduct that causes something which would have happened anyway.

Causation

Application of the 'but for' test **example:**



Causation:

- Did the driver's carelessness cause the injury?
- 'But for' test:
 - If driver was not texting would the passenger have suffered the injury?

Causation

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”)

4

Remoteness

The loss, damage or injury was not too remote



Remoteness

- The defendant is not liable for all the damage suffered.
- The defendant will not be liable for damage that the court considers to be too remote (not reasonably foreseeable)
 - Only foreseeable damage is recoverable

Remoteness

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

- (1) A determination that negligence caused particular harm comprises the following elements:
- (b) that it is appropriate for the scope of the negligent person's **liability to extend to the harm so caused** ("scope of liability").

Remoteness

Foreseeability test

Whether a reasonable person could **foresee** the **possibility** of the **specific damage** as a consequence of their carelessness?

- If NO (damage is too remote)
 - Defendant is not liable
- If YES (damage is not too remote)
 - Defendant is liable

End of Lecture

Next week:

The Legal Environment of Business: Tort of Negligence (II) – Negligent Misstatement



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