

CHAPTER 6: NEGLIGENCE

-The analysis of a negligence claim unfolds as follows:

- First, the plaintiff (injured party or victim) must prove:
 - that the defendant **owed a duty of care**
 - that the defendant **breached the standard of care** (the standard is different from the duty of care as we will see.)
 - that the defendant **careless act caused the harm** (i.e. is there causation?)
 - causation is further divided into
 - does a causal connection exist?
 - is the loss too remote?

-If the plaintiff can prove that all of these four elements above then the defendant will be negligent. But the analysis does not end there. Then the court turns to the defendant and asks whether the defendant has a **defence** that might result in the reduction or total elimination of damages that must be paid.

-So that framework above is very important to know. It outlines the steps of a negligence claim with the four things the plaintiff must first prove and then allows the defendant to put forward a defence if the plaintiff successfully proves negligence.

Okay, let's start with the **duty of care**.

DUTY OF CARE

-Essentially, the test considers whether the defendant has an obligation to use reasonable care to avoid harming the plaintiff. If there is no duty of care owed then the negligence claim ends there. So, what are the **three criteria** for establishing whether a duty care is owed to the plaintiff by the defendant?

- **Reasonable Foreseeability** - would a reasonable person looking at the situation have foreseen the risk of harm? The rationale for this criteria is that it would be unfair to hold the defendant liable for every loss (after all, the defendant could not prevent an unforeseeable incident.) But, if the defendant should have seen the risk of harm but did not because of inattention or carelessness then the plaintiff should have recourse by legal action.
- **Proximity** - if reasonable foreseeability exists then the courts assess whether they had a relationship of proximity (a close and direct connection.) Your text details the various kinds of physical proximity including
 - physical proximity
 - social proximity
 - commercial proximity - these are the main ones but your text sets out a couple of others.

- **Policy** - even if there is reasonable foreseeability and proximity, sometime the duty of care is rejected based on policy reasons such as overriding social or political concerns. Consider, for example, that there is no general legal duty to rescue another person (say, in a burning house or drowning in a lake.) There is certainly a moral duty that will cause most people to react in such a crisis but not a legal duty on everyone in society. You cannot be sued for negligence for a failure to act.

- Take a look at the *Donoghue v. Stevenson* case in your text which established the "neighbour principle" regarding to whom a duty of care is owed. In that case, the woman that bought the ginger beer could sue based on privity of contract (remember from contract law?) but her friend who was given the ginger beer with the decomposed snail did not have privity of contract. So, she sued in negligence (the manufacturer's carelessness).

-Under the duty of care discussion in your text, also check out the section on duty of care for negligent statements by a professional and read the *Hercules Management* case excerpt. This is something you should be aware of since many of you plan to become financial advisors, accountants, and other professionals one day. Essentially, the Supreme Court of Canada held that liability is more likely if

- the defendant claimed **special knowledge**
 - usually the reason that you seek out the services of a professional
- the statement was communicated on a **serious occasion**
 - i.e. in an office setting rather than out at the bar after a ball game
- statement is made in response to a **direct inquiry**
 - plaintiff asks for advice of professional on a certain matter
- the defendant received **financial benefit**
 - was the professional making the statement being compensated?
- the statement was given as a **statement of fact** rather than a statement of opinion
- whether a **disclaimer** was made by the defendant (making it less likely that the defendant will be held liable)

Now, we move to the second step of the analysis - breach of the standard of care.

STANDARD OF CARE

-Once the plaintiff has passed the gatekeeper by showing that the defendant owed the plaintiff a duty of care (i.e. reasonably foreseeable, proximity of relationship, no overriding policy reasons) then the plaintiff must prove that the defendant **breached the standard of care**.

-A good analogy for the standard of care is the high jump or pole vault competitions in athletics. In both of these competitions, the successful jumpers make the "standard" (the level that the bar is placed) and then these successful jumpers move on to compete at the new higher standard. The jumpers that are knocked out of the competition do not meet the standard (do not get over the high jump or pole vault bar on their three attempts.)

-Similar to these jumpers, in negligence actions, the court wants to set the standard (the level of care) that the defendant must get over. The standard of care essentially means **how much** must the defendant take care of the plaintiff?

-The answer goes back to our old friend, the reasonable person. The courts will consider the **reasonable person test** (an objective test) and ask how would a reasonable person in the defendant's situation have acted? The reasonable person is not the most brilliant or talented person or the dimmest and most hopeless person either but rather is the average, prudent person in society (much like all of us.)

If the defendant acts with less care than the reasonable person then s/he has breached the standard of care (fallen below the standard). If the defendant acts with the same level or more care than the reasonable person the s/he has been careful enough and so will not have breached the standard of care and not be liable for negligence.

-The reasonable care test is somewhat flexible as well and allows the courts to adjust what is considered reasonable conduct to the particular situation. Take a look at your text and read some of the factors that can influence the level of care required by the defendant

- reasonable foreseeability of risk
- likelihood of loss/severity of loss
- usefulness of society of the defendant's activity (social utility)
- affordability of precautions
- less care required in emergent situations (sudden peril doctrine)

-Professional Negligence also raises the bar (the standard of care) since the plaintiff relies on the expertise and training of these individuals who are usually well compensated for their skills and talents.

-So, a professional is held to the standard of care not of a reasonable person but rather to that of a reasonable professional (i.e. a reasonable physician, a reasonable CPA, a reasonable dentist, a reasonable lawyer and so on.) If someone claims to be **a specialist or an expert** then that person is held to an even higher standard of care (for example, a reasonable brain surgeon rather than just a reasonable physician or a reasonable international tax accountant and not just a reasonable CPA.)

-When setting the standard for reasonable professionals there is **no allowance made** for someone with **less experience**. Think about it from the point of view of the average person who goes to seek the services of a doctor, a dentist, a lawyer, an accountant and so on. The client/patient will likely not look beyond that the person has the necessary credentials and is licensed by the appropriate body (i.e. the accountant is a CPA or the lawyer is a barrister and solicitor.) If it turns out the professional is sued for carelessness (negligence) then the professional can't hide behind their lack of experience (for example, I have only been a doctor for six months so I should be held to a lower standard than other more experienced doctors.) No, the courts find that if a person holds herself out to be a licensed physician, a CPA, a barrister and solicitor, and so on

then the standard of care is the same for everyone in that profession regardless of the amount of experience.

-Interesting enough, there was a study a few years back by one of the law societies that looked at negligence claims against lawyers (yes, you can sue your lawyer) over a period of time. The study broke down the number of claims into three bands - lawyers with less than 7 years of practice, lawyers with 7 to 14 years of practice and lawyers with more than 14 years of practice. Which group do you think had the most claims?

The younger ones? Perhaps, because this group has a lot less experience and, as such, are more prone to mistakes.

The older ones? Perhaps, because this group is less up-to-date on recent developments of the law, less attentive to detail and a little more complacent about work (preferring to enjoy the fruits of their labour (the good life) earned over the years.)

-Well, as it turned out, it wasn't the younger group. Yes, they had less experience but they also knew they had less experience and spent all of their days working as well as checking and double checking all of their work. So, they were very careful about everything and, as such, had fewer negligence claims. You will probably be the same when you get out into the working world as a CPA, financial advisor or other career path you choose. You will likely work all the time in the first few years to expand your knowledge and because of a deep fear of making careless mistakes (which could cost you your reputation as well as your job.)

-It also wasn't the older group either. Yes, this group might not stay up on the cutting edge of things but they also have developed a keen sense over the years of what amounts to careless behaviour (i.e. they have loads of experience.) As such, they know how to best utilize their junior partners and associates, provide advice as mere opinions rather than factual statements, and issue disclaimers if there are any concerns of potential negligence. Of course, there likely is a point when people become so old that they should no longer be plying their trade because because of the greater possibility of careless incidents (but, fortunately, many professionals tend to retire - or be forced into retirement by their colleagues - as they move into their golden years.)

-It was the middle group (7 to 14 years) that had the most negligent claims likely because they had enough experience under their belts to think they knew a whole lot more than they actually did and likely took more risks resulting in greater carelessness.

-I am willing to bet the results from this study would hold for most professions including the ones that you are set to move into over the next few years.

Your text has a section on **product liability**. I now go into this topic in great detail in BUSN 3710 (Sales and Marketing Law) if I one day see you in that course but for now just be aware of the basics.

-There is a stark difference between product liability in the United States and here in Canada. In the United States, the Americans impose strict liability on manufactured products meaning that a

manufacturer is **liable for any defects** in its products. In Canada, however, we still use the negligence approach so a manufacturer is liable **only for careless defects**. So, the injured party (the plaintiff) must prove that the manufacturer was careless (i.e. duty of care owed, standard of care breached, harm linked to careless act, not too remote.) As you read this section of the text, consider which approach you think is best (the US or the Canadian approach?)

-Since the duty of care is usually found to be owed in carelessly manufactured products (reasonable foreseeability, proximity) then the standard of care turns on the issues of i) negligent manufacture, ii) negligent design, and iii) no reasonable warning.

-As I mentioned, I discuss these topics in great detail in BUSN 3710 but for your exam I only want you to be familiar with negligent manufacture when it comes to product liability. In other words, if there happens to be a question on the exam about a person harmed by defective product then it will focus on the negligent manufacture of the product (not the negligent design or failure to warn.) I am not saying there necessarily will be such a question but if there is then it will it will have to do with negligent manufacture.

So, now let's move on to the third stage of the analysis - **causation of harm**.

CAUSATION OF HARM

Your text discusses causation of harm as the third element of the negligence analysis but there are actually two aspects to causation of harm so you might want to consider it as the the third and fourth elements that must be proven by the plaintiff.

I. The Causal Connection - Factual Causation

The plaintiff must establish that there is a link between the careless act of the defendant and the injury the plaintiff suffered. We call this link the **causal connection** or **causal link**. It can be graphically depicted this way:

CAUSE -----> EFFECT

CARELESS -----> INJURY TO PLAINTIFF OR PLAINTIFF'S
PROPERTY
ACT Causal Connection

-The causal connection is also referred to as factual causation because the courts look at whether or not the careless act did, in fact, cause the plaintiff's loss or injury.

-The test that the courts use to determine whether or not a causal link exists is the unfortunately named "**BUT-FOR TEST**". You can also think of it as "EXCEPT-FOR" if you are having a hard time wrapping your thinking around the 'But-For' phrase. Basically, it asks but-for (except-for) the careless act would the loss or injury have occurred? So, what does that

mean? Essentially, it means that if the injury would not have occurred EXCEPT FOR the careless act then there is a causal link. If, however, the loss or injury would still have occurred anyway even without the careless act then there is no causal link.

-In order to prove whether or not the causal connection exists then the plaintiff must prove **on a balance of probabilities** that the defendant's careless act resulted in the loss or injury. That means that the plaintiff must show that the defendant's careless act **probably caused** (i.e. was more than 50% responsible) for the plaintiff's loss.

-The **standard of proof** (on the balance of probabilities) is a threshold that the plaintiff must cross in order to receive compensation from the defendant.

- If the plaintiff can prove that the defendant's careless act probably caused the loss (a **probable causal connection**) then the plaintiff can claim **full compensation**.
- If, however, the plaintiff is unable to prove that the defendant's careless act probably caused the loss (**no probable causal connection**) then the plaintiff can claim **no compensation**.
- This is what the law refers to as an **all-or-nothing approach** (i.e. if the plaintiff is unable to get across the threshold then s/he receives no compensation but once across the threshold then s/he can claim full compensation)

The second part of a causation of harm analysis looks at whether or not the defendant's careless act is too remote (far-fetched) from the harm.

II. Remoteness - Legal Causation

-The courts apply the remoteness test so that the defendant is treated fairly. The courts again apply the reasonable foreseeability test to determine whether or not it would be unfair to the defendant to hold him accountable for a careless act. Essentially, the principle says that if a reasonable person would not foresee harm from a careless act then the defendant shouldn't be held liable.

-So, a plaintiff must prove that the careless act caused the plaintiff's injury (**causal connection**) **AND** that a reasonable person could have foreseen that the careless act would cause the plaintiff's injury (**not too remote**). If there is a causal connection BUT it is too remote then there will be no compensation.

Let me give you an example. If I carelessly throw a bunch of pens and markers on the classroom floor (remember the days when you once came to class?) and a student comes and slips on them suffering severe injuries then can I be sued for my careless act? First, is there a causal connection? The student would need to show that except for my careless act then s/he wouldn't have fallen and suffered harm. I think that is obviously the case. Second, would a reasonable person think that if I leave a bunch of pens and markers rolling around on the floor then someone might slip and fall and be injured? In other words, is it too remote? I think that a reasonable person could foresee such a thing and it would not be too remote so the plaintiff could prove both branches of causation of harm.

Let's tweak the example a little bit. I still threw the same pens and markers on the floor and the student slipped on them but instead of falling bumped another student that set off a chain reaction of students bumping into other students and dropping things on other students and continuing a long chain reaction of events that led to an explosion in the Anvil Office Tower with computers blasting out the window and derailing a Skytrain going by at the time. Okay, a bit of a crazy example but let's consider it from the point of causation.

-From a factual causation perspective, the injured plaintiff (the Skytrain or Skytrain passengers) might be able to trace everything back to my careless act of throwing the pens on the floor but it is obviously too remote since a reasonable person would unlikely foresee my careless act of leaving pens and markers on the floor resulting in the derailment of the Skytrain.

-Before I leave the issue of remoteness and causation, I also want to mention a favourite of mine - **the thin skull principle**. This principle essentially says that a defendant who harms someone because of a careless act cannot raise the issue of remoteness if the victim was harmed more than might be expected. A person will be held accountable for their careless act and if they are unfortunate to have a person more susceptible or more vulnerable to harm as their victim then too bad - the defendant is still liable.

For example, if the plaintiff only receives a slight injury because of the defendant's carelessness (say, a muscular young man who breaks a leg) or the plaintiff receives substantial injuries (say, a 95-year old woman with severe bodily harm) then the defendant is liable to fully compensate the victim. Essentially, the defendant cannot choose their victim and is responsible for the careless act (as long as it is not too remote and a causal link is established) regardless of the magnitude of the injury. **The test for the thin skull rule** is that **if some harm is reasonably foreseeable** from the careless act then the plaintiff can recover for the **entire injury**.

SUMMARY

So, in order for the plaintiff to prove the tort of negligence against the defendant the plaintiff must show

1. The defendant owed the plaintiff a duty of care - consider reasonable foreseeability, proximity and absence of a policy rule to extinguish the duty
2. The defendant breached the standard of care - based on the reasonable person standard
3. The careless act of the defendant was linked to the injury the plaintiff suffered - apply the but-for test
4. The careless act of the defendant was not too remote from the harm caused

After the plaintiff has proven their case then the defendant is presumed to be negligent. But, the analysis does not end there. Then the court turns to the defendant and asks whether or not the defence can raise any defence. The three special defences available for the tort of negligence are i) contributory negligence, ii) voluntary assumption of risk, and iii) illegality.

DEFENCES TO NEGLIGENCE

Contributory Negligence

Contributory Negligence allows the courts to apportion loss between the various parties including the plaintiff who might be partly to blame for his own injury (hence the name contributory negligence - i.e. the plaintiff contributed to his own loss.)

The BC *Negligence Act* supports the courts apportioning the loss between multiple defendants as well as the plaintiff. Section 1 of the Act reads:

Apportionment of liability for damages

1 (1) If by the fault of 2 or more persons damage or loss is caused to one or more of them, the liability to make good the damage or loss is in proportion to the degree to which each person was at fault.

So what effect does the contributory negligence defence have? The damages payable by the defendant will be reduced to reflect the contribution of the plaintiff (i.e. the loss is apportioned).

If a plaintiff is held to be contributorily negligent then usually it runs in the 5 - 35% range but it has gone as high as 50% in some cases.

-Why would the plaintiff not be held to be contributorily negligent for more than 50%? Consider if it was suggested that a plaintiff's carelessness was 70% at fault for the loss then that would mean the defendant is only 30% at fault. Under the factual causation test (causal connection) above, it must be shown that the defendant's careless act must have **probably caused** the injury. So, if it cannot be shown that the defendant is more than 50% responsible (in our example, the defendant is only 30% responsible) then that would mean that the defendant **probably did not cause the injury** and the plaintiff would be unsuccessful in their negligence claim.

-Interestingly, the US states are all over the map on this issue. Some states adhere to a **Pure Contributory Negligence Approach** that holds that if the plaintiff is the least bit at fault (even 1%) then the plaintiff is unable to recover from the careless act of the defendant (so, be very careful if you ever travel to Alabama, Virginia, North Carolina, Maryland or Washington D.C.). Other states go to the other extreme so that the plaintiff can recover damages even if they are mostly at fault (so, if the defendant is 20% at fault and the plaintiff is 80% at fault then the plaintiff can still recover a portion of the loss or injury - in this example 20%.) This is known as the **Pure Comparative Approach**. Finally there are several states that are like here in Canada that allow for apportioned compensation if the plaintiff is contributorily negligent up to 50%. If,

however, the plaintiff is more than 50% responsible then the plaintiff receives nothing (this is known as the **Modified Comparative Approach**). I thought you might find this interesting but you aren't responsible for it on your exam.

-There are three (3) forms of contributory negligence:

- if the plaintiff unreasonably **enters into a dangerous situation**
 - the classic example is the plaintiff getting into an automobile when aware that the driver is intoxicated
- if the plaintiff unreasonably **contributes to the creation of the accident**
 - as an example, every year young people are seriously injured in BC when "surfing" on the back or on the top of a moving vehicle. If the person injured sues the driver of the vehicle and the driver is found negligent (owed duty of care, breached standard of care, causal link and not too remote - all satisfied) then the defendant will raise the defence of contributory negligence
- if the plaintiff unreasonably contributes to the extent of the injury
 - here in BC, we have all kinds of health and safety laws that require people to wear hard hats and special boots on a worksite, wear helmets when riding a bike or motorcycle, wear a helmet when playing certain sports, wear a seat belt when in a moving motor vehicle, and so on. So, if a person suffers more serious injuries than they would have if abiding by the safety laws then the courts could apportion part of the loss on the plaintiff (i.e. reduce the damages the defendant must pay) through contributory negligence

Voluntary Assumption of Risk

-This is an absolute defence and is not as commonly accepted by the courts as the previous defence of contributory negligence. The reason is that if the defence is successful then the plaintiff will receive nothing and the court usually does not want to leave the victim with nothing.

-This defence is usually raised if the plaintiff has signed an exclusion clause for a particularly risky activity. Many of you have likely signed these clauses (you might know them as a waiver) when participating in activities like bungee jumping, sky diving, hang gliding, white water rafting, zorbing, or even downhill skiing. Essentially, you are acknowledging that the activity is hazardous and if you are injured then you voluntarily assume the risk and will not sue the other party for negligence.

-These exclusion clauses are sometimes accepted by the court but often times the court will try to reduce or eliminate their coverage depending on the situation.

Example. If a person breaks his ankle on a turn when downhill skiing then the exclusion clause will likely hold and the plaintiff will recover nothing if a lawsuit is brought against the ski hill. Similarly, if a person does some injury to their joints while bouncing around on a bungee jump.

-If, however, the bungee jumping company gave the jumper too much rope (say, provided the longer rope length used for an intermediate jump to a person only doing a short beginner jump) then likely the court will not accept the defence of voluntary assumption of risk (since, the jumper didn't accept the risk that he would be given 100 feet of rope for a 60 foot jump!). How about you take this example and see how it fits into the overall negligence analysis (duty of care owed, breach of standard of care, causal connection, not too remote)?

Illegality

Illegality is the third defence and, again, is a complete defence that is usually not accepted by the courts. Usually the fall back defence is contributory negligence as in the *Hall v. Hebert* case set out in the text. This is a BC case that went all the way to the Supreme Court of Canada. Note how the court assessed contributory negligence against the plaintiff in the amount of 50%. Consider again the entire negligent analysis as it applies to this case (owed duty of care, breached standard of care, causal connection, not too remote.)