

LAW OF TORT

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CONTENTS

W13

- **General Principles of Law of Tort**
- **Law of Negligence**
- **Contributory Negligence**

W14

- **Professional Negligence**
- **Vicarious Liability**

W13

- ☐ **General Principles of Law of Tort**
- ☐ **Law of Negligence**
- ☐ **Contributory Negligence**

General Principles of Law of Tort

- “Tort “ ~ a Norman-French lang : *wrong*;
origin ~ Latin “tortus”: *twisted or wrung, i.e wrong*
- Main source from the common law rather than statute.
- “Tort” refers to *non-criminal wrongful conduct* done by a person & injuring another
~ does not include breach of contract.

Tortious Liability

- Winfield definition restated as follows:
 - ~ liability arises from the breach of a duty
 - ~ the duty is primarily fixed by law
 - ~ the duty is towards persons generally
 - ~ its breach is redressable by an action for unliquidated damages.

- Understanding law of tort is not by its definition but the description of the aims.

Aims of Law of Tort

1. Primary function: compensation & loss distribution
~ On whether these losses are to be compensated for by the person responsible for the relevant activity OR whether the loss must lie with the victim.
2. As a deterrent function. Tortfeasor has had to pay some compensation to victim. So, tortfeasor will be > responsible & careful in all future activities.
~ yet, as some injury are resulted from error rather than blameworthiness, this aim serves tort law other than negligence.

Aims of Law of Tort

3. To protect interests of citizen:
 - ~ from deliberately inflicted physical harm & restriction on freedom of movement;
 - ~ protection of interest in tangible property, especially the rights to non-interference of goods & land.
4. The scope widen to include protection towards people & his property.
 - ~Tortfeasor will be liable even though the interference is not caused intentionally.

Summary: Nature of Tort

1. Tort is inflicted against / without consent.
eg: volenti non fit injuria
2. Tort is violation of rights in rem.
eg: rights of reputation / against trespass [considering that the act would continually cause nuisance etc to persons]
3. Duty in tort is general & imposed by law.
eg: If I've a right vs defamation, I've a duty not to defame others.
4. Damages for tort mostly are unliquidated
~ unascertained; assessed by courts to compensate the victim
5. Remedies for tort: damages, injunction, self help, restitution.
6. Motive, although not relevant, but being considered in some cases. eg: malicious prosecution, deceit

TORT

- No consent b'w parties
- Vs. rights in rem
- General duty & imposed by law
- Damages: mostly unliquidated
- Remedy: damages, injunction, self help, restitution
- Motive considered in some cases

CONTRACT

- Upon consent of contracting parties
- Vs. rights in personam
- Specific; fixed by consent
- Damages: mostly liquidated
- Remedy: damages, s.p & injunction
- Motive not material at all

TORT

- **Phrase:** liable / not liable
- **Remedy:** compensation by tortfeasor
- **Obj:** Want to reform wrongdoer
- **Add'l nature:** Can become a crime: Penal Code ss 3, 51, 421, 499.

CRIME

- Guilty; innocent; prosecuted
- Punishment by the State
- Have ceiling limit for imprisonment & fine
- A crime is a crime.

Scope of Law of Tort

Negligence

**Trespass to
Person**

**Trespass to
Land**

Defamation

Nuisance

Law of Negligence

- Generally, refers to the condition / state of mind of a person at a given moment
~ i.e “recklessness” or “carelessness”
- Specifically, negligence is the name of an independent tort.
- *Loghelly Iron & Coal v M’Mullan [1934]:*
“Negligence means more than heedless or careless conduct... it properly connotes the complex concept of duty, breach, and damage thereby suffered by the person to whom the duty was owing.”

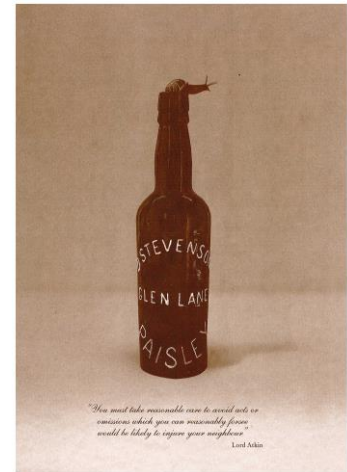
1) Existence of duty of care to act reasonably

- Only to those people who would foreseeably be injured by one's actions.
- The tort of negligence extended beyond the tortfeasor and the immediate party. It raised the question of exactly which people might be affected by negligent actions.
- The Neighbour principle by Lord Atkins 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 act that I ought to have them in [mind] when I am [considering these] acts or omissions.”

Landmark decisions:

- *Donoghue v Stevenson* [1932] AC 562: decomposed snail in an opaque bottle of ginger beer. Plaintiff became ill after drinking it.



- * Plaintiff not the buyer, thus cannot rely on action for breach of contract. So, she sued manufacturer claiming that they owed her a duty of care.

Held: D, being manufacturer of the ginger beer, owed a duty of care to the P, the ultimate consumer / purchaser of the drink.

□ **Elements of negligence:**

- 1) Existence of a duty of care to act reasonably owed by D to P;
- 2) Breach of that duty;
- 3) Proximate cause; &
- 4) Injury to P.

“Duty situation”

- Duty: An obligation or burden, imposed by law, which requires a person to conform to a certain standard of conduct.
- *Lauder Watson v The Govt. of Perak* [1913]:
P had been alienated a piece of land by D. Water from a canal, D's property, had overflowed & damaged P's property. The canal had been constructed many years before P was granted his land.

Held: by alienating the land to P, D had not imposed upon themselves the obligation to exercise a greater degree of control over the canal than before. D owed no duty of care to the P in respect of the maintenance of the banks of the canal.

2- Breach of Duty of Care

- Negligence: Owe a duty of care + breach of it.
- The test applied in order to see foreseeability is of a reasonable person of ordinary prudence.
 - ~ whether D's conduct fell below the standard of care which is expected from the reasonable man.
- *Bolam v Friern Hospital Management Committee* [1957]: the reasonable man is the man “in the street” or the “man on the Clapham omnibus” (per McNair J.)

Test of Reasonable man

- Courts look at the external or “objective standards” of conduct which are of general application.

Glasgow Corpn v Muir [1943] : the reasonable man is presumed to be “free from over-apprehension and from over-confidence.”

~ A reasonable man is not a perfect citizen / gentleman.

Fardon v Harcourt-Rivington [1932] : He certainly does not have the courage of Achilles, the wisdom of Ulysses, the strength of Hercules, nor the prophetic vision of a clairvoyant. He is also not expected to foresee fantastic possibilities, but he is expected to guard against reasonable possibilities.



□ *Thomas v Grand Hyatt Hotel* (1990)

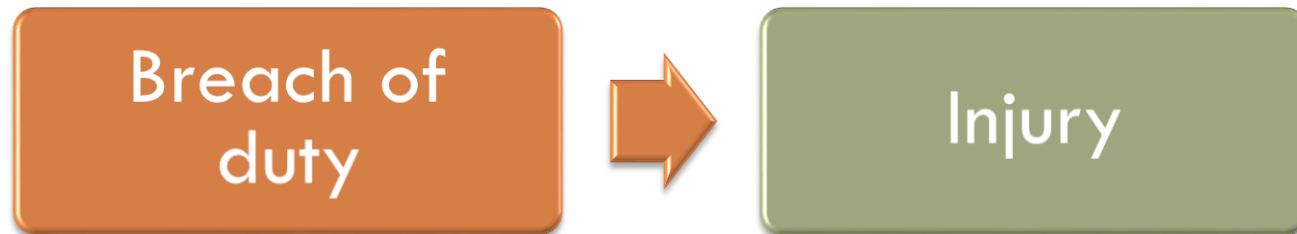
P was modeling clothes for W&L which had leased a space from D for a fashion show. While walking out of the stage, P slipped & fell, injuring her left foot & ankle.

Held: Since P did not know what caused her to slip & D was unaware of the dangerous condition that caused her to slip, thus D was not in breach of the duty to act reasonably to P.



3- Proximate cause

- The **direct & immediate** foreseeable **connection** between a breach of duty & a resulting injury [cause & effect]



The Wagonmound Test vs. the Re Polemis Test



Occupiers' Liability

- One of several cases of liability based on negligence is '**occupiers' liability**'.
- **Occupier:** need not be in actual possession of the premise. Sufficient if he has substantial degree of control of the premises in question.
- *Waugh v Duke Corp (1966)*: D's motel had floor to ceiling glass panels which constituted the major wall. Emily Waugh, a child, walked into the glass panel & suffered injuries. Held: D failed to construct guards/ place anything around / on the glass to give notice & failed to give verbal warning that a panel exists.
- ~ Although the premises may be safe for adult, they may present unreasonable risk to children. The negligence was a proximate cause of the child's injury.

4- Injury

- To win a lawsuit, P must have suffered injury as a result of D's breach of duty.
- Either bodily harm ~eg broken arm.
- Or, damage to property ~ eg dented car.
- Or, emotional or monetary loss.

Burden of proof

□ S.101 of Evidence Act 1950:

~ the burden of proof for negligence on the P.

~ standard of proof is on balance of probability (that is was more probable than not that the D was negligent)

Sometimes, its very difficult for P to prove everything in detail, & in such a case, P can rely on the maxim *Res Ipsa Loquitor* (the thing speaks for itself).

When RIL is raised, D does not automatically be liable for negligence, the D still has the right to rebut the maxim that he acted reasonably in the circumstances.

Contributory negligence

- Plaintiff injury not only due to Defendant's negligence but also due to Plaintiff's negligence.
- It is a partial defense, if successful, has the effect of reducing the amount of damages the defendant is ordered to pay.
- Based on principle that Plaintiff owes a duty of care to avoid injury himself.

CONTRIBUTORY NEGLIGENCE AND
COMMON EMPLOYMENT

Apportionment of liability in case of contributory negligence

12. (1) Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the Court thinks just and equitable having regard to the claimant's share in the responsibility for the damage:

Provided that—

- (a) this subsection shall not operate to defeat any defence arising under a contract; and
- (b) where any contract or written law providing for the limitation of liability is applicable to the claim the amount of damages recoverable by the claimant by virtue of this subsection shall not exceed the maximum limit so applicable.

(2) Where damages are recoverable by any person by virtue of the foregoing subsection subject to such reduction as is therein mentioned, the Court shall find and record the total damages which would have been recoverable if the claimant had not been at fault.

- 'Fault' means negligence, breach of statutory duty, or other act or omission amounting to liability in tort
- Plaintiff has failed to take reasonable care of his own safety, i.e P's lack of care a contributing factor to the accident which caused his damage
- Unless, his conduct could not have been foreseen as likely to result his own injury.

Exercise

- Find cases of contributory negligence
- Whether the person claimed against is excluded/
escape from liability upon finding of contributory
negligence?

W14

- **Professional Negligence**
- **Vicarious Liability**

Professional Negligence

- Comprises a subset of the general rules of negligence.
- The general situation : Defendant has **represented** himself or herself as **having more than average skills and abilities** by virtue of the services, which they offer and supply.

Professional Negligence

- The occupations regarded as professions have four particular characteristics:
 - a) The work or service is skilled and specialised;
 - b) The practitioner is expected to provide a high standard of service and is expected to be particularly concerned about the duty of confidentiality;
 - c) Practitioners usually belong to a professional association which regulates admission and seeks to uphold the standards of the profession;
 - d) The practitioner holds a high status in the community

Bolam v. Frien Hospital Management Committee

[1957] 1 WLR 582, 586

- A standard of care required of a professional quarry operator as expounded by McNair J:

“Where you get a situation which involves the use of some special skill or competence, then the test as to whether there has been negligence or not is not the test of a man on the top of the Clapham omnibus, because he has not got this special skill. The test is the standard of the ordinary skilled man exercising and professing to have that special skill. A man need not possess the highest expert skill, it is well established law that it is sufficient if he exercises the ordinary skill of the ordinary competent man exercising that particular art.”

(quoted by James Foong FCJ in Wu Siew Ying v. Gunung Tunggal Quarry & Construction Sdn Bhd & Anor 410 [2011] 1 CLJ)

MPAJ v. STEVEN PHOA CHENG LOON & ORS

FEDERAL COURT, PUTRAJAYA [2006]

Fact: On 11 December 1993, a landslide occurred resulting in the collapse of Block 1 and the subsequent evacuation of the respondents from Blocks 2 and 3. The respondents then filed a suit in the High Court against various parties including MPAJ, the appellant herein, for negligence and nuisance.

- **Issue:** “whether local circumstances would require the respondent, an estate agent, a professional who advertised premises for rent, who knew that the premises was a subject matter of a pending foreclosure action, to owe a duty of care to the appellant, who answered to the advertisement and subsequently entered into a tenancy agreement for a period of two years, to disclose the fact that the premises was subject to a pending foreclosure action?”
- I do not have the slightest doubt that the answer should be in the affirmative.”**
(per Abdul Hamid Mohamad FCJ)

Steven Phoa's case excerpt:

- “This is not a case of a friend telling another friend that there is a house for rent. **This is a case of a professional firm, holding out to be a professional with expertise in its field, earning its income as such professional.** They know that people like the appellant would act on their advice. Indeed, I have no doubt that **they would hold out to be experts in the field and are reliable.** It would be a sad day if the law of this country recognises that such a firm, in that kind of relationship, owes no duty of care to its client yet may charge fees for their expert services.”

Profession v Occupation

- “a **“profession”** in the present use of language involves the idea of an occupation requiring either purely intellectual skill, or of manual skill controlled, as in painting and sculpture, or surgery, by the intellect of the operator as **distinguished from an occupation** which is substantially the production or sale or arrangements for the production or sale of commodities. **The line of demarcation may vary from time to time.**
- The law relating to professional negligence has been developed to include the likes of architects, engineers, quantity surveyors, insurance brokers and accountants, amongst other professions.

Other Cases

- *Merrett v. Babb*: Plaintiff brought an action against D, a salaried employee of a company, personally seeking damages for negligent valuation. CoA affirmed the decision of HC that D, a professionally qualified surveyor and valuer, although was a salaried employee, was negligent in preparing the mortgage valuation report.
- *Uda Holdings Bhd v. Melewar Leisure Sdn Bhd* [2008] the standard of care expected of CH Williams (valuers) would be that of a prudent and reasonable valuer interpreting the lease agreement

MERCANTILE INSURANCE SDN BHD v. A DENNYS & COMPANY SDN BHD [2002]

- The crux of the plaintiff's case is that the defendants due to their negligence had overvalued three plots of land at RM15,000,000 resulting in the plaintiff paying approximately RM6,071,077 above the actual value of the said property to the vendors. According to the plaintiff, instead of paying out only RM3.4 million, the plaintiff paid out RM9,471,077.
- The plaintiff's complaint is that the defendants did not exercise "all due skill and care in valuing the said property" by not valuing the said property in a prudent manner as expected of a registered **valuers** and appraisers.

MERCANTILE INSURANCE SDN BHD v. A DENNYS & COMPANY SDN BHD [2002]

- Held: conflicting opinions between two **valuers**, over the price of the same property, did not indicate *prima facie* case of negligence. It is a common knowledge that **valuers** do differ in their opinions when making valuation over the same property. Thus in this case **the burden remain with the plaintiff to show that the defendants were negligent** and the plaintiff had failed to do so and accordingly the plaintiff's claim is dismissed with costs.
- “After all the market value of a property is determined by market forces rather than the opinion of **valuers**”.

Professional Liability (Malpractice)

- Actually a negligence action against a professional.
- “All forms of professional discipline [must] maintain justified public confidence in their fairness & efficacy”
- Plaintiff must prove that he suffered loss or damage if he were to claim for the professional negligence.

DUTY
BREACH
CAUSATION
+ DAMAGES
NEGLIGENCE

Vicarious Liability

- An employer may be jointly or severally liable with his employee for the latter's tort.
- Rationales:
 1. The employer must have been negligent in:
 - a) Employing a negligent servant,
 - b) Failing to control his servant.
 2. Employer benefits from employee's work, so he should bear the responsibility for damage caused by his employee.
 3. Employer has greater fund to pay damages to the injured party than the employee.
 4. Usually employer an enterprise / undertaking, therefore they can spread the loss. Moreover, they also have insurance coverage.

Vicarious liability

□ Conditions:

1. There was contract of service
2. Tort committed during course of employment

~even if:

- 1) Employee disobeys orders as to how to do his work, or
- 2) He was engaged in his duties & does something for his own convenience

Vicarious liability

- Both employer & employee may be sued together as joint tortfeasor.
- If employer is held vicariously liable, he may seek indemnity for his costs from his employee.
- **Tort by independent contractor:** no VL.
- Yet, liability do exist
 - ~ he failed his duty to ensure a competent contractor was employed;
 - ~ *Honeywill & Stein v Larkin Bros* [1934]: the operation is of a particularly dangerous nature



Q & A