

1. Introduction to Negligence

You should be familiar with the following areas:

- how to prove negligence
- legislative reform to the law of negligence

INTRODUCTION

A tort exists to protect rights. The law of torts defines the rights and obligations that arise when an individual commits a wrong or injury against another. The law of torts is a body of law which has been developed by the common law. A tort has been defined as ‘an injury other than breach of contract, which the law will redress with damages’ (Fleming, J, *The Law of Torts*, 9th edn, 1998, Sydney: LBC Information Services). Tort liability compensates a victim/plaintiff by forcing the wrongdoer to pay for any damage done (although in some torts damage is not necessary; for example, a trespass to land).

It should be remembered that the aim of tort law is not just to compensate. Courts are not just concerned with the liability and relationship between the parties before them. In determining outcomes of individual cases in tort law courts will always weigh up the standards of conduct for the wider society. Policy therefore plays an important role in the outcome of cases in this area of law.

There are different types of tort. Negligence is the dominant tort and is covered in Chapters 1 through to 6 in this text. Negligence is a tortious action which was established in 1931 in the case of *Donoghue v Stevenson* (1932). Negligence is rapidly subsuming other areas of tortious liability. The torts that now form part of a general category of negligence include strict liability, occupiers’ liability and an employer’s duty of care to employees. Other torts include trespass to the person such as assault, battery and false imprisonment (see Chapter 7) and nuisance (see Chapter 12). There are many different torts – this text does not cover all of them and instead focuses upon the major areas of the university tort syllabus.

Negligence is a tort which determines legal liability for careless actions or inactions which cause injury. Thus, the tort of negligence spans the whole range

of human activity, since it is not concerned with the activity itself, but with the manner in which the activity is carried out. In *Donoghue v Stevenson* (1932), Lord Atkin noted that the law of negligence ‘should be based on a general public sentiment of moral wrongdoing’ – a statement said by the Judicial Committee of the Privy Council in *The Wagon Mound (No 1)* (1961) to be the ‘sovereign principle’ of negligence ...’ (see the First Ipp Report, *The Report of the Law of Negligence*, 2 September 2002 at <http://revofneg.treasury.gov.au/content/reports.asp>, p 32).

Negligent conduct is therefore conduct which falls below an acceptable standard. This standard is one set for society and is established in order to protect others from an unreasonable risk of harm. However, not every type of careless behaviour will constitute the legal action of negligence. The question is how does the law determine what is an unreasonable risk of harm?

HOW TO PROVE NEGLIGENCE

To prove an action for negligence, and thus establish whether the defendant has exposed the plaintiff to an unreasonable risk of harm, each of the following elements of the tort must be established:

- (a) Duty – the defendant owed the plaintiff a duty of care.
- (b) Breach – the defendant breached that duty of care (that is, did not reach the required standard of care).
- (c) Causation – the damage suffered by the plaintiff was caused by the defendant’s breach of duty.
- (d) Damage – the type of damage suffered is not too remote from the defendant’s conduct.

If the plaintiff can prove that each of these elements exists, their action in negligence will succeed unless the defendant is able to establish one of the defences to the tort of negligence. For the defences available, see Chapter 6.

Generally, the onus of proving negligence will rest upon the person alleging the action. As negligence is a civil action, a plaintiff will be compensated if it can be shown ‘on the balance of probabilities’ that the act or omission was negligent.

It is important to note that there is no substantial measure of agreement between commentators or judges as to the limits of these elements which are needed to prove negligence. That is, these elements are often categorised as three elements (the third being a combination of causation and remoteness). Or, in judgments, the elements are fused into one (*Roe v Minister of Health* (1954), per Denning LJ). Often, decisions as to which element a case may turn upon seems arbitrary. Often, the division between these elements is blurred. However, to divide

negligence into elements is useful for analysis. This is because each element is used as a means to limit liability in that, usually, if any element is missing, there can be no action in negligence.

Legislative reform

Traditionally the law of negligence has been governed by the common law – law made by judges. In Australia this has changed with the introduction of legislation in all jurisdictions from 2002 onwards which has significantly impacted upon the law of negligence.

This legislation (referred to as civil liability and wrongs legislation throughout this text) was introduced as a legislative response to a perceived imbalance in the law of negligence in favour of plaintiffs and therefore a bias against defendants. In other words, plaintiffs were perceived as receiving payouts which were too large and too easy to establish in law. Further, there was a perception that community events such as local sporting events were not going ahead due to escalating insurance premiums which were in turn due to the rising numbers of successful negligence claims.

This perception is illustrated by two high profile cases of that time. The first occurred in May 2002 when a swimmer was awarded almost \$4 million by the NSW Supreme Court when he injured himself at Sydney's Bondi Beach. A jury found the local council responsible for the paralysis suffered by the plaintiff when he hit his head on a sandbank while swimming between the surf flags. The plaintiff was alleged to have been intoxicated at the time. The second incident also occurred in 2002 and involved a plaintiff who drank six beers and five bourbons and climbed onto the roof of a Sydney hotel after being denied access to the downstairs nightclub. The licensee, thinking the plaintiff was a thief, hit him with a baton-like object. The plaintiff sought compensation for the use of force against him and the plaintiff's mother sued for compensation for nervous shock after seeing her son's injuries. The judge called the plaintiff 'a drunken lout' and awarded him \$50,000 and his mother nearly \$20,000.

As a result of these types of cases, which were apparently viewed by the general public and media to be unfair to the defendants involved, calls were made to reform the public liability system. The need for reform arose from concern about the availability and cost of insurance, especially public liability insurance. The result was the 2002 *Report of the Panel for the Review of the Law of Negligence* (the Ipp Report), which recommended a national statutory response to reform the law of negligence. It is extremely useful to read the final report. The reports of the Panel are found on the Commonwealth Treasury website (<http://revofneg.treasury.gov.au/content/reports.asp>, accessed November 2009). These reports will assist in understanding many of the legislative reforms of the common law of negligence.

The Impact of the Ipp Report

The Ipp Report has resulted in statutory reforms in every Australian jurisdiction in respect of:

- (a) limiting the amount and type of damages awarded;
- (b) reforming some of the common law elements of negligence; and
- (c) increasing the number of defences available to negligence actions.

The impact of the legislative reform has been to swing the balance of bias in tort law away from the plaintiff in favour of the defendant. Generally the reforms make it difficult for a plaintiff to establish a negligence action and also, if a negligence action is established, the amount of damages payable is reduced.

This legislation, which has been introduced in the Australian States, Territories and the Commonwealth, is broadly similar, though not identical. This means that because each jurisdiction has its own legislation the law of negligence may now develop differently in each Australian jurisdiction. Prior to the introduction of the legislation, the common law, through pronouncements of the Australian High Court, developed more holistically throughout Australia.

The legislation introduced includes:

JURISDICTION	LEGISLATION
Australian Capital Territory	Civil Law (Wrongs) Act 2002 (ACT)
Northern Territory	Personal Injuries (Liabilities and Damages) Act 2003 (NT)
	Personal Injuries (Civil Claims) Act 2003 (NT)
New South Wales	Civil Liability Act 2002 (NSW)
Queensland	Civil Liability Act 2003 (Qld)
	Personal Injuries Proceedings Act 2002 (Qld)
South Australia	Civil Liability Act 1936 (SA)
	Recreational Services (Limitation of Liability) Act 2002 (SA)
	Volunteers Protection Act 2001 (SA)
Tasmania	Civil Liability Act 2002 (Tas)
Victoria	Wrongs Act 1958 (Vic)

JURISDICTION	LEGISLATION
Western Australia	Civil Liability Act 2002 (WA) Law Reform (Contributory Negligence and Tortfeasors' Contribution) Act 1947 (WA)
Commonwealth	Trade Practices Amendment (Liability for Recreational Services) Act 2002 (Cth) Commonwealth Volunteers Protection Act 2003 (Cth)

It is recommended that you read this text together with a complete copy of the legislation relevant to your jurisdiction, as it is not possible or desirable to repeat sections of statutes in this text. Cases from the superior courts in each jurisdiction are being handed down on the legislation – where relevant these will be discussed and noted.