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LEGAL TOPIC: THE TORT OF NEGLIGENCE

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What is Negligence?

The general principles of the law of negligence were set out in *Halsbury's Laws of England (Volume 78 (2018))*. Negligence is defined as a specific tort and in any given circumstances is the failure to exercise that care which the circumstances demand. What amounts to negligence depends on the facts of each particular case. It may consist of omitting to do something which ought to be done or in doing something which ought to be done either in a different manner or not at all.

There are three main elements to the tort of Negligence.

A claimant must establish the following:

- (1) a duty of care owed by the defendant to the claimant;
- (2) breach of that duty by the defendant; and
- (3) damage to the claimant attributable to the breach of the duty by the defendants.

The Courts have expanded on the aforementioned elements. In the case of the local case of *Jason Balbosa v Telecommunications Services Of Trinidad And Tobago*



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Limited CV 2015-01128 the Honourable Justice Seepersad quoted the learning in *Clerk & Lindsell on Torts 21st Edition at Para 8-04* which sets out the elements that a Claimant must prove to establish a Defendant's liability for negligence and these were listed as follows:

- (1) *The existence of a duty of care situation, i.e. one in which the law attached liability to carelessness. There has to be recognition by law that the careless infliction of the kind of damage in question on the class of person to which the claimant belongs by the class of person to which the defendant belongs is actionable;*
- (2) *Breach of the duty of care by the Defendant, i.e. that he failed to measure up the standard set by law;*
- (3) *A causal connection between the Defendant's careless conduct and the damage;*
- (4) *That the particular kind of damage to the particular claimant is not so unforeseeable as to be too remote.*

1. DUTY OF CARE

In general, a duty of care will be owed wherever in the circumstances it is foreseeable that, if the defendant does not exercise due care, the claimant will be harmed. This foreseeability test was laid down by Lord Atkin in the celebrated case of **Donoghue v Stevenson [1932] AC 562, p 579** and is known as the 'neighbour principle'.

According to the 'neighbour principle', one must not injure one's neighbour. The question then becomes, 'Who is my neighbour?'. According to the principle, you must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. In law, your neighbour is any person who is so closely and directly affected by your act that you ought reasonably to have them in contemplation as being so affected when you are directing your mind to the acts or omissions which are called in question.

EXAMPLES OF COMMON SITUATIONS IN WHICH IT IS WELL ESTABLISHED THAT A DUTY OF CARE EXISTS:

- (i) A driver of a vehicle on the road owes a duty of care to other road users, pedestrians and occupiers of premises abutting the highway to drive carefully. Interestingly enough, that driver also owes a duty of care to the passengers travelling in his own vehicle as he can be sued by the passengers, if through his Negligent driving, he causes an accident which results in loss or damage to any of his passengers. This is poignantly and potently demonstrated where these other passengers are the Driver's Family members, so much so, that a wife may sue her Husband (Driver), if his Negligent driving caused and accident resulting in loss, damage or injury to his Wife. And similarly, his children in the back seat,

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can also bring a Lawsuit against their Father, if by his Negligent driving, they suffered loss, damage or injury;

- (ii) An occupier of premises owes a duty of care to visitors to ensure that the premises are reasonably safe and free from potential damage or injury to persons entering thereupon. Interestingly enough, this also applies to Trespassers, so if you leave clearly dangerous and harmful situations on your premises, and your property is unfenced and someone takes a short-cut across your property and falls into a dangerous open, unlit, unguarded manhole on your property, then even if that person is a Trespasser, they can bring an action against you in Occupier's Liability;
- (iii) An employer of a workman in a factory owes a duty of care to provide adequate equipment and a safe system of working for his employees.

Please note that this list is in no way exhaustive and simply gives a few circumstances within which a duty of care is owed from one party to another.

2. BREACH OF DUTY

Once it is established that a duty of care was owed by the defendant to the claimant, the Court must then decide whether or not a reasonable man, placed in the defendant's position, would have acted as the defendant did.

According to the Court in *Blyth v Birmingham Waterworks Co. [1843–60] All ER Rep 478*,

“Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do.”

The principle of negligence was stated in the case of *Wagon Mound (No 2) Overseas Tankship v Miller Steamship [1966] 2 ALL ER*, the general principle that any person must be regarded as negligent if he does not take steps to eliminate risk which he knows or ought to know is a risk and not a mere possibility which would never influence the mind of a reasonable man.

Essentially, the question becomes one of reasonableness. In deciding what a reasonable man would have done in the circumstances, and in assessing the standard of care expected of the defendant, the court may take into account what may be called the 'risk factor'. This has four elements:

- (a) the likelihood of harm;
- (b) the seriousness of the injury that is risked;

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- (c) the importance or utility of the defendant's conduct;
- (d) the cost and practicability of measures to avoid the harm.

3. CAUSATION

The claimant must establish that the defendant's breach of the duty of care owed to him was a cause of his injury damage or loss. This is necessary to successfully maintain a claim for damages due to the defendant's negligent actions. According to Lord Reid in *McGhee v National Coal Board* [1972] 3 All ER 1008,

"It has always been the law that a pursuer succeeds if he can show that fault of the defender caused or materially contributed to his injury. There may have been two separate causes but it is enough if one of the causes arose from fault of the defender. The pursuer does not have to prove that this cause would of itself have been enough to cause him injury."

4. REMOTENESS/FORESEEABILITY

The test for remoteness of damage is whether the kind of damage suffered was reasonably foreseeable by the defendant at the time of the breach of duty: *Overseas Tankship (UK) Ltd v Morts Dock and Engineering Co Ltd (The Wagon Mound No 1)* [1961] AC 388. The defendant will be liable for any type of damage which is reasonably foreseeable as liable to happen even in the most unusual case unless the risk is so small that a reasonable man would in the whole circumstances feel justified in neglecting it : *Heron II* [1969] 1 AC 350.

In the local case of *Alexandria Badal (supra) v North West Regional Health Authority and Amalgamated Security Services Limited CV 2017-02186* the Honourable Court discussed the concept of foreseeability. In doing so, the Court made reference to the following explanation,

"Speaking generally, one of the necessary prerequisites for the existence of a duty of care is foresight that carelessness on the part of the defendant may cause damage of a particular kind to the plaintiff. Was it reasonably foreseeable that, failing the exercise of reasonable care, harm of the relevant description might be suffered by the plaintiff or members of a class including the plaintiff? "Might be suffered" embraces a wide range of degrees of possibility, from the highly probable to the possible but highly improbable. Bearing in mind that the underlying concept is fairness and reasonableness, the degree of likelihood needed to satisfy this prerequisite depends upon the circumstances of the case..... There must be reasonable foreseeability of a risk which a reasonable person would not ignore. The risk must be "real" in

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the sense that a reasonable person would not brush [it] aside as far-fetched” [The Attorney General v Craig Hartwell (British Virgin Islands) [2004] UKPC 12 at para. 21]

5. DAMAGES

The basis of compensatory damages is to put the person back to the position they would have been had the tort not occurred: *Livingstone v Rayward Goals Company [1880] UKHL 3*. This is a principle known as *restitution in integrum*. The general rule is that, where any injury is to be compensated by damages, the claimant should as nearly as possible get that sum of money which will put the him in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation.

It is important to note that the claimant is expected to take all reasonable steps necessary to mitigate his loss. If the claimant fails to do so, then the amount of compensation he can recover may be significantly reduced by the extent of his failure to mitigate his losses. Thus if you suffer damage in an accident and cannot work for a year, but thereafter you're fit to work and simply refuse to do so, relying upon the payment to come to you in a Lawsuit for the other party's Negligence; then if you sat home for an additional four years or so, the Court will not give you five years loss of Earnings. It will say that you ought to have mitigated your loss by going out to work once you were able to do so and will reduce your five year claim for loss of earnings to only one year. On the other hand, if for those additional four years you were making every effort to secure employment but couldn't, and you could show that you were sending out Applications, attending interviews, putting your CV out there but just were unlucky and despite all your efforts could not secure employment, then you can make a claim for the full five years of unemployment.

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