

Introduction to negligence, tort law



**ASSIGN
BUSTER**

1. Discuss what is meant by a 'duty of care' in the tort of negligence.
2. Explain the test which is applied in the tort of negligence to determine whether the defendant breached the legal duty of care owed to the claimant.
3. What factors would a court take into account when determining how a reasonable person would act?

Duty of care

Test applied for determining

Factors court would take into account to determine how a reasonable person would act

Tort law

Tort in general are a set of rights, obligation that are provided to the citizen by a civil court in order to maintain safety of people and provide remedies for persons who have been inflicted suffering/losses by the wrongdoings of other citizens.

(<http://legal-dictionary.thefreedictionary.com/Tort+Law>)

A tort is a wrongdoing by a citizen towards another for which he/she is tried in the court of law. The plaintiff is the person against whom the wrong has been committed and who has suffered losses. Whereas, the person because of whom the damages/losses have occurred to the plaintiff is known as the defendant.

The law of torts obtained from common law principles that have come from case laws and legislative enactment. Torts are not dependent on any sort of agreement between the two parties involved and this is how tort law is distinguishable from breach of contract or any other type of law. Moreover, it is the citizen who brings the tort case even though criminal prosecutions are applied by the state. Defendants, in case of tort law, do not receive fines and neither do civil courts incarcerate them. (http://www.findlaw.co.uk/law/government/constitutional_law/500400.html)

The word tort is derived from a Latin word 'torquere', meaning incorrect or twisted. There was no separate legal action under the English common law. In place of tort the English law system provided plaintiffs with two options of reparation: trespass for direct injuries and for indirect injury, action on the case. In time, other civil wrongdoings were also recognized by the English common law, for example Defamation, libel, slander. English common law became popular in America and they started adopting it. The first U. S. treatises that were published had a portion of common law which was created under the tort law.

Every tort action requires some criteria to be fulfilled. First, the plaintiff must prove that the defendant had a legal obligation to act in a particular manner. Second, the plaintiff must prove that the defendant breached this duty by acting in a wrong way. Third, the plaintiff must be able to prove that he suffered losses, damage and injury because of the defendant not being able to follow his legal duty. (<http://legal-dictionary.thefreedictionary.com/Tort+Law>)

The law of tort aims to serve the following objectives. First, tort law aims at providing compensation to the plaintiff for injury/losses suffered due to the misdoings of the defendant. Second, it tries to punish the defendant by making them pay for the cost of such losses/injury. Third, it seeks to make sure that such an irresponsible, careless behavior is discouraged in the future. Lastly, tort law seeks to claim the legal rights that are compromised or diminished. The above mentioned objectives come into play when the tort liability is imposed on defendants for negligence, intentional misdoings.

Types of tort

Intentional Torts

Intentional tort is when a citizen or a group of people purposely indulge in an activity that harms or causes damage to another. For example, one person attacking another in a fight will be considered as an intentional act that would come under this tort.

Seeing the above example it may look like an intentional tort may be categorized as a criminal case, but there are some differences between them. A crime can be thought of as when an individual's actions damage or injure the interest of the society. Whereas, an intentional tort is when the actions of an individual affect/injure the property/well-being of one individual. While in a criminal case the charges are brought on by the government and can lead to jail sentence, in a tort the victim presses the charges against the defendant and is usually seeking for monetary compensation for the injury/damages caused by the defendant.

Negligence

Every individual/citizen is anticipated to behave in a particular manner and conduct themselves responsibly. This is also considered as a legal duty of the citizens as this would reduce the risk of damage/injury/harm to the others. If a citizen fails to abide by these requirements he/she is said to be negligent and the act comes under negligence. Tort of negligence has been the most prevalent tort. A lot different than the tort of intention, negligence tort doesn't consider intentional actions by a person, whereas it takes into account the cases where an individual acts carelessly and fails to obey the above mentioned legal duties towards fellow citizen causing them harm/injury/damage. The most common case is of slip and fall wherein a property owner fails to behave as a rational person would, hence causing harm to the visitor.

Strict Liability

This type of tort (strict/absolute) involves imposing responsibility, for a damage/injury/harm, on the person who has done wrong without the requirement of proof of negligence or intention. What only count is that an action transpired which eventually led to injury/damage/harm of another person.

The most major example is of defective products, where the liability is imposed irrespective of intent. In such cases the only requirement the injured person has to fulfill is to prove that the injury was directly caused by the malfunction of the product in order to have the law on their side. The company's intention in this case is not taken into consideration.

Business tort ([http://www. inc. com/articles/1999/11/15387. html](http://www.inc.com/articles/1999/11/15387.html))

In business tort the damage is not done to an individual but to imperceptible assets such as economic interest or business relations or contracts.

Fraudulent Misrepresentation

Fraudulent misrepresentation aims at protecting an individual's economic interests and also their right to reasonable and true treatment. If a plaintiff wishes to file a fraud claim he/she must prove that the defendant purposely misrepresented a fact which the plaintiff relied on and was eventually harmed/suffered losses due to the misrepresentation. For example, if a company presents factually wrong/misleading financial statements to a bank in order to procure a loan and the bank relying on those statements provides the loan then the bank is eligible to file a case for fraud against the company if they aren't able to pay the loan back. Fraud claim can be filed if the defendant had the duty to disclose a fact but he/she failed to do so. Like for instance a financial advisor on behalf of both buyer and seller may be held for fraud if he has knowledge about the toxic content of the property and fails to tell this to the buyer.

TORT OF NEGLIGENCE

The most common kind of tort that one comes across is the tort of negligence and is generally used to represent behavior that causes the unreasonable risk of harm to other individuals. There are a few elements that are required to be established for the negligence tort. They are as follows:

1. A duty of care should exist between the plaintiff and the defendant.

<https://assignbuster.com/introduction-to-negligence-tort-law/>

2. The defendant breaching that duty of care.
3. Defendants breach causes direct harm/ injury/damage to the plaintiff.

DUTY OF CARE

A duty of care is when a person is required to behave carefully, with responsibility and attention towards other individuals in a way a reasonable person would. If the individual fails to meet the expected standard of care then their behavior is considered negligent and any damage/harm resulting from it may be filed for negligence in the court of law. (<http://legal-dictionary.thefreedictionary.com/duty+of+care>)

Judges making decisions in various cases involving tort of negligence has led to the gradual development of duty of care. This first came to light in a case of negligence of *Donoghue v Stevenson* (1932) in which the plaintiff (Mrs. Donoghue) went to a café with a friend of hers. Her friend brought her a drink of ginger beer and ice cream. The contents of the beer couldn't be seen as it was in a dark bottle. Mrs. Donoghue drank some of the beer and then poured the rest out and to her shock saw a dead, decomposing snail in the drink. This horrified Mrs. Donoghue and led to her becoming ill. The main reason of her falling ill was the sight and the ginger beer she had already drunk.

In spite of clear negligence on the part of the manufacturer Mrs. Donoghue couldn't claim against the manufacturer or the shopkeeper based on contract since she wasn't the one who bought the drink. Mrs. Donoghue's friend bought the drink hence she could claim against the café based on contract, but again since her friend didn't suffer any kind of illness/losses

apart from the fact that she had bought the defective good. In this case the only remedy that could be provided was money back to the friend and no remedy for Mrs. Donoghue's health. Hence, Mrs. Donoghue decided to file a claim against the drink's manufacturer (Stevenson). Her claims were based on the stomach illness and resulting shock from the consumption of the beer and the sight respectively.

Whether her claim against the drink's manufacturer would succeed or no was now dependent on the court's decision. This situation led to Lord Atkin's famous statement.

“ The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer's question, ‘ Who is my neighbour?’ receives a restricted reply. 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 reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.”

Donoghue v Stevenson (1932) was the first attempt that succeeded to set out a general principle with respect to the concept of the duty of care. As the lawyers began to realize that the above mentioned principle could be changed to be used with various types of cases, the test was restructured to create the three part test in the case of Caparo v Dickman (1990)

The general parameters set in the test for Caparo v Dickman were as follows

1. It should be reasonably foreseeable that an individual in the plaintiff's position was at risk of injury/harm/damage.
2. There should be satisfactory proximity between the two parties.
Proximity here means that two parties involved should be close enough such that it is 'reasonably foreseeable' that negligence by one party leads to damage/injury to the other party.
3. It should be just, rational and realistic to enforce liability on the defendant.

All the above mentioned parameters should be met if a duty of care is to be payable by the defendant to the plaintiff. Also there is a necessity for each part to be proved and explained separately and unambiguously.

Caparo Test

The First Part – Foreseeability

This test is objective. Would it be foreseeable that someone in the claimants place might be injured by a reasonable individual? In *Donoghue v Stevenson* (1932) it can be seen that the consumer's health will be affected if the snail gets into the bottle. This particular situation is of supplying consumable products with foreign bodies in it and a reasonable individual would be able to foresee that the consumer (plaintiff) may very likely be injured.

In the case of *Kent v Griffiths* (2000) a patient was suffering from a serious asthma attack and therefore a doctor ordered an ambulance to take the patient to the hospital immediately. The ambulance control centre received the message and they acknowledged it. Without any acceptable reason the ambulance arrived very late, the result of which was that the patient

suffered a heart attack. The heart attack could have been avoided if she had been attended to earlier. A reasonable individual would find it foreseeable that the ambulance's failure to arrive in time would cause the patient to suffer from serious harm.

There have also been various cases where the courts have decided that it isn't reasonably foreseeable that the plaintiff would suffer harm. For instance, in *Bournhill v Young* (1943) a motorcyclist crashed into a car and was killed due to driving too fast. Mrs. Bournhill, who was very close to the scene, was eight months pregnant. Mrs. Bournhill only heard the incident but didn't actually see it. As she witnessed the blood on the road and body it led to her experiencing a severe shock which further led to her baby being born still. She filed a case against the motorcyclist blaming him for her plight. But the court denied her claims as they decided that the motorcyclist couldn't have reasonably foreseen that his accident would affect Mrs. Bournhill, hence he didn't owe any duty of care to her.

The Second Part – Proximity

A duty of care exists only when the harm caused is reasonably foreseeable and also if the relation between the plaintiff and the defendant is sufficiently close. The same can also be seen in the case of *Osman v Ferguson* (1993) in which the police officers were aware of the risk the victim was at. The victim was hence murdered by the attacker. During the proceedings the courts established that the plaintiff and defendant had a sufficiently close relationship. However, the case failed because it was decided that it isn't fair, just to impose a duty of care on the police.

The Third Part – Fair, just and reasonable

Generally, courts refrain from imposing a duty of care on the public authorities. However, in few situations the police do somehow owe a duty of care. In the case of *MPC v Reeves* (2001) a man with suicidal tendencies was taken into custody by the police. He hanged himself to death in the cell while he was in custody. In this particular case the police did owe the victim a duty of care.

Breach of Duty

Once a claimant has proved the duty of care is owed he must then show that the defendant breached that duty. This is merely when the defendant falls below the standard of care appropriate to the duty. Breach of duty is measured objectively by the 'reasonable man test'. The reasonable man is the ordinary person performing the particular task: he is expected to perform it reasonably competently. Thus, when I am riding my bicycle, I am expected to be a reasonably competent cyclist who can ride a bicycle. Therefore, a number of factors that can be considered to raise or lower the standard. This is logical because a reasonable person will rightly take greater risks in an emergency, and take more care when the risk of harm is greater. For a breach of duty to occur, the court will take four factors into account:

Now that the plaintiff has proved that duty of care exists the next step is to show that the defendant has breached that duty.

-The *degree of risk* involved: the greater the risk, the more the defendant has to take care. (*Bolton v Stone* 1951).

-The *cost of precautions* : the courts will see how high the risk is involved, and then take into account the expense of taking precautions to prevent that risk (Bolton v Stone and Latimer v AEC).

- *Potential seriousness of injuries* : so if there is a very high risk of serious injury, the more the defendant needs to be very careful (Paris v Stepney B. C. 1951).

-The *importance of the activity* : in an emergency, sometimes it is not possible to reflect, think of a possible risk (Marshall v Osmand 1982).

Standard for experts- where the defendant has some expertise, for example, he is a doctor carrying out medical treatment, then the standard of care is that which would normally be expected from a doctor. In Bolam v Friern Hospital Management (1957) the judge said:

“ A man need not possess the highest expert skill; it is ... sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular art.”

In some situations, it is difficult to know exactly what happened, although it is found obvious that the defendant was negligent. In these situations a rule called *res ipsa loquitur* , which means (things speak for themselves) was developed by judges. It has to be shown that:

- i. The defendant was in control of the situation (causing injury).
- ii. The injury was more likely than not to be caused by negligence.

If the claimant proves these two things then the defendant has to prove that he was not negligent. This rule was shown in the case of *Scott v London and St. Katherine Docks(1865)* where the claimant was hit by six bags of sugar which fell from the defendant's warehouse. The claimant could not say why the bags had fallen but the court ruled that the facts spoke for themselves and it was up to the defendant to prove that he was not negligent.