LAW OF TORT - NEGLIGENCE

Negligence

Negligence developed from trespass. The modern law of negligence can be said to have begun with the case of *Donghue v Stevenson* (1932) although many 19th century cases helped in this development.

Three main elements must be proved for the plaintiff to be successful in Negligence.

Duty of Care - the defendant must have owed a duty of care to the plaintiff either at Common Law or Statute;

Breach - the defendant must have broken the duty of care by an act or omission which fell below the standard of care that was required of him or her;

Damage - the plaintiff must have suffered damage which was caused by the defendant's breach of the duty of care that was of a type that was a foreseeable result from such breach.

Common Law Duty of Care

Lord Aitken's neighbour principle:

You must take reasonable care to avoid acts of omissions which you can reasonably foresee would be likely to injure your neighbour...who is my neighbour...my neighbour is the person who is so closely and directly affected by my act that I ought reasonably to have him in contemplation when I am directing my mind to the act of omission in question."

The main principle is reasonable foreseeability.

The test is considered too wide as expressed in the statement as it would mean that every careless act would be actionable. However it is used today mainly with reference to reasonable foreseeability and is the foundation of a general concept of negligence which is an action in its own right and not just an offshoot of trespass. Judges have used the principle and limited its application over a period of years.

In *Dorset Yacht Co v The Home Office* (1970) the principle was confirmed but Lord Diplock said that foreseeability alone was not the sole criteria but it was also necessary to consider previous decisions, public policy and proximity.

In *Anns v London Borough of Merton* (1978) Lord Wilberforce put forward a two part test:

"It is not necessary in every case to compare the facts of the situation that is before the court with those of previous situations in past cases and require the two to correspond before declaring that a duty exists. The court should instead answer to questions:

1) was there a sufficient relationship of proximity between the defendant and the plaintiff that the defendant ought to have reasonably contemplated that carelessness on his or her behalf would be likely to cause damage to the plaintiff"

This is the same as Lord Aitken's principle but the word "proximity" is used instead of "foreseeable" the effect of this is that the plaintiff who has suffered damage must not only be in the defendant's contemplation but also he or she must be "close" to the defendant in same way.

2) "If there is proximity then were there any grounds for negating, reducing or limiting the scope of the duty or the class of persons to whom it was owed or the damages to which a breach of duty might give rise."

Even if a person is proximate (foreseeable) the court may still hold that no duty was owed because there were other considerations such as public policy or it was just unreasonable to allow the plaintiff to be successful.

Reasons for limiting Lord Aitken's principle are as follows

Commentators have tried to mark out a pattern as to when, even though there is proximity or foreseeability, judges will consider that no duty should exist. It has been found that there are a number of specific situations when the duty will either not exist or will be reduced even though there is proximity of foreseeability. Examples of these are as follows:

1. Economic Loss

There is no remedy for an action in negligence where there was neither personal injury nor property. Damages for pure economic loss are not recoverable.

In *Murphy v Brentwood District Council* [1990] 2 All ER 908 a local authority negligently approved plans for the construction of a house which had as a result had defective foundations. There was not damage to other property or to any person therefore the loss was only economic and therefore not recoverable.

In *Department of the Environment v Thomas Bates* [1990] 2 All ER 943 a building was constructed on piers which were inadequate for the design load. Held the remedial work was economic loss only and therefore not recoverable.

In both cases the proper remedy would be found in contract.

2. Omissions to Act

There is no duty to act for the benefit of others. If a person fails to save someone from drowning when it appears that they could have done so with limited risk to themselves the person will not be liable.

There are some exceptions: There is a duty upon employers to ensure that safety of employees. This has been extended by statute in the Health and Safety At Work Etc Act 1974. There is also a duty upon parents to look after children.Therefore where there is a special relationship between the parties and one is under a duty to protect the other there will be a duty to act and failure to do so will lead t liability.

Statutory Duty of Care

Occupier's Liability

The Occupier's Liability Act 1957 imposes onto occupiers a duty of care in respect of all visitors. A visitor is anyone who has expressly or impliedly permission to be on the premises. A trespasser is anyone who is not a visitor and the liability that the occupier has for them is dealt with by the Occupier's Liab;lity Act 1984, see below. A visitor therefore only has to show that he or she suffered injury due to the negligence of the occupier for the occupier to be liable.

Liability for Visitors

Under the Occupiers Liability Act 1957:

1. An occupier of premises owes a duty of care to all visitors unless the occupier has lawfully excluded, restricted or extended this duty.

2. The common duty of care is to take such care as in the circumstances of the case is reasonable to see that the visitor shall be reasonably safe in using the premises for the purpose for which he or she was invited or permitted by the occupier to be there.

3. The circumstances which must be taken into account when assessing the duty of care owed include the degree of care and want of care which would ordinarily be looked for in a particular visitor, e.g.

a) an occupier must be prepared for children to be less careful that adults,

b) an occupier may expect that a person in the exercise of his or her calling will appreciate and guard against any special risks that ordinarily arise in the exercise of that calling so far as the occupier leaves him or her to do so.

4. In deciding whether the occupier has discharge the duty of care to a visitor all the circumstances have to be considered e.g.

a) where damage is caused to a visitor by a danger of which he or she had been warned by the occupier, that warning will only absolve the occupier from liability if it was enough to enable the visitor to be reasonably safe;

b) where damage is caused to a visitor by a danger which was created by the faulty execution of work by an independent contractor employed by the occupier, the occupier will not be liable for the danger if in the circumstances it was reasonable to entrust the work to an independent contractor whom the occupier has taken reasonable care to ensure is competent and has done the work properly.

5. An occupier is not liable to a visitor in respect of risks willingly accepted by the visitor.

6. The occupier does not owe a duty of care to people who enter the premises under a legal right (police officers with search warrants).

The occupier has the following defences:

- the visitor was warned of the danger;

- the visitor consented to any risks;

- the occupier employed a competent contractor;

- the visitor was exercising a legal right.

O'Connor v Swan & Edgar (1963)

The plaintiff was a visitor working as a demonstrator. Part of the ceiling of the shop fell on her. She sued the occupiers who were the owners of the shop and the plasterers who had undertaken the work for the occupiers.

Held: The occupiers were not liable and so the plasterers were solely liable as independent contractors.

Liability for Trespassers

In *Addie v Dumbreck* (1929) a trespasser was defined as someone who goes onto land without invitation of any sort and whose presence is either unknown to the proprietor or if known is practically objected to.

A visitor shall become a trespasser if he or she goes into the part of the premises to which he or she has not been invited or acts in a manner inconsistent with the invitation.

Before 1972 only two duties were owed to the trespasser:

1. not to deliberately injure the trespasser;

2. not to act with reckless disregard for the trespasser's safety (in respect of children the knowledge of that they were present and the existence of allurements would amount to reckless disregard. In *Glasgow Corpn v Taylor* (1922) the Corpn were held liable when a child of seven eat poisoned berries in a public park although at the by eating the berries the child was a trespasser.

In 1972 the case of *British Railways Board v Herrington* extended the duty owed to a trespasser by adding a duty of common humanity. In the case a six year old child went through a hole in a fence from a children's play ground to an electrified railway line and was electrocuted. The evidence showed that the fence had been broken for some time and that the defendants knew this and were also aware that children regularly had climbed through the fence but had taken no action to stop them.

Held: The defendants were held liable for the injury caused to the child because they owned a common duty of humanity. It was stated that an occupier must act in a humane manner in relation to trespassers taking into account the occupier's:

- knowledge;

- ability;

- resources.

It was emphasised that the duty of humanity was not as high as the duty of care under the Occupier's Liability Act 1957. Under the duty of humanity the occupier need only take reasonable steps to enable known trespassers to avoid personal injury from known dangers. There was no duty on the occupier to inspect the premises for dangers. These principles are now incorporated into the Occupier's Liability Act 1984 as follows:

A duty of care to trespassers arises:

a) when an occupier is aware or ought to be aware of a danger; and

b) when that occupier is also aware of the presence of a trespasser or that a trespasser may enter the premises; and

c) it is reasonable, taking into account the type of risk involved, to expect that protection should be given to the trespasser (a warning may be sufficient).

A number of cases between 1972 and 1984 have helped to show the application of this principle.

Pannet v McGuiness (1972)

Demolition contractors were burning rubbish on a site. Three workmen were appointed to supervise the fire and look out for children. P aged 5 fell into the fire while the workmen were away. P was a trespasser and children had been chased away o a number of occasions.

Held: The demolition contractors were liable. The had failed to keep a proper look out knowing that children were about.

Penny v Northampton BC (1974)

A fire was lit on a demolition site by contractors and a child was injured when an aerosol canister exploded having been thrown into the fire by another child.

Held: The defendants were not liable as the child had not been injured as a direct result of the negligence of their contractors.

Harris v Birkenhead Corpn (1975)

H aged 4 fell from the upper window of a derelict vandaalised house. The house was due to be demolished but the Council had failed to board up the doors and windows in the mean time.

Held: The Council were liable because the house was a dangerous and tempting place for young children.

It was stated that occupiers should have in mind:

- the probability of a trespasser;

- the types of trespasser who is likely to enter;

- the seriousness of the danger;

- whether the danger is hidden or obvious or particularly alluring;

- and in respect of the above would be expected to have knowledge of a substantial probability but may neglect a bare possibility.

Westwood v The Post Office (1973)

W, an adult employee of the Post Office was injured when he entered an unlocked room which had a warning of danger on the outside.

Held: The Post Office were not liable. Although the door should have been locked in the circumstances the notice was sufficient warning to an adult.

Breach of the Duty of Care

Once the defendant has been shown to owe a duty of care to the plaintiff it must then be shown that the defendant is in breach of that duty of care.

Standard of care of the reasonable person

The standard of care which people are expected to exercise is that of the reasonable person. If a person fails to act reasonably and as a result causes damage to another to whom he or she owes a duty of care then that person will be negligent.

"Negligence is the omission to do something which a reasonable man guided upon these considerations which ordinary regulate the conduct of human affairs, would do, or do something which a prudent and reasonable man would not do." Alderson B in *Blythe v Birmingham Water Works* (1856).

The reasonable man is:

- the man on the clapham omnibus;

- the man who takes the magazines at home and n the evening pushes the lawn mower in his short sleeves;

- he has not the courage of Achilles, the wisdom of Ulysses or the strength of Hercules but he never puts out of

consideration the teachings of experience and so will guard against the negligence of others when experience shows such negligence is common.

A greater degree of skill is required when dealing with children but a lesser degree in an emergency

The reasonable person and skill

The reasonable man or woman does not have the skills of a surgeon or a builder unless he or she is one. If the person professes to have certain skills then the standard of care which he or she must exercise when using that special skill is that of the reasonable person with that skill.

A person who has a special skill is expected to display a standard of competence common to all persons with that skill i.e. average competency.

In *Mahon v Osbourne* (1939) a surgeon was held negligent as he left a cotton swab inside a patient which a surgeon of average competency would not have done.

A person is judged by the competency of the time (the state of the art). In *Roe v Min of Health* (1951) it was common practice to keep ampoules of vaccine in a particular liquid to keep them sterile. Following an injection it was found that the vaccine had become contaminated by the sterile liquid due to hair line cracks in the ampoules.

Held: The medical practitioner was not liable since at the time this was the usual practice and the incident revealed its unreliability.

Risk v standard of care

The standard of care must commensurate with the risk. If the risk is small then no precautions need be taken since the defendant need only guard against reasonable probabilities not fantastic possibilities.

1. Magnitude of the risk

There are two elements:

a) how likely is an injury;

b) how serious would any injury be should it happen.

Bolton v Stone (1951)

The plaintiff was hit by a cricket ball while walking along a road that passed a cricket ground, such an event was foreseeable and the cricket club owed a duty of care to passers by but considering the distance form the pitch to the road, the club had discharged its standard of care by the erection of a 7ft fence and so was not liable.

Hilder v Associated Cement Manufacturers (1961)

The plaintiff was injured by a football kicked out of a play ground while riding his motor cycle passed the ground.

Held: The owners of the ground were liable in negligence as they owed a duty of care to passers by and knew the ground was used for football and that it was likely that a ball would be kicked out. However they had not taken any precautions and so were in breach of their standard of care.

Paris v Stepney BC (1951)

The plaintiff employee only had one eye and undertook work which had a slight risk of eye injury. However the severity of the injury would be greater in his case. The employers were therefore held liable for breach of their standard of care, when his good eye was injured, in failing to provide the employee with goggles.

2. Importance of the object to be obtained

Greater risks may be taken where the act or omission is in futherance of an important objective.

Watt v Herts CC (1954)

A fireman was injured while riding in the back of a lorry carrying a jack. The lorry was not equipped to carry the jack but it was being taken to an accident where a woman had been trapped under a heavy vehicle, therefore it was held that the

object was worth the risk and the Authority was not liable.

3. Practicality of precautions

If the defendant has taken all practical measures to protect the plaintiff then he or she will not be liable. The likelihood of injury will be weighed against the cost of eradicating the risk.

Latimer v AEC (1953)

A factory floor became slippery after a flood. The defendants did all they could to get rid of all the effects of the flood but the plaintiff slipped and was injured. The plaintiff argued that the factory should have been closed.

Held the likelihood of injury was not so great as to warrant the enormous expense of closing the factory.

Res Ipse Loquitur

For a plaintiff to prove negligence he or she must show that specific acts of omissions of the defendant amounted to negligent conduct. However in certain circumstances the courts will allow a plaintiff to take a short cut when the defendant's conduct on the face of it has been so obviously negligent that the facts speak for themselves (res ipsa loquitur) and the defendant will not have to give detailed evidence on that point.

Scott v St Catherine's Docks (1865)

A bag of sugar fell on the plaintiff through the door of the defendant's warehouse. Since bags of sugar are inanimate the defendant must have been negligent unless he could offer a reasonable explanation which would show that he was not liable.

Three conditions are necessary for the maxim to apply:

1. Control - the thing which has caused the incident must be under the management or control of the defendant or his or her employees. If it can be shown that there was or a likelihood of some intervening event the maxim will not apply.

2. The accident would not have happened without negligence - It must be considered in the light of experience and knowledge. If a barrel falls from an upstairs window onto a passer by (*Byrne v Boadle* (1863)) or a vehicle strikes a person on the pavement (*Ellar v Selfridge* (1930)) then experience tells us that the occupier of the premises or the driver of the vehicle lacks proper care.

3. Absence of explanation - if an explanation of the conduce can be made then either it will show the defendant is not liable or if it shows he or she is potentially negligent the plaintiff will have to go on to prove that negligence as the maxim will not apply. *Barkway v South Wales Transport* (1950) B was killed when a bus veered across the road and fell over an embankment. B tried to raise the inference of res ipsa loquitur however the reason for the accident was a punctured tyre and therefore the maxim did not apply.

Damage

The plaintiff must show hat he or she has suffered damage which has been caused by the breach of duty of care such damage not being too remote.

Causation

The breach of duty must have caused the breach of duty of care. To assess whether it did or not the most common test is the "but for" test i.e. the damage would not have occurred "but for" the defendant's breach of duty of care.

Barnett v Kensington HMC (1969)

B, a nightwatchman, went to hospital complaining of vomiting. The duty doctor did not examine him and sent him home telling him to see his doctor in the morning. B died of arsenical poisoning.

Held: Although the doctor had been negligent B had not died as a result of that negligence. B would have died in any event whether he had been examined or not.

Cutler v Vauxhall (1971)

The plaintiff grazed his ankle due to the negligence of the defendants. This caused an ulcer which caused a varicose vein to form which the plaintiff already had a propensity for which led to an operation. The plaintiff claimed for both the injury to

his ankle and for the varicose vein and operation.

Held: He was successful in claiming for the accident but not for the varicose vein and operation because he already had a propensity for the condition and so the breach of duty of care had not caused the operation. [Lord Russell dissented saying that the operation had become a certainty because of the accident whereas otherwise it would only have been a probability i.e. but for the accident it might never have to be done.]

Remoteness

Theoretically the consequences of any conduct may be endless. The judiciary have sough to limit the liability of a defendant to reasonable bounds. Several different tests have been put forward but each seeks to have the same effect.

1. All Direct Consequences Test

A defendant is liable for all the direct consequences of his or her actions suffered by the plaintiff whether a reasonable person would have foreseen them or not.

Re Polemis (1921)

Stevedores were employed by the charterers of a ship to unload it. They negligently dropped a plank into the hold which caused a spark which caused some chemicals to ignite which caused a fire which caused the ship to be totally destroyed (£200,000).

Held even though they could not have foreseen that the ship would be destroyed by the negligently dropping of a plank they were found to be liable for all the direct consequences which included the loss of the ship.

2. Foreseeability Test

This test is now preferred. A person is liable for the consequences of his or her negligent actions suffered by the plaintiff so far as those consequences are reasonably foreseeable. (same test as for duty of care)

Wagon Mound

The Wagon Mound was moored at a wharf in Sidney Harbour. Due to the negligence of the owners oil spilt onto the water was mixed with flotsam and floated around another wharf where a ship was being repaired by welding. The oil caused the flotsam to catch fire and set light to the wharf. The owner of the wharf claimed for:

- damage to the slipways due to the spillage of oil; and

- damage by fire.

Held the foreseeability test was applied and it was held that the damage to the slipways was foreseeable and but the damage by fire was not.

Hughes v Lord Advocate (1963)

The post office left and inspection chamber open all night surrounded by paraffin lights. A boy aged 8 picked up one of the lamps and fell with it into the inspection chamber causing an explosion and burning the child.

Held the Post office were liable for the consequences of their negligence. It should have been foreseeable that a child would be injured by burning due to the presence of the lamps. The fact that it occurred in a different way than might be expected does not effect the liability. Provided an injury was foreseeable and actually occurred and that the injury was **of the same kind** as that which should have been foreseen then the defendant will be liable.

Intended Consequences

Scott v Shepherd (1773)

The defendant negligently threw a lighted fire work which blinded the plaintiff.

Held: The defendant intended to cause damage and injury and therefore was liable for the damage.

Unintended Consequences

The defendant must take a victim as he or she finds him or her. The defendant cannot seek to reduce the level of damages

by claiming that the injury would have been less or non-existant in respect of a different defendant.

Smith v Leach Brain (1962)

Molten metal negligently splashed the plaintiff's lip which caused a cancer which the plaintiff had a propensity for.

Held: The defendants were liable for all the damage that was caused.

Contributory Negligence

Before 1945 contributory negligence was a complete defence. It it could be shown that a person had contributed to his or her injuries or damage caused in part by the carelessness of another then no claim could be made against that other.

In 1945 the Law Reform (Contributory Negligence) Act allowed liability to be apportioned so that the plaintiff's damages would be reduced by the amount that the plaintiff contributed to the damage or injury.

S 1 Where any person suffers damage as a result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damages but the damages shall be reduced to such extent that the court thinks just and equitable having regard to the claimants share in the responsibility for the damage.

1. There is no age under which a child cannot be found to have been contributorily negligent. However the expected knowledge and awareness of a child of a particular age will be considered.

Yachuk v Blaise (1949)

A 9 year old boy bought petrol saying that it was for his parents whereas in fact he was going to play with it. He was badly burnt and the seller was sued for negligently selling the petrol to him.

Held: The seller alone was liable. The child was not contributorily negligent because he could to be expected to know the properties of petrol.

2. A more lenient view of contributory negligence is taken in the context of a factory where repetition, noise confusion fatigue and preoccupation dulls the employees sense of danger.

3. If a plaintiff in the agony of the moment tries to save him or herself from injury caused by the defendant's negligence and in the event causes him or herself greater injury he or she will not be contributorily negligent.

Jones v Boyce (1816)

The plaintiffs was a passenger on the top of the defendant's coach. Due to the breaking of a defective rein the coach was in danger of overturning. The plaintiff therefore jumped from the coach and broke his leg. In the event the coach was not upset.

Held The plaintiff was successful i claiming for his injuries caused by the negligence of the defendant who allowed the defective rein t be used. The plaintiff was said to have acted as a reasonable and prudent person although he had selected the more dangerous of the two alternatives i.e. to jump form the coach instead of staying where he was. He was entitled to do so in the agony of the moment and was able to recover damages.

Sayers v Harlow UDC (1958)

S went to a public toilet whilst waiting for her bus. The door lock stuck due to the negligence of the defendants and S was left with a choice of either just shouting for help or attempting to escape. After shouting for a while she attempted to escape. She climbed onto the toilet seat and was intending to climb over the cubicle door. Unfortunately the door was too high and she put her foot on the toilet roll holder which gave way causing her to fall and injure herself.

Held: She was successful in suing for her injuries as it was considered reasonable for her to attempt to escape. However her damages were reduced because it was thought she contributed to her injuries by trying to steady herself on the toilet roll holder which clearly was liable to move.

Vicarious Liability

Vicarious liability is where one person is liable for the torts of another.

The main example is where an employer is liable for the torts of an employee in the course of his or her employment.

The main reasons put forward for this liability are:

a) the employer receives the benefit of the employment and so he or she must also suffer some of the burdens when torts are committed in the employers name by employees;

b) if the employee has been negligent then the employer has been tainted with that liability by employing someone who is negligent;

c) an injured person is more likely to obtain compensation form the employer than form an employee since the employer is likely to be wealthier and better insured.

Relationship of employer and employee

The employer is only liable for the torts of the employee as distinct from an independent contractor. An employer in not liable for the torts of an independent contractor except where the employer has failed in some duty e.g. employing a competent contractor.

Distinctions between employees and independent contractors

1. The control test - under this test the distinction might be drawn in that the employer not only tells the employee what to do but also how to do it;

2. The integrated test - under this test an employee is seen as an integral part of the employers business where as the independent contractor is seen as an extra.

3. The multiple test - no one test is really effective and therefore it is a number of factors including tests 1 and 2 above as well as whether wages, tax, national insurance are paid through the employer, whether the employer has the power of dismissal.

Liability

The employer will only liable for the torts of the employee, such as negligence, if the employee is acting in the course of his or her employment. An act is deemed to be in the course of employment if it is either an act authorised by the employer or an unauthorised method of doing an act authorised by the employer. The unauthorised method must be closely connected with the authorised act. If the act itself is unauthorised then the employee is said to be on a "frolic of his or her own".

Before an employer is liable for the employee's tortious acts the employee's liability must be established first of all. Both the employer and the employee will be liable. If the employer is found vicariously liable he of she may pay the damages and the reclaim them form the employee who will almost certainly be in breach of an express or implied term of contract not to act negligently.

Course of employment or frolic of his/her own

The employer will be liable if the employee while acting in the course of his or her employment:

a) commits a tort while using an authorised method of doing an authorised act; or

b) commits a tort while using an unauthorised method of doing an authorised act.

In all other cases a tort will be committed while the employee was on a "frolic of his or her own" and the employer will not be liable.

Course of employment

Century Insurance v NRTB (1942)

A petrol lorry driver negligently lit a cigarette whilst transferring petrol from the lorry to the garage tanks and caused an explosion.

Held: The lorry driver's employers were vicariously liable for the damage caused because the lorry driver was doing an authorised act although in an unauthorised manner.

Limpus v London Omnibus Co (1862)

A driver negligently obstructed a rival bus and thereby caused an accident.

Held: the driver's employers were vicariously liable because the employee was doing an authorised act although in an unauthorised manner.

Rose v Plenty (1976)

A boy was injured due to the negligence of a milkman while helping the milkman on his rounds.

Held: The milkman's employers were vicariously liable as the milkman was doing an authorised act although in an un authorised manner.

Poland v John Paw

An off duty employee injured a boy while stopping a theft from his employer.

Held: The employers were vicariously liable as the employee had implied authority to stop theft from his employer.

"Frolics of their own"

Hilton v Thomas Burton

An employee was killed due to the negligent driving of a fellow employee in the employer's vehicle while they took an unauthorised break from work.

Held: The employer was not vicariously liable as they were acting outside the course of their employment.

Beard v London Omnibus Co (1900)

A bus conductor moved a vehicle and negligently caused an accident.

Held: The employer was not vicariously liable as the bus conductor was not authorised to drive vehicles and so was acting outside the course of his employment.

Irvine v Beans Express

An employee gave an unauthorised lift to a passenger in the employer's vehicle. The passenger was injured due to the negligent driving of the employee.

Held: The employer was not vicariously liable as the employee was doing an unauthorised act and so was not acting in the course of his employment. The act of picking up the passenger is a separate act from the authorised one of delivering. Therefore so far as the giving of the lift was concerned he was on a frolic of his own.