

Negligence

While other fields of tort law lie quiet and peaceful, like backwaters or side-streams of a busy river, negligence law rushes on. Litigation drives the development of the law. Every case has the potential to decide a legal controversy; most of them narrow, perhaps unremarkable; but each case represents both the fuel that keeps the process moving and the product of its movement.

Negligence law is one of the legal companions to an economy that is always changing in its particulars and which features an enormously complex division of labour. One of the ways that our separate activities are co-ordinated into a coherent whole is by requiring each of us to submit to a set of general legal principles that guide each of us in our individual activities. Negligence law and its close companion contract law contain some of those principles.

We start in the middle of the life-story of Common Law negligence law with the case of Donoghue and Stevenson, the now famous 1932 decision of the House of Lords. Why start in the middle? Sometimes it is the best vantage point for faster understanding. From there you can look both back to see what was and ahead to see what will be. The view is better from the middle.

We will examine each legal element of the law of negligence; but for the moment I want to focus on a concept called '**Duty of Care**'. In order for one person to be legally liable to a second person for the damage caused by negligent activity, the first person must be under a duty to take care with respect to the second person. How does the law draw the shape and boundaries of that duty of care? Sometimes it helps to think graphically. Imagine (Star Trek like) that as you walk around you project a kind of "duty field" and anyone who falls within that field is owed a duty of care by you. But in part we are using a metaphorical idea of physical space. Some people owed a duty of care will be a very long way from you. Others may be physically close. The shape of the 'duty field' will depend on the activity that is engaging your duty to take care.

Before Donoghue and Stevenson

Standing in the stream of legal history at 1932 we look back. What do we see. The issue of Duty of Care was not new to the judges who decided **Donoghue and Stevenson**. It's just that before that case, they decided the issue in a different way. Pre-1932 judges looked at the individual circumstances of the case and then compared those circumstances with previously decided cases. If the relationship between the negligent party and his victim and the form of negligence was comparable to earlier cases where a duty of care had been found then a duty of care would be found in the case before the court. This ad hoc approach is how the law generates principle. It sometimes seems as if humans always start with the general principles and then derive how they should behave in the particular instance from those principles. But, particularly in the case of complex institutions and human phenomena (and law is certainly one of those) the process is actually closer to the reverse. We copy what works even if we do not fully understand why, even if we do not understand completely what constitutes success. When we have enough experience over time in a field, we begin to discern the principles that describe what we have been doing. Then we can use those newly identified principles to assist us in going forward. In formal terms the process is inductive and not deductive.

Donoghue and Stevenson

Mrs. Donoghue claimed that her friend bought a bottle of ginger beer at a little cafe in Paisley, Scotland and shared the ginger beer with her. She drank some and then, when she poured the bottle out, the remains of a decomposed snail made its famous appearance. In fact Mrs. Donoghue was never required to prove these alleged events because the case climbed all the way to the House of Lords on issues of law with the expectation that the matter would be returned to Scotland for trial. But after the House of Lords decision, and before any trial could be held, Mr. Stevenson died (one suspects his last breath might have been a sigh of relief) and the case was settled out of court. In response to Mrs. Donoghue's claim, Mr. Stevenson had argued (as would have been expected on the basis of the law before this case) that he (as the ginger beer manufacturer) owed no duty of care to Mrs. Donoghue or anyone in

like position. His duty, he argued, was described by contract. He owed a duty to the retailer, to whom he had sold the ginger beer. Maybe, if it could be argued that the retailer was the agent of the purchaser, he might owe a duty to the purchaser, but certainly not her friend. In all this Mr. Stevenson took the legally conventional position. Then the House of Lords broke new ground. First it decided that manufacturers owe a duty to ultimate consumers to take reasonable care to prevent defects in products that will cause injury (to persons or things). Secondly, it formulated the general principle that would thereafter serve as the great guide to whether or not a duty of care existed.

Either of these aspects of the result would make the case important. The combined effect made the case famous. Looking at these principles one at a time:-

1. That manufacturers owe consumers a duty of care.

Pick up an ordinary wooden pencil and look at it. By modern standards it is an exceedingly simple product. But consider for a moment how many contractual relationships have gone into its manufacture; the lead, the wood, the paint, the eraser, the metal band holding the eraser. Contract after contract, all of which neither the retailer nor the consumer were privy to. Is the retailer in a position to ensure that the paint is lead (as in Pb) free? Can retailers ensure the quality of manufacture? The decision to hold manufacturers to a duty of care to consumers has the feel of inevitability to it now - as in, '*this had to happen sooner or later*'. The early scope of tort and contract law reflected a society when contractual relations were simpler, less anonymous; when contractual chains were far shorter; when distribution was local; when the manufacturer was also the distributor, wholesaler and retailer. When we look back we must be careful not to give too much weight to that sense of inevitability however. We can never know with precision the results of a path not taken. Perhaps the law might have evolved quite differently. But it didn't and so perhaps all we can say is that the House of Lords addressed a problem that was real and increasingly pressing. There was pressure for a decision like **Donoghue and Stevenson**.

2. You have a duty to your 'neighbour'.

It is for this second principle that **Donoghue and Stevenson** remains perhaps best known. Instead of simply finding one more discrete instance where the courts would find a duty of care, **Donoghue and Stevenson** generated the articulation of a general principle that could be used to assist future courts and (equally important) solicitors who are advising their clients about potential liability. Here is the oft-quoted passage from Lord Atkin's judgment:-

*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 that are called in question.***

Put in those terms, manufacturers of ginger beer should have little difficulty keeping in mind that they owe a duty to people who might drink their product.

Donoghue and Stevenson is worth reading. Not simply as a lawyer would tear through it, looking for the legal principles for which the case might be argued to stand, but also as a historical document that provides great insight into the then understanding of the economic engine and what might cause it to splutter or stall. We are so used to riding the great wave of economic activity that we simultaneously create that it seems natural for us to be concerned about what will cause the wave to slow or falter. But there was a time not long ago in western history when this kind of thinking would have seemed bizarre. Our sense of living in a society in a state of perpetual rapid change is historically new. The Great Depression of the 1930's taught people then about the consequences to a civilization which lives riding the

wave, when that wave crashes. The judges in **Donoghue and Stevenson** can be read and understood as being worried that they may be damaging a phenomenon that they do not fully understand but whose importance is without a doubt. Given the events the economic events of 2008, that combination of partial insight and uncertainty has a familiar feel to us.

Donoghue and Stevenson shone a light on the path ahead that was sufficient to show the way. For the remainder of the century negligence law grew by leaps and bounds as the formula for estimating 'Duty of Care' was applied.

That is not to say that all legal questions have been answered or ever will be answered. A society in constant rapid evolution means new fact patterns will be generated all the time for which past case law will have a partial but not complete answer. If there is enough in doubt to argue about the there is enough for a trial and therefore a new decision which will incrementally grow the law.

Analysis of a negligence case

Your client has come into your law office with a story which is bizarre but, truth being stranger than fiction, checks out as true. Here it is:-

A passenger was trying to get onto a train as it was moving out of the station. He got on the train with the help of a railroad employee pushing him on and another employee on the train pulling him in. But in the process he dropped a parcel containing fireworks which fell onto the track and exploded knocking over some weigh scales at the other end of the platform which fell on your client. She wants to sue the railroad company.

You took the case to trial and lost. The Court found that that your client was beyond the range of foreseeable danger and that therefore the defendant railroad company owed your client no duty.

The facts and result are in fact those of a well known American case, **Palsgraf v. Long Island Railway. Co.** about duty of care. We will come

back to Palsgraf because it is a good fact pattern for illustrating how slippery the analytic principles tend to be in negligence law.

The Analytical Principles

1. Duty of Care

It doesn't matter how negligent a person was, or how much damage or injury he caused (a loaded term); if that person did not owe a Duty of Care to the Plaintiff (the party who claims damage and has brought suit) then the Plaintiff cannot succeed in the law suit. Post-Donoghue, what is the test for Duty of Care? If it was your duty the law would put it this way:-

You must take reasonable care to avoid acts or omissions which one can reasonably foresee would be likely to injure a neighbour. A neighbour is a person who is so closely and directly affected by your act that you ought to have them in contemplation (as a category of persons, if not the precise individual) at the time of your act or omission.

So in **Palsgraf** terms, should the railroad company have had in contemplation that by jostling a passenger around that passenger might drop something which might somehow get on the track and cause some damage that would injure someone at the other end of the platform - or some such similar question? Note that if, in asking the question, we posited the theoretical possibility that every passenger might loosely be carrying a potentially explosive bundle of fireworks then we are probably fixing the level of generality too low and therefore improperly protecting the railroad company from liability. If on the other hand we suggest that the railroad company ought to be able to foresee any and all consequences of physically assisting passengers, however unlikely the consequence, then we have abandoned Duty of Care as a limiting principle and we are instead saying that people ought to be able to foresee anything all the time with respect to anybody.

Duty of Care as a liability limiting principle was further developed in

another House of Lords case in 1977. In *Anns v. Merton London Borough Council* the Court explicitly held that there ought to be a two stage test. First the reasonable foreseeability/neighbour test; then second, the court was to ask if there were any considerations that might additionally limit or reduce the scope of the duty or the class of persons to whom that duty was owed; except that if the first question was answered in the affirmative, then it fell to the defendant to show why the damaged plaintiff should none-the-less remain uncompensated.

This test proved to be an expansionary one; it expanded the scope of liability for negligence. In 1984 the test was adapted in Canada in the Supreme Court of Canada case of *Neilson v Kamloops*.

The high court (SCC) stuck with the Neilson principle through the balance of the twentieth century. Then in 2001 a retrenchment took place. In two companion cases, *Cooper v. Hobart* and *Edwards v. Law Society of Upper Canada* the Court reformulated the test for Duty of Care as follows:-

i) has a duty of care been previously recognized in an analogous case. If so, presumptively a duty exists in the case under consideration:

ii) If the case is new ground in the sense that there is no analogous prior decision then a three stage test is to be applied:-

a) Was the damage reasonably foreseeable?

b) Was the relationship between the plaintiff and the defendant sufficiently close as to be "proximate"? (Even if the damage was foreseeable, should the defendant have been concerned that such damage might occur to one of this class of persons?) **

c) Are there policy or societal reasons that ought nonetheless to prevent liability.

** There is a lot of academic writing about whether ii) a) and ii) b) are really two principles at all. In law as in other highly abstract endeavours, you will

sometimes not discover that a distinction was illusory until at the end of the long mental hike you end up at the same place as you would have done if you had taken the other route. Respecting this issue, it is sometimes said that one cannot really consider what is foreseeable damage without considering who might be damaged and that therefore a) and b) collapse into one principle.

If we climb to 20,000 feet and look down in space and time what might we say. Donoghue was the court's declaration that the history of discrete findings of a duty of care had reached the stage that the court could look at all its prior cases and formulate a general principle that represented the discovered wisdom arising from those cases. Since Donoghue, the courts have discovered that at the margins of liability Donoghue does not accurately describe our legal universe (the formula does not produce the result that we want or intend) and so we must add another limiting discretion to the court's power to prevent an expansion of liability that would cause unwelcome results. We should not be surprised by this. In law, as in physics, the principles that we generate are not the rules of the legal universe. They are, instead, the rules for our best and latest model for what we think is going on. Our models are never completely accurate in all circumstances.

What is it that I want you to take from our look at Duty of Care? On a case by case basis the courts have tried to fashion a principle that would answer for each of us, '*To whom do we owe a duty to be careful not to cause harm as we go about our lives?*'. No answer to this question has proven fully satisfactory. But there can be no doubt that the question must be continuously asked and answered, even if our answers prove problematic at the margin.

I am separately attaching a copy of:

Neilson v. Kamloops;

Cooper v. Hobart

Edwards v. Law Society of Upper Canada

We are about to take up Standard of Care but before we do we will take up the subject of 'Pure Economic Loss', because it so well illustrates the need

for a restrictive principles to co-exist alongside the Donoghue expansionary principle in the matter of 'Duty of Care'.

Pure Economic Loss

The clearest example of the fact that the Donoghue and Stevenson principles are not enough to fully deal with the problem of Duty of Care is where the damage alleged is 'pure economic loss'. You will remember from our look at Contract Law the example of the purple house. We will modify the facts and use the example again. Harry had his house painted purple - bright purple - from the roof to the ground. His neighbour Bob complains that the value of his house has fallen on account of Harry's unusual choice of house colour. Other neighbours also complain to Bob that their houses have been reduced in value too, once they see Bob complaining. Will Harry have to compensate them? The answer is no; but the reason that it is so is not obvious. When we ask was Harry's conduct negligent, we often define conduct as being negligent by reason of the very fact that it harms someone else. So if harm were the sole issue then Harry was indeed negligent. Was the damage reasonably foreseeable? Indeed it was. But the difficulty is that our every act may have an adverse economic effect on someone somewhere. If the test was, 'thou shalt not cause harm to thy reasonably foreseeable neighbour' then all of us would be embroiled in countless lawsuits all the time.

The law's response is to limit duty of care such that 'pure economic loss' is not generally compensable. Or to put it another way, if all you have suffered is 'pure economic loss' then you will not be successful in your law suit. In order to get a feel for what 'pure economic loss' is, it is useful to say what it isn't. Tort suits pay damages for physical injury to persons or property (by property I mean both land and buildings and things - cars, iPods, garden gnomes etc). So if your house is physically damaged by the negligence of another then you may sue for the reduction of value caused by that damage.

There are exceptions to the rule that 'pure economic loss' is not compensable. One of those exceptions is where a person (a corporation is a 'legal person') is giving advice knowing that it will be relied upon. 'Pure economic loss' may be compensable where it arises from negligent advice,

which the advisor knew people, even people not privy to a contract for advice, were going to rely upon. So be careful Mr./Ms. Stockbroker - which will lead us to the next topic which is **Standard of Care**. So before we leave Duty of Care, in summary; Duty of Care is a concept that seeks to limit the scope of our liability to pay damages for the harm that we do to others in the pursuit of our own goals and activities. At the margin it is not always clear whether we wish to encourage the activity in question by finding no duty of care or discourage it by making people liable for harm done to others.

Standard of Care

When we raised the example of the stockbroker who might have a duty of care to those harmed by his/her advice ('My shares went down in value Buster and I'm suing you!') it might have occurred to you that tort law might make life oppressive for stockbrokers. Don't people have a right to be wrong? Does anyone know what the market is going to do with any certainty? You are right. Life would be intolerable for stockbrokers and many others if negligence was defined as the simple fact of being wrong, as in mistaken. Negligence requires more than being mistaken. Thus in all fields of endeavour, in order that a person be liable to pay damages, it is not enough that they caused injury to person or property or caused economic loss, the conduct must be found to be negligent. The standard of care is that of '**the reasonably prudent person in the circumstances**'

Let me give you some examples.

1. I am driving along, at or below the speed limit, paying attention, when a pedestrian jumps off the sidewalk in front of my vehicle and I hit the pedestrian despite the fact that I brake hard and immediately.
Seems obvious doesn't it, that I should not be held liable because there was nothing that I could have done or should have done to prevent the accident.
2. Same scenario except there is black ice on the road and but for the black ice I would have been able to stop in time.
Now things are not so clear. I did not know there was black ice there but should I have known. That might depend on whether there was black ice

elsewhere on the road that I should have noticed; or perhaps I should have noticed that while I was doing the speed limit, other vehicles on the road were going significantly less than the speed limit. Shouldn't I have slowed down until I figured out why the cars approaching me were going slowly, especially since the difference between good and bad driving is so often a question of foresight.

3. A Surgeon operates on my back and instead of making things better the surgery leaves me in worse shape.

Now things are going to get complicated. Medical Negligence is a complex field of law. Medicine is part science, part art. It is a field in which doctors are required to exercise judgment, based on imperfect information. People are much more complicated than machines and the same procedure performed on person A may produce a very different result when performed on person B. Medicine is a field where the benefits are obvious but risk of adverse results cannot be reduced below a certain level. Furthermore some high risk procedures are necessary if life or a decent quality of life is to be saved. Who wants a surgeon holding a scalpel with his/her hand shaking because the thought was ever present, "If I make a mistake I will be sued for all that I am worth!". So mistakes of judgment get made, and surgical errors occur and people get injured or die because of those errors and the doctor is not liable simply because mistakes were made. If you want your family to receive cash as a consequence of your death (whatever the cause) buy life insurance. But to succeed in a medical negligence suit you must show that the doctor who caused your injury/death failed to act as a reasonably careful and prudent doctor practicing in whatever medical specialty is in issue. At trial then you will call an expert (another doctor) who will testify that the procedure followed was not reasonable or prudent by the standards of the profession. The doctor that you are suing will call an expert who will say that the procedure followed was acceptable and that the unfortunate result was one of those things. You can readily see why medical malpractice trials are sometimes described as being 'a battle of experts'. In summary; Negligence law requires each of us to be reasonably careful and prudent and if the negligence occurs from an event arising from a specialized field then we will be held to the standard of a careful and prudent practitioner in that field.

Cause

It must never be forgotten that even if the Defendant was shown to be negligent (failed to meet the standard of care) and even if the Defendant had a duty of care towards the Plaintiff and even if the Plaintiff suffered injury, the Plaintiff must still prove that it was the Defendant's negligent conduct that caused the injury. Sometimes this is simple enough; often it isn't.

To go back to the car hitting the pedestrian example:- you will readily see that such an accident may be in part the fault of the pedestrian and in part that of the driver. Suppose the court decides that the pedestrian has suffered injuries which warrant an award of \$100,000.00 in damages. If the Court goes on to find that the pedestrian was 50% at fault for the accident then the pedestrian will only receive 50% of the damages (\$50,000.00).

In medical negligence cases the question of cause can become very complicated. There may be multiple explanations for the patient's unfortunate condition. Or the first doctor's error may have been correctable by the second doctor who, it is alleged, failed to do so. In the last example how does the court resolve the issue. The 'last clear chance' principle is often invoked. Whoever had the last clear chance to put things right may be held liable for what went wrong. But of course, if the last doctor in the chain was not negligent in trying to put things right but the patient outcome was poor, then it may be the doctor who caused the problem in the first place who bears the brunt of the matter and has to pay damages.

Lest some of you are considering medical school and are concerned about the legal terrain, I should point out two matters. First, doctors carry medical malpractice insurance so when an allegation of malpractice is made and a suit is commenced, the insurance organization steps in and appoints counsel. Only very good counsel, who have specialized in this field of law, are retained for this purpose. Second, the insurance organization for Canadian doctors is a fierce outfit. It never pays people to go away. It only pays when it is convinced the claim has every likelihood of succeeding if

the matter goes to trial. In the result medical malpractice claims are not lightly undertaken.

On the subject of both tort and contract claims I should point out an issue of legal procedure which has a profound effect on how litigators conduct civil suits. In our major trial courts (B.C. Supreme Court in this province) ours is a 'loser pay' system. That means that who ever loses the trial must pay the court expenses of the winning party. These 'Court Costs' as they are known, can be a very substantial some of money. A 'loser pay' system forces every litigant to take the prospect of going to trial seriously. The question is never simply, "Will I win?" it is also "How much will I have to pay out if I lose?". Thus prudent risk management is an essential part of a civil litigator's skills.

Remoteness

The same question that naturally arises in contract disputes, is present in tort claims too. 'Which consequences of my negligence should I be compelled to pay damages for?'. And the answer is the same too. 'You must pay damages arising from the consequences that were reasonably foreseeable'.

In this course we must strike a balance between breadth and depth. We could spend two semesters without difficulty studying tort law alone. In fact if you chose to go to law school you would study tort law throughout your first year there. In Hist.Pols 258 we must move across a lot of legal terrain, pausing occasionally to study iconic cases that may give us a feel for the fabric of the law as a whole. We are about done with Negligence but before we leave there are two matters that should be the subject of comment:-

1. The Government as the negligent party.

Modern government is so powerful that it is the elephant whenever it is in the room. It takes determination and a real commitment to the rule of law to force the government to play by something like the same rules that bind the rest of us. We are never more than partially successful at this but, to put matters philosophically, the effort is an important part of what we mean by a free society. Still and all, the government will always be a

special player because it controls law-making machinery (the legislature) and can therefore set the legal rules that will determine how it and we will fare in litigation.

There are two constitutional levels of government in Canada. They are the Federal Government and the Provincial Governments. Municipal governments are statutory creations of provincial legislatures. A municipal government, such as the City of Prince George, has all the power that the B.C. Government has granted by statute. Much of that power is contained in a statute called the Local Government Act which used to be called the Municipal Act ('more words covers less action' is a deep unarticulated principle of government).

Local governments are granted statutory power to make by-laws. The local government decision to make or not make a by-law has important consequences in negligence law. To state the matter simply:- If the local government uses its power to create a by-law that, by its terms, imposes some duty of action upon the local government (for instance, building inspection) then the government will be held liable to the plaintiff citizen if it exercises that duty in a negligent fashion (arising from the manner in which it acts or its failure to act). But it cannot be held liable if no duty has been created. Thus a local government can be held liable for negligent building inspection. But if there is no bylaw imposing a duty to inspect buildings then the local government cannot be held liable for failing to exercise its power to legislate. Government power attracts no liability in negligence. Government duty does. As usual, at the frontier of our legal understanding, things can be uncertain and uncertainty attracts the clarifying process of litigation. That is what *Kamloops v. Nielsen* is about. Having created a building inspection by-law, did the City of Kamloops thereafter have a duty to enforce, in court, a 'stop work' order issued by its building inspector. The by-law says nothing like "... the City shall take all reasonable steps to enforce a 'stop work' order in the B.C. Supreme Court." So if the City does have a duty to seek enforcement of its building inspector's orders in court, that duty must arise by implication from the duty that has been created to inspect. A bare majority of the SCC (Supreme Court of Canada) found that the City did have an implied duty to seek enforcement of its building inspector's orders. What is going on here? Granted the City has a power to go to court if it wants to. But why

should the SCC be in the business of forcing it to do so? The answer lies in the concept of reliance. When government establishes a quality control agency (which is what building inspectors are) and it is reasonably foreseeable that people will come to rely on that agency to impose its certificate of quality then the government must follow through. It cannot do half the job and mislead us into thinking we are receiving the benefit of inspection when in fact we are not. A description of a building inspector must be something more decisive than, "He came, he inspected, he wondered off!", if the by-law framework is to be of any use to us at all. In blunt terms the Court is saying, " Either do the job or don't!" .

2. Strict Liability

The credo of negligence law is 'Be careful as you go or you will pay damages if you hurt someone'. But in some situations, often those that might be described as inherently dangerous, the law imposes a higher standard. Where the law imposes 'Strict Liability' then the law's credo is something like, 'The situation is fraught with danger, so if someone gets hurt you must pay.'. Negligence law is a more modern development than strict liability. Before the concept of negligence gained traction strict liability was more often the rule. So in Canada 'strict liability' is often found where negligence (the younger, more dynamic face of law) has failed to occupy the field. Some examples of legal terrain where strict liability still applies:-

i) where something escapes from your land and does damage (water, cattle etc);

ii) Fire that was started deliberately and which escaped;

iii) Inherently dangerous animals (If your tiger eats somebody it will be no use to say, " It's never done that before. He must have annoyed it." .

One of the reasons that negligence law has now occupied much of the legal terrain is because the legal concepts are so easily capable of adjustment to meet different legal challenges. Thus negligence law would handle the 'tiger case' by raising the standard of care to take account of

the fact that tigers are dangerous. Being anything less than extremely careful would be unreasonable simply because its a tiger.

Next up we look at some of the most significant cases in the law of negligence with a particular emphasis on BC Courts and the SCC

SDMW