

The tort of negligence is a cause of action that arises when a defendant breaches the duty of care owed to the plaintiff. This article will discuss the elements required to establish negligence.



A. INTRODUCTION

Liability in negligence refers to the accidental misconduct of a defendant, which is more than mere recklessness but less than intentional harm. Negligence requires the defendant to have been careless in maintaining the required standard of care owed to the plaintiff.

The modern day tort of negligence was shaped through the landmark case of *Donoghue v Stevenson* [1932] (United Kingdom Scottish case). In this case, the plaintiff became sick after drinking a ginger beer that had decomposing remains of a dead snail. The plaintiff could not sue the manufacturer for breach of contract (which was how damages were claimed at the time) because her friend had purchased the drink for her. Instead, the plaintiff claimed that the manufacturer was negligent and breached the duty of care owed to his consumers. After initially failing, the plaintiff succeeded on appeal where it was held that a duty of care was owed by the manufacturer to the ultimate or eventual consumer.

In the *Donoghue v Stevenson* case, it was established that the plaintiff needs to prove the following fundamental elements:

1. The defendant owed the plaintiff a duty of care;
2. The defendant breached that duty of care through negligent conduct;
3. The defendant's breach caused the plaintiff actual damage; and
4. The damage was not too remote from the breach.

B. DUTY OF CARE OWED

The first element requires the plaintiff to prove that the defendant owes the plaintiff a duty of care. This element is not an issue where the relationship between the defendant and plaintiff falls within an established duty category, such as:

- Doctor and patient;¹
- Employer and employee;²
- Manufacturer and consumer;³
- Motorist and other road users/pedestrians;⁴ and

¹ *Rogers v Whitaker* (1992).

² *McClellan v Tedman* (1984).

³ *Donoghue v Stevenson* [1932].

⁴ *Chapman v Hearse* (1961); *March v Stramare* (1991).



- School and pupil.⁵

Where the relationship does not fall within an established category, the plaintiff is required to prove that a duty of care should be imposed. To establish a duty of care in novel situations (ie the situation has never been heard before) consideration needs to be paid to the:

1. Reasonable foreseeability of the plaintiff (ie a reasonable person would recognise it may be expected that the negligent behaviour would cause harm);
2. Identification of salient features (ie features such as the vulnerability of the plaintiff or reliance of the plaintiff on the defendant, which create a sufficient relationship giving rise to a duty of care); and
3. Absence of any law or policy that would preclude a duty of care.

C. BREACH OF DUTY

Under section 5B of the [Civil Liability Act 2002 \(NSW\) Australia](#), the plaintiff must prove that the defendant was negligent because:

1. The risk was foreseeable;
2. The risk was not insignificant; and
3. A reasonable person in the same position would have taken precautions against the risk.

C.1. FORESEEABLE RISK

The plaintiff must first establish that the risk of harm was reasonably foreseeable before it can be assessed that a reasonable person would have taken precautions against that risk. It has been held that a foreseeable risk is one that a reasonable person in the position of the defendant would consider and not dismiss as being 'far-fetched or fanciful'.⁶

C.2. RISK WAS NOT INSIGNIFICANT

Under this element, the plaintiff must prove that the likelihood of an injury occurring was more than 'not far-fetched or fanciful'. As such, the plaintiff must establish that the defendant's behaviour

created a reasonably foreseeable risk that was not insignificant of causing harm.⁷

C.3. REASONABLE PERSON TAKING PRECAUTIONS

The final element to establish a breach of duty (known as the reasonable person's test) requires the plaintiff to demonstrate that a reasonable person in the position of the defendant would have taken precautions to prevent that harm or injury from occurring. To determine whether a reasonable person would have taken precautions, the courts consider several factors such as:

- The likelihood of the harm occurring even if precautions had been taken;⁸
- The seriousness of the harm;⁹ and/or
- The burden of having to take precautions to prevent the harm.¹⁰

The reasonable person's test is an objective test, where the reasonable person is held to the standard of a good citizen.¹¹

D. CAUSATION

The plaintiff must prove on the balance of probabilities that the defendant's negligent behaviour actually caused the plaintiff to suffer harm. This is achieved through establishing that:

1. The negligence was a necessary condition of the loss suffered;¹² and
2. It is appropriate for the defendant's liability for the negligent conduct to extend to the harm caused.¹³

D.1. NECESSARY CONDITION

The loss of harm suffered must be proven to be a necessary condition of the defendant's negligence. This is established through the 'but for test', which asks whether the plaintiff would have suffered loss but for the defendant's negligence.

⁵ *Commonwealth v Introvigne* (1982).

⁶ *Wagon Mound (No 2)* [1967].

⁷ *Romeo v Conservation Commission of NT* (1998).

⁸ *Civil Liability Act 2002* (NSW) s 5B(2)(a).

⁹ *Ibid* s 5B(2)(b).

¹⁰ *Ibid* s 5B(2)(c).

¹¹ *Hall v Brooklands Club* [1933].

¹² *Civil Liability Act 2002 (NSW)* s 5D(1)(a).

¹³ *Ibid* s 5D(1)(b).



The 'but for test' is a hypothetical question whereby the court considers what would have happened if the defendant had not acted negligently. If the answer to the 'but for test' is 'yes, the plaintiff would have suffered damage even without the negligent conduct', then the defendant is not liable.

D.2. SCOPE OF LIABILITY

This element questions what the scope of the defendant's liability should be. In other words, should the defendant be liable for all of the loss suffered by the plaintiff or only a part of the loss suffered. To determine the defendant's liability, the courts look at other factors (in addition to the 'but for test') to consider what the appropriate scope of liability is. For instance, this could include the court considering:

- Whether there was an intervening event occurring after the defendant's negligent act that was the real cause for the plaintiff's harm; or
- Whether there were multiple causes for the plaintiff's harm and not just the defendant's negligent act.

E. REMOTENESS

The final element required for the tort of negligence is proving that the damage was not too remote from the breach. This is a question about the extent of damage that the defendant is liable for. To determine scope of liability, the court considers whether or not and why responsibility for the harm should be imposed on the defendant.¹⁴ To establish that the damage is not too remote, the plaintiff must prove that:

1. The damage was reasonably foreseeable (ie there was real risk that would occur to the mind of a reasonable person);¹⁵ and
2. The kind of damage was foreseeable (even if the extent of seriousness of injuries was not).¹⁶

F. CONCLUSION

There are several elements that need to be established to be successful in a claim of negligence. Most of these elements require consideration of the mindset of what a reasonable person would think or do.

For more information on related matters, you may wish to read the following articles:

1. [**Personal Injury Law in New South Wales:**](#) Discusses the definition of personal injury at common law and under the *Civil Liability Act 2002* (NSW) and how damages can be claimed.
2. [**Court Actions in Tort:**](#) Discusses civil actions in court seeking compensation for losses suffered due to negligence, trespass to land, nuisance, deceit and defamation.
3. [**Medical Negligence:**](#) This article seeks to explain what medical negligence is and what making a medical negligence claim entails. Additionally, it addresses the time limit in which a claim must be made and who can make a medical negligence claim.

¹⁴ *Civil Liability Act 2002* (NSW) s 5D(4).

¹⁵ *Wagon Mound (No 2)* [1967].

¹⁶ *Hughes v Lord Advocate* (1963).

Comasters can act for clients in starting or responding to a claim of negligence.

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