NATIONAL OPEN UNIVERSITY OF NGERIA

SCHOOL OF LAW

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> *be impeded in the pursuit of his own wants and desires. Hence the administration of the law involved a weighting of those conflicting interest on the scale of social value, with a view to promoting a balance that will minimize friction and be most conducive to the public good.*

So tort law is seen as an instrument through which society is regulated. In that way it must take into account social and economic practicalities. An example of this is the tort of trespass to the person. Technically, a traveler might commit such a tort on a fellow traveler when they bump together on a crowded train. But since the conduct is a result of people living in crowded societies and engaging in activity that is socially and commercially productive, namely train travel, the law will not (without some extra element such as intention) give redress. The activity is purely a by-product of modern industrial life.

Leaving those broad considerations to one side, more specific policies can be identified. In the first place, there is the function of tort to **compensate** the plaintiff. It is not to punish the defendant. This means that the focus is on the loss suffered by the plaintiff. If there is no loss, there is no tort. So even if, for instance, the defendant was guilty of very reckless driving but luckily the plaintiff was not injured, the courts, in administering tort law, will not punish the defendant. This is the function of the criminal law. In fact, the plaintiff will not succeed at all, or if he or she does, the damages will be minimal.

In looking to compensate the plaintiff, the law traditionally has focused on **individual responsibility** based on fault. This notion arose in part out of religious influences on the law which looked at moral culpability of the parties. This approach also satisfied the aim of deterring anti-social behaviour by the defendant and serve as a warning to others. This was a by-product of the fundamental object of compensating the plaintiff.

While fault is still the fundamental principle of our tort law it is gradually being regarded as out-model. Sometimes the degree of loss suffered is out of all proportion with the degree of fault. Also it is not always easy to pinpoint actionable fault. In many cases, the accident causing the harm arises out of our busy industrialized society and perhaps it is necessary for society to accept some part of the burden of loss. This concept is known as **loss spreading.** Here, the law, rather than attaching liability to the wrongdoer, focuses on the person who is best able to spread the loss. The system is already at work through insurance. The best example of loss spreading is the system of worker's compensation. If a person is injured at work, irrespective of whose fault it is, the worker is compensated by the employer. However, the

employer will not pay the damages out of his/her own pocket; they carry compulsory insurance. The insurance company pays but is able to recoup through higher premiums which are borne by all its clients. Those clients meet the higher premiums by charging higher prices for their goods or services. So eventually the public pays.

In some areas of tort law there is a hybrid system that combines both fault and loss spreading. The best example is compulsory third party personal injury insurance. Here a plaintiff injured in a motor vehicle accident has to show that the defendant was at fault but (ordinarily) the defendant does not have to pay for the damages. They are met from an insurance fund to which all vehicle owners contribute.

As a rule, courts do not overly take into account the policy of loss spreading or insurance when reaching their decisions and so these factors are more likely to influence legislatures when reforming a particular area of law.

SELF ASSESSMENT EXERCISE

1. Define the term “tort”
2. Give five examples of types of tort

3.3 Elements, Tests, Factors, Rules

3.3.1 Causes of Action

A **cause of action** is a specific law or principle of law that enables the citizen to obtain some redress from the courts. The law regulates only through specific causes of action such as negligence or breach of contract.

3.3.2 Elements

For a plaintiff to be successful, it is necessary to ensure that all requirements of the cause of action have been met. To aid in this task, it is common for lawyers to express the cause of action, or its underlying principle, in the form of **elements**. The point is that each element must be met before the cause of action is established.

The term ‘cause of action’ is most commonly used where the common law is operating. However the same approach can apply to a civil claim based on a statute. Again, you will find it necessary to break the statute up in to its constituent parts (elements) all of which must be satisfied before the claim is met.

3.3.3 Test/Indicative Factors

As we proceed with our lessons, frequent reference will be made to elements but another term that will arise will be **test.** Quite frequently, the application of an element is not clear on its face and it may be necessary to resort to further law to explain the content of the element or to provide some sort of measuring stick. Here, two possibilities present themselves:

(a) The courts may have laid down a test for the application of the particular element. A test might also be used to describe the prerequisite or limits of the elements and forms part of the element. A good example of this is found in relation to negligence. As you will see, one of the elements of negligence is the need to establish that the defendant owed to the plaintiff a duty of care. But how do we measure the duty of care? The answer is by the application of the test of 'reasonable foreseability', that is, was the injury or damage resulting from the defendant's act reasonably foresee-able? [Actually as you will see later on this module there are two tests for the duty of care but only one is mentioned here as an example of the word "test". We look in detail at negligence presently and more information if given on the law. For the moment, we are only concerned with the mechanics of the operation of the law.

(b) The other possibility is that the courts do not lay down a test but leave it to each case to determine if the element in question is met in a particular case. The courts may provide examples that assist in the application of the element but they are no more than examples. These examples are called **indicative factors** and unlike elements, they do not have to be satisfied. A good example of indicative factors is to be found in the first element of *Amadios* case. You will recall that before a person could establish unconscionable conduct they had to show that they were under a 'special disability'. The court did not lay down a test for this element but rather give some examples of what might amount to a 'special disability' such as old age, sickness, illiteracy or lack of education. The list is neither exhaustive nor does it mean that even if one of these examples is met then the element is satisfied. It is still a matter for the court to decide in the particular case whether the element is met.

Quite often, later cases provide more and more illustrations of the application of the element which paints a more detailed picture of the indicative factors (this is one role of precedent) but even so the factors are still just examples.

Where the element is quite clear on its face then it may be a simple task for the court to apply the element to the facts of the case as where the defendant knows of the plaintiff's special disability. Here all the court is concerned with is whether as a matter of fact the defendant has this knowledge. No legal tests or indicative factors are required. You will be told when tests or indicative factors are applicable but one pointer is the presence of a general or vague word (or concept) that could be open to interpretation such as 'duty of care' or 'special disability.

3.4 Rules

The other word that lawyers often use when describing the law on a subject is **rule.** This is a general word, which usually refers to requirements that either are of universal application or have to be met in particular circumstances. Rules are not like elements that have to be met as part of a cause of action. They are developed from precedent cases that have had to deal with particular fact situations that come before the courts and for this reason they usually apply in specific circumstances. Rules appear frequently in contract law and as you study that area rules will become more familiar to you.

4.0 CONCLUSION

Do we have a law of tort or a law of torts or mere "shreds and patches"? What is your view and the basis! What is of more relevance is the meat in the pie – the features or elements of torts; namely fault, damage, causation, policy.

5.0 SUMMARY

In this unit, you have studied Tort Law as a broad outline. Try to remember the features that are reasurable, common to torts., Tort claims call for adjustment of competing interests. In this regard, the deciding factor may range from the function of tort to compensate the plaintiff, and individual responsibility based on fault. The concept of loss spreading impacts on decisions but the court do not admit.

We also talked about causes of autum and attempted to break them into elements. To he successful, all elements must meet some elements and contain a test which is the legal measuring stick for the element. Some elements rather than having a legal test have indicative factors which are examples for guidance only. We noted that Rules are legal requirements that have to be met but they are more specific than elements, which are concerned with courses of action

6.0 TUTOR-MARKED ASSIGNMENT

Distinguish Law of Tort from Law of Contract and the criminal Support your answer with illustration and decided cases

7.0 REFERENCES/FURTHER READINGS

Fleming J. (1992). *The Law of Tort.* 8th Ed. Sydney: The Law Book Company Ltd.

Gardiner B. (1991). *Outline of Torts.* Sydney: Butterworth.

UNIT 3 SPECIFIC TORTS: NEGLIGENCE

CONTENTS

1.0 INTRODUCTION

Negligence as a separate tort emerged only in the 19th Century. Prior thereto, it was basis of other action like nuisance and trespass. It was subsumed under the action on the case. With the growth of science and technology and mechanical inventions and increase in negligently inflicted injuries, coupled with abolition of forms of action, negligence became a separate tort with its distinct form of principles. Today, it is the most important tort.

Street has noted that more people suffer damages from careless acts of others than from intentional ones. Rereprectably, it is not the law that a person suffering damages as a result of careless conduct can sue in tort. The reason is that careless acts do not necessary constitute the tort of negligence.

According to Lard Wright, "negligence, in strict legal analysis means more than headless or careless conduct, whether in omission or commission: it properly connotes the complex concept of duty, break and damage thereby suffered by the person to whom the duty was owing"

In this and the next units, we shall be considering these three elements of the tort of negligence duty, break of duty and ensuing damage

2.0 OBJECTIVES

On successful completion if this unit, you should be able to:

- identify the elements of a duty of care in negligence actions and apply those elements to a given fact situation
- illustrate breaches of the standard of care in negligence
- describe the relevance of questions of causation and remoteness of damage where the plaintiff has been found to be negligent
- identify the specific rules applying to negligent mis-statement and professional negligence
- identify the situation where two defences to negligence actions, namely contributory negligence and voluntary assumption of risk, will apply.

3.0 MAIN CONTENT

3.1 Negligence

This is certainly the most important tort. You have already learnt of the celebrated negligence case, *Donoghue v Stevenson* [1932] AC562 – the case about the snail in the ginger beer bottle. The law of negligence has grown in its use and important since that case. Everyday, new cases are testing the extent of liability in negligence such as hotel to its patrons or cigarette companies to consumers and those in the vicinity of smokers.

3.1.1 Elements of Negligence

There are four **elements** which must be established for an action in negligence to be successful. These are:

- Duty of care;
- Breach of the duty
- Loss caused by the defendant's breach; and
- Damage suffered is not too remote.

Duty of Care

The objective of the first element is to establish if a duty of care is owed to the person suffering damage. The **test** for duty of care has two parts:

a. reasonable foreseeability of harm; and
b. proximity of relationship.

(a) Foreseeability

For a test of foreseeability of harm the starting point is the 'negligence principle' of Lord Atkin in *Donoghue v Stevenson*. Notice how widely

the principle is stated. As Turner mentions, foreseeability is an **objective** test. This means that it is not who the particular defendant would think might be injured by his or her actions, but who a reasonable person in the defendant's position would think would be injured by the defendant's actions.
The precise loss or injury to the plaintiff need not be foreseen, more the possibility of loss or injury. Also as long as the plaintiff belongs to a class of persons who the defendant should have realized was at risk (e.g. consumers) then the reasonable foreseeability requirement will be met.

Three points to notice about the test of foreseen ability:

- It is viewed through the eyes of the defendant, or more correctly, a reasonable defendant.

- The test is objective as distinguished from a subjective one. This distinction arises quite frequently in the law. The objective test is a means of trying to find a norm of behaviour which is acceptable to society. To do this you ask what a 'reasonable' driver, repairer, manufacturer (as the case may be) would have done in the particular case. Contrast a subjective test which would enquire into whether the particular defendant thought their behaviour was acceptable. You can imagine the variation that would occur in this situation and it is not permitted in negligence cases. In fact you will find the subjective test is rarely applied by the courts.

- To pass the test of reasonable foreseeability then the defendant does not have to be the best (driver, repairer, manufacturer etc) – just a reasonable one.

(b) Proximity

While reasonable foreseeability is general in nature, the second test, proximity, focuses more on the actual relationship between the parties. There are three aspects of proximity: physical, circumstantial and causal but only one needs to be present to establish proximity.

Jaensch v Coffey (1984) 155 CLR 549 considered whether a duty of care was owed in circumstances giving rise to nervous shock.

In this case the plaintiff's (Mrs. Coffey's) husband (a police constable) was knocked off from his motor bike by a car which (it was admitted) was being negligently driven at the time. The husband sustained quite serious injuries and was taken to hospital. Mrs. Coffey (the plaintiff) was not at the scene of the accident but was informed by police of it and was taken to the hospital, where she saw her husband in great pain in the

casualty ward. The plaintiff waited while her husband was operated upon and after his return from the theater she was told to go home. His condition was described as 'pretty bad'. Early next morning she was advised that he was in intensive care and a few hours later she was asked to come to the hospital as soon as possible because his condition had deteriorated. The husband survived but remained seriously ill for some weeks.

About six days after the accident the plaintiff showed symptoms of a psychiatric illness. The condition, which was an anxiety depressive state, worsened and she was admitted to a psychiatric ward. At the trial, the defendant admitted he was negligent in his driving but denied that he owed a duty of care to the plaintiff. The High Court held that such a duty was owed.

The major judgment was delivered by Deane J from which the following propositions arise:

1. Besides reasonable foreseeability it is necessary to consider the notion of proximity in determining the duty of care.

2. In nervous shock cases in the past it has been necessary to place limits on the ordinary test of reasonable foreseeability by requiring for example, that a duty of care will not arise unless risk of injury in that particular form (i.e. nervous shock) was reasonably foreseeability. This is still the law. Another limitation which had been placed was that the plaintiff had to be within the area of physical danger. This is no longer the case.

3. However, some limitation must be set for the duty of care and it was that the psychiatric injury must result from contact with the injured person either at the scene or is aftermath. Contrast say after-accident care which occurs after immediate accident treatment and which results in a psychiatric illness. The latter is not actionable.

4. Deane J categorized nervous shock resulting from the accident or its aftermath as falling within **causal proximity** although he did admit that it could also satisfy the requirements of **physical proximity** in the sense of space and time. It was casual because the psychiatric illness results directly from matters which themselves form part of the accident and its aftermath. There is a clear link between the illness and the accident.

SELF ASSESSMENT EXERCISE 1

Differentiate between the foreseeability and proximity tests in Negligence.

Re-examination of Proximity

Historically, proximity was developed by the Court to provide an extra control test on the duty of care when they where considering new area of negligence. The reasonable foresseability test worked satisfactorily for the accepted classes of negligence such as motor vehicle accidents, consumer protection cases, industrial injuries and the like – especially where physical injury was involved. However, when a new area was being considered, such as nervous shock to relatives, it was agreed that the foreseeability test was too broad. So Deane, J. formulated the element of proximity as discussed above.

Gradually since *Jaensch v Coffey,* however, there has been a re-evaluation of the proximity test. The problem is that there is disagreement among members of the Court and considerable uncertainty exists. However, until there is a definitive statement by the Apex Court, lower Courts are continuing to apply the element of proximity and so shall we.

Finally, you should be aware that while foreseeability and proximity are separate tests you will find that quite frequently they overlap. For example, if a driver causes a car accident because they failed to remain on the right hand side of the road it is reasonably foreseeability that they would collide with a car traveling in the opposite direction causing injury to the other driver. This event would also satisfy the element of proximity because of the physical and causal aspects of the collision and the resulting injury.

Breach of the Duty of Care

Having established the first element, duty of care, the next question is to determine if there has been breach of the care.

The essential point here is whether the defendant has breached that duty by failing to exercise the care expected of a '**reasonably prudent person'.** Part of the test is to ask how a reasonable person would have responded to that risk. Turner points to various **indicative factors** that go to what is the appropriate response to the risk, namely:

- Probability of risk;
- Gravity of the harm;
- Who carries the burden of eliminating the risk; and
- The utility of the conduct in question.

Note the cases which are referred to in connection with each of these 'indicators' of the standard of care expected of a reasonable prudent person in the defendant's position. You should note also that these factors are not elements of whether the standard of care has been reached, but are guide which may or may not apply in a situation to determine the standard of care.

Causation of Loss and Damages

The law must have some means by which the right to recover damages flowing from a negligent act, is limited. It does this in two ways: by imposing the requirement of **causation** and **remoteness.** Suppose that an executive is driving to the airport to catch a plane to lodge a tender for a lucrative government contract. On the way to the airport, he is involved in a collision with another driver and his car is extensively damaged. Assume it was the other driver's fault. The executive misses his plane, fails to lodge the tender in time and does not win the contract. As a result, his company becomes insolvent and many employees lose their job. Should the employees be able to sue the other driver for their loss of wages? Most people would say, 'that is not fair on the driver to impose that burden'. But how does the law draw the line? This is where the tests for causation and remoteness come in. We consider the issue of remoteness in a moment but first let us look at causation.

As Turner points out – the basic test of causation is the '**but for**' test. In other words, 'but for' the negligence in question the loss would not have been sustained. This test allows the facts to be tested to see if the negligence really causes the loss. Put another way, the court must be satisfied that there is a causal between the negligence and the loss. Suppose in the situation above it can be established that the executive would not have missed the plane anyway because he left the office too late, that the tender would not have won the government contract even if it was lodged in time or that the company would have become insolvent because of the recession, whether or not it obtained the contract in question. In each of these cases a claim by the employees or the company itself would not survive the 'but-for' test. There is no causal link between the negligence of the other driver and the loss or wage. So one way to test for causation is to see if there are any intervening factors operating between the negligence and the loss. In the above example, the lateness of the executive in leaving to catch the plan, the fact that the tender would not have been successful in any event, the economic recession are all intervening events that break the chain of causation.

Turner provides an example of where the plaintiff failed to satisfy the causation requirement, namely, *Cummings v Sir Williams Arrol & Co Ltd [1962] 1 ALL ER 623.*