

▲ Readings and Questions

TOPIC 8

THE LAW OF TORT

Readings

For all of the topics that follow, a readings book will be supplied.

The Law of Tort (especially the law of negligence, and negligent mis-statement)

Reading: Turner, C, *Australian Commercial Law*, LBC, 1999, ch 28, pages 823-843

Introduction

Prior to the early decades of this century, the law was loath to impute liability for negligent acts for fear of the ‘floodgates principle’, namely indefinite legal liability to an indefinite class of people for an indefinite time. Thus, liability for negligence, and, in particular, negligent advice, took a long time to be recognised. In English law, that has now changed. Negligence can now arise in a variety of situations, whether or not the adviser is in the business of giving opinions or not. It may happen in the context of advice given in a construction project or a project to do with operations, such as logistics or defence needs. The modern approach is that the categories of negligence are never closed. Let us begin with the general rules of negligence.

What is a tort?

A tort is a civil wrong that allows remedies (usually compensation – referred to as ‘damages’) for harmed caused, whether it’s intentional or not, in circumstances that have not arisen from contract.

The tort of negligence

Definition: the neglect of ordinary care and skill to any person to whom the ‘tortfeasor’ (defendant) owes a duty to observe care and skill, and the injured person (plaintiff) suffers loss.

The following points are taken from the readings:

1. The duty of care especially in relation to the tort of negligent misstatement

- Positive infliction
- Liability for omissions
- In cases of pure economic loss

2. Breach of the duty of care

- Probability of risk of injury
- Gravity of the harm
- Burden of eliminating the risk
- The utility of the defendant's conduct
- The 'reasonable person' test

3. Causation: Actual loss caused by the breach

4. Remoteness of damage: the loss must have been foreseeable

5. Defences to an action in negligence:

Of course, if the plaintiff cannot prove all of the above things, on the balance of probabilities, (that it was more likely than not), then the claim fails. But even if the things required to be proven can be proven, there are 2 defences available to defendants:

- Contributory negligence – a partial defence that enables apportionment of liability
- Voluntary assumption of risk – a total defence.

'Vicarious' liability

The principle of vicarious liability means that, in some circumstances, an employee will implicate his or her employer by their negligent actions. That is, if an employee or person acting under the contractual instructions of another does a negligent act, then the person injured can sue the employer or principal in negligence too. The test is whether there is evidence that the negligent party was at the time of the negligent act, standing in the stead of his or her employer or principal.

Negligent misstatement

There are two High Court cases that are useful. The first is *San Sebastian v Minister Administering Environmental Planning and Assessment Act* (1986) 162 CLR 340.

Find it reported at

<http://www.austlii.edu.au/cgi-bin/disp.pl/au/cases/cth/high%5fct/162clr341.html?query=title+%28+%22san+sebastian%22+%29>

While it is possible to win a claim against a person who, or authority that, makes a negligent statement, the court needs proof that the statement was relied upon. In *San Sebastian*, a developer, relying upon a development plan released for the Woolloomooloo area of Sydney, bought up land, and lost money when the plan was abandoned. The court found that the developer could not establish that the author of the plan had made actual representations, and thus his claim failed.

The second case is *Esanda Finance v Peat Marwick* (1997) 142 ALR 750.

Find it reported at

<http://www.austlii.edu.au/cgi-bin/disp.pl/au/cases/cth/high%5fct/unrep305.html?query=title+%28+%22esanda+finance%22+%29>

This case examines the liability of auditors. Relying on audited accounts of a company called Excel, Esanda lent them money. It lost that money when Excel collapsed. The court rejected the argument that Peat Marwick was liable. Yes, they owed a duty of care to exercise skill and judgment, but they owed no duty in the absence of evidence that they had induced Esanda to rely upon the report.

Summary

The tort of negligence is a powerful weapon in the hands of any person who can prove evidence of a breach of a duty of care that caused foreseeable loss. But the evidence is not always there, especially when it comes to proving, on the balance of probabilities, that a certain statement (later seen to be a misstatement) was made. But the law appears to be expanding in this field to compensate losses more broadly.

Questions

8.1 (*Negligence generally*) A fire on a Marine Department boat causes the death of a sailor (Reid). The fire was caused by a person (Smith) working as a refueller for an independent contractor, XYZ Fuels. Smith failed to take adequate precautions in fitting new fuel hoses at the time, as required under a contract of service. The costs associated with the loss of life include the grieving of loved ones and a range of financial costs, direct and indirect, to the families. Reid's family sues the Marine Department, Smith and XYZ Fuels for negligence in relation to the losses sustained by Reid's family. (Ignore, for the moment, any action for breach of contract.)

Explain what Reid's family will need to prove and their legal arguments

(200 words)

8.2 (*Negligent misstatement*) Jing is in the business of investment as a stock broker. On different occasions he provides advice to his clients. Comment on the following advice: Debra is planning to invest her life savings (\$500,000) in R & L Pty Ltd, a company listed on the Stock Exchange. It is her first investment as a young businesswoman. "I will give you my advice", said Jing, "but you have to understand that I hold no responsibility for its accuracy and I want you to sign a waiver clause to that effect". Jing checks R & L Pty Ltd, and finds that they have declared no dividends for 5 years but, over lunch with a friend, Jing decides, on the friend's advice, that it's an OK investment. He advises Debra accordingly. Debra makes the investment and loses all of her money when the Asian financial collapse occurs.

Can Debra sue Jing successfully for the negligent advice? What would she have to argue?

(200 words)

