



**Bull, Houser
& Tupper** LLP

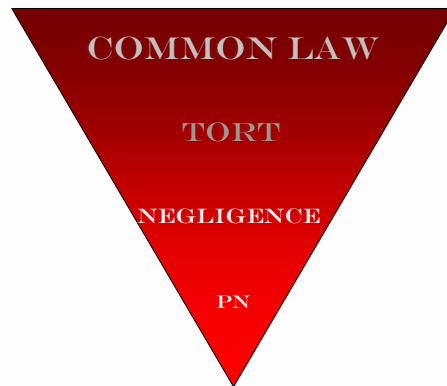
Professional Negligence

Jeremy T. Lovell
Bull, Houser & Tupper LLP

Overview

- Professional negligence law in context
- Negligence law in general
- Duty of care
- Standard of care
- The individual and the firm
- Other issues

Professional Negligence in Context



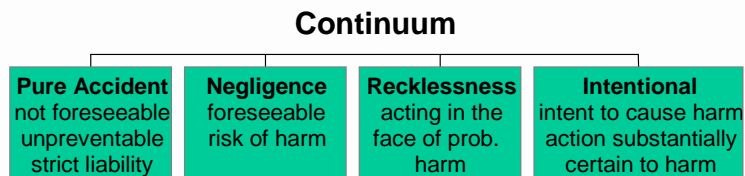
The Common Law

- “Judge-made” law – each decision forms a precedent, which must be followed
- System adapts easily to new facts
- Contrasts with statute law and civil codes
- Tort law is a branch of the common law

Torts

- A “civil wrong”, other than a breach of contract, committed by one person against another.
- Redressed through an award of damages.
- Distinct from criminal law, where the state punishes the wrongdoer.

Accidental, Intentional & Negligent Conduct



Strict liability is rare. The rule in *Rylands v. Fletcher* is an example.

Examples of Torts

- Assault
- Battery
- Intentional Infliction of Nervous Shock
- False Imprisonment
- Trespass
- Nuisance
- Defamation
- Negligence

Negligence

The categories of negligence are never closed.
(Donoghue v. Stevenson, [1932] A.C. 562 (HL))

Negligence is the most important field of tort liability today, as it regulates most activities in modern society. Therefore, as soon as some new type of activity emerges, it is accommodated within the general framework of negligence principles.

One of the prime functions of negligence law is compensation for accident victims who are victims of someone else's faulty conduct. Another objective of negligence law is to serve as a deterrent by reducing the frequency of accidents. Negligence law encourages people to behave carefully in order to avoid liability.

3 Elements of Negligence

There are three essential elements that a plaintiff must prove in order to establish negligence:

- the defendant owed the plaintiff a *duty of care*;
- the defendant breached that duty of care through action or inaction, which fell below the *standard of care*;
- the defendant's breach caused the injury to the plaintiff.

Duty of Care

- You must take *reasonable* care to avoid acts or omissions which you can *reasonably foresee* would be likely to injure your neighbour.

The case of *Donoghue v. Stevenson* has been one of the most important decisions in our modern legal system.

Discuss

The question of who is one's "neighbour" was answered by the House of Lords to be persons who are so closely and directly affected by one's act that he or she ought reasonably to have them in contemplation as being so affected when directing his or her mind to the acts or omissions which are called in question. Before *Donoghue*, negligence required a direct relationship between the wrongdoer and victim. For the reasons expressed in *Donoghue*, this seemed unfair. After *Donoghue*, there was a concern to limit the scope of the neighbour principle so that liability was not indeterminate.

Duty of Care for the Professional

- Like the maker of ginger beer in *Donoghue*, carelessness in the advice given by a professional can result in harm to others...

Hedley Byrne v. Heller

Hedley Byrne v. Heller is the landmark case of *professional* negligence. It was also a decision of the English House of Lords, but many years later, in 1964. In *Hedley Byrne*, the defendants were bankers who received inquiries, indirectly, from the plaintiffs (who inquired through their own bank) about whether a certain company had a good credit rating. The defendant bank said that the credit rating was fine when, in fact, it was not. The plaintiff lost £17,000. The court held that when a professional makes a statement within his or her area of expertise, and knows that the listener will rely on that statement, then the professional has a duty to take proper care in making the statement. If the listener follows the advice and suffers damage, the professional may have to compensate the listener for the damage. This applies not only to advice given in a formal setting, such as the office, but may also apply to informal conversations, such as at a cocktail party.

A basic understanding of the law of negligence is important for all professionals. Virtually every lawsuit filed against a design professional contains allegations of professional negligence.

Duty of Care for the Professional

- Like the make of ginger beer in *Donoghue*, carelessness in the advice given by a professional can result in harm to others...
- ...including persons with whom the professional does not directly deal.

One of the ways the courts had limited the expansion of liability in negligence following *Donoghue* was to bar recovery for pure economic loss where there was no direct relationship between the parties. Pure economic loss is that which does not arise from some injury to person or physical damage to property.

Winnipeg Condo:

In *Winnipeg Condominium Corporation No. 36 v. Bird Construction Co.*, the Supreme Court of Canada considered whether contractors and design professionals involved with the construction of a condo could be liable to persons who had bought units, subsequently from the original owners, for pure economic loss.

The defendants were involved in the construction of an apartment building, which, some years later, was turned into a strata property and sold to the new strata owners. After it was turned into a strata, the owners observed that the cladding on the building was inadequately installed. The owners sued the contractor, engineers, and architect in negligence to recover the cost of re-cladding the building. The defendants argued that this was pure economic loss and the plaintiff could not recover against them, because they had no direct relationship when the work was done.

The SCC ruled that contractors and design professionals could be liable to subsequent purchasers when it can be shown that it was foreseeable that a failure to take reasonable care in constructing the building would create defects that pose a substantial danger to the health and safety of the occupants.

Standard of Care

- Objective
- Different for different classes of persons
- Professionals are held to the standard of persons of ordinary competence, practicing the profession at that time

Standard of Care for the Professional

- To exercise the skill, care and diligence which may reasonably be expected of a person of ordinary competence, measured by the professional standard at the time

Standard of Care for the Professional

- To exercise the skill, care and diligence which may reasonably be expected of a person of ordinary competence, measured by the professional standard at the time

Standard of Care for the Professional

- To exercise the skill, care and diligence which may reasonably be expected of a person of ordinary competence, measured by the professional standard at the time

Standard of Care for the Professional

- To exercise the skill, care and diligence which may reasonably be expected of a person of ordinary competence, measured by the professional standard at the time
- Perfection is not the standard
- Be warned, however, that through contractual representations, an engineer may be held to a higher standard of care than he or she would be otherwise

Allegations of professional negligence against engineers usually arise (perhaps not surprisingly) out of either design work or field reviews.

With respect to field reviews, an engineer must do as many as he or she feels is necessary to be reasonably sure that the work is being carried out in accordance with the design. In *Coast Hotels Ltd. v. Bruskiwich*, the BCSC had to assess liability for a failed plumbing system. Both the contractor and the mechanical engineer were sued. The court found that the bulk of liability rested with the faulty workmanship of the contractor, but did assess the engineer with a portion of liability for failing to conduct adequate field reviews. The engineer and the contractor had worked together in the past and the court found that the engineer put too much faith in the contractor's ability. Field reviews were not done at appropriate times.

With respect to design work, clues as to what constitutes the applicable standard of care can be found in the various codes and regulations that apply to the industry.

Standard of Care for the Design Professional

- Sources of professional standards for engineers
 - B.C. Building Code
 - *Engineers and Geoscientists Act*
 - B.C. Electrical Code

- Compliance with codes is not necessarily sufficient to meet the standard of care.
- Failure to comply with codes will likely constitute a failure to meet the standard of care.

Causation

- Did the allegedly negligent conduct result in injury or damage to the plaintiff?

Duty to Warn

If, at any time, an engineer becomes aware of an error in his or her design, or that of others, which error gives rise to an issue of public safety, he or she must warn others of the error.

- Owners
- Authorities having jurisdiction
- Users

Failure to warn may result in professional negligence.

Failure to warn also contravenes the Code of Ethics.

Liability of the Person and the Firm

- In the first instance, the firm will be liable and not the individual engineer
- This changes if the plaintiff can establish that he or she relied on a particular engineer's skill or representations – in this case, both the individual and the firm will be liable

In the 1993 decision in *Edgeworth Construction Ltd. v. N.D. Lea & Associates Ltd.*, the Supreme Court of Canada was asked to consider whether individual engineers, who had sealed tender drawings, and their firm could be held liable for losses allegedly suffered by a contractor, who said that the drawings were negligently prepared.

The court held that the firm, but not the individual engineers, could be liable to the contractor.

Important points:

1. As with *Donoghue v. Stevenson*, here is a case where there is no direct relationship between the plaintiff and the defendant. The firm could be liable, because, applying the *neighbour principle*, it ought to have known that the contractor, in bidding on the project, would reasonably rely on the information contained in the tender drawings.
2. The court in this case said that the mere application of one's seal was not enough to create a duty of care between the individual engineer and the injured party. The affixation of a seal was an attestation that a qualified engineer had prepared the documents, but the seal was not considered a guarantee of accuracy.

Other Issues

- Contributory negligence
- Joint and several liability
- Limitation Periods

Limitation Periods

- The law on limitations is complicated.
- Basically, claims in negligence or contract must be made within:
 - Two years, for personal injuries or damage to property; or
 - Six years, for other claims.
- N.B. The clock begins to run only when the plaintiff should reasonably have become aware of the claim.

Professional Negligence

Jeremy T. Lovell
Bull, Houser & Tupper LLP



**Bull, Houser
& Tupper** LLP