

## NEGLIGENCE

Negligence implies absence of intention to cause the harm complained of. It means careless or unreasonable conduct. But merely unreasonable conduct without damage is not actionable though it may be a punishable offence. Such conduct when followed can cause harm to another gives rise to liability for negligence. It may be pointed out that negligence may mean a mental element in tortious liability or it may mean an independent tort.

Basically there are two theories about the negligence in the law of tort. They are:

1. Subjective Theory- According to this theory of Salmond, negligence denotes 'State of mind'. This state of mind varies from person to person and the person is liable only for his intentional acts only and not otherwise. It involves a personal element. If a person has acted to the best of his ability then he cannot be held liable for negligence.
2. Objective Theory – According to this theory of Pollock, negligence is a type of conduct which a reasonable man can avoid with a reasonable degree of care and caution..

Negligence has been recognised as independent tort by the House of Lords in the case of **Donoghue v. Stevenson**<sup>1</sup> in 1932. This case treats negligence as a type of conduct and not a particular state of mind. In this case, A purchased a bottle of ginger beer from a retailer for the appellant, a lady friend. Some of the contents were poured in a tumbler and she consumed the same. When the remaining contents of the bottle were poured into her tumbler, the decomposed body of a snail floated out with her ginger beer. The appellant alleged that she seriously suffered in her health in consequence of having drunk a part of the contaminated contents. The bottle was of dark opaque glass and closed with a metal cap, so that the contents could not be ascertained by inspection. She brought an action against the manufacturer for the damage.

One of the defences pleaded by the defendants was that he did not owe any duty of care towards the plaintiff. The House of Lords held that the manufacturer owed her a duty to take care that the bottle did not contain any noxious matter, and that he would be liable on the breach of the duty. According to Lord Atkin: "A manufacturer of products, which he sells in such a form as to show that he intends them to reach the ultimate consumer in the form in which they left him with no reasonable possibility of intermediate examination and with the knowledge that the absence of reasonable care in the preparation or putting up of the products will result in any injury to the consumer's life or property, owes a duty to the consumer to take that reasonable care."

The tort of negligence is therefore, complex and fluid because in determining the liability in negligence, issues like duty, care, causation, remoteness of damage are to be analysed in any given case.

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<sup>1</sup> (1842) 10 M

## **ESSENTIALS OF NEGLIGENCE: -**

1- DUTY TO TAKE CARE: One of the essential conditions of liability for negligence is that the defendant owed a legal duty towards the plaintiff. The following case laws will throw some light upon this essential element.

In *Grant v. Australian Knitting Mills Ltd.*,<sup>2</sup> the plaintiff purchased two sets of woolen underwear from a retailer and contacted a skin disease by wearing an underwear. The woolen underwear contained an excess of sulphates which the manufacturers negligently failed to remove while washing them. The manufacturers were held liable as they failed to perform their duty to take care.

2-DUTY TO WHOM: *Donoghue v. Stevenson*<sup>3</sup>, carried the idea further and expanded the scope of duty saying that the duty so raised extends to your neighbour. Explaining so as to who is my neighbour LORD ATKIN said that the answer must be “the 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 which are called in question”.

3-DUTY MUST BE TOWARDS THE PLAINTIFF- It is not sufficient that the defendant owed a duty to take care. It must also be established that the defendant owed a duty of care towards the plaintiff.

In *Bourhill v. Young*<sup>4</sup>, the plaintiff, a fishwife, alighted from a tram car. While she was being helped in putting her basket on her back, a motor-cyclist after passing the tram collided with a motor car at the distance of 15 yards on the other side of the tram and died instantly. The plaintiff could see neither the deceased nor the accident as the tram was standing between her and the place of accident. She had simply heard about the collision and after the dead body had been removed she went to the place and saw blood left on the road. Consequently, she suffered a nervous shock and gave birth to a still-born child of 8 months. She sued the representatives of the deceased motor-cyclist. It was held that the deceased had no duty of care towards the plaintiff and hence she could not claim damages.

4- BREACH OF DUTY TO TAKE CARE: Yet another essential condition for the liability in negligence is that the plaintiff must prove that the defendant committed a breach of duty to take care or he failed to perform that duty.

In *Municipal Corporation of Delhi v. Subhagwanti*, AIR 1966 SC 1750; a clock-tower in the heart of the Chandni Chowk, Delhi collapsed causing the death of a number of persons. The structure was 80 years old whereas its normal life was 40-45 years. The Municipal Corporation of Delhi having the control of the structure failed to take care and was therefore, liable.

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<sup>2</sup> 1935 AC 85

<sup>3</sup> 1932 AC 562

<sup>4</sup> 1943 AC 92

5. CONSEQUENT DAMAGE OR CONSEQUENTIAL HARM TO THE PLAINTIFF: The last essential requisite for the tort of negligence is that the damage caused to the plaintiff was the result of the breach of the duty. The harm may physical harm, i.e. harm to body; Or harm to reputation; or harm to property, i.e. land and buildings and rights and interests pertaining thereto, and his goods; or economic loss; and mental harm or nervous shock.

In *Achutrao Haribhau Khodwa v. State of Maharashtra* (1996) 2 SCC 634; a cotton mop was left inside the body by the negligence of the doctor. The doctor was held liable.

#### **DEFENCES FOR NEGLIGENCE:**

1- CONTRIBUTORY NEGLIGENCE: It was the Common law rule that anyone who by his own negligence contributed to the injury of which he complains cannot maintain an action against another in respect of it. Because, he will be considered in law to be author of his wrong.

2- ACT OF GOD OR VIS MAJOR: It is such a direct, violent, sudden and irresistible act of nature as could not, by any amount of human foresight have been foreseen or if foreseen, could not by any amount of human care and skill, have been resisted. Such as, storm, extraordinary fall of rain, extraordinary high tide, earth quake etc.

3- INEVITABLE ACCIDENT: Inevitable accident also works as a defence of negligence. An inevitable accident is that which could not possibly, be prevented by the exercise of ordinary care, caution and skill. it means accident physically unavoidable.