

4. Negligence

General principles

- two meanings of the word “negligence”:
 - the absence of reasonable care according to the circumstances (*Fahrlässigkeit*)
 - independent tort consisting of the breach of a duty of care which causes damage to the person to which the duty is owed
- development
 - 19th century: breach of duty of care recognised as basis of liability under particular circumstances
 - *Donoghue v Stevenson* (1932): tort of negligence recognised as independent tort, general requirements set out by Lord Atkin, general guideline as to when a “duty of care” arises
 - *Hedley Byrne v Heller* (1964): House of Lords awards damages in case of pure economic loss
 - *Anns v London Borough of Merton* (1978): broad two-stage-test, applicable without recourse to precedent
 - *Murphy v Brentwood District Council* (1991): *Anns* overruled, two-stage-test recognised as being too broad
- general requirements:
 - (1) existence of a duty of care
 - (2) breach of the duty
 - (3) damage caused by the breach

Duty of care

- The defendant must owe a duty of care to the claimant: “A man is entitled to be as negligent as he pleases towards the whole world, if he owes no duty to them” (*Le Lievre v Gould* [1893] 1 QB 491 (497) per Lord Esher)
- Circumstances under which a duty of care arises cannot be defined exactly: “The categories of negligence are never closed” (observed by Lord Macmillan in *Donoghue v Stevenson*).
- Possible approach: the “neighbour principle” identified by Lord Atkin in *Donoghue v Stevenson*:
 - persons who are so closely and directly affected by defendant’s act (= **relation of proximity**)
 - that he should reasonably think about their being affected when acting (= **reasonable foreseeability**)
 - It must also be **just and reasonable** to impose a duty of care on the defendant.
- A duty of care is easier to establish in cases concerning physical injury or damage to property. The establishment of a duty is much more difficult in cases concerning pure economic loss.
- Ultimately the decision whether a duty exists is a matter of policy.

- Case study: *Spartan Steel v Martin*

Economic loss

- *Donoghue v Stevenson* (and earlier cases) establish that the breach of a duty causing physical injury or damage to property is actionable.
- damages for (pure) economic loss?
 - majority vote in *Candler v Crane Christmas & Co* (see Materials I 3 a): not recoverable under tort of negligence, but powerful dissent by Lord Denning
 - compare § 823 I BGB
 - *Candler v Crane Christmas* overruled in *Hedley Byrne v Heller*
- *Hedley Byrne v Heller*:
 - tort liability for negligent misstatements even without contractual relation between the parties
 - problem: limits of liability, solution: test of proximity
 - duty of care arises when defendant assumes responsibility towards claimant
- category 1: liability for negligent misstatements, contrast *Hedley Byrne v Heller* and *Caparo Industries v Dickmann*
- category 2: liability for professional misconduct, see *White v Jones* [1995] 2 AC 240
- category 3: liability for causing or for not recognising building defects, see *Anns v Merton London Borough Council*, *Junior Books v Veitchi*

Psychiatric illness

- mere grief or emotional distress is not actionable
- Often the problem is not the absence of physical damage, however, but the potentially unlimited range of claimants.
- Contrast *Bourhill v Young* [1943] AC 92 (no duty of care to unrelated person not present at site of accident) and *Mc Loughlin v O'Brian* [1983] AC 410 (liability towards wife and mother of victim)
- *Alcock v Chief Constable of South Yorkshire* (Hillsborough disaster case): two categories
 - primary victims = persons participating in the event (e.g. rescuers or persons endangered themselves): duty of care (+) if physical damage reasonably foreseeable
 - secondary victims = persons just witnessing the event: duty of care only (+) if close proximity between victim and claimant and temporal and local proximity to the event.

Breach of duty

- Negligence = “the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or something which a prudent and reasonable man would not do” (*Blyth v Birmingham Waterworks*, 156 ER 1047, 1049 (1856))

- negligence (+) when defendant exposes claimant to unreasonable risk of harm, factors to be taken into account:
 - magnitude of risk
 - social desirability of action
 - cheapest cost avoider/cheapest insurer
 - defendant's cost of avoiding risk
 - claimant's possibility of avoiding risk
- personal circumstances of defendant, e.g. professionals required to attain standard of reasonably competent member of the profession

Causation and remoteness of damage

- The defendant's act must have caused the damage. Test: If the damage would not have happened but for the fault then the fault is the cause of the damage ("but-for test")
- Causation must be proved. Awarding a percentage of the damage proportional to the probability of causation is not permissible.
- The defendant's liability must be kept within reasonable bounds → damage must not be too remote
- Test (established in *The Wagon Mound*): was the damage reasonably foreseeable by the defendant?
- Neither the manner of occurrence nor the type of damage need to be precisely foreseeable.
- Liability is not excluded where the damage is higher than reasonably foreseeable, e.g.: full liability for physical injury even if exacerbated by pre-existing physical or psychological abnormality ("egg-shell skull" rule).