4. Negligence

General principles
- two meanings of the word “negligence”:
  - the absence of reasonable care according to the circumstances (\textit{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
  - \textit{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
  - \textit{Hedley Byrne v Heller} (1964): House of Lords awards damages in case of pure economic loss
  - \textit{Anns v London Borough of Merton} (1978): broad two-stage-test, applicable without recourse to precedent
  - \textit{Murphy v Brentwood District Council} (1991): Anns overruled, two-stage-test recognised as being to 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” (\textit{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 \textit{Donoghue v Stevenson}).
- Possible approach: the “neighbour principle” identified by Lord Atkin in \textit{Donoghue v Stevenson}:
  - persons who are so closely and directly affected by defendant’s act (= \textit{relation of proximity})
  - that he should reasonably think about their being affected when acting (= \textit{reasonable foreseeability})
  - It must also be \textit{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’Brien [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 psychical abnormality ("egg-shell skull” rule).