

# ***BUSINESS LAW GUIDEBOOK***

## ***SECOND EDITION***

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### **CHAPTER 8: THE LAW OF NEGLIGENCE IN THE BUSINESS WORLD**

#### **TEST YOUR KNOWLEDGE**

##### **1. Outline the elements of the tort of negligence.**

#### **ANSWER**

The elements of the tort of negligence are:

- a duty of care
- a breach of the duty of care
- damage (suffered by the plaintiff).

##### **2. Give an example of a fact situation that may give rise to a claim in negligence.**

#### **ANSWER**

Let us take the example of a person who has bought some moisturiser from a company. This person used the moisturiser as directed and had a rash. The rash is not due to any allergy she may have. The manufacturer here owes a duty of care to take precautions (in the use of the ingredients) to protect persons who may be likely to be affected by the use of the moisturiser. There may be a need, for example, to give appropriate warnings on the labels of the products sold.

### 3. To whom is a duty of care owed?

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#### ANSWER

A duty of care is owed by one person, the defendant (who breached the duty of care) to another person, the plaintiff (who suffered damage).

### 4. Explain what is meant by the neighbour principle.

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#### ANSWER

The neighbour principle in *Donoghue v Stevenson* says that where an established duty of care does not already exist, we owe a duty of care not to injure persons whom it can be reasonably foreseen would be affected by our acts or omissions. The practical application of the neighbour principle is to provide individuals with a remedy against the suppliers or manufacturers of products consumed by the individuals who suffer injury. The existence of a duty of care is determined here by reference to the test of reasonable foreseeability of injury or damage resulting from the supplier's or the manufacturer's act.

5. Read the case of *Donoghue v Stevenson* again and state its *ratio decidendi*. Here are some possible ratios from this case:

- (a) A manufacturer of soft drinks has a duty to persons who purchase such a drink to take care that the drink does not contain decomposed snails.
- (b) All people have a duty to act in such a way that their conduct does not cause harm to other people.
- (c) A manufacturer of food or drinks has a duty to take reasonable care that the food or drinks sold do not have in them a defect that will cause harm to the purchaser.
- (d) A person must take reasonable care to avoid harmful acts that he or she could foresee as likely to injure someone who is in reasonable proximity.

Which one of the above possibilities is in your opinion the *ratio decidendi*? Give reasons.

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#### ANSWER

The *ratio decidendi* can be found in (c). Read the decision of *Donoghue v Stevenson* again and we can see that it is more consistent with alternative (c) than with the other alternatives. For example, (a) is too narrow. If this is the ratio of *Donoghue v Stevenson*, it would not be a very important case. Alternative (b) is too wide. It would not be reasonable

to hold a person legally responsible for everything done by that person. Alternative (d) is also wide for a similar reason.

## 6. Discuss the concept of 'negligent misstatement'.

### ANSWER

The law imposes a duty to avoid making careless statements that can harm a person. In the past, the law was reluctant to allow claims for negligent misstatements unless there was a contract or fiduciary relationship. The law was altered with *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465. Now, courts would come to the conclusion that a negligent misstatement, whether spoken or written, could give rise to an action for financial loss, apart from any contract that existed between the parties if the existence of a 'special relationship' between the parties could be established. The maker of the statement has to owe a duty of care to the recipient, but it is not necessary for the plaintiff to be personally known to the defendant.

## 7. Explain the impact of s 18 of the *Australian Consumer Law* on the law of negligence.

### ANSWER

The impact of s 18 of the *Australian Consumer Law* is evident. Although its main function is to protect consumers, s 18 applies to all representations made in trade or commerce, whether made in an advertisement, directed at a mass audience, or made as part of precontractual negotiations. A number of negligence situations are now being litigated under s 18.

## 8. Discuss what is meant by manufacturers' liability.

### ANSWER

In the past, it was difficult for a consumer to have a remedy against anyone but the immediate supplier (e.g. the retailer) of defective goods because of the issues involved under the doctrine of privity of contract. Yet, most goods in our society are manufactured by a person or corporation rather than by a retailer or seller of goods. Now legislative intervention in the form of the *Australian Consumer Law* (Part 3–5) imposes strict liability on manufacturers and importers of defective goods that bring about personal injury or property damage.

### 9. Explain what is meant by 'defective' under the *Australian Consumer Law*.

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#### ANSWER

To be liable under ACL Part 3–5 of the *Australian Consumer Law* there must be a defective product. Under s 9 (1) of the ACL, goods are defective if their safety is not such as persons generally are entitled to expect. The standard to be applied is an objective one based on what the public or community at large, rather than any particular individual is entitled to expect.

### 10. What are the different situations in which the manufacturer can be liable for defective goods?

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#### ANSWER

The manufacturer is liable for defective goods where:

- an individual suffers loss or damage as a result of a defective good: (s 138)
- another person suffers death or injury as a result of the loss suffered by the individual: (s 139)
- other goods of a kind ordinarily acquired for personal, domestic, or household use are damaged or destroyed because of the defective product and a person using or intending to use the goods suffers damage: (s 140)
- land, buildings or fixtures are damaged or destroyed because of the defective product and a person using or intending to use the land, buildings or fixtures suffers damage: (s 141).

### 11. What is the problem with Australian Consumer Law Part 3–5 with regard to the concept of 'defect'?

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#### ANSWER

The problem with Pt 3–5 is that the plaintiff has the onus of proving that the product was defective, that he or she suffered damage, and that the defect in the product caused the damage. What this means is that the plaintiff must not only show that the goods were in some way defective, he or she must also establish that the loss or damage came about because of the defect in the goods. That is to say, the injured party has to show a causal link

or connection between the defect and his or her injuries. It may not be that easy for the plaintiff to satisfy this requirement.

## PROBLEM QUESTION

*Before you attempt the following problem, make sure you read the 'Guidelines for answering problems' and be acquainted with the IPAC method of writing answers to problem questions.*

In a problem involving the question of negligence, students should understand that to succeed in an action in negligence, a number of steps should be followed:

- **Duty.** The defendant owes the plaintiff a duty of care. The defendant has breached the duty of care.
- **Causation.** The defendant's breach of duty caused the damage suffered by the plaintiff.
- **Remoteness.** The damage is not too remote. Damage is too remote if the damage which resulted from the defendant's negligence was not reasonably foreseeable by the defendant. The defendant is not liable to compensate for damage which is too remote.

## PROBLEM

*Frank was thinking of buying a block of land to build his house on. He contacted the Department of Main Roads in Sydney to find out whether there is a plan for road widening on the land. Alan, an employee of the Department of Main Roads informed Frank that there was no plan whatsoever to widen the road. Frank bought the block of land.*

*Later Frank found out that the advice given by Alan was wrong. The Department had plans to widen the land so that a main road could be built on it. Frank decided to sue the Department.*

## ANSWER

The question is concerned with the issue of negligent misstatement in the tort of negligence. **(Issue)**

Negligent misstatement is a statement of fact made by one person and it is relied and trusted by the recipient, and the person making the statement knew or ought to have known that it will be relied upon: *Shaddock & Associates Pty Ltd v Parramatta City Council*.

In order for Frank to succeed, he must prove that:

- he sought the advice or information and was given that advice or information
- he relied on the advice or information and acted on the advice or information
- he suffered economic loss. **(Rule)**

From the facts given, Frank did seek advice or information from the Department of Main Roads. He did rely on the advice and accordingly acted by purchasing the block of land. He

has suffered financially because he cannot proceed in developing the land that he had purchased. **(Application)**

Therefore, Frank does have an action against the Department of Main Roads for breaching their duty of care in not providing him with the correct information. **(Conclusion)**