

**A TEST OF PROXIMITY AND FORESEEABILITY WITH RESPECT TO THE TORT  
OF NEGLIGENCE : AN INTERNATIONAL PERSPECTIVE**

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**ABSTRACT**

This research emphasis on the negligence which occur due to breach of duty and breach of right of others in an International perspective as basically tort law is prevailing in many parts globally. The scope of this topic emphasises on different international cases as precedent which gives us the knowledge on proximity and foreseeability of such dangers that might be caused through negligence. It points out the different forms of liabilities for such breach of duty and care, breach of rights directly or indirectly under different circumstances under the principles of proximity and foreseeability. The objective of the study are to learn in depth on principles of proximity and foreseeability, to gain clear understanding on Essentials of negligence of tort. This study is mainly based on doctrinal research which includes precedent cases, journals, books, authenticated websites. Essentials of Negligence are of grave importance to commit the same. The tort cannot be caused even when, only one essential is missing. All the three conditions must be fulfilled and that to in the same order to commit the tort of negligence. Also, the rudiments of each essential that are namely, existence of duty of care, breach of duty of care and resultant damage, are of vital importance.

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## INTRODUCTION

Negligence as per Winfield is defined as, "Negligence as a tort is the breach of legal duty to care by, which results in damage, undesired by the defendant to the plaintiff." In simple words negligence mean failure to perform the legal duty which would result in causing damages or inconvenience to other party or defendant which gives aggrieved the privilege to seek for compensation. Negligence can be of both civil and criminal wrong. To be a criminal wrong mens rea (guilty mind) must exist. The breach of duty should amount to death (not amounting to culpable homicide) to amount to criminal negligence. Also, the proof should be beyond reasonable doubt. From beyond a reasonable doubt the next question that comes to our mind is that who has to prove it i.e. who has the burden of proof. The burden of proof is on the plaintiff. In other words, the plaintiff has to prove that the defendant has caused the negligence. To prove the act as negligent the evidence produced by the plaintiff against the tort-feasors should be of cogent and clear. The aim of the study is To learn in-depth on principles of proximity and foreseeability, to gain clear understanding on Essentials of negligence of torts.

## HYPOTHESIS:

H<sub>0</sub>: There is no significant contribution of proximity and foreseeability to negligence of tort.

H<sub>a</sub>: There is significant contribution of proximity and foreseeability to negligence of tort.

## MATERIALS AND METHODS:

1. The nature of the project is non-empirical in nature. It is purely based on data collected from books, acts, journals and web sources.
2. The methodology also includes data collected both from the primary and secondary sources, but mainly from secondary sources.

## OBSERVATIONS

### REASONABLE FORESEEABILITY

In layman's language foreseeability means to know beforehand and in this context it means knowing beforehand whether the commission or omission of an act will likely cause any damage or injury to another. Whether an act is foreseeable or not is determined from the perspective of a reasonable man. Also, (Wright 2003) foreseeability is a matter of knowledge and inference. As, no matter how likely it is that something will occur, it is foreseeable by a person only if that person knows or ought to know that it might occur. On the other side, an event that is of a very less probability may be foreseeable by a person if, the person knows or ought to know it has occurred in the past. (Mullender 2005) If the person is said to be reasonably able to foresee the consequences (injury) of his commission and omission of an act, then he is said to owe a duty of care to another. In other words, if the person (who causes injury) is not able to foresee the damage due to his commission or omission, then in that case he will not be held liable for his negligence. E.g. C is a shop keeper and D, a customer, asks her water with certain chemical composition, as she has a certain allergy for normal water (fact unknown to C), now C gives her ordinary water. Due to which D gets affected and files a suit for negligence against C. This act will not be considered as negligence as X did not know the fact of Y's sickness and could not foresee the injury arising out of it.

### RELATED CASE LAWS

In *Norfolk Shipbuilding & Drydock* case,<sup>2</sup> the Plaintiff was on board ship when he felt something brushed against his leg and he jumped up, injuring his back. Object that hit his leg happened to be rolled up candy wrapper that had been thrown by another seaman through hatch above. This did not constitute actionable negligence. Negligence carries with it liability for consequences that in light of circumstances could reasonably have been anticipated by prudent person, but not for casualties which though possible, were wholly improbable. In order for negligence to be actionable a defendant need not have anticipated or have foreseen precise injuries sustained, but

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<sup>2</sup> *Norfolk Shipbuilding & Drydock v. Scovel*, 240 Va. 472, 397 S.E.2d 884.

it is sufficient if ordinarily careful or prudent person under circumstances to have anticipated that an injury might probably result from act. Injury in this case was not foreseeable.

In Indian Acres of Thornburg case,<sup>3</sup> plaintiff struck by falling concrete thrown from silo by 12-year-old boy. Boy obtained concrete and used silo on property under construction and owned by defendant. No liability on part of owner-developer. In this case the injury is not foreseeable.

In Smith v. Prater case,<sup>4</sup> defendant was driving ten-year-old worn out automobile with three persons in front seat at excessive speed around sharp curves. Plaintiff fell out of door. Such accident was foreseeable.

#### PRINCIPLE OF PROXIMITY

It means the nearest cause which is responsible for the injury i.e. It involves the notion of nearness or closeness, a nexus or relationship. In other words, it means that if the person who has suffered an injury is directly or rather proximately suffered the loss. Then only the defendant will be liable. (Nortvedt and Nordhaug 2008) Any damage arising out of the scope of proximity will not be under the ambit of negligence as, this duty is not owed to everyone but only to the one who is nearest and directly affected by one's act. If there are two negligent acts which have caused damage, the most direct and proximate cause will be considered. This can be further explained with the help of a case law.

In this case, the plaintiff were the official builders of the apartment of the defendant. After some time, structural movement began i.e. walls started cracking, bulging, sloping of floors etc. this happened because of poor foundation of the same. The government passed Public Health Act, 1936, prior to the beginning of construction of plaintiff's apartment, to supervise the constructions all over the country. The second defendant did not (government employees) did not perform the work properly and did not inspect the building of the plaintiff. The court held that the most proximate and direct cause was, that the builders did not perform their duties properly. Thus, the builders were responsible.<sup>5</sup>

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<sup>3</sup> Indian Acres of Thornburg, Inc. v. Denion, 1975, 215 Va. 847, 213 S.E.2d 797

<sup>4</sup> Smith v. Prater, 1966, 206 Va. 693, 146 S.E.2d 179

<sup>5</sup> Anns V. London Borough of Merton, (1970) 2 All ER 294

**"The Case of the Pregnant Fishwife"**

Mrs Euphemia Bourhill (Ms Hay before she married) was not in the proximity of the bad driving of Mr John Young a motorcyclist who crashed before Mrs Bourhill came on the scene. Young owed a duty of care to the car driver he collided with, as he could reasonably foresee that if he rode his motorcycle too fast he is likely to crash into a vehicle on the road. Mrs Bourhill getting out of a tram she heard the noise of the collision but was in no danger. She went to the accident spot and saw the blood on the road and suffered nervous shock (she was pregnant at the time). She was not in proximity to Mr Young, so he could not reasonably foresee that his action of riding the motorcycle negligently would affect her.<sup>6</sup>

**WHAT ARE THE ESSENTIALS OF NEGLIGENCE?**

To commit the tort of negligence,(Steele 2014) there are primarily three main essentials or rather conditions that are a prerequisite to commit a negligent act which are namely, Existing duty of care, Breach of that duty and the causation (i.e. resulting damage). (Statsky 2011)An act will be categorised as negligence if and only if, all the three conditions are satisfied. This can be further explained with the help of the above example. In that example when, X was assigned to take care of the garden a duty was established.

Further, when he went away from that garden, it consequently resulted in breach of duty. Lastly, children plucking the rare flower caused the damage to Y. Thus, all the conditions were satisfied and thus it can be taken as the case of negligence. Further, no act can be done if any element is missing. Now, if the above example if we say that the children never came. Then X will not be liable for negligence as no damage was caused to Y.

**A) EXISTANCE OF DUTY OF CARE**

It is one of the essentials which is required to make the person liable(Plunkett 2018). It means, that a person should owe a duty of care to another i.e. no person can be held liable for a careless act if he doesn't owe a duty of care to another. However,(Bermingham and Brennan 2014) the duty of care should be legal in nature and not of moral, ethical, religious etc. By legal duty it

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<sup>6</sup> (Hay) or Bourhill v Young [1943] HL

means that it should be lawful and not unlawful or illegal. However, what duty falls under the negligence is an issue. As a person owes a duty of care for every act. E.g. In case of assault, the tortfeasor owes a duty of care to the defendant not to hurt him. However, this act cannot be characterized as a negligent act.

In Dominion Natural Gas case,<sup>7</sup>In actions for damages in respect of an accident against the appellant gas company it appeared that the appellants were not occupiers of the premises on which the accident had occurred and had no contractual relations with the plaintiffs, but that they had installed a machine on the said premises, and the jury found that the accident was caused by an explosion resulting from gas emitted, owing to the appellants' negligence, through its safety valve direct into the closed premises instead of into the open air:-

The court held, that the initial negligence having been found against the appellants in respect of an easy and reasonable precaution which they were bound to have taken, they were liable unless they could shew that the true cause of the accident was the act of a subsequent conscious volition, e.g., the tampering with the machine by third parties.

#### B) BREACH OF DUTY OF CARE

The second important essential to hold the tortfeasor liable in negligence is that the defendant must not only owe a duty of care to the plaintiff, but also he must be in breach of it(Horsey and Rackley 2017). In other words, breach of duty of care means that the person who has existing duty of care should act prudently and not omit or commit any act which he has to do or not do.<sup>8</sup> In simple terms it means non-observance of standard of care. E.g. X assigns Y, to care of his office while he is gone out. In absence of X, Y doesn't bother about the office and leaves it unguarded. After sometime, a thief steals an antique wall clock. In, this scenario Y has committed breach of duty and must compensate X for the loss. The man to whom the duty is assigned should follow ordinary prudence and reasonable skill i.e. reasonable standard of care. In the above mentioned example, if Y had been guarding the place and used due diligence to stop the theft. Then Y would not have been liable as, there would have been no breach.

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<sup>7</sup> Dominion Natural Gas v Collins and Perkins [1909] AC 640, PC

<sup>8</sup> Blyth v. Birmingham Waterworks Co., (1856) 11 Ex 781

### PARAMETERS FOR EVALUATING STANDARD OF CARE

There are few factors which can determine the standard of care whether taken or not namely(Brennan 2017):

1. Importance of Object to be attached- which means if an object is of great importance, then there shall be a difference in standard care when compared to an object which of comparatively less importance. E.g. Public's welfare is the prime most importance.
2. Magnitude of Risk- where a person takes highly due care during some situation and comparatively less care under some circumstances. E.g. A owns a gun which is authorised by law. A shall pay highly due care when the gun is fully loaded. likewise, he shall comparatively pay less care when the gun is not loaded with any bullets.
3. Degree of consideration spent for services- The degree of care depends upon the kind of service which is offered by the defendant and the consideration paid by the plaintiff for the same.

### C) DAMAGES

This is the final essential which needs to be fulfilled in order to put a tortious act under the ambit of negligence(Gumbel 1997). The cause of action only arises when actual or real damage is suffered.

To prove that whether there was an injury or nor lies upon the plaintiff i.e. the onus of proof is on the plaintiff. However, there are exception to this such as the doctrine of *Res Ipsa Loquitur*, which means things speak for itself which is related to Section 106(Payne 1955). There are 2 conditions for application of this doctrine following:

- The person who is injured is injured by negligence
- The negligence is not attributed by the injured person himself or some third party

If these 2 conditions are satisfied, then the onus of proof can be shifted from the plaintiff to the defendant.(Ranjan 2016) E.g. in this case, the plaintiff's wife was hospitalized in a government hospital and was operated. The doctors while performing a sterilization operation left the mop in the body of

the patient which resulted in formation of puss and eventually leading to death subsequently. Under this case it was held that the doctrine could be applied as the person in the case was

injured by the negligence of the hospital and the doubt of doing something was not there as, he was immobilized.<sup>9</sup>

## 5. CONCLUSION

Thus the researcher would like to conclude that Essentials of Negligence are of grave importance to commit the same. The tort cannot be caused even when, only one essential is missing. All the three conditions must be fulfilled and that to in the same order to commit the tort of negligence. Also, the rudiments of each essential that are namely, existence of duty of care, breach of duty of care and resultant damage, are of vital importance. They, check whether the conditions of these essentials are fulfilled or not. Also, the researcher come to know that there are no more essentials that are there to commit the tort of negligence, be it mandatory or not.

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