TORT LAW

CIVIL LIABILITY

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name

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QUESTION 1:

Briefly explain the principles that were established in Donoghue v Steveson?

ANSWER:

Common law is the origin of the tort of negligence and principles of negligence came into existence modern in 1932 during the settlement of the House of Lords in Donoghue v Steveson. After that any suspected person or institution will be considered liable in conducting activity or behavior such as careless surgery, production of defective products, erecting warning signs failure, giving unprofessional financial advice, construction of defective buildings and injuring interloper. Insurance growth was the main factor in boom of litigation. Individual or institution became more interesting suspects if insurance factor is ignored. Mostly cases of negligence law violation related to suspects, who were supported by insurers, presented in court. Premium increased with increase in the number of cases. Due to increasing costs of insurance and lack of resources to afford it, everyone faced insurance crisis in late 1990's but most people perceive that the reason behind this crisis is law of negligence and inappropriate balance between protection of insured and personal responsibility was far from community expectations.

Commonwealth and State Government conducted a review of negligence law by panel of experts supervised by Justin David IPP after disintegration of insurance company HIH in 2001. They issued Ipp report that suggested extensive range of changes in negligence law. From 2001, varieties of reforms were introduced by each state and territory to modify common law principles of negligence. Caps, threshold and other limitations were introduced to deal with different amount and types of damages capable of recovering. During this time, changes were made to federal Trade Practices Act 1974 which is now known as the Competition and Consumer Act 2010 so that recreation and sporting suppliers are able to agree by a written legal agreement of implied warranties in customer transactions but the injured party is restricted to compliant about actions related to any personal injury or death occurrence from violation of statutory prohibitions in case of deceiving and delusive behavior. The purpose of these changes was to make sure that no one can use the federal legislation to weaken State and territory civil liability reforms. Injuries and damages caused by smoking and utilization of other tobacco items that were allowed to be awarded under federal legislation are not restricted. The civil liability legislation is not limited to tort but also covers all claims of personal injury in contract or under statute but eliminate all the claims related to dust diseases, motor vehicle accidents, employee remuneration, or cause injury or death intentions. It is applicable to property impairment and economic loss.

Duty of care is one of the three elements of negligence on which plaintiff can succeed in a negligence action. The legislation has introduced all the rules concerning duty of care and situations in which defendants don't owe a duty of care. Judge has to determine whether the duty exists or not. It was established in Donoghue v Steveson in 1932 which is quite famous with snail in the bottle case. According to this principle, duty of care exists only if it is reasonably foreseeable, considered as a benchmark even today, to the defendant means it is obvious that his behavior or action can harm others. Donoghue v Steveson is one of the precedent cases which explain that manufacturer and consumer relationships create a duty of care. It is recognized by court.

The snail in the bottle case explains this kind of relationship. Reasonable care should be taken in order to refrain from actions or eliminations that is obvious to you would likely harm your neighbor. Ms Donoghue suffered gastroenteritis and shock due to drinking ginger beer purchased by her friend at café because dead snail was found in the bottle. She couldn't see it before because it wasn't transparent bottle. She didn't have any contract with the owner of the café therefore she sued the manufacturer of the bottle because he failed to be careful in performing his duty before the product reached to the final user that's why he was found liable. Specific reason given by the House of Lords was that manufacturer has a duty to care to make sure that the product is free of defects because other person cannot inspect it before use and general reason was that you should not harm your neighbor because he will be directly affected by what you do or fail to do.

Donoghue v Steveson in 1932 established that a manufacture owes a duty of care to any person utilizing his products. If a person is harmed by any concealed defects in the product which is reasonably foreseeable then he has the rights against the manufacturer.

QUESTION 4:

'I've failed three driving tests, I am never going to get my license', Dietrich tells his uncle at a family birthday party. 'Nonsense' says his uncle. 'We are going in my car right now. I will teach you in half an hour.' Dietrich reluctantly agrees. Soon after, while driving his uncle's car, he brakes too hard and rolls the car, injuring his uncle. Does Dietrich owe his uncle a lesser standard of care because he is a learner driver? Explain

ANSWER:

In this case, plaintiff is uncle and defendant is Dietrich. If the defendant has breached his duty which led to failure in complying with the requirements of standard of care then plaintiff should prove it. The standard of care has legal importance therefore the court decide it with the help of 'reasonable person test' application which focuses on the question that the reasonable person could see the risk of injury to the plaintiff and whether he took any precautions to save him from that injury or not. Distrish should be careful before he drives the car because he knew well that he is not good at driving therefore he had to ask for guidance before he started driving. He wan aggressive with his driving lessons and didn't care about risk of injury to his uncle. He was even hesitant to go with his uncle for driving lesson but he told him already about his driving history. There was a reason why he failed driving tests but his uncle didn't take it seriously.

The civil liability legislation states that it is the duty of the defendant to take precautions against the risk of injury. He will not breach his duty unless the risk was obvious or predictable, the risk was worthy of attention from the aspect of reasonable person and precautions might be taken by reasonable person instead of defendant. The court should consider four factors other than the relevant things while determining whether it was necessary for the reasonable person to take precautions against risk of injury.

- If the reasonable person feels like there was no need for given attention to the risk of harm because it was negligible then in this scenario defendant has not violated his duty of care. In

Bolton v Stone case occurred in 1951, the House of Lords decided that cricket club was not found guilty for the damages caused when a ball was hit so hard that it went out of ground over the fence because it happens rarely so there was lowest probability of injury. A reasonable person can be justified if he does not take any precautions in such cases.

- Defendant cannot ignore risk even if the risk of harm is too small but its consequences are severe and reasonable person can take legal action against it.
- If the risk is severe and probability of injury is high then it should be balanced against the cost, difficulty and inconvenience in making any move to ignore it. Let take the case of Roads and traffic Authority of NSW v Dederer that happened in 2007, the High court reached to a conclusion that even after incurring high cost for new handrail and fencing, they still displayed a 'no diving' sign so that they can stop people diving from the bridge. In this way they took every precaution to minimize the risk of injury therefore RTA did not breach their duty of care.
- Utilizing social activity can create a risk of harm but in such cases it is allowed by the court. For example, in the case of Waverly council v Ferriera happened in 2005, the court reached to a conclusion that there are certain activities for which risks are worth taking such as an emergency vehicle crossing the speed limit to take the injured or sick person to the hospital. In such cases, if a person fails to take precautions then it will considered reasonable due to social activity or emergency.

Districh can be justified in this case before he already told his uncle about his driving skills and failed tests but his uncle didn't feel like there will be any risk of harm and didn't take any precautions as well but Districh shouldn't ignore risk because the consequences can lead him to court such as death of his uncle. He ignored the risk that he could injure his uncle and failed to be careful while driving. According to the Cook v Cook case (1986), his uncle is entitled to a lesser standard of care because he volunteer to supervise him even after learning about his poor driving skills. According to Imbree v McNeilly, the driver has a duty of care to the third party regardless of his relationship with them and less experience.

QUESTION NO.7:

The driver of a truck that is transporting oil falls asleep and crashes. The oil spill causes two cars to skid and collide outside a school. The father of a child who attends the school hears the news on the radio. He is so upset that he runs his car off the road and crashes into a tree, badly damaging his car which is not insured. Explain which losses, if any, the employer of a truck driver will be liable for.

ANSWER:

Under common law, plaintiff has to prove that he was harmed because defendant breached his duty of care and the harm was not too unlikely to happen. The civil liability applies two tests in such cases that are factual causation test and scope of liability test. To prove that plaintiff was harmed because of defendant's negligence, 'BUT FOR' test is carried out under common law in which the question is asked by the court that if there was no negligence by defendant would the harm still occur. Defendant is not responsible if the response is yes.

In this case, the driver of employer is defendant. If we apply the 'but for' test in this case then this harm would not happen if driver did not breach his duty of care. It was his fault that he fell asleep during

driving the truck. It was also the responsibility of employer to check whether his employee is active enough to drive for hours and careful while driving. He should not hire irresponsible driver. If he did not breach his duty of care, it would never happen. One accident led to other incidents. According to Alexander v Cambridge Credit corporation LTD case, a defendant is not liable if the plaintiff's loss is caused by other events that break the chain of causation. It is obvious that employer is not responsible for the damages caused to the car of the father of a child studying in that school. It only happened because he was upset but breached of duty of care by the truck driver is contributing cause. He was worried about his son that's why he was driving faster and lost control of it.

Scope of liability test is to check whether the harm caused to plaintiff was reasonably foreseeable by defendant under common law. It can be foreseeable if the reasonable person would not consider it as improbable. The employer of the driver will only be liable for the losses caused by the truck driver which also includes the cars collision outside the school but if we refer to the Wagon Mound case occurred in 1961 then a defendant is not responsible for loss or injury that was not reasonably foreseeable so the other two cars that were collided with the school was not foreseeable.

QUESTION NO. 9:

Lok suffers several broken bones when playing football on the weekend and intends to sue the football club for damages. What must the club establish to successfully argue voluntary assumption of risk?

ANSWER:

Voluntary assumption of risk is one of the two defenses to negligence. Defendant can have complete justification if he is proves that plaintiff had all the knowledge about the risk of injury and still he decides to participate with that activity having risk involved in it. The justification fails most of the time and especially use in cases where a person is insured personally by his actions. In the case of Insurance commissioner v Joyce that happened in 1948, a passenger, who was injured, couldn't recover damages because he accepted the lift even after knowing that the driver was drunk. Another case where the justification of voluntary assumption of risk was successful is the case of Leyden v Caboolture Shire Council that occurred in 2007. This case is about a 15 years old boy who got injured when he smashed his BMX bicycle on a council track. He was experience rider who was familiar with the track because he used it frequently. According to the Queensland court of appeal, the council was not responsible for the injuries caused by the track because rider was fully aware of all the risks and was capable of estimating the risk himself therefore he cannot blame the council for injuries.

In the case of Lok, since he is playing football at football club therefore he must be aware of all the risks of harm. Once he voluntarily participated in the activity and got injured then he cannot blame the football club for the injuries because he was injured by his personal actions. If he was not aware of the risks of harm and football club hid some information that became the reason for injury then in that case he can sue the football club but the club can defend themselves by proving that Lok's participation was voluntarily and he was fully aware of the risk of harm.

General damages supplies remuneration for pain and suffering, disfigurement and loss of enjoyment and expectation from life but these are limited in two main ways that are

- Maximum sum payable in all jurisdictions
- Minimum permanent injury or monetary loss

General damages are awarded to plaintiff if they prove that they have lost a minimum percentage as contrast to most severe case. A limit is set for maximum weekly rates for economic losses in all jurisdictions.

QUESTION NO.10:

Doreen, with the aid of crutches, is shopping in a suburban shopping centre. She notices a sign warning that the floor is wet and slippery, but there is no alternative route available. Although she takes special care, she falls and breaks her hip. Is the shopping centre liable in negligence to Doreen?

ANSWER:

Occupier's liability is one of the categories of negligence. Any person who has occupied or control over a land or any structure on land is known as occupier. There can be one occupier or more than one such as landowner and architect constructing a factory on a block of land can be joint occupiers. Occupiers were obligated to comply with various standard of care to the people entering their property before 1980s. They owed the highest standards to those people who were invited by them on their property such as customers or clients visiting their store and lowest standard of care to any trespasser.

In the case of Australian Safeway stores v Zaluzna occurred in 1986, the High court switched to discarding these insincere differences and integrating the liability of an occupier into tort of negligence. On a rainy day, Mrs. Zaluzna slipped on the floor of a supermarket which was wet because staff did not paid constant attention to check whether the floor was dry or not. The high court decided to ignore previous differences among various classes of entrants and that the tort of negligence now dominates occupier's liability. It is the responsibility of the occupier to take appropriate care so that the foreseeable risk to all entrants can be avoided. The appropriate care will depend upon the circumstances in which the plaintiff enters the premises. Another point is very important in civil liability legislation, any person who gets injured while committing crime will not be able to recover damages.

In Doreen case, it was the occupier's liability to take special care in order to provide an alternative road or allot staff members to make the floor dry before the shopping hours so that no one get injured during the visit. Since it was his property and he failed to take care of his customer therefore he will pay for the damages. He could have allotted staff to assist his customers or help them if the drying the floor was not possible at that point. The risk of harm was obvious and therefore special attention should be given to avoid any injury. Not only Doreen, but other customers would also faced the risk of injury if they walk on that wet and slippery floor so it is the obligation of occupier to avoid such risk of injury and provide safety precautions for all customers.

QUESTION NO. 11:

Keira invests her retirement funds in XYZ Ltd based on the latest audit report of Smart & Co Auditors. Keira has no accounting or financial knowledge so she found it very difficult to really understand the report which was written in technical language. Explain whether Smart & Co Auditors owe a duty of care

to Keira. Refer to the concepts of 'control', 'vulnerability', 'reasonable reliance' and 'assumption of responsibility' as well as relevant cases.

ANSWER:

Pure economic loss is a financial loss where a person or property doesn't get injured or damaged. Australian courts have been unwilling to recognize actions related to pure economic loss because they are afraid that it might increase the number of litigation with large amount and force defendants to bear uncertain and incapacitate damages. If a person makes a statement without thorough research and diligence that becomes a reason for economic loss of another person then in such circumstances that person may be liable in negligent misstatement. A plaintiff has to prove duty of care, violation and harm caused due to such negligence actions. Few difficulties are usually faced while establishing the duty of care. The development of negligent misstatement can be explained with the help of following relevant cases.

In the case of Hedley Byrne v Heller that happened in 1964, high priced advertising space was reserved and promised for Easipower plc by Hedley Byrne Company on the basis of advantageous credit report from merchant bank Heller and partners that would be in their favor. They took no responsibility of the report. Hedley Byrne took legal action against merchant bank when they suffered the loss due to which Easipower could not pay for the advertising expense due to their negligence. The House of Lords decided that if a person who possess a special skill accepts that he will apply the apply to help the other person who is relying upon him apart from any contract then a duty of care arise in such a scenario. According to the English House of lords, if special relationship between two parties exists then liability arises. In order to establish this type of special relationship, plaintiff has to prove that he has trusted and relied on the statement given by defendant and on the other hand, defendant has assumed responsibility. It can only occur if they have special skills but if the person, who is giving assistance, issues a transparent refusal then they are not liable.

In another case of MLC v Evatt (1968), Evatt was told by the senior executive of MLC insurance firm on his inquiry that HG Palmer Ltd which is a finance company is a good investment but the fact was tottaly opposite because it was not under good management. Soon after Evatt invested more funds in HG Palmer, the company was liquidated. According to the High court of Australia, only individuals with special skill or knowledge are not obligated to duty of care but also the one who gives advice in serious situations. MLC was found liable for negligent misstatement but when they appealed to the Privy Council, serious circumstances test was rejected and they didn't hold MLC liable because it didn't possess any special skills of giving financial advice.

In Shaddock's case (1981), a legal representative of Shaddock & Associates while thinking about purchasing a property in Parramatta was advised by the local Council that there was no need remaining for potential road widening on this land. They did not ask for fees or issue a disclaimer. Shaddock bore significant losses after purchasing the property because it was resumed for road widening therefore he took legal action against Local Council for negligent misstatement. According to the High Court, only professional or businesses which are skillful and competent enough to give financial advice are not liable for negligent misstatement but also the individual or any public authority giving financial advice on

which other person is relying to make reasonable decision is liable too. He should be careful in providing correct information therefore Shaddock was compensated for the loss. In this scenario, High court followed its own decision rather than that of Privy Council.

In the case of Esanda Finance v Peat Marwick Hungerfords (1995-97), Excel liquidated soon after Esanda Finance funded it with a loan relying on the audit report given by PMH. Excel was facing problems during audit. Esanda tried to convince the court that PMH was liable to negligent misstatement because it was pretty obvious that credit providers like them would rely on audited accountsbut High Court highlighted the fact that PMH did not forced or encourage Esanda to just rely on the audit report neither had any relationship which would enforce duty of care on PMH therefore it was Esanda's fault in making decision without further research. Secondly, proximity test was also rejected by the High court. Esanda cannot be considered vulnerable because it can take actions to protect against any loss.

In the case of Keira, Smart & co does not owe a duty of care to Keira because they are not forcing or encouraging Keira to invest her retirement funds in the XYZ Ltd without further research. It is totally her decision so she cannot blame Smart & Co and since she does not possess technical skills to judge the audit report and making financial decisions therefore she should carry out proper research or take financial advice from a professional so that she can avoid loss in future. Secondly, they both have no special relationship but Smart & Co should be careful in publishing audit report because many people can rely upon it since it is public. If they don't want to take responsibility then they should issue disclaimer to avoid liability otherwise they may be held liable by the court. Keira is not vulnerable because she opportunity to take actions in order to protect her from any loss.