Essentials of Negligence (Law of Torts)  
With Respect To India  

Apoov Phillips  
Undergraduate Student, College of Legal Studies, University of Petroleum and Energy Studies, India  

1. INTRODUCTION  

A. What is Negligence?  

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 other words, it is a breach of duty caused by the omission to do something which a reasonable man with ordinary prudence would have taken care of, and the resultant damage. E.g. X is told by Y to take care of his garden. X agrees to do the same, later, X goes away thinking that nothing will happen. In a while some children came and pluck the rare flowers from the garden. In this scenario, he will be liable for negligence.

Negligence can be of both civil and criminal wrong. To be a criminal wrong mens rea must exist. The breach of duty should cause 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 provided by the plaintiff against the tort-feasor(s) should be of cogent and not vague.

B. What are the essentials of negligence?  

To commit the tort of negligence, there are primarily 3 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). An act will be categorised as negligence if and only if, all the 3 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 consequentially 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.

2. EXISTANCE OF DUTY OF CARE  

It is one of the essentials which is required to make the person liable. 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, the duty of care should be legal in nature and not of moral, ethical, religious etc. By legal duty it 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 in every act. E.g. In case of assault, the tort-feasor owes a duty of care to the defendant not to hurt him. However, this act cannot be characterized as a negligent act.

In the case of Donohue V. Stevenson it was stated that “English law there must be, and is, some general conception of relations giving rise to a duty of care, of which the particular cases found in the books are but instances. The liability for negligence, whether you style it such or treat it as in other systems as a species of “culpa,” is no doubt based upon a general public sentiment of moral wrongdoing for which the offender must pay.” Other than the prior case laws in the above statement, new duties can be recognised as well in India. There are few rudiments which determine the existence of duty of care which are the following:

A. 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, 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 hand, an event that is of very low probability may be foreseeable by a person if, the person knows or ought to know it has occurred in the past. 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. Will not be held liable for negligence. E.g. X is shop keeper and Y, a customer, asks him water with certain chemical composition, as he has a certain allergy for normal water (fact unknown to X), now X gives him ordinary water. Due to which Y gets affected and files a suit for negligence against X. 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.

B. Reasonable Care and Standard of Prudence and Skill

This means that whether the person is taking reasonable care or not i.e. whether the person is reasonable enough to act with ordinary prudence or not. Not only prudence but a reasonable skill is also necessary for giving a reasonable care. E.g. if a medical practitioner does not have ordinary skill, the damage caused to the patient will be termed as an act of negligence. If the person is said to be unreasonable then the act so committed which causes the breach and damage will be covered under the tort of negligence. However, if reasonable care is taken and still damage is caused then the person will not be liable for the negligence. E.g. if a person, let’s say, X is driving a car with ordinary prudence i.e. with a controlled speed and taking all precautions. During this time, a cyclist moves into the lane of the X rashly resulting in an accident. Then, X will not be liable for the negligence as he was driving rationally. The reasonable care taken should be comprised of prudence and skill. Prudence and skill need not be of best in nature but, it needs to be reasonable. E.g. In a case, the occupier built a rick of hay on the verge of his own land, in such a state that there was evident danger of fire, and left it there after repeated warnings. The hay stack caught fire, which consequentially burnt the defendant’s cottage as well as the neighbouring ones. In this case, the man was unreasonable and did not have ordinary prudence which led to a negligent act.

C. Proximate Cause

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. Any damage arising out of the scope of proximity will not be under the ambit of negligence as, this duty is not owed to every but only to the one who is nearest and directly affected by one’s act. If there are 2 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.

D. Policy Considerations

Policy considerations are material in limiting the persons who can claim that a duty of care not to cause economic loss was owed to them by a tort-feasor. In other words, it can be said that the person cannot be held liable if that person is not directly responsible to the plaintiff, that has suffered damage indirectly due act of the tort-feasor, as no duty of care was directly imposed on the tort-feasor. E.g. X is an artisan and because of Y’s negligence, X is injured. Due to which X is not able to make paintings and sell it to the customers. In this case, the customers will not be able to sue Y on the ground that, because of his negligence X was injured and couldn’t supply the paintings on time. Only, X will be able to sue Y for the loss caused due to Y’s negligence. However, there is an exception in case of local authorities that, they are owe a duty of care under a statutory provision to all and thus can be made liable for the same. However, if a criminal act has been caused due to the negligence of the defendant the plaintiff is not allowed to claim the damages for the same.
The person cannot be made liable due to the act of third party i.e. a person is not under the control to prevent the act of the third person\(^{22}\). Generally, this is a form of defence in the case of negligence. However, there are certain circumstances in which the act of third party can be treated as an act for negligence for the defendant. Which are the following\(^{23}\):

- Where special relation existed between the plaintiff and the defendant. E.g. a holder of land who holds it open to the public is under, the same duty to members of the public who enter in response to his/her invitation.

- Where danger was negligently created by the defendant and it was reasonably foreseeable that third parties might interfere. E.g. If an electrician leaves open the transformer and the theft is committed by a person who steals the screws and wires are pulled out. If any person suffers any damage (e.g. in form of shock) from the pulled out wires while passing. Then the electrician will be held responsible for negligence.

- Where the defendant had the knowledge that the third party is creating danger or risk of danger on property or a person but fails to take reasonable steps. E.g. A policeman having the full knowledge of a person, trying to commit suicide, whereabouts ignores the arrest. The damage which will be subsequent to that postponing of arrest will be called as a negligent act\(^{24}\).

3. 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. 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\(^{25}\). 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\(^{26}\). In the above 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. There are few factors which can determine the standard of care whether taken or not:

A. Importance of Object to be attained

It means that if the object is of more importance. Then, standard of care would be different as compared to the object which is less important\(^{27}\). E.g. Taking care of a diamond requires more standard of care as compared to taking care of a steal equipment. As the value of the object in the example taken differs which can be related to its importance. However, the law does not require highest degree of care but, it should be of reasonable\(^{28}\). However, the reasonability differs as per the above statements according to objects. Also, it is to be noted that more the importance of the object which is to be attained more the risks can be taken\(^{29}\). This tells us that the importance is directly proportional to the importance of the object.

In the cases of public importance, as the importance of object to be attained is very high, high risk can also be taken. It can be explained with the help of a case\(^{30}\).

In this case the plaintiff had an orchid consisting of fruit bearing trees. The State government constructed a canal for irrigation purposes. Due to absorption of excess water in the canal. The fruit bearing plants of the plaintiff died. Causing huge amounts of damage to the plaintiff. It was held that the irrigation was necessary to increase the public good. However, irrespective of the importance of an object only a reasonable risk must be taken and no careless act should be done\(^{31}\).

B. Magnitude of Risk

The degree of risk which a person can take varies from situation to situation\(^{32}\). In other words, the person can take high risks in certain situation (e.g. in case of public good\(^{33}\)) and low risk in others. That is, one act may be negligent in one situation may not be in other. To determine the standard of care magnitude of risk must be taken into account so that the necessary precautions can be taken into due consideration. E.g. X owns a revolver, which is authorized under law. Now, if X carries it unloaded the standard of care i.e. in here, precaution taken will be low. However, if he carries it fully loaded the precaution which should be taken would be high. It may also be inferred as magnitude of risk is directly proportional to the degree of care required.
Furthermore, there are two factors which are used in determining the magnitude of risk, which are the following:

- The seriousness of the injury risked – It means that how much serious or grave the injury risked is. If the injury risked is a lot serious then, more standard of care would be maintained.

- The likelihood of the injury being – It means how much likely an injury might occur i.e., what are the chances of that injury been done. If the chances are more then, more precautions will be taken to avoid the injury.

Also if the magnitude of risk is high, the precautions become high. However, the act is still continued as it is not necessary and beneficial to stop any act. This can be explained further with an example. If in mining of a rare substance some toxic chemicals are released, the mining of that industry will not stop as it causes harmful effects but, the precautions taken to minimize that harmful effect will be used as it will be much beneficial than stopping that activity.

C. Amount 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. In other words, it means that if consideration paid is more then, service that is offered should be better i.e. the mote the standard of care. It can also be inferred that the consideration is directly proportional to the standard of care offered. It can be further explained with the help a case. In this case, the customer of the hotel got injured and went into paralysis when he took a dive into the swimming pool. It was observed that higher the price higher will be the quality of safety of its services offered.

4. Damage

This is the final essential which needs to be fulfilled in order to put a tortious act under the ambit of negligence. The cause of action only arises when actual or real damage is suffered. E.g. If X assigns Y, to take care of a rare vase. However, Y shows carelessness, due to which the vase gets broken into pieces. Now, Y will be liable to compensate X for the value of the vase as a real damage i.e. actual damage was caused. However, if the damage is minimal no compensation is required.

That is, until and unless a real damage is done no act can constitute this tort, not even the occurrence of risk. In this case, the plaintiff was exposed to asbestos in the course of his employment and developed a pleural plaque. Although, there was no actual damage to the lungs due to this. Yet, the chance of life threatening disease increased in the near future. It was held that as no actual damage took place, the act wasn’t under the tort of negligence.

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. There are 2 conditions for application of this doctrine, which are the 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. 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.

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 knew that there are no more essentials that are there to commit the tort of negligence, be it mandatory or not.
1. WINFIELD AND JOLOWICZ Tort, 12th ed
2. Jacob Mathew V. State of Punjab, (2005) 6
   SCC 1
3. Section 304-A, Indian Penal Code, 1860
4. National Insurance Company Ltd. V. Sintha,
   (2012) 2 SCC 356
5. Poonam Verma V. Ashwin Patel, AIR 1996 SC
   2111
6. WINFIELD AND JOLOWICZ Tort, 12th ed
7. 1932 AC 562
8. Ibid
9. Madhya Pradesh Road Transport Corporation
   V. Basanti Bai, (1971) III LJ 273 MP
11. Rural Transport Service v. Bezlum Bibi, AIR
    1980 Cal 165
12. WINFIELD AND JOLOWICZ Tort, 12th ed
13. Malay Ku. Ganguly V. Sukumar Mekharjee,
    2004 (3) CHN 187
15. Vaughan V. Menlove, (1837) 3 Bing N.C. 468
    157 CLR 424
17. Davis V. Radcliffe, (1990) 2 All ER 536 (PC)
    All ER 294
19. Candlewood Navigation Corp. Ltd. V. Mitsvi
    OSK Lines Ltd., (1985) 2 All ER 935
20. (Xminors) V. Bedford Shire County Council,
    (1995) 3 All ER 353
    81
    All ER 294
    1 All ER 710
24. Lee v. Corregedore, 83 Haw
    11 Ex 781
26. WINFIELD AND JOLOWICZ Tort, 12th ed
27. Ibid
29. Nazir Abbas V. Raja Ajamshah, ILR 1947 Nag
    955
30. K. Nagireddi V. Government of Andhra
    Pradesh, AIR 1982 A.P 119
31. Ibid
32. Franklin V. Bristol Tramways Co., (1941) 1
    All ER 188
33. Latimer V. A.E.C Ltd., (1953) A.C 643
34. LAW OF TORTS, MEDICAL NEGLIGENCE
    AND CONSUMER PROTECTION, Dr. Rajiv
    Kumar Khare
35. Ibid
36. Law of Torts 18th ed., RK. Bangia
37. Klaus Mittlebachert V. East India Hotels Ltd.,
    AIR 1997 Del 201
38. WINFIELD AND JOLOWICZ Tort, 12th ed
40. Roshwell V. Chemical & Insulating Co. Ltd.,
    (2007) 4 All ER 1047
41. Ibid
42. Indian Evidence Act, 1872
43. Minor Ramperey & Anr. V. Jai Prakash & Anr
    AIR 1963 Pat 316
44. Acchutrao Haribhau Khodwa v. State of
    Maharashtra, AIR 1996 SC 2377