

The contrast between
a liability in tort and a
contractual liability

A.C. 3.1

What is a tort?

- ▶ A tort is an act that injures someone in some way, and for which the injured person may sue the wrongdoer (tortfeasor) for damages.
- ▶ **a civil wrong** arising from an act or failure to act, (omission) independently of any contract, for which an action for personal injury or property damages may be brought.
- ▶ Tortious liability arises from the breach of a duty primarily fixed by law; this duty is towards persons generally and its breach is redressible by an action for damages.

Breach of Duty in Tort

- ▶ Where there is a breach of duty in tort then negligence occurs.
- ▶ Negligent torts are not deliberate actions, but instead present when an individual or entity fails to act as a reasonable person to someone whom he or she owes a duty to. The negligent action found in this particular tort leads to a personal injury or monetary damages.
- ▶ The elements which constitute a negligent tort are the following: a person must owe a duty or service to the victim in question; the individual who owes the duty must violate the promise or obligation; an injury then must arise because of that specific violation; and the injury causes must have been reasonably foreseeable as a result of the person's negligent actions.

Breach of duty in tort contd...

- ▶ The elements which constitute a negligent tort are the following:
 1. a person must owe a duty or service to the victim in question;
 2. the individual who owes the duty must violate the promise or obligation;
 3. an injury then must arise because of that specific violation;
 4. and the injury causes must have been reasonably foreseeable as a result of the person's negligent actions.

Do you see any similarities and differences with negligence in tort and negligence in contracts?

<http://www.lawteacher.net/cases/tort-law/hedley-byrne-v-heller.php>

Distinction between a contractual liability and tortious liability.

- ▶ According to the definition of a contract, a contract requires agreement between two or more parties, but in tort, it is not necessary of agreement between two or more parties.
- ▶ The main difference between tortious liability and contractual liability is the nature of duty. The duties in the torts are fixed by the law where the duties in the contracts are fixed by the contractual parties. Therefore, there is more structured and stricter in tortious liability than in contractual liability. **(W. V. H. Rogers, Winfield & Jolowicz on Tort (16th edn, Sweet and Maxwell, 2002)**
- ▶ <http://www.lawteacher.net/free-law-essays/contract-law/contractual-and-tortious-liability-analysis.php>

What are the distinctions between a breach of tort as opposed to a breach of contract?

1. For there to be a breach of contract, an agreement must exist between the parties as opposed to a tort. In tort there need not be any agreement.
2. The remedy available for breach of tort is damages where as in breach of contract a court may order the party in breach to:
 - pay damages
 - specific performance
3. The aggrieved party may also repudiate or rescind the contract.

Forum Questions

- ▶ 1. What is a tort?
- ▶ 2. Explain the nature of a tortious liability?
- ▶ 3. Based on the case of *Hedley Byrne v Heller*, what are the principles arising out of negligence?
- ▶ 4. Distinguish between a tortious liability and a contractual liability.
- ▶ 5. What must be present for a negligence to occur?



The liability in negligence

A.C. 3.2

What is negligence?

- ▶ “In strict legal analysis, negligence means more than heedless or careless conduct, whether in omission or commission; it properly connotes the complex concept of duty, breach and damage thereby suffered by the person to whom the duty was owing”: *per* Lord Wright in *Lochgelly Iron & Coal v M’Mullan* (1934).
- ▶ Negligence involves harm caused by carelessness, not intentional harm. In order to be successful in a negligence claim, the claimant must prove The defendant owed him a duty of care. The defendant had breach that duty. The defendant’s breach of duty caused damage to the claimant.

The nature of the liability in negligence

- ▶ The existence of a duty of care for injury was originally decided by Lord Atkins **neighbour test** from **the case Donoghue v Stevenson 1932**.
- ▶ To successful in the claim of negligence, claimant must provide evidence that there was a breach of duty of care of defendant that caused the damage to him. The court will consider whether the defendants act fell below the standard of reasonable care, the person concerned should do what a reasonable man would do, that could be *be expected of a reasonable person in the same circumstances*
- ▶ The standard that is mentioned here is not the standard of an average man but the standard that require for a person act or job, for example, the standard of doctor or car driver
- ▶ http://www.academia.edu/8223826/Aspects_of_Contract_and_Negligence_for_Business

Damage to the Claimant

- ▶ Claimant only be compensated if he has suffered actual loss, injury, damage or harm as a consequence of anothers action. A claim for compensation for negligence will succeed unless these elements could be proved:
 - ▶ 1. The breach of duty have rise to the harm.
 - ▶ 2. The harm was not too remote from the breach

Vicarious Liability in Businesses

A.C. 3.3

What is vicarious liability?

- ▶ Vicarious liability refers to a situation when someone is held responsible for the actions of other another person. In a workplace, an employer can be charge for the action or exclusion of his employees in the course of employment. At the course, to make the employer liable for the action of employee, it is necessary that:
 1. There is a relationship between them of employer and employee
 2. The employee's tort is committed in the course of his employment.

Liability

- ▶ Three questions must be asked in order to establish liability:
- ▶ 1. Was a tort committed?
- ▶ 2. Was the tortfeasor an employee?
- ▶ 3. Was the employee acting in the course of employment when the tort was committed?

Vicarious Liability in Contract

- ▶ There is a term implied at common law into contracts of employment that an employee will exercise all reasonable care and skill during the course of employment. An employee who is negligent is in breach of such a term and the employer who has been held vicariously liable for the tort may seek an indemnity from the employee to make good the loss.
- ▶ The law of agency also explains how a business or an employer can be vicariously liable for their employee.
- ▶ The law of agency creates a fiduciary relationship between the principal and the agent. A fiduciary relationship means that the principal is placing trust or confidence in the agent to be faithful and loyal and to conduct the principal's business with care. When you deposit money with a stockbroker with instructions to buy stock in your name, the broker is in a position of trust and confidence, or a fiduciary position, with respect to your stock purchase transaction. Consequently, when a fiduciary relationship exists, the law implies certain duties that both parties must perform on behalf of the other, which may be amplified or supplemented by a written agreement.

Vicarious Liability contd

- ▶ An agent has a duty to obey a principal and to perform all tasks the principal has directed, as long as those tasks are consistent with the engage of the agent.
- ▶ The principal also has obligations of the agent that are implied by law and that may be amplified or supplemented by an agreement.

Forum Questions

- ▶ 1. What is vicarious liability?
 - ▶ 2. Explain how a business would be vicariously liable through a contract?
 - ▶ 3. What should be established in order for an action of vicarious liability to arise?
 - ▶ 4. What is a fiduciary relationship?
 - ▶ 5. Discuss the ways in which a business or employer may be exempted from vicarious liability.
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- ▶ <http://www.lawteacher.net/free-law-essays/commercial-law/vicarious-liability-of-principal-for-acts-of-agent-commercial-law-essay.php>