

ASPECTS OF CONTRACT AND NEGLIGENCE FOR BUSINESS



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Lesson 7



- **ASPECTS OF CONTRACT AND NEGLIGENCE FOR BUSINESS**

- LO 2: Understand principles of liability in negligence in business activities

- September – November 2014

The Basic Syllabus



- Understand the essential elements of a valid contract in a business context.
- Be able to apply the elements of a contract in business situations.
- Understand principles of liability in negligence in business activities
- Be able to apply principles of liability in negligence in business situations.

LEARNING OBJECTIVES



- At the end of the class, students should be able to:
 - contrast liability in tort with contractual liability

OVERVIEW



“Two frequently used terms in the field of law are tort and contract. Though they both deal with legally enforceable agreements, in practice they serve quite different functions. The key distinction between tort and contract comes down to a question of consent. A contract is created as the product of two consenting parties, whereas a tort needs no consent and is typically issued by one party against another.”

- Mike Howells



Differences to contract

Remember that a breach of contract is a breach of a legal obligation, so the aim of the remedies is to put the claimant in the position that they would have been had the defendant fulfilled the obligation. This means putting the claimant in the position that they would have been in had the contract been performed. In relation to damages, this may be divided into expectation loss (benefits that might have been gained from the performance of the contract) and reliance loss (expenses incurred by the claimant in his side of the contract).

The conduct of the claimant may also affect the amount of damages payable, since the claimant is under an obligation to take reasonable measures to mitigate the loss, as in *Payzu v Saunders* (1919). For example, if the buyer refuses to accept or pay for the goods, the seller must recover what they can by selling the goods to a third party. The damages will be the difference between the contract price and the amount that the seller receives. If the seller receives the contract price or higher from a third party, only nominal damages will be claimable. A claimant who does not attempt to mitigate their loss may have their damages reduced by the amount by which they could have done so. It is for the defendant to prove that the claimant failed to mitigate the loss.

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Differences to contract



Negligence cases are based on a non-contractual relationship between the parties. The parties may be known to each other, as with a surgeon and a patient, or they may be strangers, as with two drivers involved in a road traffic accident. Due to the lack of any agreed relationship between the parties, the first question that arises in the case of negligence is that of whether any relationship exists between them at all. If one party is to be held liable to another in A useful case in this respect is *Caparo Industries plc v Dickman* (1990). Here, the claimants were shareholders in a company and the defendants were the company's auditors. The claimants relied on the audited accounts and purchased more shares with a view to making a takeover bid. Having taken over the company, the claimants discovered that the company had in fact made a £400,000 loss rather than the £1.2m profit shown by the financial statements.

Duty of care



- A useful case in this respect is *Caparo Industries plc v Dickman* (1990). Here, the claimants were shareholders in a company and the defendants were the company's auditors. The claimants relied on the audited accounts and purchased more shares with a view to making a takeover bid. Having taken over the company, the claimants discovered that the company had in fact made a £400,000 loss rather than the £1.2m profit shown by the financial statements.

Duty of care

- The House of Lords held that the requirements for a duty of care to exist were as follows:
- the harm must be reasonably foreseeable
- there must be proximity between the claimant and the defendant
- it must be just, fair and reasonable to impose a duty of care on the defendant.

DUTY OF CARE

- A duty of care involves an obligation that a person in a specific role has to make sure others and the public, as needed, are taken care of. This involves attention, watching out for anything that can go wrong, prevention and making wise choices about steps taken in a role. Frequently, if a duty of care is not met in a role that requires it, then the responsible person can be held accountable for allowing negligence to occur. This situations then provides the basis for a lawsuit in the legal arena.

DUTY OF CARE

- In order to prove negligence and claim damages, a claimant has to prove a number of elements to the court.
- These are:
 - - the defendant owed them a duty of care
 - - the defendant breached that duty of care, and
 - - they suffered loss or damage as a direct consequence of the breach.
- Even if negligence is proved, the defendant may have a defence that protects them from liability, or reduces the amount of damages they are liable for.

BREACH OF DUTY OF CARE

- In many cases brought before the courts it is evident that a duty of care exists between the defendant and the claimant. The real issue is whether or not the actions of the defendant were sufficient to meet their duty. To determine this, the court will set the standard of care that they should have met. This standard consists of the actions which the court considers a 'reasonable person' would have taken in the circumstances. If the defendant failed to act reasonably given their duty of care, then they will be found to have breached it.

BREACH OF DUTY OF CARE

- This 'reasonable' standard may be adjusted given the actual circumstances of the case. For example, if the claimant is vulnerable, such as being disabled or frail, it is reasonable to expect the defendant to have paid them special attention or taken extra care over them as compared to someone who is fit and healthy.
- Other circumstances which may be taken into account include whether:
- The actions the defendant took are in line with common practice or industry recommendations. If they were, then it is likely that the defendant will be found to have met their duty unless the common practice itself is found to be negligent.
- There was some social benefit to the defendant's actions. If there was, then the court may consider it inappropriate for them to be found to have breached their duty.
- The defendant's actions had a high probability of risk attached to them. If they did, then the court will expect them to show they took extra precautions to prevent loss or damage.

BREACH OF DUTY OF CARE

- There were practical issues that prevented reasonable precautions being taken, or unreasonable cost would have been involved in taking them. If there were, then the court is unlikely to expect the defendant to have taken them in order to meet their duty of care.
- The defendant is a professional carrying on their profession. If they were, then the court will judge their actions against a reasonable professional in their line of work, rather than just any ordinary person. If professional guidelines are in place then the court will judge the defendant's actions against these rather than its own expectations.

BREACH OF DUTY OF CARE

- *RES IPSA LOQUITUR*
- In extraordinary cases, the facts may be so overwhelmingly in favour of the claimant that the court decides the defendant should prove that they were not negligent. The legal term for this is *res ipsa loquitur* (meaning the facts speak for themselves). It applies in circumstances where the cause of the injury was under the control of the defendant and that the incident would not have occurred if they had taken proper care. It is often applied in medical cases, for example in *Mahon v Osborne* (1939), a surgeon had to prove it was not negligent to leave a swab inside a patient.

DAMAGE CAUSATION

- The 'but for' test is usually employed in the investigation of causative links between the tort(s) and the damage. This test involves asking the simple question: 'Would the claimant have incurred the damage "but for" the defendant's tort?' A negative answer to this question means that it is likely that the defendant's wrong factually caused the claimant's damage. If the damage would have been sustained anyway, irrespective of the defendant's wrong, there will be no liability. This test is a somewhat crude device and does not provide a satisfactory solution in every case.

REMOTENESS OF DAMAGE

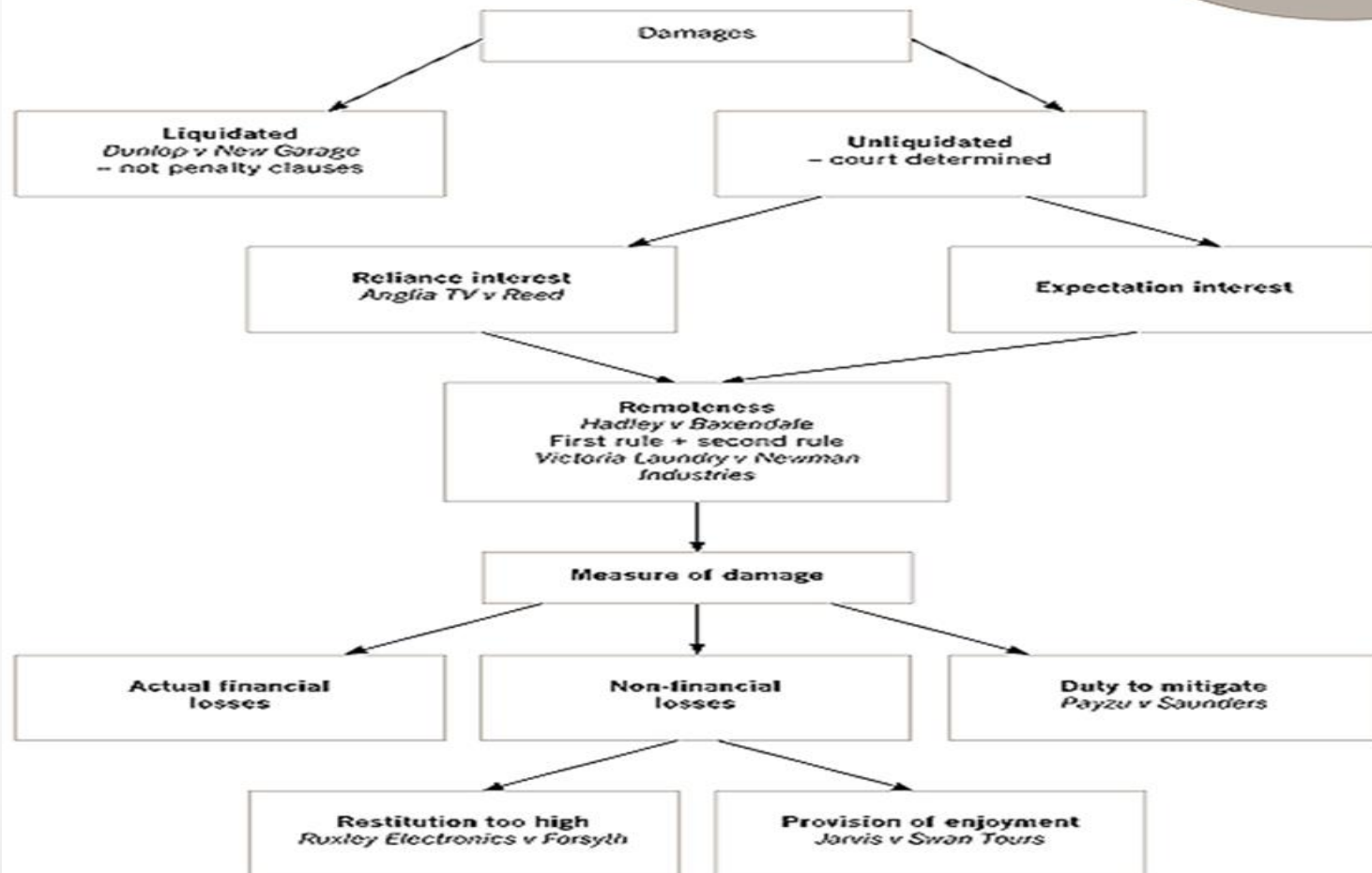
- Even where causation is proved, a negligence claim can still fail if the damage caused is 'too remote'. The test of reasonable foresight developed out of *The Wagon Mound* (1961). Liability is limited to damage that a reasonable man could have foreseen. This does not mean the exact event must be foreseeable in detail, just that the eventual outcome is foreseeable.

REMOTENESS OF DAMAGE

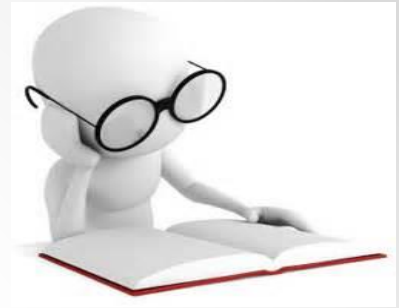
- The Wagon Mound 1961
- The facts: A ship was taking on oil in Sydney harbour. Oil was spilled onto the water and it drifted to a wharf 200 yards away where welding equipment was in use. The owner of the wharf carried on working because he was advised that the sparks were unlikely to set fire to furnace oil. Safety precautions were taken. A spark fell onto a piece of cotton waste floating in the oil, thereby starting a fire which damaged the wharf. The owner of the wharf sued the charterers of the Wagon Mound.
- Decision: The claim must fail. Pollution was the foreseeable risk: fire was not.

REMOTENESS OF DAMAGE

FIGURE 1: AN EXAMPLE OF A DIAGRAM FOR DAMAGES



Further readings



- The law of obligations 4: Formation of contracts I
ACCA BPP F4
- Contract Law - Catherine Elliott and Frances Quinn
- <http://www.lawhandbook.org.au>
- In Law, What Is the Difference Between Tort And
Contract? - Mike Howells
- KEY ASPECTS OF THE LAW OF CONTRACT AND THE
TORT OF NEGLIGENCE –ACCA F4
- Define Duty of Care By Tom Lutzenberger
- The tort of negligence – Stephen Osborne
- <http://smartelibrary.com/>