

TORT LAW CONCEPTS FOR REGULATORS



What is a Tort?

- A legal construct
 - only exists when the law says it exists
- A private or civil wrong or injury
- Primary purpose is to compensate person injured by the actions of another

Canadian Tort Law

- Is mostly “judge-made” law
- Reflects different, often inconsistent, views and values
- Evolves with society; early cases involved railway accidents, industrial injuries, horse & buggy collisions
- Modern cases concerned with damage to reputation, nervous shock, mental suffering

Purpose of Torts

- Justice to victims, security to society
- Punish and deter wrong doing
- From deliberate injury
- Intent to do harm

Unreasonable Conduct

- Slightly substandard conduct
- Reckless Conduct
- Gross Negligence

Negligence

- Negligence is the failure to take care for the safety of another party.
- To bring an action in negligence the injured party must prove 3 distinct elements:
 - The wrong doer owed the injured party a duty of care
 - The wrong doer breached that duty
 - The breach caused the injury or harm

Neighbour Principle

- *Donoghue v. Stevenson* introduced the neighbour principle
- “You will be liable only for causing harm which you should have **reasonably foreseen** may injure your neighbour”
- Must be a close and direct relationship of proximity or neighbourhood

Duty of Care

- Two step approach to determining if there is a private law duty of care (*Anns v. Merton London Borough Council*)
- First, are the parties “neighbours” or sufficiently proximate in relationship to create a duty?
- Secondly, is that duty negated or limited?

Two-Part Test

- SCC first articulated the two-part test in *Kamloops (City) v. Nielson*
- First Step: Is there sufficient proximity?
- Second step: are there any factors that negate or limit the duty of care?

Private Duty of Care

- The crux is a sufficiently close relationship between the parties
- May co-exist with a public duty where the legislation does not foreclose a private duty

Proximity

- SCC in *Cooper v. Hobart* focused on need for “proximity” of relationship
- Proximity means the “close and direct” relationship described in *Donaghue v. Stevenson*
- Is it just and fair given the nature of the relationship to impose a duty of care?

Policy Considerations

Policy factors in *Cooper v. Hobart*

- Must balance private and public interests
- Duty to act fairly in cancelling broker's licence
- Duty of care to investors would create insurance scheme for investors at taxpayer's costs

Scope of Duty of Care

- Duty of Care may be limited by broad policy considerations:
 - Efficiency
 - Economic Fairness

Role of Legislation

- No Tort for breach of statute
- Statute may give rise to a Duty of Care but most statutes aimed at public duties or interest
- Legislative scheme may expressly or implicitly foreclose a private law duty

Duty Based on Interaction

- Courts will determine proximity based on interaction between plaintiff and regulator
- Proximity is found where actions of a regulator directly caused harm to plaintiff
- Distinct from claims that a regulator should have prevented harm by a third party

Statutory Regulators

- Courts tend to focus on first step in *Anns/Kamloops*
- Hurdle for plaintiffs is regulatory functions are aimed at general public interest; not individual
- Does statutory scheme imply a special private duty to a subset of the community?

Policy v. Operational Decisions

- Inappropriate for courts to review government policy decisions
- Implementation of policy or operational activity may create tort liability

Standard of Care

- Once duty of care exists must determine standard of care
- What would a reasonable, prudent person in same circumstances do?
- Depends on the facts

Measuring Reasonable

- Likelihood of a known or foreseeable harm
- The gravity of that harm
- The burden or cost which would be incurred to prevent the injury

Additional Measures of Reasonable Conduct

- May look to external indicators such as:
- Custom or industry practice
- Statutory or regulatory standards

Standard for Professionals

- Professionals must live up to the standards of persons of reasonable skill and experience in their calling
- May still exercise independent discretion provided it is reasonable

Statutory Immunity

- Is the protection from legal actions given to certain persons or entities by statute.
- Recognizes a person acting in the public interest may be exposed to personal liability
- Typical immunity provision has four common elements;
 - protects the person or entity against liability for damages;
 - for anything done or omitted to be done
 - in good faith
 - in the execution of their duties or powers.

Public Health Act

- No protection for bad faith [Sec. 92]
- Immunity for person required to act [Sec 93]
- Protection against adverse actions [Sec. 94]

A Cautionary Tale

- Plaintiff alleged law of negligence had expanded to provide an alternative cause of action
- Plaintiff did not seek to impose duty in the context of the Health Authority's statutory function
- Court not receptive to attempt to merge defamation and negligence

What This Means for You

- Understand your legislative authority and act within it
- Know your professional responsibilities
- Act in good faith
- Be reasonable
- Consult with colleagues, senior staff, supervisors
- Learn from past practice