Negligence: Duty of Care
What is negligence?

- A breach of a duty caused by an omission to do something which a reasonable person would do OR an act that a reasonable person would not do.
- The law is only concerned with carelessness where there is a duty to take care and where failure in that duty has caused damage.
What is negligence?

*Jacob Mathew v State of Punjab*, AIR 2005 SC 3180

“Negligence is the breach of a duty caused by the omission to do something which a reasonable man ... would do, or doing something which a prudent or reasonable man would not do. Actionable negligence consists in the neglect of the use of ordinary care or skill towards a person to whom the defendant owes the duty of observing ordinary care and skill, by which neglect the plaintiff has suffered injury to his person or property."
What are the elements of a claim in negligence?

- **Duty**: That the defendant owed the plaintiff a duty to take care in the circumstances;
- **Breach**: That the defendant’s act of omission failed to reach the standard of carefulness required by the circumstances and so there is a breach of the duty to take care;
- **Causation**: That the defendant’s breach of duty has caused damage to the plaintiff; AND
- **Damage**: That the damage suffered by the plaintiff is legally recognisable and not too remote from the breach of duty.
The existence of a duty of care is essential before a person can be held liable in negligence.

Prior to *Donoghue v Stevenson* an action in negligence could only be brought if a pre-existing relationship between the two parties could be proved.

Therefore the existence of the duty of care owed was interpreted narrowly.

*Donoghue v Stevenson* created a general rule of when a duty of care arises and such pre-existing relationships are just examples of this general rule.

In the vast majority of cases the question of duty of care, a duty is established where there is precedent of such a category (e.g., consumers, users of roadways, etc.)
Importance of this case:

- Established the new category of duty owed by manufacturer to consumer.
- But more importantly, established the general principle for creation of new categories of duty of care.
- Before this case: only a few categories of duties (e.g. inn keepers to guests, lawyers to clients).
Facts:
- P’s friend bought a bottle of ginger beer manufactured by D from a shop.
- The bottle was sealed with metal cap and made of opaque glass.
- P drank the ginger beer.
- When P’s friend tried to empty the ginger beer from the bottle, something which looked like the remains of a dead snail flowed out of the bottle.
- P suffered shock and became severely ill as a result.
- P sued D for damages.

Question: Why did the Plaintiff not sue the retailer?
Held:

- The manufacturer of the ginger beer owed a **duty of care** to the consumer to ensure that it did not contain any noxious matter which would cause injury to the consumer.
- The manufacturer had **breached** that duty to P and was therefore liable to his injury and loss.
- The “**Neighbour Principle**” and negligence.
Lord Atkin:

“"The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer’s question, Who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be – persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question."
This case established the new category of duty owed by manufacturer to consumer.

This case established the so-called “Neighbour Principle”:
- One must take reasonable care to avoid acts or omissions that could reasonably be foreseen as likely to injure one's neighbour.
- The principle is used as a test to determine the existence of a duty of care.
- Who is a neighbor?
  - Persons who are so closely and directly affected by my act (or omission) that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts.
Facts:
- A doctor bought woolen underwear, manufactured by Australian Knitting Mills Ltd from John Martin & Co., Ltd.
- Suffered from acute dermatitis after wearing the underwear.
- Dermatitis was caused by an irritating chemical, free sulphite, which the manufacturer omitted to remove during the manufacture process.
Grant v Australian Knitting Mills Ltd [1936]

Held:

- The manufacturer had breached their duty to him as they had failed to use due or proper care in manufacturing the underwear.
- Against the retailer: Breach of warranty. Underwear not fit for the purpose bought and not of merchantable quality.
Grant v Australian Knitting Mills Ltd [1936]

Held:
- Applying the principle laid down in Donoghue v Stevenson [1932], the manufacturer owed a duty of care to P which it had breached and was therefore liable for P’s loss in tort.
- The retailer was also liable to P for breach of the implied term of the contract as the underwear was not of merchantable quality or fit for the purpose for which it was purchased.
Underwear sold not fit for the purpose:

- “[M]erchantable does not mean that the thing is saleable in the market simply because it looks all right; it is not merchantable in that event if it has defects unfitting it for its only proper use but not apparent on ordinary examination.”
Sue Retailers in Contract and Manufacturer in Tort based on Negligence:

- “The retailers ... are liable in contract: so far as they are concerned, no question of negligence is relevant to the liability in contract. But when the position of the manufacturers is considered, different questions arise: there is no privity of contract between the [consumer of the underwear] and the manufacturers: between them the liability, if any, must be in tort, and the gist of the cause of action is negligence.”

*Grant v Australian Knitting Mills Ltd [1936]*
"The principle of Donoghue’s case can only be applied where the defect is hidden and unknown to the consumer, otherwise the directness of cause and effect is absent: the man who consumes or uses a thing which he knows to be noxious cannot complain in respect of whatever mischief follows, because it follows from his own conscious volition in choosing to incur the risk or certainty of mischance."
Latent defects:

“...The presence of the deleterious chemical in the pants, due to negligence in manufacture, was a hidden and latent defect just as much as were the remains of the snail in the opaque bottle: it could not be detected by any examination that could reasonably be made. Nothing happened between the making of the garments and their being worn to change their condition...The garments were made by the manufacturers for the purpose of being worn exactly the way they were worn in fact by the appellant: it was not contemplated that they should be first washed.”
Expansion of manufacturer’s liability

- Manufacturer
  - Consumer
  - Other people injured by the defective product
A wider basis of liability

- *Anns v Merton London Borough Council* (1978) laid down a general principle of liability which did not require taking into account existing categories and provided a two-stage test for determining the existence of duty of care.

- Lord Wiberforce’s two-stage test:
  1. There must have been sufficient relationship of proximity or neighbourhood; foreseeability was not enough;
  2. If the answer to the above is in the affirmative, then the courts should take into account considerations which ought to negative, or to reduce or limit the scope of liability to determine the existence and scope of the duty.
In *Leigh & Sullivan v Aliakmon Shipping Co* (1985), the House of Lords held that the test in Anns should not apply to a case of pure economic loss caused by a negligent act because in the past the courts had refused to impose liability in such situations.

In *Sutherland Shire Council v Heyman* (1985) (the case of negligent certification of a building), Brennan J of the High Court of Australia refused to impose liability on the council for negligent certification by its inspectors and held that the law should develop novel categories of negligence incrementally and by analogy with established categories.

Note that *Murphy v Brentwood* overruled Anns and followed Sutherland.
The modern approach for determining the existence of duty of care

The Caparo three-fold test:
1. Foreseeability;
2. Proximity; and
3. Fairness, justice and reasonableness.
The Caparo three-fold test: the case

_Caparo Industries Plc v Dickman_ [1990]

- The HoL took a narrow view of Duty of Care.
- The auditors of a company were negligent in preparing accounts which were relied upon by a potential investor who bought large numbers of shares on the basis of those accounts.
- The company became insolvent and the investor sued the auditor.
- **Held:** no duty exists where the defendant has no specific knowledge of the transaction in respect of which P relies on the information or advice.
Foreseeability:

- D must foresee P or the class of persons to which D belongs as being likely to be affected by his act or omission.
- It is not a duty to take care in the abstract but a duty to avoid causing to the particular P damage of the particular kind which he has in fact sustained.
- D is liable for injuries arising in the ordinary course of things.
- Ordinarily, D is not liable for injuries in extraordinary situations unless D ought to have known that such injuries could arise as a result of his action or inaction.
- Eg’s:
  - Palsgraf v Long Island Railway Co (1928)
  - Nova Mink v Trans Canada Airlines [1951]
To find that a duty exists, P must be foreseeable, or proximate to the scene of the accident.

The House of Lords denied that Mrs. Bourhill had been foreseeable to Mr. Young, at the time of the accident.

Lord Russell stated:

“... I am unable to see how he could reasonably anticipate that, if he came into collision with a vehicle coming across the tramcar into Glenlockhart Road, the resultant noise would cause physical injury by shock to a person standing behind the tramcar. In my opinion, he owed no duty to the appellant, and was, therefore, not guilty of any negligence in relation to her”
Proximity:

- Proximity may be judged by physical closeness as in the case of nervous shock or cause and effect as in the case of injury caused by a defective product.

- Further, where D has the management and control of a certain activity which caused P’s injury the fact of existence of such management and control generally establishes proximity and its absence negates proximity.

- In *Yuen Kun Yeu & Ors v Attorney General* - there was proximity between a depositor and his deposit-taking company or bank but none between him and the Commissioner of Deposit taking companies. No proximity because the Commissioner does not have power to control the day to day management of the company.

- See also: *Hill v Van Erp (1997)*

*The Caparo three-fold test: proximity*
Conditions that had to be fulfilled in order for a duty of care to be found in such cases, including:

- The claimant who is a "secondary victim" must perceive a "shocking event" with his own unaided senses, as an eye-witness to the event, or hearing the event in person, or viewing its "immediate aftermath".

- This requires close physical proximity to the event, and would usually exclude events witnessed by television or informed of by a third party, as was the case with some of the plaintiffs in Alcock.

- The shock must be a "sudden" and not a "gradual" assault on the claimant's nervous system.

- If the nervous shock is caused by witnessing the death or injury of another person the claimant must show a "sufficiently proximate" relationship to that person, usually described as a "close tie of love and affection".
The Caparo three-fold test: fairness, justice & reasonableness

Fairness, justice & reasonableness:

- **White v Jones**
- **Mcfarlane v Tayside Health Board** (negligence in carrying out a vasectomy operation resulting in P’s pregnancy-healthy child being born-held fairness and justice demanded that the hospital should not be liable for the cost of upbringing of the child).
- **Rees v Darlington Memorial Hospital NHS Trust** [2004], a healthy child was born to a blind mother and her claim that extra expenses would be incurred to bring up the child because of her own disability was also rejected by a four to three majority (the HL refused to create an exception to the principle laid down in McFarlane).
- See also **Cattanach v Melchior** (2003)
Facts:
- The defendants were solicitors.
- They were instructed by the plaintiffs’ father to draw up a will giving the plaintiffs £9,000 each.
- The solicitors delayed in carrying out the father’s instruction. After a month, the father again asked the solicitors to draw up the will and the solicitors failed to do so.
- The father died without executing the will.
- The plaintiffs had no remedy against the estate of their father so they sued the solicitors.

Held:
- It was fair, just and reasonable that the defendants should be liable to the intended beneficiaries, otherwise there would be no sanction in respect of a solicitor’s breach of his professional duties. If the defendants were not held to be liable, they would go scot-free, which could not be right.
Indian case law:

See pages 226-235 of your Bangia text for summaries of cases which have taken place in an Indian context.
The question of public policy is sometimes relevant in determining whether a duty of care exists.

In some cases, a court may refuse to impose a duty of care due to public policy reasons.
Public Policy Reasons

- The Police:
  - *Hill v Chief Constable West Yorkshire* [1989]

- The Legal Profession

- Military
  - *Mulcahy v Ministry of Defence* [1996]
  - *Shaw Savill v The Commonwealth* (1940)
The police should be immune from an action of this kind.

Imposition of a duty of care on the police could lead to their “function being carried on in a detrimentally defensive frame of mind”. (Lord Keith)

 “[A] great deal of police time, trouble and expense might be expected to have to be put into the preparation of the defence to the action and the attendance of witnesses at the trial. The result would be a significant diversion of police manpower and attention from their most important function, that of the suppression of crime. Closed investigations would require to be reopened and retraversed, not with the object of bringing any criminal to justice but to ascertain whether or not they had been competently conducted”. (Lord Keith)
To whom a duty of care is owed?

- **Consumers**
  - Donoghue v Stevenson [1932]
  - Grant v Australian Knitting Mills Ltd [1936]

- **Road Users**
  - Bourhill v Young [1943]

- **Users and Purchasers of Premises**
  - Australian Safeway Stores v Zaluzna (1987)

- **School Children**
  - Geyer v Downs (1977)
  - Mullin v Richards, [1998]
  - Minor Muthulakshmi v Government of TN, AIR 2012 Mad 189

- **The unborn child**
  - Watt v Rama [1972]

- **Rescuers**
  - Chapman v Hearse (1961)
Duty to the unborn child

- Now a person can claim damages for an injury caused while he was in his mother’s womb.
- *Watt v Rama (1972) (Victoria, Australia)* held that where a child was born with a physical disability as a result of D’s negligence while he was in his mother’s womb he could recover damages for his injuries against D.
- *Burton v Islington Health Authority (1992)* also took the view that there was a potential duty to the unborn child that crystallised upon his live birth.
Position where the injury is caused by the mother herself:

- No action can be brought against the mother for her negligence in causing injury to her unborn child even if such injury has been caused by the mother taking drugs or indulging in excessive drinking, smoking or even when the injury is caused due to the mother's negligent driving.


However, the father does not enjoy any immunity from his child’s legal action for injuries caused by his negligence.
Where a child is born due to D’s negligence in performing an unsuccessful vasectomy or sterilisation or abortion, the mother cannot sue D, if a healthy child is born, *(McFarlane v Tayside Health Board)*.

Further a child cannot sue for the stigma of being an “illegitimate” or unwanted child.

However, where a child was born with disabilities, due to D’s negligence, the mother of the child can claim damages for costs associated with bringing up such a child *(Emeh v Kensington AHA)*.
Claims for wrongful life

- A legal action where someone is sued by a (usually disabled child) for failing to prevent the child's birth.
- There is no duty on a doctor to abort or to destroy a foetus even if the doctor is certain that the child will be born with deformities (Mckay v Essex Area Health Authority).

See also Edwards v Blomely

- Public policy reasons.
Claims for wrongful life: US case law


The Curlender decision involved a child who was allegedly born with Tay-Sachs disease after the parents relied upon the defendants' representations about the reliability of their genetic tests in refraining from proceeding with amniocentesis.

- “The circumstance that the birth and injury have come hand in hand has caused other courts to deal with the problem by barring recovery. The reality of the 'wrongful-life' concept is that such a plaintiff both exists and suffers, due to the negligence of others. It is neither necessary nor just to retreat into meditation on the mysteries of life. We need not be concerned with the fact that had defendants not been negligent, the plaintiff might not have come into existence at all. The certainty of genetic impairment is no longer a mystery. In addition, a reverent appreciation of life compels recognition that plaintiff, however impaired she may be, has come into existence as a living person with certain rights.”
Pre-natal Diagnostics Technique Act (1994):

no pre-natal diagnostic techniques shall be used or conducted unless the person qualified to do so is satisfied for reasons to be recorded in writing that any of the following conditions are fulfilled, namely:—

(i) age of the pregnant woman is above thirty-five years;
(ii) the pregnant woman has undergone of two or more spontaneous abortions or foetal loss;
(iii) the pregnant woman had been exposed to potentially teratogenic agents such as drugs, radiation, infection or chemicals;
(iv) the pregnant woman or her spouse has a family history of mental retardation or physical deformities such as, spasticity or any other genetic disease;
(v) any other condition as may be specified by the Central Supervisory Board;

Medical Termination of Pregnancy Act