

# Negligence Liability Principals

The General Concepts Involving Negligent Conduct



## Guide to Understanding Negligence Principles Involving the Duty of Care and Standard of Care



Negligence matters are among the most common torts that give rise to litigation claims (lawsuits) and often involve injury to persons or damage to property caused by the carelessness of others such as the failure to, among other things, properly keep walkways safe resulting in a 'slip and fall'. Negligence was recently

defined in *Seyom v. TTC*, [2018 ONSC 6848](#) as:

[6] Generally speaking, negligence is the doing of something which a reasonably prudent person would not do, or the failure to do something which a reasonably prudent person would do, under circumstances similar to that found in a case. Negligence is relative to the circumstances. Negligent conduct gives rise, through an act or omission, to an unreasonable risk of harm.

A case in negligence may be founded when:



- ▷ There is a duty of care owed;
- ▷ There is a standard of care owed that has been unreasonably breached;
- ▷ There is harm as result of the breach that was reasonably foreseeable; and
- ▷ There are no public policy reasons to negate liability.

## Duty of Care

"The duty of care in negligence law is based upon a relationship of proximity between parties which requires one person to take reasonable care for the protection of the other."; Lewis Klar, Tort Law, 3rd ed. (Toronto: Carswell, 2003) at 153 [Klar]

The duty of care owed to those within a relationship of proximity is known as the 'neighbour principle' per the precedent in *Donoghue v. Stevenson*, [\[1932\] A.C. 562](#) where it was said by Lord Atkin at page 580:

You must take reasonable care to avoid acts or omissions which you can reasonably 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 into question.

## Standard of Care

The standard of care in negligence law is based upon the failure to do what a reasonable person would do, or failure to refrain from doing what a reasonable person would refrain from doing, when faced with the same circumstances; *Seyom*, supra at paragraph 6. It is important to keep in mind that a 'reasonable person' is merely a fictitious person. The test is one of whether the risks of harm were reasonably foreseeable such that proper care should be taken at the time, without considering afterward, with 20/20 hindsight, whether the risks of harm were a possibility - as by using such a hindsight test, whenever there has been an occurrence of harm stemming from a risk, the possibility of the risk actually occurring would be shown as absolute. Determining whether there was a breach of the standard of care is a considerably different question than asking whether an occurrence of a potential risk took place.

Over the years, cases continue to refine and clarify the principles founded in *Donoghue*; and in particular, those in regards to the general, rather than specific, 'duty of care' as well as to assist in resolving confusion that may arise when attempting to understand the difference between the legal duty of care and the standard of care. These two important yet separate concepts were well articulated by the Court of Appeal in the case of *Rausch v. Pickering (City)*, [2013 ONCA 740](#) wherein it was stated:

[37] The foundation of a claim in negligence is the recognition of a duty of care owed by the defendant to the plaintiff. A duty of care is not a duty to do anything specific: the duty is to take reasonable care to avoid causing foreseeable harm to those with whom one is in a relationship of proximity.

[38] An error frequently made is conflating the duty of care with the standard of care. They are discrete concepts. As the Supreme Court of Canada wrote in *Stewart v. Pettie*, [1995 CanLII 147 \(SCC\)](#), [\[1995\] 1 S.C.R. 131](#), at para. 32, "*the question of whether a duty of care exists is a question of the relationship between the parties, not a question of conduct.*" The question of what conduct is required to satisfy the duty is a question of the appropriate standard of care. This important point is expressed in Carolyn Sappideen & Prue Vines, *Fleming's The Law of Torts*, 10th ed. (Sydney: Thomson Reuters, 2011), at pp. 123-24:

The general standard of conduct required by law is a necessary complement of the legal concept of "duty". There is not only the question "Did the defendant owe a duty to be careful?" but also "What precisely was required of the defendant to discharge it?" Indeed, it is not uncommon to encounter formulations of the standard of care or of some particular precaution that an actor in the defendant's position should take in terms of "duty", as when it is asserted that a motorist is under a duty to keep a proper lookout or that a person has (or has not) a duty to warn another of a certain risk. But this method of expression is best avoided. In the first place, the duty issue is already sufficiently complex without fragmenting it further to cover an endless series of details of conduct. "Duty" is more appropriately reserved for the problem of whether the relation between the parties (like manufacturer and consumer or occupier and trespasser) warrants the imposition upon one of an obligation of care for the benefit of the other, and it is more convenient to deal with individual conduct in terms of the legal standard of what is required to meet that obligation. Secondly, it is apt to obscure the division of functions between judge and jury or the distinction between questions of law and fact. It is for the court to determine the existence of a duty relationship and to lay down in general terms the standard of care by which to measure the defendant's conduct; it is for the jury or judge sitting alone to translate the general into a particular standard suitable for the case in hand and to decide whether that standard has been attained or the duty breached.

[39] The existence of a duty of care simply means that the defendant is in a relationship of sufficient proximity with the plaintiff that he or she ought to have the plaintiff in mind as a person foreseeably harmed by his or her wrongful actions. It is not a duty to do anything specific; it is a duty to take reasonable care to avoid causing foreseeable harm: *Ryan v. Victoria (City)*, [1999 CanLII 706 \(SCC\)](#), [1999] 1 S.C.R. 201, at paras. 25-27.

[40] If a duty of care is recognized, then the standard of care necessary to discharge the duty and whether it has been breached will be determined at trial.



Accordingly, it appears that a pre-trial review could properly question of whether a legal duty of care exists; and where the answer is negative, litigation involving negligence would cease at an early stage; however, the question of whether the legal standard of care was breached, as a secondary question if the initial duty of care question is answered in the positive, requires evidence at trial so to establish the proper standard of care, the actual level of care as occurred in the circumstances, and to consider whether the level of actual care fell below the level of proper care.

### Summary Comment

A review of negligence issues begins with the two key foundations to negligence law being whether a duty of care exists, meaning a duty to act carefully, and then whether the standard of care was breached, meaning was the level of care provided sufficient. These are merely the initial two key foundations to negligence matters that require review within the litigation process.