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## TORT LIABILITY IN A COVID WORLD, PART 1: THE PRINCIPLES OF NEGLIGENCE IN A COVID WORLD

In the landmark case of *Donoghue v Stevenson*, Lord Atkin famously explained that the law of negligence obliges businesses and individuals to “take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour.”<sup>1</sup> But how can service providers, manufacturers, professionals, and everyday Albertans ensure that they are taking reasonable care to avoid harming their clients, customers, and neighbours during a pandemic?

This article - the first in our Tort Liability in a COVID World series - summarizes the overarching elements of negligence most impacting our clients as they navigate through the realities of our new COVID world.

### What is the Standard of Care During a Pandemic?

The “standard of care” is the objective standard of prudence that must be met in the circumstances. Every type of conduct has an applicable standard which must be met to protect others from the unreasonable risk of harm.

The standard against which each individual or business is judged is that of the “reasonable person in similar circumstances.”<sup>2</sup> In assessing whether the risk of harm resulting by a party’s action (or inaction) is reasonable, Courts consider the danger created by the conduct and compare it to the usefulness of the conduct. If an action is very risky but has high social value (such as continuing to operate a seniors’ care facility during a pandemic), the conduct may be held to be reasonable despite the risks. Along the same lines, the cost or difficulty of removing a risk will also be considered in assessing whether an action is reasonable.

Each of these factors will be balanced in assessing whether a party has acted prudently to prevent harm to others in the context of COVID-19. Since the infection risk of the virus causing COVID-19 virus is high, it follows that businesses are required to take more than minimal steps to prevent its spread - even if they are costly or difficult to implement. The question is how far they must go, and how much expense must be incurred, in order to act “reasonably” in the circumstances.

<sup>1</sup> *Donoghue v Stevenson*, 1932 SC (HL) 31 [Donoghue]

<sup>2</sup> *Hill v Hamilton-Wentworth Regional Police Services Board*, [2007] SJC No 41, para 69

## Who is My "Neighbour" in Our New COVID World?

Even if a party has acted negligently by failing to meet the applicable standard of care, they will not be held responsible unless they owed a duty to the person that was harmed. Duties are not owed to all the world - they are only owed to those "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."<sup>3</sup>

The range of foreseeable claimants in a COVID world is unclear. However, where the risk of personal injury is high, Courts are more likely to hold that the claimant was foreseeable, and in a close and direct enough relationship with the wrongdoer to find that a duty of care existed.

Courts have recognized that where a person themselves creates a risk - for example, by hosting a party, serving an excessive amount of alcohol, and allowing guests to drive home - he or she may be held liable to those that are subsequently injured. It appears that the same logic could be used to hold a company or individual liable for failing to take measures to prevent the spread of a deadly virus, thereby creating risk for its employees, customers, or clients.

Unique considerations apply when considering whether to protect against purely economic losses or hold government entities liable. COVID-19 will surely give rise to novel questions in these areas too.

## The Principles of Causation in a COVID World

For a defendant to be held liable in negligence, a plaintiff must prove that the defendant's action caused the plaintiff's loss. In assessing the issue of causation, the question is:

But for the defendant's negligence, would the plaintiff have sustained loss?

A plaintiff who contracts the virus would likely face difficulties in proving causation. An individual can be asymptomatic for 2-14 days. How would that individual know for certain the source of the virus? Furthermore, what if that individual was exposed to more than one person who had the virus: how would the individual know from whom she contracted the virus?

Consider the scenario of an individual who contracted the virus after a flight and wants to sue the airline. Under the traditional approach to causation, it likely cannot be said that, but for the airline's negligence, the plaintiff would not have contracted the virus. After all, how could the individual know whether he contracted the virus in a hotel, in the lounge before the flight or on the flight? These COVID causation conundrums may lead plaintiffs to rely on the alternative causation test that is applied when the court simply cannot tell which of a number of different negligent acts may have caused the loss.

<sup>3</sup> *Donoghue*

It will also be interesting to see whether the overall anxiety and fear associated with this worldwide pandemic give rise to extreme reactions to infection or exposure. Any losses incurred as a result may be considered “too remote” to recover.

## **Damages**

A negligence claim also requires proof of actual damage, usually relating to injury or loss to a person or property. While a plaintiff who develops COVID-19 may be able to claim special damages for pecuniary losses such as unpaid time off during a hospital stay, a question arises as to whether they can claim general damages for pain and suffering, especially if the plaintiff recovers and there is no long-term or permanent injury.

## **Conclusion**

Over the next several weeks, JSS Barristers’ product liability, professional negligence, and commercial liability lawyers will delve into specific issues facing our clients in the face of COVID-19. This will include specific liability issues impacting public-facing businesses like restaurants, grocery stores, and retail establishments; liability considerations in the healthcare industry; product liability issues; and getting the most out of your business’s insurance coverage.

If you have questions about your business’s obligations in the face of COVID-19, we encourage you to contact the lawyers at JSS Barristers. The information provided in this series of articles is not intended to replace the need for legal advice that takes into account the circumstances of your business and facts of your case and the legal principles applicable to COVID-19 (which are evolving). JSS Barristers has acted as counsel and advised in multiple disputes involving professional negligence, product liability, the standard of care imposed on business owners, and the obligations and rights of government authorities under principles of negligence. We would be pleased to provide answers to your questions during this critical and rapidly changing time.

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