

FORSEEABILITY OF DAMAGES IN NEGLIGENCE RELATED TO
CONSTRUCTION INDUSTRY IN MALAYSIA

NOOR HAJAR BINTI MOHAMAD RASDI

A thesis submitted in fulfilment of the
requirements for the award of the degree of
Master of Science (Construction Contract Management)

Faculty of Science
Universiti Teknologi Malaysia

AUGUST 2020

DEDICATION

This thesis is dedicated to my father, who taught me that the best kind of knowledge to have is that which is learned for its own sake. It is also dedicated to my mother, who taught me that even the largest task can be accomplished if it is done one step at a time.

ACKNOWLEDGEMENT

In preparing this thesis, I was in contact with many people, researchers, academicians, and practitioners. They have contributed towards my understanding and thoughts. In particular, I wish to express my sincere appreciation to my main thesis supervisor, Dr. Norazam Othman, for encouragement, guidance, critics and friendship. I am also very thankful to my co-supervisor Dr Hamizah Liyana binti Tajul Ariffin for her guidance, advices and motivation. Without their continued support and interest, this thesis would not have been the same as presented here.

I am also indebted to Universiti Teknologi Malaysia (UTM) for providing resources to my research. Librarians at UTM also deserve special thanks for their assistance in supplying the relevant literatures.

My fellow postgraduate student should also be recognised for their support. My sincere appreciation also extends to all my colleagues and others who have provided assistance at various occasions. Their views and tips are useful indeed. Unfortunately, it is not possible to list all of them in this limited space. I am grateful to all my family member.

ABSTRACT

Negligence is a failure to take reasonable care to avoid causing injury or loss to another person and foreseeability of damages can be found after all the elements of negligence has been go through. Foreseeability only comes until the damages are done but how to determine the liability or damages except foreseeability of damages happened. Research found that reasonable foreseeability of damages could be determine by using reasonable foreseeability test. The aim of this research is to identify the reasonable foreseeability damages in construction in Malaysia. In order to achieve the research aim, the objectives are to identify the foreseeability test could or could not bring damages to be foreseen and to determine type of damages by using foreseeability test. This study was carry out by using a case study approach with 10 legal cases that having reasonable foreseeability damages as a claim towards defendants and as defends towards plaintiffs and using reasonable foreseeability damages in determine liability or damages rise by parties in construction industry in Malaysia. The development of research methodology comes after analysis the published literatures regarding the reasonable foreseeability damages in negligence and related legal cases to the topic. As for the finding, the aim of this research is to identify the reasonable foreseeability damages in construction industry in Malaysia has slightly achieved. The type of damages could determine by 30% of using foreseeability test but most of the cases cannot be determined. The damages could 50% be foreseen by using foreseeability test but most of cases used foreseeability to identify the relationship of duty of care between parties.

ABSTRAK

Kecuaian adalah kegagalan untuk mengambil langkah berjaga-jaga bagi mengelak kerosakan dan kerugian terhadap orang sekeliling manakala kebarangkalian jangkaan kerosakan hanya dapat ditentukan selepas elemen-elemen kecuaian dinilai terlebih dahulu. Jangkaan kerosakan hanya akan berlaku selepas kerosakan terjadi di dalam sesuatu situasi, akan tetapi jangkaan kerangkalian kerosakan hanya dapat ditentukan sebelum kerosakan tersebut itu berlaku. Kajian telah mendapati jangkaan kebarangkalian kerosakan dapat ditentukan melalui ujian jangkaan kebarangkalian kerosakan. Tujuan kajian ini dilakukan adalah untuk mengenal pasti jangkaan kerosakan yang munasabah dalam pembinaan di Malaysia. Untuk mencapai tujuan penyelidikan tersebut, objektif kajian ini adalah untuk mengenal pasti ujian jangkaan kebarangkalian kerosakan dapat atau tidak dapat membawa kerugian yang dapat diramalkan dan untuk menentukan jenis kerosakan dengan menggunakan ujian jangkaan. Kajian ini dilakukan dengan menggunakan pendekatan kajian kes dengan 10 kes undang-undang yang mempunyai jangkaan kerosakan yang munasabah sebagai tuntutan terhadap defendan dan sebagai pembelaan terhadap plantif bagi menggunakan jangkaan kerosakan yang munasabah dalam menentukan liabiliti atau kerugian yang ditimbulkan oleh pihak-pihak dalam industri pembinaan di Malaysia. Perkembangan metodologi penyelidikan dilakukan setelah analisis yang diterbitkan mengenai kes-kes yang dipilih dalam meramal kebarangkalian kerosakan dan kecuaian yang berkaitan dengan topik tersebut. Sebagai penemuan kajian ini dalam mengenalpasti jangkaan kerosakan yang berlaku dalam industri pembinaan di Malaysia adalah hampir tercapai. Jenis ganti rugi dapat ditentukan dengan 30% penggunaan ujian jangkaan tetapi kebanyakannya kes tidak dapat ditentukan. Kerosakan dapat diramalkan 50% dengan menggunakan ujian jangkaan tetapi kebanyakannya kes menggunakan ramalan untuk mengenal pasti hubungan tugas penjagaan antara pihak.

TABLE OF CONTENTS

	TITLE	PAGE
DECLARATION		ii
DEDICATION		iii
ACKNOWLEDGEMENT		iv
ABSTRACT		v
ABSTRAK		vi
TABLE OF CONTENTS		vii
LIST OF TABLES		x
LIST OF FIGURES		xi
 CHAPTER 1 INTRODUCTION		 1
1.1 Background	1	
1.2 Problem Statement	2	
1.3 Research Aim and Objective	3	
1.4 Research Sampling	4	
1.5 Scope and Limitation	4	
1.6 Research Structure	6	
1.6.1 Chapter 1 (Introduction)	7	
1.6.2 Chapter 2 (Literature Review)	7	
1.6.3 Chapter 3 (Research Methodology)	7	
1.6.4 Chapter 4 (Research Result)	7	
1.6.5 Chapter 5 (Conclusion and Recommendation)	8	
 CHAPTER 2 LITERATURE REVIEW		 9
2.1 Introduction	9	
2.2 Negligence	10	
2.2.1 Elements of Negligence	11	
2.2.1.1 Duty of care	12	
2.2.1.2 Breach of duty	16	

2.2.1.3	Damages / Causation	21
2.2.1.4	Damages was not remote	23
2.3	Reasonable Foreseeability of Damages	25
2.3.1	Test of Damages	28
2.3.1.1	The Reasonable Foresight Test	29
2.3.1.2	Direct Consequence Test	35
2.4	Type of Damages	37
2.4.1	Unforeseeable Type of Harm	39
2.4.2	Unforeseeable Manner of Harm	39
2.4.3	Unforeseeable Extend of Harm	40
2.4.4	Egg Skull Rule	41
CHAPTER 3	RESEARCH METHODOLOGY	43
3.1	Introduction	43
3.2	Research Process	43
3.3	Research Design	45
3.3.1	Data Analysis	45
3.4	Conclusion	46
CHAPTER 4	RESEARCH ANALYSIS AND RESULT	47
4.1	Introduction	47
4.2	Legal Cases Analysis	47
4.2.1	Tokio Marine Insurans (M) Bhd v WTC Construction Sdn Bhd & Anor (2018)	48
4.2.2	Chong Fatt Tze Mansion Sdn Bhd v Hotel Continental Sdn Bhd (Hong Hing Thai Enterprise Sdn Bhd) (2010)	50
4.2.3	Noble Sound Sdn Bhd v Mass Rapid Transit Corp Sdn Bhd & Anor (2018)	52
4.2.4	ECH Development & Management Sdn Bhd v Prabagaran a/l Perumal & Anor (2020)	54
4.2.5	Puncak Niaga (M) Sdn Bhd & Anor v Sykt Sidhu Adek Beradek Sdn Bhd & Anor (2015)	56
4.2.6	Tenaga Nasional Bhd v Panareno Sdn Bhd (Vital Projects Sdn Bhd, third party and	

Semantra No-dig Engineering Sdn Bhd, fourth party) (2018)	58
4.2.7 Tenaga Nasional Bhd v MTD Construction Sdn Bhd. (2013)	59
4.2.8 Batu Kemas Industri Sdn Bhd v Kerajaan Malaysia Tenaga Nasional Berhad (2015)	61
4.2.9 Bauer (Malaysia) Sdn Bhd v Hundred Vision Construction Sdn Bhd & Anor [2020]	63
4.2.10 Tenaga Nasional Malaysia v Batu Kemas Industri Sdn Bhd and another appeal (2018).	65
4.3 Legal Cases Summary	67
4.3.1 Discussion to Result Analysis	72
4.4 Result Analysis	73
4.4.1 Objective 1: Damages could be foreseen by Using Foreseeability Test	73
4.4.2 Objective 2: Type of Damages by Using Foreseeability Test	76
4.4.3 Analysis Summary	79
CHAPTER 5 CONCLUSION AND RECOMMENDATIONS	81
5.1 Introduction	81
5.2 Conclusion	81
5.3 Recommendations	83
REFERENCES	85

LIST OF TABLES

TABLE NO.	TITLE	PAGE
Table 2.1	Type of Damages	38
Table 4.1	summary of ten (10) legal cases which related to the research finding	67
Table 4.2	Summary of legal cases and justification to Objective 1 & 2	79

LIST OF FIGURES

FIGURE NO.	TITLE	PAGE
Figure 1.1	Summary of Research Structure	6
Figure 2.1	Factors of duty of care	16
Figure 2.2	The standard of the reasonable man	18
Figure 2.3	Damages Element in Negligence	22
Figure 2.4	Basic elements on balance of probabilities	28
Figure 2.5	Factors of using The Foresight Test	31
Figure 4.1	Summary of finding Objective 1	72
Figure 4.2	Summary of Objective 1: Damages Could be Foreseen by using Foreseeability Test	73
Figure 4.3	The Usage of Foreseeability Test in Legal Cases	75
Figure 4.4	Objective 2: Type of damages by using Foreseeability Test	76
Figure 4.5	Determine Type of Damage by using Foreseeability Test	78

CHAPTER 1

INTRODUCTION

1.1 Background

Negligence is a failure to take reasonable care to avoid causing injury or loss to another person. Negligence may not go unnoticed and do no harm, but another may cause enormous damages and sufferings (Williams, 2019). This shows that a negligence defined as culpable or failure to exercise the standard duty of care which a reasonably prudent person has exercised in particular situation (Harbans, 2011). Negligence with a defence directs to behavioural standards at both parties to the accident. The injurer will be free from expected liability if either he fulfils duty of care or if he is negligent but excused from liability to the victim's negligence (Friehe, 2012). A discussion of defences is usually limited to issues like self-defence, necessity as far as the defendant's or known as tortfeasor's behaviour is concerned, consent, assumption of risk or contributory negligence.

In English law, the element of negligence to establish that the plaintiff of defendant owed a duty of care, breached that duty, suffered harm and the breach of duty was the cause of the harm. Correspondingly, there is a defence against claim if the absence of duty of care, or breach of duty of care, or causation, or the foreseeability (Young, Faure and Fenn, 2006).

Foreseeability can be shown by the court looks at whether the type of damage incurred by the plaintiff was a reasonably foreseeable result of the defendant's negligence. This question of reasonable foreseeability of damage is different to the standard of care (Jim, 2018). Unforeseeable damages, according to the judgement that the plaintiff cannot be compensated for unforeseeable damages in an incomplete contract unless he informs the defendant of the possible unforeseen contingency beforehand (Kim, 2011).

1.2 Problem Statement

The foreseeability shows that the claim of liability may be reduced by showing a proof there was a reasonable foreseeability of damages has been taken by defendant and possible unforeseen contingency must be shown or proof before he is granted with exclusion. However, the activities must be happened in order to determine the foreseeability of damages. Therefore, how to determine liability or damages except foreseeability damages had happened? Foreseeability only comes until damages is done. How should the court to determine the foreseeability liability or damages except foreseeability of damages happened?

Negligence in law on the other hand deals with the extent to which damages may be recovered for particular items of plaintiff's loss. There must be a causal link between the act of the defendant and the plaintiff's injury. This is a question of fact which must be proved on the balance of probabilities by the plaintiff. Harbans (2011) in his book stated to establish the plaintiff's loss and shows that defendant's had foreseen the injury, few tests are generally applied which are the reasonable foresight test, the direct consequence test, but-for test, reasonable man test and Egg Skull test.

However, how does the reasonable foresight test bring the damages could or could not be foreseen? In the matter of event that does not happen in plaintiff's situation, how does a test in court could bring and work the foreseen event to show that the plaintiff was neglecting his duty that causing to damage plaintiff's property?

However, as a defence from the defendant, he must show that the foreseeability toward the accident was beyond his control and has taken his duty of care. Therefore, it is significant to find out how the reasonable foreseeability test bring that damages could or could not be foreseen. In other words, how could the foreseeability test could bring a result shows the damages could be seen or unforeseen?

Other than that, the reasonable foresight test brings the test for remoteness into line with the test for establishing duty into account in deciding whether certain

types of damage are to be excluded. However, does reasonable foresight test bring into deciding whether type of damages could be determined? Did any type of damages to the plaintiff bring any exclusion to the remoteness of damages towards defendant?

1.3 Research Aim and Objective

This research highlighted about foreseeability of damages in negligence related to construction industry in Malaysia.

Due to charges plaintiff towards defendants must proof that the event could be foreseen for any kind of and in reverse as defence in negligence towards plaintiff, defendants must proof that the foreseeability of damages could not be foreseen. Due to foreseeability in negligence recognise by law, therefore the aim of this research is to identify the reasonable foreseeability damages in negligence related to construction industry in Malaysia.

In order to achieve the research aim, the following research objectives are established as follows:

- i. To identify the foreseeability test could or could not bring damages to be foreseen
- ii. To determine type of damages by using foreseeability test

The law of negligence is mainly concerned with providing compensation for personal injury and property damages in construction that caused by negligence. Therefore, this research highlighted the reasonable foreseeability of damages and types of damages that could and could not be excluded towards plaintiff and defendant that recognise by law of tort which related to construction industry in Malaysia.

1.4 Research Sampling

The construction industry in Malaysia consists of three main groups namely Client (owner and developer), Consultants (Architect, Engineer and Surveyor) and Contractor (Building and civil contractor). Basically, Client as the owner or developer is the organization that will decide to start a construction project which may involve a lot of teams and workers. Thus, Client will appoint Consultant comprising planner, engineer, surveyor who will convert Client intention to a project design. Finally, Contractor will construct the building according to the consultants' drawing and specification by applying their knowledge and experiences by involving with sub-constructor and building material supplier.

As what we can see, the construction industry is a long chain that ties all together to make a construction project. Therefore, negligence consists in every connection and relations towards others. Negligence is a collection of remedies entitling a person to recover damages for loss and injury which have been caused by the actions, omissions or statements of another person in such circumstances that the latter was in breach of a duty or obligation imposed at law which some of it using the reasonable foreseeability of damages in imposing damages. For the purpose of this study, the sample will be chosen randomly according to the four group explained above within limitation and scope assigned.

1.5 Scope and Limitation

Random sampling will be done in choosing legal cases in Malaysian construction industry that consists foreseeability of damages in negligence that accepted by court. There are some limitations for this study;

- i. The information and data taken to current legal cases until past 10 years' back
- ii. Area for data collection confine within Malaysia

The reason of limitation to legal cases until 10 years' back is because the catch the current situation in reality with construction industry that having the issue for the purpose of this research and it is limited within Malaysia only as we are improving our construction industry towards developed country.

1.6 Research Structure

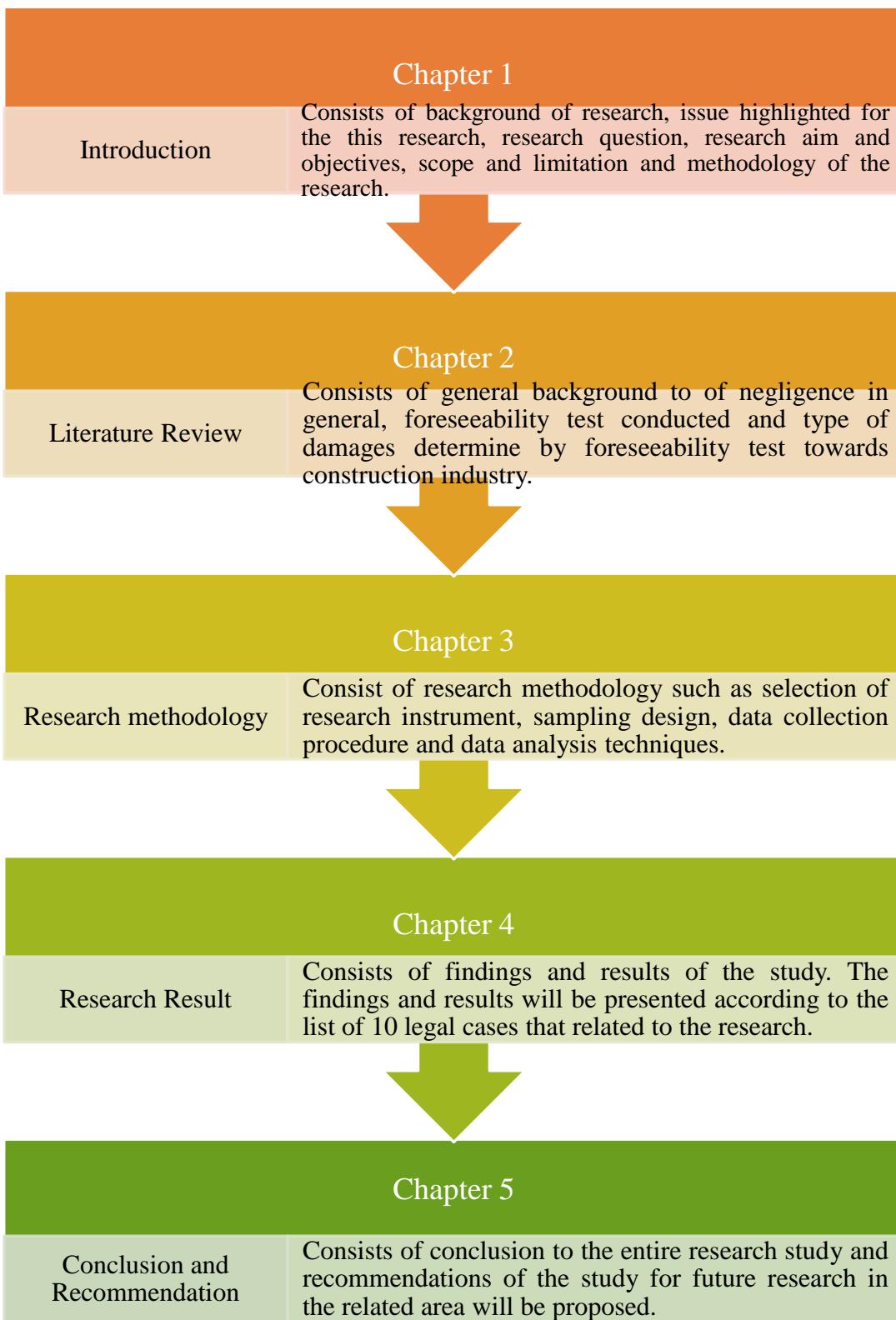


Figure 1.1 Summary of Research Structure

1.6.1 Chapter 1 (Introduction)

Chapter 1 present the introduction to the background research which consist of issue highlighted the purpose of this research, the statement of research problem that relate to the issue, the research aim and objectives, scope and limitation of research and the methodology to conduct the research. Chapter 1 which is the introduction and define the purpose and origin of this research.

1.6.2 Chapter 2 (Literature Review)

Chapter 2 reviews existing literature review to the research study. A generally background will be carried out to determine negligence in general, foreseeability test conducted in Malaysia and type of damages determine by foreseeability test towards construction industry. Further than that, this research will discuss more deeply towards foreseeability test that could or could not bring the damages to be foreseen and does it is conducted in court.

1.6.3 Chapter 3 (Research Methodology)

Chapter 3 explains the research methodology that used in the research study such as selection of research instrument, sampling design, data collection procedure and data analysis techniques.

1.6.4 Chapter 4 (Research Result)

Chapter 4 presents the findings and results of the study. The findings and results will be presented according to the list of 10 legal cases that related to the research in construction industry in Malaysia. The research result will discuss about foreseeability of damages in negligence related to construction industry in Malaysia

has been used in the legal cases. All the findings will be analysed and presented in the form of table analysis.

1.6.5 Chapter 5 (Conclusion and Recommendation)

Chapter 5 discusses the findings, provides an overall conclusion to summarize the entire research study. Subsequently, the limitations of the study will be highlighted and recommendations of the study for future research in the related area will be proposed. Lastly, highlight some implications of the study and how useful and valuable the research is in contributing to a new knowledge to an individual, organization as well as the society as a whole of foreseeability of damages in negligence related to construction industry in Malaysia.

REFERENCES

- Crossley, L. F. (2019, April 17 2019) *The Eggshell Skull Rule*. Retrieved from <https://crosleylaw.com/blog/eggshell-skull-rule-apply-texas-car-accidentcases/#:~:text=The%20eggshell%20skull%20rule%20also,%20defense%20tort%20case>.
- Friehe, T. (2012) ‘Victim interdependence in the accident setting’, (September 2010), pp. 371–391. doi: 10.1007/s10657-010-9176-9.
- Jim, J. (2018, June 16). *Negligence tort law*. Retrieved from <http://www.malaysiaconstructionservices.com/pepc-exam-general-paper/negligencetortlaw>
- Kim, J. (2011) ‘Compensating for unforeseeable damages in torts’, (May), pp. 265–280. doi: 10.1007/s00712-011-0214-z.
- Marshall, A. (2019, September 2019). *Elements of a Negligence Case*. Retrieved from <https://injury.findlaw.com/accident-injury-law/elements-of-a-negligence-case.html>
- McDowell, B. (1985) ‘Foreseeability in Contract and Tort: The Problems of Responsibility and Remoteness’, *Case Western Reserve Law Review*, 36(2), p. 286.
- Modha, H. (2018, June 18). *What is contributory negligence*. Retrieved from <https://www.hja.net/what-is-contributory-negligence-and-what-does-it-mean-for-your-personal-injury-claim/>
- Mozley, N. H. & Whiteley, G. C. *Mozley & Whiteley's Law Dictionary*, Toronto : The Canada Law Book Co. pg. 337.
- Plunkett, J. (2018) The Duty of Care in Negligence, *The Duty of Care in Negligence*. doi: 10.5040/9781509914876.
- Schorock, J. (2019, November 2019). *What are the Elements of Negligence*. Retrieved from <https://injury.findlaw.com/accident-injury-law/proving-fault-what-is-negligence.html>
- Tan, K. (1995), ‘Volenti Non Fit Injuria: An Alternative Framework’ 3 *Tort L Rev* 208. The Illegality Defence in Tort (2001), Law Commission Report No 160.

- Todd, N. V (2010) ‘Medical negligence: legal theory and surgical practice’, Orthopaedics and Trauma. Elsevier Ltd, 25(1), pp. 64–74. doi: 10.1016/j.mporth.2010.10.005.
- Williams, G. (2019) ‘Taking Responsibility for Negligence and Non-negligence’, Criminal Law and Philosophy. Springer Netherlands, (0123456789). doi: 10.1007/s11572-019-09506-8.
- Winter, R. A. (2006) ‘Liability insurance , joint tortfeasors and limited wealth’, 26, pp. 1–14. doi: 10.1016/j.irle.2006.04.001.
- Young, R., Faure, M. and Fenn, P. (2006) ‘Defences in negligence: Implications for tortfeasor care’, International Review of Law and Economics, 26(1), pp. 67–87. doi: 10.1016/j.irle.2006.05.006.