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NEGLIGENCE.

As defined in the *Civil Liability Act 1936* (SA), s3: “negligence” means failure to exercise reasonable care and skill.

- Physical (personal) harm
- Mental (personal) harm
- ~~Property damage~~
- Pure economic loss

Fault: does not equate to moral culpability, simply the act was either

Intentional: intended the actual outcome

Reckless: subjective state of mind – acted in wilful disregard or the likely consequences

Negligent: objective test, what a reasonable person would have done or foreseen

- By identifying what the reasonable person *would* have done, looking at what the defendant *should* have done

Objective Tests: measured against external criteria with broad standards

Subjective Tests: imbued with individual characteristics

DUTY OF CARE

Lord Atkins Neighbourhood Principle: People could only hold a duty to people through a contract before duty of care was introduced. The class of people who you would think of as being harmed with a faulty object are those to whom you owe a duty of care. A duty is owed when someone may be harmed by your actions.

Process

Establishing a duty of care for:

PHYSICAL HARM:

Tabet v Gett (2010) 240 CLR 537

Reasonable foreseeability of physical harm is generally enough to impose a duty of care on a person who knows or ought reasonably foresee that physical harm is a likely result of his or her conduct.

MENTAL HARM:

Civil Liability Act 1936 (SA), s53

Civil Liability Act 1936 (SA), s33

PURE ECONOMIC LOSS:

Esanda Finance v Peat Marwick Hungerfords (1997 HC)

Such a duty requires more than the usual reasonable foreseeability

Duty: Relies on salient features/control factors

- Inducement to rely- was there an inducement on D to rely on the advice?
- Adviser must know or ought to know advice would be relied upon
- Adviser must know their audience- cannot be held to owe a duty if you don't know to whom you owe the duty.
- Did the plaintiff do/say etc anything to suggest that they weren't just relying upon advice the defendant was giving them?
- Did the defendant do/say/not say something that leads to the conclusion that they accept responsibility for the problem?
- Is the defendant in the business of giving advice?
- Another source of information
- Identity and position of parties relative to each other. Positions of power?
- Special skills
- Request for information:

Reid LJ - Hedley Byrne [483];

1. keep solemn or decline,
 2. give an answer but make it clear that you're not responsible,
 3. simply answer, if answered, you owe responsibility
- Consent
 - Financial interest- definite
 - Disclaimer – if you're the only source of advice, how can you disclaim it? E.g. council

MLC v Evatt (1970 HC)

“[the duty will arise] whenever a person gives information or advice to another, whether that information is actively sought or merely accepted by that other upon a serious matter...”

Barwick CJ

1. There must be reasonable reliance
2. What is reasonable will depends upon the facts of the case
3. Actual reliance must be established
 - Test of reasonableness
1. Nature of the subject matter
2. Occasion of the interchange
3. Identify and relative positions of the parties as regards actual or potential knowledge
4. Capacity to form and exercise independent judgement

Case Law

RTA v Dederer (2007) 234 CLR 330, [43]

- “A duty is an obligation of a particular scope, and that scope may be more or less expansive depending on the nature of the relationship”

Donoghue v Stevenson [1932] ac 562, at 618

- “The law takes no cognisance of carelessness in the abstract. It concerns itself with carelessness only where this is a duty to take care and where failure in that duty has caused damage.”

Jaensch v Coffey (1984) 155 CLR 549

- Proximity Involves a notion of nearness or closeness and embraces:
- physical proximity (in the sense of space and time) between the person or property of the plaintiff and the person or property of the defendant,
- circumstantial proximity such as an overriding relationship of employer or employee or of a professional man and his client, and
- causal proximity in the sense of closeness or directness of the relationship between the particular act or cause of action and the injury sustained.”

Sullivan v Moody (2001) 75 ALJR 1570

- All JJs stated that the formula for determining whether or not there is a duty of care is not proximity

Perrett v Williams [2003] NSWSC 381

- High Court has been unable to establish a definitive statement of when a duty of care will arise

Chapman v Hearse (1961) 106 CLR 112

- “To establish the prior existence of a duty of care with respect to a plaintiff who is subsequently injured as a result of a sequence of events following a defendant's carelessness it is not necessary for the plaintiff to show that the precise manner in which his injuries were sustained was reasonably foreseeable; it is sufficient if it appears that injury to a class of persons of which he was one might reasonably have been foreseen as a consequence.”
- Established Duty Categories

- Employer employee – *Koehler v Cerebos (Australia Ltd)* [2005] UNSW Law J 147;
- Road user and road user – *Cook v Cook* (1986) 68 ALR 353; 162 CLR 376
- Driver and passenger - *Imbree v McNeilly* [2008] HCA 40
- Dr and patient - *Rogers v Whitaker* [1992] HCA 58
- Teacher and student - *Watson v Haines* (1987) ATR 80- 094
- Manufacturer and user - *Donoghue v Stevenson* [1932] ac 562
- Prison and prisoner – *New South Wales v Bujdosó* [2005] HCA 76
- Occupier and invitee - *Lipman v Clendinnen* (1932) 46 CLR 550
- Occupier and neighbour - *Goldman v Hargrave* [1968] UWA Law R 6
- Licensee and third party – *Adeels Palace Pty Ltd v Bou Najem* [2009] HCA 48
- Parent and child – *Dickinson v Dickinson* [2006] NO. FA 03 478083
- Mental Harm

Wicks v SRA (NSW); Sheehan v SRA (NSW) (1010) 241 CLR 60 (Pre-legislation)

- o The legislation “must be understood against the background provided by the common law of negligence in relation to psychiatric injury as stated by this court in *Tame and Annetts*’

Tomisevic v Menzies Wagga Southern Pty Ltd [2005] NSWCA 178 (Pre-legislation)

- o “where the plaintiff’s response to the defendant’s conduct is so extreme or idiosyncratic as to render the risk of that response far-fetched or fanciful, the law does not require the defendant to guard against it.”

Tame v NSW and Annetts v Australian Stations (2002) 211 CLR 317 (Pre-legislation)

3 Control Mechanisms:(as identified by Gummow and Kirby JJ)

The requirement that:

1. liability for psychiatric harm be assessed with reference to the hypothetical person of ‘normal fortitude’
2. psychiatric injury be caused by ‘sudden shock’
3. a plaintiff “directly perceive” a distressing phenomenon or its immediate aftermath.

Mount Isa Mines v Pusey (1970) 125 CLR 83 (Pre-legislation)

- o Sorrow does not sound in damages particular pathological condition need not be foreseeable
- o Employer/employee relationship was sufficient to give rise to a duty of care
- o Some doubts re bystander (BUT he who hears of accident and comes to look, choice sufficient to break chain of causation)
- o Considered issue of ‘normal fortitude’ - difficult to establish
- o Declined to extend liability to those who merely hear bad news (in the absence of knowledge/intent)

Jaensch v Coffey (1984) 155 CLR 549 (Pre-legislation)

- o Reasonable foreseeability of shock is the foundation of
- o duty of care
- o Hearing of news over the phone; all said no except for Deane J who doubted the logic of such a rule
- o No recovery for those who look after ill loved ones - no shock
- o Important extension of ‘immediate aftermath’

King v Philcox [2015] HCA 19

- o At common law, as under s33, the existence of a duty of care not to cause another person pure mental harm is dependent upon a number of variables which inform the foreseeability of risk.
- o Does not: Prescribe a pre-existing relationship
- o Require to have witnessed at the scene a person being killed, injured or put in peril
- o Require a sudden shock