

# LAWS206 – Torts – Exam Notes

## NEGLIGENCE

### Elements of Negligence:

1. Did the defendant owe the plaintiff a duty of care
2. Was there a breach of this duty of care?
3. Was there harm because of this breach of duty of care?
4. Was the harm foreseeable?

### Duty of Care

Test for proving a duty of care existed:

Heaven v Pender (1883) 11 QB 503 p 264

FACTS: Plaintiff was a ship builder employed by Gray. Gray had entered a contract with the defendant to paint ship in defendants' dry dock. Defendant built staging around the ship to allow access for painting which broke. The plaintiff fell to the bottom of the dry dock and was injured. Plaintiff sued for negligence, claiming proper care had not been taken in building the staging.

ISSUE: Did the defendant owe the plaintiff a duty of care even if not in a contractual relationship?

DECISION: Court held that a d/c was owed to the plaintiff. There were differing ratios:

- When it appears that an individual could see that if he did not use ordinary care and skill it would cause injury to another's property or person, they have a duty of care
- Defendant had a duty of care because an occupier of a premises owes a duty of reasonable care to invitees.

SIGNIFICANCE: Duty of care extends beyond contractual relations.

Neighbour Principle:

Donohue v Stevenson [1932] AC 562 p 266

FACTS: Donohue drank a bottle of ginger beer purchased by her friend that had a snail in the drink. When P drank the bottle she became very ill. P tried to sue the manufacturer.

ISSUE: Did the defender owe the plaintiff a duty to take reasonable care in manufacturing the ginger beer?

DECISION: Set a general test to establish d/c

'You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour.'

Your neighbour is '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'

SIGNIFICANCE: Set a test that widened the scope of liability.

Sequence of events and Reasonable foreseeability test:

Chapman v Hearse (1961) 106 CLR 112 p 268

A negligent driver caused an accident and was injured, a Doctor stopped to help and was hit by an oncoming vehicle. Court found that the actions of the first driver caused the whole sequence of events, therefore was liable for everything that resulted.

If the negligent driver didn't have an accident, the whole sequence of events would not have happened – therefore he is negligent.

DIFFERENT SITUATIONS:

Cole v South Tweed Heads Rugby League Football Club (2004) 217 CLR 469 p 269

Plaintiff injured by a car while leaving the premises after drinking in excess. Found that the defendant owed no d/c for the consequences of her being drunk.

Established a distinction between legal issues and factual issues:

Legal: Did the Defendant owe the plaintiff a d/c?

Fact: Did the defendant breach the d/c?

*Kuhl v Zurich Financial Services* (2011) 243 CLR 361 p 272

Plaintiff was using a vacuum when he was seriously injured, P sued the manufacturers.

Found in favour of the plaintiff because the court found that it was reasonably foreseeable that the events occurred. Found that the reasonable foreseeability test is very broad.

## **AUSTRALIA's D/C**

+ Follow *Donohue v Stevenson* 2 stage process;

1. Was p's damage/loss/injury a reasonably foreseeable consequence of d's failure to take reasonable care?
2. Was there a sufficient proximity between p and d to bring them into a 'neighbour relationship'  
*Gala v Preston* (1991) 172 CLR 243 p 276-277

+ Salient features Test:

A description of the factors considered when determining whether a duty of care should (or should not) be imposed.

ie. Foreseeability of harm, nature of harm, the degree and nature of control able to be exercised by the defendant to avoid harm.

Judges can use their own judgement of the facts to consider if a d/c was present.

Non-exhaustive list: *Caltex Refineries v Stavar* (2009) 75 NSWLR 649 (Persuasive) p 279-280

+ The tort of Non-Feasance: The duty to act – take affirmative action.

Examples:

SCHOOL/TEACHER TO STUDENTS

*Richards v Victoria* (1969) VR 136 p 295

Student hurt in a fight in a schoolyard. Teacher had a d/c to reasonably protect P. What was reasonable? Stepping in.

*Victoria v Bryar* (1970) Cox v NSW (2007) Aust Torts Reps 81-888 - Bullying

*Oyston v St Patrick's College No 2* (2013) NSWCA 310 - bullying

*Geyer v Downs* (1977) 138 CLR 91 p 195

Child injured while playing in playground before school. D/c applies to children for the whole time that children are present and school gates are open.

*Bathurst v Koffman* (1996) Aust Torts Reps 81-399 p 296

Student injured by a child from another school at the bus stop 300m from the school. School liable. D/c relationship determined by circumstances.

*Graham v NSW* (2001) 34 MVR 196 p 296

Pupil with impaired eyesight and balance problems was injured on the way home from school. NSW COA found that only in exceptional circumstances do schools have d/c beyond the school boundaries, this was not an exceptional circumstance.

## PARENTS TO THEIR OWN CHILD

*Robertson v Swincer* 1989 52 SASR 356 p 297

D/c exists when parent's actions create risks for the child. Not automatically a d/c.

*St Mark's Orthodox Coptic College v Abraham* (2007) NSWCA

Child injured at school, when he was dropped off by his father prior to school starting. Court found that the child's father was not negligent, he did have a d/c but it was not breached by dropping the child off prior to formal supervision.

## PRISON AUTHORITIES to a PRISONER

*Howard v Jarvis* (1958) 98 CLR 177 p 298

Prison Authorities have a d/c at Common Law to exercise reasonable care of the prisoner during detention. When a prisoner's liberty is taken, the prison authorities take control of their person and therefore have a d/c.

*NSW v Bujdosos* (2005) 227 CLR 1 p 299

Extent of d/c, prisoners need to be treated differently as necessary. The p in this case had been threatened and was particularly vulnerable due to his crime. PA failed to take reasonable steps to ensure his safety.

*Cran v NSW* (2004) 62 NSWLR 95 p299

Man held in custody for 9 weeks pending laboratory results. The police failed to inform lab of importance. P did not succeed because the Police and DPP were not in custody of the P, therefore the d/c in *Howard* did not apply.

## EMPLOYER to an EMPLOYEE

*English v Rogers* (2005) Aust Torts Reps 81-800 p 300

P was a cleaner who was held hostage at a hotel where her employer contracted for her to work. Sued both her employer and the person who held the contract.

Court distinguished difference between employee and contractor, employees follow procedure how the employer chose, contractors set how to and do a specific job.

## MEDICAL PRACTITIONER to person needing medical help

*Lowns v Woods* (1996) Aust Torts Reps 81-376 p 301

An MD has a duty to anyone who seeks medical assistance, regardless of if they are a patient or not.

*Alexander v Heise* (2001) NSWSC 69

Affirmed the above precedent.

## + Autonomy Principle overrides a duty of care:

Lack of autonomy creates a duty to act. If a plaintiff is free to help or protect themselves, there is no duty to take action.

*CAL v Motor Accidents Insurance Board* (2009) 239 CLR 390 p 302

Ps husband was drinking at D's hotel and agreed that his motorcycle should be locked away and she would come and collect it. When P's husband was cut off and became aggressive, bartender gave keys back. The husband died in a car accident, court found that D did not have a d/c for the road. P's husband was autonomous.

*Stuart v Kirkland –Veenstra* (2009) 237 CLR 215 p 304

2 police officers see a person with a hose attached to the exhaust but assured the police he did not intend to do anything. He proceeded to commit suicide, d/c did not apply because the police did everything they could and the man was autonomous.

### + Duty to prevent a person causing harm to another person

*Smith v Leurs* (1945) 70 CLR 256

A child shot a stone from a slingshot in P's eye. P sued child's parents. Court found that the Parents did have a d/c to P from the actions of their son, but it was not breached because they had told their son not to use the slingshot.

*Dorset Yacht Co Ltd v Home Office* (1974) AC 1004 – 'the possibility of damage to property nearby' p 306  
Boys from a reform school escaped on a yacht owned by the plaintiffs. P sued Prison Authorities, court found that the PA did have a d/c for the actions of the boys because they were in the control of the PAs, this extended to their foreseeable actions.

*NSW v Godfrey* (2004) Aust Torts Reps 81-741 p 307

Prisoner escaped jail, was free for 2 months when he pointed a gun at a pregnant woman, the stress caused a premature birth. NSW authorities not held liable because it is not possible to be liable to the public at large.

### + Duty of Care to 3<sup>rd</sup> Parties

*Smith v Littlewoods Organisation* (1987) AC 241 p 308

D owned a derelict property with plans to demolish it. It was broken into and set fire damaging surroundings. Held that the defendant did not have a d/c because it needs to be probable not possible.

*WD & HO Wills v State Rail Authority of NSW* (1998) 43 NSWLR 338

P's goods stolen from a building leased from D in the middle of an unguarded rail yard. P sued claiming that D had a duty of care to keep in secure. Court found that D did not on the Probable/possible distinction.

### + Duty of Care in Criminal Attacks

*Modbury Triangle Shopping Centre v Anzil* (2000) 205 CLR 254

d/c only if

(1) if a high level of recurrent, predictable criminal behaviour and

(2) if occupiers fail to control access to premises.

*Proprietors of Strata Plan 17226 v Drakulic* (2002) NSWLR 659 – Man robbed and injured on stairwell of building,

## **Standard of Care**

### + OBJECTIVE TEST: What a *reasonable* person in the defendant's position would have done.

MEDICAL ILLNESS:

*Rogers v Whitaker* (1992) 175 CLR 479 p 88

Patient had one good eye and one blind eye. Surgeon did not inform patient of risk of blindness to her other eye. When that happened, she sued claiming that if she had known of the risk she wouldn't have proceeded with the surgery.

Court decided a reasonable surgeon would have advised the patient of the risk.

CHILDREN

Determined as what a reasonable child of that age would do in the circumstance.