

# **Torts 70311**

## **Full Exam Notes**

# Negligence:

## The elements:

- The defendant owed a duty of care
- The defendant has breached that duty of care by negligent conduct
- That the defendant's breach caused the actual damage
- And the damage was not too remote from the breach

## 1. Name the plaintiff, defendant and the tort:

- If an employee, vicarious liability with employer as a joint tortfeasor

## 2. Duty of care:

### 1. Is it an established duty?

#### **What is a duty:**

- **Donoghue v Stevenson**- 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
- **Sullivan v Moody (2001)**- current Australian test- a defendant will only be liable, in negligence, for failure to take reasonable care to prevent a certain kind of foreseeable harm to a plaintiff, in circumstances where the law imposes a duty to take such care
- **Chapman v Hearse (1961)**- contribution case- sufficient in the circumstances to ask whether a consequence of the same general character as that which followed was reasonably foreseeable as one not unlikely to follow a collision between two vehicles on a dark wet night upon a busy highway- sufficient if it appears that injury to a class of persons of which was one might reasonably have been foreseen as a consequence.

#### Established Duties:

- **Motorists and other highway users**- **March v Stramare**- **Chapman v Hearse**- wasn't necessary to foresee the exact nature of the injuries, just injuries of the same general character and to the same class of persons
- **Occupier of land and lawful entrant**- **Australian Safeways Stores v Zaluzna**
  - Landowners- occupiers have positive duty to remove hazards to adjoining land (**Hargrave v Goldman**)
- **Manufacturer and consumer**- **Donoghue and Stevenson**, **Grant v Australian Knitting Mills** (P sued D for a rash from underwear and succeeded in the negligence claim- tort law has established liability between consumers and all aspects of the product supply chain- repackagers, repairers etc.
- **Service Providers**- **Woods v Multi-Sport**
- **Employer and employee**- **Kodis v State Transport Authority**
  - Take reasonable care for employee safety- **McLean v Tedman**, **Hamilton v Nuroof**.
  - Duty to enforce the safe system of work but also to establish and maintain and enforce such a system- safest practice being used- **McLean v Tedman (1984)**
  - **Koehler v Cerebos (Aust) Ltd (2005)**- employee developed a psychiatric illness from work she was required to complete under contract, was not foreseeable she would develop such an injury
  - **Gittani Stone**- indicates that employer's failure to address a known risk may amount to a breach of duty
- **Doctor/dentist and patient**- **Rogers v Whitaker**

- **Hospital and patient-** *Albrighton v Royal Prince Alfred Hospital*
- **School and pupil-** *Commonwealth v Introvigne*
- **Advocates immunity-** lawyers cannot be sued on the basis of *Giannarelli v Wraith*- cannot be sued for negligence committed in the course of performing protected work- but can be sued in particular cases- *Hawkins v Clayton and Curnuck v Nitschke*- must professionals take out professional indemnity insurance- compulsory for legal practitioners to protect against claims of professional negligence- Barristers also required
  - o **Section 50-** standard of care for professionals- if the professional acted in a manner that was widely accepted in Australia as competent professional practice.

Other unusual categories of duty of care- established

- **Unborn child-** owed duty of care. Can be negligent before conception (*X & Y v Pal*), during IVF or ex utero (*Waller v James*) or in utero (*Watt v Rama*)
  - o Duty of care is owed directly to the unborn child (not to cause injury) which crystallizes on birth. No legal identity but is owed a duty of care. The child can bring an action when they are born. Injuries can occur; before conception, during IVF or in utero
    - *Watt v Rama (1972)- in utero-* driver owed a duty of care to unborn child – car accident, foetus was injured by defendant and born with brain damage, epilepsy and paralysis from neck down. Pregnancy is reasonably foreseeable by members of the community
    - *Lynch v Lynch (1991)- in utero* mother owes a duty of care to unborn child only with respect to driving, not extended to other lifestyle choices (*Bowditch v McEwan (2003)*)
    - *X & Y v Pal (1991)-* before conception- duty of health care professional to woman, her foetus and future unborn children, obstetrician failed to do a routine test for syphilis, court held that the obstetrician owed a duty of care to her and the foetus as well as any future children
    - *Waller v James (2002)-* ex utero (IVF)- plaintiff born with cerebral thrombosis, plaintiff could not recover on the wrongful life claim but found that doctor had duty of care during IVF treatment to the plaintiff
- **Wrongful life-** claim by child that due to negligence, they were born. Cannot win, court will not compare being born with being alive (*Harriton v Stephens*)
  - o This is due to principles such as the sanctity of life, self-esteem of people with disabilities, exposure of parents to liability, impossibility of assessing damages
- **Wrongful birth-** where parents allege defendant's negligence caused them to have the child
  - o Used to be able to get compensation- *Cattanach v Melchoir* but now CLA stops any recovery for costs of raising child or lost earnings s 71(1). Only for disabled child costs (*CLA s 71(2)*)
- **Psychiatric illness: mental harm section 27-33:**
  - o Nature of the relationship between plaintiff and victim- a plaintiff will not recover if they are not foreseeable by the defendant as someone who would suffer nervous shock as a result of the negligence- *Bourhill v Young (1984)-* pregnant women who suffered miscarriage due to watching a motor accident behind a tram was not foreseeable
  - o **Section 30-** applies to the liability of the defendant for pure mental harm to a person arising wholly or partly from mental or nervous shock in connection with another person being the victim killed, injured or put in peril by the act or omission of the defendant
    - Plaintiff to recover must have witnessed at the scene, the victim being killed, injured or put in peril or be a close family member of the victim
      - Close family member- parent, guardian, spouse, a partner, child, stepchild, brother, sister, half, brother, half-sister, stepbrother, stepsister
  - o **Section 31-** the harm must be a recognised psychiatric illness to claim