

NEGLIGENCE

Start with Civil Liability Act 2002 (CLA) and then go to the Common Law.

- CLA predisposes the continuation of the operation of the CL, to the extent CL is not inconsistent with the CLA.
- **Neindorf v Junkovic (HCA) as per Kirby J:**
 - “It is the duty of Australian courts to start their analysis of the legal liability of parties affected not with pre-existing common law but with the statutory prescription ... where Parliament has spoken, it is a mistake to start with common law authority.”

Establishing an action in negligence (**Lonchgelly Iron Co per Lord Wright**)

- (1) Duty of care was owed to P from D;
- (2) Breach of duty; and
- (3) D caused P’s injury/damage.

1. DUTY OF CARE

Duty is not governed by CLA. CL principles must be looked at.

1. Neighbour Principle

- Lord Atkin’s neighbour principle in **Donoghue v Stevenson** (adopted in **Grant v Australian Knitting Mills**):
 - “You 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.**”
 - Courts have held this as an insufficient standard on its own.

2. Salient Features (Current Approach; Sullivan v Moody)

- **Sullivan v Moody:**

Children taken to sexual assault centre and examined. Doctors concluded sexual assault. Information passed onto government authorities who reached same conclusion. Police charged father with sexual offences; subsequently dropped (insufficient evidence). Father sued for psychiatric harm suffered. Alleged doctors/social workers owed parent suspected of abusing child duty of care in conducting investigations. HC held no duty.

- Court rejected foreseeability as sole test of duty (requires additional ‘limiting factors’), proximity test as the ‘limiting factor,’ and policy-based decisions.
- No duty was owed in this case due to inconsistency of imposition of duty with doctors’/social workers’ mandatory reporting duties; the law of defamation; and indeterminacy of liability.

Approach for establishing duty of care:

- **D must owe legally recognised duty of care to plaintiff (Harwood).**
- **Whether duty of care exists is a question of LAW (Seltsam).**
- **Formulation of duty of care is not a general duty (held by HC per French CJ and Gummow J in Kuhr)**
- **Formulation is retrospective (with HINDSIGHT) and as an obligation to avoid a particular act or omission said to have caused the loss.**

ESTABLISHING DUTY FOR PRE-EXISTING CATEGORIES/RELATIONSHIPS:

- Prima facie a duty is established if parties’ relationship falls into an established duty category (**Harriton v Stevens** per Kirby J)
- **EMPLOYER/EMPLOYEE**

- Obligation to take reasonable care to avoid exposing employee to unnecessary risk of injury (incl. injury arising from place of work, system of work, equipment) (**Hamilton**)
- Duty to protect from actions of 3rd party (**Chomentowski**)
- No duty to prevent stress when fulfilling a contractual obligation (**Koehler**)
- Note – Occupational Safety & Worker’s Compensation legislation
- **Hamilton v Nuroof**

Bucket of molten bitumen raised by hand on six storey building. Duty is of the reasonably prudent employer and it is a duty to take reasonable care to avoid exposing employees to unnecessary risk.

Consider:

- Degree of injury likely to result
- Degree of risk of accident
- Degree of risk involved in taking precautionary measures

- **Chomentowski**

Employee walking through area known to be dangerous at night to deposit earnings. Attacked by third party. Court held duty extended to some circumstances for protecting from third party conduct.

- **MANUFACTURER/CONSUMER**

- Manufacturer must take reasonable care when putting a chattel into circulation when there is no intermediate opportunity for inspection (**Donoghue v Stevenson**)
- Note – ACL Manufacturer’s liability

- **DOCTOR/PATIENT (Rogers v Whitaker)**

- Duty to exercise reasonable care, skill, judgment in provision of medical advice/treatment
- Duty to warn of material risk inherent in proposed treatment (inherent risk = in the circumstances reasonable person in patient’s position, if warned, would be likely to attach significance to it)
- s5PB CLA for standard of care of health professionals
- **Rogers v Whitaker**

Whitaker was advised by Rogers he could operate on her eye to approve appearance and restore significant sight to damaged eye. Following operation, no improvement in right eye and developed sympathetic ophthalmia, leading to complete loss of sight in left eye.

Failure to warn of risk was negligent even though risk of ophthalmia was very low

- **SOLICITOR/CLIENT**

- **Hill v Van Erp**

Solicitor’s negligence in failing to get intended beneficiary’s husband to sign will.

- **TEACHER/STUDENT/SCHOOL AUTHORITY (Geyer v Downs)**

- School must purport to exercise authority over the behaviour of the children.
- Once duty exists, school authority need not carefully plan adequate supervision of students.
- **Geyer v Downs**

Student injured when hit by softball bat by fellow student. There was no teacher supervision.

- **OCCUPIER/ENTRANT**

- AT COMMON LAW: Being a lawful entrant on land (s2 OLA) establishes relationship sufficient to create a duty of care to take reasonable care to avoid foreseeable risk of injury (**Zaluzna**)
- Occupier’s Liability Act 1985 (WA):

2. Terms used

In this Act, unless the contrary intention appears –

occupier of premises means person occupying or having control of land or other premises;
premises includes any fixed or movable structure, including any vessel, vehicle or aircraft.

5. Duty of care of occupier

- (1) Subject to (2) and (3) occupier owes entrants a standard of care to reasonably ensure that the entrant will not suffer injury or damage
- (2) Duty of care owed in (1) does not apply to risks willingly assumed by the entrant
- (3) Persons entering with intention to commit or in commission of an offence only owed s5(2) duty
- (4) Whether occupier has discharged duty, consider:

- a) gravity and likelihood of probable injury
- b) circumstances of entry onto premises
- c) nature of premises
- d) knowledge occupier has or ought to have of likelihood of persons or property being on the premises
- e) age of person entering premises
- f) ability of person entering to appreciate the danger
- g) burden on occupier of eliminating the danger or protecting the person entering the premises from the danger as compared to the risk of danger to person

6. Negligence of independent contractor

(1) Occupier is not liable when damage is due to negligence of independent contractor if occupier exercised reasonable care in selection and supervision and it was reasonable in the circumstances that work should have been undertaken.

○ ***Australian Safeway Stores v Zaluzna***

P slipped in D's store.

○ ***Modbury Triangle (Cf. Adeels Palace)***

P attacked in open car park of shopping centre by third parties. Scope of duty of shopping centre didn't extend to taking positive steps to protect P.

○ ***Adeels Palace v Moubarak***

Fight broke out in nightclub and third party shot Ps. Duty of care existed but Ps were unsuccessful in establishing breach and causation.

Liquor Act (NSW) was a relevant consideration in finding a duty of care. Court found Adeels owed duty to take reasonable care to prevent injury from violent & disorderly conduct of other persons. (Higher duty imposed by statute on licenced bodies).

• **DRIVERS/OTHER ROAD USERS**

- Driver owes duty to other road users to take reasonable care while driving and keeping a proper lookout.
- Doesn't matter how inexperienced the driver is, standard is of the reasonable driver (***Imbree v McNeilly***)
- Duty of care is owed to passengers (***Imbree v McNeilly***)
- Also consider s5AD CLA (***Chapman v Hearse***)

5AD. Protection of good Samaritans

- (1) A good Samaritan does not incur any personal civil liability in respect of an act or omission done or made by the good Samaritan at the scene of an emergency in good faith and without recklessness in assisting a person in apparent need of emergency assistance.
- (2) A medically qualified good Samaritan does not incur any personal civil liability for advice given in good faith and without recklessness about the assistance to be given to a person in apparent need of emergency assistance.

○ ***Imbree v McNeilly (HCA)***

Imbree let unlicensed Mcneilly drive car. Imbree knew M was little driving experience.

○ ***Chapman v Hearse***

C drove negligently and injured himself. Dr Cherry then hit by Hearse when helping C on roadside. Both C and H owed Cherry duty of care – was within foreseeable class.