Negligence: Approaching the duty of care

Introduction:

Elements of negligence:

- The defendant owed the plaintiff a duty of care.
- That the duty must have been breached.
- That breach must have caused damage to the plaintiff.

For the tort of negligence to be established, a duty of care must first be shown to exist.

If the circumstances are of a standard kind and come commonly before the courts, the judge may use an established legal formula or rule.

This established rule will lay down the requirements for the duty of care relating to the class of case into which the one before the judge falls; that is, a legal formula establishes the particular duty situation.

In a negligence case it was whether there had been a breach of duty, and indeed in most litigated cases, this is the issue to be decided.

In *Voli v Inglewood Shire Council* (1963) 110 CLR 74, Windeyer J at 86, said that one should not treat the duty of care as it were a statutory enactment.

To some extent, breach and causation are pre-empted by the duty of care concepts in determining what is regarded as responsible and irresponsible behaviour.

The steps plaintiff has to prove,

- That the defendant owes a duty of care to the plaintiff or a person in the class to which the plaintiff belongs,
- That the defendant breached that duty
- That the defendant's breach of duty caused the harm that the plaintiff suffered.

The development of the duty of care:

In 1960s, courts began to expand the tort of negligence be developing the duty of care.

Negligence began to move into areas that had been closed, such as pure economic loss, liability for third parties and liability for governmental (or public authorities).

Pure economic loss had been regarded as the domain of contract, and there was said to be a "bright line rule" preventing the use of negligence for pure economic loss.

In *Hedley Byrne & Co V Heller & Partners Ltd* [1964] AC 465, the trial judge found that the defendants had been negligent but owed no duty to the plaintiffs.

The Court of Appeal also held that there was no duty of care.

The plaintiffs appealed to the House of Lords, where the House of Lords discussed the differences between acts and words, noting that words can be just as powerful as acts.

Soon after *Hedley Bryne* another case was decided which also expanded the duty of care. In this case, *Home Office V Dorset Yacht Co Ltd* [1970] AC 1004, there were several hurdles for the plaintiffs.

Firstly, they had to sue a public authority (the home office, which was the government department in charge of prisons), secondly the plaintiffs injury was not caused directly by the Home Office but by the voluntary actions of other humans and thirdly, there was a long chain of events in between the control of the Home Office and the damages to the plaintiff's yacht.

The respondent sued the Home Office for damages.

The House of Lords decided in this case that although the damage was done by independent human activity of the boys, the Home Office did owe a duty of care because it was foreseeable that yachts in the near vicinity were at risk if the boys escaped custody.

In this case the fact that the people who might be harmed were specifically foreseeable made it possible for the court to hold that the Home Office was liable.

Anns v Merton London Borough Council- Expansion of the duty of care. The significance of *Anns* is that is established an approach to the duty of care which was influential in England for some time, and remains significant in Canada.

The approach to duty taken by Lord Wilberforce in the two-stage test in *Anns* was rejected by Mason J in *Sutherland Shire Council v Heyman* (1985) 157 CLR 424 and has never been accepted per se in Australia.

However, *Anns* illustrates the then trend, which also existed in Australia, of treating the duty of care in an increasingly expansive and principled way.

Some issues considered in *Anns* remain pertinent to Australia, including the treatment of statutory authorities.

In the 1980s, the Australia High Court began to develop a distinctly Australian jurisprudence, which included an approach to negligence based on a formulation of proximity by Deane J and which was taken up by the majority of the High Court.

This formulation was regarded as important when dealing with cases which would not traditionally have been regarded as giving rise to a duty of care, that is, cases which in some way were novel in that they seemed to call for expansion of the duty in existing categories or the creation of new categories.

The focus of the 'proximity –as-principle approach was to consider reasonable foreseeability and then proximity, which involved considering the concepts of relationships and responsibility first, and only later to consider which category of case was at issue.

In order to use proximity this way, even when the category is clear one would still proceed to look to those traditional requirements in the category that reflect human notions of relationships and responsibility.

Such indicators included reliance, assumption of responsibility, control and vulnerability, and so on.

This approach was used by Deane J to develop a general principle of negligence that could operate either inside or outside recognised categories of liability.

It was used to overcome or extend various categories of liability, including occupier's liability, pure economic loss and nervous shock.

The scope of the duty required was determined by the answer to this very specific question. In *Australian Safeway Stores Pty Ltd v Zaluzna* and *Hackshaw v Shaw*, proximity- as-principles was used to soften the categories of occupiers liability; they lost their determinative nature, and became merely illustrative.

Similarly, using this approach, negligence overcame the *Rylands v Fletcher* category of tort law in *Burnie Port Authority v General Jones Ltd*.

The major role for proximity-as-principle was therefore in examining and developing new categories as these cases showed.

The "salient factors" approach:

The High Court of Australia's current approach has been termed the "salient factors" approach.

One begins with the test of reasonable foreseeability of harm, but as that is a relatively weak test, the court uses the salient factors test to determine whether or not a duty of care can arise.

The salient factors test may be used both within a category or when the case if novel.

In both cases salient factors may include matters such as the level of vulnerability of the plaintiff compared with the power or control of the defendant in the situation, the level of reliance of the plaintiff on the defendant, the kind of knowledge involved and so on.

Salient factors is important, because the High Court has emphasised that a duty of care is not a general duty, but is limited in its scope according to the category.

This means that it is a duty to take reasonable care to avoid causing the specifically foreseeable kind of injury to identifiable people in identifiable circumstances.

In *Kuhl v Zurich Financial Services Australia Ltd, French CJ and Gummow K* cautioned that the duty of care must always include the "first important step" of considering reasonable foreseeability and the salient features of the relationship between the plaintiff and the defendant.

Establishing the categories of duty:

Determining the approach to take in accepted categories:

The categories are accepted and defined by factors which appear in them. We regard these as accepted duty categories.

So for example, the paradigm case, which we have considering in *Donoghue v Stevenson,* is that arising where an act causes personal injury.

These factors are the ones to take into account and we know that the test to use for the duty of care for the duty of care in cases involving acts causing personal injury in the neighbour principle or the question of reasonable foreseeability of harm.

This test also applies to acts causing property damage. These are the easiest negligence cases in which to establish a duty of care.

Factors which may affect the approach to the duty of care include:

- Whether an act or omission is involved; if an act, the kind of act, for example words or physical acts.
- What kind of harm has been caused (personal injury, psychiatric harm, property damage, pure economic loss etc.
- Who the defendants is- an individual, a public authority, a manufacturer etc.
- In some cases who the plaintiff is- for example, a child at school, a patient in a hospital etc. or a third party to some other relationship.

As a general rule, when the factors move away from the original paradigm of an act causing personal injury or property damage, more is required in order to establish the duty of care.

Recognising the categories:

The wrong- acts/omissions/words:

The general rule is that where an omission is at issue a duty to act (or a duty of affirmative action) will not arise unless special factors exist.

One of the reasons for this is that where there is an omission and some has been harmed there is usually another cause of some kind so that the defendant seems to be peripheral.

For example, the failure of the driver to put their foot on the brake is regarded as part of their negligent driving- it is, therefore, not an omission but part of the act of driving.

Other omissions are harder to distinguish: for example, where a person lawfully creates an obstruction on a highway so that they can carry out some work on it, but fails to put a warning sign up.

It is important for medical practitioners than others is the duty to warn a patient of risks before the patient goes ahead with treatment.

This often leads to litigation where the allegation is that the doctor failed to warn (that is, omitted to warn) the patient of a particular risk which, in fact, eventuated.

Types of defendant:

Defendants who may alter the requirements of the duty of care include public authorities and the government.

For example, a Shire Council is a public authority, but not the government of the state.

Occupiers of premises, school authorities, hospitals, doctors are some of the categories of defendant which might alter the requirements for a duty of care.

Types of harm:

Physical injury and property damage are the paradigmatic types of harm.

Psychiatric injury is somewhat distinguished from physical injury and alters the requirements.

The general rule was that pure economic loss was not able to be sued for, it being regarded as part of the domain of the contract.

Hedley v Bryne v Heller [1964] AC 465 changed that, but it continues to be the case that extra requirements arise where the loss is purely economic.

Novel cases:

Where the facts of a case do not fit into the accepted categories of where a duty of care will arise, how is the court to decide whether or not to recognise a duty?

Such novel cases can create great difficulty.

Once it is established that the harm suffered was foreseeable, how should the court proceed?

The court takes an incremental approach, and still considers the salient factors, such as where aspects of the case seem familiar to other cases, the court will make determinations by arguing by analogy to those cases and they will not move too far from the decided cases.

However, some matters simply require the courts to come to a decision about whether or not to recognise a duty- to some extent this is a matter of policy.

As the High Court decided cases after the 1990s, it was possible to discern new approaches to policy concerns in the judgements.

Reasonable foreseeability:

Chapman v Hearse

1. The role of reasonable foreseeability has varied over time since *Donoghue v Stevenson.* It remains the central element in the test for the duty of care.

2. It has been argued that it is important because without being able to foresee a risk one cannot avoid it, and without being able to consider the level and significance (reasonableness) of the risk one cannot decide whether it should be avoided. (*Wyong Shire Council v Shirt)*

3. Risk is a central issue in the law of negligence, because it is the risk which must reasonably foreseen.

4. Foreseeability is said to be something that operates at a different level of abstraction at each stage of the elements of the tort of negligence. We see it again at the breach stage and at the stage of causation of damage in the remoteness element.

The unforeseeable plaintiff:

Palsgraf v Long Island R R Co 248 NY 339 (1928) (US).

Bale v Seltsam Pty Ltd [1996] QCA 288

Policy and the duty of care:

It is arguable that the whole concept of the duty of care turns on policy and that this is the reason why it is so difficult to find a formula which can be used as a 'litmus test' for whether a duty of care should exist or not.

There are a range of policies which range from policy being legally recognised and to policy which is really no more than an imposition of a particular judge's personal values.

Legally recognised policy matters relevant to the duty of care include the policy that people should not profit from their illegal behaviour, and policies offering immunity from tortious suit to certain people or groups, such as, military personnel when at war, judges, witnesses and barristers in court and so on.

Another policy is that judges should be extremely cautious about interfering with policy decisions of governmental bodies.

There are policies at work in the law which can be identified and applied to novel problems, but the law of tort develops by reference to principles, which must be capable of general application, not discretionary decision-making in individual cases.

Where the plaintiff has been involved in some illegal activity policy determines whether or not the plaintiff is precluded from bringing their action. This may be a defence or a matter of the duty of care. *Miller v Miller* (2011) 242 CLR 446; [2011] HCA 9

Policy is not always so overtly stated. The duty of care itself is often redolent of the attitudes of the judiciary, or the community, to issues like moral fault and personal responsibility.

1. One of the concerns about judges using policy arguments is that it might encourage them to be 'judicial activists'. This concern implicitly assumes that judges simply find and declare the law, but the notion that judges do not make new law has now been firmly rejected.

2. When judges refer to public policy they generally mean taking into account wider considerations than purely those issues between the parties.
   Some public policy matters are widely accepted, for example, the idea underlying the

ex turpi causa rule, that people should not benefit from their illegal activities.

3. Governmental policy may create a situation where a public authority is immune from a suit in negligence.
   The general view is that where there is a policy this should not be interfered with by the judiciary, but where the wrong is concerned with the carrying out of the policy, the judiciary may intervene.

4. *Batchelor v Tasmania* (2005) 13 Tas R 403; [2005] TASSC 11