

TORTS LAW NOTE

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TORT OF NEGLIGENCE

- Unlike intentional torts, where a defendant is liable for a deliberate or intentional invasion of the plaintiff's legal protected interest, negligence is an unintentional tort that deals with a defendant's unreasonable - but not deliberate - invasion of a plaintiff's interests
- To be successful in the tort of negligence, the plaintiff needs to establish four elements:
 - o Duty of care
 - o Breach of duty
 - o Causation
 - o Foreseeable and not too remote

Donoghue v Stevenson [1932] AC 562

Facts:

- Mrs Donoghue went to a café in Scotland with her friend, and her friend bought her a ginger beer
- She consumed about half of the bottle, which was made of dark opaque glass
- When the remainder of the ginger beer was poured into a glass, the decomposed remains of **a snail floated out** causing her alleged shock and severe gastro-enteritis
- She brought a claim against the manufacturer of the bottle of ginger beer
- She **was not able to claim through breach of warranty** of a contract: she was not party to any contract with the manufacturer nor she in a contractual relationship with the owner of the café
- She **hadn't bought the drink**; her friend had bought it for her
- She issued proceedings against Stevenson, the manufacturer, in negligence

Held:

- They would **no longer recognize a duty of care only in certain legal relationships**
- The House of Lords laid down a general principle, known as the 'neighbour principle' for determining when a duty of care will arise in any situation that might arise. Two key elements:
 - o A defendant **must take reasonable care** to avoid acts or omissions that the defendant can reasonably foresee will injure **their neighbour**

- A neighbour means a person who is **so closely and directly affected by the defendant's act** that the defendant ought to have had them in contemplation when engaging in that act.

1. Duty of care

- When seeking to establish a duty of care, **two requirements** must be met:
 - **Reasonable foreseeability** of the plaintiff as a person at risk of harm from the defendant's negligent activity; and
 - A '**special relationship**' between the parties - this can be either a relationship that falls within an established category or a '**novel**' duty.
- Compensable forms of damage:
 - Physical injury
 - Property damage
 - Economic loss
 - Psychiatric injury

a. Reasonable foreseeability

- These established categories of duty of care take a number of forms:
 - Doctor/patient – *Roger v Whitaker*
 - Driver – *Chapman v Hearse*
 - Manufacturer/consumer – *Donoghue v Stevenson*
 - Solicitor – *Hill v Van Erp*
 - Occupier/Landlord – *Australian Safeway Stores Pty Ltd v Zaluzna*
 - Employer/employee – *McLean v Tedman*
 - School/pupil or Teacher/pupil – *Richards v Victoria, Geyer v Downs*
 - Public authorities or Commercial provider - *Vairy v Wyong Shire Council, Woods v Multi-Sport Holdings (2002) 208 CLR 460*
- In case the relationship does **not fall within the category**, the courts will need to **weigh a range of factors** to determine whether a '**special relationship**' exists.
- The **only question** is whether the defendant **could reasonably foresee** that any **carelessness on his part might cause** some kind of damage to the plaintiff.
- It means simply that they can foresee that the claimant is a person at risk either individually or as a member of a class of persons that are at risk.

Chapman v Hearse (1961) 106 CLR 112

Facts:

- Mr Chapman collided into another vehicle on a dark, wet night.
- Dr Cherry, who was driving past, came upon the scene and left his car to assist Chapman.
- While Dr Cherry was treating Chapman, another car driven by Hearse hit Cherry and killed him
- Dr Cherry's estate sued Mr Hearse in negligence.
- Hearse denied liability and claimed that Dr Cherry was liable for contributory negligence
- He also joined Mr Chapman as a third party on the grounds that he had contributed to the accident.

Issue:

- whether Mr Chapman owed a duty of care to Dr Cherry, and in particular, whether Mr Chapman could foresee Dr. Cherry, as a rescuer, as a person at risk of injury if he was to drive negligently.
- If Mr Chapman had himself run over Dr Cherry, there would be no question

Held:

- A duty of care was owed because Chapman could foresee generally the general sequence of events that occurred
- He could foresee that **if he drove his car negligently and was injured as a result, that a third party, out of a moral, ethical or social obligation, decide to render assistance, thereby putting that person at risk of injury.**
- Rejected that the exact sequence of events had to be foreseeable to Chapman
- Mr Chapman couldn't foresee if he drove negligently, he would
 - o Be projected onto the road
 - o A medical doctor would be nearby and would come to his assistance
 - o A car might run over Dr Cherry and kill him because there was no-one to keep a look out
- But Dr Cherry was within the class of persons that was foreseeable at risk of injury
- Generally, there are **two main questions:**
 - o Does the plaintiff **fall within a class of persons** at risk of some harm or damage from any careless performance of the defendant's activities?

- Was it **farfetched or fanciful** that the plaintiff might be injured if the defendant was to act negligently?

Palsgraf v Long Island RR Co 248 NY 339

Facts:

- The plaintiff was standing on a railway platform
- A train stopped at the station, and a man ran forward to catch it
- When he attempted to board the train in haste, he dropped a package containing fireworks
- As a result, the plaintiff was injured from the subsequent explosion and sought to hold the railroad liable for negligence

Issue: whether the plaintiff was foreseeable at being at risk on injury given she was not close to where this incident occurred

Held:

- Under the foreseeability test, it was not reasonable to hold that the railroad's alleged negligence was the cause of the passenger's injuries
- A duty of care must be ascertained from the risk that can be reasonably foreseen
- The defendant could not have reasonably foreseen that the package contained explosive and posed a threat to anyone

Bale v Selsam Pty Ltd [1996] QCA 288

Facts:

- Mr Bale, as part of his employment duties, was required to work with asbestos
- When he came home, his clothes were covered in the asbestos dust and fibres
- Mrs Bale put those clothes in the washing machine for her husband, as a result, inhaled the asbestos dust and fibres and contracted mesothelioma, which is a malignant lung disease.

Held:

- During the period where Mr. Bale was working for the defendant, and Mrs Bale was exposed to the asbestos dust, there wasn't sufficient scientific evidence that someone who washed another person's clothes could be at risk of mesothelioma
- There was some evidence available to suggest that a person working directly with asbestos could be at risk, but it had never been considered possible that someone who

merely washed a person's asbestos-covered clothes would be at risk of an asbestos-related diseases

Jones v Southern Grampians Shire Council [2012] VSC 485

Facts:

- The plaintiff's husband worked for the Council from 1984 to 1994
- The plaintiff alleged that she was exposed to asbestos dust during that as a result of washing his clothes.
- She consequently developed mesothelioma

Held:

- There was **sufficient evidence by the 1980's** that a person who comes into contact with clothes of another person who has been exposed to asbestos dust could be at risk of an asbestos-related disease.

b. Special relationship – control factors determined by the court

- A special duty situation arises when:
 - o The category of duty of care is still being developed aka **a novel duty of care**
 - o The scope of the duty of care is in issue
 - o Policy considerations discourage finding of duty of care
- The court will use salient features to determine whether a special relationship exists, and a duty of care is owed

From proximity to salient features

- Proximity is no longer relevant to determining whether a duty of care exists – **Hill v Van Erp**
- Instead, the court will rely on a number of factors, such as:
 - o Control of the activity by the defendant – **Caltex Refineries (Qld) Pty Ltd v Stavar**
 - o Vulnerability of the plaintiff - **Caltex Refineries (Qld) Pty Ltd v Stavar**
 - o Knowledge by the defendant of the risk
 - o The plaintiff's individual autonomy and personal responsibility
 - o **The need to preserve the coherence of the law**
 - o **Indeterminacy of liability**
 - o **Whether imposition of liability would lead to defensive practices**

Special kinds of duties

Immunities

- Court work by legal advocates – *Giannerelly v Wraith (1988)*
- Child protection agencies when investigating abuse allegations – *Sullivan v Moody [2001] HCA 59*
 - The need to preserve the coherence of the law
 - Indeterminacy of liability
 - Whether imposition of liability would lead to defensive practices
- Police authorities when investigating a crime – *Annetts v Australian Stations Pty Ltd [2002] HCA 35, Hill v Chief Constable of West Yorkshire [1989] AC 53*
 - There isn't blanket immunity for police action, it will only apply where the police are investigating the crime. It doesn't apply to a direct action by the police, where an action directly and immediately inflicts harm – *Michael v The Chief Constable of South Wales Police [2015] UKSC 2*
 - The police owed a duty of care to the plaintiff who was sprayed with capsicum spray by police, as they were arresting an offender in her shop – *State of Victoria v Richards [2010] VSCA 113*
- Armed forces – *Shaw Savill & Albion Co Ltd v The Commonwealth (1940)*
- Policy decision by governments
 - The government will be immune from exercising discretionary, policy making functions (as opposed to operational activities)
- i. ‘Wrongful birth’ actions
 - The conduct by doctor, either before the pregnancy or during the pregnancy, that **deprives the parents of the opportunity** to prevent or terminate that pregnancy, as a result in the birth of child
 - The parents **were entitled** to the **costs of raising a healthy child born through the negligence of a doctor** in providing advice regarding a sterilisation operation
Cattanach v Melchior:
 - The liability of the doctor should be based on ordinary negligence principles
 - The ‘wrong’ and ‘legal harm’ for which damages are awarded is not the birth of the child, but the negligence of the doctor

‘Wrongful life’ claims made by the child – not a valid cause of action in Australia –
Harriton v Stephens (2006) 226 ALR 391; Waller v James (2006) 226 ALR 457

ii. Publicans in respect of intoxication-induced injuries off premises

CAL No 14 Pty Ltd v Motor Accidents Insurance Board

Facts:

- The CAL operated the Tandara Motor inn where Mr Scott was drinking on 24 January 2002.
- At some point Mr Scott arranged with the Inn’s licensee, Kirkpatrick, for Mr Scott’s motorcycle to be locked in a storeroom and the keys to be given to Kirkpatrick on the understanding that Scott’s wife would collect him later in the evening
- After drinking, Scott was refused service and aggressively declined Kirkpatrick’s request for him to provide his wife’s telephone number
- Scott demanded the return of his motorcycle and keys and after attempts by Kirkpatrick to resist the request
- Kirk handed over the motorcycle and the keys.
- A short distance from home Scott rode off the road and was killed
- Scott’s wife brought the proceedings against CAL

Issue: whether CAL and Patrick owed a duty of care to the intoxicated Mr Scott

Held:

- The publicans **do not owe a general duty of care** to customers to monitor and **minimise the service of alcohol or to protect customers** from the consequences of alcohol they choose to consume
 - o Difficult to give a practical content to any such duty
 - o Balancing pleasures of drinking against the risks a matter of personal responsibility of the drinker
 - o A duty of care would conflict with P’s personal autonomy
 - o Legal coherence with other common law torts and legislative responsibilities
 - o Difficulty in giving practical content to duty
 - o Same principles should apply a fortiori to private hosts
- **HOWEVER**, it is **different if the plaintiff is vulnerable** (unable to care for his or her own interests) and is under the care, control and custody of the defendant

iii. Liability of a landlord

- A landlord is liable **only for injuries caused by defective premises**. A ‘defect’ refers to a condition of the premises that render the premises **unsafe** when used normally – *Cavalier v Pope*
- A landlord is only under a duty to remedy defects **that are known or suspected**, or that should have been detected on inspection by the landlord or agent. A landlord is **not under a duty to have the premises inspected by experts** for possible defects.
- A landlord is **not strictly liable for the negligence of a contractor** who carries out work on the premises. A landlord is **liable only** if he or she engages **a contractor who is not qualified or apparently competent**