

LAW231 – Torts I – Tri 1, 2015

Negligence (Week# 1)

A tort is a civil wrong – negligence is the most common tort – other torts: trespass, private nuisance, breach of statutory duty

Name and case reference: *Donoghue v Stevenson* [1932] AC 562
Clarke et al, 1.5 pg 7

Court: House of Lords

Facts: plaintiff's [Mrs Donoghue] friend bought her a drink of ginger beer – opaque color bottle – she was ginger beer in a café in Paisley, Renfrewshire when remains of a dead snail was discovered by her - she fell ill, and she sued the ginger beer manufacturer, Mr Stevenson

Legal principle: Law of Torts and negligence – general principle where one person would owe a duty of care to another person – the neighbour principle

The court's decision (application of the legal principle to the facts): The House of Lords held that the manufacturer owed a duty of care to her, which was breached, because it was reasonably foreseeable that failure to ensure the product's safety would lead to harm of consumers - the neighbour principle 'you must take reasonable care to avoid acts or omissions which you can reasonable foresee would be likely to injure your neighbour. Who, then, in law id my neighbour? The answer seems to be persons who 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 in question' -

PROXIMITY – a good example of proximity of the neighbour principle - Lord Atkin referring to a defendant owing a duty of care to persons 'so closely and directly affected' by their act

Name and case reference: *Cook v Cook* (1986) 162 CLR 376

Court: High Court of Australia [Mason, Wilson, Brennan, Deane and Dawson JJ]

Facts: Margaret Cook [plaintiff/appellant] and Irene Cook [respondent] went to buy dinner – Irene let Margaret drive her car – Margaret did not have a learner's permit – Margaret hit a concrete electricity post – Irene was injured and was rendered a tetraplegic

Legal principle: Negligence - Standard of care - Care owed by car driver to particular passenger - Driver inexperienced and unlicensed - Knowledge of passenger - Passenger injured in collision - Ingredient of carelessness outweighing driver's inexperience - Relationship of proximity between parties.

The court's decision (application of the legal principle to the facts): Appeal dismissed – the standard of care which arises from the relationship of pupil/instructor is that which is reasonably to be expected of an unqualified and inexperienced driver in the circumstances in which the pupil is placed

Background and context: NOTE: this decision was later overturned in *Imbree v McNeilly*

Name and case reference: *Imbree v McNeilly* (2008) 236 CLR 510

Court: High Court of Australia [Gleeson CJ, Gummow, Kirby, Hayne, Heydon, Crennan and Keifel JJ]

Facts: Appellant/Plaintiff [Imbree] allowed respondent [McNeilly] to drive his 4WD – McNeilly steered to the right – Imbree shouted telling him to break, but he didn't – vehicle rolled – Imbree suffered spinal injuries

Legal principle: An inexperienced driver owes the same standard of care as any other person driving a motor vehicle - to take reasonable care to avoid injury to others – contributory negligence (damages reduced by 30%) – compulsory insurance

The court's decision (application of the legal principle to the facts): Appeal allowed – driver owed passenger the same standard of care as any other person driving the vehicle – 'standard should not be qualified by reference to the holding of a license or by reference to the level of experience of a driver'

In the High Court, the plaintiff argued that the Court of Appeal had applied the wrong standard of care, which impacted upon the assessment of apportionment of responsibility. The plaintiff argued that *Cook v Cook* was wrong and should be overruled. Instead, the plaintiff's central proposition was that the defendant owed the same objective standard of care as any other driver, whether licensed or not - In addition, the plaintiff argued that any contributory negligence did not cause the damage he suffered. In the alternative, the plaintiff argued that the Court of Appeal should not have interfered with the trial judge's assessment of contributory negligence.

The defendant submitted that the claim should be dismissed on the grounds that there was no departure from the standard of care required of the defendant. That is, having regard to the plaintiff's knowledge of the defendant's limited skills and experience; the defendant's driving did not depart from the standard of care the plaintiff was entitled to expect the defendant to exercise.

Kirby J – the existence of compulsory insurance 'encourages my acceptance of a single universe, objective standard of care owed by all drivers – 'the Court should acknowledge the relevance of compulsory insurance to the content of the liability for motor vehicle accident liability'

Background and context: At first instance, Studdert J assessed damages in excess of \$9.5 million. His Honour found that the defendant breached the duty of care he owed the plaintiff, but reduced damages by 30% for the plaintiff's contributory negligence - The Court of Appeal confirmed the finding of negligence, but the Majority increased the contributory negligence reduction from 30% to 66% - Both the trial judge and the Court of Appeal proceeded on the basis that *Cook v Cook* remained good law, as they were bound to do.

In general terms, the High Court decided in *Cook v Cook* that where a supervisor is aware that his or her pupil driver is inexperienced, the standard of care which arises from this relationship is of an unqualified and inexperienced driver in the circumstances. In other words, because the supervisor cannot reasonably expect a high level of competence from an inexperienced driver, a "lower" standard of care applies

Overruled *Cook v Cook* as bad law

Name and case reference: *Derrick v Cheung* [2001] HCA 48

Court: High Court of Australia [Gleeson CJ, Gaudron, Kirby, Hayne and Callinan JJ]

Facts: Appellant/Plaintiff [Derrick] travelling 45-50 km/h in a 60 km/h zone – struck an infant who darted on to road

Legal principle: negligence – standard of care

The court's decision (application of the legal principle to the facts): Appeal allowed – HC held that there was no basis on which to make a finding of negligence

Duty of Care (Week# 2)

The duty of care is a control mechanism that aims to restrict the circumstances in which a person may be held liable for careless conduct. Two kinds of duty situations:

1. Established categories of case, such as:
 - Employee/employer (*Hamilton v Nuroof (WA) Pty Ltd*)
 - Manufacturer/consumer (*Donoghue v Stevenson*)
 - Doctor/patient (*Rogers v Whitaker*)
 - Owner/occupier (*Zaluzna v Australian Safeways Stores Pty Ltd*)
 - Solicitor/client (*Hill v Van Erp*)
 - Parent/child (*Robertson v Swincer*)
2. Noval categories = are all the other activities which are not established.

Name and case reference: *Le Lievre v Gould* [1893] 1 QB 491

Court: Queens Bench

Facts: Mortgagees of the interest of a builder under a building agreement, advanced money to him from time to time, relying upon certificates given by a surveyor as to stages reached. The surveyor was not appointed by the mortgagees, and there was no contract between them. The surveyor was negligent, and his certificates contained untrue statements as to progress, but there was no fraud on his part.

Legal principle: duty of care – established categories of case

The court's decision (application of the legal principle to the facts): The surveyor owed no duty to the mortgagees to exercise care in giving his certificates, and they could not maintain an action against him by reason of his negligence – Lord Esher states that 'a man is entitled to be as negligent as he pleases to the whole world if he owes no duty to them'

Background and context: It was established from this case that there are 2 kinds of duty situations:

1. Established categories of case: such as doc/patient, accountant/client, solicitor/client, employer/employee & driver/passenger
2. Noval categories

Name and case reference: *Jaensch v Coffey* (1984) HCA 52

Court: HCA from Supreme Court South Australia

Facts: Appellant/Plaintiff [Mrs Coffey] had had an unhappy life until she met and married her husband, Allan. It was a happy marriage, and a baby was born to them in February 1979, a few months before Allan's accident. He was a policeman in Adelaide. In the early evening of 2 June 1979 he was on duty riding his motorcycle when he collided with a motor vehicle driven by Mr Jaensch – due to his careless driving – Allan suffered many injuries and Mrs. Coffey was informed through the hospital – later she suffered anxiety and depression and this caused gynaecological problems and

she had a hysterectomy – she sued Jaensch for damages and was given \$\$\$ for damages – Jaensch then brought charges stating that he did not owe any duty of care to Mrs. Coffey and that he is not liable in damages for negligence occasioning nervous shock

Legal principle: reasonable Foreseeability – proximity and policy consideration

The court's decision (application of the legal principle to the facts): The High Court dismissed the appeal stating that a combination of factors need to exist in order for a duty of care to exist - The High Court extended the class of persons to whom a duty of care is owed to those who, although not present at the scene of an accident, are at risk of suffering psychiatric injury by personally perceiving the direct and immediate aftermath of the accident in which a person with whom they are in a “close or intimate relationship” with is negligently injured or killed - The duty of care was characterised as arising from the injury being reasonably foreseeable and sufficient proximity between the plaintiff and the defendant

Background and context: The Deane J Approach – stated that a combination of three factors were required in order for a duty of care to exist:

1. Reasonable Foreseeability
2. Proximity
3. Policy consideration

Reasonable Foreseeability

Reasonable foreseeability – relevant to duty, breach and remoteness of damage

Duty: It is reasonable foreseeable that careless conduct of any kind on the part of the defendant, may result in damage of *some kind* to the plaintiff? This part relates to the group of people who may be affected if the D failed to take reasonable care? And ask the following two questions:

1. What class of persons might possibly be at risk of injury in some way if the defendant failed to take reasonable care?
2. Is the P one of those people?

If the D is negligent, who will be affected? This is the WHO question. If looking at salient features then this would be the part. As salient features is the current approach of HC in relation to noval situations.

Breach: Is it reasonable foreseeable that the kind of carelessness that the D is accused of might cause damage of *some kind* to the P? This is related to the alleged wrongful conduct

- If the D is negligent by doing x or by not doing x, is it foreseeable that that specific act will cause damage?

This is where we have to address **s 5B (1)(a) of the CLA 2002.**

Remoteness: Was *the kind* of damage suffered by the P a reasonably foreseeable consequence of the D's negligence?

Is it foreseeable that doing that act will cause this kind of damage?

This is where we have to address **s 5D(1)(b) of the CLA 2002**.

Reasonable foreseeability is the 1st factor in Deane J's 3 stage test

The Deane J Approach – stated that a combination of three factors were required in order for a duty of care to exist:

1. Reasonable Foreseeability
2. Proximity
3. Policy consideration

Name and case reference: *Chapman v Hearse* (1961) 106 CLR 112
Clarke 8.26, pg 299

Court: HCA – appeal from the SC of SA

Facts: The Appellant (Chapman) drove negligently and hit into another car, flipping his own over and being knocked out of it into the road where he lay unconscious - several cars stopped by to help the victims of this accident. One was Dr. Cherry, who rushed towards the appellant - whilst he was attending to the unconscious Appellant - Dr. Cherry was struck by the Respondent (Hearse) who was also driving negligently - Dr Cherry died as a result - The Appellant claimed that he could not reasonably foresee that he would be thrown out into the road, and that someone would stop and assist him and that this person would then be run over by another car - Because there was no reasonable foreseeability, he owed no duty of care - Court decided on the case, and the Appellant owed money to Dr. Cherry's estate

Legal principle: Did driver 1 [Chapman], owe a duty of care to the victim of crash 2 [Cherry]?

The court's decision (application of the legal principle to the facts): In agreement with the Full Court of Appeal, the High Court doesn't think the precise sequence needed to be reasonably foreseeable - instead, it needs to be a consequence of the same general character - "It is, we think, sufficient...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 - Quoting *Haynes v Harwood*: "it is not necessary to show that this particular accident and this particular damage were probable; it is sufficient if the accident is of a class that might well be anticipated as one of the reasonable and probably results of a wrongful act - The particular sequence here was of a class that should have been anticipated when driving negligently - driving negligently could very easily result in someone being run over - The Appellants argument fails.

Background and context: This case shows that the court essentially asks 2 questions when considering reasonable foreseeability:

1. What class of persons might possibly be at risk of injury in some way if the defendant failed to take reasonable care?
2. Is the plaintiff one of those people?

If the answer to the second question is no, then no duty of care is owed

Note: class of persons can include other road users, pedestrians, rescuers and passengers

Proximity

Proximity is the second factor in Deane J's 3 stage test - Proximity = closeness

A good example of proximity of Lord Atkin's Neighbour principle in *Donoghue v Stevenson* [see week 1 case brief]

Lord Atkin was referring to a defendant owing a duty of care to persons 'so closely and directly affected' by their act

Policy Consideration

'At its simplest, [policy consideration] is a term which supports the lifting of judicial eyes from the facts of the case ... and the taking into account of broader considerations including the impact of the decision'.

Name and case reference: *Gala v Preston* (1991) 172 CLR 243
Clarke 8.34, pg 304

Court: HCA [Mason C.J., Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ]

Facts: Plaintiff and defendant unlawfully using stolen motor vehicle - A passenger injured whilst travelling in a car that was used for an unlawful purpose was not entitled to damages for injuries he received when the driver lost control of the vehicle and collided with a tree. The court held that a duty was not owed because there was no relationship of proximity between the parties and in the circumstances that they could not have had "any reasonable basis for expecting that a driver of the vehicle would drive it according to ordinary standards of competence and care"

Legal principle: Whether driver owed duty of care to passenger?
negligence – duty of care – proximity – public policy - policy consideration – illegality

The court's decision (application of the legal principle to the facts): Appeal allowed with costs – it highlights the importance of policy consideration in deciding whether a duty of care should be owed – issues for HC was 'what are the principles that govern the liability of the driver of a motor vehicle to a passenger in that vehicle, in the course of ... the commission of a criminal offence? – joint illegal activity was the only relevant relationship between the parties in this case – thus, no duty of care should be owed to the respondent

Significance of this case: this is a leading case dealing with criminal activity curtailing civil compensation

Name and case reference: *Hill v Chief Constable of West Yorkshire Police* [1989] AC 53
Clarke 8.35, pg 305

Court: House of Lords

Facts: Jacqueline Hill [daughter of the plaintiff in this case] was the final victim of Peter Sutcliffe (the Yorkshire Ripper) who had committed 13 murders and 8 attempted murders over a five year period - Jacqueline's Mother made a claim against the Chief Constable on the grounds that the police had been negligent in their detection and detention of Sutcliffe - the defendant [Chief Constable of West Yorkshire Police] applied to have the claim struck out on the grounds that there was no cause of action since no duty of care was owed by the police in the detection of crime

Legal principle: Could the police, as a public agency, be liable in negligence for failing to capture Sutcliffe in time?

The court's decision (application of the legal principle to the facts): No duty of care was owed – the class of potential plaintiffs was too large for the police to owe them any duty of care – police officers do not owe a duty of care in relation to their failure to apprehend an unknown criminal - no general duty of care to members of the public to identify and apprehend an unknown criminal – detrimentally defensive behaviour – indeterminate behaviour – police need to make decisions on matters of policy and discretion and it would not be appropriate for the courts to call these decisions into question.

Name and case reference: *Robertson v Swincer* (1989) 52 SASR 356

Court: Supreme Court of South Australia (Full Court)

Facts: The parents of a 4 year old boy took him to visit some friends – while the parents were standing at the door to say goodbye, the boy went to where their car was and when he was coming back, he was hit by a car and injured – Parents claimed damages from the driver of the car – The driver (really the compulsory insurer) sought contribution from the parents – in order to recover contribution, the driver had to show that the parents would have been liable if they had been sued by the child – the trial judge held that the driver had been negligent, that the child was too young to be contributory negligent and that the parents were not in breach of any duty of care that they may have owed to the child – accordingly, the claims for contribution were dismissed – the driver appealed to the Full Court against the dismissal

Legal principle: impact on social support networks – parent/child responsibility and duty of care

The court's decision (application of the legal principle to the facts): the appeal was dismissed – held that parents do not owe a general duty of supervision to their children – if there was a duty, it could extend to relatives and friends – this would have an impact on social support networks and possible impact on the financial well-being of families

Background and context: Millhouse J – were it not for the policy considerations I should have been inclined to suggest that this appeal be allowed – However, having read the reasons for the other members of the court I do not make that suggestion - ... the considerations of policy are decisive ... the appeal should be dismissed

Jacobs J - ... to have the sword of Damocles duty of care handing over the parental head at all stages of a young child's life is a totally unwarranted burden which the law does not impose – if such a burden were to be imposed, then one should ask for what period during a child's development in such a duty to be imposed. When does the duty cease? Is a child 10 one which the law classifies as old enough to accept responsibilities and therefore outside the limits of such a duty of care? Clearly, the law imposes no such borderlines

Incrementalism

The court must:

1. Identify similar cases where a duty has been owed
2. Using a process of induction and deduction, identify relevant factors. Apply factors to the facts at hand
 - Incrementalism tends to be conservative in its approach
 - Advocates developing new duty categories slowly, over a period of time, by taking small steps

Name and case reference: *Sutherland Shire Council v Heyman* (1985) 157 CLR 424
Clarke 8.31, pg 302

Court: HCA

Facts: Plaintiff bought a house which had bad foundations causing damages - The Plaintiff sued the council for negligence in approving plans for the erection of the house and in failing to ensure that the land will be inspected before a permit is issued

Legal principle: Was the council liable to the new owner?

The court's decision (application of the legal principle to the facts): Brennan J stated that it was preferable for the law to 'develop novel categories of negligence incrementally and by analogy with the established categories rather than by massive extension of a prima facie duty of care restrained only by indefinable "considerations which ought to negative or ... limit the scope of the class of person to whom it is owed."

Background and context: This case considered the issue of reasonable foreseeability and whether or not a duty of care was owed by a local council to a home owner in relation to the construction and approval of a house

The Caparo Test

Three stage test from *Caparo Industries v Dickman*

1. Was it reasonably foreseeable that the wrongful conduct or an omission would be likely to cause harm to the plaintiff or a person in the same position?
2. Was there a relationship between the plaintiff and the defendant that could be characterised by the law as one of 'proximity' or neighbourhood?

3. Fair, just and reasonable that the law should impose a duty of care upon the defendant?

Name and case reference: *Caparo Industries v Dickman* [1990] 2 AC 605

Court: House of Lord following the Court of Appeal

Facts: A company called Fidelity plc, manufacturers of electrical equipment, was the target of a takeover by Caparo Industries plc – Fidelity was not doing well – In March 1984 Fidelity had issued a profit warning, which had halved its share price – In May 1984 Fidelity's directors made a preliminary announcement in its annual profits for the year up to March - This confirmed the position was bad - The share price fell again - At this point Caparo had begun buying up shares in large numbers - In June 1984 the annual accounts, which were done with the help of the accountant Dickman, were issued to the shareholders, which now included Caparo - Caparo reached a shareholding of 29.9% of the company, at which point it made a general offer for the remaining shares, as the City Code's rules on takeovers required - But once it had control, Caparo found that Fidelity's accounts were in an even worse state than had been revealed by the directors or the auditors - It sued Dickman for negligence in preparing the accounts and sought to recover its losses - This was the difference in value between the company as it had and what it would have had if the accounts had been accurate.

Legal principle: The Caparo test

The court's decision (application of the legal principle to the facts): Appeal allowed - Caparo were unsuccessful in establishing a claim in negligence as, ultimately, the House of Lords held that the issuing of company accounts (by Dickman) was intended to be for the use of company shareholders for the purpose of exercising their class rights in general meetings etc. The accounts were not, it was held, published for the intention of illustrating the potential of future investment by shareholders or other interested parties.

The main turning point of the decision was that Dickman had no knowledge as to the use that the published accounts would be put to, and thus there could be no proximity of relationship as the accounts were published and issued to shareholders as a whole.

Background and context: Three stage test from *Caparo Industries v Dickman* was established:

1. Was it reasonably foreseeable that the wrongful conduct or an omission would be likely to cause harm to the plaintiff or a person in the same position?
2. Was there a relationship between the plaintiff and the defendant that could be characterised by the law as one of 'proximity' or neighbourhood?
3. Fair, just and reasonable that the law should impose a duty of care upon the defendant?

The Caparo test was expressly rejected by the High Court in *Sullivan v Moody*

In Australia, *Caparo* was followed in *Esanda Finance Corporation Ltd v Peat Marwick Hungerfords*. *Caparo* is also noted for the comments made as to the analysis of Brennan J of the Australian High Court in *Council of the Shire of Sutherland v Heyman* espousing the proposition that the law should develop novel categories of negligence 'incrementally and by analogy with established categories'. That observation was subsequently rejected in *Sullivan v Moody*.

Salient Features

Requires the court to look at the important features of a case and decide if the relationship is sufficiently close to give rise to a duty of care. Particularly popular in pure economic loss cases and cases where the defendant is a statutory authority. See p 114 [Luntz et al]

Only applicable when it is novel categories, not in established category of cases.

Name and case reference: *Perre v Apand* (1999) 198 CLR 180

Clarke 8.39, pg 311

Court: HCA [GLEESON CJ, GAUDRON, McHUGH, GUMMOW, KIRBY, HAYNE AND CALLINAN JJ]

Facts: Plaintiffs were potato growers in SA – the defendant (Apand) imported potato seeds infected with bacterial wilt and sold them to the Sparnons, who planted them on a property neighbouring the plaintiffs’ – legislation prohibited potatoes grown within 20 km of an affected area from being imported into WA – Plaintiffs could not sell their potatoes in WA and instead had to sell them in SA for less than half the price – potatoes could not be sold in the market with higher \$\$\$

Legal principle: Duty of care – pure economic loss - salient features

The court’s decision (application of the legal principle to the facts): The Defendant owed the Plaintiff a duty of care to prevent causing even pure economic loss - the Plaintiff wins.

McHugh J:

The court rejects 'proximity' as a requirement = "this Court no longer sees proximity as the unifying criterion of duties of care"

Instead, there is a reasonable foreseeability test, followed by a list of considerations as to why a duty should imposed (or not imposed):

1. **Indeterminacy of liability** - a duty of care will only be imposed if liability does not become indeterminate. This is relevant because economic loss can 'ripple' down to a large amount of parties. "As a general rule, no duty will be owed to those who suffer loss as part of a ripple effect". "Liability is indeterminate only when it cannot be realistically calculated...Indeterminacy depends upon what the defendant knew or ought to have known of the number of claimants and the nature of their likely claims^[3]..."
2. **Unreasonable burden on commercial activity** - the courts approve of commercial competition, and will not impose a duty of care if the duty of care is an unreasonable burden.
3. **Vulnerability** - was the plaintiff vulnerable?
 - A plaintiff is vulnerable if he was unable of taking reasonable steps to protect himself from the negligent act

- If a plaintiff could have taken reasonable actions to protect himself, a duty of care will **not** be imposed.

For vulnerability, it is also relevant whether: the plaintiff was subject to the defendant's control, Whether there was reasonable reliance/assumption of responsibility placed on the defendant's information.

4. **Knowledge** - did the defendant know that its conduct would cause harm to individuals such as the plaintiff?

- The court also notes that insurance is irrelevant.

In this case:

- Reasonable foreseeability satisfied: "The losses suffered by the Perres [Plaintiff] were a reasonably foreseeable consequence of Apand's conduct in supplying the diseased seed"
- Vulnerability exists: "The Perres' business was vulnerably exposed to Apand's conduct because the Perres were not in a position to protect themselves against the effect of Apand's negligence apart from insurance (which is not a relevant factor)..."
- No indeterminate liability, no interference with commercial freedom:
- "Imposing the duty on Apand does not expose it to indeterminate liability although its liability may be large; imposing the duty does not unreasonably interfere with Apand's commercial freedom because it was already under a duty to the Sparnons to take reasonable care..." - ie, imposing a duty wouldn't put a burden on the defendant which he didn't already owe to someone else anyway.

The Defendant owed the Plaintiff a duty of care to prevent causing even pure economic loss - the Plaintiff wins.

Background and context: pure economic loss – no physical damage e.g an accident outside of your shop which causes your business not to have customers

Name and case reference: *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1
Clarke 8.43, pg 329

Court: HCA [GLEESON CJ, GAUDRON, McHUGH, GUMMOW, KIRBY, HAYNE AND CALLINAN JJ]

Facts: Plaintiff worked as a stevedore for the Defendant on a day to day basis - Plaintiff was exposed to asbestos while working, contracted a disease, and died - The estate sued the Defendant for failing nonfeasance (failure to act where action is required – wilfully or in negligent) - failure to ensure the Plaintiff's safety.

Legal principle: Salient Features – the incremental approach

The court's decision (application of the legal principle to the facts): Appeal allowed with costs - Set aside the orders of the Court of Appeal of the Supreme Court of Victoria and remit the matter to that Court for determination of the remaining issues in the appeal to that Court, including the costs of that appeal

The incremental approach

McHugh J:

Favours the incremental approach - "ascertaining whether the case comes within a factual category where duties of care have or have not been held to arise." If it is a new category of cases, we do an incremental test for relevant factors which have arisen in previous cases concerning public authorities. The process is as follows:

1. **Reasonable foreseeability** - as usual, reasonable foreseeability is the cornerstone of a duty of care.
2. **Power/control** - did the defendant, by virtue of the statute giving it powers, have the power to protect the plaintiff? Also, did the defendant have a degree of **control** over the plaintiff?
 - Control will also be satisfied if the defendant assumed responsibility for the plaintiff.
 - The presence of **control pretty much means a duty of care** - "it can seldom be the case that a person, who control or directs another person, does not that person a duty to take reasonable care to avoid risks of harm from that direction or the effect of that control." and "usually the very fact of the direction or control will itself be sufficient to found a duty."
3. **Vulnerability** - was the plaintiff **vulnerable**, in the sense that he could not be reasonably expected to protect himself?
 - Exceptions:
 - If the public authority has control (or assumes a responsibility) to help the plaintiff, he is considered automatically vulnerable.
 - If the public authority has a **statutory obligation** to protect (however, this is rare, because if there was already a statutory obligation to protect, this would immediately entail a duty of care and there would be no way of denying the duty).
4. **Knowledge** - did the defendant know or ought to have known that its non-feasance will most likely bring about harm to the plaintiff? Moreover, did the defendant have **sole** knowledge? (as in, no one else knew of the risk except for the defendant)
5. **Policy** - is the alleged negligence a part of the defendant's exercising of 'core' policy areas or 'quasi-legislative' powers? If yes, no duty of care. Refer to

the policy/operation distinction.

6. **Statutory scheme** - check the statutory scheme to see whether imposing a common law duty would be inconsistent to the duties given to the public authority by the statute.(if yes, no duty of care)

- As in, will there be a conflict of duties?

In this case

- The incremental process is answered as follows:
 1. Yes. The risk of harm was reasonably foreseeable.
 2. Yes. The defendant had tremendous power and control over the workers. This is the principle reason here why there is:*definitely a duty of care.
 3. Yes. Nature of the relationship made the Plaintiff very vulnerable and unable to protect himself. Moreover, the Plaintiff was already under the control of the defendant and therefore is automatically vulnerable.
 4. Yes. The defendant had knowledge of the possible harm
 5. No. Although some of the powers were 'quasi-legislative' in nature and thus immune from a duty of care, plenty of other powers which could have been used were clearly operational matters.
 6. No. There is no inconsistency between imposing a duty of care and the statutory scheme in this case. No policy reasons to deny a duty of care.

Therefore, there is a duty of care.

Name and case reference: *Sullivan v Moody* (2001) 207 CLR 562

Clarke 8.52, pg 344

Court: HCA [GLEESON CJ, GAUDRON, McHUGH, HAYNE AND CALLINAN JJ]

Facts: The plaintiff [Thomas Sullivan] was the father of a young daughter – the daughter said some things to her mother (the plaintiff's wife), which led the mother to contact the Crises Centre branch of the Department of Community Welfare – she was referred by the Department to the Adelaide Children's Hospital, which in turn referred her to the Sexual Assault Referral Centre – Defendants were a doctor and 2 social workers – no criminal charges were laid against the plaintiff but allegations were believed by his wife and this broke the marriage – Sullivan suffered shock, anxiety, personal and financial loss – Sullivan brought an action in negligence against the government officials who charged him for child sexual assault when he had not committed the alleged offence – Plaintiff alleged that the defendants did not exercise their duties to provide reasonable care while investigating sexual assault of his daughter

Legal principle: Negligence – proximity

The court's decision (application of the legal principle to the facts): Appeal dismissed with costs - Government officials investigating allegation of child abuse do not owe a duty of care to a parent

who may be a suspect to conduct their investigations carefully so as to avoid psychological harm to the parent – to impose a duty of care would be contrary to the statutory scheme that existed to protect the interests of children rather than parents – it was concluded that the duty of care for which appellants content does not exist

Background and context: It was held that their case rests on foreseeability and that is not sufficient

Name and case reference: *Caltex Refineries v Stavar* (2009) 75 NSWLR 649

Court: NSWCA

Facts: Mr Stavar worked at an oil refinery in Queensland, at which time he used and applied asbestos materials to parts of the refinery on a daily basis and would wear **asbestos** contaminated clothing home from work where Mrs Stavar (the plaintiff) would wash throughout the time he worked at the refinery. Mrs Stavar (the plaintiff) **washed his contaminated clothes**. In 1971 the Asbestos Rule made under the *Factories and Shops Act 1960* (Qld), s38(1) came into effect in Queensland. The Asbestos Rule required, amongst other things, the provision of protective clothing to those working with asbestos and that contaminated clothing be cleaned on site (or removed safely for cleaning off site).

Mrs Stavar now suffers from malignant mesothelioma contracted as a result of coming into contact with asbestos dust and fibres on her husband's work clothes in the family home and car. The President of the DDT gave judgment for the plaintiff against the five defendants for the employment period after 1974.

Caltex appealed to the Court of Appeal. The appeal was dismissed, the cross-appeal allowed and questions relating to the cross-appeal were remitted to the Dust Diseases Tribunal.

Legal principle: duty of care – negligence – noval categories

The court's decision (application of the legal principle to the facts): Held that not only an assessment of foreseeability, but also attention to consideration such as control, vulnerability, assumption of responsibility and nearness or proximity - Appeal dismissed – remit the matter to the tribunal so that the liability of the appellant for the period from 1965 to 1974 can be determined accordingly

Background and context:

1. Appeal dismissed.
2. Grant leave to cross-appeal.
3. Cross-appeal allowed.
4. Set aside that part of the order for costs made by the Tribunal refusing to award costs to the plaintiff in respect of the period before 1974 and remit that issue together with any attendant questions of the duty of care and breach thereof in the period prior to 1974 to the Tribunal for rehearing.
5. The appellant pay the respondent's costs of the appeal and cross-appeal.