## TOPIC 1: Negligence – Duty of Care

### General Principles

**Case: *Heaven v Pender* (1883)**

**Facts:** The defendant, the owner of a dry dock, entered into a contract with a shipowner to supply a stage supported by ropes that would be flung over the side of a ship while it was in the dock. Painters employed by an independent contractor used the stage to paint the ship. Whilst painting, one of the ropes gave way and one of the painters was injured. *The ropes had been scorched before they were supplied by the defendant, who had failed to give reasonably careful attention to their condition.*

The injured painter sought to sue the defendant. However, he had no contract with the owner, so he sued in tort.

**Issue:**

- *Did the defendant owe the injured painter a duty of care?*

**Held:**

(Brett MR – *minority*):

"Whenever one person is by circumstances placed in such a position with regard to another that **everyone of ordinary sense who did think** would at once recognise that **if he did not use ordinary care and skill in his own conduct** with regard to those circumstances **he would cause danger of injury to the person or property of the other**, a duty arises to use ordinary skill and avoid such danger".

Tort law should assume a broad view of this area. If any person with ordinary sense realises that if they did not exercise proper care and skill, damage could be occasioned to another or another's property from their actions, they should be held liable.

Brett MR was part of the *minority*. The majority gave a narrower interpretation: liability can only be found in this area of tort when there is an action between owners/occupiers of a premises and **licensees**. The painter was not a licensee, so he could not be successful in tort – *Defendant successful*.

## Case: *Donoghue v Stevenson* (1932)

**Facts:** The plaintiff went into a cafe with a friend. The friend bought a ginger beer for the plaintiff. This purchase created a contract between the shopkeeper and the friend, but the plaintiff was not privy to this contract.

The ginger beer was manufactured by the defendant, who sold it to the distributor, and the distributor on-sold it to the shopkeeper. The ginger beer was in an opaque bottle with a sealed metal cap, so that the contents inside were not visible. The shopkeeper poured a portion of the beer into a glass and gave it to the plaintiff. The plaintiff drank. The friend then poured the remainder of the bottle into the plaintiff's glass, whereupon the decomposed remains of a snail emerged from the bottle. The plaintiff became very ill from this sight, and sought to sue the defendant manufacturer, claiming the presence of the snail was due to his negligence. She was unable to sue in contract because she had not bought the beer directly from the defendant manufacturer. Additionally, the defendant claimed that he did not owe a duty of care to the plaintiff.

**Issue:**

- *Did the defendant manufacturer owe a duty of care to the plaintiff?*

**Held:**

(Lord Atkin):

"The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; that is, 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 – person show 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**"

A manufacturer puts up an article of food in a container which he knows will be opened by the actual consumer. There can be no inspection by any purchaser and no reasonable preliminary inspection by the consumer. Negligently, in the course of preparation, he allows the contents to be mixed with poison. The law as it stands states that the poisoned consumer has no remedy against the negligent manufacturer; in fact, not only would a consumer have no remedy against the manufacturer, he would have none against anyone else. If this were the result of the authorities, I should consider the result a grave defect in the law, and so contrary to principle that I should hesitate long before following any decision to that effect. It will be an advantage to make it clear that the law in this matter, as in most others, is in accordance with common sense. The appeal should be allowed – *Plaintiff successful*.

## Reasonable Foreseeability

### Case: *Chapman v Hearse* (1961)

**Facts:** Chapman was driving negligently and subsequently crashed into the car in front of him. The door of Chapman's vehicle was flung open and he was thrown out on to the road. Shortly afterwards, Dr Cherry – a passerby – stopped his car and went to the aid of Chapman. While Dr Cherry was attending to Chapman, Hearse negligently ran over Dr Cherry, killing him. An action was successfully brought against Hearse by Dr Cherry's widow, who received full compensation.

Hearse's insurers then sought to claim for contribution by Hearse against Chapman. The right to recover depended on whether Chapman, if sued by Dr Cherry's widow, would have been liable.

**Issue:**

- *Could Hearse's insurers recover against Chapman in the circumstances?*

**Held:**

(Dixon CJ, Kitto, Taylor and Windeyer JJ):

In order to establish a duty of care with respect to a plaintiff injured as the result of a defendant's carelessness, it is not necessary to show that the *precise manner* in which his injuries were sustained was reasonably foreseeable; rather, it is sufficient in the circumstances to ask whether a *consequence of the same general character* as that which followed was reasonably foreseeable. It is irrelevant that Dr Cherry was a medical practitioner or that Chapman was deposited on the highway. **What is important to consider is whether a reasonable man might foresee, as the consequence of such a collision, the attendance on the roadway of persons fulfilling a moral and social duty to render aid to those incapacitated or otherwise injured**.

These considerations make it clear that Hearse's contention must fail. When account is taken of the circumstances as they existed on the night in question, there can be little doubt that it *was reasonably foreseeable* that subsequent injury by passing traffic to those rendering aid after a collision was possible. Chapman could not have reasonably foreseen the convolute series of events when he was driving negligently, but he could have foreseen the **general character** of events that would result in someone being harmed. Chapman is liable to contribute damages to Hearse - *Hearse successful*.

## Case: *Caterson v Commissioner for Railways* (1973)

**Facts:** The plaintiff boarded a train for the sole purpose of assisting a departing passenger with his luggage. The train started moving without warning before the plaintiff had time to disembark. The plaintiff's 14 year old son was alone on the platform 64km from home. The plaintiff jumped from the train and was injured. The plaintiff sought to sue the train company for his injuries. A jury found in favour of the plaintiff, but this verdict was set aside by the Court of Appeal, who asserted that the test of reasonable foreseeability was based on the premise of '*likely to injure*'; it was not sufficient that the risk be foreseeable as a mere *possible* cause of injury. Thus, the Court of Appeal deemed that there was no duty of care owed to the plaintiff by the train company. This decision was appealed to the High Court.

**Issue:**

- *Were the plaintiff's injuries reasonably foreseeable?*

**Held:**

(Barwick CJ):

The test for reasonable foreseeability is not **likely to injure** but rather, **not unlikely to occur**. This is for two reasons: firstly, it denies the proposition that the event or damage should be *more likely than not to occur or be suffered*, and, by its negative form, excludes possibilities which are *theoretical and unreal* in the circumstances. There are grounds and evidence supporting the jury's original verdict. The plaintiff's injuries were reasonably foreseeable in that they were not unlikely to occur – *Plaintiff successful*.

## Case: *Sullivan v Moody* (2001)

**Facts:** 2 fathers were accused of child abuse by a medical practitioner and social worker whose duty it was under legislation to investigate into child abuse. The plaintiff, a father accused of abusing his child, claimed he'd had no dealings with the medical practitioner or hospital investigating, and because of their accusations he suffered psychiatric harm. The plaintiff sought to sue in negligence on these grounds, asserting that he'd suffered harm because he'd been negligently accused of abusing his child. It was up to the court to consider whether people investigating child abuse under statute owe a duty of care to the person they are investigating.

**Issues:**

- *Was the psychiatric harm suffered by the plaintiffs reasonably foreseeable?*
- *Did the investigators owe a duty of care to the people they were investigating?*

**Held:**

(Gleeson CJ, Gaudron, McHugh, Hayne and Callinan JJ):

The appellants' allege that it was foreseeable that harm of the kind suffered might result from lack of care on the part of those investigating into child sexual abuse. But the fact that it is foreseeable - in the sense of being a **real and not far-fetched possibility** – that a careless act or omission on the part of one person may cause harm to another *does not necessarily mean the first person is subject to a legal liability to compensate for the harm that results from their carelessness*.

If reasonable foreseeability was alone the test, a duty of care would have been found. However, at least 2 undesirable consequences would follow: firstly, the law would subject citizens to an intolerable burden of potential liability and constrain their freedom in a gross manner; secondly, the tort of negligence would disrupt and conflict with other settled areas of law. Thus, reasonable foreseeability should be coupled with a ***salient feature test***, so that people can understand whether negligence extends into certain areas of life and law.

In the present case, the investigators were acting under a statutory duty. To find negligence in this case would conflict with that area of law. For this reason, the case should be dismissed – *Defendant successful*.

## Proximity

**Case: *Sutherland Shire Council v Heyman* (1985)**

**Facts:** The defendant's Council gave approval for the erection of a house on a slope, along with several conditions. The conditions included that notice to be given to the Council at various points of construction, and a prohibition of occupation without the completed building being inspected and passed.

A few years later, the plaintiffs bought the house and went into occupation. The following year they became aware of the damage to the house caused by the inadequacy of the foundation. They incurred expense to remedy the damage and strengthen the foundations, and sued the Council for recovery of the expenses. It was found that the Council had not been negligent in approving the plans and specifications. There was no evidence that the then owners gave notice when the building was completed or that the building was inspected and passed by the Council. The plaintiffs appealed again, claiming that the Council was negligent either a) in carrying out inspections of the house whilst it was under construction, or b) in failing to make the inspections that ought to have been made.

**Issue:**

- *Was the Council negligent in either carrying out inspections of the house whilst it was under construction, or in failing to make inspections?*

**Held:**

(Gibbs and Wilson J):

Foreseeability alone is *not sufficient to establish proximity or neighbourhood*. The scope of the duty must depend on the circumstances of the case. The Council owed to the plaintiffs, as owners and occupiers of the house erected subject to its approval and under its control, a duty to give *proper consideration as to whether it should exercise its powers of inspection.* However, the Council had no statutory duty to inspect the building at any time before completion, and there was nothing in the relationship or the circumstances that gave rise to a duty to make an inspection. The Council was not guilty of any breach of duty owed to the plaintiff.

(Mason J):

The plaintiffs did not specifically rely on the Council's exercise of its power. The judgment could only be sustained on the footing that the Council was in breach of a duty of care based on a general reliance or dependence on the Council investigating and approving the building. However, such a case was not advanced by the plaintiffs, and they thus failed to establish that the Council owed them a duty of care.

(Brennan J):

The risk of structural damage to the house was not created or increased by some act done by the Council. The approval of the plans did not increase the risk of defective and unworkmanlike construction. The Council's omission to exercise its power of inspection more rigorously did not make it liable for the consequences of the builder's negligence.

(Deane J):

Reasonable foreseeability of loss or injury and proximity are distinct notions. **Proximity remains the touchstone of the categories of case in which the tort of negligence will admit a duty of care**. The Council's connection with the erection of the house – the content of the only relevant relationship between the Council and plaintiff – were of a routine, administrative nature.

The types of cases in which proximity will give rise to a duty to take reasonable care to avoid reasonably foreseeable risk or injury are special or exceptional. In cases involving mere omission or mere economic loss, it is likely that the existence of the requisite element of proximity will reflect reliance **by the plaintiff upon care being taken by the defendant to avoid or prevent injury, loss or damage to the plaintiff or their property.**

In this case, all the factors taken together did not supplement the existence of reasonable foreseeability of economic loss in a way which would warrant a conclusion that the element of proximity existed between the parties. On that basis, there was no duty on behalf of the Council to take reasonable care to ensure the plaintiffs did not sustain loss – *Defendant successful*.

**Case: *Gala v Preston* (1991)**

**Facts:** A group of youths, including the plaintiff and defendant, spent an afternoon getting drunk. During the course of the afternoon, the plaintiff and defendant steal a car for the purposes of travelling to see friends, and in so doing, commit burglary. The plaintiff falls asleep at the back of the car. The defendant, who was driving the car at the time, crashes and the plaintiff is injured. The plaintiff sues the defendant in negligence for his injuries. In the true sense of the word, the plaintiff and defendant had proximity; that is to say, they were physically close to each other. The question was whether this argument would hold up in court.

**Issue:**

- *Did the rule of proximity apply to the plaintiff and defendant in this case?*

**Held:**

(High Court):

For policy reasons, there can be no duty of care when the plaintiff passenger and the defendant driver are jointly contravening legislation and getting involved in illegal activity. People committing a crime should not be able to avail themselves in the civil law. The plaintiff cannot succeed – *Defendant successful*.

## Vulnerable Plaintiffs

**Case: *Levi v Colgate-Palmolive Pty Ltd* (1941)**

**Facts:** The plaintiff received from the defendants a gratuitous box of bath salts. She dissolved most of the bath salts in a bath of warm water, in which she remained for 20 minutes. While in the bath, the plaintiff noticed her skin tingling. When she emerged, she found that her face and other parts of her body had become very red. The redness continued and spread, and an itch developed which was troublesome and lasted for a long time. She attempted to sue the defendant for her injuries.

**Issue:**

- *Was the harm suffered by the plaintiff reasonably foreseeable, taking into account her vulnerable circumstances?*

**Held:**

(Jordan CJ):

Where an act is incapable of injuring an ordinary normal person, the person who does the act owes no duty to do more simply because a person of abnormal susceptibility may be affected. Special circumstances may give rise to a duty to take special precautions to avoid injury to particular abnormal persons likely to be affected, but the mere fact that abnormal persons exist in the community does not create a special duty of care. Persons who trade in and supply ordinary foodstuffs and articles of domestic use are subject to no duty to issue warnings that the use of such articles may cause discomfort or injury to abnormal people who may be allergic to said articles.

On this basis, the injury suffered by the here abnormal plaintiff was not reasonably foreseeable, and the defendant did not owe a duty of care – *Defendant successful*.

## Case: *Haley v London Electricity Board* (1965)

**Facts:** Workers employed by the defendant had excavated a trench in the footpath. They erected signs on the roadway to keep cars away from the kerb so as to allow pedestrians to pass by walking on the road. The workers surrounded the trench with implements to guard it and show pedestrians that it was there.

The plaintiff, a blind man, was walking along the footpath with his white stick in front of him. The plaintiff could not see the trench in front of him and ended up tripping over the implements. He struck his head on the ground and became deaf as a consequence. He sought to sue the defendant in negligence.

**Issue:**

- *Was the injury sustained by the plaintiff reasonably foreseeable, making the defendant liable?*

**Held:**

(Lord Reid):

There is evidence in this case about the number of blind people in London, the number of which appears to be 1 in 500. By no means are all sufficiently skilled or confident to venture out alone, but the number who do so must be quite large. On the whole, blind people do safely avoid all ordinary obstacles on pavements. However, a low obstacle in an unusual place – such as here - always poses a grave danger, even to the most skilled blind person. In the circumstances, a light fence 60cm high would have been an adequate warning.

No doubt there are many places open to the public where for one reason or another, people would be surprised to see a blind person walking alone. However, a city pavement, let alone a residential street, is not one of them. It is quite impossible to say that it is *not reasonably foreseeable* that a blind person may pass along a particular pavement during any given day. The ordinary principles of common law,

**fundamentally dependent on what a reasonable man, careful of his neighbour's safety, would do in the position of the defendant**, must apply. "A measure of care appropriate to the inability or disability of those who are immature or feeble in mind or body is due from others who know of, or ought to anticipate, the presence of such persons within the scope and hazard of their operations" . The defendant owed to a duty of care to the disabled who would come across their operations – *Plaintiff successful*.

## Salient Feature – Control

**Case: *ACT v Crowley* (2013)**

**Facts:** The plaintiff suffered a psychotic episode during which he paraded around his neighbourhood holding a kendo stick and claiming to be Jesus Christ. During the course of this episode, the plaintiff had a number of altercations with people in the neighbourhood, during which he made a number of threats to other people. However, the people he came in contact with managed to placate him, and none of the altercations resulted in violence.

At one point during the episode, police were called to look for and apprehend the plaintiff. The 2 officers who eventually found the plaintiff had not worked together previously and did not discuss what would be done if and when they found him. The officers eventually found the plaintiff in an area in which no other people were around, so no one was in imminent danger from the plaintiff's stick. The officers yelled at the plaintiff to get on the ground, but this had no effect. The officers then resorted to pepper spray, but that too did not stop the plaintiff. The officers then shot the plaintiff, hitting him in the neck. As a consequence, the plaintiff became quadriplegic and sought to sue the officers and the Australian Federal Police in negligence.

**Issue:**

- *Did the police officers owe the plaintiff a duty of care?*

**Held:**

Trial Judge:

"Police assume a duty of care by **taking control, or attempting to take control**, of a situation. When they walked out of their car, they were **clearly exercising their authority as police officers and taking control of the situation**". There should be a way for plaintiffs to sue policemen for negligence in apprehension, specifically in the area of control. *Control should be a salient feature*.

Distinguishing *Sullivan v Moody*

In *Sullivan v Moody*, only the safety of the child was considered paramount. Here, AFP principles require that **'the safety of the police, the public and offenders or suspects is paramount**'. Thus, police *could owe a duty of care to more than one party.* This duty of care would be owed to **'anyone who is directly**

**caught up in the exercise of authority**', including suspects or offenders – like the accused – victims and innocent bystanders.

The Trial Judge's argument was rejected by the Court of Appeal.

(Court of Appeal):

Regarding 'Control'

Control is a salient feature, but the police ***did not actually have control; they were merely attempting to gain control***. Control was not present here.

Regarding a Duty of Care

The main duty of police is to the **public, as opposed to the suspect**. However, the police could owe a duty to a suspected criminal, victim or bystander in circumstances where they could discharge their duties without injury to these persons - *Defendant successful, but duty of care unclear*.

**Cf. Case: *Hill v Chief Constable of Yorkshire* (1989)**

**Facts:** The 'Yorkshire Ripper' was a man responsible for the murder of numerous women between 1975 and 1980. The police were inadequately prepared for the murder hunt. They took a long time to apprehend the murderer, despite interviewing him nine times during the course of the investigation. As a consequence, the plaintiff - the mother of the last victim of the 'Ripper' – sought to sue the police in negligence. She claimed that had the police investigated properly, the 'Ripper' would have been off the street, and a number of murders would have been prevented, including that of her daughter.

**Issue:**

- *Do the police owe a duty of care to the public in the course of investigations?*

**Held:**

(House of Lords):

The police, although liable in negligence in appropriate cases, *owe no duty of care in the conduct of their investigations into crime to prevent injury to a member of the public who may foreseeably be harmed by a person whom they fail to apprehend*. If the police knew they could be sued as a result of their inability to capture criminals, and therefore owed a duty to the victim, police would be policing in a way that was **unduly defensive, inefficient and would place the community at risk**. There should not be tortious liability surrounding police action – *Police successful*.

*"The discharge by the police of their public duties cannot be constrained or limited by the fear that in carrying out those duties police officers may be liable to suspected criminals, victims or bystanders, because that will impede the discharge of those duties. If it were otherwise, policing would become unduly defensive and therefore inefficient, and, as a consequence, members of the community would be put at risk".*

Distinguishing *ACT v Crowley*: **Directness issue** – in *Hill*, the police failed to catch the criminal in time, and the victim was indirectly killed as a result of their negligence; in *Crowley*, the police directly shot and injured the plaintiff. Crowley is ***hugely controversial***, making police immune for the injury they cause *themselves*, not just immune from the harm occurring as a consequence of their negligence.

## Case: *Caltex Oil v The Dredge 'Willemstad'* (1976)

**Facts:** A dredge was dredging a deep water channel in Botany Bay at night. Part of the dredging was to occur over pipeline carrying oil products from a refinery owned and operated by AOR. Both the defendant and those on board the dredge knew of the existence of the pipeline, yet they continued to dredge.

As a result of the dredge passing over the pipeline, the pipeline was damaged. A comparatively small quantity of the product was lost. However, whilst it was being repaired, the pipeline could not be used. Consequently, the plaintiffs had no make alternative arrangements to transport the products. These alternative arrangements resulted in expenses totalling $95,000. The plaintiffs subsequently brought an action against the defendant for recovery of the expenses.

**Issue:**

- *Could the plaintiffs recover its financial expense from the defendant?*

**Held:**

(High Court):

Ordinarily, **a plaintiff cannot claim for pure economic loss**. However, because the defendant knew of the pipeline's existence and knew the plaintiff would suffer loss if damage occurred to the pipeline, the defendant is liable to the plaintiff. The defendant knew that a particular person was likely to suffer economic loss as a consequence of their carelessness, and should not escape liability for their wilful disregard – *Plaintiff successful*.