

TOPIC 1 – NEGLIGENCE: INTRODUCTION AND FINDING A DUTY OF CARE

NEGLIGENCE

Negligence elements

- Duty, breach, damage - *Jaensch v Coffey*

DUTY OF CARE

- A person owes a DOC 'when it is reasonable in all the circumstances' – *Graham Barclay Oysters Pty Ltd v Ryan*

Established DOC categories:

DRIVER/PASSENGER OR PEDESTRIAN

- *Imbree v McNeilly*

DRIVER/OTHER ROAD USER

- *Imbree v McNeilly*

MANUFACTURER OF PRODUCTS/CONSUMER

- *Donoghue v Stevenson*

OCCUPIER OF PREMISES AND ENTRANT

- *Strong v Woolworths*, also *Australian Safeway Stores Pty Ltd v Zaluzna*

EMPLOYER AND EMPLOYEE

- *Smith v Charles Baker & Sons*

DOCTOR/PATIENT (MEDICAL NEGLIGENCE, FAILURE TO WARN)

- *Rogers v Whitaker*

PROFESSIONAL/CLIENT

- *Heydon v NRMA Ltd*

SCHOOL/STUDENT

- *Commonwealth v Introvigne*

BUILDER/HOME BUYER

- *Bryan v Maloney*

HOSPITAL/PATIENT

- *Ellis v Wallsend District Hospital* (AUTHORITY on hospital duty of care)

VICARIOUS LIABILITY (EG EMPLOYER/EMPLOYEE)

- *Stevens v Sawmilling Co Pty Ltd*
- *Hollis v Vabu Pty Ltd*
- *Deatons Pty Ltd v Flew*

NOVEL DUTY OF CARE CASES

- In novel cases, the **salient features** test should be used - **Graham Barclay Oysters Pty Ltd v Ryan**
- McHugh J lists 5 steps in **Perre v Apand Pty Ltd**
 - Reasonable foreseeability (was damage reasonable foreseeable?)
 - Indeterminate liability (does action affect a specifiable group of people?)
 - Impact on autonomy (can P still exercise autonomy? For reasonable, not ideal outcome)
 - Vulnerability (could P protect against loss?)
 - Knowledge (did, or should have, D known about impact?)
- McHugh J lists 6 steps in **Crimmins v Stevedoring Industry Finance Committee**
 - Reasonable foreseeability
 - Power to protect
 - Vulnerability
 - Knowledge
 - Conflict with decision making functions
 - Any other **policy reasons** to deny DOC
- Allsop P lists 17 salient features to be examined if they arise on particular facts *Caltex Refineries (Qld) Pty Ltd v Stavar*
 - Foreseeability of harm
 - Nature of harm
 - **D's ability to exercise control, and the degree and nature of that control**
 - **P's vulnerability, and ability to protect himself/herself**
 - Degree of reliance (how much does P depend on D?)
 - Assumption of responsibility by D
 - Proximity of parties (physically, temporally, or relationally)
 - Relationship (if any) between D and P or D and P's close associate
 - Nature of D's pertinent activity
 - Nature or degree of likely harm from D's actions
 - D's knowledge (actual or constructive) that act will harm P
 - Any possible intermediate liability (ie is P part, or all, or a definite class affected?)
 - Reasonableness of any notice to avoid harm
 - Impact on autonomy, including right to follow interests
 - Any conflicting legal duties
 - Consistency with any relevant statute
 - Aim for coherency in the common law

****Issues about vulnerability, and autonomy, and usually policy considerations, should ALWAYS be discussed**

POLICY CONSIDERATIONS

- Policy considerations play a large role in establishing duty of care, particularly as courts try to keep the law coherent **Miller v Miller**
- Policies laid down by the courts include:
 - DOC's do not arise in cases of joint criminal enterprise, unless the parties have a pre-existing DOC relationship **Gala v Preston**
 - Courts do not apply conflicting DOCs **Sullivan v Moody**
 - Those who owe a general DOC (eg the police) do not owe one to specific people **Cray v NSW**

SCOPE OF DUTY

- Generally, the scope of the DOC requires the defendant to exercise reasonable care **RTA v Dederer**
- However, special requirements are in play for doctors, who owe a fourfold DOC to take reasonable care regarding examination, diagnosis, treatment, and provision of information **Rogers v Whittaker**
- Employers owe employees a DOC to provide a safe work system, a safe workplace, and adequate tools and material – see **Smith v Charles Baker & Sons** and **Czatyрко v Edith Cowan University**

INTRODUCTION - What is Negligence?

- Negligence is a cause of action where a person's 'unintentional' or 'consequential' wrong has caused harm to another...
- But not all wrongs will lead to successful claims in negligence!
- The cause of action involves:
 - i) a relevant duty owed by the D to the P to take reasonable care
 - ii) a breach of that duty of care in that the doing of the act (or the manner in which it was done) was inconsistent with what a reasonable man would do by way of response to the foreseeable risk...; AND
 - iii) injury..., which was caused by the D's carelessness and which was within the limits of reasonable foreseeability.

Establishing Negligence

- **ALL** elements (Duty, Breach, Causation and Damage) must be established to prove negligence.
- Each of the elements have further components within them.
- These components are what the Courts look at in order to determine whether or not each element has been established.
- Refer to the Negligence Overview Chart. Note that it starts with identifying the **damage**
- This is important as:
 - 'damage is the gist of the action in negligence'
 - Identifying the type of damage (as well as the context) assists you in deciding where to go next (i.e.
 - Most often you will be considering duty of care at common law
 - act/omission; established category; novel situation – detailed analysis;
 - Sometimes you will start or refer to statute – e.g. mental harm; statutory authority

DUTY OF CARE

What does DUTY mean?

- Legal obligation one party has toward another to take care not to cause them harm.
- This relationship arises whether or not the parties know each other, provided the elements of duty — as espoused by the Courts — exist.

HISTORY AND EVOLUTION OF DUTY OF CARE

- A DUTY of care was been imposed on people **in certain types of relationships** for centuries

- C14th (eg. innkeepers, common carriers, and blacksmiths...
- Over time, duties were:
 - imposed where no pre-existing relationship (collision cases) (C17th)
 - Extended to other relationships (eg. occupiers/invitees) (C19th)
- The Courts resisted laying down a larger principle of duty of care for centuries.
 - The origin of the duty of care comes from Brett MR:
 - *'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 or injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger.'* **Heaven v Pender (1883) 11 QBD 503 at 509**
- MAIN PRINCIPLE: Reasonable Foreseeability
- Then... **Donoghue v Stevenson [1932] AC 562 (House of Lords)** (considered the foundation stone of the modern tort of negligence)
- Lord Atkin makes an influential speech

Donoghue v Stevenson

- FACTS:
- The P drank a bottle of ginger beer manufactured by the respondent (which had been purchased by her friend for her in a café)
- In the bottle there was the remains of a decomposed snail which the P was unable to see due to the opaqueness of the glass;
- Afterwards she suffered shock and severe gastro-enteritis.
- The Plaintiff's case:
 - Mrs Donoghue sued the manufacturer saying
 - he did not provide a system of work that would not allow the snails to get into the bottles;
- and
 - that it was his duty to provide an efficient system of inspection of the bottles before the ginger-beer was filled in them.

Legal Issue

- *Whether the manufacturer of an article of food, medicine and the like, sold by him to a distributor in circumstances which prevent the distributor or the ultimate purchaser or consumer from discovering by inspection any defect, is under a legal duty to the ultimate purchaser or consumer to take reasonable care that the article is free from defect likely to cause injury to health.* (as stated by Lord Aitken at 578)
- (in other words...
 - Did the manufacturer owe Mrs Donoghue a duty to take care?)
- Held: The court found that Stevenson owed a duty to Mrs Donoghue
- The ratio: