

LAWS4106: TORTS

key

Start of topic

Section in code

Element

case

or (case)

NEGLIGENCE

- The struggle for courts was to identify *when* and *why* the loss should shift.
- In this sense the history of modern negligence coincides with the history of the element known as the DUTY OF CARE.
- With industrialisation the old methods become insufficient:
 - o Other torts (e.g. trespass): intention is too high a burden
 - o Contract: *privity* is too much of an obstacle
 - o Special duty categories: too limited in range (e.g. occupiers, surgeons etc.)
 - o Dangerous goods: too limited in nature (e.g. explosives)

Donoghue v Stevenson - Mrs Donoghue went to a cafe with a friend who bought her ice cream and a bottle of ginger beer. The ginger beer contained a decomposed snail. Mrs Donoghue suffered from personal injury due to this and proceeded to claim against the manufacturer which was successful and resulted in the establishment of the modern law of negligence and the neighbour test. "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 persons who are so closely and directly affected by my act that I ought reasonably to have them"

Elements

1. Duty of care
 - a *legal* question: is a duty owed?
2. Breach of duty
 - a *factual* question: is the conduct faulty?
3. Causation of harm
 - *factual* AND *legal*

insurance

Imbree v McNeilly (2008) 236 CLR 510 - compare Kirby J at [106]-[112], [156]-[179] and Gleeson CJ at [14]-[23]

- *Whatever may be the relevance of liability insurance for other areas of substantive law, in the field of liability of drivers and owners of motor vehicles to those whom they injure, the time has come to adjust the fiction of individual personal liability.* Kirby J at [112]
- *If it were not for insurance, the common law would operate with intolerable harshness in its application to driving. That is a sound reason in public policy for legislative intervention...[...]... Such insurance does not, however, provide a step in a process of reasoning towards an answer to the particular question that arises for decision in this appeal.* Gleeson CJ at [23]

DUTY OF CARE

- What is it?
 - o DoC is the 'entry point' of negligence  No Duty = No Liability
 - o *Donoghue v Stevenson* [1932] AC 562 – 'the neighbour principle'
 - "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 - persons who 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 in question ...” Per Atkin LJ at [580]

- Case-based or inductive reasoning often runs the risk of over-determining or under-determining a legal issue:
 - Here the question was whether foreseeability alone is sufficient

Scope of duty

- The issue
 - What is to be determined when discussing the duty of care is not just whether the duty EXISTS but whether the SCOPE of the duty of care EXTENDS to the particular situation at hand
- The scope should not be classified too broadly (which would render it meaningless) or too narrowly (which would merge issues of duty with breach).
- The question to ask is:
 - *Under what kind of circumstances should the defendant take care when acting or refraining from acting in certain ways?*
 - Nature of relationship between the parties? and
 - General nature of harm that might occur to class of persons including plaintiff?

Sullivan v moody - “A defendant will only be liable, in negligence, for the failure to take reasonable care to prevent a certain kind of foreseeable harm to a plaintiff, in circumstances where the law imposes a duty to take such a care”

RTA of NSW v Dederer - “A duty of care is a particular and defined legal obligation arising out of a relationship between an ascertained defendant (or class of defendants) and an ascertained plaintiff (or class of plaintiffs)”

2 types of duties of care

1. Established duties – determined by reference to factually similar precedent
2. Novel duties of care – where the factual situation is itself novel
 - a. Most cases will fit within an existing category; AND
 - b. “In most cases of physical injury or damage resulting from positive acts on the part of the defendant ... a duty of care will exist and need not be discussed further” Luntz et al., *Torts - Cases and Commentary* (8th ed) at p. 100

DUTY OF CARE CATEGORIES

- Road users

Chapman v hearse - On a dark and wet night Chapman drove his motor vehicle into the back of Emery’s car. Chapman was left lying on the road after the accident. Dr Cherry came upon the scene and left his motor vehicle and began to assist Chapman. While Cherry was treating Chapman a motor vehicle driven by Hearse hit Cherry and killed him. Cherry’s estate sued Hearse. “[W]hether ... Dr. Cherry’s conduct involved any departure from the standard which reasonable care for his own safety demanded. To our minds this question can be answered in only one way. He had, naturally enough, come to Chapman’s assistance; in the course of attending to Chapman his attention must invariably have been diverted from the road and if, by reason of this fact, he failed to see the oncoming car until it was too late to get out of its way it would be quite wrong to hold that he was guilty of contributory negligence.”

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- Manufacturer and consumer

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Grant v aus knitting mills -

- *C bought two pairs of woollen underwear which was manufactured by D.*
- *C got dermatitis from the excess amount of sulphite in the underwear and nearly died as a result.*
- *C sued in negligence.*
- *D argued that as the garments were packaged in paper, there was a possibility someone could have tampered with the goods before they arrived to C.*

"That conclusion means that the disease contracted, and the damage suffered by the appellant, were caused by the defective condition of the garments which the retailers sold to him, and which the manufacturers made and put forth for retail and indiscriminate sale. The Chief Justice gave judgment against both respondents, against the retailers on the contract of sale, and against the manufacturers in tort, on the basis of the decision in the House of Lords in *Donoghue v Stevenson*"

Graham Barclay oysters v Ryan - heavy rains around Wallis Lake, caused human faecal matters to be washed into the lake. As a result, oysters growing in the lake, contaminated the oysters with Hepatitis A virus ('HAV'). At trial, the risk was held reasonably foreseeable and the risk was not far-fetched or fanciful. The Court applied the negligence calculus and the important factors found by the Court were: firstly, there was no test for Hepatitis A virus in the water, and secondly, the septic tanks were heavy weighted tanks and those tanks could have had contaminated water.

- Employer and employee

Hamilton v nuroof - Whether the employer's duty may perhaps be stated as a duty to ensure that all reasonable steps are taken to provide a safe system of working. YES

Chomentowski v red garter restaurant - P was a waiter at D and would take a money pot to bank at night on a bad street. They were robbed. Does an employer have to take care of employee for a foreseeable risk? Risk was created by the employer therefore, yes they were liable

- Occupier and entrant

Aus safeway stores v zaluzna - The plaintiff (Zaluzna) visited a supermarket (Safeway Stores) with the intention of buying some cheese. It was raining that day and as a result, the entrance of the shop had become wet and slippery. She slipped on the wet floor and sustained injuries. The Court concluded that Safeway Stores owed a duty of care to Zaluzna.

Thompson v Woolworths - P independent contractor delivering goods to premises who suffered back injury while trying to move bins knowing that she had a bad back already. Liability for further of an injury? Even if a risk of injury is obvious to a PL, an occupier may still be found to have breached its duty if there is evidence it could have taken steps to alleviate the risk of injury yet failed to do so.

- Professional and client

Rogers v Whitaker - The primary issue arose from Dr. Rogers' failure to apprise Ms. Whitaker of the potential risks associated with the surgical procedure on her right eye. Specifically, Dr. Rogers did not inform her of the risk of developing a condition known as sympathetic ophthalmia in her left eye, a severe eye disorder that could result from the surgery. The core of the matter was to determine whether this omission amounted to a breach of the duty of care owed by Dr. Rogers to Ms. Whitaker, especially as a medical practitioner providing professional services to his patient. It introduced and affirmed the 'failure to warn' principle, emphasising the obligation of medical practitioners to adequately inform patients of significant risks associated with proposed medical procedures.

Hill v Van Erp - Negligent preparation of will caused economic loss to intended beneficiary, who did not receive gift under will as a result

Geyer v Downs - An eight year old child was hit on the head with a bat by another child when they were playing before school. The Court held that the principal of the school owed a duty of care to its students, and that this is to be fulfilled by providing supervision while the school gates are open.

IMMUNITIES FROM NEGLIGENCE

- Armed forces
- Police officers and prosecutors
- Barristers and trial advocates
- Parole boards
- Fire brigades and emergency services
- Statutory immunities
- University examiners

ILLEGALITY

- There are two separate types of situation:
 - o Illegality of a third party:
 - **Chomentowski v Red Garter Restaurant (1970) 92 WN (NSW)**
 - **Modbury Triangle v Anzil (2001) 205 CLR 254**
 - **Adeels Palace Pty Ltd v Moubarak (2009) 239 CLR 420 at [1]-[6], [21]-[26]**
 - o Joint illegality of the parties:
 - **Miller v Miller (2011) 242 CLR 446**

Modbury triangle v anzil –

- No duty of care for the illegal acts of third parties unless there is a “special relationship” linking plaintiff and defendant (e.g. employer - employee as in Chomentowski)
- The court is not inclined to include the Occupier/Entrant relationship into that special category unless exceptional circumstances warrant it.
- So, in general, while a shopping centre owes a duty to entrants, the SCOPE of that duty does not extend to positive protection of entrants vs wrongdoing of third parties.
- “The law is, and in my view should be, slow to impose a duty of care on a person with respect to the actions of third parties over whom he or she has no control” *Per Gaudron J* at [43]

Adeels palace pty ltd v Moubarak –

- Duty was found to exist and extend to wrongdoing of third parties - though plaintiffs ultimately were unsuccessful (issues of breach and causation)
- Distinguish from *Modbury*:
 - o Degree of control over access to premises was different from *Modbury* (car park vs inside premises)
 - o Premises were licensed for sale and consumption of alcohol => careful!
 - o The duty owed by the occupier here is to take reasonable care to prevent or mitigate the occurrence of events which, under the *Liquor Act NSW* (similar laws in WA), the licensee is bound to prevent from occurring (including violent or similar disorderly conduct).
- NB: Existence of statutory obligation DOES NOT imply a duty of care will be owed in negligence BUT it is a relevant consideration.
- *Adeels* is to be distinguished from *Modbury*: the TYPE of premise occupied is inherently different and

Miller v Miller –

- Joint illegality poses explicit policy issue (unlike other areas of DoC): should the civil law condone a criminal act by allowing a civil claim by a plaintiff who engaged in a joint criminal activity with the defendant? Normally no.
 - o Plaintiff & defendant were charged under s371a (WA CC) (stealing a vehicle)
 - o s8 (WA CC): 2 people who jointly prosecute a common unlawful purpose will both be guilty of any offence that is a probable consequence – unless one person withdraws by word or conduct and takes reasonable steps to prevent commission of offence.
 - o Claim fails in WA (no DoC) – appeal to HCA: statutory purpose of 371a is inconsistent with finding duty of care between those jointly involved in committing a crime – no condoning as a general rule!
 - o BUT: in the circumstances of Miller HCA found that plaintiff had withdrawn when she asked to be let out and there were no other possible steps to take – therefore she was owed a duty.

WRONGFUL LIFE

- Women has an illness whilst pregnant and a doctor misdiagnoses her so that her baby is born with disabilities and has a 'less than satisfactory life'

Harriton v Stephens (2006) 226 CLR 52 –

- The appellant, Alexia Harriton, was a 25-year-old woman with severe congenital disabilities that had been caused by her mother's infection with the rubella virus while pregnant with her. These disabilities left Harriton unable to care for herself. The defendant, Paul Richard Stephens, was the doctor of Harriton's mother while she was pregnant. After conducting and reviewing pathological tests, Dr Stephens advised the mother that she did not have the rubella virus. Harriton's mother claimed that she would have had her pregnancy terminated had she known of the chances of having a disabled child.
- Conceptualises the difference between existing and non-existing
 - Can only have a valid tort in negligence if you can show that because of the negligence you are somehow worse off
 - Misdiagnosis occurred before her birth and therefore cant say she has no loss to compensate because she wasn't alive
 - The only alternative is that her mum would have got an abortion so then you look at the scenario of is death better than a disabled life
- Crennan J at [225] and [252]
 - 'A right of action and a duty of care are inseparable. In a case like this, the existence and extent of a duty of care can usefully be considered by reference to the nature of the damage suffered because a cardinal principle of imposing liability for negligence in novel circumstances is that the party complained of should owe to the party complaining a duty to take care, which the law can recognise as a matter of principle, and that the party complaining should be able to prove that actual loss or damage has been suffered as a consequence of a breach of that duty. Proving that actual loss or damage has been suffered requires proof of interference with a right or interest recognised as capable of protection by law.'
 - 'A comparison between a life with disabilities and non-existence, for the purposes of proving actual damage and having a trier of fact apprehend the nature of the damage caused, is impossible. Judges in a number of cases have recognised the impossibility of the comparison and in doing so references have been made to philosophers and theologians as persons better schooled than courts in apprehending the ideas of non-being, nothingness and the afterlife.'
- Difference between damage and damages → damage is the loss (worse of then you were before), damages is what you get by way of compensation (remedy)
- Corrective justice → the party that did the wrong has a duty to correct that wrong

ENVIRONMENTAL DAMAGE

Sharma by her litigation representative Sister Marie Brigid Arthur v Minister for the Environment [2021] FCA 560 –

- The Australian Minister for the Environment was considering whether to provide approval pursuant to sections 130 and 133 of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) for Vickery Coal Pty Ltd to substantially extend its coal mine near Gunnedah in New South Wales.
- Eight Australian children filed an application with the Court, on their own behalf and representing other children ordinarily resident in Australia, seeking:
 - a declaration that the Minister owes them a common law duty of care, recognised by the law of negligence, to exercise her power under sections 130 and 133 of the *EPBC Act* in a manner that does not cause them harm arising from the climate impact of the Vickery Project; and
 - an injunction to restrain an apprehended breach of that duty by the Minister.
- You may be able to point to a breach, pointing to the harm is harder (because it is a future harm)
- distributing justice → less horizontal, perceived fairness of how rewards and costs are shared by (distributed across) group members.
- Bromberg J at [293] and [312]
 - “It is difficult to characterise in a single phrase the devastation that the plausible evidence presented in this proceeding forecasts for the Children. As Australian adults know their country, Australia will be lost and the World as we know it gone as well. The physical environment will be harsher, far more extreme and devastatingly brutal when angry. As for the human experience – quality of life, opportunities to partake in nature’s treasures, the capacity to grow and prosper – all will be greatly diminished. Lives will be cut short. Trauma will be far more common and good health harder to hold and maintain. None of this will be the fault of nature itself. It will largely be inflicted by the inaction of this generation of adults, in what might fairly be described as the greatest inter-generational injustice ever inflicted by one generation of humans upon the next.”
 - “They bear no responsibility for the unparalleled predicament which they now face. That innocence is also deserving of recognition and weight in a consideration of the relationship between the children and the government they look to for protection.”

MINISTER FOR ENVIRONMENT V SHARMA –

- 295. I have already referred to the unusualness in the law of tort of a duty of care being imposed in the absence of damage or likely threatened damage from the tortious conduct. Not only is it unusual, but also it has, in these circumstances, the vice of separating the imposition of the duty from the existence of the cause of action or damage of such immediate direct threat as to justify a conclusion of the threat of a cause of action.
- 297. Here duty is sought to be imposed decades before any foreseeable harm which could have any connection whatsoever to the act in question referable to the duty imposed.
- 298. A duty is being imposed decades before one knows whether there will be a cause of action. This is not to say that the risk of catastrophic global warming is only hypothetical and not real. It is, however, to say that a duty is being imposed under the law of torts not only before any damage occurs, but decades before one can even begin to assess the causal contribution, if any, of this decision to any harm.

WHEN AND WHY IS A DUTY OWED?

- 2 main options
 - o A duty can be owed only when a recognisable damage is possible AND reasonably foreseeable – current position (*Harrington* per Crennan J, and *Sharma* appeal per Allsop CJ)
 - o A duty can be owed as such and independently of damage based on the characteristics of the relationship between plaintiff and defendant (*Harrington* per Kirby J, and *Sharma* per Bromberg J)

WHAT DOES NEGLIGENCE RESPOND TO

- It follows from these observations on duty:
 - o Traditionally and currently, a duty of care is owed for the purpose of responding to damage. If damage is the ‘gist of negligence’, then what the tort responds to is loss and the need to provide some form of compensation.
 - The compensatory principle: put the victim in the position they would have been had the tort not occurred.
 - This principle aligns broadly with the notion of ‘corrective justice’
 - o Outliers suggest the possibility of a role beyond compensation:
 - Distributive justice
 - Preventative action
 - Vindication
 - o The tort of negligence is embedded in a specific political economy of harm – that is: a specific structure of power relations that influences the very definition of what is harm to grant or deny access to private law remedies

FORESEEABILITY

- Foreseeability alone ran the risk of opening up the ‘floodgates of litigation’
 - o Negligence had to develop a number of ‘control devices’ to avoid subjecting individuals to potential indeterminate liability AND maintaining balances with other rights, obligations, duties and freedoms *Sullivan v Moody* (2001)

Anns v Merton London Borough Council [1978] AC 728

- *First, one has to ask whether, as between the alleged wrongdoer and the person who has suffered damage there is a sufficient relationship of proximity or neighbourhood such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter – in which case a prima facie duty of care arises.’*
- *‘Secondly, if the first question is answered affirmatively, it is necessary to consider whether there are any considerations which ought to negative or to reduce or limit the scope of the duty of the class of persons to whom it is owed or the damages to which a breach of it may give rise.’*
 - o *Per Lord Wilberforce* (rejected in Australia by Brennan J in *Sutherland Shire Council v Heyman* (1985) 157 CLR 424 at [481] – incrementalist view

Three stage approach

- ***Caparo Industries Plc v Dickman* [1990] 2 AC 605**
 - o “In
 - (1) addition to the foreseeability of damage, necessary ingredients in any situation giving rise to a duty of care are that there should exist between the party owing the duty and the party to whom it is owed
 - (2) a relationship characterised by the law as one of proximity or neighbourhood and that the situation should be one in which the court considers it

- (3) *fair, just and reasonable that the law should impose a duty of a given scope upon the one party for the benefit of each other.*” - Per Lord Bridge

PROXIMITY

- **Hill v van erp**
 - *“The requirement of proximity is at least a useful means of expressing the proposition that in the law of negligence, reasonable foreseeability of harm may not be enough to establish a duty of care... But to hope that proximity can describe a common element underlying all those categories of case in which a duty of care is recognized is to expect more of the term than it can provide.”*
- **Jaensch v coffey**
 - *“[Proximity] is directed to the relationship between the parties ... It involves the notion of nearness or closeness and embraces physical proximity (in the sense of space and time) between the person or property of the plaintiff and the person or property of the defendant, circumstantial proximity such as an overriding relationship of employer and employee or of a professional man and his client and causal proximity in the sense of the closeness or directness of the relationship between the particular act or cause of action and the injury sustained”* - Per Deane J
- **Perre v apand**
 - Kirby J - 3 stage framework incorporating foreseeability, proximity and policy (Caparo approach);
 - Gleeson CJ & McHugh J - suggested that the general rule was that no duty would exist but that certain factors would allow for the development of exceptions (incremental approach);
 - Gaudron J - analogy with cases involving negligent misrepresentation
 - Gummow, Hayne & Callinan JJ's - identified salient features and control mechanisms that would point to a duty.

Sullivan v moody

- Material facts of the case and alleged damage
 - Report of child abuse by medical practitioners & social workers caused reputational and mental harm
- Key legal issues
 - Whether a duty of care is owed to the parents considering:
 - Statutory functions; and
 - Lack of personal dealings between parents and medical practitioners and social workers involved.
- Ratio decidendi and changes to existing law
 - Inconsistent with existing statutory duties to owe duty of care to potential suspects
 - ‘Proximity’ retired in favour of: Principled analogies with established cases (lesser focus on facts – otherwise established category) In this case: coherence of the law; indeterminate liability; type of rights
- “The formula is not ‘proximity’. Notwithstanding the centrality of that concept, for more than a century, in this area of discourse, and despite some later decisions in this court which emphasised that centrality, it gives little practical guidance in determining whether a duty of care exists in cases that are not analogous to cases in which a duty has been established.” *Per* Gleeson CJ, Gaudron, McHugh, Hayne and Callinan JJ at [48]
- The High Court unanimously:
 - Rejected foreseeability as the sole test of duty, Rejected proximity as the ‘additional limiting factor’, Rejected decision-making based openly on policy, and Determined that inconsistency with other laws, incompatibility with legal duties, indeterminacy of liability lead to the finding of no duty