

These were my 2016 study notes for the exam, answers to questions, outlines and flashcards overviewing the elements that I comprised. Good luck!

# Torts LLB102

## Study Notes

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## Full Negligence Example

**Connie May v Theodore Chart** – where Connie is the plaintiff and Theodore is the defendant.

### **Tortious Action of Negligence (Donoghue v Stevenson)**

**Jurisdiction:** Queensland

**Time Limitation:** For claims regarding personal injuries, the limitation period is 3 years commencing at the date of discoverability, according to [LAA 1974 \(Qld\) s 11](#).

**Onus of Proof:** The onus of proof is on the plaintiff to prove all elements.

#### **Interference:**

- Theodore practised spinal manipulation on Connie.
- Theodore failed to disclose the risks of spinal manipulation to Connie.

Both resulting in Connie being diagnosed with 'equinas syndrome' and being unable to continue to play volleyball.

#### **Duty of Care – Question of Law**

The duty of care is established, under the category of a medical professional. A medical professional owes a duty to exercise reasonable care and skill in the provision of professional advice and treatment, single comprehensive duty that extends to examination, diagnosis and the provision of information: [Rogers v Whitaker](#). The interference falls within the scope of duty due to the fact that Theodore Chart, a registered chiropractor under the Health Practitioner Regulation National Law (Queensland), failed to disclose the risks of spinal manipulation to Connie, resulting in Connie being diagnosed with 'equinas syndrome' and being unable to continue to play volleyball.

#### **Standard of Care – Question of Law**

It must be determined if the duty of care was to the relevant standard of care and if the duty was breached in terms of a reasonable person, using the objective test: [Imbree v McNeilly](#).

- Original standard: The standard of care is that of a reasonable and competent chiropractor carrying out professional treatments and advice.
- Altered standard: Nothing on the facts alters the standard of care owed.
- Final standard: The final standard is the same as the original standard.

#### **Alterations:**

- Intoxication ([CLA s 46](#))
- Child ([McHale v Watson](#))
- Emergency ([CLA ss 26 and 27](#))
- Skills ([Rogers v Whitaker](#))
- Inexperience ([Imbree v McNeilly](#))
- Mental Disability ([Carrier](#))
- Physical Disability ([Roberts](#))

Standard of Care = the standard of care is that of a reasonable and competent chiropractor carrying out professional treatments and advice.

Has the standard of care been breached?

**Breach of Duty – Question of Fact**

**Civil Liability Act 2003 (Qld) s 9 (1)**

**1. Foreseeability (a)**

The risk was foreseeable and was not far-fetched or fanciful, as the defendant ought to have known that with regular manipulation, the chance of equinus syndrome increases. It was also foreseeable that due to being diagnosed with this syndrome, Connie would be unable to play volleyball, hence earn an income [Wyong v Shirt](#).

**2. Not Insignificant (b)**

The risk of not informing the plaintiff of dangers and not appropriately instructing Connie as to the risk of the procedure is serious and a reasonable person would view this as a risk. Equinus syndrome is a serious injury involving compression of the nerves in the lower spinal cord, however regular spinal manipulation may even result in an even more serious injury and a lower quality of life for the plaintiff; therefore, as the risk is significant, it is not insignificant.

**Civil Liability Act 2003 (Qld) s 9 (2)**

**3. Reasonable Response**

In determining the response of a reasonable person, the consideration of the following factors is required.

**Probability (a)**

There is an arguably high probability of harm arising, as was demonstrated through the debate of the members of the Australian Chiropractic Society, where half of the members agreed the practise should not be regularly performed. On the facts, regular spinal manipulation increases the probability of the syndrome occurring from one in a million chance, to one in 100 chance: [RTA v Dederer](#).

**Likely Seriousness (b)**

Due to the high potential of harm, serious precautions should have been taken to avoid any damage. The plaintiff was diagnosed with the permanent equinus syndrome and is now unable to play volleyball, however the damage could have lowered her quality of life even further and resulted in injuries even more serious: [RTA v Dederer](#).

**Burden of Taking Precautions (c)**

It would have been reasonable for Theodore to limit the amount of spinal manipulation that Connie was being given and to ensure that Connie was aware of the associated risks of the procedure. This would not have been expensive or inconvenient, especially in comparison to the seriousness of the risk: [RTA v Dederer](#).

**Social Utility (d)**

Social utility is irrelevant within this case.

## **Anticipation**

Not relevant on facts: [Derrick v Cheung](#).

## **Professional Standards**

Half of the members of the ACS believe it shouldn't be done regularly. [CLA s 22](#) provides that a breach of duty if it is established that the professional acted in a way that was widely accepted by peer professional opinion by a significant number of practitioner's in the field.

Has there been a breach of duty in the case of *Connie May v Theodore Chart*?

*It can be concluded on the facts that a reasonable chiropractor in the position of Theodore would have disclosed the risks of spinal manipulation to Connie and taken reasonable precautions against the high risk of equinus syndrome, therefore, the duty of care has been breached.*

## **Damage**

### **1. Recognised Kind of Damage**

The damage is non-minimal and is of a kind recognised by law and capable of compensation. Connie has suffered personal injury as a result of Theodore's breach of duty, including her incurring equinus syndrome. Consequential economic loss was also suffered as a result of the physical injuries caused by the defendant's breach, including Connie being unable to play professional volleyball and earn money.

Damages not recognised:

- Fright, anguish, grief ([Tame v NSW](#))
- Illegality ([Meadows v Ferguson](#))
- Vexation
- Wrongful life cases

## **Civil Liability Act 2003 (Qld) s 12**

### **2. Factual Causation – Question of Fact**

Was the defendant's breach of the duty of care a necessary condition of the harm?

#### **Standard of Proof**

Factual causation is a question of fact, where the plaintiff bears the onus of proving, on the balance of probabilities, any fact relevant to the issue of causation: [Tabet v Gett](#). 50% likelihood rule ([Hotson v EBA Health Authority](#))

**Civil Liability Act 2003 (Qld) s 11 (1)(a) – Subjective Test, Question of Fact**

#### **Necessary Condition – [Strong v Woolworths Ltd](#)**

The plaintiff's negligence will be a necessary condition for the occurrence of the harm, if the 'but for' test under s 11 (1)(a) is satisfied: [Zanner v Zanner](#).

#### **'But for' Test**

Would the plaintiff have suffered the harm 'but for' the defendants breach? 'But for' Theodore failing to ensure Connie was aware of the associated risks of regular spinal manipulation, she would not have incurred equinus syndrome. The breach satisfies the 'but for' test.

#### **Civil Liability Act 2003 (Qld) s 11 (2)**

Multiple Causes – if s 11 (1)(a) is not satisfied, factual causation may still be satisfied under s 11 (2) as it is sufficient to prove that each Def's breach materially increased the risk of the Plaintiff's harm.

#### **Civil Liability Act 2003 (Qld) s 11 (3)**

S 11 (3)(a) states that it is a subjective test whether the harm would have occurred notwithstanding the defendant's breach, however this is subject to s 11 (3)(b), which allows objective evidence, but not subjective evidence, meaning the plaintiff's own testimony is not admissible unless against his or her interests. Connie alleges that had she known of the risk of weekly spinal manipulation, she would have never consented to this procedure, however this is inadmissible due to s11 (3)(b). However, the facts do state that Connie only consented to the treatment in order to enhance her volleyball playing, therefore it is evident that if she was aware of the associated risks, she would not have undergone the regular manipulation.

### **3. Scope of Liability**

Was the plaintiff's damage a reasonably foreseeable consequence of the defendant's act or omission or is it too remote?

#### **Civil Liability Act 2003 (Qld) s 11 (1)(b) 11(4) – Question of Law**

##### **Reasonably Foreseeability**

It should be foreseeable to Theodore, as a reasonable chiropractor, that there was a real risk that the kind of damage involving a skeletal or muscular disorder would occur if the patient had weekly spinal manipulations. This risk, in the position of a reasonable person in Theodore's position, would not have been brushed aside as far-fetched, as medical disorders and syndromes are serious matters, especially due to Connie's career being based on her health. The manner in which the damage occurred or the extent of it is irrelevant: [Chapman v Hearse](#).

##### **Intervening Acts**

On the facts, there are no intervening acts that may break the chain of causation [Chapman v Hearse](#).

→ Voluntary ([Haber v Walker](#))

→ Causally Independent Act ([Medlin v SGIC](#))

*Not the very thing likely to happen.*

##### **Legally Significant Cause**

On the facts, this risk is one a patient would ever accept. This is a very legally significant reason to uphold duty of care: [Wallace v Kam](#).

Did Connie suffer damage as a result of Theodore's act?

*On the facts, the damage element is satisfied as the damage (physical injury, pain, weakness and loss of feeling) and consequential economic loss (loss of earning capacity as a professional volleyball player) was caused by the beach and was the reasonably foreseeable consequence of the breach.*

### **Remedies**

The plaintiff is liable to receive compensatory damages for the personal injury (damage to throat) and consequential economic loss.

### **Apportionment of Liability**

Dr Snow could also be liable at law as medical practitioners owe a duty of care to patients, Doctor to Patient: **Rogers v Whitaker**. The scope of the duty is to exercise reasonable care in the provision of diagnosis, treatment and advice.

A medical practitioner is a profession that applies to treatment and diagnosis: **CLA s 22**. This states that a professional does not breach their duty if it is an established manner of practising based on peer professional opinion. Not checking a patient's history is not an accepted practise and therefore Dr. Snow has breached his duty.

Both Dr. Snow and Malcolm will be liable.

Dr. Snow was an intervening act as it was inexcusably bad, and therefore Malcolm will not be liable for the worsened throat condition.

*If wrong, multiple tortfeasors – several concurrent tortfeasors: several persons commit independent torts which combine to produce the same damage liable under ss 6 and 7 of the LRA.*

### **Liability for Personal Injury Apportioned under LRA ss 6 and 7**

S 6 – Plaintiff may bring an action against both

S 7 – Contribution recoverable is that which is just and equitable

### **Just and Equitable**

The court is to consider each defendant's degree of departure from the standard of care of the reasonable person and the relative importance of each act in causation of the damage suffered.

## Tort Elements Flashcards

# Negligence

(Donoghue v Stevenson)

Duty of Care – Question of Law

Breach of Duty – Question of Fact (for jury)

Standard of Care – Objective Test (Imbree)

CLA s9 (1) and (2)

- Foreseeable (Wyong v Shirt)
- Not Insignificant
- Reasonable Precautions
- Probability (RTA v Dederer)
- Likely Seriousness (RTA v Dederer)
- Burden (RTA v Dederer)
- Social Utility
- Customary/ Statutory Standards
- Anticipation (Derrick v Cheung)

Damage

1. **Recognised at Law**
2. **Factual Causation** – Question of Fact  
**Standard of Proof** CLA s12
  - Necessary Condition CLA s11 (1)(a)  
(Strong)  
⇒ “But for” (Zanner)
  - Multiple Causes CLA s11 (2)
  - Testimony CLA s11 (3)
3. **Scope of Liability** CLA s11 (1)(b) and 11 (4)
  - Reasonable Foreseeability  
(Chapman)
  - Intervening Act (Chapman)

