

## Week 12 – The Rise of the Tort of Negligence (pg. 362 – 379)

### Review – Forms of action VS Causes of action

- **Forms of action (writ)** → abolished by the *Judicature Acts of 1873*
- Torts developed from TWO forms of actions (writs):
  - Writ of trespass
  - Writ of trespass on the case ('case')
- Note that **forms of action** were replaced with **causes of action**
  - However, **causes of action** still retain the rigidity associated with **forms of action**
  - **Maitland (1962)** comments that, 'The forms of action we have buried, but they still rule us from their graves'

A **cause of action** is the sum of the legal elements which a court will recognise as constituting a basis for liability.

- Tort of Negligence → requires ALL elements of the cause of action to be present:
  - That the defendant owed the plaintiff a **duty of care**
  - That the defendant **breached that duty**
  - That the breach **caused the harm** suffered by the plaintiff which was **not too remote from what was foreseeable**

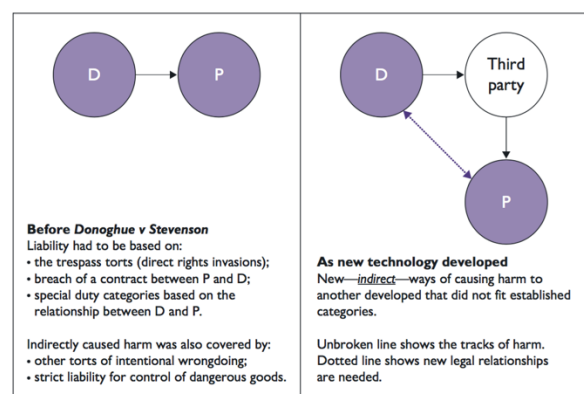
### Negligence

- Significance → harm can occur **indirectly**
  - One person's conduct → set of a complex chain of cause and effect → end up harming a complete stranger
- Before negligence emerged as a distinct tort, there were only a **limited number of recognised causes of action**:
  1. **Other torts** → tort of deceit (or fraud), 'actions on the case' for the intentional infliction of physical harm or nervous shock
  2. **Contract** → breach of a contractual duty to take reasonable care
  3. **Special duty categories** → recognised relationships between the plaintiff and defendant
  4. **Dangerous goods** → those in charge of dangerous goods had a special duty to compensate those injured by those goods

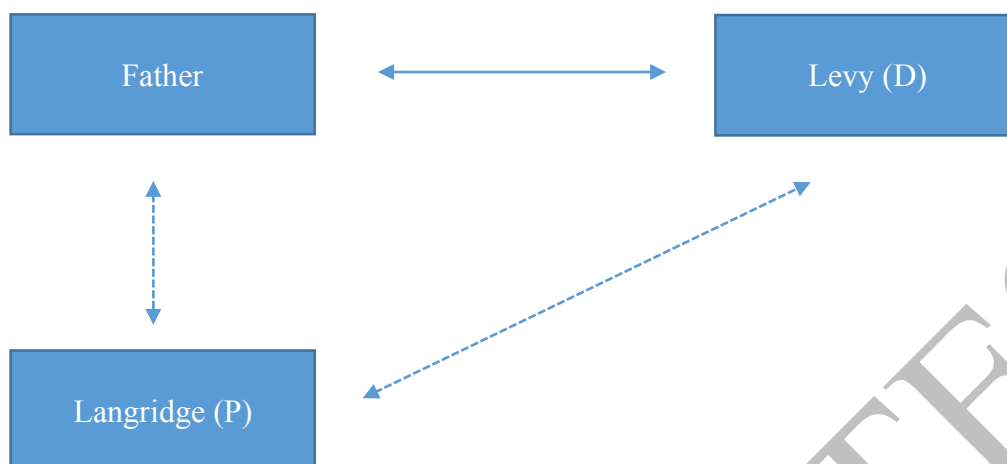
### Following FOUR cases

- The following FOUR cases **cumulatively came together** to begin establishing the basic principles of **negligence**
- When these cases were decided (mid-late 19<sup>th</sup> century), there were **NO overarching legal principles** regarding negligence at this stage
- Rather, **analogies were made with previous cases** (if a case was sufficiently analogous in facts, then it was applied)
  - These cases were treated as *persuasive authority*

FIGURE 10.1 Before *Donoghue v Stevenson*



**Langridge v Levy (1837) 2 Meeson & Welsby 519 (pg.365)**



- **Father contract with Levy** to buy gun
- **Langridge** given gun by Father to use → gun was defective when sold and exploded in hand such that hand was amputated
  - **Does Levy owe a duty of care to Langridge?**

**HELD:**

- No duty arises out of a **privity contract**
  - Essentially, Langridge was NOT part of the contract
  - Therefore, could NOT sue
- However, this was a **fraudulent transaction** → “deceitful”
  - Thus, it was established that when an item is delivered to a plaintiff, whilst the defendant has made a false representation, and the plaintiff acts on this representation, then the **plaintiff can sue**

<b>Material Facts</b>	<ul style="list-style-type: none"> <li>• Father of P bought a gun from D.</li> <li>• Specifically told D it was for the use of himself and his sons.</li> <li>• D warranted that the gun was made by a reputable gun-maker → this was NOT true           <ul style="list-style-type: none"> <li>○ The defendant was a <b>contractor to the third person</b></li> <li>○ However, he became liable to everybody who might use the carriage</li> </ul> </li> <li>• The gun was defective → when the son used it, it exploded in his hand so that his hand had to be amputated.</li> </ul>
<b>Legal Issues</b>	Whether a duty could result out of a private contract, and whether the injury needs to arise immediately from the D’s act.
<b>Legal Reasoning</b>	Parke B: <ul style="list-style-type: none"> <li>• D knew the gun was to be used by the son. He also knew it was defective. He falsely represented the gun. Therefore he was liable.</li> </ul>
<b>Outcome/Ratio</b>	<ul style="list-style-type: none"> <li>• The D is <b>responsible for the consequences of his fraud</b> whilst the instrument was in the possession of any person to whom his <b>representation was either directly or indirectly communicated</b>, and for whose use he knew it was purchased.</li> <li>• He had to know the son was going to use it. <b>Duty can arise from contract as well as from tort.</b> Fraud was a crucial element: principle of the case was quite narrow, based on fraudulent misrepresentation.</li> </ul>

## Cheung v Derrick

### Facts:

- Plaintiff, Cheung, was 21 months-old
- Ran onto the **road into the path** of oncoming traffic
- Was hit by the defendant, Ms Derrick → travelling between 40-50km/h (speed limit was 60km/h)
  - Braked suddenly, but still hit P → P becomes seriously injured

### District Court of NSW (Unreported, 17 July 1998):

#### Chesterman ADCJ:

- Held that the defendant drove negligently at the time
  - Numerous factors to support this judgement, including:
    - Presence of houses and shops
    - Date → shortly before Christmas
    - Day → Saturday
    - Time → 9am
  - Whilst speed was 10-15km/h below the speed limit, it was still fast enough to give her very little time to stop
    - Thus, the **accident could have been averted if the defendant had been driving at what in the circumstances would constitute a reasonable speed**
  - **Griffiths v Wood (1994)** and **Stock v Baldwin (1996)** → speed significantly below the speed limit does not necessarily disqualify it from being negligent. These cases should not be distinguished.
  - Thus, the plaintiff establishes liability against the defendant in negligence

### New South Wales Court of Appeal [1999] NSWCA 341:

#### Stein and Fitzgerald JJA:

- Refers to **Wyong Shire Council v Shirt (1980)** → four elements that need to be taken into consideration:
  - The **extent of the damage** that may be done by the driver to pedestrian
  - The **degree of likelihood** that a pedestrian will come into the path
  - The **consequent extent of precautions** that should be taken
  - The extent to what a driver is able to do **when confronted with such danger**
- Highlights how an accident like the one in this case involve **special difficulties**:
  - A pedestrian cut run into traffic *at any point*
  - There may be *no opportunity* to avoid collision
  - Travelling at the speed limit, in conformity with traffic flow, is ordinarily reasonable
- Nevertheless, the court of appeal finds **NO case for appellate intervention**
- **Stocks v Baldwin** → A breach of duty of care is NOT determined by a '*sylogistic process from facts to conclusion*'
- **Shirt v Wyong Shire Council** → Rather, involves making value judgements (which the trial judge did)
  - Thus, **the appeal should be dismissed**

#### Davies AJA (dissenting):

- **Stocks v Baldwin** → The fundamental test is what a **reasonable man would do** by way of response to the risk attendant upon his driving
  - In this case, Davies refers to a combination of factors which emphasise that the **appellant's driving was appropriate in the circumstances**:
    - There was **no perceivable risk** → no particular danger observable
    - Drove at a modest speed (15km/h below the speed limit) → well under the speed limit

- Kept an appropriate distance between vehicle
- Kept a proper lookout
- Further, the toddler should NOT have been on the roadway → it was not *reasonably foreseeable* that she would cross the road unattended
  - Thus, the appeal **should be set aside**

**[2001] HCA 48:**

**Gleeson CJ, Gaudron, Kirby, Hayne and Callinan JJ:**

- There is **no basis upon which any finding of negligence on the part of the appellant could be made**
- Trial judge's contention that if the appellant had driven a few km/h slower she would have avoided the collision is "*not an inference upon which a finding of negligence could be based*"
  - Possibility of a different result "*does not represent the proper test for negligence.*"
  - 13 → **The proper test** involves whether the plaintiff has proved that the defendant, who owed a duty of care, has NOT acted in accordance with the reasonable care
- *Stocks v Baldwin* should be distinguished → different facts
- "*No negligence on the part of the appellant was established.*"
  - **Appeal allowed**, judgment of NSWCA set aside.