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1. Introduction to Negligence

- General issues to consider in a torts case
  - Did the defendant owe the plaintiff a duty of care?
  - Was there a breach of this duty?
  - What was the standard of care to be applied?
  - Did the breach cause the plaintiff to suffer damage?
  - Measure of damages

- That is, the plaintiff must show that:
  - A duty of care owed by the defendant (tortfeasor) to the plaintiff (the relationship question)
  - Breach of that duty (failure to meet the standard of care)- (the conduct question)
  - As a result of the breach they have suffered damage (causation), which is not too remote (the damage question)

2. Duty of Care

2.1 Introduction

- A duty of care is required of anyone whose actions could reasonably be foreseen to cause injury to others. *(Donoghue v Stevenson)*
  - Cited by Lord Aitkin as the “neighbour” principle
  - Reasonably foreseeable means not far fetched or fanciful, but can be improbable *(Wyong v Shirt; Nagle v Rottnest Island Board)*

- Only the class of plaintiff need be foreseen, not the individual circumstances. *(Chapman v Hearse)*
  - Foreseeability is not concerned with probability. *(Chapman v Hearse)*
  - Negligence to a third party need not have any influence on the particular case – no such thing as a derivative right of action. *(Palsgraf v Long Island RR Co)*
  - If the class of plaintiff is too large, then it is possible that there will be no duty of care. *(Hill v Chief Constable of West Yorkshire)*
  - If plaintiff is not of a class of persons that to which injury is foreseeable, then no duty *(Bale v Seltsam)*
• Reasonable foreseeability alone not enough, need relationship factor. Courts
take incremental approach starting with established relationships of plaintiff &
defendants and working outwards:
  o Where positive act results in physical injury foreseeability alone is
    enough (Sutherland Shire Council v Heyman)
  o Intermediate examination is not, ipso facto, enough to eliminate a duty
    of care (Vol v Inglewood Shire Council) contrary to the literal
    interpretation of (Donoghue v Stevenson)
  o Voluntary assumption of risk may eliminate duty (Agar v Hyde)
  o Established categories of relationship can give rise to or indicate a
    duty is owed ie
      - Doctor/patient
      - Employer/employee

• Since Sullivan v Moody, proximity is no longer a requirement. In considering
whether duty exists a number of factors may be considered:
  o Vulnerability: P was vulnerable in his/her relationship with D e.g.: P
    subject to D’s directions (Crimmins)
  o Assumption of responsibility / Reliance: (particularly in omissions) did
    D undertake some task which lead P to rely on it being performed?
    (Modbury) (Sutherland Shire Council v Heyman)
  o Control: D control (or there lack of) over relevant kinds of activities
    e.g.: criminal activity (Modbury) or rules used in sporting game (Agar v
    Hyde)

• Policy decisions though not explicitly stated may effect findings of duty
  o Primary duty: (to the child’s interest) may override secondary duty
    (father’s) (Sullivan v Moody)
  o May have no duty when taking part in joint illegal activity (Garla v
    Preston) although degree of illegality unclear
  o Barristers are immune from liability in negligence (Giannarelli v Wraith)
    i. Recent UK decision overturned this principle with regards
    to barristers in civil cases, but preserved it with respect to
    criminal trials. (Arthur JS Hall & Co v Simons)
Parents do not have a legal obligation to prevent their children from harming themselves, as there is no objective standard of parenting (Robertson v Swincer)

- **Scope of Duty may be exclude duty in certain cases when in general a duty exists:**
  - Criminal Acts of 3rd party may exclude duty (Modbury Triangle)
  - Does not extend to latent defects (Jones v Bartlett)

- **Occupiers Liability Part 8.1 s101 CLWA (replaces common law)**
  - Duty of care to anyone on the premises for state of premises

### 2.2 Elements

#### 2.2.1 Reasonable foreseeability of the class of plaintiffs

**Donoghue v Stevenson**

Held: 
- You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour

**Chapman v Hearse**

**Facts:** Chapman driving in Adelaide on an evening negligently collided with a vehicle and was flung out of the car onto the road. Dr Cherry who was at the scene got out of his car to assist Chapman. Subsequently Hearse negligently collided with Dr Chapman and killed him. The widow of Mr Cherry against Hearse successfully brought an action. This case arose out of an action of contributory negligence by Hearse against Chapman.

**Held:**
- It is not necessary that the precise sequence of events leading to the injury is foreseeable.
- It is enough that the plaintiff belong to a class of persons to whom the damage could have been foreseen
Palsgraf v Long Island RR Co [USA]

**Facts**: Guards employed by the train station pushed a passenger carrying a parcel containing fireworks onto an overcrowded train. The firework fell off onto the tracks, exploded and caused metal scales fell on Palsgraf standing on the opposite platform.

**Held**:  
- No duty of care because there was no sign that the parcel contained fireworks, and hence was not reasonably foreseeable.

2.2.2 Reasonable foreseeability not alone sufficient

- Need to ask, 'was it foreseeable that careless conduct of any kind on the part of defendant may result in damage of some kind to the person or property of the plaintiff? (San Sebastian NSW CA)

Voli v Inglewood Shire Council

**Facts**: An architect faultily designed a stage which was insufficient to pass the local council’s bylaws or the Australian Standards Association. Nonetheless the plan was approved by the Public Works Department with no objections, and built exactly as specified. It later collapsed. At Issue: 1) Does the failure of Public Works to pick up the faulty design exonerate the architect? 2) Although the architect certainly held a duty of care to his employers (the Council) did this extend to people who reasonably foreseeably used the building, after it was handed over to the council?

**Held**:  

**Issue 1**:  
- Chain of causation not necessarily broken by intermediate events (i.e.: the Public Works Department’s examination and failure to pick up fault in design)  
- First wrongdoer won’t necessarily escape blame by proving injury would not have occurred but for the later negligence of another  
- Windeyer J: “It is, on final analysis, the need for care lest someone be injured that both creates the duty and determines what amounts to a breach of it.”
Issue 2:

- Yes the architect held a duty of care to anyone who could reasonably foreseen to be injured as a result of his negligence, even if this duty is not identical to that of the council.
- Windeyer J “Put shortly, an architect is not ordinarily liable because someone falls down in the building and is injured. He may be if the building falls down and someone is injured.”

If you have any queries regarding the torts summary please email us - lawskool@lawskool.com.au