# 3003LAW Negligence Law Notes

## DUTY OF CARE

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**CASE STUDY: STOLEN GENERATION CASES**

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Causation

Causation: Loss of Chance

Wrongful Birth and Wrongful Life

Social Policy Considerations re medical negligence

Breach of Statutory Duty (Tort)

Elements

1. Does the statute confer on the plaintiff a right to sue?

2. Is the plaintiff protected?

3. Was the statute directed at preventing the kind of harm suffered by the plaintiff?

4. The statutory duty must have been imposed on the chosen defendant.

5. Has the statute been breached?

6. Causation and the onus of proof

Defences

Product Liability and the Australia Consumer Law

Relevant ACL provisions

Chapter 3 Part 3 - 3 Safety of Consumer Goods and Product Related Services

Chapter 3 Part 3 - 5 Liability of manufacturers for goods with safety defects

Specific actions for individuals

S 138 Action by injured individual

Defences

The Vioxx Case Study: Merck Sharp & Dohme (Australia) Pty Ltd v Peterson [2011] FCAFC 128 (12 October 2011)

Defences

Contributory Negligence

Apportionment

Contributory Negligence and Employment
DUTY OF CARE
I.e. is there a duty owed to the person who has been injured?

Types of duty of care
The CLA, for the most part, leaves the principles of duty of care to the common law.

At common law, there are two types of duty of care:
- **Presumed duty** - in cases of direct physical injury (for example car accidents, and cases of pre-existing relationships such as doctor and patient, employer/employee) a relevant precedent for duty of care usually exists. Examples include:
  - doctor + patient - *Rogers v Whitaker* (sp)
  - motorist + motorist
  - prisoner + prisoner - *NSW v Budjoso* (state vicariously liable)
  - employer + employee - e.g. *Paris v Stepney Borough Council* [1951]
  - school + child - *NSW v Lepore* (intentional tort case)
  - occupiers + entrants - *Australian Safeway Stores P/L v Zaluzna* (1987)
- **BUT** even through these duties are presumed, a specific factual scenario might not come within the scope: *Modbury; Stuart.*

*Modbury Triangle Shopping Centery Pty Ltd v Anzil* (2000) 205 CLR 254
- No duty of care to prevent an attack on an employee of a shop in a shopping centre by unknown persons in the car park after dark.
- Because no duty, no enforceable right of action. (Even though there is a presumed duty for occupiers to entrants.)
- Also authority that you generally don’t have an authority to protect someone against a third party.

*Stuart v Kirkland-Veenstra* (2009) 237 CLR 215
- Statute provided police may apprehend people who appear to be mentally ill. People met a person about to commit suicide but he convinced them he wouldn't He subsequently did and his wife sued for negligence.
- Held no duty owed. Emphasis on **personal autonomy** of the deceased.

- **Novel duty** - There is still some uncertainty in the High Court in relation to the test for duty of care but the following two issues appear relevant.

The test for a novel duty

A. Reasonable Foreseeability
Would the reasonable person in the Defendant’s position have foreseen that there was a real risk that carelessness on his/her part could cause loss/harm to PEOPLE in the plaintiff’s position?

*Sydney Water Corporation v Turano* [2009] HCA 42
- *Sydney* laid pipe in a trench which led to water pooling around a tree which became infected with pathogens which destroyed the roots of the tree. The tree then fell on a passing car. The car owner sued. HC held no duty of care in this circumstance because it was **not reasonably foreseeable.**
B. Salient Features

- The HC now favours a ‘salient features’ test: *Graham Barclay Oysters v Ryan* (2002) CLR 540 as per Kirby J.
- This is the salient features of the relationship between the plaintiff and the defendant.

Relevant factors include:

- Certainty, i.e. wouldn’t be indeterminate number or indeterminate class of plaintiff
- Coherency, e.g. what result best fits with other areas of the law. For example, re a drunk driver and the existence of a duty of care, they would say, what other law is there here? There is criminal law! And criminal law says this is not a good thing to do. The HC would then say it would be very inconsistent to have a tortious duty of care conflicting with that criminal law. So we shouldn’t have one.
- Vulnerability (not as big now Kirby J is not around though), e.g. the idea if a plaintiff is not able to do anything to help themselves the defendants may be more likely to have a duty of care
- Control
- Public policy considerations: is it just, is it fair, what are the social consequences, what is the cost, etc: *Sutherland Shire Council v Heyman* (1985) CLR. Although the courts say they shouldn’t be investigating this, they invariably do.
- Contractual provisions, e.g. a disclaimer in a contract for services.

*Cal v Motor Accidents Insurance Board* (2009) 239 CLR 390
- Man got drunk at hotel. Usually hotel locks up his motorcycle and keeps the keys. The man demanded the keys back while drunk and they gave them to him - he subsequently drove the motorcycle and died. Wife sued alleging hotel was negligent.
- Issue re existence of duty of care.
- Among other things, court looked to other areas of the law. Generally persons in the position of the Proprietor and the Licensee, while bound by important statutory duties in relation to the service of alcohol and the conduct of the premises in which it is served, owe no general duty of care at common law to customers which requires them to monitor and minimise the service of alcohol or to protect customers from the consequences of the alcohol they choose to consume.

*Sullivan v Moody* (2001) CLR
- Case where Kirby J wasn’t sitting and all the other judges decided upon the new way to assess a duty of care.
- Rejected the ‘proximity’ test.
- This case was also important because it made the causation test more flexible.

Note: the negligence map tells you to identify relevant salient features (including policy factors) for the relevant category of case. Categories you will study include:

- Sports Liability
Public Authority Liability

• Liability for defective structures
• Psychological loss

**Duty of care: Pure economic loss**

Pure economic loss = financial loss not consequent upon any injury or damage to the plaintiff’s property or person.

Traditional exclusionary rule (*Perre*) only accepted:
1. Loss consequent upon personal injury
2. Loss consequent upon another’s personal injury

**BUT NOW** recovery in limited circumstances / ie exclusions to the exclusionary rule! See:

- *Hedley Byrne & Co Ltd v Heller & partners Ltd* [1964] AC 465
  - Business made a contract with Hedley (advertising agency) for services. Hedley asked the business’s bank what their finances were like. Bank sent a letter saying their finances were OK including a disclaimer. Business failed and Hedley sued the bank for negligent misstatement resulting in pure economic loss. HELD there was a duty of care BUT the disclaimer overcame it.

- *Caltex Oil (Australia) P/L v The Dredge ‘Willemstad’* (1976) 136 CLR 529

- *Bryan v Malony* (1995) 182 CLR 609
  - House builder to purchaser

- *Woolcock Street Investments* (2004) 216 CLR 515
  - Engineer to purchaser of commercial building.

- *Hill v Van Erp* (1997) 188 CLR 159
  - Solicitor to beneficiary

  - RSL and casino sued by problem gamblers.

**Perre v Apand Pty Ltd** (1999) 198 CLR 180

- Factors relevant to finding a duty of care:
  - It would **not lead to indeterminate liability** ie indeterminate number, indeterminate class.
  - **Knowledge by the defendant** (or should reasonably have known) of the risk of harm to the plaintiff individually, or as a member of an ascertained class
  - **Vulnerability** of the plaintiff/control by the defendant
  - Duty would not place **unreasonable restraints on legitimate** business/commercial activities/ autonomy of individual.
  - Other factors.

**Duty of Care: Negligent Misstatement**

- Could only traditionally recover where the words were fraudulent as opposed to merely negligent: *Derry v Peek* (1889) 14 App Cas 337.
There are issues re indeterminability: *Ultramares Corp v Touche* (1931) 174 NE 441 as per Cardozo CJ. Exposure to a ‘liability in an indeterminate amount for an indeterminate time to an indeterminate class.’

Concurrent with contract, i.e. disclaimers will be relevant: *Hedley Byrne v Heller* [1964] AC 465 (see Luntz)

BUT NOW there is some provision for negligent misstatement in Australia:

1. Look at circumstances of each case to determine whether there has been **reasonable reliance** or **assumption of responsibility**.

2. Factors which might (without being determinative) impact upon such a decision include:
   - the type of advice and formality of occasion
   - strength/detail of advice and apparent reliance
   - special skill/knowledge known to be possessed
   - whether the giver of the advice is the only reliable source of that information, and whether the recipient had their own means of access to the information.
   - presence of request for info and any financial benefit to defendant
   - absence of effective disclaimer (noting disclaimer is not definitive of no duty if the defendant is only source of info it may still be reasonable to rely).
   - Whether the recipient was the direct intended recipient, or an unintended recipient/member of an indeterminate class who might access the communication.(compare *Tepko* and *Esanda*).

*Tepko Pty Ltd v Water Board* (2001) 206 CLR 1

- There must be known, **reasonable reliance** and/or an **assumption of responsibility** on the part of the person making the statement.
- The circumstances must be such that it is **reasonable** for the recipient to **rely** on the information.
- Consider the **circumstances** of each case.

*Esanda Finance Corp v Peat Marwick Hungerfords (Reg)* (1997) 188 CLR 241

- 6-0 majority against pl (Esanda).
- Key Factors: **reasonable reliance**, assumption of **responsibility**, **knowledge** of plaintiff/entry into transaction in **reliance**
- McHugh & Gummow JJ: **public policy** factors paramount

**Duty of Care: Psychiatric / Psychological Injuries**

Nervous Shock = Psychological harm = Psychiatric injury.

Requirements for psychiatric injury:

1. **Recognised psychiatric illness** (NB may be some difference with what is a recognisable psychiatric illness). Note that this will usually be explicitly stated in a hypothetical.

2. **Reasonable foreseeability** is the central enquiry: The defendant will not ordinarily owe a plaintiff a duty unless the defendant could have foreseen that the plaintiff would have suffered the psychiatric illness in the circumstances.

   **Relevant factors** for determining reasonably foreseeable include:
The ‘normalcy’ of the reaction of the plaintiff.
• Whether there was a sudden shock (not essential, but may help).
• Whether the plaintiff was at the scene or immediate aftermath.
• Whether the plaintiff perceived the events with their own senses.
• Whether there was pre-existing relationship between the plaintiff and defendant (e.g. in Annetts the parents had received assurance from the parents)
• The nature of the relationship between the plaintiff and any person killed, injured or put in peril.

NB: Legislation has been introduced in other states, but not in Qld. It is stricter than the common law: Wicks v State Rail Authority [2010] HCA 22 (rescuer case).

Key cases (heard at same time in HC): Tame v NSW; Annetts v Australian Stations P/L (2002) 211 CLR 317

Tame v NSW
• Lady wrongly had a blood/alcohol reading transcribed to her record. She notified the police and they changed this but then was always worrying that others might think worse of her for this mistake. The HC held that it was not reasonably foreseeable that the mistake of the defendant would lead to this kind of injury by the plaintiff.

Annetts v Australian Stations P/L
• Parents sent their son to a rural farm where he would do an apprenticeship and the farmers assured the parents he would be looked after. He was sent to a remote outstation. After a while it was realised that he and another guy were missing. Eventually their bodies were found in the desert dead with a broken down car. The parents sued alleging they have received psychiatric injuries from this. There was an argument there was not a sudden shock because the news had come to them over a long period of time. The HC allowed recovery in this case because they said there did not need to be a sudden shock, i.e. not necessarily a time relationship. They also said that because it was a parent-child relationship the defendant should have realised the parents would have gotten psyciatric injuries, especially where the defendant gave assurances the son would be safe.

• Man killed in workplace accident and children suffered psychiatric injuries some time after they were notified. Held it was reasonably foreseeable children would be significantly affected. NB the court talked about a parent-child relationship, but they emphasised that it was a loving and stable relationship, not just the fact that it is familial relations per se.

Koehler v Cerebos (Australia) Ltd (2005) 222 CLR 44
• Involved a lady who was a sales merchandiser and due to financial difficulties in the company she was told she could no longer be employed full time. She was paid a lot less but her workload didn’t change accordingly. She told her employer about this but the employer did nothing. She contracted a psychiatric injury. (Note that women often get psychiatric injury from this). The HC held it is not reasonably foreseeable that people will get psychiatric injuries from working hard in the workplace. The HC also focussed on the fact that she agreed to to the new arrangement. The HC also said that in this situation for the plaintiff to be able to claim she would have had to had told the workplace
BREACH OF DUTY

Overview:
1. What is the standard of care?
   • Standard is that of a reasonable person in position of the defendant.
2. Has that standard of care been breached?
   1. Was the risk of injury to the plaintiff reasonably foreseeable?
      • Standard is “not insignificant”.
   2. If so, was the response of the defendant to that risk reasonable?
      • Use the negligence calculus.

A. Standard of Care
What standard of care is required of the defendant? The CLA is the primary reference point.

• CLA s 9(1)(c) - standard is a reasonable person in the position of the person

• You must be able to affirmatively imagine what the reasonable person would have done (and thus was the defendant should have done) before you can find a defendant was negligent: Graham Barclay Oysters v Ryan (2002) CLR.

• Objective legal test: Don’t focus on the particular characteristics of the actual defendant.

• Exceptions: The standard for children is reasonable care owed by a child of that age: McHale v Watson (1966) 115 CLR 199.

• C.f. people with mental illness are held to the reasonable person standard! This is often because the mentally ill people have insurance in these cases.

• Relationship and degree of knowledge between the two parties usually irrelevant: Imbree v McNeilly (2008) 236 CLR 510.

• Another exception is for professionals as per s22 CLA where the standard is what is ‘widely accepted’ by other professionals to be done in such an instance. NB also s21 CLA about the proactive and reactive duties of doctors to warn of risk. Need to disclose enough info for the patient to make an informed decision as well as anything else the doctor thinks they need to know.

• Another exception is to protect emergency workers (s26) and entities (s27) (including laymen) who are helping out in emergencies in good faith and are not reckless, e.g. by administering first aid.

• There are also special policy considerations for public authorities: ss 34 - 37.

• A learner driver is expected to come up to the standard of care of the ordinarily skilled driver even if the plaintiff passenger knows that the driver lacks that skill.
• A father had his son and his son’s friend with him on some 4-wheel-driving adventure where he let them drive, and the son’s friend (a learner driver) overturned the car. The HC said that the standard of care was that of a reasonable driver.
• However, the fact the father knew the boy was a learner driver may be relevant for a
defence of contributory negligence.

*Rogers v Whitaker* (1992) 175 CLR 479:
• The standard of reasonable care and skill required is that of the ordinary skilled person
exercising and professing to have that special skill. Ergo the standard of care depends
on your profession.
• If you are a GP you have a standard of care which is reasonably for a GP, but if you are
a specialist your standard of care will be *higher*.
• The court determines what is reasonable.

**B. Was that Standard Breached: Risk v Response**

Once you have worked out what the standard of the duty of care is, has the standard been
breached by the defendant’s acts or omissions? In a hypothetical at this point you will
need to clearly identify precisely what the defendant has done which is alleged to be a
breach.

At common law this was a question of fact for juries, but s73 CLA provides: “a proceeding
in a court based on a claim for personal injury damages must be decided by the court
sitting without a jury.” This is because it was thought juries were being too generous with
plaintiffs.

• **Plaintiff must prove** this on the *balance of probabilities* – CLA s 12.

This is a two-stage test:

1. **Was the risk of injury to the plaintiff reasonably foreseeable?**

• CLA s 9(1) that a person is not in breach of their duty of care unless:
  (a) Risk foreseeable
    • A person cannot be liable for failing to take precautions against an unforeseeable
      risk: *Roe v Minister of Health*.
    • A risk will be foreseeable if it is not farfetched or fanciful (*Wyong / Shirt*); AND...
  (b) Risk not insignificant
    • More than not farfetched or fanciful (*Wyong / Shirt*) but less than highly probable

*Wyong Shire Council v Shirt* (1980) 146 CLR 40
• This case was about a water skier who due to mistakenly incorrectly reading ‘deep water’
signs, stacked it in shallow water and got spinal injuries.
• As per Mason J (*the Shirt test*):
  • “A risk of injury which is quite unlikely to occur … may nevertheless be plainly
    foreseeable. Consequently, when we speak of a risk of injury as being "foreseeable"
    we are not making any statement as to the probability or improbability of its
    occurrence, save that we are implicitly asserting that the risk is not one that is far-
    fetched or fanciful … it certainly does not follow that a risk which is unlikely to occur
    is not foreseeable.” (at p47)
• In this case it was held that it was reasonably foreseeable that the council’s signage
  would cause someone to have the mistaken belief.
• To sum up the common law test:
  • Look at the risk: Degree (likely) and Gravity (seriousness) of the risk/harm)