

# Salient Features

## PRIVATE NUISANCE

### **Live and let live principle**

- Acts necessary for common and ordinary use of land may be done if done with proper consideration for neighbours (*Clarey v Women's College*)

### **Locality**

- Less appropriate act is, given locality, more likely interference will be unreasonable
- *Sturges v Brigman*

### **Intensity**

- Greater intensity of discomfort suffered by P, more likely unreasonable
- *Feiner v Domachuk; Polsue Alfieri v Rushmer*

### **Time, duration, frequency**

- Time – more peculiar time, more likely to be unreasonable
- Duration – longer is, more likely to be unreasonable
- Frequency – more frequent, more likely to be unreasonable
- *Clarey v Women's College; Seidler v Luna Park*

### **Practicality of avoiding interference**

- More practicable it is for D to not do, more likely interference is unreasonable
- *Clarey v Women's College*

### **Sensitivity of P**

- Court doesn't take into account abnormal sensitivity >> must show it would affect a reasonable "normal" person (*Robinson v Kilvert*)

### **Social utility**

- More likely to view interference as reasonable if benefits society (*Munro v Southern Dairies*)

### **Malice**

- Malice may make reasonable interference unreasonable (*Hollywood Silver Fox v Emmett*)

## **DUTY OF CARE**

### **Conflict of duties**

- Will the finding of a duty in this instance conflict with an already existing duty?
- *Sullivan v Moody*

### **Conflict of laws**

- Is there a better suited area of law under which the P's action should be brought?
- *Sullivan v Moody*

### **Illegality**

- On the part of the part of P *Gala v Preston*

### **Floodgates**

- Would finding a DOC in this case risk flooding the courts with claims of liability?
- *Sullivan v Moody*

### **Control**

- P subject to D control?
- If the D was in control, there is more likely to be a duty (*Perre v Apand*)
- D controls, broadly, the activities that may ultimately cause DOC (*Adeels Palace*)

### **Vulnerability**

- P is vulnerable if unable to take reasonable steps to protect from neg act. If P could have taken, DOC not be imposed (e.g. insurance) (*Johnson Tiles; CAL No. 14*)

### **Assumption of Responsibility**

- Did P rely on D to act without negligence and did D assume responsibility to exercise reasonable care?
- Assurances given by D to P? (*Annetts v Australia Stations*)

### **Autonomy**

- Would imposing DOC compromise autonomy of P? (*CAL No. 14*)

### **Proximity**

- The more physically close, the more likely a duty is owed (*Perre v Apand*)

## **PEL**

### **Indeterminate Liability**

- Whether the imposition of a duty of care would impose liability “in an indeterminate amount or an indeterminate time to an indeterminate class” (*Johnson Tiles*)

### **Interference with legitimate business activity**

- Courts approve of commercial competition, wont impose DOC if unreasonable burden
- More likely where DOC would be simply co-extensive to that already owed, no further burden (*Perre v Apand*)

### **Actual or constructive knowledge of risk of harm**

- D had knowledge of the risk of economic of harm to the P
- D ought to have known that their conduct exposed P to risk
- *Perre v Apand*

### **Reasonable reliance**

- Whether reasonable reliance placed on D info (*Perre v Apand*)

### **Contractual Regime**

- If there's a contract between P and D, it will point away from DOC, especially if contract allocates risk or responsibility in the event of a negligent act
- *Brookfield Multiplex; Perre v Apand*

### **Statutory Regime**

- Presence of statute dealing with particular area of law in question will point away from DOC owed. Suggests parl alone regulates area, and negligence shouldn't interfere (*Johnson Tiles*)

### **Conflict with community standards**

- Whether a finding of a duty of care would be inconsistent with community standards in relation to what is ordinarily legitimate in the pursuit of personal advantage;
- *Johnson Tiles*

## **VICARIOUS LIABILITY – EMPLOYEE**

### **Control**

- The modern formulation: emphasis has shifted from *actual* exercise of control to the *right* to exercise control
- More likely to be control if it's control over central activity of business (*Hollis v Vabu*)

### **Holidays**

- If person for whom work is done can stipulate when holidays can be taken, and for how long, that will point towards person doing work being employee (*Hollis v Vabu*)

### **Skill level**

- Lesser the level of skill necessary to do relevant work (and lesser need for special qualifications) more likely that person doing work is employee (*Hollis v Vabu*)

### **Identification – particularly strong**

- If person doing work is somehow presented as an *emanation* of person paying him, more likely to be employee
- Conversely if have identification of self; e.g. 'Gerry's Tort Service' more likely to be independent contractor – own company (*Hollis v Vabu*)

### **Equipment**

- If person doing work is provided with equipment by person for whom doing it, point towards being employee (*Hollis v Vabu*)

**Obligation to work** (*Stevens v Brodribb Sawmilling*)

**Setting own hours** (*Stevens v Brodribb Sawmilling*)

**Ability to work for other employers** (*Stevens v Brodribb Sawmilling*)

**Ability to delegate work** (*Stevens v Brodribb Sawmilling*)

**Type of payment** (*Stevens v Brodribb Sawmilling*)

Tort of negligence >> designed to protect and compensate people for damage caused by another person's careless conduct

Negligence = failure to exercise reasonable care

**Requires actual damage** – not actionable per se

## Negligence – Duty of Care

The D must have owed the P a duty to take care of them

- If D didn't owe – not liable regardless of how reckless/careless been
- No provisions of wrongs act deal spec with duty
- Except for MH – common law applies in general duty

### Historical origins/general concept

Heaven v Pender (1883)

- UK
- Brett MR: Whenever one person is by circumstances placed in such a position with regard to another, whereby may cause danger of injury, duty arises to use *ordinary care and skill* to avoid such danger

Donoghue v Stevenson (1932)

- UK
- Manufacturers owe final consumer of their product a DOC (at least in the instance where the goods can't be inspected between manufacturing and consumption)
- There need not be a contract between manufacturer and consumer to sue in negligence
- Atkin L: DOC to avoid acts/omissions that you can reasonably foresee are likely to injure persons who are closely or directly affected by your acts (neighbours)

### The Wrongs Act 1958 (Vic) s 43

- **Damages** - includes any form of monetary compensation;
- **Harm** - means harm of any kind and includes—
  - o (a) injury or death; and
  - o (b) damage to property; and
  - o (c) economic loss;
- **injury** - means personal or bodily injury and includes—
  - o (a) pre-natal injury; and

- (b) psychological or psychiatric injury; and
  - (c) disease; and
  - (d) aggravation, acceleration or recurrence of an injury or disease;
- **negligence** - means failure to exercise reasonable care.

# 1. Settled Duty Situations

## 1.1. Duty Exists

Sufficient to point to precedent to say DOC exists but be sure within scope of circumstances they apply to

- **Doctors** owe duty to **patients** in respect of provision of medical treatment (*Rogers; F v R*)
- **Road users** owe DOC to other road users (*Chapman v Hearse*)

## 1.2. No Duty Exists

### 1.2.1. Barristers

- In relation to **work done in court** or that **relates to court proceedings** (*D'orta-Ekenaike*)

#### 1.2.1.1. *D'Orta-Ekenaike v Victoria Legal Aid (2005)*

- HCA
- **Advocate can't be sued by a client for negligence in the conduct of a case or in out-of-court work affecting the conduct of the case.**
- Affirmed barristers/solicitor advocates/instructing solicitors remain immune from suit
  - o Central concern is the **finalisation of controversies** which are not to be reopened except in a few narrowly defined circumstances.
  - o **Adverse consequences for admin of justice** that would flow from re-litigation
- Along with advocates, *judges, witnesses and jurors* enjoy immunity from suit
- Court held immunity also *extends to advice leading to decision* (such as guilty plea) which affects conduct of case in court

## 1.2.2. Medical Practitioners & Child protection agencies

### 1.2.2.1. *Sullivan v Moody (2001)*

- HCA
- **DOCTORS**
- **No DOC between medical practitioners** who examine children for suspected child abuse **and suspected perpetrator of abuse**, doctor's duty to child is paramount
- Practitioners need to perform their duty **without fear of becoming subject of legal claim for damages brought by third party**
- **AGENCIES**
- It would be **inconsistent with statutory structure** for the protection of children in force in SA **to hold that agencies owe DOC to parents wrongly accused** of sexually abusing their children

## 1.2.3. Police

### 1.2.3.1. *Cran v State of New South Wales (2004)*

- NSWSCA
- Police and DPP didn't owe a DOC to P
- **Interest in unimpeded investigation by police and DPP in carrying out prosecutorial function precluded any DOC**
- The police **owe no DOC when investigating and suppressing crime**
- The *wider public interest* overrides the claim of any individual to be protected

## 1.2.4. Parents

- Parents owe DOC to their children regarding any positive act they perform which injures their children
- However, **DOC doesn't extend to failure to take action to protect one's children** where parent did no positive act in relation to child of a kind that created a risk  
(*Robertson v Swincer*)
  - o Exclusion of family from public liability insurance schemes
  - o Impossibility of meeting standard at all times
  - o Lack of clear standards
  - o Discouraging effect on sharing care

## 1.3. Particular Duty Situations

- PEL or MH? See elsewhere and run through steps to establish duty for them

## 2. Reasonable Foreseeability

- D will only owe P a DOC if it was **reasonably foreseeable** that if D was careless, P, **as either individual or member of class of people**, might have been harmed  
(*Donoghue v Stevenson*)
- **Not necessary to foresee the precise sequence** of events that caused harm, nor exact P (*Chapman v Hearse*)
- **rf to a rp in the position of D** that **careless conduct of any kind** on part of D **may result in damage of some kind to P** or to a class of persons to which P belongs  
(*Chapman v Hearse*)
- Degree of risk that must be foreseen is that the **risk is real, not far-fetched or fanciful** (*Sullivan v Moody*)
- Not sufficient to show that a risk of harm to someone was foreseeable, **must be P specifically or class of people to which P belonged** (*Donoghue; Chapman*)
- OBJECTIVE: not what D foresaw but what rp in D's position would've foreseen
- **Vulnerable P's**: where act incapable of injury ordinary P, no duty arises bc abnormally susceptible person may be affected
  - o If D knows person likely to be affected due to their particular vulnerability, DOC may be held (*Levi v Colgate-Palmolive*) >> **allergic P, no RF**
  - o *Hayley v London Electricity Board*: >> **blind P, RF found**

### 2.1. Chapman v Hearse (1961)

- HCA
- Similar sequence of events should've been anticipated when driving negligently
- **It's not the precise sequence of events that should've been reasonably foreseeable but a consequence of the same general nature**

### 2.2. Caterson v Commissioner for Railways (NSW) (1973)

- HCA
- Question is whether the harm is likely to occur or not likely to occur

### 2.3. Sullivan v Moody (2001)

- HCA
- Foreseeability of harm isn't enough to give rise to DOC
- Reasonable person must've **foreseen a real, rather than far-fetched or fanciful, possibility of some harm to the P**

#### 2.4. Bourhill v Young (1943)

- **Must be rf that P specifically; or class of which P is a member might be injured**
- Heard but didn't see incident, saw lots of blood later, went into nervous shock, baby stillborn
- Motorcyclist (D) owed DOC to motor driver who crashed into and to other road user but not P bc bystander – not foreseeable
- Would be **decided differently today**
  - o Courts today more likely to find MH as foreseeable
  - o Threshold test easier to satisfy
- **In court, need to distinguish why Bourhill wrong**

#### 2.5. Palsgarf v Long Island Railway (1928)

- USA
- it wasn't rf that negligently knocking an unmarked parcel could lead to an explosion, which would injure someone standing at the other end of the platform

#### 2.6. Levi and Hayley

- If D knows person likely to be affected due to their particular vulnerability, DOC may be held (*Levi v Colgate-Palmolive*) >> **allergic P, no RF**
- *Hayley v London Electricity Board*: >> **blind P, RF found**
  - o Employees had DOC not to endanger people who might reasonably be expected to walk along footpath
  - o Extended to blind people if rf that blind people would use footpath
- How to reconcile?
  - o Whether D could reasonably have been expected:
  - o 1) to know of vulnerable group in question (allergies not known as much at time)
  - o 2) to know that they could be harmed by their general activities
  - o Probability and foreseeability distinguished – low threshold for foreseeability: can be foreseen even if prob low, if prob doesn't mean foreseeable
  - o Courts greater appreciation of social diversity

EXAM – cite both, mention courts are struggling and point how would be reached today in 2016