

LAW231

Exam Short Notes

Basic Negligence

Does ACC bar the claim?

- ACC bars compensatory damages claim for personal injury caused by accident, s317(1) ACA 2001
- However, exemplary damages still can be claimed under s319

Person Injury is defined under s26:

- (a) death
- (b) physical injury
- (c) mental injury suffered because of physical injury (s 26)
- (d) work-related mental injury (s 21B)
- (e) mental injury from a sex crime (s 21)

(2) Personal injury does not include personal injury caused wholly or substantially by a gradual process, disease, or infection unless it is personal injury of a kind described in section 20(2)(e) to (h).

Elements

Starting Point

- a) Is there an established category duty of care? If no, apply test.
- a) The question is whether it is fair, just and reasonable for the defendants to owe the plaintiff a duty of care in these circumstances (*Rolls Royce v Carter Holt Harvey*)
- b) New Zealand adopts a two stage test (novel cases) for a breach of duty of care (*South Pacific Manufacturing AND The Grange decision in 2012*) focusing on the proximity of the relationship between the parties and looking at policy reasons to affirm or negate a finding of the duty of care.

1. Duty of Care

Proximity

- a) Requires more than mere foreseeability of harm (*Marx v AG*)
- a) Looks at foreseeability of harm, proximity, special relationship between the parties (*South Pacific*)
- b) Exercise of judicial judgement

- 1) Physical proximity in time and space
- 2) Circumstantial Proximity and Causal Proximity - Relationship between the parties. (*CNR v Norsk* where the P was in a place to foresee and protect against the outcome) - Usually in relational economic loss.
- 3) Degree of direct contract (*Rolls Royce v Carter Holt Harvey*)
- 4) Foreseeability due to contractual structure - subcontract (*Rolls Royce v Carter Holt Harvey*)
- 5) Vulnerability of the Plaintiff (*Rolls Royce v Carter Holt Harvey*)
 - Any way they could have protected themselves? Insurance? - Links to policy
- 6) Specialised nature of skill of the defendant relative to the plaintiff (*Rolls Royce v Carter Holt Harvey*)
- 7) Defendant's control of the situation; (*The Grange*)
- 8) Alternative remedy adequate and realistic? E.g. contract/statute; *Rolls-Royce*.
- 9) Foreseeable and reasonable reliance; *The Grange*.
- 10) Generality or particularity of the class of plaintiff foreseeably at risk; *The Grange*.
 - Known plaintiff.
- 11) Contractual background / contractual matrix; *Rolls-Royce*.

Policy

- Are there any policy factors relating to the public interest (broadly affecting the community) that recognise or deny a DOC; *The Grange*.
- 1) Compensation; *South Pacific* – compensate a blameless plaintiff.
 - 2) Distributive justice – comparing plaintiffs with other plaintiffs (who can or cannot recover); *White*.
 - 3) Deterrence; *South Pacific*.
 - 4) Defensive practice; *The Grange*.
 - Likely behaviour of other potential defendants in reaction to the decision.
 - 5) General floodgates (many claims); *South Pacific*.
 - Indeterminate liability; *Ultramares*.
 - Ripple effect; *CNR*.
 - 6) Economic theory; *CNR*.
 - Capacity of each party to insure against liability.
 - 7) Coherence – consistency of imposition of liability within the legal system more generally; *The Grange*.
 - Defamation; *Balfour v AG*.
 - Conflicting duties of care; *South Pacific*.
 - Contractual background / contractual matrix; *Rolls-Royce*.
 - 8) Commercial certainty; *Carter Holt Harvey v MOE (2016) NZSC*.
 - 9) Statutory background; *South Pacific*.
 - Common law should develop alongside statute to protect interest?
 - No remedy intended by Parliament?
 - 10) Public authority; *The Grange*.
 - Resources and demands of public authority.
 - Functions and powers of public authority.

2. Breach of a Duty

Standard of Care

1. What is the standard of care the defendant must be held to
 - What is reasonable in their individual circumstances *Goldman v Hargrave*
 - Does not take into account skill level (Driver) - *Nettleship v Weston*
 - Youth and Age *Mullin v Richards*
 - Disability *Mansfield v Weetabix Ltd*
 - Professional (Error of judgement could be a defence IF it is carried with reasonable care and skill. *Whitehouse v Jordan*)

2. Whether that standard of care taken by a reasonable man in the defendant's circumstances has been breached
 - Not expected to guard against every risk **Bolton**
3. Weighing exercise (negligence calculus) to determine the standard of care required.
 - Likelihood of the risk eventuating.
 - Cricket ball hit out of the cricket ground 6 times out of 30 years is a low risk; **Bolton v Stone**.
 - Seriousness of potential circumstances.
 - Blinding caused by welding is a very serious potential circumstance even though the likelihood of occurrence is low; **Paris v Stephney (1951) UKHL**.
 - Ability of defendant to avoid the loss / difficulty of remedial measures / burden of adequate precautions.
 - Defendant's physical and financial abilities; **Goldman v Hargrave (1967) PC**.
 - Social utility of the activity.
 - Leaking oil into the harbour is of zero social value; **Wagon Mound No.2 (1967) PC**.
 - Saving lives is of the greatest social value; **Watt v Hertfordshire (1954) UKCA**.
 - Special skills and knowledge
 - Where the situation involves the use of some special skill or competence, the test is the standard of the ordinary skilled man exercising and professing to have that special skill.; **Bolam v Friern (1957)**.
 - Whether the activity requires specialist skill and knowledge is a question of fact.
 - This excludes emergency surgery situations.
 - (1) Reasonable careful practitioner in his field of expertise; **Shakoor v Situ (2010) UKQB**.
 - E.g. TCM practitioner held to standard of a TCM practitioner, not a specialist or surgeon. Not expected to have specialist knowledge.
 - Jeweller who did a piercing (and caused an infection) held to the standard of a jeweller of reasonable skill and care, not that of a surgeon; **Philips v Whitely (William) (1938)**.
 - (2) Cognizant of general expectations and standards; **Shakoor v Situ (2010) UKQB**.
 - E.g. abide by the laws and standards in the country, general health standards etc.
 - Expert opinion and advice while relevant and influential in the judge's assessment of what is reasonable in the circumstances for a person in the profession, can be departed from in rare circumstances where the judge is not convinced of the logic of the opinion; **Bolitho v City and Hackney Health Authority (1998) UKHL**.
 - Setting the duty of care standard is ultimately a question of law decided by the court.

Res Ipsa Loquitur - the event speaks for itself

- Enables the plaintiff to establish a prima facie case of breach which is sufficient to survive a nonsuit. Shifts an evidentiary onus on the defendant; **Ng Chun Pui v Lee Chuen Tat (1988) PC**.
 - o Onus still on the plaintiff to establish beyond the balance of probabilities.
- Applies where there is no evidence as to what happened other than the fact that it happened.
 - o E.g. surgical instruments left inside plaintiff's body after surgery cases.
 - o E.g. anaesthetic awareness cases.

• 3 elements; **Scott v London and St Katherine's Dock (1865)**.

- o **Damage that does not ordinarily occur without negligence. Must be supported by ordinary human experience.**
- o **The defendant's sole control over the thing.**
- o **Absence of explanation.**
- If no evidence provided by the defendant, the judge would be deciding the case based on inferences from the whole of the evidence (including any expert opinion); **Ratcliffe v Plymouth (1998) UKCA**.
- 2 ways to rebut the inference of negligence; **Ratcliffe v Plymouth (1998) UKCA**.
 - o Prove that the defendant exercised all reasonable care and skill.
 - o Offer an alternative plausible explanation.

3. Causation

The plaintiff's injury, damages must have been caused by the defendant's breach of a duty

- Test: Whether the plaintiff would have suffered the loss but for the defendant's wrongdoing (*Barnett v Chelsea Hospital*)
- Apply "But for" if damage is single and indivisible, but relaxed where multiple sources (*ACC v Ambros*)
- Events contributing to the damage can be simultaneous or successive; *Williams v Bermuda Hospitals (2016) PC*.

For multiple sources, apply **Material Contribution Test** (*Bonnington Casting v Wardlaw*)

- No need to prove sole, or even main cause of injury as long as there is a material contribution to the damage.
- Claimant inhaled silica at workplace from guilty source (employer negligent) and innocent source (no negligence). Proof that there was a material contribution sufficient.
- Limited in New Zealand, 1 in 5 sources not enough (*Wilsher v Essex Area Health Authority*)

Increase in risk is not equivalent to a material contribution to injury as a rule of law; *ACC v Ambros (2007) NZCA*.

Industrial Diseases

- Where defendant's breach of duty increases an existing risk factor, Court may make a robust inference on the totality of the evidence that there was a material contribution to the injury; *ACC v Ambros (2007) NZCA*.
 - Infer from a known fact (increase in risk), the existence of an unknown fact (material contribution).
 - E.g. in *McGhee v National Coal Board (1972) UKHL*. Exposure to dust at worksite inevitable but negligent failure to provide washing facilities increasing the existing risk factor.
 - E.g. in *Fairchild v Glenhaven (2002) UKHL*. Exposure to asbestos at workplace. Multiple employers and no way to prove which employer was responsible.
- But where there are a number of disparate factors (any one of which could have caused the harm), and one of those factors is attributable to the defendant's wrongdoing; not legitimate to make inference of material contribution; *ACC v Ambros (2007) NZCA*.

Loss of chance (of a better medical outcome)

- Loss of a chance analysis (and discounting damage to reflect loss of chance) for physical damage is incompatible with the ACC scheme; *ACC v Ambros (2007) NZCA* and not accepted in UK, Canada and Australia said in medical negligence
 - But may apply to economic damage.
 - E.g. in *Gregg v Scott (2005) UKHL*. Negligent delay in diagnosis of cancer. Reduce chance of survival from 42% to 15%. No recovery.
- E.g. in *Wilsher v Essex (1988) UKHL*. Over-saturating of baby with oxygen (doctor's negligence) and 4 other possible causes of blindness (no negligence). No recovery.
- Policy considerations – (1) major consequence of health system.
- Potentially can apply to economic damage.
- Redefines the nature of the damage from loss of a better outcome to the loss of a chance of a better outcome.
- Can discount damages to reflect the loss of chance.

4. Remoteness

Test: Whether the damage is of the **type** and **kind** that a reasonable man would have foreseen *Hughes v Lord Advocate*

- Lord Guest: the initial **type** of injury (fire) must be reasonably foreseeable *Hughes v Lord Advocate*
- If follows that the party is not responsible for all direct consequences of the breach. *Wagon Mound 1*
- Do NOT need to foresee the precise detail of the damage or extend of damage caused.

Egg Shell Principles (Do not need to foresee extend of damage) *Hughes v Lord Advocate*

- Take the victim as you find them *Stephenson v Waite Tileman*
- Applies to economic state the same as to his physical and mental vulnerability *Lagden v O'Connor*
- Even in cultural and family setting *Kavanagh v Akhtar (1998) NSWCA*.
 - Muslim woman forced to cut hair (culturally significant) as a result of physical injury and suffers psychiatric injury – husband disapprove and separated from her. Unusual reaction of injured plaintiff cannot be disregarded even because of an unforeseeable religious or cultural background.