**Duty of Care - Negligence**

**Negligence definition:**

Lack of proper care and attention/carelessness.

**Negligence Definition – Case:** Grant v Australian Knitting Mills Ltd [1936] AC 85, 103 (PC), Lord Wright:

“The mere fact that a man is injured by another’s act gives in itself no cause of action: if the act is deliberate the party injured will have no claim in law even though the injury is intentional, so long as the other party is merely exercising a legal right: if the act involves lack of due care, again no case of actionable negligence will arise unless the duty to be careful exists.”

Negligence does not consider:

* Likelihood or number of claimants.
* Likelihood that loss would be caused.
* Nature and extent of circumstances.
* Circumstances of losses that were inflicted.

Elements of Negligence:

* Defendant acted in such a way as to breach the duty of care.
* Damage suffered by claimant caused by defendant’s breach of duty.
* Damage was sufficiently proximate consequence of breach.

**Bolam Test – Case:** *Bolam v Freirn Hospital Management Committee* [1957] WRL 582.

"I myself would prefer to put it this way, that he is not guilty of negligence if he has acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art. I do not think there is much difference in sense. It is just a different way of expressing the same thought. Putting it the other way round, a man is not negligent, if he is acting in accordance with such a practice, merely because there is a body of opinion who would take a contrary view. At the same time, that does not mean that a medical man can obstinately and pig-headedly carry on with some old technique if it has been proved to be contrary to what is really substantially the whole of informed medical opinion. Otherwise you might get men today saying: "I do not believe in anaesthetics. I do not believe in antiseptics. I am going to continue to do my surgery in the way it was done in the eighteenth century." That clearly would be wrong." At page 587.

The case lays down the typical rule for assessing the appropriate standard of reasonable care in negligence cases involving skilled professionals i.e. doctors and carpenters.

**Injury, Prevention, Rehabilitation, and Compensation Act 2001, s317(1).**

No person may bring proceedings independently of this Act, whether under any rule of law or any enactment, in any court in New Zealand, for damages arising directly or indirectly out of –

(a) Personal injury covered by this Act; or

(b) Personal injury covered by the former Acts.

**Heaven v Pender (1883) 11 QBD 503 (CA)**

* Claimant ship’s painter
* Staging collapsed
* Claimant successfully sued dock owner

Sir Baliol Brett at page 509:

“Whenever one person is by circumstances placed in such a position with regard to another that every one of ordinary sense who did think would at once recognise that if he did not use ordinary care and skill in his own conduct with regard to those circumstances he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger.”

Criticism of Heaven v Pender Approach:

* Too broad
* Create too onerous a burden
* Rejected by Brett in *Le Lievre v Gould* (1893) 1 QB 491, 497.

**Donoghue v Stevenson [1932] AC 532:**

* Effects everyday lives
* Determined difference between duty under contract and tort
* Product liability

Legal Issues

* No contract
* Cafe owner not negligent
* Could only sue manufacturer

**Question** at page 578:

“...whether the manufacturer of an article of drink sold by him to a distributor, in circumstances which prevent the distributor or the ultimate purchaser or consumer from discovering by inspection any defect, is under any legal duty to the ultimate purchaser or consumer to take reasonable care that the article is free from defect likely to cause injury to health.”

**Neighbor Principle** at page 580:

the rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer’s question, Who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be – persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the act or omissions which are called in question.”

Remaining Issues:

* Did the snail exist?
* Was the ginger beer brewed by David Stevenson?

***Grant v Australian Knitting Mill* [1936] A.C. 562:**

**Facts** of the case:

Dr. Grant bought underwear from Aus Knitting Mill, which contained sulphites in the material. Sulphites were latent and undetectable. The sulphites gave Grant dermatitis.

**Established:** That there is a duty of care between manufactures and claimants.

**Anns v Merton London Borough Council [1978] AC 728:**

**Facts:** Local authority permitted builders to build insufficient foundations. Claimant leased flats. Structural integrity of buildings affected.

**Anns’ Two Stage Test**, page 751-752:

1. Firstly, is there a sufficient relationship of proximity or neighbourhood between the wrongdoer and the complainant such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter, in which case a prima facie duty of care arises.
2. Secondly, if the first question is answered in the affirmative, it is necessary to consider whether there are any considerations that ought to negative or to reduce or limit the scope of the duty or the class of the person to whom it is owed or the damages to which a breach of it may give rise.

***Anns* confirmed following re.duty of care:**

* Harm is reasonably foreseeable
* Sufficient proximity between parties
* No policy reason to restrict liability

**Issues with Anns’ test:**

*Governers of the Peabody Donation Fund v Sir Lindsay Parkinson* [1985] AC 210 (HL). Retreaded from the test.

*Caparo Industries v Dickman* [1990] 2 AC 605 (HL). Abandoned the test and replaced.

***Caparo Industries v Dickman* [1990] 2 AC 605 (HL) 3 Stage Test:**

1. Was there foreseeable harm to the claimant;
2. Proximity/Neighborhood between claimant and defendant; and
3. Fair, just and reasonable to impose duty of care.

***South Pacific v NZ Security Consultants Ltd* [1992] 2 NZLR 282:**

**Facts:** Claimants alleged investigators acted negligently in concluding fire started by claimants. No duty of care to the insured.

**Established:**

* Duty should not cut across existing legal doctrines
* Ann’s two stage test a framework thus merely method of tackling problem
* Not at odds with *Caparo* approach

**AG v Carter [2003] 2 NZLR 160:**

**Facts:** “Nivanga” ship bought for $200,000. Survey certificates issued by law. Claimant alleged they relied on certificates. Nirvanga sold for scrap for $500. There was no duty of care from the Cert issuers to the claimants as there was no proximity and policy reasons precluded the duty of care.

**Established:** Supports theory that policy reasons may mitigate duty of care.

**Negligence Overview:**

* Defendant to owe legal duty of care
* Easy to ascertain in some situations
* Novel situations requires 2 stage test in NZ
* Two stage test merely method of tackling problem

**Proximity/Neighborhood:**

* Were the party close enough that the damage was foreseeable?
* Defendants actions, or lack of, affect claimants closely; therefore they are parties.
* Consider: physical, circumstantial and causal connections
* Glazebrook J, *Rolls Royce NZ v Carter Holt*: no presumption arose at any stage; all relevant factors to be weighed together
* Def may owe duty to claimant but not to world at large.

***Palsgraf v Long Island Railroad Co* 162 NE 99 (1928):**

**Facts:** A passenger was boarding a train. The guards attempted to assist him, when his package fell onto the tracks resulting in an explosion. The claimant was further down the station and injured by the explosion.

**Judgment:** The courts determined that the relationship between the guard and the claimant was too indirect, making it unforeseeable, for there to be liability.

***Bourhill v Young* [1943] AC 92 (HL)**

**Facts:** Claimant was leaving train when a motorbike sped past on the other side of the tram. The motorbike collided with a car causing fatal injuries. The claimant sued for sight of blood and sound of accident.

**Established:** The House of Lords denied that Mrs Bourhill had been foreseeable to Mr Young at the time of the accident.

Lord Russell stated at page 102:

“Can it be said that John Young could reasonably have anticipated that a person, situated as was the appellant, would be affected by his proceeding towards Colinton at the speed at which he was travelling? I think not. His road was clear of pedestrians. The appellant was not within his vision, but was standing behind the solid barrier of the tramcar. His speed in no way endangered her. In these circumstances I am unable to see how he could reasonably anticipate that, if he came into collision with a vehicle coming across the tramcar into Glenlockhart Road, the resultant noise would cause physical injury by shock to a person standing behind the tramcar. In my opinion, he owed no duty to the appellant, and was, therefore, not guilty of any negligence in relation to her.”

***Marx v Attorney-General* [1974] 1 NZLR 164 (CA):**

**Facts:** Claimant’s husband was injured in work accident and suffered mental injury. Husband physically and sexually abused claimant as a result. Claimant argued that husband’s employer was at fault.

**Judgment:** Same as Bourhill.

***McCarthy v Wellington City* [1966] NZLR 481(CA):**

**Facts:** Boy stole detonators from defendant’s quarry. Boy gave detonators to his younger brother who then gave them to another boy, the claimant.

**Established:** A person storing dangerous explosives on his premises owed a duty of care to keep them secure to all persons foreseeably likely to be injured as a result of a breach of that duty.

**Policy Propositions:**

1. **Duty not to interfere with autonomy of defendant;**

- Autonomy and liberal democracy intertwined

- Reasonable constraints imposed only where necessary

1. **Extent of duty should be proportionate;**

- Important of claimant’s interest that has been injured;

- South Pacific Manufacturing v NZ Security Consultants [1992] 2 NZLR 282, 295;

- The more serious the harm, the more strict the duty

1. **Appropriate to recognise duty to protect claimant;**

- Consider claimant’s entitlement to protection;

- Certain people/groups may need additional protection;

- Fair Trading Act 1986, Consumers’ Guarantees Act 1993

- Creative justice between claimant and defendant

*- Smith v Eric Bush* [1990] 1 AC 831 (HL)

*- Rolls Royce New Zealand v Carter Holt Harvey* [2005] 1 NZLR 324 (CA)

1. **Duty should not conflict with legal system**

- Does it fit with overall rights and responsibilities?

**Positive Acts:**

- Active and positive conduct = duty of care generally

- Difficult to distinguish between positive wrong doing and non-failure to act

- Negligent words: different treatment depending on financial loss or physical damage

*- Mountney v Smith* (1904) 1 CLR 146

**Physical Damage:**

*- Hunter v Canary Wharf* [1997] AC 655 – build up of dust – amounts to damage?

- But some things inevitable - dependant on location so physical damage fact dependent

*- McMullin v ICI Australia* (1997) 72 FCR 1

*- Rockport Pharmacy Inc v Digital Simplistics* 53 F 3d 195 (1995)

**Special Cases:**

*- Mulcahy v MoD* [1996] 2 WLR 474 – gunner injured by large gun

- Echoed in *Matthews v MoD* [2003] 2 WLR 435. Asbestos poisoning; claimed Crown Proceedings Act 1947 infringed Human Rights

*- Home Office v Dorset Yacht Company Ltd* [1970] AC 1004 (HL)

**Home Office argument in *Home Office v Dorset Yacht Company Ltd:***

**Case Citation:** *Home Office v Dorset Yacht Co Ltd*[1970] 2 All ER 294, [1970] AC 1004.

1. Virtually no authority for imposing such a duty;
2. No person can be liable for a wrong done by another who is of full age/capacity and not the servant/acting on behalf of that person; and
3. Public policy prevents any liability arising under such an action.

**Dobson v Dobson [1992] 2 SCR 753 (SSC):**

**Facts:** Cynthia Dobson, 27 weeks pregnant, was involved in a car crash. The baby, Ryan, was born that day with major defects. Cynthia’s father sued.

**Question:** Should the mother be liable for damages to fetus in a prenatal negligent act?

**Analysis:**

* Avoided first stage of *Anns*’ two stage test;
* Only concerned with public policies;
* Is this because *Anns* creates presumption of duty?
* Did it answer any questions?

**Public Policy Definition:**

General: The principles, often unwritten, on which social laws are based.

Law: The principle that injury to the public good is a basis for denying the legality of a contract or other transaction.