

# Problem questions

## Duty of care

### Key precedents

- *Altmarloch* – a territorial authority owes a duty of care in the preparation of a LIM

### Novel duty

- *Donoghue* – whether it is reasonably foreseeable that if you're careless the defendant will be harmed – a manufacturer owes a duty of care when there is no opportunity for intermediate inspection
- *Anns/ Northshore City Council* – Modern duty 'proximity and foreseeability' and then policy implications
- However, there can not be any set test and it is an assessment of the values

### 3<sup>RD</sup> Party duties

- *Dorset Yatch* – duty where it is foreseeable that if they were careless harm would be suffered at the hands of a 3<sup>rd</sup> party – the action must be highly likely to not break the chain of causation – discussion on proximity and power and control
- *Smith* – must look to foreseeability but that the injury is highly likely
  - o Goff: no general duty to prevent if so, it is very limited
    - creating a source of danger: *Haynes v Harwood*, where it is foreseeable that a third party may 'spark off the danger'
    - the fireworks example (a source of danger created on their land that could attract wrongdoers), etc.
    - When they know a third party has created a hazard eg *Goldman v Hardgrave* situation
- *Couch* (no 1)
  - o Minority – look at foreseeability and proximity, whether it's the "very kind of thing to occur"
  - o Majority
    - Must be subject of a distinct and special risk of the harm suffered because of particular vulnerability

- Particular Vulnerability was:
    - Tendency to be violent when offending
    - In need of money, worked where there were significant amounts of cash
    - Knew of the security systems - made it a target
  - Whether the *relationship* between Bell and DoC is special is measured by whether they had control over the immediate wrong doer
  - Proximity to be fair, just and reasonable: proximity = special risk, must be more than just foreseeable
- *Michael*
  - Disapproves of Majority in *Couch*
  - No CL duty just because statutory duty

### Misstatement Duty

- Does the D have a professional skill? – *Hedley Byrne* – contract like relationship
- Was the advice given based on that skill? – *Hedley Byrne*
- Does the defendant know or ought to know the purpose for which the information will be used? *Caparo*
- Will the information be used for a particular purpose? *Caparo*
- Does the Defendant know the person the person/ class relying on the info? *Hedley Byrne* – contract like relationships
- Did the plaintiff rely on the information? *Boyd Knight*
- Was the reliance reasonable? *Henry*
- Was it relied on for the purpose for which it was given? *Henry*
- *Caparo*
  - The advice is required for a purpose
  - The advisor knows (or ought to) that the advice will be communicated to the advisee
  - It is known that the advice is likely to be acted upon without independent inquiry
  - It is acted upon by the advisee to their detriment – must show they relied and sustained loss *Scott Group*
- *Hedley Byrne*
  - Must be something more than an innocent misstatement
  - Duty where it is plain that the party seeking information or advice was trusting the other to exercise such care as the circumstances

- required, where it is reasonable to do so, and whether the giver knew or ought to have known the inquired was relying on him
- Where someone possesses a special skill undertakes, to apply that skill for the assistance of another, who relies on that skill, a duty of care is owed.
- Contract like relationships are a good indication of reliance
- *Spencer on Byron*
  - If a council does not owe a duty of care to inspect, they cannot owe a duty in misstatement to report on those inspections
- *Carter*
  - Use the usual two stage approach
    - Proximity: consider foreseeability, reliance, assumption of responsibility – then policy
    - There is an assumption of responsibility when it is reasonably foreseeable that the plaintiff will rely on the information, contract like relationship
  - There must be reasonable reliance (*Carter; Henry*) it will usually not be reasonable to rely on something for something outside of the purpose of the info

## Breach

- While the question of breach is fact dependent the case law gives some guidance
- Standard of care is objective *Nettleship v Weston*
- *Blyth v Birmingham* the reasonable person considers what **has** happened in determining the standard of care
- *Watt v Hertfordshire* must consider risk against the ends being achieved (person being injured for getting to an emergency)
- Whether the risk was so small no reasonable person would have taken steps *Bolton*
- *Wagon Mound (no 2)* when there is a *Bolton* small risk it is only reasonable when there is a reason not to - eg Financial Burdon
- *Wagon Mound (no2)* Consider severity, justification, magnitude and knowledge of reasonable person in D's position
- *Tomlinson* Free will and social utility of the risk; cost to prevent
  - Contrast total free will in *Tomlinson v no free will Bolton*
- *Goldman v Hardgrave* – must consider the special circumstances of defendant (resources, ability, interests) when a the risk is 'thrust upon him'

- *Bolam* – the test for skills is the conduct of the ordinary skilled man professing to have that skill – not negligent if acted in accordance with a practice accepted as proper by a responsible body of men skilled in that art.
- *Res ipsa loquitur* – it speaks for itself eg hammer falling from building site

#### *Cook and Nettleship*

- *Cook* more or less overruled by *Nettleship*
- *Cook* allowed a special standard of care

### Causation in fact

- In fact
  - Whether "but for" the breach the damage would not have occurred
  - If the result would have been the same there is no causation *Barnett*
  - Use a balance of probabilities in determining causation in fact *Ambros*
  - When there are multiple possible causes and no way of proving, liability should be distributed by the probability it was caused by each defendant *Barker*
  - Where both A and B could have caused the negligence, both are possible defendants *Fairchild*

### Causation in law

- In law
  - Whether the breach/ damage was outside the scope of the duty *Henry*
- Duty to inform vs advise
  - Only when advising will they be liable for all consequences *Henry*

### Remoteness

- *Re Polimus* held that the limit on damages should be determined by 'directness'
- *Wagon Mound* (no1) - Causation in law should instead be determined by foreseeability because:
  - the *Polemis* test was difficult to apply, unclear what was direct/ indirect, inconsistent to apply foreseeability in duty and standard but not to remoteness.
- Kind of damage
  - 'property damage' too wide *Wagon Mound* (no 2)
  - If the injury is foreseeable it is not required that the method is foreseeable *Hughes v Lord Advocate*
- *Stephenson v Waite*
  - Personal injury cases
  - Principles of egg shell remain – will be liable if type of injury is foreseeable
  - Foreseeability is limited to the initial injury – after that, matter of causation

## Pure economic loss

- NZ courts have not minded the distinction *Sunset terraces*

## Vicarious liability

- **Vicarious liability**
  - *Christian Brothers*
    - Can compensate victim
    - **Tort committed as a result of the activity being done on behalf of the employer**
    - **Activity part of the business of the employer**
    - **Created the risk by employing person**
    - Employee under some control

## Non-delegable duties

- Two categories *Armes*
  - Independent contractor performing tasks which are hazardous
  - Duty with 3 critical characteristics
    - Antecedent relationship
    - Duty is positive duty to actively protect certain people against certain risks
    - Is by virtue a personal relationship to the defendant
    - Characteristics: assumption of the positive duty, delegation

## Contributory negligence and joint tortfeasors

- No contributory negligence in misstatement cases as could not reasonably rely if negligent *Henry*
- Law Reform Act s 17 (1)
  - (a) judgment recovered against any tortfeasor liable in respect of that damage shall not be a bar to an action against any other person who would, if sued, have been liable as a joint tortfeasor in respect of the same damage:
  - (c) any tortfeasor liable in respect of that damage may recover contribution from any other tortfeasor who is, or would if sued in time have been, liable in respect of the same damage, whether as a joint tortfeasor or otherwise, so, however, that no person shall be entitled to recover contribution under this section from any person entitled to be indemnified by him in respect of the liability in respect of which the contribution is sought.
- Contributory negligence Act 1947

- Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage:

## Essay topics/ notes

### ACC

#### Woodhouse report

##### Principles

- National interest:
  - Should protect all citizens including self employed and house wives from the burden of sudden loss due to physical incapacity
  - All injured persons should receive compensation regardless of the causes of the injuries
  - Must forward the physical and vocational recovery of these citizens while providing monetary compensation for their loss
  - Real compensation requires income related benefits for income
  - The achievement of the system will be eroded to the extent that its benefits are *delayed, inconsistent* or administered *wastefully*

##### Summary of Principles

- Community responsibility
  - Two way relationship: society benefits from working people; thus society must help people who want to work but cannot.
- Comprehensive Entitlement
  - Must give benefits to all social groups (young, working, elderly)
- Complete Rehabilitation
  - Objective must be to completely rehabilitate people in the shortest possible time
- Real compensation
  - Must cover all loss both physical and economic
- Administrative efficiency
  - Collection and distribution of funds must be done speedily,, consistently, economically and without contention

##### Conclusion

- Must have reform

##### Purpose

The purpose of this Act is to enhance the public good and reinforce the social contract represented by the first accident compensation scheme by providing for a fair and sustainable scheme for managing personal injury that has, as its overriding goals, minimising both the overall incidence of injury in the community, and the impact of injury on the community (including economic, social, and personal costs), through—

(a)

establishing as a primary function of the Corporation the promotion of measures to reduce the incidence and severity of personal injury:

(b)

providing for a framework for the collection, co-ordination, and analysis of injury-related information:

(c)

ensuring that, where injuries occur, the Corporation's primary focus should be on rehabilitation with the goal of achieving an appropriate quality of life through the provision of entitlements that restores to the maximum practicable extent a claimant's health, independence, and participation:

(d)

ensuring that, during their rehabilitation, claimants receive fair compensation for loss from injury, including fair determination of weekly compensation and, where appropriate, lump sums for permanent impairment:

(e)

ensuring positive claimant interactions with the Corporation through the development and operation of a Code of ACC Claimants' Rights:

(f)

ensuring that persons who suffered personal injuries before the commencement of this Act continue to receive entitlements where appropriate.

### **Illness and accident**

- Illness not covered because
  - Responding to the tort law system of compensation
  - *Booth* - eating the sausages is just a vehicle for getting ill

### **Cover for mental injury**

- Generally not covered though exceptions
  - Arising out of physical injury 26(1)(c)
  - By certain criminal acts 21 (sch3)
  - Work place mental injury 21B
- Defined at 27: clinically significant, tort law requires us to be generally mentally tough

### **Treatment injury**

- Purpose was to bring claims for treatment within ACC
  - But often on border of illness and accident, what if treatment not working out as well as patient had hoped

### **Summary of cover:**

- PI by accident s 20(2)(a) and (g)
- By treatment s 20(2)(b-d) (f-i)
- Work related disease or infection s20(2)(j)
- Mental injury
  - Consequence of PI s26(1)(c)
  - Criminal ss 21, 26(1)(d) sch 3
  - Work related s21B and 26(1)(DA)

### **Torts not barred by s317**

- Trespass
- Conversion
- Intentional or negligent financial loss (deceit)
- Negligent damage to property
- Defamation
- Invasion of privacy



- False Imprisonment

### Basic approach to statutory interpretation

- *Harrild* - Generally an expansive approach to ACC
  - Shouldn't undermine Social Contract by narrow interpretation

### Exemplary damages

#### Exemplary damages

Damages means compensatory damages in s317

- Aggravated damages for distress ect which are a kind of compensatory damages
  - And are thus barred by 317
- Distinction between A and X damages is less important in other CL jurisdictions
- Punitive are another kind of exemplary damages - synonymous
  - Donselaar concerned law before s 319

*Donselarr v Donselaar [1982] (NZCA)*

- Allowed exemplary damages with ACC
- COOKE J
  - Act has no punitive element - mischief it sought to resolve is
  - Exemplary damages do clearly 'arise directly from the injury'
    - *Rookes* held that C and E damages overlap
  - Court must be able to mold damages for society, as it can't use compensatory
- HELD: attacking with a hammer did not constitute exemplary damages

*Daniels v Thompson [1998] (NZCA)*

- Exemplary damages could not be brought for conduct which has been or is likely to be the subject of criminal proceedings
  - LATER s 319 reversed this where the injury is covered by the act

*A v Bottrill [2003] (NZPC)*

- Conscious recklessness and intentional harm are not only grounds
- Objective negligence is possible (overturning ca)
- Subjective usually taken but;
  - Negligence generally goes with objective term
- Not impossible for outrageous conduct despite not knowing risk
  - Hence objective is needed - more of a "never say never" approach

*Couch v A-G (no2) [2010] (NZSC)*

- CJ Elias (dissent)

- Creates an almost 'subspecies' of negligence
- Focuses on the appreciation of risk rather than the conduct of the tortfeasor
  - Despite not being part of the tort
- Majority
  - Overrules *Bottrill* (PC) - agrees with *Bottrill* (CA)
  - 317 only refer to compensatory damages
  - EX must not be seen as extra compensatory - rather it is to punish
  - Civil remedies are generally not to punish so exemplary damages should be restricted
  - Where it is not intentional the state of mind must be close to intentional.
    - Adjectives such as 'outrageous' suggest conscious wrong doing

State of mind of actor for an exemplary damage claim

- Intention to cause harm: *yes*
- - *Bottrill* said *yes* but overturn
    - Said *yes* there may be a time when exemplary damages should be made even though the person didn't appreciate the risk

Punishment is criminal not private law?

Interpretation - SHOULD interpretation exclude x damages?

- Strictly: unclear
- Mischief rule?
  - To remove the negligence compensatory claims
  - Except for exceptional claims X damages involve deliberate harms
- The courts should not give up a *tool in the legal armory*
- Useful constitutional tool to be able to be able to give damages to the victim
- Criminal law vs Tort law
  - Double jeopardy

## Negligent misstatement

- **Policy**
  - People tend to take less care in words of sometimes "off the cuff" statements are used *Hedley Byrne*
  - The potential loss and plaintiffs is almost limitless *Hedley Byrne*
    - Could be liable to some one for which there is very little relationship
  - Conflict with law of tort especially where there is no consideration
  - Causation issue
    - Would the plaintiff have acted that way even without the advice?
- **General rules**
  - An innocent but negligent misrepresentation gives no CoA, there must be something more than mere misstatement *Hedley Byrne*

- Special Relationship: where plaintiff trusted D to exercise reasonable care, was reasonable to do so and the Defendant knew (or ought to have known) that the information would be relied on *Hedley Byrne*
- By choosing to give the information with no disclaimer they accepted some responsibility *Hedley Byrne*
- Not limited to contract or fiduciary: equivalent to contract means where there is a
  - Payment for info is good indication of reliance but if not greater care in distinguishing social and professional relationships is important
- Question is whether they can set up a relationship equivalent to contract and rely on an implied undertaking to accept responsibility

## Building cases

*Anns* – gave us modern duty AND ability to sue for pure economic loss

*Murphy* – UK held that a home was a big chattel, there was no cover for pure economic, and there should be no liability for council if not for builder

*Hamlin* – NZ continued with *Anns*

*North Shore City Council v BC 188529* – held *Anns* applied to investment rentals as they could become homes

*Spencer on Byron* – SC held there was a duty on the council – units were for self-owned and hotel guests – no distinction between residential and nonresidential – distinction would be strange

*Southland Indoor Leisure Centre* – Court applied *Hamlin* to entirely non-residential - NZ continues to apply the *Anns* principles - duty of care in novel duty cases - Approach to negligent building cases - English abandoned both

- Now approach: Negligence causing damage and then compensation
  - Pure economic is not damage
- If the builder would not be liable then the council should not be liable
- NZasq
  - No distinction pure economic and damage

## Duty principles

- Shouldn't inappropriately interfere with autonomy of the defendant – generally don't hold a duty for omissions *Smith*
- Proportionate burden of liability in respect of wrong doing

- Appropriate to recognize a duty to protect a person in the position of the plaintiff
- Proposed duty should work coherently

### **Cutting across other areas**

- Defamation, contract, privacy ect
- Concurrent contract and tort liabilities can both exist and if they are inconsistent assume the parties agreed to limit the tort liability

*Henderson*

### **Pregnancy cases**