

ISSUES

1. Whether Chris is liable for failure to pack an emergency kit.
2. Whether Jimmy and Tony are liable for not getting assistance.
3. Whether the Department of Parks is liable for injury caused by the falling branch.

LAW

Negligence

Negligence connotes conduct that fails to satisfy certain standards that are expected of a reasonable person in the same circumstances. It means acting, or failing to act, in a manner that a prudent person would have acted if he was in the same situation.¹ In legal parlance, negligence can be used to either refer to a cause of action based on the common law of tort or to denote a threshold or standard of the conduct often referring to carelessness.² Articulated by the iconic House of Lords ruling in *Donoghue v Stevenson*³ where the neighbour principle was formulated, to establish negligence under common law, three basic elements must exist. These are the existence of a duty recognised by law; a breach of that duty; and damage or injury being a direct result of that breach.⁴ It is imperative to establish the existence of each of these elements.⁵ However, based on the wealth of literature and judicial pronouncements on negligence, it is evident that these elements can be unpacked and dissected to include more elements. These are causation, remoteness and the absence of a valid defence.⁶

¹ *Blyth v Birmingham Waterworks Co* (1856) 11 Ex at 784.

² Luke Meier, 'Using Tort Law to Understand the Causation Prong of Standing' (2011) 80 *Fordham Law Review* 1241.

³ [1932] AC 562.

⁴ Jenny Steele, *Tort Law: Text, Cases and Materials* (Oxford University Press, 3rd ed, 2014).

⁵ David G Owen, 'The Five Elements of Negligence' (2007) 35(4) *Hofstra Law Review* 1671.

⁶ Walker R, 'Elements of Negligence and Malpractice' (2011) 36(5) *The Nurse Practitioner* 9.

Elements of Negligence

i. Duty of Care

It is contended that the development of the law of negligence has principally been pegged on establishing circumstances that point to the presence of a duty of care.⁷ Common law requires the existence of a duty of care owed to the specific victim for negligence to be successfully invoked.⁸ There are established classes of duty of care turning on various relationships in which principles of legal responsibility are well settled.⁹ These include, but are not limited to professionals,¹⁰ proprietors and occupants of properties.¹¹ There are also those in specific relationships where there is a special vulnerability because of a degree of dependency or ceding of control hence a duty to protect arises.

In *Heaven v Pender*¹² the Lord Esher, known as Brett MR at that time, attempted to craft a general test for duty of care in cases that did not fit within any of the established cases. His Lordship, although in the minority, ruled that everyone has a duty to exercise care and skill when they ought to take cognisance of the fact that if they do not exercise care and skill, it will expose another person to a risk of harm.¹³ The law only becomes concerned with negligent conduct where a duty to be careful is imposed.¹⁴ In *Sullivan v Moody*¹⁵ it was held that a cause of action in

⁷ Supreme Court of Tasmania, *Negligence and Foreseeability: Doctrine of Law or Public Policy* (6 August 1999) <http://www.supremecourt.tas.gov.au/_data/assets/pdf_file/0003/53760/Negligence99.pdf>.

⁸ *Thomas v Quatermaine* (1887) 18 QBD 694.

⁹ *Modbury Triangle Shopping Centre Pty v Anzil* (2000) 205 CLR 254.

¹⁰ *Groom v Crocker* [1939] 1 KB 194.

¹¹ *Australian Safeway Stores Pty Ltd v Zaluzana* (1987) 162 CLR 479.

¹² (1883) 11 QBD 503 (Brett MR).

¹³ *Ibid.*

¹⁴ *Donoghue v Stevenson* [1932] AC 618-19 (Macmillan LJ).

¹⁵ (2001) 207 CLR 562.

negligence will only lie where a person fails to take reasonable care to avert foreseeable injury in cases where the law has imposed such a duty.

Following the neighbour principle enunciated in *Donoghue v Stevenson*, a person is liable for negligence if in similar circumstances a reasonable person would have anticipated the injury, and only if there is a close and direct connexion between the involved parties, also referred to as proximity.¹⁶ It was first applied in Australia by the High Court in *Grant v Australian Knitting Mills Ltd*¹⁷ where the plaintiff bought underpants manufactured by the defendant company. He wore them without washing and contracting dermatitis because of sulphur in the underpants. The court held in the plaintiff's favour. Foreseeability and proximity are the necessary foundations for establishing the presence of a duty of care.

It is contended that the neighbour principle is misleadingly simple because it does not set out the nature or scope of the duty.¹⁸ Further, owing to its reliance on reasonable foreseeability, the consequences of its application are very wide and uncertain. Accordingly, qualification of the principle became necessary. Different approaches to establishing duty have been articulated and the test has evolved over time. There is a preference for an 'incremental and salient features' approach which requires consideration of each case's peculiar facts but drawing from previous decisions.¹⁹ Therefore, factors beyond the traditional requirements of foreseeability and proximity

¹⁶ *Cooper v Hobart* [2001] 3 SCR 537.

¹⁷ [1936] AC 85.

¹⁸ Amanda Stickley and Frances McGlone, *Australian Torts Law* (Chatswood, NSW LexisNexis Butterworths, 3rd ed, 1950-2013) 134.

¹⁹ Martin Davies and Ian Malkin, *Torts* (Chatswood, NSW LexisNexis Butterworths LexisNexis, 5th ed, 2008) 196.

have to be considered before imposing a duty of care.²⁰ The totality of the circumstances involved should be the utmost consideration.²¹

Accordingly, the current test in for the existence of a duty in Australia was established in *Sullivan v Moody*.²² The court recognised that a person may be subject to several duties as long as these duties did not conflict. The test, which was affirmed in *Caltex Refineries (Qld) Pty Ltd v Stavar*²³ posited that whereas cases whose facts fall within already established categories of duty present no problems, new cases should be analysed from a perspective that interrogates the ‘salient features’ of the relationship between the involved parties or reasons which would vitiate the exercise of reasonable care. A non-exhaustive list of these salient features was laid down by the court. These include but are not limited to the foreseeability of harm, proximity or closeness of relationship, the nature of conduct and the resulting harm and policy concerns. Accordingly, to establish that a duty of care exists in novel cases, the test has been expounded and the factors for consideration expanded to take account of the varying circumstances and peculiarities of every case.

Common law does not impose a general duty to assist, act or rescue a person in danger.²⁴ Therefore, a person who has not taken part in creating a risk of either physical or emotional distress to another person does not have a duty to prevent the resulting harm.²⁵ However, the law creates a duty to act in some situations as an exception to this general rule.

²⁰ Ibid.

²¹ *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* [2004] HCA 16.

²² (2001) 207 CLR 562.

²³ (2009) 75 NSWLR 649.

²⁴ *Smith v Littlewoods Organisation Ltd* [1987] 2 AC 241.

²⁵ Peter Cooke, ‘Great Britain’ *The Good Samaritan Law Across Europe* (The Dan Legal Network, 2013) <<http://www.daneurope.org>>.

These include where a person's previous actions inadvertently create a risk of harm.²⁶ In such instances, there is a duty to avert the danger from happening, and if it does, to help the injured.²⁷ Another instance is where a person makes a gratuitous promise and the promisee relies on the strength of that promise resulting in a detriment to him.²⁸

ii. Standard of Care

Standard of care denotes the level of expectations that a person's conduct in relation to others must conform. In negligence, the standard of care adopted is objective because to determine whether a person as behaved in a negligent way, a comparison is drawn between his conduct and that of a reasonable man in a similar situation.²⁹ The reasonable person standard has been the yardstick even before the negligence as a cause of action was formulated as evidenced by its candid pronouncement in *Blyth v Birmingham Waterworks Co.*³⁰ The reasonable person has been defined in varying and colourful terms.³¹ In *Glasgow Corporation v Muir*³² the reasonable person was described as a 'reasonable man of ordinary intelligence and experience.'³³ The objective test does not allow for deliberation on a person's peculiarities.³⁴

²⁶ Saul Schwartz, Emergency Preparedness Canada, *The Legal Position of the Good Samaritan* (Ottawa: Emergency Preparedness Canada, 1987).

²⁷ John Gunther Fleming, Carolyn Sappideen and Prue Vines, *Fleming's The Law of Torts* (Thomson Reuters [Professional] Australia Limited, 10th ed, 2011)164.

²⁸ Fred R Godwin, 'Torts-Liability for Harmful Reliance on a Gratuitous Promise' (1958) 18(3) *Louisiana Law Review* 584.

²⁹ Wendy Bonython, 'The Standard of Care in Negligence: The Elderly Defendant with Dementia in Australia' (2011) 10(2) *Canberra Law Review* 119.

³⁰ (1856) 11 Ex at 784 (Alderson J).

³¹ *McGuire v Western Morning News Co Ltd* [1903] 2 KB 100, 109 {'the man on the Clapham omnibus'}; *Papatonakis v Australian Telecommunications Commission* (1985) 156 ZCLR 7, 36 {'man on the Bondi Tram'}.

³² [1943] AC 448.

³³ *Ibid* 457.

³⁴ *Vaughan v Menlove* (1837) 132 ER 490.

Nonetheless, the standard of care must be gauged according to the circumstances of each case, taking into account the relationship between those involved.³⁵ The peculiar nature of every case necessitate that various factors must be factored to establish the applicable standard of care.³⁶ Therefore, as recognised in *Imbree v McNeilly*,³⁷ there are instances where the standard of care expected of a person may vary or be more specific. In this regard, professionals will be held to a higher standard of care compared to other people. The standard expected of a professional is that of a capable and judicious member of the specific profession that a person practices.

iii. Breach of Duty

Breach of duty occurs when a person fails to achieve the standard of care that is expected by law.³⁸ Breach manifests, when there is a foreseeable risk and the concerned person, responds carelessly or recklessly in relation to that risk.³⁹ According to *Wyang Shire Council v Shirt*, a person cannot be liable for a risk that they are not aware. Liability only attaches where he had the requisite knowledge or if a person on the same position was expected to be aware of the risk.⁴⁰ The court further held that the requirement is that the risk is foreseeable, even if there is a very remote chance of its occurrence, and that a prudent person would have taken steps to avoid the danger.⁴¹ Further, it is not imperative that the chain of causation resulting in the risk of injury is foreseeable.⁴² Damage denotes an injury or harm recognised by law.⁴³ Further causation that

³⁵ *Smith v Jenkins* (1970) 119 CLR 397, 400.

³⁶ Amanda Stickley and Frances McGlone, *Australian Torts Law* (Chatswood, NSW LexisNexis Butterworths, 3rd ed, 1950-2013) 226.

³⁷ (2008) 236 CLR 510.

³⁸ Amanda Stickley and Frances McGlone, *Australian Torts Law* (Chatswood, NSW LexisNexis Butterworths, 3rd ed, 1950-2013) 135.

³⁹ *Wyang Shire Council v Shirt* (1980) 146 CLR 40.

⁴⁰ Amanda Stickley and Frances McGlone, *Australian Torts Law* (Chatswood, NSW LexisNexis Butterworths, 3rd ed, 1950-2013) 236.

⁴¹ *Wyang Shire Council v Shirt* (1980) 146 CLR 40.

⁴² *Tame v New South Wales* (2002) 211 CLR 317.

the specific conduct complained of must have been the primary cause of the injury must be proved. The injury must also be a foreseeable result of the behaviour that constituted the breach. Causation is established by applying the 'but-for' test.⁴⁴

APPLICATION

The Department of Parks (DoP) administers the National Parks. It, therefore, possesses the proprietary rights and control of the park. A park is a public place hence it is expected that it is frequented by several people. The control position that the DoP has over the national park carries with it a duty that it takes all the necessary and reasonable measures to ensure that the safety of all the people that visit the park is assured. Its proprietary interest coupled with the control over the park creates a relationship akin to the established category of duty of care at common law of a property owner towards those lawfully on his property. Therefore, a duty of care is owed to all those who choose to visit the park. The element of duty is satisfied.

The standard of care expected of the DoP is that which is expected of a prudent public body with regard to the safety of all the people within its area of control. Having established the duty and standard of care, we take cognisance of the fact that the DoP was aware of the risk of the trees dropping branches because of the outbreak of the borer weevils. At an objective standard, it is a foreseeable risk that leaving diseased trees with a tendency to break branches to stand in a park, any person within the vicinity of the falling branch may incur personal injury.

Nonetheless, the DoP did not act on the report which resulted in Chris' and Ingrid's injuries. Chris and Ingrid belong to a category of people to which the DoP owes a duty of care.

⁴³ Amanda Stickley and Frances McGlone, *Australian Torts Law* (Chatswood, NSW LexisNexis Butterworths, 3rd ed, 1950-2013)136.

⁴⁴ *Barnett v Chelsea & Kensington Hospital* [1968] 1 ALL ER 1068.

This category comprises of those people who have an interest in the Australian bush and enjoy bushwalking and it necessarily follows that they get to visit the park. The DoP owes a duty of care for their safety and wellbeing while at the park. Failure to act on the report of the possible danger posed by the trees is conduct short of the expected standard hence a breach. The DoP is liable for Ingrid's injuries.

Chris and Ingrid conclude an agreement for him to take her on a bushwalk at the park. The nature of the relationship between Chris and Ingrid is similar to that of a professional and his client. Therefore, it fulfils the requirement of duty of care by fitting into an established category. Bernard presents Chris as an experienced bushwalker who has previously worked as a tour guide. It follows that it is expected that Chris has all the knowledge and skills necessary for a professional tour guide and bushwalker. Further, he assumes responsibility for organising everything for the walk. The standard of care expected of Chris is that of a prudent tour guide in the same circumstances as him. Therefore, it is expected that Chris is aware of the safety and emergency requirements that any objective tour guide ought to know which includes carrying an emergency kit whenever he is out in the bush. Ingrid relied on him and his failure to carry the kit is conduct that is below the expected standard of care hence a breach of duty. It unnecessarily prolongs Ingrid's injuries because she could neither treat her injuries nor signal for help as soon as the accident occurred.

Jimmy and Tony had no hand in creating the risk of harm that befell Chris and Ingrid. They have no duty to act in the circumstances to help. However, the promise Ingrid that they would go and get help for them. Relying on the promise, Ingrid stops shouting for help that leads to the ranger passing without realising that there had been an accident. Ingrid's reliance on Jimmy and Tony's promise created a duty of care. Reasonable people in the circumstances would have

sought help immediately they got back to the campsite. Failure to do so is, therefore, conduct short of the objective standard hence a breach of duty of care that further prolonged Ingrid's injuries.

CONCLUSION

Ingrid can sustain a cause of action in negligence against the Department of Parks, Chris, Jimmy and Tony. They all had a duty of care towards her but their conduct fell below the expected standard resulting in injury to her.

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