

Institution

Elements of the Tort of Negligence

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Introduction

This paper is an application of the general principles of negligence as developed through the common law of tort to a set of facts that calls to question the use of toxic substances by the Australian Defence Force (ADF) on Oakey Base. The use of these toxins subsequently contaminated the groundwater around the area to the detriment of local residents. In arguing for those residing around the base, the paper shows that, on the facts, all elements that must be present for a cause of action in negligence to arise are satisfied. Therefore, the ADF is liable for negligently using toxic substances that resulted in physical injury, both personal and proprietary, to the residents of the areas adjacent to the base.

Duty of Care

The fundamental foundation for the growth of the law of negligence has been the premise that circumstances that prove the existence of a duty of care must be established in all cases (Supreme Court of Tasmania, 1999, p.1). Therefore, the law's concern in negligence is only aroused where there is an imposed duty to be careful (*Donoghue v Stevenson*, 1932). Prior to *Donoghue*, a claim had to fit into the existing categories of relationships that had been established and recognized by law as giving rise to a duty of care (*Modbury Triangle Shopping Centre Pty v Anzil*, 2000). Included in these established categories were proprietors and occupants of land and real property. Those with proprietary control are in a category in which a duty of care was historically recognized to exist in relation to those they allow onto their property. The effect of the decision of the court in *Burnie Port Authority v General Jones Pty Ltd* (1994) on proprietors and controllers of property was that whenever they allow dangerous substances and activities to be introduced onto their land, a duty of care to take reasonable

measures to ensure that the dangerous substances or activities do not intrude into adjacent properties.

A general principle of the duty of care was first enunciated in *Heaven v Pender* (1883) in an attempt by Brett MR to craft a general principle applicable to situations that were not compatible with any of the prior established categories. Although his fellow Lords did not agree, his Lordship pronounced a general principle of duty of care that requires everyone to exercise a duty of care and skill whenever they find themselves in a situation in which they realize that if they do not exercise an appropriate level of care and skill in their conduct, another person may end up suffering injury or loss (Vines 2011, p. 97).

His Lordship's reasoning was affirmed in *Donoghue* by the formulation of the neighbor principle. Accordingly, a person is liable for negligence if an objective person in a similar situation would have anticipated or foreseen the harm, and only if a close and direct link can be established between the defendant's conduct and the injury occasioned to the plaintiff (*Cooper v Hobart*, 2001). These are the foreseeability and proximity elements. Foreseeability and proximity are the necessary foundations for establishing the presence of a duty of care. Since the rule in *Donoghue*, the establishment of a duty of care is now premised on general foreseeability. This requirement has been maintained even in the face of statutory reform of the duty of care element by the *Civil Liability Act of 2002*.

The Act provides that a claim of negligence cannot exist unless the involved risk of foreseeable; the anticipated risk was 'not insignificant'; and that a reasonable person in the same circumstances would have taken precautions. Foreseeability in this context means that the risk involved was one that was or ought to have been in the defendant's knowledge (*Civil Liability*

Act, 2002, s. 5B (1)). The provision further lays down some factors that ought to be considered in making the determination whether a reasonable person in similar circumstances would have taken precautions against an anticipated risk of harm.

On the facts, ADF is in possession and in control of the land that makes up Oakey Base. By virtue of this proprietary control over the land, ADF fits into one of the historically established categories that were recognized as giving rise to a duty of care; that of proprietors or occupiers of land. Further, following the decision in *Burnie Port Authority v General Jones Pty Ltd* (1994), it necessarily follows that for allowing PFC's on the base, a duty of care arose that required ADF to take all necessary and reasonable measures to ensure that these toxins do not escape and occasion harm to adjacent land owners. Adopting the foreseeability test that was developed in *Donoghue* and adopted by the *Civil Liability Act* yields a similar result. It is a foreseeable risk allowing toxic substances on land may result in their penetration into the eventual soil contamination of groundwater. Simply allowing these toxins on land is a foreseeable risk that a reasonable person would have taken measures to avert. Therefore, the requirement of duty is established.

Breach of Duty

Having established that a duty of care exists, it now becomes imperative to prove that there has been a breach of that duty for a claim of negligence to suffice. Breach of duty arises when a person on whom a duty of care has been imposed fails to conduct himself in a way that satisfies the standard of care expected of a reasonable person (Stickley and McGlone, 2013, p. 234). A breach of duty occurs when, although a risk is foreseeable, the involved person does not respond appropriately because of carelessness or recklessness hence his conduct does not meet

the minimum threshold or standard of care that is expected of a reasonable person in the same circumstances (*Wyong Shire Council v Shirt*, 1979). The court further concluded that a person cannot be in breach of duty that he does not know about. Liability for negligence can only arise where the defendant possessed the requisite knowledge or if an objective person in the same situation is expected to have the necessary knowledge (Stickley and McGlone, 2013, p.312).

The standard of care signifies a level of expectations that a person's behavior towards other people must conform. The standard of care adopted in cases of negligence is an objective one because to establish whether the defendant's conducted amount to negligence, the impugned behavior is compared to that of an objective person in the same circumstances (Bonython, 2011, p. 119). In *Glasgow Corporation v Muir* (1943) the reasonable person was described as a 'reasonable man of ordinary intelligence and experience.' The objective standard does not allow for the consideration of the peculiarities that influence the actions of a person in a particular situation (*Vaughan v Menlove*, 1837).

We have established that ADF's control over the base creates an obligation on its part to ensure that any dangerous substances or activities on the base do not have an adverse impact on the adjoining lands. Further, it is expected that, on an objective standard, a user of a certain substance must be aware of its qualities, advantages and possible adverse effects. Therefore, as a user of PFC's ADF must have known or ought to have known of their qualities and the potential harm that they could cause to the environment. With this knowledge, an objective person would have taken necessary measures to ensure that these toxins do not escape or penetrate into the soil. For allowing the toxins to be used at the base and not taking all the necessary steps to ensure that the PFC's did not escape into the environment by penetrating the soil surface, ADF's actions are

short of the expected standard of care hence constitute a breach of the duty imposed on them to ensure that the dangerous substances on their land does not escape to other adjacent lands.

Harm

Harm denotes the damage or injury suffered by the plaintiff as a result of the defendant's conduct that is recognized by law (Stickley and McGlone, 2013, p.519). The objective of the law of negligence is to compensate a person upon whom harm has been wrongly inflicted (Owen, 2007, p.1685). The law of negligence protects a person's interests by providing recourse for the physical harm that has been improperly inflicted. This harm can either be personal physical injury, death or damage to property (Owen, 2007, p. 1686). A group of people residing around the base are suffering from various diseases that have been noted as possible consequences of ingesting PFC's that have contaminated the groundwater. Further, anecdotal evidence shows that the prices of land adjacent to the base whose groundwater has been contaminated have dropped. Therefore, the breach of the duty of care imposed on ADF has resulted in physical harm to the residents adjacent to the base.

Causation

Also known as the cause-in effect, the element of causation requires that a claimant must prove that the specific actions complained of must be the direct and principal cause of the injury that he has experienced. Therefore, the element requires that a cause-in-effect relationship between the negligent act and the resultant harm to be established. Causation makes up the link or 'actual connection' between the defendant's conduct and the claimant's injury. Causation is established by applying the 'but-for' test (*Barnett v Chelsea & Kensington Hospital*, 1968). Further, the injury must be a foreseeable consequence of the conduct that founded the breach.

The *Civil Liability Act* provides for elements that must be present for a determination of negligence to be made. First, the conduct that is said to be negligent must be a 'necessary condition' for harm to occur; and second, it must be appropriate for the negligent person's scope of liability to extend to the particular harm occasioned in that situation.

On the facts, contaminated groundwater has been detected several kilometers to the west and southwest of the base. It is also clear that the spread of these toxins in groundwater is far beyond the base. Therefore, it necessarily follows that all the people residing within the radius in which the effect of these toxins has reached are directly affected. Therefore, it is more likely than not that, first, the diminishing in the value of these properties is a direct result of the contamination of groundwater. Second, having been exposed to the toxins in groundwater, all those within the scope of the contamination are more likely to incur personal injury in the form of various diseases that are attributable to PFC's. Nonetheless, the plaintiff's side must be aware of the possible difficulties in proving causation in light of the fact that the use of PFC's by ADF was a continuing act between 1970 and 2005. Accordingly, the level of exposure and degree of damages suffered by the various claimants will necessarily vary. Further, the possibility of other intervening factors over that period may also cast doubt on the element of causation.

Defence and Policy Questions

The facts do not reveal possible defences applicable to the situation. Although ADF may claim that the fire drills were lawful or permitted activities. However, one policy consideration that the set of facts raises, that of environmental preservation and sustainability, defeats the permitted activity defence. This is because environmental considerations must be placed above the need to conduct fire drills using toxic substances. In any cases, alternatives to these toxic

substances could have been used instead. Another policy concern raised by the set of facts relates to establishing the element of causation in a situation with multiple claimants whose extent or degree of damages incurred is different.

Conclusion

We have established that a duty of care arose when the ADF allowed toxic substances onto the land that is under its control. The duty of care required that, having brought a dangerous substance onto their land, they had the obligation to put all necessary measures in place to ensure that the dangerous toxic substances do not escape from their property to the prejudice of adjacent landowners. ADF has breached this duty of care because they allowed the toxic substances to penetrate the soil and contaminate the groundwater in the area. The breach of duty has resulted in harm to the residents living around the base. The toxins have had an impact on the people's health as well as on the value of the property. This harm is a direct result of the failure by the ADF to contain the PCF's in their land. Therefore, all elements necessary to establish a claim of negligence have been satisfied.

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