



## Example of the Development of Court Made Law

The development of negligence, in particular, the duty of care and native title are examples of precedents at work.

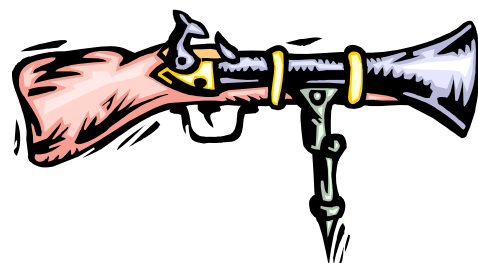
### Development of the Law of Negligence

The development of Negligence in the last hundred and fifty years provides a good illustration of the role of analogy in the case law process. The law gradually accepted a category of things dangerous in themselves.

During the 19<sup>th</sup> Century, manufactures had no liability for the goods they made. The liability of manufactures for the losses suffered by the consumers took several decades to be established.

#### Case 1: *Langridge v Levy* (1837) – The exploding gun (affirming the status quo)

A man purchased a gun from a gun maker, warranted to be safe. The man's son used the gun and one of the barrels exploded, resulting in the mutilation of the son's hand.



As the son did not buy the gun there was no remedy in contract law. The court was asked to consider if the son could sue the gun seller or manufacturer, and if so what for.

Court said he could not sue:

- In contract he did not buy the gun
- For negligence because it did not exist in law, (and court was reluctant to change the existing law).

He could however sue for fraud. The gun was warranted to be safe, when in fact it was not. The seller knowingly made a false statement.

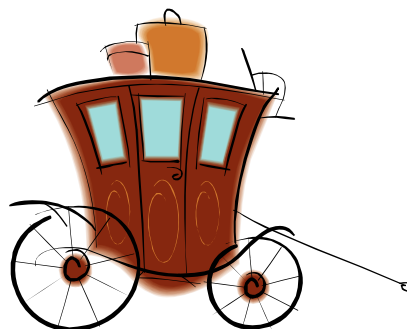
#### Case 2: *Winterbottom v Wright* (1842) – The broken axel (limited duty considered)

Defendant had contracted with the Post Master General to put a coach in good repair. The driver of the coach was injured when the axel broke and he was thrown from the coach. The court was asked to consider if the driver had any claim against the Post Master General or the Coach Repairer.

The court ruled the driver had no action against either the Post Master General or the Coach Repairer for breach of contract. The court also said that they could not consider negligence because the contract was between the Post Master General and the Coach Repairer.

Lord Aitken said:

*“The duty of the defendant under the contract with the Postmaster General could only have involved such direct relations with the servant of the persons whom the Postmaster General employed to drive the*



coach as would give rise to a duty of care owed to such servant.”

This was a step towards the concept of negligence.

**Case 3: *George v Skivington* (1896) – Negligently manufactured Hair-wash**

A man brought hair-wash from the seller/manufacturer for use by his wife. His wife suffered hair-loss and a scalp disorder. As his wife was not a party to the contract she could not make a claim under the contract. *Although the court did say that the duty under the contract should extend to those whom the seller knew would be using the product.*

Plaintiff successful because the seller/manufacturer knew the product was negligently made and was going to be used by someone other than the purchaser.

The judge substituted the word negligence for fraud and maintained that the circumstances were close enough to *Langridge v Levy* to follow the decision in that case.

**Case 4: *Heaven v Pender* (1883) – Enter at your own risk (reasonable foreseeability)**

A ship's painter was injured when a platform slung over the side of the ship which he was standing collapsed. The platform was faulty. The painter was employed by Gray that had been contracted to do the painting by the ship's owner to paint the ship. Gray had then entered into a contract with Pender the dock owner to supply the platform.

The court of Appeal was asked to consider if the defendant (Pender) owed a duty of care to a person who was to use the platform. The court ruled that a duty of care was owed to the person who was to use the platform, especially as it was during his employment.

Court went further saying as *obiter dictum*: “*It is undoubted, however, that there may be the obligation of such a duty from one person to another although there is no contract between them with regard to such duty.*”

**Case 5: *Donoghue v Stevenson* (1932) – The snail in the bottle (duty of care created)**

Donoghue and her friend stopped for a drink at a café. The friend ordered the drinks and paid for them. The drink, ginger beer was supplied in a dark opaque bottle. Donoghue filled her glass and drank some of the contents. As she poured the rest of the contents out of the bottle a partially decomposed snail fell out of the bottle into the glass. Donoghue became very ill, suffering nausea, gastro-enteritis and shock. She sued the manufacturer for damages in negligence.



Lord Atkin applied a new rule of law to this case: “The duty of care”. Stating:

“*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 - the person who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being to be affected when I am directing my mind to the acts or omissions which are called in question.*”

The law placed on the manufacturer a direct duty of care to the

consumer, not just the purchaser, but the ultimate consumer – the person for whom the goods are intended. Third parties now had the right to sue if it was breached.

### So how did Australia get the Law of Negligence?

#### Case 6: *Grant v Australian Knitting Mills (1936)* – Itchy Undies (duty extended)

The concepts of *D v S* were further expanded in *Grant v AKM*. In this case the manufacturers failed to remove a chemical irritant from their woollen underwear. Grant upon wearing the undies contracted dermatitis. He then sued *AKM* for damages.

The Court used *Donoghue* as a **persuasive precedent** and expanded the legal principles established in *Donoghue* to include all manufacturers. They also stated that for an action in negligence to be successful it must be shown that:

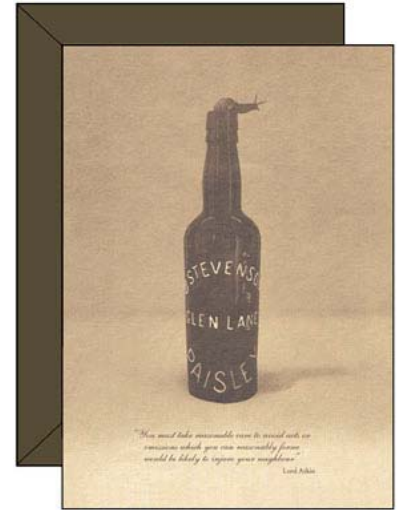
- There was a duty of care owed by the defendant
- There was a breach of the duty owed, and
- Damage was suffered as a result of the breach.

Each of the three aspects must be proved before a claim for negligence will be successful. The duty to take care must be owed to the consumer (the ultimate user), the defendant (manufacturer) must in some way fail to observe that duty, and damage must be suffered (which may be to the person or to the person's property).

Once the law of negligence was established, it was possible to interpret it to include any type of goods. The law of negligence could be expanded to apply to many other situations.

E.g. *L Shaddock & Associates Pty Ltd v Parramatta City Council (1981)* – provision of negligent advice that is relied on in the ordinary course of business.

*Hedley Byrne v Heller (1963)* the principles of *Donoghue v Stevenson* were extended to include liability for providing information and advice. In this case a banker was asked by a creditor to provide information about the credit worthiness of another person. The banker provided the information stating that the individual in question had a good credit rating. On the basis of this information credit was given. However the loan was not repaid and the information supplied by the banker was found to be incorrect. The creditor sued the banker but was unsuccessful. Although the court agreed that a duty of care was owed, the banker had clearly stated that the advice given was 'without responsibility on the part of the bank or its officials'. The court found in favour of the banker. The court stated if the banker had not made the disclaimer, the banker would have been liable.



### ***Harrinton v Stephens***

In *Harrinton v Stephens*, the High Court considered reproductive rights from the perspective of an unborn child. The court was called upon to decide whether a child born with severe congenital defects, who would have been aborted but for medical negligence, has a right of action against the medical practitioner, a cause of action which has become known as an action for wrongful life.

An agreed statement of facts was prepared for the Supreme Court. The questions put to the court were:

(a) If the defendant failed to exercise reasonable care in his management of the plaintiff's mother and, but for the failure the plaintiff's mother would have obtained a lawful termination of the pregnancy, and as a consequence the plaintiff would not have been born, does the plaintiff have a cause of action against the defendant?

(b) If so, what categories of damages are available?

### **'ordinary principles of negligence law'**

The traditional approach, espoused by Atkin LJ in *Donoghue v Stevenson*, views a **duty of care** as arising out of some relationship between the two parties, rather than by reference to a specific act or damage. In this case, a finding of negligence requires not only a finding that a child with Alexia Harrinton's disabilities would be better off if they had never been born, but also requires the court to attribute a monetary value to their life. This is a finding with which, as Spigelman CJ noted in the Court of Appeal, many people in the community would feel uncomfortable. The moral discomfort with a court adopting this position is not quelled by Kirby J's statement that 'law suits are not about love or family but about money'.