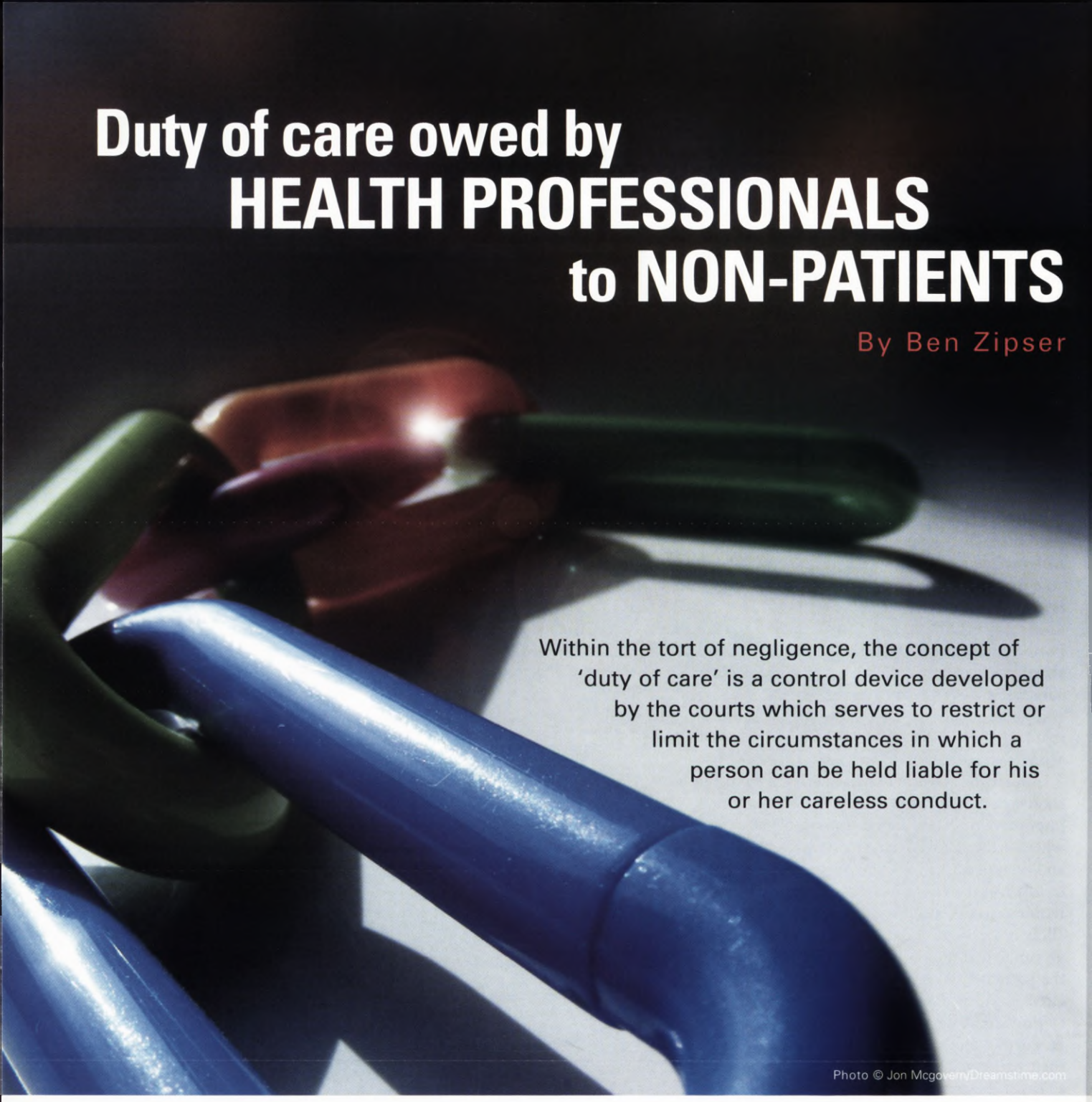
Duty of care owed by HEALTH PROFESSIONALS to NON-PATIENTS

By Ben Zipser



Within the tort of negligence, the concept of 'duty of care' is a control device developed by the courts which serves to restrict or limit the circumstances in which a person can be held liable for his or her careless conduct.

A person (A) cannot be liable to another (B) for his or her careless conduct that causes injury to B unless A owes B a duty of care. Reasonable foreseeability of injury is a necessary condition for the existence of a duty of care. For some categories of relationships between A and B, reasonable foreseeability of injury is sufficient to establish a duty of care owed by A to B. However, for other categories of relationships, an additional factor or connection is required between A and B in order for a duty of care to arise. For some of these latter categories, the law has settled on the additional factor or connection, while for others, the additional factor or connection remains unclear.

In the context of health professionals (as for any other group of professionals):

1. a health professional always owes a duty of care to a patient/client; and
2. in limited circumstances, a health professional may owe a duty of care to a person other than the patient or client.

This article considers the circumstances in which a health professional owes a duty of care to persons other than the patient. The circumstances involve the application of general principles, applicable to duty of care questions for all

professional groups, to categories of cases involving health professionals. It is useful first to consider general principles, and then their application to categories of cases involving health professionals.

GENERAL PRINCIPLES APPLICABLE TO ALL PROFESSIONAL GROUPS

Whether a professional owes a duty of care to a third party requires a consideration of four matters.

The first matter is the nature of the injury suffered by the plaintiff. Where the plaintiff has suffered physical injury or property damage, and the injury or loss is caused by an act of the defendant, 'reasonable foreseeability of such injury will commonly suffice to establish that the facts fall into a category which has already been recognised as involving a relationship of proximity between the parties with respect to such an act'.[1] However, where the plaintiff has suffered mental injury or pure or mere economic loss, there must be both reasonable foreseeability of injury and something more in order for a duty of care to arise.

The second matter is whether the plaintiff's injury or loss was caused by an act (or, alternatively, an omission) of the defendant. Where the plaintiff's injury or loss was caused by *an act* of the defendant, again, 'reasonable foreseeability of such injury will commonly suffice to establish that the facts fall into a category which has already been recognised as involving a relationship of proximity between the parties with respect to such an act'.[2] However, where the plaintiff's injury or loss was caused by *an omission* of the defendant, something more than reasonable foreseeability of the injury or loss may be needed in order for a duty of care to arise.

The third matter is whether the plaintiff's injury or loss was reasonably foreseeable. The proper question is not what the defendant could have foreseen, but what a reasonable person in the defendant's position would have foreseen.[3] In the context of professional negligence claims, injury or loss to a client or patient as a result of careless conduct by the professional is nearly always foreseeable to a person in the professional's position. In many cases, injury or loss to a third party will also be foreseeable.

The fourth matter is as follows. As stated above, in cases other than those in which an act of the defendant causes physical injury or property damage to the plaintiff, something more than reasonable foreseeability of the injury or loss is usually required in order for the defendant to owe the plaintiff a duty of care. Recent judgments of the High Court of Australia dealing with the question of when a duty of care exists have sought to identify salient features or significant factors in the relationship between the plaintiff and defendant that either militate in favour of, or against, the existence of a duty of care.

Four factors militate in favour of the existence of a duty of care:

1. The vulnerability of the plaintiff to harm from the defendant's conduct may be a prerequisite in cases involving pure economic loss: see *Perre v Apand*.[4] Vulnerability 'is to be understood as a reference to the plaintiff's inability to protect itself from the consequences of a defendant's want of reasonable care'.[5]
2. Where the defendant is in a position of control over the risk of injury to the plaintiff, this factor favours the existence of a duty of care.[6]
3. 'Reliance' and 'assumption of responsibility' are relevant to the existence of a duty of care, particularly in cases involving negligent misstatement. In *San Sebastian Pty Ltd v The Minister*, Gibbs CJ, Mason, Wilson and Dawson JJ stated:

   > 'When the economic loss results from negligent misstatement, the element of reliance plays a prominent part in the ascertainment of a relationship of proximity between the plaintiff and the defendant, and therefore in the ascertainment of a duty of care …'[7]

4. A fourth factor is the degree of foreseeability of harm.[8]

Four factors that militate against recognition of a duty of care are as follows:

1. One factor is the law's concern to avoid the imposition of liability 'in an indeterminate amount for an indeterminate time to an indeterminate class'.[9]
2. A second factor is the need to avoid imposing unreasonable burdens on the freedom of individuals to protect or pursue their own legitimate social and business interests without the need to be concerned with other persons' interests.[10]
3. A third factor is the need to avoid imposing incompatible or conflicting duties on a person.[11]

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4. A fourth factor is that the law of negligence should not be extended such that it would 'cut across other legal principles'[12] or 'occasion incompatibility with other areas of the law'.[13]

APPLICATION OF GENERAL PRINCIPLES TO CATEGORIES OF CASES INVOLVING HEALTH PROFESSIONALS

Whether duty of care owed to child not yet conceived

A health professional treating a patient may owe a duty of care to a future child of the patient not conceived at the time of treatment.[14]

The facts of *X & Y v Pal* assist in understanding the ratio. In January 1973, the plaintiff mother became pregnant and in March 1973 she commenced seeing the defendant, Dr Pal, an obstetrician and gynaecologist. At the time, the plaintiff mother was suffering from syphilis, although she was unaware of that fact. Prior to her confinement, Dr Pal submitted the plaintiff mother for a number of tests, but not for syphilis. The syphilis remained undetected. In October 1973, the plaintiff mother gave birth to a child who died shortly afterwards. In mid-1974, the plaintiff, now under the treatment of a different gynaecologist, became pregnant again. Again, she was submitted for a number of tests, but not for syphilis. The syphilis remained undetected. In March 1975, the plaintiff child was born. The plaintiff child suffered from physical abnormalities and mental retardation. It was common ground that if Dr Pal had screened the plaintiff mother for syphilis in 1973, the plaintiff child would not have been born with some of the abnormalities from which she suffered.

A question before the trial judge and in the Court of Appeal was whether Dr Pal owed the plaintiff child a duty of care at the time he treated the plaintiff mother, even though the plaintiff child was not conceived at the time of treatment. Clarke JA in the Court of Appeal stated (at 41):

> 'In principle therefore it should be accepted that a person may be subjected to a duty of care to a child who was neither born nor conceived at the time of his careless acts or omissions such that he may be found liable in damages to that child. Whether or not that duty will arise depends upon whether there is a relevant relationship between the careless person and the class of persons of whom the child is one.'

Clarke JA concluded (at 44) that Dr Pal owed a duty of care to the plaintiff child. The reasons were that injury to the plaintiff child was foreseeable to Dr Pal if he did not exercise due care in treating the plaintiff mother; there was a consistency between Dr Pal's obligations to the plaintiff mother and his obligations to the plaintiff child; the plaintiff child was vulnerable to harm from Dr Pal; Dr Pal assumed the responsibility of exercising due care in the treatment of his patient; and the patient relied upon him to administer that treatment with due care.

Other members of the Court of Appeal came to the same conclusion.

Whether duty of care owed to foetus

There are cases where a health professional carelessly causes an injury to a foetus, resulting in an infant suffering an abnormality or disability. A question is whether the health professional owes the infant a duty of care in respect of the abnormality or disability. The answer is usually 'yes'.[15]

There are other cases where a health professional carelessly fails to detect an abnormality in a foetus where, had the abnormality been detected and the mother informed, the mother would have terminated the pregnancy and the infant would not have been born with the abnormality or disability caused by the abnormality. A question is whether the health professional owes the infant a duty of care in respect of being born with the abnormality or disability. The answer is 'no'.[16]

The facts of *Harriton v Stephens* assist in understanding the ratio. In August 1980, a pregnant woman consulted the defendant doctor, and told him that she may be pregnant and may have rubella. The woman was aware that rubella in early pregnancy could produce congenital abnormalities in an unborn child. The defendant doctor arranged for the woman to have a blood test to determine whether she was suffering from rubella. The blood test recorded that the woman was pregnant and had rubella. However, the defendant doctor carelessly told the woman that she did not have rubella. The woman subsequently gave birth to the plaintiff child who had serious congenital abnormalities caused by rubella, including blindness and mental retardation. If the defendant doctor had told the woman at the time of the blood test that she was suffering from rubella, she would have obtained a lawful termination of pregnancy. Unlike the facts in *X & Y v Pal*, in *Harriton v Stephens* there was no act or omission of the defendant medical practitioner that caused damage to the foetus. Hence, the question was not whether the defendant medical practitioner owed a duty of care in respect of physical injury caused by the medical practitioner. Instead, the question was whether the defendant medical practitioner owed a duty of care in respect of her being born. The High Court said 'no'. Reasons were that any duty of care owed by the medical practitioner to the foetus may be incompatible with the duty of care owed by the medical practitioner to the mother; recognition of a duty of care owed by the medical practitioner to the foetus would impinge on the freedom and autonomy of the mother and may create a 'conflict between the interests of mother and child'; and recognition of a duty of care 'has the capacity to introduce conflict … into the body of relevant legal principles'.[17]

Whether duty of care owed to contact of patient

Where a health professional treats a patient in respect of a transmittable disease, the health professional may owe a duty of care to a contact of the patient in respect of the disease.[18] In *BT v Oei*, the defendant, Dr Oei, commenced treating AT in November 1991. In about April 1992, AT commenced a relationship with the plaintiff BT. In March 1994, BT was diagnosed as HIV positive. She became HIV positive as a result of sexual contact with AT. She sued Dr Oei for negligence. She claimed that Dr Oei owed her a duty of care in which the content of the duty was to diagnose AT's

HIV infection and give proper counselling and advice to AT as to the need for an HIV test. Bell J concluded (at [98]) that Dr Oei owed BT a duty of care. Factors supporting this conclusion included that 'there is no conflict between the duty owed by the defendant to AT and BT as the two are coincident', 'it was reasonably foreseeable that AT, if HIV positive, would transmit the virus to a sexual partner', and 'failure to diagnose and adequately counsel AT to undertake an HIV antibody test exposed AT's sexual partner to the real risk of contracting a fatal disease'.

Whether duty of care owed to non-patient requiring immediate medical attention

Does a health professional owe a duty of care to a person who is not a patient, but who requires immediate medical attention? The usual answer is 'no'. In *Lowns v Wood*,[19] the Court of Appeal approved the following statement of principle by the trial judge:

> 'In general the common law does not impose a duty to assist a person in peril even where it is foreseeable that the consequences of a failure to assist will be the injury or death of the person imperilled … It has been held in other common law jurisdictions that a doctor is under no duty to attend upon a person who is sick, even in an emergency, if that person is one to whom the doctor has not and never has been in a professional relationship of doctor and patient.'

However, a majority of the Court of Appeal held that, in the particular circumstances of the case before it, the defendant Dr Lowns owed a duty of care to the plaintiff Patrick Woods, a young boy who was not and had never been a patient of Dr Lowns, but who required immediate medical attention.

Whether duty of care owed to non-patient in respect of psychiatric injury

Where a health professional treats a patient and it is foreseeable to a person in the position of the health professional that a family member of the patient or other person may suffer a recognisable psychiatric injury as a result of carelessness by the health professional, the health professional may owe a duty of care to the family member or other person in respect of the recognisable psychiatric injury.[20]

Whether duty of care owed to non-patient in respect of non-economic loss

Where a health professional treats a patient, the circumstances in which the health professional will owe a duty of care to a person associated with the patient in respect of pure economic loss are very limited.[21]

CONCLUSION

There are a variety of circumstances in which a health professional may owe a duty of care to persons other than the patient. This article has identified some of the circumstances, and sought to explain how the circumstances involve the application of general principles applicable to duty of care questions for all professional groups. ■

Notes: **1** *Bryan v Maloney* (1995) 182 CLR 609 at 619. **2** *Ibid.* **3** See, for example, *Chapman v Hearse* (1961) 106 CLR 112. **4** (1999) 198 CLR 180 at 194, 225 and 289. **5** *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* (2004) 216 CLR 515 at [23]. **6** See *Perre v Apand* (1999) 198 CLR 180 at 195, 201 and 259; and *Gifford v Strang Patrick Stevedoring Pty Ltd* (2003) 214 CLR 269 at [90]. **7** (1986) 162 CLR 341 at 355. **8** See *Perre v Apand* (1999) 198 CLR 180 at 194. **9** *Bryan v Maloney* (1995) 182 CLR 609 at 618; and *Perre v Apand* (1999) 198 CLR 180 at 199 and 221. **10** See *Perre v Apand* (1999) 198 CLR 180 at 219; and *Bryan v Maloney* (1995) 182 CLR 609 at 618. **11** See *Sullivan v Moody* (2001) 207 CLR 562 at [55] and *Harriton v Stephens* (2006) 226 CLR 52 at [242]-[250]. **12** *Sullivan v Moody* (2001) 207 CLR 562 at [53]-[54]. **13** *Harriton v Stephens* (2006) 226 CLR 52 at [262]. **14** *X & Y v Pal* (1991) 23 NSWLR 26. **15** *Ibid.* **16** See *Harriton v Stephens* (2006) 226 CLR 52. **17** At [248]-[250]. **18** *BT v Oei* [1999] NSWSC 1082. **19** NSW Court of Appeal, 5 February 1996. **20** *Tame v New South Wales* (2002) 211 CLR 317; *O'Leary v Oolong Aboriginal Corporation Inc* (2004) Aust Torts Reports 81-747. **21** *AAA v BBB* [2005] WASC 139.

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