

# APPENDIX 48.12

## *New Zealand Legislation: Acts*

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### **173 Power of entry in cases of emergency**

- (1) A local authority may, for the purpose of doing anything that it is authorised to do under this Act or any other enactment, enter occupied land or buildings without giving prior notice, if—
- (a) there is a sudden emergency causing or likely to cause—
    - (i) loss of life or injury to a person; or
    - (ii) damage to property; or
    - (iii) damage to the environment; or
  - (b) there is danger to any works or adjoining property.
- (2) If a local authority exercises the power in subsection (1), it must, as soon as practicable after doing so, inform the occupier and, if the occupier is not the owner, the owner of the land or building.

Compare: 1974 No 66 s 708A(3)

# APPENDIX 48.13

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### **175 Power to recover for damage by wilful or negligent behaviour**

A person who wilfully or negligently destroys, damages, stops, obstructs, or otherwise interferes with any works or property owned, constructed, acquired, or used by a local authority is liable for, as the case may be,—

- (a) the amount of the destruction or damage; or
- (b) the cost incurred by the local authority in removing the stoppage or obstruction; or
- (c) any loss or expenses incurred by the local authority by the stoppage or obstruction or interference.

Compare: 1974 No 66 s 695

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### Local Government Act 2002 No 84 (as at 01 December 2009), Public Act

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#### Act by section

**Contents > Part 8 Regulatory, enforcement, and coercive powers of local authorities > Subpart 3—Powers in relation to private land**

#### 191 Local authority not authorised to create nuisance

This subpart does not entitle a local authority—

- to create a nuisance; or
- to deprive the Crown or any person of any right or remedy the Crown or the person would otherwise have against the local authority or any other person in respect of any nuisance.

Compare: 1974 No 66 s 247H

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# APPENDIX 48.14

# Duty of care

From Wikipedia, the free encyclopedia

In tort law, a **duty of care** is a legal obligation imposed on an individual requiring that they adhere to a standard of reasonable care while performing any acts that could foreseeably harm others. It is the first element that must be established to proceed with an action in negligence. The plaintiff must be able to articulate a duty of care imposed by law which the defendant has breached. In turn, breaching a duty may subject an individual to liability in tort. The duty of care may be imposed *by operation of law* between individuals with no *current* direct relationship (familial or contractual or otherwise), but eventually become related in some manner, as defined by common law (meaning case law).

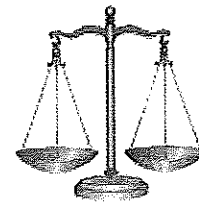
Duty of care may be considered a formalization of the social contract, the implicit responsibilities held by individuals towards others within society. It is not a requirement that a duty of care be defined by law, though it will often develop through the jurisprudence of common law.

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- 1 Development of the general duty of care
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- 5 Particular types of cases under which the duty usually exists
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## Development of the *general* duty of care

At common law, duties were formerly limited to those with whom one was in privity one way or another, as exemplified by cases like *Winterbottom v. Wright* (1842). In the early 20th century, judges began to recognize that the cold realities of the Second Industrial Revolution (in which end users were frequently several parties removed



## Tort law

Part of the common law series

### Intentional torts

Assault • Battery  
False imprisonment  
Intentional infliction of emotional distress (IIED)

### Property torts

Trespass (land • chattels)  
Conversion  
Detinue • Replevin • Trover

### Defenses

Consent • Necessity  
Defense of: (Self • Others • Property)

### Negligence

**Duty of care** • Standard of care  
Proximate cause • Res ipsa loquitur  
Calculus of negligence  
Rescue doctrine • Duty to rescue

### *Specific types*

Negligent infliction of emotional distress (NIED)  
Employment-related • Entrustment  
Malpractice (legal • medical)

### Liability torts

Product liability  
Ultrahazardous activity

### Nuisance

Public nuisance  
*Rylands v. Fletcher*

### Dignitary torts

## United Kingdom

*Main article: Duty of care in English law*

The leading judicial test for a duty of care in the United Kingdom is found in the judgments of *Caparo Industries plc v Dickman*,<sup>[1]</sup> in which the House of Lords set out the following three-part test:

- Harm must be a "reasonably foreseeable" result of the defendant's conduct;
- A relationship of "proximity" between the defendant and the claimant;
- It must be "fair, just and reasonable" to impose liability.

## United States

Because each of the 50 U.S. states is a separate sovereign free to develop its own tort law under the Tenth Amendment, and because *Erie Railroad Co. v. Tompkins* (1938) ruled that there is no general federal common law (thus implying no general federal tort law), there are several tests for finding a duty of care in United States tort law.

### Foreseeability test

In many states, like Florida and Massachusetts, the *only* test is whether the harm to the plaintiff from the defendant's actions was foreseeable.<sup>[2][3]</sup>

The Supreme Court of California has sharply criticized the idea that foreseeability, standing alone, constitutes an adequate basis on which to rest the duty of care: "Experience has shown that . . . there are clear judicial days on which a court can foresee forever and thus determine liability but none on which that foresight alone provides a socially and judicially acceptable limit on recovery of damages."<sup>[4]</sup>

### Multi-factor test

California has developed a complex balancing test consisting of multiple factors which must be carefully weighed against one another to determine whether a duty of care exists in a negligence action. The underlying facts are universalized and analyzed in the larger context of general public policy.<sup>[5]</sup> The original factors as stated in 1968 were as follows:

- the foreseeability of harm to the injured party;
- the degree of certainty he or she suffered injury;
- the closeness of the connection between the defendant's conduct and the injury suffered;
- the moral blame attached to the defendant's conduct;
- the policy of preventing future harm;
- the extent of the burden to the defendant and the consequences to the community of imposing a duty of care with resulting liability for breach;
- and the availability, cost, and prevalence of insurance for the risk involved.<sup>[6]</sup>

A 1997 case added on one more factor:

- the social utility of the defendant's conduct from which the injury arose.<sup>[7]</sup>

Some states simply copied California's factors but modified them, like Michigan (which deleted the insurance factor and never picked up the social utility factor),<sup>[8]</sup> while others developed different



enacted the Occupiers Liability Act 1957. Similarly, in the 1968 landmark case of *Rowland v. Christian*,<sup>[11]</sup> the Supreme Court of California replaced the old classifications with a general duty of care to *all* persons on one's land, regardless of their status.

## Business

*See also: Business judgment rule*

In business, "the duty of care addresses the attentiveness and prudence of managers in performing their decision-making and supervisory functions."<sup>[12]</sup> The "business judgment rule presumes that directors (and officers) carry out their functions in good faith, after sufficient investigation, and for acceptable reasons. Unless this presumption is overcome, courts abstain from second-guessing well-meaning business decisions even when they are flops. This is a risk that shareholders take when they make a corporate investment."<sup>[12]</sup>

## References

- <sup>1</sup> ^ *Caparo Industries plc v Dickman* [1990] 2 AC 605
- <sup>2</sup> ^ *McCain v. Florida Power Corp.*, 593 So. 2d 500, 503 (Fla. 1992).
- <sup>3</sup> ^ *Jupin v. Kask*, 849 N.E.2d 829, 835 (Mass. 2006).
- <sup>4</sup> ^ *Thing v. La Chusa*, 48 Cal. 3d 644, 667 (1989).
- <sup>5</sup> ^ *Ballard v. Ariebe*, 41 Cal. 3d 564, 572 n.6 (1986). In this oft-cited footnote, the Court stated: "[A] court's task — in determining 'duty' — is not to decide whether a particular plaintiff's injury was reasonably foreseeable in light of a particular defendant's conduct, but rather to evaluate more generally whether the category of negligent conduct at issue is sufficiently likely to result in the kind of harm experienced that liability may appropriately be imposed on the negligent party."
- <sup>6</sup> ^ *Rowland v. Christian*, 69 Cal. 2d 108 (1968).
- <sup>7</sup> ^ *Parsons v. Crown Disposal Co.*, 15 Cal. 4th 456 (1997).
- <sup>8</sup> ^ *Buczowski v. McKay*, 441 Mich. 96, 1100-1101; 490 N.W.2d 330 (1992).
- <sup>9</sup> ^ *McCall v. Wilder*, 913 S.W.2d 150, 153 (Tenn. 1995).
- <sup>10</sup> ^ *Gilson v. Metropolitan Opera*, 5 N.Y.3d 574 (2005).
- <sup>11</sup> ^ *Rowland v. Christian*, 69 Cal. 2d 108 (1968).
- <sup>12</sup> ^ <sup>a</sup> <sup>b</sup> Alan R. Palmiter, *Corporations: Examples and Explanations*, 5th ed. (New York: Aspen Publishers, 2006), 192.

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