

NEGLIGENCE: DUTY OF CARE

DEFINE NEGLIGENCE:

D may be liable in negligence (**s43 Wrongs Act**) with respect of P's personal injury for [insert conduct]. The burden of proof is on the P to prove all 5 elements (**Holloway**) on the balance of probabilities.

STEP 1: DEFINE

When one person is placed in a position that would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger (**Heaven v Pender**)

STEP 2: DETERMINE IF SETTLED LAW THAT:

1. Duty of care exists

- The law has been clear that the relationship between P and D gives rise to a DoC
 - Doctors have a Duty to be careful of their patients (**Rogers v Whitaker**)
 - Road users and other road users (**Chapman v Hearse**)
 - Drivers and passengers (**Imbree v McNelly**)

2. Duty of care does not exist

- The law says for policy reasons, there will be no DoC between P and D
 - Barristers (**D'Orta-Ekenaike v Victorian Legal Aid**)
 - Parents and their children (**Robertson v Swincer**)
 - Child protection agencies – no duty to those being investigated (**Sullivan v Moody**)
 - Police and prosecutorial authorities – no duty to those under investigation unless there is an implied or express assumption of responsibility: (**Cran v State of NSW**)

3. No Settled Law

- There is no settled law on whether a DoC exists or does not exist
- For these *novel* situations, ask the following:
 - **Firstly**, was it **reasonably foreseeable** that the PI could be injured by D's actions? (**Donoghue v Stevenson**); **AND**
 - Secondly, are there **sufficient salient features** of a duty relationship to find that a duty exists? (**Sullivan v Moody**)

STEP 3: TEST FOR REASONABLE FORESEEABILITY

Objective test → "what would a reasonable person be thinking at that period in time before doing that particular act, and did that act/omission fall below the reasonable standard?" (**Donoghue v Stevenson**)

→ Is it RF of a person in D's position that careless conduct of any kind may result in damage of some kind to P or class or persons to which P belongs to (**Chapman v Hearse**)

1. This 'reasonable person' must have foreseen a **real**, rather than **fanciful/far-fetched** possibility of injury. (**Sullivan v Moody**)
2. You don't need to foresee the '**precise sequence of events**,' the question is whether a consequence of the same general character as what occurred is reasonably foreseeable. (**Chapman v Hearse**)
3. The damage must extend directly to P or **to a class** of persons to which P belongs (**Chapman v Hearse**)
4. There must have been a reasonable possibility that the particular class of people could have been put at risk by the conduct of D.

NOTE: The question is not what the D subjectively thought at the time, but what a RP in the position of the D could have foreseen!

STEP 4: SALIENT FEATURES

→ Reasonable foreseeability is necessary but not sufficient to establish the existence of a DOC on its own (**Sullivan v Moody**). It is therefore necessary for the P to show that the salient features of the case weigh in favour of imposing a DOC.

Can be applied across varied facts and are used to **weigh-up the likelihood of a DoC** existing in a particular case

Conflict of Duties: Does the finding of a duty conflict with an already existing duty? (Points against a relationship) (**Sullivan v Moody**)

Conflict of laws: Is there a better-suited area of law under which the P's action should be brought? For example: defamation. (**Sullivan v Moody**)

Illegality: Is the P behaving illegally at the time? (points against a duty relationship) (**Sullivan v Moody**)

Floodgates: would a finding of a duty of care in this case risk flooding the courts with claims of liability? Policy argument – do we risk flooding the court with future claims?

Vulnerability: Is P particularly vulnerable and did D know this? (points towards a duty)

- It can be argued that **PL** was vulnerable to **D's** negligent [**act**] in the sense that **PL** could not reasonably have been expected to have taken steps to have guarded against the harm that is suffered (**Perre v Apand**)

Indeterminate Liability: Indeterminacy of liability is a factor that will ordinarily defeat a claim that the defendant owed a duty of care to persons such as the plaintiff. Indeterminacy arises when the defendant would not be able to determine how many claims might be brought against him or her or what their general nature might be. Would a finding of duty in this instance risk flooding the courts with claims of liability? If the class of persons is reasonably ascertainable then IL is not likely to be an issue. If member of unascertainable class then IL is an issue (*Perre v Apand*).

Control: Did the D have significant control over the actions that led to the risk to P? (If yes, points to relationship)

Autonomy: Would a duty be inconsistent with D's autonomy? (*CAL (No 14) v Motor Accidents Insurance Board*)

Coherence with other areas of law: Would a duty cohere with other areas of law? (*CAL (No 14) v Motor Accidents Insurance Board*)

STEP 5: CONCLUSION

On the balance of probabilities, the reasonable foreseeability test combined with the salient features approach indicate that D did owe P a DoC.

PARTICULAR DUTY SITUATIONS: PURE ECONOMIC LOSS

Pure economic loss involves **economic harm** suffered by P as a result of D's negligence, which does **not** follow on from personal injury or damage to P's property (this is consequential economic loss and *must* be distinguished from PEL).

Two types of PEL:

- PEL caused by **reliance on advice or information**
- PEL caused by **act** or **omission**

To determine duty: weigh up **reasonable foreseeability** and **salient features**.

Traditional reluctance to compensate due to:

- Competition and legitimate business activity
- Indeterminate liability
- Extent of the harm

STEP 1: IDENTIFY NEGLIGENT ACT AND HARM SUFFERED

D may owe a DoC to P in negligence not to cause pure economic loss (PEL) by their negligent act of [identify act]

STEP 2: IS THERE PURE ECONOMIC LOSS?

PEL is financial loss that is not the loss of personal injury or injury to P's property

STEP 3: TEST FOR REASONABLE FORESEEABILITY

→ Was it reasonably foreseeable that the P might suffer PEL as a result of the carelessness on the part of D?

Generally, damages are **not** recoverable for economic loss, which is **not** consequential upon injury to person or property

Exception – D knew or ought to have known that a particular person (e.g. Caltex), not merely a member of an unascertainable class (e.g. users of oil from the gas pipeline), will be likely to suffer economic loss (Caltex Oil)

- **NOTE:** This case has been superseded (just the starting point) as there are now cases that show that not just a particular person but classes of people can be exceptions

STEP 4: SALIENT FEATURES (choose approx. 5)

→ Reasonable foreseeability is necessary but not sufficient to establish the existence of PEL on its own (**Sullivan v Moody**). It is therefore necessary for the P to show that the salient features of the case weigh in favor of imposing a PEL DoC

PERRE V APAND:

Indeterminate Liability:

- Less likely to find a DOC if it would make the D liable to an unascertainable class of people.
- Where the class is so extensive, it cannot be determined (humans)

Control:

- D is in control of the circumstances or activity which cause the harm to P
- Was D in control (broadly) of the activity that caused the harm?

Vulnerability:

- Can P take reasonable steps to protect themselves/is it reasonable to expect P to guard themselves from certain interferences?
- If vulnerable, points towards DoC.

Actual or Constructive knowledge of risk of harm:

- Did D know or ought to know of the risk of harm? Points towards DoC

JOHNSON TILES:

Contractual regime:

- Courts are reluctant to impose a DoC that interferes with a pre-existing contractual regime
- Courts want to enforce the parameters of liability agreed to

Statutory regime:

- Are there rules governing duties of the D?
- If yes, points against a DoC.

Interference with legitimate business activity:

- Are there other existing duties to P? A duty to prevent PEL could interfere with the duties and safety to workers whom a duty already exists.

Assumption of responsibility:

- Did P rely and D assume responsibility. Points to Doc.

STEP 5: CONCLUSION

On balance of probabilities, it appears as though P would/would not be able to establish that D caused the PMH suffered

PARTICULAR DUTY SITUATIONS: PURE MENTAL HARM

****Policy reasons for reluctance to compensate:** Risk of fabrication, Risk of indeterminate liability and floodgates, Difficulty proving causation and the variability of mental constitutions.

STEP 1: DEFINE

→ P may claim damages per s23 WA for pure mental harm suffered as a result of [insert negligent act]

s. 23 Wrongs Act: In any action for injury to the person the plaintiff shall not be debarred from recovering damages merely because the injury complained of arose wholly or in part from mental or nervous shock

STEP 2: IS THERE MENTAL HARM?

→ Mental harm is defined in s. 67 as a psychological or psychiatric injury.

s. 67 Wrongs Act: Mental Harm: a recognised psychological or psychiatric injury

STEP 3: IS IT PURE (DIRECT OR INDIRECT) OR CONSEQUENTIAL MENTAL HARM?

Direct = Plaintiff themselves was placed in peril

Indirect = Witness or was told about someone being place in danger

S. 67 Wrongs Act: Consequential Mental Harm: Mental harm that is a consequence of any other injury of any other kind (relatively easy to prove that D's negligence that caused physical harm to the Pl, also caused consequential harm. In terms of liability, this will often fall short at the remoteness stage.

S. 67 Wrongs Act: Pure Mental Harm: mental harm other than consequential mental harm

A 'special duty' category: PMH can result where the D **directly** causes the Pl to suffer (i.e. by putting them in a situation of danger), OR where the D **indirectly** causes the Pl to suffer PMH by witnessing or learning about another's situation of danger.

STEP 4A: PMH CAUSED BY DIRECT HARM – REASONABLE FORESEEABILITY

REASONABLE FORESEEABILITY TEST:

(D) Does not owe a duty to (P) to take care not to cause the P PMH unless the D foresaw or ought to have foreseen that a person of normal fortitude **might**, in the circumstances of the case, suffer a recognised psychiatric illness if reasonable care were not taken **S72(1)**

→ MIGHT suffer psychiatric illness – doesn't mean that they have to in facts

S. 72(1) Wrongs Act: requires that the **D** foresaw or ought to have foreseen, that a person of normal fortitude might, in the circumstances of the case, suffer a psychiatric illness if reasonable care were not taken.

IDENTIFYING REASONABLE FORESEABILITY (weigh up the following):

S. 72(2) Wrongs Act: The circumstances of the case include -

- | |
|---|
| a. Whether or not the mental harm was suffered as a result of a sudden shock ; |
| b. Whether the plaintiff witnesses, at the scene, a person being killed, injured or put in danger ; |
| c. The nature of the relationship between the plaintiff and any person killed, injured or put in danger; |
| d. Whether or not there was a pre-existing relationship between the plaintiff and the defendant. |

EGG SHELL SKULL RULE:

S. 72(3) Wrongs Act: This section **does not affect the duty of care** of a person (D) to another (Pl) If the defendant knows, **or ought to know**, that the plaintiff is a person of **less than normal fortitude**.

STEP 4B: PMH CAUSED BY HARM TO ANOTHER PERSON (D INDIRECTLY caused PMH)

One particular kind of PMH case is where plaintiff suffers mental harm due to *witnessing or learning* of another being killed, injured or put in danger by the defendant's negligence

s 73 Wrongs Act (Hurdle requirement, do this first then foreseeability test)

- (1) Where **pure mental harm** results – in whole or in part – due to another person (the primary victim) being killed, injured or put in danger by the defendant's negligence.
- (2) The plaintiff is not entitled to recover damages for pure mental harm unless –
 - (a) The plaintiff **witnessed**, at the scene, the victim being killed, injured or put in danger; or
 - (b) The plaintiff is or was in a **close relationship** with the victim
- (3) No damages to be awarded if the **victim** would be unable to recover damages from the defendant.

WITNESS AT THE SCENE:

Wicks v State Rail Authority of NSW: There is no limitation on the time it takes for PMH to fully develop after witnessing a traumatic scene.

- Exposure to shocking sensory inputs helps you to point to a foreseeability of psychiatric injury

CLOSE RELATIONSHIP:

Gifford v Strang Patrick Stevedoring: It is the closeness and affection of a relationship - rather than the legal status of the relationship – that is relevant in determining duty of care.

Annetts Case – “the central inquiry is whether in all the circumstances, the risk of the PL sustaining a recognizable psychiatric illness was reasonably foreseeable in the sense that the risk as not far fetched or fanciful

THEN DISCUSS REASONABLE FORESEEABILITY TEST ABOVE

STEP 5: SALIENT FEATURES

Reasonable foreseeability is necessary but not sufficient to establish the existence of PMH on its own (***Wicks v State Rail Authority of NSW***). It is therefore necessary for the P to show that the salient features of the case weigh in favour of imposing a PMH DOC.

Assumption of responsibility: (**Annetts**)

- D said/did something to assume responsibility
- Where the D undertakes responsibility for an act and P relies on D to undertake responsibility without negligence.
- *Explicitly assures P: 'I will take care of you'*

No indeterminate liability:

- Where the class is so extensive, it cannot be determined (humans)
- Less likely to find a DOC if it would make the D liable to an unascertainable class of people. (**Gifford**)

Vulnerable –

- To risk of harm that D exposed them to (**Annetts**)
- Could they have taken reasonable steps to protect themselves? (**Gifford**)

Control:

- D controlled the circumstances giving rise to the risk to the P (**Annetts**)

Interference with legitimate business activity:

- Not legitimate business to expose P to risk of harm (**Annetts**)

Conflict of duties:

- The duty to the P would simply be co-extensive to the settled duty:
- To the employee (**Annetts**)
- Police officer statutory reporting duties (**Tame**)

Relationship between victim and P: Closeness (Gifford)

Conflict of laws:

- If finding P to owe a DOC would be inconsistent with the purpose and scope of any relevant statute
- The courts are less likely to impose a DOC, if there is a better suited area of law under which the P's action should be brought (**Tame**)

CONSIDER: MESSENGERS

- No duty for mental harm caused by the **manner in which bad news is communicated** (*Annetts*)
- Due to public policy reasons relating to the importance of open reporting and communication (*Annetts*)
- There *may* be a duty of care for mental harm caused by **carelessness in the accuracy** of the information communicated (*Annetts*)

CONSIDER: CONSEQUENTIAL MENTAL HARM

s.74 ; P can only recover for Consequential Mental Harm where D:
Foresaw or ought to have foreseen that a person of normal fortitude might, in the circumstances, suffer a recognized psychiatric illness if reasonable care were not taken; or
Knew or ought to have known that P is of less than normal fortitude and foresaw or ought to have foreseen that P might, in the circumstances, suffer a recognized psychiatric illness if reasonable care were not taken.
At remoteness stage; additional foreseeability test is required.

S.75 damages are limited to harm consisting of a recognized psychiatric illness that take up at least 10% impairment.