

NEGLIGENCE CLAIM

PRELIMINARY QUESTIONS

- Wrongful Death Claim?
 - Not available at common law – s 17 of the Wrongs Act allows for them
- Legally recognised harm?
 - Wrongful birth: *Cattanach v Melchior*
 - Wrongful life: *Harriton v Stephens*

DUTY OF CARE

Contents:

1. Established categories
2. Foreseeability
3. Salient features (including public policy, advocates, joint illegal activity) (look at factual before policy)
4. Special situations:
 - i) Conduct → omissions
 - ii) Defendants → occupiers, statutory authorities (inc illegal entry)
 - iii) Kinds of harm → mental harm, pure economic loss

1. Is it an established category?

- Road user – *Chapman v Hearse*
- Employer and employee – *McLean v Tedman*; *Paris v Stepney Borough Council*
- School and pupil – *Geyer v Downs*, *Oyston v St Patricks*
- Doctor and Patient – *Rogers v Whitaker*
- Occupier's liability as to the state of the premises – s14B Wrongs Act

*Note: Always be careful about the way the duty of care is formulated. No duty is absolute in its scope.

IMMUNITY FROM LIABILITY:

- Good Samaritans s31B
- Community Volunteers s36 - s37
- Food Donors s31F

Provided they provide good faith effort.

If it is not an established category – follow a 2 step process:

- i) Was the harm reasonable foreseeable?
- ii) Do the salient features support the recognition of a duty of care in the case at hand?

2. Reasonable foreseeability

- **RULE:** Was it reasonably foreseeable that any conduct on behalf of the defendant might cause some kind of harm to the plaintiff? (*from San Sebastian per Glass JA*)
 - **The manner in which harm occurred need not be foreseeable – only that some kind of harm occur needs to be foreseeable** (*Chapman v Hearse*) → cite this one
'sufficient if it appears that injury to a class of persons of which he was one might reasonably have been foreseen as a consequence.'
 - Definition of reasonable foreseeability:
 - ➔ 'Not far-fetched' (*Sullivan v Moody – the sexual abuse – fathers*)
 - ➔ 'not unlikely to occur' (*Chapman v Hearse and Catterson v Commissioner for Railways*)
 - Objective inquiry: question is what a reasonable person in the position of the defendant could have foreseen (*Panagiotopolous v Rajendram*)
 - Relevant cases: *Chapman v Hearse, Sullivan v Moody, Catterson, San Sebastian*
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- **Special cases: Unforeseeable Plaintiffs**
 - ➔ *Palsgraf* (NY – dropped parcel -exploding fireworks, person injured far away – unforeseeable plaintiff)
 - ➔ *Bounrhill* (HL – pregnant fishwife, did not see accident, saw blood etc, suffers stillbirth, sues insurance company of negligent motorcyclist – fails to meet the not unlikely threshold test)
 - ➔ *Seltsam* (2006, NSWCA): Plaintiff suffers lung cancer as a result of exposure to asbestos, he is a priest helping a relative in renovations – unforeseeable plaintiff, not known to the company that short-term exposure could trigger harm.
 - ➔ *Bale*: spouse of an employee exposed to asbestos through clothes of the husband – unforeseeable plaintiff, DC of employers to employees is not easily expanded to non-employees)

3. Salient features:

- Factual salient features that link the parties:
 - ➔ Plaintiff's vulnerability: *Crimmins, Pyrenees* (age – if young more vulnerable)
 - ➔ *Perre v Apand*- vulnerability case (he could not protect himself from the risk)
 - ➔ Defendant's assumption of responsibility: *Nagle, Geyer, Oyston*
 - ➔ Defendant's knowledge /awareness of risk or likelihood of harm to P? (*Crimmins, Pyrenees*) (you knew or should have known of the risk)
 - ➔ Defendant's control the situation: *Crimmins*, not found in *Strickland*
 - ➔ consider if fractured control (if control shared among a few, *Agar v Hyde, Graham Barclay Oysters*)
 - ➔ Proximity (*Agar v Hyde*)
 - ➔ Autonomy of plaintiff (*Agar v Hyde*) – consider also age there
 - ➔ Assumption of risk (by the P or the D) – if D (*Sutherland Shire v Heyman* – if create risk as D) (*Geyer v Downs*- opening the school assuming responsibility and risk)
- Policy consideration salient features:
 - ➔ Indeterminate class of liability – *Sullivan*
 - ➔ Would it constrain the defendant's autonomy (*Stuart v Kirkland – Veenstra*) (*Agar v Hyde*)
 - ➔ Defensive practices – *Sullivan; Hill; D'Orta* (*Agar v Hyde* – limiting choices)

- ➔ Deterrence – can lead to DC, (Vabu) to not condone certain behaviour, deter it
- ➔ Diversion of resources: Sullivan; Hill
- ➔ Coherence of the law; Sullivan; CAL

Full list of salient features:

Caltex Reinerries Pty Ltd v Staver - Allsop J [103] These salient features include:

- a) the foreseeability of harm
- b) the nature of the harm alleged
- c) the degree and nature of control able to be exercised by the defendant to avoid harm;
- d) the degree of vulnerability of the plaintiff to harm from the defendant's conduct, including the capacity and reasonable expectation of a plaintiff to take steps to protect itself;
- e) the degree of reliance by the plaintiff upon the defendant;
- f) any assumption of responsibility by the defendant
- g) the proximity or nearness in a physical, temporal or relational sense of the plaintiff to the defendant
- h) the existence or otherwise of a category of relationship between the defendant and the plaintiff or a person closely connected with the plaintiff;
- i) the nature of the activity undertaken by the defendant;
- j) the nature or the degree of the hazard or danger liable to be caused by the defendant's conduct or the activity or substance controlled by the defendant;
- k) knowledge (either actual or constructive) by the defendant that the conduct will cause harm to the plaintiff;
- l) any potential indeterminacy of liability;
- m) the nature and consequences of any action that can be taken to avoid the harm to the plaintiff;
- n) the extent of imposition on the autonomy or freedom of individuals, including the right to pursue one's own interests;
- o) the existence of conflicting duties arising from other principles of law or statute;
- p) consistency with the terms, scope and purpose of any statute relevant to the existence of a duty; and
- q) the desirability of, and in some circumstances, need for conformance and coherence in the structure and fabric of the common law.

Sullivan v Moody (child abusers, fathers)	<ul style="list-style-type: none"> • <u>Indeterminate liability</u>: If a duty was recognised any proposed limit (ie only to parents) would be artificial liability would be to any suspect. • <u>Defensive practices</u>: Would discourage health-workers from undertaking procedures to protect children. • <u>Incoherence in the law</u>: The workers had statutory responsibilities to protect children and report any potential harms – would give rise to 'inconsistent obligations'
Agar v Hyde (rugby players) Autonomy of players	<ul style="list-style-type: none"> • Indeterminacy: Hard to know who would be covered by this duty. Potentially everyone who plays rugby in the world. 'unreal as absurd'. • Lack of control: The board was promoting rules, not deciding which ones to follow on the day of the match. The control is too fractioned (local clubs, referees etc). • Policy considerations: autonomy of the players. It is the players' choice to go for rugby rather than other past times. Autonomy that the court seeks to uphold.
D'Orta	<ul style="list-style-type: none"> • Coherence of law: The first duty of the advocate is to the court not the client. Consistency (why not extend this to the judge etc). • Policy considerations:

(lawyers)	<p>→ Finality of proceedings.</p> <p>→ Undermine trust in the system. (Cabrank rule)</p> <p>Defensive practices: Would prevent lawyers from running new cases, encourage them to settle cases.</p>
Pyrenees Shire Council v Day (the defective chimney)	<ul style="list-style-type: none"> • Control: Council had power to change the situation. • Knowledge: Had been told by the CFA of the problem with the chimney and were aware of the change tenancy. • Vulnerability: The new tenants knew nothing of the problem whereas the Council did.
Stuart v Kirkland-Veenstrar (omission – police,	<ul style="list-style-type: none"> • Is there a power to act? Is the power consistent with the asserted duty of care? • Factor of control: The degree and nature of control exercised over the risk of harm that has eventuated (ie was the person under the control of the defendant or did they remain autonomous like Mr Stuart) • Degree of vulnerability – had the plaintiff's autonomy been compromised?