

Duty: 1. Reasonable foreseeability

[●] need show [■] owes him a duty of care in the [...] activity as it is reasonably foreseeable that [■]'s careless conduct would result in harm of some kind to [●].

Considering the low-threshold for reasonable foreseeability (*Chapman*; *San Sebastian* per Glass JA), it suffices for [●] to prove that with [■]'s careless conduct, the harm is 'not unlikely to occur' (*Chapman*) or far-fetched (*Sullivan*) (since [●] need not show that the precise manner in which his injuries were sustained was reasonably foreseeable (*Chapman*)).

- If any person in P's position jumps off the moving train, the harm is 'not unlikely to occur' (*Caterson* per Barwick CJ)

[■] might argue that [●] was an unforeseeable plaintiff because

- The bank gave the statement as to the customer's credit 'without responsibility' (*Hedley Byrne v Heller*, House of Lords) ⇒ not reasonable for [●] to rely on the statement
- Public awareness and information available at the time of the harm does not support the finding the occasional exposure to asbestos would entail harm (*Seltsam*, NSWCA)
- P suffered miscarriage as a result of nervous shock after hearing the collision and seeing blood on the road (*Bourhill v Young*, House of Lords)
- Chain of events (*Palsgraf v Long Island*)
 - Not foreseeable that the man was carrying the explosive materials
 - Not foreseeable that the package would drop
 - Not foreseeable that the explosion would cause the scale on platform to injury

Since [●] suffered pure mental harm from [■]'s alleged negligence, to make out the reasonable foreseeability test, [●] need to show that [■] foresaw or ought to have foreseen that a person of normal fortitude might suffer a recognised psychiatric illness if [■] did not take reasonable care (WA s 72(1)). [●] might point to the following circumstances:

- [●]'s mental harm was suffered as a result of a sudden shock (WA s 72(2)(a); *Jaensch*)
- [●] witnessed, at the scene, a person being killed, injured or put in danger (WA s 72(2)(b); *Wicks* ⇔ *King*)
- Relationship between [●] and the person killed, injured and put in danger is close (parent-child, *Annetts*; couple, *Jaensch*)
- There was a pre-existing relationship between [●] and [■] (WA s 72(2)(c)).

Although the conduct complained of consists of omission, unlike in *Agar* where IRB had no control over the risk, [■]'s previous positive conduct of [...] created the risk (*Lawes*).

- ⇔ D assumed no responsibility as to the structural defect as P did not make further inquiries (*Sutherland v Heyman*)
- ⇔ No general duty to rescue even if D has the power to do so (*Stuart* ⇔ *Lawes*)

Duty: 2. Established category

Although the relationship between [●] and [■] falls into the established category of [...], [■] might still argue that his duty does not extend to [●] because

- Manufacturer-consumer (*Donoghue*)
 - Opaque bottle (*Donoghue*)
 - Contamination occurred in the process of manufacturing (*Donoghue*) ⇔ third party conduct
 - The probability of accident is low or yet to be proved (*Thompson; O'Dwyer*)
 - The possible injury is not serious (⇔ *O'Dwyer*)
 - The precautions were burdensome (⇔ *O'Dwyer*)
- Road users (*Chapman; Zanner*)
 - P did not see the collision and only suspected the accident with the sight of blood on the road (*Bourhill*)
- Driver-passenger (*Lynch, NSWCA; Miller; Imbree*)
 - Mother-foetus ⇒ contribution
- Employer-employee (*Paris*)
 - The third-party criminal conduct was not foreseeable (⇔ *Chomentowski*)
 - [■] Employer does not know [●]'s susceptibility to certain risk (⇔ *Paris*)
- School-pupil
 - [●] was mature in age and not under control of [■] (⇔ *Geyer*)
- Doctor-patient (*Chappel; Roger; WA s 59*)
- Occupier-entrant
 - State of the premises / things (WA s 14B(3)(4); *Shaw v Thomas*)
 - Hazardous occurrences on the premises (*Hargrave*: leave fire alit; neighbouring)
 - Activities on the premises
 - [●]'s activity (*Strong*)
 - Third party activity (*Adeels; Modbury*)
- Ward-prisoner / Criminal
 - The prisoner escaped beyond the immediate vicinity of a gaol and the harm occurred two months after the escape (*Godfrey*)
 - [■] was not under the duty to ensure the safety and security of the vulnerable (⇔ *Bujdoso*)
 - [■] had no complete control over the prisoner's activity (⇔ *Bujdoso*)
 - [●] is only a member of the general public, and there was no evidence suggesting that the criminal was targeting at [●] (*Hill*)
- Publican-patron (*CAL; Cole*)
 - It is not observable that [●] has passed certain degree of inebriation
 - [●] was still autonomous (*CAL*)
 - [■] has not promised to ensure the safety of [●] after he left the premises (*Cole*)
- Police (*Stuart; Hill*)
 - ⇔ [●] is under [■]'s control (*Cran*)

Breach: 3. Reasonable person standard

[■] might argue the reasonable person standard should be adjusted down to reflect his young age, as HCA did in *McHale*. However, [●] might in turn argue

- [■] was engaging in premediated conduct, as opposed to the impulsive conduct in *McHale* common to normal boys at P's age
- A person at the same age of [■] would have the foresight and prudence even considering the limitation due to young age
- Like the 11-year-old driver in *Zanner*, [■] had performed the activity previously without mishap. If the reasonable person standard is not adjusted down for the defendant's inexperience (*Imbree*), [■], an experienced performer of the activity, should not benefit merely because of his young age.

[■] might, referencing the adjusted down standard for contributorily negligent claimant in *Russell* (involving intellectual disability) by NSWSC (supported in obiter by NSWCA in *Kelly*), push for parallelly adjusting down the reasonable person standard because of his mental disability, despite the Qld CA's persuasive authority of *Carrier* finding the contrary. [●] should in turn emphasise that there is no objective standard to measure the unsound state of mind (*Carrier* per McMurdo P).

As [■] is a [...] professional, he might argue that he is not negligent in performing [...] diagnosis] by establishing that at the time the service was provided, [■] acted in a manner that was widely accepted by peer professional opinions as competent professional practice in the circumstances (WA s 59(1)). To counter such argument, [●] should adduce evidence

- Persuading the court that the peer professional opinions submitted by [■] are unreasonable, therefore pushing for the court to exercise the judicial discretion not to rely on such opinions (WA ss 59(2)(5)).
- Demonstrating that the peer professional opinions submitted by [■] are not universally accepted, and receive significant objection from other peer professionals (though both arguments do not completely nullify [■]'s submission) (WA ss 59(3)(4)).

Since [■]'s alleged negligence arising from failure to warn, the common law reasonable person standard persists (WA s 60 [professional]), and [●] need to establish that [■] breached his duty for failure to warn [●] of a material risk inherent in the proposed treatment (*Rogers*). A risk is material where one a reasonable person in [●]'s position, if warned of such a risk, would be likely to attach great significance to it (*Rogers*).

- Nature of the mater to be disclosed, and the treatment (complex or routine)
- P's desire for the information ⇒ P has shown concern for risks (*Rogers*)
- Temperament and health of the patient (*Rogers*)
- Emergency; safer alternatives (*Chappel*) ⇒ what [●] would have done (WA s 51(3))
- Even if [■] is not professional, it could be reasonably expected of a person holding himself as possessing the skill at the time of alleged negligence to take reasonable care to warn of the risk (WA ss 50, 58)