

DUTY OF CARE

A legal obligation for the defendant to take reasonable care to avoid unreasonable risk to the plaintiff.

NOVEL DUTIES

A duty of care established in original circumstances is a question of law, and applicable to this class of parties thereafter.

Reasonable foreseeability (general approach)

You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour; persons so closely and directly affected that D should have thought of the consequences on them *Donoghue v Stevenson*

Salient Features

Then undertake a close analysis of the facts bearing on the relationship between the plaintiff and the putative tortfeasor by references to the “salient features” or factors affecting the appropriateness of imputing a legal duty to take reasonable care to avoid harm or injury. *Caltex Refineries (Qld) Pty Ltd v Stavar*

- The degree and nature of control able to be exercised by the defendant to avoid harm
- 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 oneself
- The degree of reliance by the plaintiff upon the defendant
- Any assumption of responsibility by the defendant
- The proximity or nearness in a physical, temporal or relational sense of the plaintiff to the defendant
- The existence or otherwise of a category of relationship between the defendant and the plaintiff or a person closely connected with the plaintiff
- The nature of the activity undertaken by the defendant
- 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
- Knowledge by the defendant that the conduct will cause harm to the plaintiff
- Any potential indeterminacy of liability – *Hill; Michael (Police Cases)*
- The nature and consequences of any action that can be taken to avoid the harm to the plaintiff
- The extend of imposition on the autonomy or freedom of individuals, including the right to pursue one’s own interests
- The existence of conflicting duties arising from other principles of law or statute *Sullivan v Moody; Thompson v Connon*
- Consistency with the terms, scope and purpose of any statute relevant to the existence of a duty
- The desirability of, and in some circumstances, need for conformance and coherence in the structure and fabric of the common law

Incremental Approach

Courts argue analogously from previously found relationships *Perre v Apand*

OVER THIRD PARTIES (CONTENTIOUS)

➤ Over prisoners

- **Prison authorities to others** – Prison authorities owe a DOC to others “at special risk of harm” where they have the capacity and responsibility to control prisoners’ behaviours *Dorset Yacht*. An exception arises where there is an indeterminacy of liability or lack of proximity (and thus diminished capacity to control) *NSW v Godfrey*
- **Prison authorities to prisoners** – Prison authorities owe prisoners a DOC *NSW v Bujdoso*

➤ Over children

- **Parents’ control over children to others** – Parents have a duty to exercise control over their child where in the absence of such, unreasonable risk of injury to others may result *Smith v Leurs*
- **Childcare centre over children to others** – owe a DOC because the risk of a child escaping and causing harm to others was reasonably foreseeable
- **School supervision of students to students themselves** – school systems have a non-delegable duty of care to reasonably protect the care and wellbeing of students under their supervision

➤ Over entrants

- **Occupiers over uncontrollable third parties to entrants** - An occupier will not owe a DOC where they do not have the capacity to control a third party’s behaviour or entry, such as third-party criminals *Modbury*
- **Licensed premises over entrants to other entrants** - An occupier will have a DOC where they have control over entry and who remains at their premises, possibly owing to a statutory obligation *Adeels*
- **Licensed premises over entrants to themselves** – An occupier will not have a DOC to protect intoxicated persons from themselves in order to maintain protection over autonomy *Cole v South Tweed Heads Rugby League*

ESTABLISHED DUTIES OF CARE

➤ **Duties of manufacturers and builders and others for physical injury arising from defective products and structures**

- Manufacturers/builders owe a duty of care to the end user to ensure that their product is safe to be used immediately, as intended, without the need for intermediate inspection by the consumer

➤ **Drivers to passengers and other road users** *Imbree v McNeilly*

➤ **Doctors over patients** *Rogers v Whitaker*

➤ **Occupiers and landlords of defective premises**

- In determining the liability of an occupier, the ordinary principles of negligence are applied as it is no longer necessary to determine the type of entrant. *Australian Safeway Stores Pty Ltd v Zaluzna*
 - Occupiers to legal entrants – mere relationship enough
 - Occupiers to trespassers – more than proximity required (*Hackshaw*)
- **Duties of persons who created a situation of peril to rescuers** *Chapman v Hearse*

STANDARD OF CARE S5B,5C

What is the standard of care of the reasonable person in response to a reasonably foreseeable risk?

s5B, 5C

Foreseeability is distinct from probability (*Shirt principle*)

- **Probability** – Negligence is unlikely to be found in failing to take precautions against a risk of harm when the probability of being injured by that risk is very low *Bolton v Stone*
- **Gravity** – The more serious the injury that could be caused by the defendant's conduct, the higher the standard of care that a court will expect *Paris v Stepney Borough Council*
- **Foreseeable risk** – either plaintiff knew of risk or a reasonable person in the position of the defendant would have foreseen the risk. It is sufficient if the general risk of injury was reasonably foreseeable
- **Practicability** – It is unlikely that there will be a breach if the only possible precautions that could have been taken against the risk would have involved excessive cost or inconvenience to the defendant. An important consideration is whether they will then also be required to take precautions against similar risk of harm *Romeo v Conservation Commission of the Northern Territory*
- **Justifiability** – A defendant will be less likely to have breached their duty of care if their activities provide a significant benefit to members of the community (social utility); construed narrowly

Who is the 'reasonable person'?

- **Inexperience** – The standard of care is not to be modified *Imbree v McNeilly*
- **Children** – The standard of care expected of a child is typically lowered to reflect their more limited experiences and lesser understanding of risks *McHale v Watson*
- **Mentally-ill persons** – No modification *Carrier v Bonham*
- **Intoxication** – No modification (*s49(1) of CLA*)
- **Professionals** – (*s50(1),(2), s5P & Rogers v Whitaker*)

BREACH OF DUTY

The plaintiff must establish that the defendant's breach of duty actually caused the plaintiff to suffer harm and that harm was within the scope of the defendant's liability.

s5D CLA

Determine factual causation

Factual causation is determined using the 'but for' test (*March v Stramare*) – would the plaintiff have suffered the harm but for the defendant's negligence?

- ⇒ Only needs to be '**a**' cause, not the cause (*March v Stramare*)
- ⇒ 'Possible' cause is insufficient (*Tabet v Gett*)
- ⇒ Use common sense (Mason J)

Remoteness/Scope

Would a reasonable person in the position of the defendant be able to reasonably foresee the type of damage? (*Wagon Mound (No 1)*)

- ⇒ Physical injury or psychiatric injury
- ⇒ The precise manner in which the harm occurs does not need to be reasonably foreseeable (*Hughes v Lord Advocate*)
- ⇒ **Eggshell Skull Rule:** The extent of the damage does not need to be reasonably foreseeable (*Smith v Leech Brain & Co* – leisure turned into cancer)

- ⇒ **Novus Actus Interveniens:** whether the subsequent tort and consequences were themselves regarded as foreseeable consequences of the first tortfeasor's negligence (*Mahony v J Kruschich*)
 - Not NAI if not voluntary (*Haber v Walker*-suicide)
 - Not NAI even if by third party or criminal
 - Does not necessarily need to be unforeseeable (eg. *Chapman v Hearse*) but if foreseeable, most likely not a novus actus (eg. *Dorset Yacht*)
 - Unrelated illness/injury will be supervening if it would have caused the same damage anyway (*Jobling v Associated Dairies*) but not NAI if just a pre-existing condition (*Smith v Leech Brain*)
 - May be foreseeable if D's negligence created the very risk of injury that P sustained (even if P's final action was 'true cause' - *Chapman v Hearse*, *Mahony v Kruschich*)
 - Third party's criminal or intentional act (*Baker v Willoughby* but cf *Dorset Yacht Co v Home Office*)
 - NAI where natural event, unrelated illness or voluntary human action