DUTY OF CARE

REASONABLE FORESEEABILITY AND SALIENT FEATURES

To recover damages in negligence, a plaintiff must firstly establish that the defendant owed him a duty of care. In broad terms, a duty of care exists when there is a sort of a 'relationship' or a proximity between the defendant and the plaintiff. To establish a duty of care, the test is one of reasonable foreseeability:

- A defendant will owe a duty of care to a plaintiff where it is reasonably foreseeable that his act or omission act might harm the plaintiff. Donohuge v Stevenson

- The defendant is legally liable for failing to live up to the standard of reasonable care only if she or he owed the plaintiff a duty to take reasonable care. Donohuge v Stevenson

1. Defendant must have owed the plaintiff a duty of care
2. The duty must have been breached
3. The breach must have caused damage to the plaintiff
4. Remoteness, cannot be too remove from the duty of care
5. Defences, whether any defences are available

The plaintiff must firstly establish that the defendant owed him a duty of care: this arises where:

- An affirmative act or omission by the defendant where it is reasonably foreseeable that the act might harm others (such as digging a ditch or throwing a stone).
- A commercial relationship between the parties (such as a contractual relationship or an undertaking). French v QBE
- A special relationship between the parties (such as that between parent and child).
- An undertaking by the defendant to do something for the plaintiff.

Think in terms of a sphere of risk around every kind of activity, the outer limit of the sphere of risk is where the risk of injury ceases to be reasonably foreseeable. If the plaintiff falls within the sphere of risk, then the defendant owes him or her a duty of care. If not, not.
Donoghue v Stevenson

Donoghue v Stevenson
- A duty of care can exist even without a contract, or without proximity of the parties.

Act or omission:
It is much easier to prove a duty of care exists for an act (that is, a defendant carried out an act wrongfully) than for an omission of an act (a defendant neglected to perform a reasonable act).
Reasonable Foreseeability and Duty: Existence v Extent

The duty to take reasonable care depends upon the reasonably foreseeable risk of injury to others if reasonable care is not taken.

Whether it is reasonably foreseeable that your action might bring harm to another. This can be defined as follows:

- An event is reasonably foreseeable if the defendant's action increases the likelihood of the event; and
- Harm is reasonably foreseeable if there is a systematic relationship between the defendant's action and the plaintiff's harm.

**Must be reasonable at that time**

Chapman v Hearse:

- Reasonable foreseeability doesn't mean that the exact sequence was probable. Rather, a consequence of the **same general character** or if the accident is **of a class that might well be anticipated**
- In this case, the general consequence or the type of harm (someone being run over) was a reasonably foreseeable result of the act (driving negligently).
- Also establishes the idea that an intervening act does not cut off liability as long as the intervening act was a reasonably foreseeable result of the original act.

It is not necessary for the plaintiff to show that the precise manner in which his injuries were sustained was reasonably foreseeable; it is sufficient if it appears that injury to a class of persons of which he was one might reasonably have been foreseen as a consequence.

**Chapman v Hearse**

- What class of people might possibly be put at some risk of injury in some way if the defendant failed in some way to take reasonable care?
- Is the plaintiff one of those people?

Yes: duty of care
No: no duty of care (but this depends on the other factors that may be taken into account)

The question of whether the defendant breached the duty owed the plaintiff a duty of care is a question of law
The question of whether the defendant breached the duty owed to the plaintiff is a question of fact.

**Cole v South Tweed Heads Rugby League Football Club**

**Graham Barclay Oysters v Ryan**
Caparo v Dickman
To decide whether a legal duty of care exists the decision maker must ask three questions

1. Was it reasonably foreseeable to the alleged wrong-doer that particular conduct or an
omission on its part would likely to cause harm to the person who has suffered damage or a
person in the same position
2. Does there exist between the alleged wrongdoer and such person a relationship
characterised by the law as one of proximity or neighbourhood
3. If so, is it fair just and reasonable that the law should impose a duty of a given scope upon
the alleged wrong-doer for the benefit of such person?

Sullivan v Moody rejected this test

REASONABLE FORESEEABILITY ON ITS OWN IS NOT ENOUGH TO ESTABLISH LIABILITY. MUST
CONSIDER SALIENT FEATURES.
ECONOMIC LOSS AND MENTAL HARM

Economic Loss
Pure economic loss = financial loss that is not the result of physical injury to plaintiff or damage to property of plaintiff
Courts have been hesitant to give compensation for pure economic loss
Fundamental problem is that economic loss can be passed on from one person to another in a way that personal injuries cannot.

If liability were to be imposed for the doing of anything which caused pure economic loss that was foreseeable, the tort of negligence would
- destroy commercial competition
- sterilize many contracts
- expose defendants to potential liability "in an indeterminate amount for an indeterminate time to an indeterminate class".

Byran v Maloney

Generally, damages not recoverable for pure economic loss (that is, loss which is not consequential upon personal injury or damage to property) UNLESS a defendant:

Caltex Oil v Dredge
  (1) knew or ought to have known;
  (2) that a particular plaintiff, not merely an unascertainable class;
  (3) will likely suffer economic loss as a consequence of the defendant’s negligence

Reliance and reasonable reliance
Reliance = establishing causation
Reasonable reliance = essential element in establishing the existence of a duty of care.
No statement can cause loss unless and until it is relied upon. The defendant cannot be liable for the plaintiff’s loss if the plaintiff did not in fact rely on the defendant’s statement. The plaintiff contributes to their own loss by rely on the statement made by the defendant. If that reliance is not reasonable in the circumstance, it is not reasonable to expect the defendant compensate the plaintiff on losses.

Mutual Life and Citizens Assurance v Evatt

Reliance and assumption of responsibility are merely indicators of a plaintiffs vulnerability to harm from a defendants conduct, and it is the concept of vulnerability rather than these evidentiary indicators which is the relevant criterion for determining whether a duty of care exists.
Australian Executor Trustees v Propell National Valuers

Common thread: more than reasonable foreseeability of harm to a person so required before the defendant comes under a duty of care. (Perre v Apand)

Indeterminacy does not require that the defendants' knowledge be limited to individual persons who are known to be in danger of suffering harm by defendants' conduct. Its liability can be determinate even when the duty is owed to those members of a specific class whose identity could have been ascertained by a defendant. Perre v Apand

Salient features (Perre v Apand)

- Indeterminacy
  - Is it possible for the defendant to identify precisely who would be affected by the defendants' action (e.g., negligence)
- Knowledge of harm to the plaintiff is a minimum requirement
- Legitimate pursuit of commercial interests
- Vulnerability
  - The more vulnerable the more likely the defendant owes them a duty of care
  - In a sense of inability to protect themselves, not merely susceptibility to loss
- Actual or constructive knowledge of risk of harm
- Control by defendant
- Conflicting duties
- Conflicting laws
- Undermining law
- Illegality
- Assumption of responsibility
- Reasonable reliance

✓ Has the negligent act cause pure economic loss or consequential loss
✓ Know or ought to know
✓ Salient features
  - Should a duty of care be owed in these circumstances

**Mental Harm**

- Courts are reluctant to award compensation for mental harm suffered
- No way to measure mental harm
- Open the floodgates to litigation

**Wrongs Act 1958 (Vic)**

s23: “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.”
s71: “Except as provided by this Part ['PART XI—MENTAL HARM'], this Part is not intended to affect the common law.”

Wrongs Act 1958 (Vic) s 67:

- “mental harm” means psychological or psychiatric injury
- “consequential mental harm” means mental harm that is a consequence of an injury of any other kind → secondary to a physical injury
- “pure mental harm” means mental harm other than consequential mental harm.
- “injury” means personal or bodily injury and includes—
  1. Direct – where D’s negligence directly causes P’s mental harm
  2. Indirect – where D’s negligence indirectly causes P’s mental harm

**ESTABLISHING DUTY OF CARE**

**INDIRECT:**

**Important** – an additional hurdle is introduced to establish duty of care in relation to indirect harm:

**HURDLE REQUIREMENT** section 73, Wrongs Act 1958 (Vic).

1. This section applies to the liability of a person (the defendant) for pure mental harm to a person (the plaintiff) arising wholly or partly from mental or nervous shock in connection with another person (the victim) being killed, injured or put in danger by the act or omission of the defendant.

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

Wicks v State Rail Authority NSW

- It would not be right, however to assuming that all cases of death, injury or being put in peril are events that begin and end in an instant, or even that they are events that necessarily occupy only a time that is measured in minutes.

**Hurdle requirement:**

1. Injury, or being put in danger, can take “place over an extended period”
(2) A person remains in danger until he or she ceases to be at risk

‘Close Relationship’: Gillford v Strange Patrick Stevendoring

- It is the closeness and affection of the relationship – rather than the legal status of the relationship.