Duty of Care

- Plaintiff to show recognised action – *Heaven v Pender*
  - Recognised Categories include:
    - Doctor-patient, school-child, employer-employee, motorist-motorist and direct physical injury
- **Novel Categories consider reasonable foreseeability and salient features**
  - Categories where a duty has not been established

1. **Reasonable Foreseeability:**
   - Could the defendant have reasonably foreseen that their acts or omissions could cause **damage of the general kind** suffered by the Plaintiff – *Chapman v Hearse*
     - Would a reasonable person in the defendants position have foreseen that there was a real risk that carelessness on their part could cause loss/harm to people in the plaintiff’s position.
     - *Wyong Shire Council v Shirt* (1980) 146 CLR 40: Mason J – ‘foreseeable’ ‘not insignificant’ risk – risk that is **not one that is far-fetched or fanciful**

2. **Salient Features** - Caltex Refineries (QLD) Pty Ltd v Stavar
   - Nature of harm – suffered by the P
   - Control by the D (Economic loss)
   - Vulnerability of the P (Economic loss)
   - Reliance of P on D
   - Assumption of responsibility
   - Physical or relational closeness
   - Nature of risk or danger – is it an obvious risky activity?
   - Knowledge by D of P (Economic loss)
   - Indeterminate liability – would liability be owed to a large group? (Economic loss)
   - Autonomy and freedom
   - Coherence with other laws – consistent with other legislation?
   - Authority – control (*Bjudoso* prison case)

**Scope**

- Duty Of Care does not extend to violent actions of a third party - *Modbury Triangle Shopping Centre P/L v Anzil*
  - Scope may be determined by looking at statute, kind of damage - *Harriton v Stephens*
  - Effect of contractual obligations – *Koehler*
  - Evidence - *Kuhl v Zurich Financial Services Australia Ltd*

**Mental Health**

- No duty owed due to personal autonomy - *Stuart v Kirkland-Veenstra*
- Hospital did not owe a duty of care to the friend - *Hunter and NE Local Health District v McKenna*
  - Similar to S v KV
Intoxication
• Duty Of Care does not extend to actions of an intoxicated person - CAL No 14 PL v Motor Accidents Insurance Board

Illegality
• Illegal actions sever the Duty Of Care HOWEVER after removing yourself and withdrawing from the illegal action there is a Duty Of Care (contributory negligence) - Miller v Miller

Police Liability
• No duty of care from police to suspects – this would be incoherent with larger duty to the public - ACT v Crowley, The Commonwealth of Australia and Pitkethly

Duty of Care: Pure Economic Loss
• Pure economic loss - Financial loss not consequent upon any injury or damage to the plaintiff's property or person
  → YES TO DUTY OF CARE
    o Knew pipes for oil when digging Caltex Oil (Australia) P/L v The Dredge 'Willemstad'
    o House builder to subsequent owner Bryan v Maloney
    o Solicitor to beneficiary Hill v Van Erp
    o Engineer to purchaser of commercial building (Commercial bodies not vulnerable) Woolcock Street Investments PL v CDG PL
  → NO TO DUTY
    o Disclaimer Hedley Byrne & Co Ltd v Heller & Partners Ltd
• Factors relevant for find a duty of care for economic loss
  o Perre v Apand Pty Ltd -
    ▪ It would not lead to indeterminate liability
    ▪ Knowledge by the defendant (or should reasonably have known) of the risk of harm to the plaintiff individually, or as a member of an ascertained class
    ▪ Vulnerability of the plaintiff/control by the defendant
    ▪ Duty would not place unreasonable restraints on legitimate business/commercial activities/autonomy of individual.
    ▪ Other factors.

Duty of Care: Negligent Misstatement
• Traditionally recover if words were fraudulent as opposed to merely negligent - Derry v Peek
• Indeterminate liability: Ultramares Corp v Touche
• Tepko Pty Ltd v Water Board (2001) 206 CLR 1 -
  o TEST - There must be known, reasonable reliance and/or an assumption of responsibility on the part of the person making the statement
  o The circumstances must be such that it is reasonable for the recipient to rely on the information.
• Australian Test - Look at circumstances of each case to determine whether there has been reasonable reliance or assumption of responsibility.
Factors which impact upon such decision include;

- The **type of advice** and formality of occasion
- **Strength/detail** of advice and apparent reliance
- **Special skill/knowledge** known to be possessed
- Whether the giver of the advice is the **only reliable source** of that information
- Whether the recipient had their own means of **access to the information**.
- Presence of **request for info** and any financial benefit to defendant
- Absence of effective **disclaimer**.

- **Esanda Finance Corp v Peat Marwick Hungerfords (Reg)**
  - No direct reliance and no vulnerability (no proper due diligence)

**Duty of Care: Psychiatric/Psychological Injuries**

- Primary and secondary victims - **Alcock v Chief Constable Of South Yorkshire Police** (primary) **White and Others v CC of SYP** (secondary witness as victim)
- Do not need a shocking event to form a psychological injury - **Tame, Annetts**
- Possible Factors include -
  - 1. Whether the victim is a primary vs secondary victim.
  - 2. The need for a sudden shocking event giving rise to the psychiatric injury.
  - 3. Need for a recognizable/recognised psychiatric injury as opposed to mere grief reaction.
  - 4. “Proximity” of time and space (ie the idea of being involved in the immediate aftermath of the relevant incident) and directness of perception of the event or its aftermath(eg with sight and hearing).
  - 5. Relational proximity/ closeness of relationship of the plaintiff to the “primary” victim
  - 6. “Normal” fortitude”
  - 7. Policy factors

- A psy injury was foreseeable due to relationship (not just biological connection) - **Gifford v Strang Patrick Stevedoring P/L**
  - Killed in a workplace – P’s are children
- Not reasonably foreseeable that work related to the injury **Koehler v Cerebos (Australia) Ltd**
- No breach of Duty Of Care as police have overriding duty of public safety - **New South Wales v Fahy**

**Elements for Psychiatric/Psychological Injuries – Salient Features/Reasonable Foreseeability** -

1. P needs to have suffered a **recognised psychiatric illness**
2. **Reasonable foreseeability**: D will not ordinarily owe a P a duty unless D could have foreseen that P would have suffered the psychiatric illness in the circumstances.
   - **reasonably foreseen psychological harm to the plaintiff in the circumstances**
3. Consider:
   - The ‘normalcy’ of the reaction of the plaintiff
   - Whether there was a sudden shock.
   - Whether the plaintiff was at the scene or immediate aftermath.
   - Whether the plaintiff perceived the events with their own senses.
   - Whether there was pre-existing relationship between the plaintiff and defendant
   - Nature of the relationship between P and any person killed, injured or put in peril.

**Breach of Duty of Care**

1. **Standard of care - s 9** (What standard of care is required of the defendant) –
   - s 9(1)(a) – The risk is foreseeable
   - s 9 (1)(b) – The risk is not insignificant
   - s 9 (1)(c) – In the circumstances a reasonable person would have taken precautions
     - A reasonable person in the position of the person
       (objective test)

   • Child standard – of a reasonable child at that age and development
     - *McHale v Watson*
     - *Zanner v Zanner*
   • Learner driver: learner driver subject to the same standard of care *Imbree v McNeilly*
   • No diving signage needed to prevent diving *Nagle v Rottnest Island Authority*
   • Need fence to prevent a girl drinking and walking off cliff- obvious risk – chance of walking off cliff was low (would be impractical to fence every clifftop) *Romeo v Conservation Commission of the Northern Territory*
   • Police partner not with her as she attended an injured person – primary duty of police is to investigate crime – not always necessary to be together *NSW v Fahy*

The standard of reasonable care and skill required is that of the ordinary skilled person exercising and professing to have that special skill *Rogers v Whitaker*

   • S20 definition of professional
   • S21 Proactive and reactive duties of doctors to warn of risk
• **S22** Standard of care for professions

**Look at the risk:** Degree (likely) and Gravity (seriousness) of the risk/harm

**Balance against the response:** Practicability of precautions; utility of acting

2. **Was that standard breached? Risk v Response**

   o Plaintiffs must prove this on the balance of probabilities **s12**
   o Question of fact for jury CL but **s 73 CLA:**
     - A proceeding in a court based on a claim for personal injury damages must be **decided by the court sitting without a jury**
   o A person does not breach a duty to take precautions against a risk of harm unless:
     - **s 9(1)(a)** – The risk is **foreseeable**
     - **s 9 (1)(b)** – The risk is **not insignificant**
     - **s 9 (1)(c)** – In the circumstances a **reasonable person would have taken precautions**

• **Wyong Shire Council v Shirt** (1980) 146 CLR 40: Mason J – ‘foreseeable’ ‘not insignificant’ risk – risk that is **not one that is far-fetched or fanciful**
  o The phrase ‘not insignificant’ is intended to indicate a risk that is of a higher probability than is indicated by the phrase ‘not far-fetched or fanciful’, but not so high as might be indicated by a phrase such as ‘a substantial risk’ – IPP Report
  o **Sydney Water Board v Turano** (was to far fetched)