

# TYLER'S TORTS NOTES (FINAL EXAM)

## BREACH OF DUTY

Breach occurs where the person did not, in the circumstances, take precautions that the reasonable person would have taken. The reasonable person is open to change (i.e. changing community standards & concern). Any shortfall is a breach. Legislation is considered first (**Adeels**)

### 1. Reasonable Foreseeability (s5B(1)(a) + Not Insignificant s5B(1)(b))

- a. Whether a RP in D's position would have RF his conduct involved a risk of injury (of some kind) to P (or class of persons)?  
**s5B(1)(a) (Wyong v Shirt)** → knew or ought to have known of the risk
  - i. A risk of injury is foreseeable if not 'far-fetched or fanciful' (**Wyong v Shirt**) → undemanding test
    1. Foreseeability of risk of injury does not refer to probability of event. (A risk that is unlikely to occur can be foreseeable) **Wyong v Shirt**
    2. The foreseeability of risk of injury is considered in general terms. Actual events as they happened are irrelevant **Doubleday v Kelly**
    3. Special knowledge of the risk of harm e.g. employers knowledge in **Paris v Stepney** of P's vulnerability to blindness will be determinative of the foreseeability question
  - b. Was it not insignificant **CLA s5B(1)(b)** – slightly more demanding test
2. **Standard of Care: (s5B(1)(c))**: did defendant fall short of the acts or omissions of a reasonable person in the defendant's position (**objective standard of care Glasgow Corporation v Muir**)? consider special vulnerabilities (P v SBC)

| Class          | Standard held to                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                          | Authority                |
|----------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------------|
| Child          | Owed/owes same as ordinary child of comparable age                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        | <b>McHale v Watson</b>   |
| Mental illness | Owed/owes same as ordinary person (healthy)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                               | <b>Carrier v Bonham</b>  |
| Learners       | Owes standard of licensed reasonable driver                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                               | <b>Imbree v McNeilly</b> |
|                | Held to higher standard in field of expertise                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                             |                          |
|                | <ul style="list-style-type: none"><li>• <b>Diagnosis &amp; Treatment – s 50 – SOC for Professionals:</b><ul style="list-style-type: none"><li>○ (1) no negligence if acted in a manner was <b>widely accepted by peer professional opinion</b> as competent professional advice</li><li>○ (2) can reject if CT thinks peer professional <b>opinion is irrational</b></li><li>○ (3) varying opinions does not prevent 1 or more of those opinions being relied on</li><li>○ (4) need not be universally accepted to be widely considered</li></ul></li><li>• <b>Advice &amp; Warning – s5P – s50 does not apply – use Rogers v Whitaker</b><ul style="list-style-type: none"><li>○ <b>Duty to warn of material risks inherent in treatment – risk is material if a RP in P's position, if warned of the risk would be likely to attach significance to it or if the practitioner is or should be reasonably aware that the particular patient, if warned of the risk, would be likely to attach significance to it</b></li></ul></li></ul> |                          |
| Professionals  |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                           |                          |

### 3. Calculus of Negligence: (how a RP, in the circumstances would respond to the risk s5B(1)(c)) is determined by factors in s5B(2).

This is assessed prospectively **Wyong v Shirt; Vairy v Wyong**. The DOC is not to include duty to prevent harm, merely to take RC **RTA v Dederer**

- a. **Probability of harm**: if risk of injury likely, ↑ standard of care; require ↑ protective measures
    - i. **Bolton v Stone**: probability of injury was remote
    - ii. **Romeo**: probability of risk was low because it was obvious
    - iii. **RTA v Dederer**: risk was low since people jump off & rarely is someone injured
  - b. **Likely seriousness**: if potential injury is serious, ↑ standard of care; require more protective measures
    - i. Risk can have extreme consequences **Romeo; Vairy v Wyong; RTA v Dederer**
    - ii. **Paris v Stepney**: if D knows of some vulnerability of the P to greater injury, the **level of seriousness of the potential consequences elevates the level of care required by the D**, notwithstanding that probability of injury is the same for this individual as for others → KNOW OR OUGHT TO HAVE KNOWN (already blind in 1 eye)
  - c. **Burden of taking precautions**: ↓ standard of care if there are economic & practical constraints to prevention
    - i. **Romeo**: burden was high due to limited resources + fence would have to extend kms + aesthetics.
    - ii. **Vairy**: cannot put a sign at every point
    - iii. **Woods**: helmets were impractical within the nature of the sport, it was not used elsewhere (inconvenient)
    - iv. **Neindorf**: risk was obvious & would be onerous to remove ALL risks from ones house.
  - d. **Social utility**: ↓ or ↓ standard of care according to effects that proposed measure would have on society as a whole (
    - i. **E v Aus Red Cross**: if testing system introduced supply of blood would decrease
  - e. Authority to look at policy reasons e.g. finding a breach would **place an onerous burden on public authorities** to create safe environments in order to safeguard the few careless visitors against consequences of their actions (**Romeo**)
4. Other
- a. S 61 – volunteers do not incur civil liability when doing community work in good faith for a community organisation

## CAUSATION

1. **Onus of Proof is on P s 5E**
2. **But For Test (s 5D(1)(a))** - that the negligence was a necessary condition of the occurrence of the harm (factual causation)
  - a. **Adeels; Strong v Woolworths**: it is the B4 test at CL – **P must prove the loss would not have eventuated but for the D's negligence act/omission (ON BOP)**
  - b. **Adeels**: recognising that changing the circumstances might have made a difference does not prove factual causation.
    - i. That something may have been a cause is insufficient **Amaca v Ellis**
  - c. **March**: A person may be responsible when his wrongful conduct is one of a # of conditions sufficient to produce that damage
  - d. **Barnett**: doctor's refusal to treat deceased did not cause death as treatment would not have saved his life anyway
  - e. Do not apply the common-sense approach under **March**
  - f. **Limitations of B4 Test**
    - i. **March**: unacceptable or illogical results in cases with multiple causes, NAs (snap causation chain) & distinguishing between causes & necessary preconditions
    - ii. **Strong v Woolworths**: multiple sufficient causes (each is treated independently), does not address policy considerations (in scope of liability), necessary preconditions – conditions that must be present for the occurrence of the harm, exceptional cases
3. **Scope of Liability (s 5D(1)(b))** - that it is appropriate for the scope of the negligent person's liability to extend to the harm so caused ("scope of liability") → **teases out common sense & experience + makes policy considerations more clear**
  - a. **NAs (case)** – break the chain of causation (generally & voluntary act or an act of god)
    - i. 3<sup>rd</sup> party acts which are not RF will break the chain of causation, it is a limit of liability **Chapman**
    - ii. Negligent medical treatment doesn't break causation **Mahoney v Kruschich**. 1<sup>st</sup> injury carries risk of neg. treatment
      1. To break the chain treatment must be **"inexcusably bad"** or "outside bounds of what a reputable medical practitioner might prescribe & so obviously unnecessary/improper"
    - iii. **Test**: must be a **voluntary human action** or **causally independent event** (so unrelated/unforeseeable) **Haber v Walker**
  - b. **Successive Causes (case)** - arise when the P suffers successive injuries, each of which is capable of causing the harm
    - i. If hard for P to prove on BOP which 1 of several Ds caused the harm, all may be held concurrently liable **Cook v Lewis**
    - ii. **Baker v Willoughby**: D is only liable for the original injury & harm. The 1<sup>st</sup> tortfeasor may not rely on the occurrence of the 2<sup>nd</sup> tort to reduce damages. The 2<sup>nd</sup> tortfeasor only responsible for additional harm (ESKR adv. here). Treated as if the 2<sup>nd</sup> event did not happen.
    - iii. **Jobling**: if the second act is a natural event (non-tortious), then the original tortfeasor is only liable for damages up to the 2<sup>nd</sup> event. (Distinguishes natural events & tortious conduct). It is an ordinary vicissitude of life.
  - c. **Common Law Remoteness (Essential)** – mechanism to limit recovery of damages to those only RF consequences of the negligent act. Influenced by policy (see below).
    - i. Damages are too remote when the damage suffered was not RF by the defendant (**Wagon Mound No 1**); RF marks the limits of liability **Chapman**
    - ii. **Foreseeability Test**: it is not RF if it was thought to be physically impossible or so farfetched that a **RP would not have paid any attention to it** (**Wagon Mound No 2**)
    - iii. **Only the general type of the damage** needs to be RF, **not manner of its occurrence or its extent** **Hughes v Lord Advocate**
      1. **Jolley**: damage that eventuated fitted the description of what was RF. Focus on the genus & not on particulars
  - d. **ESSKR Applies Stephenson v Waite** → injuries more severe than expected due to personal vulnerabilities will be compensated. **Only need to establish RF of initial injury** **Stephenson** **later consequences need not be RF (e.g. Extent)**
    1. **Nader** - psychological vulnerabilities will be considered + also beliefs etc. (both physical & non-physical attributes)
      - a. take the plaintiff with all his weaknesses, beliefs & reactions as well as his capacities and attributes, physical, social & economic
    2. **Kavanagh** – take person in the family & cultural setting that they live (includes religion). Irrelevant that the ultimate damage occurred from an unforeseeable event of cutting hair
      - a. Foreseeable that the initial damage (shoulder injury) would affect P's capacity to attend to personal hygiene and home duties, leading to marriage breakdown and psychiatric illness.
4. **What you have done had you been warned cases (loss of chance)** (connected to s 5D(1)(a) s 5D(3)) - If it is relevant to the determination of factual causation to determine what the person who suffered harm would have done if the negligent person had not been negligent
  - a. (a) the matter is to be determined subjectively in the light of all relevant circumstances, subject to paragraph (b), and
  - b. (b) any statement made by the person after suffering the harm about what he or she would have done is inadmissible except to the extent (if any) that the statement is against his or her interest.
  - c. Cannot say it was a cause of harm if having being warned you would have done it anyway **Chappel**
  - d. **Test**: **whether THIS person would have proceeded with the surgery if warned of the risk** **Percival**