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## DUTY OF CARE

There is a duty to take reasonable care to avoid acts or omissions which you could reasonably foresee would be likely to injure your neighbour. Your neighbour is persons who are so closely and directly affected by your act that you ought reasonably to have them in contemplation, as being so affected when directing your mind to the acts or omissions called into question. *Donoghue v Stevenson 1932*

### 1. Supply Chain – Consumer

Manufacturer (*Grant v Australian Knitting Mills Ltd 1935 & Donoghue v Stevenson 1932*)

Product Designers (*O'Dwyer v Leo Buring Pty Ltd 1966*)

Re-Packagers (*Glendale Chemical Products Pty Ltd v ACCC 1998*)

Repairers (*Hadeldine v Daw 1941*)

Modifiers (*Stillwell Trucks v McKay 2002*)

Growers & Distributors (*Graham Barclay Oysters Pty Ltd v Ryan 2002*)

### 2. Employer – Employee (*Kondis v State Transport Authority 1984*)

There is an obligation on employers to establish, maintain and enforce a safe system of work (*McLean v Tedman*). The obligation encompasses the risk that employees may behave carelessly for their own safety (*McLean v Tedman*). This duty is non-delegable, the employer cannot argue that it was the negligence of another unrelated party that caused the injury.

### 3. Occupier – Entrant (*Australian Safeways Stores v Zaluzna 1987*)

This duty does not extend to protecting plaintiffs from the criminal acts of third parties (*Modbury Triangle Shopping Centre Pty Ltd v Anzil 2000*), except where reasonable care for patrons must be taken against known risks of violence and anti-social behaviour, such as in licensed premises (*Adeels Palace Pty Ltd v Moubarak 2009*). This duty also extends to having a system in place to regularly inspect and clear the store & sidewalk area (*Strong v Woolworths 2012*).

### 4. Doctor/dentist – Patient (*Rogers v Whitaker 1992*)

### 5. Hospital – Patient (*Albrighton v Royal Prince Alfred Hospital 1980*)

### 6. School – Pupil (*Commonwealth v Introvigne 1982*)

### 7. Motorist – Highway Users (*March v Stramare 1991*)

### 8. Driver – Unborn Child (*Watt v Rama 1972*)

### 9. Mother driving – Unborn Child (*Lynch v Lynch 1991*)

## BREACH OF DUTY

A defendant will have breached their duty of care if they fail to meet the standard of care that would have been shown by a reasonable person in avoiding or reducing a risk of injury to the plaintiff.

The use of increased knowledge or experience embraced in hindsight after the event should form no part of the components of what is reasonable in all the circumstances. The matter must be judged in prospect and not in retrospect (*Maloney v Commissioner for Railways 1978*).

### 1. Foreseeable risk

- Where the defendant had actual knowledge of the risk, this element is easily satisfied
- If the defendant was unaware of the risk, the issue will be whether a reasonable person in the position of the defendant would have foreseen the risk
- It is not necessary for the exact sequence of events that led to the plaintiff's injury to be foreseeable, it is sufficient if the general risk of injury was reasonably foreseeable (*Doubleday v Kelly 2005*)
- Where there is something/an object that kids may climb on, the risk of injury is foreseeable (*Shaw v Thomas*)
- A reasonably foreseeable risk, is a real risk; something which a reasonable person in the defendant's position would not brush aside as far-fetched or fanciful (*Overseas Tankship (UK) Ltd v Miller Steamship Co Pty Ltd 1967*)

### 2. Not insignificant risk

- The phrase is intended to indicate a risk that is of a higher probability than something 'not far-fetched or fanciful', but not so high as might be indicated by a phrase such as 'a substantial risk' (*IPP Panel*)
- Look to the likely seriousness of the harm & the probability that the harm would occur

### 3. Reasonable person would have taken precautions

- The courts must apply the standard of care to the defendant's conduct having regard to the defendant's knowledge and responsibilities immediately before the injury, NOT with the wisdom of hindsight (*Adeels Palace Pty Ltd v Moubarak 2009*)

#### *Probability of harm occurring*

Refers to the likelihood of harm occurring; probability that a risk will eventuate. Where the risk of injury is very slight, reasonable care may be taken by doing nothing at all to eliminate the risk (*Bolton v Stone 1951*)

#### *Seriousness of the harm*

A higher standard of care is required/expected, where the risk has more serious consequences (*Paris v Stepney Borough Council 1951*)

*Wallace v Kam [2013]*

**Facts:** Medical failure to warn case. The defendant neurosurgeon had negligently failed to warn the plaintiff of two inherent risks of a surgical procedure. One of the two risks, a painful though temporary condition called neurapraxia, eventuated. The other, more serious risk, risk of permanent catastrophic paralysis did not eventuate. The plaintiff would have undergone the surgery even if warned of the risk of neurapraxia.

**Held:** The surgeon's failure to warn of one risk (which the patient would apparently not have taken and therefore would not have had the surgery at all) could not be a cause of the materialization of a different risk (one which the patient was prepared to take). **The surgeons' liability should not extend to harm from risks that the patient was willing to hazard.**

*Mt Isa Mines v Pusey (1970)*

**Facts:** The plaintiff was employed by the defendant and went to the aid of two fellow employees who had been very badly burned when an electrical switchboard exploded, due to the negligence of the employer. The plaintiff claimed damages for nervous shock.

**Issue:** Was this illness a damage that was reasonably foreseeable?

**Held:** Some type of mental disturbance was a foreseeable consequence of the defendant's negligence and the plaintiff's mental illness was not a different kind of damage. Only harm of a like kind need be foreseeable.

*Kavanagh v Akhtar (1998)*

**Held:** It was foreseeable that the plaintiff's injuries would place strain on her marriage and that such strain might lead to a breakdown in the marriage, which in turn might lead to psychiatric illness. The fact that the plaintiff's extreme reaction to her hair cutting was unforeseeable was irrelevant, so long as psychiatric injury is itself is regarded as a foreseeable consequence of the physical injury inflicted on the plaintiff. **Only need to foresee the kind of damage, not the precise type of damage or the extent or seriousness**

*Hughes v Lord Advocate [1963]*

**Held:** A burn injury was foreseeable, even though the *extent* of the severe injuries were not foreseeable. The defendant can only escape liability where the plaintiff's damage was different in kind from that which was foreseeable. Essentially, a defendant will be liable for all damage caused by an act provided that the *kind* of damage is reasonably foreseeable.

*Nader v Urban Transit Authority of NSW (1985)*

**Issue:** Was the psychiatric illness, caused by the parents' reaction, damage which was reasonably foreseeable?

**Held:** The damage of Ganser Syndrome was not too remote, as it was foreseeable that an accident of a 10-year-old boy would bring about a reaction from his parents. **Taking the plaintiff as you find them (egg shell skull rule), includes family circumstances!**

*Medlin v SGIO (1995)*

**Facts:** The plaintiff was a university professor who was injured in a motor vehicle accident and subsequently decided to retire early due to his injuries.

**Issue:** Was the plaintiff retiring an intervening act?

**Held:** The defendant was held to be liable for the plaintiff's loss of income and long-service leave benefits, as the act of retiring was not truly a voluntary act.

## DEFENCES TO NEGLIGENCE

<b>Contributory Negligence</b>	<p>Where a plaintiff has failed to take reasonable care for their own safety and suffered harm from a reasonably foreseeable risk of injury (<i>Nance v British Columbia Electric Railway</i>)</p> <ol style="list-style-type: none"><li>1. Fell below the standard of care they ought to have shown for their own safety<ul style="list-style-type: none"><li>▪ Standard of care is that of a reasonable person in the position of that person (e.g. kid as a kid) (<i>s 5R</i>)</li><li>▪ Determined on basis of what the plaintiff knew or ought to have known (<i>s 5R</i>)</li><li>▪ Not CN where failure to take care is mere inattention or inadvertence (<i>McLean v Tedman and Brambles Holdings</i>)</li></ul></li><li>2. Failure to take reasonable care must be a cause of the harm suffered (<i>Froom v butcher</i>)</li></ol>
<b>Intoxication</b> (also apply to contrib. neg.)	<p>A court is not to award damages to a plaintiff who is intoxicated to the extent that they are unable to exercise reasonable care and skill, unless the court is satisfied that the plaintiff's harm would have occurred even if they were not intoxicated (<i>s 50(1) &amp; (2) CLA</i>)</p> <ul style="list-style-type: none"><li>▪ Where the damage is likely to have occurred even if the person were not intoxicated, contributory negligence will be presumed (<i>s 50(3) CLA</i>)</li><li>▪ Does not apply where the intoxication was not self-induced (<i>s 50(5) CLA</i>)</li></ul>
<b>Voluntary Assumption of Risk</b>	<p>In order for a defendant to rely on the defence of voluntary assumption of risk, they must show that the plaintiff;</p> <ol style="list-style-type: none"><li>1) Knew of the facts constituting the risk</li><li>2) Fully appreciated that risk</li><li>3) Freely consented to that risk</li></ol> <p>(<i>Insurance Commissioner v Joyce</i>)</p> <ul style="list-style-type: none"><li>▪ Not available where the plaintiff is so intoxicated that they cannot assess or consent to the risk (<i>Joslyn v Berryman</i>)</li><li>▪ The need for genuine consent to the risk, makes it hard for employers to rely on this defence (<i>Smith v Charles Baker &amp; Sons</i>)</li></ul>
<b>Obvious Risk</b>	<p>A plaintiff is presumed to be aware of a risk if it was an obvious risk, unless they can prove that they were not aware of the risk (<i>s 5G(1) CLA</i>)</p>