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## NEGLIGENCE → DUTY OF CARE

### Is it a recognised duty category such as:

- Doctor / Patient → *Rogers v Whitaker*
- Driver / Road User → *Imbree v McNielly*
- Manufacturer / Consumer → *Donoghue v Stevenson*
- Lawyer / Client → *Giannarelli v Wraith*
- Prison Authority / Prisoner → *NSW v Buidoso*
- Occupier / Entrant → *Neindorf v Junkovic*
- Licensee / Third Party → *Club Italia v Richie*
- Parent / Third Party → *Smith v Leurs*
- Parent / Child → *Robinson v Swincer*
- School / Student → *Cth v Introvigne*

### Physical Harm:

- *Tabet v Gett (2010)*
  - X owes Y a duty of care as reasonable foreseeability of physical harm is generally sufficient enough to impose a duty of care on a person

### Mental Harm Duty of Care

- **Step 1: S53 CLA**
  - Was the plaintiff:*
  - Physically injured
  - Present at the scene of accident
  - Parent/spouse/child of person killed/injured/endangered in accident

\*Being present at the aftermath does not count as satisfying s53 (*King v Philcox*)

### AND

- Suffered a recognised psychiatric illness (S53(2))

- **Step 2: S33(1) CLA**
  - Is it reasonably foreseeable that a person of normal fortitude would suffer mental harm in these circumstances?

### *Relevant Circumstances to Consider (S33(2) CLA):*

- Was the mental harm a result of sudden shock
- Whether the plaintiff witnessed, at the scene, a person being killed, injured or put in peril
- The nature of the relationship between the plaintiff and any person killed, injured or put in peril
- Whether or not there was a pre-existing relationship between the plaintiff and the defendant

## Case Examples - Mental Harm:

1. King v Philcox (2015)
  - a. S33(1) requires a person of normal fortitude in the plaintiff's position would have suffered mental harm
2. Mt Isa Mines v Pusey (1970)
  - a. Declined to extend liability to those who merely hear bad news
  - b. Employer / employee relationship enough to established duty of care
3. Jaensch v Coffey (1984)
  - a. Reasonable foreseeability of shock is the foundation of duty of care

## Normal Fortitude:

- Is measured against a person of normal health
- “where the plaintiff’s response to the defendant’s conduct is so idiosyncratic as to render the risk of that response far-fetched or fanciful, the law does not require the defendant to guard against it.” (*Tomisevic v Menzies Wagga Southern Pty Ltd*)
- E.g. Abnormal reaction to the colour yellow and the defendant deliberately shows that colour to the plaintiff, the defendant would not be liable for negligence in the first instance.
  - However, if they are of knowledge of that idiosyncrasy and still do it, they can be found for negligence.

## Bearer of Bad Tidings:

- No liability (in the absence of malign intentions)
  - Neither carelessness nor insensitivity will found an action in negligence
- E.g. if X tells Y that their mum has died, Y cannot sue X for telling them

## STANDARD OF CARE

### Make sure this is discussed:

- Is it reasonably foreseeable that **this** act of carelessness could lead to **some** kind of injury to the plaintiff (or a class of people to which the plaintiff belongs)?

### Types of Standard of Care:

- **S31 / s32 CLA**
  - Ordinary standard of care
  - Use **s31** as definition
- **S41**
  - Professional standard of care
- **S40**
  - Special skill
- **S20**
  - Occupier (if the location or premises caused the injury)
- **Rogers v Whitaker**
  - Failure to advise as a medical practitioner (if its bad treatment use s41)

### Determining Ordinary Standard of Care

1. Go through all elements in S31(1) and S32(1)
2. If s32(1)(c) is not clear (ambiguous), go through the calculus elements (s32(2)) and mention the most relevant one to determining whether a reasonable person would have taken such actions to prevent the negligence

### 'Not insignificant' Case Examples: s32(1)(b)

#### Benic v NSW [2010]

- Refers to the probability of the risk occurring

#### Vincent v Woolworths

- **Risk was not insignificant and therefore the defendant was negligent:** An assessment of the probability of the occurrence of the risk

### Calculus of Negligence Case Examples: s32(2)

- **Social Utility**
  - E v Australian Red Cross Society [1991]
    - Social utility of blood stocks was greater than testing
- **Burden of Adequate Precautions**
  - Onus on P to show reasonable precautions available (see *Neill*)
  - Consider expense, difficulty and inconvenience
- **Probability of Harm**
  - Need to consider that the plaintiff may be a range of people (inattentive, careless, drunk, breaking the law); (*Romeo*)
  - Conditions may exist (darkness, crowds; *Romeo*)

- **The likely seriousness of the harm**

- Any particular susceptibility of the plaintiff, known or ought to known have been known by the defendant, is relevant
  - E.g. The damage to a one-eyed workman if a chip flies into his eye is greater than that to a two-eyed workman, and may necessitate different precautions; *Paris*

### Standard of Care Owed by Children:

\*Childhood is not an idiosyncrasy (*McHale v Watson*) → It is the standard of child the same age

*Sometimes relevant:*

- i. Is normal adult foresight and prudence reasonably to be expected of someone of D's age
- ii. If no, is P doing something a child of that age can legitimately do?
- iii. If yes, standard is of a reasonable child of the defendant's age

### Zanner v Zanner [2010]

The standard to be expected was of an 11 year old child who was to drive the vehicle over a distance of three to four meters on private property into a carport in circumstances where, to the knowledge of the respondent, he had performed that manoeuvre on five or six previous occasions without mishap.

### Professionals Standard of Care (s41)

#### Bolam v Friern Hospital Management Committee [1957] → **The Bolam Test**

‘doctor is not guilty of negligence if he has acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art’

- Accepted by a responsible body of peers
- The existence of a body which takes a contrary view will not result in a negligence finding

### Material Risk

“A risk is material if, in the circumstances of the particular case, a reasonable person in the patient’s position, if warned of the risk, would be likely to attach a significance to it or if the medical practitioner is or should reasonably be aware that the particular patient, if warned of the risk would be likely to attach significance.”

### Particular Skill - S40

*Determined by:*

- A. What could reasonably be expected of a person professing that skill
- B. The relevant circumstances as at the date of the alleged negligence and not a later date