

LAW2202: TORTS B

TOPIC 1: NEGLIGENCE – DUTY OF CARE

*Liability in the tort of negligence may arise where (i) a plaintiff sustains damage as a result of the defendant's negligent conduct, and (ii) the defendant owed the plaintiff a **duty of care** not to cause that damage. Whether or not a duty of care exists in a given situation is regarded as a question of law.*

There are 3 types of situations concerning duty of care: a) **Where it is settled law that a duty of care exists** – because there is a very strong precedent for it. For example, doctor and patient, pedestrians and other road users; b) **Where it is settled law that a duty of care does not exist**; c) **Where there is no settled law on whether a duty of care exists or not** – these are the grey areas, which is the focus of this course (see below).

General Concept Broad Test: If any person with ordinary sense realises that if they fail to exercise proper care and skill, their actions could occasion damage to another or another's property, they should be liable if such harm or damage results (*Heaven v Pender*). **Narrower Test:** A person must take *reasonable care* to avoid acts or omissions which you can **reasonably foresee** would be likely to injure your neighbour. A 'neighbour' is any person so closely and directly affected by my act that I ought to have them in contemplation as being affected when considering my acts *or omissions* (*Donoghue v Stevenson*).

Duty of Care Element 1 - Reasonable Foreseeability: It is not necessary that there be reasonable foreseeability with regard to the *precise* sequence of events that caused the harm; the question is merely whether a consequence of the *same general character* as what occurred is reasonably foreseeable (*Chapman v Hearse*).

What degree of risk must be foreseeable to be deemed 'reasonable'?: It must be reasonably foreseeable to a reasonable person in the position of the D that careless conduct of *any kind* on the part of the D may result in damage of *some kind* to the P or class of persons to which the P belongs (*Minister v San Sebastian*). The degree of risk must be *not unlikely to occur*, as opposed to *more likely than not* (*Caterson v Commissioner for Railways*). The reasonable person must have foreseen a *real, rather than far-fetched or fanciful*, possibility of some harm to the plaintiff (*Sullivan v Moody*) → **more recent case**.

Police Duty of Care: The police could owe a duty to a suspected criminal, victim or bystander in circumstances where they could discharge their duties without injury to those persons (*ACT v Crowley*). However, police do not owe a duty of care to possible victims of a criminal whom they negligently fail to apprehend. If they did owe a duty, they would be policing in a way that was *unduly defensive, inefficient* and would place the community at risk (*Hill v Chief Constable*). Police immunity extends to injury they cause directly, as well as injury occurring through their negligence. Police could owe a duty if they have taken control of a situation (*Crowley*).

But something more is needed... Suggestion 1: Proximity: Based on whether there was a relationship of proximity between the plaintiff and defendant. Proximity between the defendant and plaintiff refers to closeness in terms of: a) **physical** – nearness in space and time; b) **circumstantial** – pre-existing relationship; and c) **causal** – a direct causal connection between the defendant's act and the plaintiff's injury. Proximity was championed by Deane J of the High Court (*Sutherland Shire Council v Heyman*). There can be no duty of care when a defendant and plaintiff are jointly involved in an illegal activity, even if they are physically proximate. People committing a crime should not be able to avail themselves in the civil law (*Gala v Preston*).

Vulnerable Plaintiffs cont.: People owe a duty of care to those disabled or feeble in mind or body and should anticipate the presence of such persons within the scope and hazard of their operations (*Haley v London Electricity Board*).

Proximity has consistently been opposed by Brennan J, for 2 reasons: a) it is a vague or empty concept; it does not tell when there will be proximity, and b) it does not explain previous judgments regarding a duty of care; it is present in some cases even where no duty is found (*Gala v Preston*). The High Court subsequently rejected the test of proximity, preferring a different test.

Suggestion 2: Reasonable Foreseeability + Salient Features - After considering reasonable foreseeability, additional considerations – known as *salient features* – should be taken into account to determine whether a duty of care exists: 1) **Conflict of duties** – whether the finding of a duty conflicts with an already existing duty (*Sullivan v Moody*); 2) **Conflict of laws** – whether there a better suited area of law under which the plaintiff's actions should be brought; 3) **Illegality** – whether the plaintiff was involved in illegal activity (*Gala v Preston*); 4) **Floodgates** – whether finding a duty of care risks flooding the courts with claims of liability. (*Sullivan v Moody*).

Vulnerable Plaintiffs: Where an act is incapable of injuring an ordinary, normal person, the person who does the act owes no duty to do more simply because an abnormally sensitive person may be affected. In such circumstances, injury will not be reasonably foreseeable and there will be no duty of care (*Levi v Colgate-Palmolive*).

TOPIC 2: DUTY OF CARE – PURE ECONOMIC LOSS BY ACTS

The specific area of duty of care regarding pure economic loss by acts has been treated with caution by the courts. **Pure economic loss** refers to loss that is not the result of physical damage to the person or property; rather, it is *financial loss only*. The courts have been dubious in allowing for a duty of care in this area partly because some of the litigation comes out of *legitimate business activities*.

STEPS: 1) *Is there pure economic loss? Define ‘Pure Economic Loss’ – just because property has been damaged, does not rule out pure economic loss (Johnson Tiles – damage to property, but that of defendant; plaintiffs suffered pure economic loss.* 2) *Was the pure economic loss caused by act? 3) The Test for Duty of Care = Reasonable Foreseeability + Salient Features (see below).*

Pure Economic Loss – Salient Features:

The courts will have regard to the following salient features when assessing a duty of care for causing pure economic loss:

- i) **No indeterminate liability** – whether a particular and identifiable person, or a class of persons, is affected;
- ii) **Control** – whether the defendant controlled, broadly, the activities that caused the pure economic loss;
- iii) **Vulnerability** – whether the plaintiff was vulnerable in that they could or could not have been reasonably expected to guard themselves against the harm; that is to say, could the plaintiffs have taken steps to protect themselves, such as through insurance?
- iv) **Interference with legitimate business activity** – whether a duty of care would interfere with the defendant’s business, or whether their duty would simply be co-extensive on the duty already owed and would impose no further burden on business activity;
- v) **Actual or constructive knowledge of risk of harm** – whether the defendant had knowledge of the risk of economic harm to the plaintiff. An affirmative to the factors points towards a duty of care being imposed (*Perre v Apand*).
- vi) **Contractual Regime** – a court will be reluctant to impose a duty for pure economic loss where to do so will interfere with a contractual regime;
- vii) **Statutory Regime** – the existence of a statutory regime regulating the field points *against* a duty of care;
- viii) **Reliance and Assumption of Responsibility** – where the plaintiff *relies* on the defendant’s assumed responsibility, such will point towards a duty of care (*Johnson Tiles v Esso*).

These are the salient features a court will consider in assessing duty of care, together with:

- ix) **Conflict of Duties;**
- x) **Conflict of Laws;**
- xi) **Illegality;**
- xii) **Floodgates**

Determinate Liability Exception: As a general rule, damages are *not recoverable* for loss which is not consequential upon injury to person or property; that is, pure financial loss. However, where the defendant knew, or ought to have known, that a *particular person* – *not merely a member of an unascertainable class* – would be likely to suffer economic loss as a consequence of their carelessness, the defendant will be liable for any economic loss that results therefrom (*Caltex Oil v The Dredge ‘Willemstad’*).

TOPIC 3: DUTY OF CARE – MENTAL/PSYCHOLOGICAL HARM

Mental harm is harm that arises as a result of psychological damage to the *mind*, as opposed to physical damage to the body – even if as a consequence, mental harm leads to damage of the body. Historically, courts have been loath to award a duty of care and compensation in this area because: a) **Risk of Fabrication** – people could make up a mental illness; b) **Risk of Indeterminate Liability and a Floodgate of Litigation;** c) **Difficulty proving Causation;** d) **The Variability of Mental Conditions.**

ISSUE 1: PLAINTIFF MUST SUFFER SOME FORM OF MENTAL HARM

There are **three types of mental harm:** Legislation recognises **3** types of mental harm (*Wrongs Act 1958, s. 67*):

- i) **Mental Harm** – defined as *psychological or psychiatric injury*. Plaintiff cannot just be suffering from mere grief or sorrow; they need to have a recognised psychiatric injury;
- ii) **Consequential Mental Harm** – mental harm that is a *consequence of any other injury of any kind*. This will be treated as a standard claim because the mental injury is founded in a claimable physical injury.
- iii) **Pure Mental Harm** – mental harm *other than consequential mental harm*. That is, mental harm originating from a purely psychological standpoint. These are normally caused by shock, fear for one’s own life, after witnessing a traumatising event etc. This is the area of contention in litigation. NOTE: Psychological injury may lead to physical injury, but that does not change its definition from pure mental harm.

Despite the restriction on mental harm being a *recognised psychiatric injury* – *Wrongs Act, s. 23*: “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 shock*. BUT: *Wrongs Act, s. 71*: “Except as provided by this Part, this Part is **not intended to affect the common law** – the common law, with its assumptions and restrictions, will still operate despite statute.

ISSUE 2: DIRECTNESS/INDIRECTNESS – once the type of mental harm has been covered, the question becomes whether the harm was caused *directly* or *indirectly*: **Direct Harm** – where the defendant’s negligence directly causes the plaintiff’s mental harm. For example, placing the plaintiff in a situation of apparent danger where they fear for their own life; **Indirect Harm** – where the defendant’s negligence indirectly causes the plaintiff mental harm. That is, where the plaintiff suffers mental harm due to *witnessing or learning* of another person being killed, injured or put in danger.

DUTY OF CARE – MENTAL HARM (cont.):

1st Hurdle: Wrongs Act, s. 73 – Recovering for Pure Mental Harm

- (1) Where pure mental harm results – in whole or in part – due to another person being killed, injured or put in danger by the defendant’s negligence (*indirect harm*; where the plaintiff is fearful for the safety of somebody else)
- (2) The plaintiff is not entitled to recover damage 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.
- (3) No damages to be awarded if the *victim would be unable to recover damages from the defendant* (if the primary victim could not have claimed, the sufferer of mental harm cannot claim; the sufferer’s claim is parasitic on the primary plaintiff’s claim).

‘Witness at the Scene’:

Being killed, injured or placed in danger do not necessarily occupy a time measured in minutes. In some cases, death, injury or being placed in danger occurs over an extended period of time. Indeed, being ‘put in danger’ means ‘being put at risk’, continuing until the victim is taken to a place of safety. Mental harm suffered in such circumstances is considered to be *continuing*, and will be remediable – even if the witness was not on the scene at the *exact time of injury* (*Wicks v State Rail Authority of NSW*).

‘Close Relationship’:

It is the *closeness and affection* of a relationship – rather than the legal status of a relationship – that is relevant in determining a Duty of Care. The relevant question to be asked is therefore whether the relationship between the victim and the sufferer was a *close and loving one* (*Gifford v Strang Patrick Stevedoring*).

2nd Hurdle: Wrongs Act, s. 72 – Reasonable Foreseeability

s. 72(1): “A person (the defendant) *does not owe a duty to another person* (the plaintiff) to take care not to cause the plaintiff pure mental harm unless the *defendant foresaw or ought to have foreseen* that a person or **normal fortitude** might, in the circumstances of the case, suffer a recognised psychiatric illness *if reasonable care were not taken*”.

- It must be assessed whether the person who suffered is ‘of normal fortitude’. It is not reasonably foreseeable if the person who encounters mental harm has a very unique fear and suffers due to that harm –

s. 72(2): “The circumstances of the case include the following –

- (a) Whether or not the mental harm was suffered as a result of a **sudden shock**;
- (b) Whether the plaintiff **witnessed, at the scene**, a person being killed, injured or put in danger;
- (c) The **nature of the relationship** between the plaintiff and any person killed, injured or put in danger;
- (d) Whether or not there was a **pre-existing relationship** between the plaintiff and the defendant.

s. 72(3) “This section does not affect the duty of care of a person (the defendant) to another (the plaintiff) if the *defendant knows, or ought to know*, that the plaintiff is a person of *less than normal fortitude* (if the defendant knew the victim was a person with less than normal mental fortitude, and that his conduct was likely to cause that person mental harm, the defendant will be deemed to have owed a duty of care.

CONSEQUENTIAL MENTAL HARM

Wrongs Act, s. 74(1): “A plaintiff is not entitled to recover damages from the defendant for *consequential mental harm* unless –

- (a) The defendant *foresaw* or ought to have foreseen that a *person of normal fortitude* might, in the circumstances, *suffer* a recognised psychiatric illness *if reasonable care were not taken*; or
- (b) The defendant *knew*, or ought to have known, that the plaintiff is a person of *less than normal fortitude* and foresaw or ought to have foreseen that the plaintiff might, in the circumstances, *suffer* a recognised psychiatric illness *if reasonable care were not taken*”

Limitations on Damages: Wrongs Act, s. 75 –

“A court *cannot make an award of damages for economic loss for mental harm* resulting from negligence *unless the harm consists of a recognised psychiatric illness*”. – NOTE: There is a higher threshold level for mental harm before damages for non-economic loss can be awarded (10% higher) -

Messengers: There is *no duty of care* for mental harm caused by the *manner in which bad news is communicated*. This is for policy reasons relating to the importance of open reporting and communication – that is, there is a public interest in conveying information. People may be reluctant to disclose information if they thought they could be sued. However, there *may* be a duty of care for mental harm caused by carelessness in the accuracy of the information conveyed (*Anettes v Australian Stations*).

3rd Hurdle: Salient Features

Salient features to consider in claims of *mental harm* caused by negligence include –

- Assumption of Responsibility** - where the defendant assumes responsibility for the plaintiff, the defendant owes a duty of care;
 - No Indeterminate Liability** – where it is clearly demarcated to whom a duty is owed, usually by some pre-existing relationship, the defendant owes a duty of care to that person;
 - Vulnerability** – where a plaintiff is completely reliant on a defendant and has no way of protecting themselves from harm, the defendant owes a duty of care;
 - Control** – if the defendant controls the activities and placement of the plaintiff, the defendant owes a duty of care;
 - Interference with Legitimate Business Activity** – if finding a duty of care does not interfere with the defendant’s business, they may owe a duty of care. This is especially the case with employers, who owe their employees a duty of care anyway;
 - Conflict of Duties** – the defendant owes a duty of care if that duty is co-extensive with other duties (*Annetts*).
- However, a person under investigation is not owed a duty of care by police as it would conflict with the investigation (*Tame*).