

Negligence

For **P** to succeed in a common law negligence action, **P** must prove that, 1) **D** owes **P** a duty of care; 2) **D**'s conduct breaches the duty owed to **P**, by not satisfying the standard of care expected of the reasonable **D**; 3) the breaches caused harm that is legally compensable and not too remote; and 4) no defence applies.

I Duty of Care – Does D owe P a duty of care?

The process to establish a duty of care includes examining the characterization and type of the relationship between the parties, defining the scope of duty by the nature of the relationship, and determining whether this scope of the duty fall within an existing duty category or to expand the scope (*Geyer*), or to find a novel duty (Payne JA in *Ibrahimi*).

A Duty and scope

1 Existing duty category or new analogous relationship

- Manufacturer & consumer (*Donoghue*) – manufacturer has knowledge of risks and the skills and capacity to limit those risks, whereas a user/consumer must trust the safety of the goods
- Employer to provide safe system of work and safe place of work for employee (*Paris*)
- Teacher (school) & students even outside formal school hours (*Geyer*) – vulnerable young ppl; teachers take responsibility over students
- Doctor & patient (*Rogers*) – skill and knowledge of risks & patient depends on her doctor
- Occupiers to take reasonable care to protect entrants from injury arising from state of the premises (*Zaluzna*)
 - S 14B(3) – state of the premises
 - 'Premises' may extend beyond property where control exists (*Strong*)
 - Extends past closing time? (*Modbury*)
 - Does not extend to harm from 3rd party (*Modbury*)
 - H/w can be supported by statute and salient features (*Adeels*)
- Road users & road user (*Chapman*)
- Airline & passengers (*Qantas Airways Ltd v Cameron*) – airline is in control of circls where risks might arise; captain professional skills; passengers rely of the captain and airline to keep them safe
- Guard & prisoner (*Bujdoso*) – prisoner is entirely dependent on the guard for his safety & the guard has taken responsibility to protect prisoners
- Solicitor (lawyer) & clients (*Hill v Van Erp*) – expert skills and is typically dealing with a vulnerable client, who trusts the solicitor to look after their best interests
- Some relationships have immunities from duty
 - Advocates immunity (*D'Orta*)
 - Good Samaritans (*WA 31B*), volunteers (*WA 31F*), food donors (*WA 37*) are protected from breach findings under WA

2 Duty and scope

- Apply same analysis as for novel case (*Geyer*) to extend the scope of the duty of care
- Duty to exercise reasonable care, not ensure P's safety (**Gummow J** in *Dederer*)

B Reasonable foreseeability

The first element that needs to be established to prove that a duty of care exists is reasonable foreseeability. The court will look at whether the risk of harm to plaintiff or to class of persons of which plaintiff is a member must be a risk that a reasonable person in defendant's position could have foreseen (*Chapman*).

- Undemanding test (*Chapman*)
- The harm to P must be in 'realm of intelligent imagination' (Hayne J in *Modbury*) but the *precise* chain of events does not have to be foreseeable (*Chapman*).
- Does not have to be likely or probable: only not far-fetched or 'not unlikely' (*Sullivan*)
 - (*Tame* is an eg of a case where reasonable foreseeability not established at duty stage: harm was "extreme and idiosyncratic" and 'farfetched')
- Objective test: does not matter whether defendant *actually* foresaw (foresight, not hindsight)

C Salient features

- Reasonable foreseeability necessary but not sufficient to establish duty in novel case (*Sullivan*).
- The court would also look at the proof of sufficient 'salient features' that link the parties, and whether the existence of factual features or policy features between parties that point towards or against a duty (*Sullivan*; *Caltex Refineries*).

1 Fact or relationship-based features	
P's vulnerability	<p>Geyer – child of immature age Perre – Apand could do nothing to protect themselves against the diseased seeds Budjoso – inability to protect oneself (no real autonomy) Adeels – no way to protect themselves</p> <p>Cf Ibrahimi – Ps arriving into Australian waters by sea is challenged by their decision to join the voyage Cf Godfery – class of persons here are those susceptible to armed robbery – NOT pregnant women at newsagents (enormous)</p>
D's assumption of responsibility	<p>Geyer – teachers taking care of students</p> <p>Cf Ibrahimi – is not triggered by taking rescue actions and is less likely to apply when a class of defendant does not increase risk of harm Cf Godfery - responsibility to prevent harm to others; not a responsibility engaged for the general public interest</p>
D's knowledge of risk	<p>Geyer – knew the kids were there Bujdoso – P was a known target of the other prisoners Perre – knowledge of the risk of potato disease</p> <p>Cf Modbury – did not know the risk of criminal activity in the area Cf Graham – no specific notice of risk & no contamination history</p>
D's control over risk	<p>Geyer – control of principal over students (access to area) Perre – control over the seeds and their supply Adeels – access to pub can be controlled Bujdoso - Request room change; not done; attacked (complete/direct control) Donoghue – actual effective control over harm</p> <p>Cf Ibrahimi – capacity to act; no control over weather, sea conditions, rickety boat Cf Godfery – no control over escape Cf Agar – no control over rugby games and behaviour of company Cf Graham – relevance of statute to control (fragmented) Cf Modbury – absent when considering possibility of criminal behaviour by stranger (can't control unpredictable 3rd party; can be countered by knowledge) Cf Stuart, CAL, Cole – personal autonomy</p>
Reliance	Absent in Ibrahimi – needs to be a representation, reliance must be reasonable
(Others)	<p><i>Sufficient proximity of relationship physical, circumstantial and causal — to give rise to a duty of care (Lowns; not found in Agar)</i> <i>Existence of category of relationship between D and P (absent in Modbury)</i> <i>Nature of activity undertaken by D</i></p>
2 Policy-based factors	
Indeterminate class of P (liability)	<p>Sullivan – if a father then who else? Bounds were limitless Godfery – 'ill-defined area' containing thousands of people Agar – all rugby players is unreasonable Modbury – liable for vast range of criminal acts</p> <p>Cf Perre – liability is indeterminate only when it cannot be realistically calculated; not on size of group but identifiable members (eg class of people) affected by potato diseases not indeterminate, although very large</p>
Individual Autonomy	<p>Agar – cannot be held liable for what players do nor participate in dangerous sports Perre – commercial autonomy Stuart – full autonomous grown adult (infringes his autonomy) Cole, CAL – chose drinking</p> <p>Cf Lowns – medical professional social responsibility (duty to rescue) *controversial</p>
Defensive practices	<p>Sullivan – an effect may be no reporting out of fear of liability Cran - introduce a risk that police would act to protect themselves from claims of neg Hill – police might preemptively arrest people to avoid liability, false imprisonment)</p>
Diversion of resources	<p>Cran – time and scarce resources that would prevent them carrying out primary functions Sullivan – child wellbeing priority</p>