

Standard of Care 1 - Foreseeability risk; Negligence calculus

Standard of Care: **Foreseeability of Risk**

Standard of Care:

There are 2 steps to finding a breach

1. Formulation of the legal standard
2. Determination of factual issue – whether D fell below the standard

1. Identify legal standard of care:

- Objective test: *Vaughan v Menlove (1837) 132 ER 490*
- 'An obligation of care; not a warranty of safety'

2. Breach of legal standard

- Question of fact
- Court compares standard with conduct of the D
- Breach is a falling short of the standard
- Breach might lie in singular failure or in a course of conduct

Determining the legal standard:

Reasonable foreseeability of RISK of harm:

- A foreseeable risk is 'a risk of which the person knew or ought to have known': **5B(1)(a)**
- Risk must be 'not insignificant': **5B(1)(b)**
- 'not far-fetched or fanciful' *Wyong SC v Shirt (1980) 146 CLR 40, 47 (Mason J)*

CLA s 5B: 'A person is not negligent in failing to take precautions against a risk of harm unless: (a) **the risk was foreseeable** ... and (b) **the risk was not insignificant**, and (c) in the circumstances, a reasonable person in the person's position would have taken those precautions.

Wrongs Act 1958 (Vic) s 48(3) (a) insignificant risks include, but are not limited to, risks that are far-fetched or fanciful; and (b) risks that are not insignificant are all risks other than insignificant risks and include, but are not limited to, significant risks.

Standard of Care: **Negligence Calculus 1**

Negligence calculus

- If risk is reasonably foreseeable, court must consider various factors: s 5B(2) CLA
- No definitive list, but will include at least:
 - Probability
 - Likely seriousness of the harm
 - Burden of taking precautions
 - Social utility of activity

Probability:

Romeo v Conservation Commission of the NT (1998) 192 CLR 431

- Majority: no breach of SOC
- Kirby J: don't need to guard against all foreseeable risks
- McHugh J (diss.): risk of serious injury & cheap to fence off area
- Hayne J: consider cost of alleviating all equivalent accidents

cf. *Nagle v Rottneest Island Authority (1993) 177 CLR 423*

Romeo v Conservation Commission of the NT (1998) 192 CLR 431

'[T]he risk which was to be foreseen (on the argument of the P) was that a person adversely affected by alcohol would mistake the appearance of an area on the cliffs (in a way which a sober and alert person would not) and walk of the edge of the cliff. No doubt the reasonable person takes account of the fact that people do not always pay attention, that people do not always take care for themselves... and that people may be affected by alcohol... But what was the likelihood of the events which happened here occurring?' (Hayne J)

Development of a conceptual scheme:

(for duty of care)

Jaensch v Coffey (1983) 155 CLR 549 - PROXIMITY (Sir William Deane 1931-)

1. Reasonable foreseeability of the real risk that P would sustain injury
2. Proximity in the relationship between the parties
3. Absence of statutory provisions or common law rules operating to preclude the imposition of a duty of care

Burnie Port Authority v General Jones P/L (1994) 179 CLR 520

- Used the Jaensch Proximity test. In this case, the importance of the element of proximity was emphasised. Proximity test had a great run in the HC for a decade.

Caparo Industries v Dickman (1990) 2 AC 605 24

UK Case - Caparo 3 stage test (only difference is it requires consideration of policy)

The right test to use according to Kirby, but no one else liked it.

1. Reasonable foreseeability of injury
2. Proximity
3. Fairness, justice and reasonableness

First 2 steps adopted from Deane J's test above.

Jaensch v Coffey (1983) 155 CLR 549 25

*'It is directed to the relationship between the parties in so far as it is relevant to the allegedly negligent act of one person and the resulting injury sustained by the other. It involves the notion of nearness or closeness and embraces **physical proximity** (in the sense of space and time) between the person or property of P and the person or property of D, **circumstantial proximity** such as an overriding relationship of employer and employee or of a professional man and his client and **causal proximity** in the sense of the closeness or directness of the relationship between the particular act or cause of action and the injury sustained.'*

- Deane J at 584

Abandonment of the proximity test

Hill v Van Erp (1999) 188 CLR 159

"If considerations of policy underlie and enlighten the concept of proximity, and if nearness and closeness are neither sufficient nor necessary to establish a relationship of proximity in all cases, then it cannot be said that any unifying common element has emerged which can adequately be described as proximity".

- Dawson J (at 177)

Sullivan v Moody (2001) 207 CLR 562 27

Still need more than reasonable foreseeability – but what?

"a D will only be liable for failure to take reasonable care to prevent a certain kind of foreseeable harm to a P, in circumstances where the law imposes a duty to take such care".

- Gleeson CJ, Gaudron, McHugh, Hayne and Callinan JJ (para 42)

Still need more than reasonable foreseeability – but what?

Critical of the concept of proximity

They stated that 'it gives little practical guidance in determining whether a duty of care exists in cases that are not analogous to cases in which a duty of care had already been established... It expresses the nature of what is in issue, and in that respect gives focus to the inquiry, but as an explanation of a process of reasoning leading to a conclusion its utility is limited'.

- Gleeson CJ, Gaudron, McHugh, Hayne and Callinan JJ (para 48)

-Salient features...

-Develop incrementally?

Nuisance, Trespass to Land, Trespass to Goods, Conversion, Detinue

NUISANCE:

Private Nuisance:

- “An unlawful interference with a person’s use or enjoyment of land, or some right over it, or in connexion with it” (*Hargrave v Goldman* (1963) (Windeyer JJ))

Elements:

1. D’s conduct
2. Causes serious and unreasonable interference
3. With P’s beneficial use or enjoyment of their land

Protected Interests:

Plaintiff’s beneficial use and enjoyment of land

- Physical damage to property
- Intangibles; smoke, noise, fumes, glare, offensive sights(?)...
- Interference with property rights (e.g. easements) (some cases interference does not amount to nuisance)
- NOT views, privacy, TV reception

McKenzie v Powley [1916] SALR 1 - the singing of songs in a Salvation Army Hall at 7am on a Sunday was considered to be a nuisance

Raciti v Hughes (1995) 7 BPR 14,837 - surveillance of P’s land might be nuisance

Successful cases where owners have unsightly views from their property:

Thompson-Schwab v Costaki [1956] 1 WLR 151 - prostitutes

Broderick Motors v Rothe (1986) ATR 80-059 (NSWSC) - A bomb of a car - “Don’t buy a lemon”

Victoria Park Racing v Taylor (1937) 58 CLR 479 - platform overlooking racecourse

Hunter v Canary Wharf [1997] AC 655 - lost television reception

Sunlight?

Bury v Pope (1586) 1 Cro Eliz 118, 78 ER 375 - Obstruction of sunlight? Pope just finished building a house on his property which prevented sunlight reaching a window in Bury’s home and the window had received sunlight without any interference for over 30 years prior. So Bury brought an action on the case in respect of his loss of sunlight, however, it was held that he had no cause of action. Pope had the prerogative to build whatever he liked on his land. It was actually Bury being foolish for building his house earlier, but too close to the boundary.

Serious and unreasonable interference

‘plain and sober and simple notions’

Walter v Selfe (1851) 64 ER 849, 852 (*Knight Bruce VC*)

Ask whether the inconvenience is “more than fanciful, more than one of mere delicacy or fastidiousness, ... an inconvenience materially interfering with the ordinary comfort physically of human existence, not merely according to elegant or dainty modes and habits of living, but **according to plain and sober and simple notions among the**

English people.”

- Plaintiff’s can’t be too precious

‘Ordinary usage of mankind’

Sedleigh Denfield v O’Callaghan [1940] AC 880, 488-489 (*Lord Wright*)

“It is impossible to give any precise or universal formula, but it may broadly be said that a useful test is ... what is reasonable **according to the ordinary usage of mankind living** in society, or more correctly **in a particular society.**”

- Objective test

Action on the Case for Wilful Injury:

Action on the case for wilful injury

- Innominate action
- Action on the case because indirectly inflicted harm

Bird v Holbrook (1828) 130 ER 911

- D set up a spring gun on his property to catch a robber
- P went onto D's garden to catch a stray pea-hen and was shot in the leg when he triggered the spring gun
- **Held:** P could recover
- *"The common understanding of mankind shews, that notice ought to be given when these means of protection are resorted to ... the P was only a trespasser: if the D had been present, he would not have been authorised even in taking him into custody, and no man can do indirectly that which he is forbidden to do directly."*

Bird v Holbrook (1828) 130 ER 911, 917-918 (Burrough J)

Wilkinson v Downton [1897] 2 QB 57

- D returned from horserace and told P her husband was badly injured
- P suffered great mental anguish
- **Held:** *"The D has wilfully done an act calculated to cause harm to the P ... and in fact thereby caused harm to her."* (58-59 (Wright J))

"One Q is whether the D's act was so plainly calculated to produce some effect of the kind which was produced that an intention to produce it ought to be imputed to the D, regard being had to the fact that the effect was produced on a person proved to be in an ordinary state of health and mind. I think that it was. It is difficult to imagine that such a statement, made suddenly and with apparent seriousness, could fail to produce grave effects under the circumstances upon any but an exceptionally indifferent person ... and it is no answer in law to say that more harm was done than was anticipated, for that is commonly the case with all wrongs." (59 - Wright J)

Janvier v Sweeney [1919] 2 KB 316

- Fiancé a German spy?
- *"[T]error wrongfully induced and inducing physical mischief gives a cause of action."* (Banks LJ (322))

Cause of action requires:

- Intentional act by D
- Calculated to cause harm
- In fact causing harm
- Provided effect would be produced on a person of ordinary health and mind

Bunyan v Jordan (1937) 57 CLR 1

- P was employee of D
- P saw D with loaded revolver
- P overheard D saying he would shoot someone
- P later heard a shot fired (but D was unharmed)
- P suffered nervous shock
- **Held:** No cause of action

The intentional words had to be uttered directly to P, or at least in P's presence; also P was overly sensitive

Carrier v Bonham [2001] QCA 234

- D mentally ill
- Attempted suicide by stepping in front of a moving bus
- P bus driver suffered nervous shock
- **Held:** action on the case and negligence made out

Contact:

- Contact with the body of another (or even with the intimate clothing of another)

(Fagan v Metropolitan Police Commissioner [1969] 1 QB 439)

- P's foot trapped under car tyre
- Could this amount to a battery?
- 'The least touching of another in anger is a battery' (*Cole v Turner* (1704) 87 ER 907 (Holt CJ))

In Re F v Clark [1990] 2 AC 1 (Lord Goff)

- Proposed sterilisation operation for a patient with serious psychiatric condition – would this constitute a battery?
- Hostility is not required
- Lord Goff stated the fundamental principle: everybody's person is 'inviolable'
- But – battery actions must be subject to limits

Held:

- Operation was justified in the circumstances

Exigencies of modern life

- Contact regarded as acceptable in everyday ordinary life
- What forms of contact do we have to put up with?
- Change in acceptable standards of behaviour over time?
- Not actually implied consent but a broad exception to trespass for various forms of physical contact that are regarded as being acceptable in everyday ordinary life

Collins v Wilcock (1984) 1 WLR 1172

- D suspected by police officer as having been soliciting for sex
- Officer took hold of D's arm in order to restrain her; D scratched officer's arm and was arrested and charged

Issue:

- Had the officer been acting in the lawful course of her duty when the alleged battery was committed?

Other:

- Goff LJ held that touching another in order to gain their attention normally can be regarded as acceptable
- What about persistent touching?
- P officer committed battery in attempting to restrain the D by force when not exercising powers of arrest

Rixon v Star City (2001) 53 NSWLR 98

- P had been excluded from gambling at a casino
- Act permitted him to be removed "using no more force than is reasonable in the circumstances"
- Employee placed his hand on P's shoulder

Issue:

- Was there a battery at this point on the basis that more force had been used than was necessary?

Other:

- Placing one's hand on the shoulder of another could be a battery
- But – acceptable in this case

Bouhey v R (1986) 161 CLR 10, 25 (Mason, Wilson and Deane JJ)

- 'It has never been the common law that actual hostility or hostile intent towards the person against whom force is intentionally applied is a necessary ingredient of unlawful battery.'
- Also: knowledge by a D or P of the contact is not necessary

Fault:

- There can be no trespass without fault
- Facts may be consistent with act intention (ie intention to bring about the unlawful contact; not necessarily to harm, but to do the act which caused the unwanted contact)
- Does negligent contact suffice?
 - E.g. you hit someone with your car - you don't intend the act, but you were careless
 - fly-swatting

Week 1: What is a Tort? Perspectives on tort law; Introduction to trespass and case

What is Tort?

Cattanach v Melchior (2003) 215 CLR 1

Wrongful birth (conception) case

- Claim typically is that the doctor failed to advise risk of failed sterilisation
- Patient ends up having an unanticipated and unwanted child
- The Q is whether the doctor should pay for the failure to properly advise; and if so, for what?
- Claims distinguish between pain and suffering of the pregnant woman, and the cost of raising a child.
 - Is the birth of a healthy child a legal harm?
 - Should the parents keep the \$105,249 they had been awarded?

Held: Yes (4:3)

- Australian Medical Association: the decision is a “horror story”
- *Should the financial burden of raising the unwanted child be offset by the “blessing” of having a healthy child?*
- McHugh & Gummow JJ: “The coalminer, forced to retire because of injury, does not get less damages for loss of earning capacity because he is now free to sit in the sun each day reading his favourite newspaper.”

NSW Legislative Response:

Section 71 inserted into Civil Liability Act 2002

- Cannot claim costs for raising a healthy baby

71 Limitation of the award of damages for the birth of a child

- (1) In any proceedings involving a claim for the birth of a child to which this Part applies, the court cannot award damages for economic loss for—
- (a) the costs associated with rearing or maintaining the child that the claimant has incurred or will incur in the future, or
 - (b) any loss of earnings by the claimant while the claimant rears or maintains the child.
- (2) Subsection (1)(a) does not preclude the recovery of any additional costs associated with rearing or maintaining a child who suffers from a disability that arise by reason of the disability.

What are torts?

- *“Tort is what is in the tort books, and the only thing holding it together is their binding.”*
Tony Weir, An Introduction to Tort Law (2nd ed, 2006) p ix
 - *“Numerous attempts have been made to define a ‘tort’ with varying degrees of lack of success.”*
W.E. Peel & J. Goudkamp, Winfield & Jolowicz Tort (19th ed, 2014) p 2
 - *“A tort is a wrong because it is a departure from what the law determines should happen.”*
Davies & Malkin (2021) p 2
 - “...they are **wrongs** because the **law says they are wrongs**, and ... they are wrongs to private individuals that lead to **private civil actions**, usually (but not always) for compensation in the form of **damages**.”
Davies & Malkin (2008) para 1.5
1. Wrongs
 2. Source - courts
 3. Enforced by individuals
 4. Damage