

## 1. DUTY OF CARE

Did the defendant owe the plaintiff a duty of care?

Step 1A - established category?

Builders	Voli v Inglewood Shire Council	Occupier/trespasser	Hackshaw v Shaw
Manufacturers to consumer	Donoghue v Stevenson	Occupier/entrant	Australian Safeway Stores v Zaluzna; Thompson v Woolsworth
Landlord/tenant	Jones v Barlett	Duties to rescuers	Chapman v Hearse; Wicks v State Rail Authority of NSW
Prison authorities to prisoners	NSW v Badusjo	Prison authorities for conduct of escapee	Home Office v Dorset Yacht Company
Parent/child to third parties	Smith v Leurs	Child care centre to children	Carmarthenshire CC v Lewis
School/student (non-delegable)	Commonwealth v Introvigne	Driver and other road users	Imbree v McNeilly
Doctor/patient	Ellis v Wallsend District Hospital; Rogers v Whitaker	Driver/passenger	Miller v Miller
Occupiers to lawful entrant to prevent criminal conduct by third parties	Modbury Triangle Shopping Centre v Anzil OR Adeels Palace v Moubarak	Licensed premises to drunken patron	Cole v South Tweed Heads Rugby League Football Club
Hospital to mentally ill patient	Hunter and New England Local Health District v McKenna	Employers/employee (non-delegable)	Kondis v Transport State Authority
Hospital/patient (non-delegable)	Ellis v Wallsend District Hospital		

Step 1B - no established duty of care

➔ Incremental approach, salient features approach & neighbor principle

The *Neighbour Principle* from **Donoghue v Stevenson [1932] AC 562** establishes that a person must take reasonable care to avoid acts or omissions that can reasonably be foreseen to injure their “neighbour” — that is, those who are closely and directly affected by their actions.

When faced with novel situations, courts adopt an **incremental and analogical approach**, taking comparable cases and cautiously extending existing duties (*Perre v Apand 1999*).

The existence of a duty of care is determined by reference to the **salient features** of the relationship between the parties. As stated by Allsop P in *Caltex Refineries v Stavar [2009]*, a duty will be imposed where it is **reasonable in all the circumstances** to do so.

## 2. DUTY OF CARE

### Negligently inflicted psychiatric injury

#### Step 1 - establish common law duty of care *Tame / Annetts*

- (1) Was the risk of P sustaining a recognized psychiatric injury reasonably foreseeable?
- (2) Was there a close relationship between D & P such that D should have had P in contemplation as a person so closely and directly affected by D's conduct?

**Tame v NSW:** The High Court held that the plaintiff's psychiatric injury was **not reasonably foreseeable** to a person of normal fortitude, and therefore **no duty of care** was owed.

**Annetts v Australian Stations:** By contrast, the court found a **duty of care existed**, because of a **close family relationship** and the defendant's **assumption of responsibility**, making the psychiatric injury **reasonably foreseeable**.

#### Step 2 - type of psychiatric injury

Plaintiff must suffer a **recognized psychiatric illness**. Mere fear, grief, or transient upset is **not sufficient**.

#### Step 3 - defendant's duty (*Law Reform (Miscellaneous Provisions) Act 1944 (NSW), Part 3*)

**s3(1):** Plaintiff retains a claim even if injury arises from nervous shock / psychiatric injury.

**s4(1):** Defendant may be liable if conduct causes harm to a person who is: Killed, injured, or put in peril.

Liability may extend to secondary victims (family members / witnesses).

Parent - Parent, grandparent, step-parent, guardian (*loco parentis*)

Child - Child, grandchild, step-child, ward under guardianship

Spouse - Legal spouse or de facto partner (if multiple, only last counts)

#### Step 4 - Plaintiff may recover if:

1. Witnesses the event (primary victim is harmed or placed in danger).
2. Has a close family relationship with primary victim (parent, child, spouse, or other close tie of love and affection).

Event must occur **within plaintiff's sight or hearing**.

Reasonable foreseeability: Defendant must reasonably foresee that psychiatric injury could occur to plaintiff.

Things to consider under scope of liability:

1. Remoteness	<p>The test for remoteness is whether the kind or type of harm suffered by the plaintiff was reasonably foreseeable as a result of the defendant's negligence (<i>Wagon Mound (No 1)</i>). Liability will only be imposed where the consequences were reasonably foreseeable.</p>
2. Egg-shell skull rule – D must take a victim as they find them	<p>The defendant must take the plaintiff as they find them. If the plaintiff is more susceptible to injury than an average person, the defendant is liable for the full extent of the harm, even if that harm is greater than could have been foreseen. This is often expressed as the “greater than expected harm” rule. In <i>Smith v Leech Brain &amp; Co</i>, a burn injury was reasonably foreseeable; the subsequent cancer was merely an extension of that harm, and thus not too remote. The defendant was held liable for the cancer as well.</p>
3. Novus actus interveniens?	<p>A novus actus interveniens is an independent intervening event that breaks the chain of causation between the defendant's negligence and the plaintiff's harm. It must be an event that is not reasonably foreseeable — so unlikely that it cannot be said to flow from the defendant's negligence.</p> <ul style="list-style-type: none"> <li>• If it is <i>the very kind of thing that is likely to happen</i> as a result of the defendant's negligence, it will <b>not</b> break the chain of causation.</li> <li>• If it is not likely to happen, it will constitute a novus actus and the chain of causation will be broken (<i>March v Stramare</i>).</li> <li>• Once the chain of causation is broken, the defendant is not liable for any harm suffered by the plaintiff following the novus actus.</li> </ul>

<i>Morris v Murray</i>	<p>The defence of <b>volenti non fit injuria</b> applied. The plaintiff willingly accepted the risk of flying with an intoxicated pilot. Although the plaintiff had been drinking, he was <b>not so intoxicated as to be incapable of appreciating and understanding the risk</b>. The flight was a <b>joint enterprise</b> (the plaintiff assisted in preparing and fueling the plane). The court held that the plaintiff <b>voluntarily assumed the risk</b>, so the defence succeeded.</p> <p><i>Note:</i> The defence will <b>not automatically apply</b> whenever a passenger accepts a ride with a drunk driver — it depends on whether the plaintiff truly appreciated and accepted the risk in the circumstances.</p>
<i>Rootes v Shelton</i>	<p>The defence of <b>volenti failed</b>. Although the plaintiff accepted the <b>ordinary risks inherent in water-skiing</b>, he did <b>not accept the specific risk</b> that resulted from the defendant's <b>negligence</b>. The relevant risk: the defendant <b>failed to warn</b> the plaintiff about a stationary boat and <b>steered too close</b> to it, causing injury. Therefore, the plaintiff's consent did <b>not extend to negligent acts</b> by the defendant.</p>
<i>Fallas v Mourlas (2006)</i>	<p>The parties were <b>engaged in shooting kangaroos at night</b>, which was held to be a <b>dangerous recreational activity</b> under the Civil Liability Act. However, the <b>risk of being shot in the leg</b> by a companion was <b>not an obvious risk</b> of that activity. Therefore, the defendant <b>could not rely on the "obvious risk" defence</b> under s5L CLA. The injury arose from <b>the defendant's negligent act</b> (turning around and shooting while the plaintiff was nearby).</p>

## STATUTE

### Workers Compensation Act s151O

The defence of volenti non fit injuria is abolished in employment cases. Instead, there is a presumption of contributory negligence on the part of the worker.

### Motor Accidents Injuries Act

The defence of volenti is not available in motor vehicle accidents except where the accident occurs during motor racing. Instead, there is a presumption of contributory negligence.

#### Volenti vs. Contributory Negligence

- ✓ Volenti – P actually knew of risk and freely consented
- ✓ Contributory negligence – P ought to have known of risk

## 6. DAMAGES

**Aim of Damages:** Put P back in the position they would have been in but for the tort (*Parramatta City Council v Lutz*). Damages usually awarded as a lump sum – “once and for all”. Court assumes P will invest lump sum and live off the income stream. Problem: Most plaintiffs don’t invest wisely or spend lump sum optimally. Lump sum can put P in a better position than receiving periodic payments over time.

No-Fault Compensation Schemes: Statutory schemes provide compensation without need to prove fault. Examples: Workers’ compensation, Motor Accidents schemes.

Economic loss	Medical expenses, loss of wages, loss of future earnings
Non-economic loss	Pain and suffering, loss of amenity of life, loss of expectation of life
Special damages	Can be precisely quantified in monetary terms
General damages	Cannot be precisely quantified; more subjective
Pre-trial (special)	Past losses that can be precisely quantified. P can lead evidence of actual expenses. Examples: Medical expenses, loss of income.
Post-trial (general)	Future losses that cannot be precisely quantified, often hypothesized. Examples: Future loss of income, non-economic loss, future medical expenses.

### STEP 1 - any pre-trial special damages available?

Any medical expenses or loss of earnings until date of trial

### STEP 2 - any damages available for economic loss?

Economic loss – loss of earning capacity and medical expenses

## Non-delegable duties of care

A person who holds a non-delegable duty (duty holder) can delegate the performance of that duty to someone else (the delegate), but the duty holder remains legally liable for any negligent failure of the delegate to perform the duty.

TLDR: You remain legally liable for the performance of a duty even if you delegate it to someone else.

High Court stance: Reluctant to create new categories of non-delegable duties (*Leichhardt Council v Montgomery*).

General principles underpinning non-delegable duties:

- There is an element in the parties' relationship that generates a special responsibility or duty to ensure care is taken.
- The duty holder has undertaken care, supervision, or control of a person, and is placed in a special relationship, assuming a particular responsibility for that person's safety in circumstances where the person might reasonably expect that due care will be exercised.

## EMPLOYERS – EMPLOYEE

Employers owe a non-delegable duty of care to provide a safe workplace for employees (*Kondis v State Transport Authority*).

- Employers have exclusive responsibility for the safety of premises, equipment, and work systems used by employees.

## HOSPITAL – PATIENTS

Hospitals owe a non-delegable duty of care to patients they have undertaken to treat. Not all patients necessarily fall within the scope of this duty (*Ellis v Wallsend District Hospital* – on whose door did the patient knock?).

## SCHOOL AUTHORITIES – PUPILS

School authorities owe a non-delegable duty of care to ensure reasonable care is taken to protect pupils from foreseeable risk of injury (*Commonwealth v Introvigne*).

Limits to school authorities' non-delegable duty:

School authority is liable only if and to the extent that an independent contractor was performing functions which the school had assumed for itself a duty to perform, generally during school hours and on school premises, or at times/places where the school carries out its educational function (*Woodland v Swimming Teachers Association*).

- Example: Teaching and supervising swimming lessons delegated to swimming teachers.
- Swimming lessons were an integral part of the school's teaching responsibility.

- s5D provides guidance on establishing causation and applying remoteness in negligence claims.
- May apply to CRA claims, even though CRA itself does not explicitly reference s5D.
- Courts could implicitly use s5D principles when determining if a defendant's wrongful act, neglect, or default caused the death.
- Possible statutory modification of CRA s3:
  - s5D may implicitly amend s3 of CRA, such that in assessing causation for CRA claims, courts consider remoteness and causation principles under CLA.
  - Particularly relevant when there is a time gap or intervening event between the wrongful act and the death of the primary victim.
- Caveat / Limitation:
  - This is only a possible interpretation.
  - There is no definitive case law confirming that s5D directly applies to CRA claims.
  - Courts may treat it as persuasive guidance rather than binding law.

#### Step 4 - consider the effect of the deceased's contributory negligence

When considering deceased's contributory negligence, look at s5T of CLA – Court may reduce damages awarded in claims under Compensation to Relatives Act on account of deceased's contributory negligence

s13 LRMPA 1965: A claim under Compensation to Relatives Act can't be defeated by deceased's contributory negligence nor will damages be reduced

#### PROBLEM -5T CLA

Damages for claim brought under Compensation to Relatives Act may be reduced on account of deceased's contributory negligence

- ✧ 5T (1) court entitled to have regard to deceased's contributory negligence
- ✧ 5T (2) s13 of LRMPA 1965 does not apply to prevent reduction of damages by deceased's contributory negligence

Relationship between s13 LRMPA 1965 & s5T CLA?

CLA is a later piece of legislation that impliedly amends s13 LRMPA

#### Step 5 - What damages are available under Compensation to Relatives Act?

s4 – can only recover for economic loss, not non-economic loss

s3 (2) – reasonable funeral expenses = recoverable forms of damages

s3 (3) – list of things that aren't taken into account when calculating damages