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**NOTE: READ THROUGH EXAM ONCE QUICKLY, WORK OUT MAIN ISSUES, AND IN**

# THE TORT OF NEGLIGENCE

## CONDITION 1: DUTY OF CARE

Two pathways: (1) RF + established duty; or (2) RF + salient features

1. Is the general harm to relevant class of persons reasonably foreseeable?

The test:

- Consequence of “**same general character**” need only be “**not unlikely to follow**” (*Chapman, car crash carer runaway by another driver case*)
- Harm need only be ‘real and not far-fetched’ (*Sullivan*) or ‘within the realm of intelligent imagination’ (Hayne J in *Modbury*)
- Only need to foresee that careless conduct of *any kind* will result in harm of *some kind* to the plaintiff. (*San Sebastian*)

For reasonable foreseeability to be satisfied at the duty stage, some kind of injury need only be ‘real and not far-fetched’ (*Sullivan*). All that is required is that a consequence of the ‘same general character’ was ‘not unlikely’ to follow from the defendant’s lack of reasonable care (*Chapman*).

But it is well-established that the precise chain of events leading to the harm in question need not be foreseeable at the duty of care stage; all that is required is that a harm of the same general character was ‘within the realm of intelligent imagination’ (Hayne J, *Modbury*) as a consequence of the defendant’s careless actions.

Failing the test:

- The plaintiff must not be an ‘**unforeseeable plaintiff.**’ Sometimes, temporal removal can create this non-foreseeability. (*Seltsam v McNeill, asbestos priest case*)

2. Is the relationship between P and D an established category where a duty exists?

Manufacturer of products to consumers	<i>Donoghue v Stevenson</i>
Road users ( <i>Chapman</i> )	<i>Chapman v Hearse</i>
Train driver to passenger	<i>Caterson v Commissioner for Railways</i>
Occupier to entrant regarding state of premises	<i>Wrongs Act 1958</i> (Vic) Pt IIA <b>BUT</b> <i>Modbury</i>
Employer and employee	<i>Paris v Stepney Borough Council</i>
School and pupil	<i>Geyer v Downs</i>
Doctor and patient	<i>Rogers v Whitacker</i>
Some relationships have immunities from duty: eg, advocates (at common law). (Good Samaritans, volunteers, food donors are protected from breach findings under the <i>Wrongs Act</i> .)	

**Joint illegality**

*Miller v Miller* (2011) 242 CLR 446

**FACTS:** P was a 16-year old, drinking in early hours of morning and some distance from home. She steals car with companions, contravening Criminal Code (WA) s 371A. Seen stealing the car by P's cousin, who took over driving. Cousin drives carelessly, speeding and ignoring red lights, refusing to allow P to get out of the car multiple times when she asked to do so. Eventually crashes into pole, killing one passenger and seriously injuring P.

**REASONING:** Generally, no duty of care owed in relationship of joint illegality. BUT By asking to be let out for the car and with no reasonable means of preventing the offence thereafter, P had done enough to withdraw from complicity in the continuation of the offence and was not jointly engaged with the driver in illegal activity at the time when the accident happened.

### Advocates' immunity

- ***D'Orta-Ekenaike v Victoria Legal Aid*:** Advocates (barristers) will not owe a duty of care to their clients.

### 3. Do the salient features of the alleged duty relationship point towards a duty of care?

Where the asserted duty relationship has not yet been established at common law, the duty inquiry requires a multifactorial analysis of that relationship's salient features (*Sullivan*).

**Tends towards a duty of care**

**Tends away from a duty of care**

### Vulnerability

The plaintiff's vulnerability to the carelessness of the defendant is a characteristic central to determining the presence of a novel duty relationship (*Geyer*). Vulnerability is to be understood as a plaintiff's 'inability to protect itself from the consequence of a defendant's want of reasonable care' (*Woolcock Street Investments*, discussed in *Ibrahimi*).

- ***Bujdoso v NSW*** – **extreme vulnerability**. Child sex abuse prisoner threatened by other inmates (no autonomy/freedom). Affirmative duty to protect against third party was found.
- ***Geyer v Downs*** – **high vulnerability**. School children highly vulnerable due to immaturity. They rely on schoolmaster for protection within school grounds.
- ***Crimmins v Stevedoring*** – **high vulnerability**. Workers forced to obey instructions concerning where they were directed to work on wharfs. Failure to comply -> disciplinary action/deregistration.
- ***Perre v Apand*** – **high vulnerability**. P could do nothing to protect themselves from economic consequences of D sowing contaminated potato crop within 20km of their own crops.

- ***Esanda v Peat Marwick Hungerfords*** – **low vulnerability**. Sophisticated organisation could investigate financial position of the borrowing company and not depend on auditor's certification.
- ***Ibrahimi v Commonwealth*** – **low vulnerability**. Plaintiffs could have protected themselves from the risk of shipwreck by not embarking on the journey from Indonesia in the first place.

In *Bujdoso*, the plaintiff, a prisoner without even the freedom to determine his movements and activities, and whose security was in the hands of prison guards, was nearly as vulnerable as possible. In *Ibrahimi*, the plaintiffs' reliance on the Australian Coast Guard to properly carry out its duties did not establish vulnerability sufficient to the finding of a duty of care. This case falls somewhere between these examples.

## Control

The level of control exercised by the plaintiff over the relevant class of risk is of importance in discerning the presence of a duty of care (*Ibrahimi*). But the mere capacity to protect another from a risk cannot, without more, constitute control (*Graham Barclay Oysters*).

***Geyer v Downs*** – school had control over children dropped off on its premises.

***Bujdoso v NSW*** – prison authorities have elevated control over the actions of inmates.

***Adeels Palace v Moubarak*** – licensed venue has the power to control and remove patrons from its venue.

***Ibrahimi v Commonwealth*** – the Australian Coast Guard's capacity to take action to protect another person from harm was too remote to constitute legal or practical 'control' for this purpose.

***Agar v Hyde*** – a rugby rule-making body did nothing which facilitated or encouraged the breach of rules by Mr Hyde's opponents. They could not control the voluntary conduct of others.

***NSW v Godfrey*** – prison guard had insufficient control over the actions of an escaped inmate on third parties.

***Modbury*** – shopping centre had insufficient control over the unpredictable criminal acts of third parties on its premises.

***Stuart v Kirkland-Veenstra*** – police officers did not control the source of the risk of harm posed by a suicidal individual to himself.

## Assumption of responsibility

**Annetts** – the defendant offered a personal assurance to the child's parents that he would keep him safe.

**Modbury** – there was no assumption of responsibility by the shopping centre because capacity does not equate to obligation.

**Ibrahimi** – a rescue operation did not constitute the assumption of responsibility because, inter alia, it did nothing to discourage the intervention by any third party or worsen the situation for those on board the imperilled vessel.

### **Knowledge**

The knowledge of potential harm arising from a want of reasonable care is significant in determining the presence of a novel duty (McHugh J in *Oysters, Perre, Bujdoso*).

**Bujdoso** – the prison authorities had knowledge that the prisoner had been threatened and knew of the perils that generally confront child sex abusers in prison.

**Perre** – Apand knew of the risks posed by contaminated potato seeds and knew of WA's restrictions on imports of seeds grown within 20km radius of contaminated potato crop.

**Geyer** – the school had knowledge of children playing on the schoolgrounds before school and the schoolmaster had warned children of that risk.

**Modbury** – there was no knowledge or forewarning that the unpredictable criminal act would take place.

### **Autonomy**

**Bujdoso** – the inmate had absolutely no autonomy while he was within the control of the prison guards.

**Agar v Hyde** – the decision to play rugby was made voluntarily. A duty of care on the rulemaking body would erode this autonomy.

**Stuart v Kirkland-Veenstra** – the deceased was acting voluntarily and with autonomy. A positive duty would erode the capacity of individuals to enjoy that autonomy.

### **Indeterminacy of liability**

**Agar v Hyde** – the duty would be one owed to *all* players of rugby. This would be absurd.

In *Godfrey*, the asserted duty of care owed by a prison authority to those harmed by an escaped prisoner's actions was too indeterminate. The Court in *Godfrey* held that to find a duty of care in that case would be to find a duty of care to the 'public at large'.

It is significant here that in McHugh J's judgment in *Perre*, he held that if the defendant is capable of conceptualising an 'ascertainable class' affected by its conduct, liability would not be indeterminate.

### **Conflict with pre-existing duty**

**Sullivan** – the duty of care to suspects of abuse was inconsistent with the statutory duty to protect children's best interests.

**Adeels** – there was a statutory power grounded in the *Liquor Act* to remove patrons under certain circumstances. This would not be in conflict with a common law duty to remove such a patron.

### **Defensive practices**

**Sullivan** – intolerable risk that authority would become excessively cautious in identifying abusers of children or reporting sexual abuse.

This could be compared to the situation in *Sullivan v Moody*, where the presence of a duty of care to suspected child abusers was deemed to be inconsistent with a statutory duty of doctors to care for the potential child victims.

**Williams v The Minister, Aboriginal Land Rights Act** – to impose a duty of care might cause the Aborigines Protection Board to adopt excessively cautious practices in the protection of Aboriginal children.

### **Diversion of resources**

**NSW v Godfrey** – police have limited resources and cannot be expected to dedicate all available resources to the capture of one escapee.

4. Is this a special case?

a. *Pure omissions*

It is relevant in the determination of this duty that its scope is alleged to extend to include affirmative action to protect against the actions of third parties. In *Stuart v Kirkland-Veenstra*, Gummow, Hayne, and Heydon JJ articulate the need for extreme control and lack of autonomy on the part of the plaintiff's class in such situations. Given the analysis above in the salient features analysis on control and vulnerability, it seems unlikely that the requisite degree of these features will be present to ground a duty of care.

It's also relevant that in *Bujdoso*, where a duty to protect against the actions of third parties was found, the authorities knew explicitly that the P had been subject to threats by fellow inmates, as well as of the general risk posed to sexual assault convicts once imprisoned.

**i. Note good Samaritan protections in *Wrongs Act 1958* (Vic) s 31B (relevant to breach)**

**31B Protection of good samaritans**

- (1) A good samaritan is an individual who provides assistance, advice or care to another person in relation to an emergency or accident in circumstances in which—
  - (a) he or she expects no money or other financial reward for providing the assistance, advice or care; and
  - (b) as a result of the emergency or accident the person to whom, or in relation to whom, the assistance, advice or care is provided is at risk of death or injury, is injured, is apparently at risk of death or injury, or is apparently injured.
- (2) A good samaritan is not liable in any civil proceeding for anything done, or not done, by him or her in good faith—
  - (a) in providing assistance, advice or care at the scene of the emergency or accident; or
  - (b) in providing advice by telephone or by another means of communication to a person at the scene of the emergency or accident.
- (3) Subsection (2) applies even if the emergency or accident was caused by an act or omission of the good samaritan.
- (4) Subsection (2) does not apply to any act or omission of a good samaritan that occurs before the assistance, advice or care is provided by the good samaritan.

**ii. Framing**

**Note:** a pure (or mere) omission is a failure to take affirmative action. This is distinct from failure to act in the course of positive conduct. But this is often a blurred line: need to argue it either way.

**Note also:** usually special relationship will be grounded in an established category. Rare to have a novel special relationship, but if the relevant salient features fit, it is possible!

- Courts will generally not impose a duty to take positive action (*Sutherland Shire Council v Heyman*).
- Whether or not your alleged duty extends to take positive action should be included in your framing of the duty.

- **Gummow, Hayne, Heydon JJ** articulate some relevant salient features in considering pure omissions:
  - Relationship between holder of power and person to whom DoC was allegedly owed (**CONTROL IS KEY**)
  - Duty to control the actions of another must usually require the person to be not autonomous (e.g., **KIDS, INMATES**)
  - Consider also: vulnerability, degree and nature of control, statutory powers
- **Crennan and Kiefel JJ**: employer-employee (*Paris v Stepney Borough Council*), teacher-pupil, carrier-passenger, shipmaster-crew, jailers-prisoners will generally attract duty to take affirmative action

iii. **Reasonable foreseeability analysis as usual**

iv. **Established category?**

- **Prison authorities to inmates (extends to protecting against actions of third parties)**

In *Bujdos*, prison authorities were found to have a duty of care to take reasonable steps (including positive acts) to protect an inmate from reasonably foreseeable harms arising from the prison setting (including the acts of third parties).

- **Relevant salient features here were**: extreme vulnerability, absolute control by authorities, complete lack of autonomy, knowledge by the prison authorities of the risks

- **School to pupils**

*Geyer v Downs* – duty of care to take positive acts to protect children from reasonably foreseeable harms. **Relevant salient features**: heightened vulnerability of children, absolute control by school.

- **Doctors (note these are NSW cases)**

In *Lowns v Wood*, a duty of care to take positive acts was found to apply to doctors to non-patients. This was supported in *BT v Oei*, where the relevant salient features were:

- There was no conflict between the duty owed by the defendant to the patient and the doctor to BT - the two are coincident
- The duty was consistent with statutory obligations to provide information about HIV
- There was vulnerability on the part of BT's class of plaintiff, and a real risk of harm
- The defendant's class had specialist knowledge and training equipped to identify the risk

- **Parents to children? (NOT a special relationship)**



- No general common law duty is owed by a parent to their child to protect them from foreseeable risks (*Robertson v Swincer*).
  - **REASONING: King CJ:** Massive financial burden imposed on parents. Adverse social consequences: supporting relatives/friends may become less willing to care for children. **Legoe J:** Unacceptable intrusion of the law of negligence into family/domestic relationships. Unwarranted burden on parents, unclear when this duty ceases. **Millhouse J:** agrees with these policy reasons.
- No general common law duty is owed by a parent to take reasonable steps to prevent harm to third parties inflicted by their children (*Smith v Leurs*).

#### v. Salient features

Key lessons from Stuart v Kirkland-Veenstra (and compare with above cases):

- Look to extreme actual control and extreme vulnerability to ground a so-called special relationship.

#### b. Occupier's liability

- i. Start with reasonable foreseeability as usual
- ii. Starting point -- *Wrongs Act* s 14B(3):

*An occupier of premises owes a duty to take such care as in all the circumstances of the case is reasonable to see that any person on the premises will not be injured or damaged by reason of the state of the premises or of things done or omitted to be done in relation to the state of the premises.*

#### iii. Definitions

- Occupier = someone in control of premises = **someone with a right to exclude** (*Wheat v Lacon*). An occupier **includes** a landlord with an obligation of repair (s 14A(a)).
- 'Premises' includes moveable things and spaces (s 14A(b))
- An invitee = any person on premises (s 14B(3)). An invitee includes **any person even if not invited** and even if on the premises **unlawfully** (*Wrongs Act*, as distinct from common law inclusion of only lawful entrants).

#### iv. Duty to control others on the premises?

*Wrongs Act* is confined to 'state of the premises.' In instances concerning controlling others/activities on premises, must return to the common law.

- *Safeways v Zuluzna*: usual rules of negligence apply to occupiers. An occupier will typically owe a duty of care to an invitee.
- *Modbury*: no general duty of care to control the criminal acts of third parties on premises.

- Usually a special relationship arises because of "special vulnerability, on the one hand, and on the other, special knowledge, the assumption of a responsibility or a combination of both"
- 
- *Adeels* (distinguishes from *Modbury*): a licensed venue does have a duty of care which extends to controlling the criminal acts of third parties on its premises.

### c. *Public authorities*

#### i. Definition

##### Section 79

- (a) the Crown;
- (b) a public service body within the meaning of the Public Administration Act 2004;
- (c) a body, whether corporate or unincorporate, that is established by or under an Act for a public purpose;
- (d) a Council within the meaning of the Local Government Act 2020;
- (e) a body established or appointed for a public purpose by the Governor in Council or by a Minister, otherwise than under an Act;
- (f) a person holding an office or position established by or under an Act;
- (g) a person holding an office or position to which he or she was appointed by the Governor in Council or a Minister otherwise than under an Act;
- (h) any other person or body prescribed  
(or of a class prescribed) as an authority to which this Part applies (in respect of all or specified functions);
- (i) any person or body in respect of the exercise of a public or other function of a class prescribed for the purpose of this Part.

#### ii. **Start with reasonable foreseeability as usual**

#### iii. **Starting point (as long as it does not pertain to dust-related conditions or tobacco (*Wrongs Act* s 81)):**

**Section 83 -- Principles concerning resources, responsibilities etc. of public authorities**

In determining whether a public authority has a duty of care or has breached a duty of care, a court is to consider the following principles (amongst other relevant things)—

- (a) the functions required to be exercised by the authority are limited by the financial and other resources that are reasonably available to the authority for the purpose of exercising those functions;
- (b) the functions required to be exercised by the authority are to be determined by reference to the broad range of its activities (and not merely by reference to the matter to which the proceeding relates);
- (c) the authority may rely on evidence of its compliance with the general procedures and applicable standards for the exercise of its functions as evidence of the proper exercise of its functions in the matter to which the proceeding relates.

**Section 85 -- Exercise of function or decision to exercise does not create duty**

In a proceeding, the fact that a public authority exercises or decides to exercise a function does not of itself indicate that the authority is under a duty to exercise the function or that the function should be exercised in particular circumstances or in a particular way.

Instructive in this analysis is the obiter of McHugh J in *Graham Barclay Oysters*. His Honour's view was that for a public authority to owe a duty of care, the injury must be reasonably foreseeable, the authority must be in a position of control, the injured person must be vulnerable, and the authority ought to have known of an existing risk of harm. For such a duty to exist, there must also not be a supervening policy reason denying a duty of care.

#### **Six Considerations**

- If the first 4 of these questions are answered in the affirmative and the 5th and 6th questions in the negative, the court will ordinarily hold that the authority owed a duty of care to the plaintiff.
- Conversely, if any of the first 4 questions are answered in the negative or either of the 5th and 6th questions are answered in the affirmative, ordinarily no duty of care will arise.

#### **Reasonable foreseeability**

1. Would a reasonable public authority reasonable **foresee** injury to the plaintiff or his or her interests?

#### **Factual salient features - MUST HAVE ALL THREE**

2. Was the authority in a position of **control**?
3. Was the injured person or his or her interests **vulnerable**?
4. Did the public authority **know**, or ought it to have known, of an existing risk of harm to the plaintiff (rather than a risk to the general public)?

#### **Policy features - 'trump cards'**

5. Would the imposition of the duty of care impose liability with respect to the defendant's exercise of "core policy-making" or "quasi-legislative" functions?
6. Is there any supervening policy reason that denies the existence of a duty of care?

**Facts in *Graham Barclay Oysters*:** Oyster lake heavily polluted. Government knew this. Statutory power gave government authorities power to prohibit taking of oysters if satisfied that oysters would be unfit for consumption. They didn't exercise this power. People consumed these oysters; contracted Hepatitis A.

***Gleeson CJ on why there was no duty owed by the statutory authority in *Graham Barclay Oysters*:***

1. Substantial managerial control over the oyster industry is an over-simplification. The state may have had this power in theory, but not in practice.
  2. Duty of care shouldn't be found with respect to political judgment by the state. Government policy powers are a 'political possibility', not an obligation to act (note *Commonwealth v Eland* (protecting Aborigines from alcoholism)).
- v.     **If the authority takes the functions of an established duty bearing relationship, then they are likely to owe a duty (e.g., as an employer)**

### ***Crimmins v Stevedoring Committee***

- **FACTS:** Crimmins: employed as waterside worker, 1961-65. Stevedoring operations regulated by Aust Stevedoring Industry Authority: set up under statute (continued under consecutive Acts). The Authority oversaw 12-15 registered stevedoring companies; 5000 workers registered with Authority. P employed casually, on a job by job basis: allocated work by the Authority. Required to work for many different companies: to unload asbestos cargoes. Dust on hair, clothes, arms > inhaled > 20 days/year on asbestos cargoes. Exposure to asbestos dust > mesothelioma diagnosed 1997 > inevitably fatal. No warning from Authority about dangers of asbestos.
- **McHugh J:** An authority may, by its conduct, attract a common duty to take care, calling for the exercise of the power (Mason in Heyman). P was **vulnerable**: this is the most important factor here, leading to finding an affirmative duty to act. Workers had to obey instructions concerning where they were directed to work (not doing so could result in disciplinary action or deregistration). This is not **inconsistent** with the Act's overall scheme and not forbidden by it. And the defendant **controlled** the plaintiff's freedom of action. And defendant **knew** of significant risk of injury (evidence: at the time it was widely known that dust, including asbestos dust, was a work hazard); and knew the employment was casual.

#### **vi. If the authority assumes responsibility by taking a course of conduct, then they are likely to owe a duty**

Turnbull v Alm (note also Pyrenees). The city council "actually set about conducting repairs" for sidewalks. But also note s 85 of Wrongs Act-> the fact that an authority decides to exercise a function does not necessarily give rise to a duty: merely starting to do something isn't enough **BUT** assumption of responsibility is. This becomes a question of argument based on particular facts before you.

#### ***d. Pure mental harm***

##### **i. Preliminary consideration #1: pure or consequential mental harm?**

A preliminary matter to be resolved in this inquiry is whether the harm suffered is consequential or pure mental harm. Consequential mental harm is mental harm that is a consequence of an injury of any other kind (s 67 Wrongs Act). A mental harm that is not a consequential mental harm is a pure mental harm (s 67 Wrongs Act).

##### **ii. Preliminary consideration #2: pure mental harm arising from shock?**

That the mental harm was the result of shock creates the need to contemplate s 73 of the *Wrongs Act*, which disqualifies shock-related pure mental harm claims which do not satisfy either s 73(2)(a) or s 73(2)(b). That is, the mental harm in question must either have involved (a) the plaintiff witnessing, at the scene, the victim being killed, injured or put in danger; or (b) the plaintiff must be or have been in a close relationship with the victim.

##### **iii. Modified reasonable foreseeability test**

**RULE:** It is a pre-condition for reasonable foreseeability that the harm that should have been foreseen was a 'recognised psychiatric illness' to be suffered by a person of 'normal

fortitude' (*Wrongs Act* s 72(1)). That a 'recognised psychiatric illness' needs to have been foreseeable must be judged with foresight, not hindsight (*Tame*).

- Note that *Tame* is useful authority for 'normal fortitude': someone of 'normal fortitude' wouldn't suffer mental harm from a briefly mistaken breath test.

The possibility that a person, having witnessed the aftermath of the severe injury of another, might suffer some form of depressive illness is well-established (*Wicks*).

**RULE:** Section 72(2) of the *Wrongs Act* provides non-exhaustive additional considerations for the determination of reasonable foreseeability in cases of pure mental harm.

**Section 72(2) – these are relevant to assessment of reasonable foreseeability:**

- (a) whether or not the mental harm was suffered as the 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.

**Section 73**

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.

**iv. Established category?**

It could be argued that the alleged duty of care is directly analogous to that found to exist in *Wicks*. In *Wicks*, the carelessness of the rail authority led to workers being severely injured and, in some instances, killed, causing first responders witnessing the scene to suffer pure mental harm.

It could be argued that the alleged duty of care is directly analogous to that found to exist in *Annetts*, where pure mental harm was suffered by the parents of a child killed while under the defendant's supervision.

v. **Salient features?**

***Control***

**Annetts**

- **INTRO:** In *Annetts*, the exclusive control wielded by the defendant in keeping the plaintiff's son safe tended strongly towards a duty of care.
- The defendant in *Annetts*, being the son's exclusive supervisor, had the sole capacity to protect him from risks that might occur in the course of his work. The corollary of this control was that the defendant also controlled the extent to which any harm to the son might inflict pure mental harm on the child's parents.

***Assumption of responsibility***

**Annetts**

- **INTRO:** In *Annetts*, the defendant had offered a personal assurance to the child's parents that he would keep him safe. This represented an unambiguous assumption of responsibility, from which stemmed a corollary responsibility to protect the child's parents from the mental harm that might result from failing that responsibility.
- In *Annetts*, the assumption of responsibility over one party was extended to support a duty of care owed by the assumer of responsibility to someone suffering mental harm as a result of a failure of that responsibility.
- Of note, however, is that in *Annetts*, the relationship was one of parents and child. In this case, it is one of event patron and fellow event patron. It is possible that this could weaken any parallels drawn with the reasoning in *Annetts*. But the relevant characteristic to this aspect of salient features analysis in *Annetts* was the assumption of responsibility, not the parent-child relationship.

***Vulnerability***

**Wicks**

- **INTRO:** The situation in *Wicks* involved police officers, vulnerable to the scenes they would be forced by their job to witness, suffering mental harm as a result of a rail authority's carelessness with respect to its workers. There was no way for these officers to protect themselves from this risk: if their occupation necessitated it, they could not refuse to go to the scene of the accident.

e. *Pure economic loss*

i. **MODIFICATIONS TO THE DUTY OF CARE TEST FOR PURE ECONOMIC LOSS**

- Pure economic loss comprises pecuniary loss, financial loss, loss of opportunity to realise financial gain
- Other economic losses will typically accompany physical, personal or proprietary losses. E.g., hospital and caring costs, clean up of polluted land costs
- Non-economic losses include: pain and suffering, loss of enjoyment of life -- things that are not easily monetised
- **RF of pure economic loss is required (McHugh J in *Perre v Apand*)**

ii. **Pure economic loss through negligent misstatements**

***Hedley Byrne v Heller [1964] AC 465***

**FACTS:** HB (agent) purchased advertising space on behalf of EP (their client). HB asked EP's bankers if EP was in good financial standing. Banker says yes, subject to caveat that information is provided without responsibility. EP goes into liquidation and can't pay HB for advertising. HB sues the banker.

**DUTY?** There was an absence of responsibility. No duty of care. Lord Reid: *'Quite careful people often express definite opinions on social or informal occasions, even when they see that others are likely to be influenced by them'*

- 'There needs to be something more than mere misstatement... responsibility'. There should be **assumption of responsibility/reliance**.
- There were three alternatives for the expert:
  - Keep silent (**no duty**)
  - Give a qualified answer with no responsibility (**no duty**)
    - Note that an absence of responsibility has to be factual. I.e., a mere disclaimer does not necessarily abrogate responsibility.
  - Give an unqualified answer (**duty!**)

***Esanda Finance Corporation v Peat Marwick Hungerfords (1997)***

*Esanda tells us that **vulnerability** is a central salient feature in these situations too. A large lender with its own expertise is not vulnerable to losses incurred as result of following the faulty audits made by a third-party who did not intend for third parties to use its audits.*

**FACTS:** P sues auditors of Excel for inaccurate report on Excel's capacity to repay loan. P lent Excel money on D's representations and that money was not repaid.

**REASONING:** P was capable of making its own investigations into Excel (ie capable of taking steps to avoid the loss in question). Auditor's liability would increase cost of auditing services, decrease competition for provision of auditing services, and reduce the standard of those services. Also, auditors don't intend for their representations to be relied upon by third parties.

iii. **Pure economic loss through careless conduct**



### ***Perre v Apand***

**FACTS:** Apand owns Smith Crisps. It supplies potato seeds to SA farmer (Spanos) who grows potatoes for them. Apand supplies seeds with bacterial wilt to Spanos. Apand knew many SA farmers supplied their potatoes to WA potato market, which prohibits import of potatoes with wilt or grown within 20km of potatoes with wilt. Perre, a neighbouring farmer to Spanos, suffered pure economic loss owing to growing potatoes within 20km of Spanos' infected potatoes

**DUTY OF CARE OWED BY APAND TO PERRE?** No clear ratio, but useful for applying salient features to pure economic loss through careless conduct.

#### **McHugh J's view**

- 'Liability is indeterminate only when it cannot be realistically calculated'

#### **Five preconditions for duty of care in these cases (pure economic loss salient features):**

1. Foreseeability of economic loss (**modification of ordinary RF test**)
2. No indeterminacy of class of potential plaintiffs: **'ascertainable class'**
3. No unreasonable interference with commercial autonomy (maybe slightly tricky to determine - depends on the facts in question - CONSIDER HOW THIS WAS DEALT WITH IN APAND)  
*as long as a person is legitimately protecting his or her social or business interests, the common law will not require that person to be concerned with the effect of his or her conduct on the economic interests of another. But the cloak of immunity cannot extend to conduct which cannot be fairly described as a legitimate pursuit or protection of a person's interests.*
4. Plaintiff is vulnerable to losses from the defendant's conduct
5. The defendant has knowledge of the potential loss

**Note from Gleeson CJ:** Duty supported by: physical proximity; knowledge of risks and of vulnerability of P; control; and limited field of liability

***Woolcock Street Investments v CDG*** confirms vulnerability, in sense of being unable to protect oneself from losses, is critical for establishing duty of care to prevent pure economic losses

## CONDITION 2: BREACH OF DUTY

### 1. The factual breach

- State what the specific alleged breach(es) is/are – should try to come up with THREE (at the least TWO)
- You then need to analyse each breach individually – there is therefore a significant bit of work to do on each alleged breach

### 2. Reasonable foreseeability

The *Wrongs Act*, s 48(1) requires that for a breach of a standard of care to be present, the risk of harm arising from the want of care must be reasonably foreseeable and not insignificant. Mason J in *Wyong* said that a risk is reasonably foreseeable if it is not 'far-fetched or fanciful'. That a risk is 'not insignificant' raises this requirement slightly, but 'not by much' (*Shaw v Thomas*).

#### *Wrongs Act*, s 48

- (1) A person is not negligent in failing to take precautions against a risk of harm unless –
- a. The risk was foreseeable (that is, it is a risk of which the person knew or ought to have known); and*
  - b. The risk was not insignificant.*
- (3) For the purposes of subsection (1)(b)—
- (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.

- **General test for 'RF' (Mason J in *Wyong v Shirt*):** a risk of injury that is 'foreseeable' can be 'remote in the sense that it is extremely unlikely to occur' but **cannot be 'far-fetched or fanciful'**
- **'Not insignificant' -- *Shaw v Thomas*:** 'Not insignificant' is a more demanding test than the common law RF test, but not by much. **It does not mean** that the risk has to be probable, likely or even significant.
- **Consider with foresight, not hindsight -- Hayne J in *Vairy*:** question of foreseeability is not considered with hindsight. Instead, you go back in time to before the harm and **ask whether it was reasonably foreseeable at that time.**
- Still no need to **consider precise chain of events (*Chapman*)**. Consider **specific alleged breach & some kind of harm** for RF at the breach stage

- ***O'Dwyer v Leo Buring***: A risk never previously realised is not indicative of a lack of reasonable foreseeability

### 3. The negligence calculus

Section 48 of the *Wrongs Act* requires that a reasonable person in the position of the defendant would have taken the alleged precautions. This is to be determined by reference to, inter alia, the probability of harm, the seriousness of the harm, the burden of taking precautions, and the social utility of the activity that creates the risk. Section 14G(2) of the *Wrongs Act* requires that the plaintiff's voluntary intoxication or illegal activity, where present, be considered in determining the question of breach.

*a. Preliminary question: affected by drugs/alcohol/acting illegally; apology?*

#### ***Wrongs Act, s 14G***

(2) In determining whether the plaintiff has established a breach of the duty of care owed by the defendant, the **court must consider**, among other things—

- (a) whether the plaintiff was intoxicated by alcohol or drugs voluntarily consumed and the level of intoxication;
- (b) whether the plaintiff was engaged in an illegal activity.

*Wrongs Act, s 14J(1)*

An apology is **not** an admission of liability, carelessness, among other things

*b. Starting point: Wrongs Act*

Section 48(2)(a) of the *Wrongs Act* suggests that probability of harm, the seriousness of the risk, the practicality/burden of taking precautions, and the social utility of not taking precautions should be considered in assessing the standard of a reasonable person in the D's shoes.

***Wrongs Act, s 48***

(2) In determining whether a reasonable person would have taken precautions against a risk of harm, the court is to consider the following (amongst other relevant things)—

- (a) the probability that the harm would occur if care were not taken;
- (b) the likely seriousness of the harm;
- (c) the burden of taking precautions to avoid the risk of harm;
- (d) the social utility of the activity that creates the risk of harm.

***Wrongs Act, s 49***

In a proceeding relating to liability for negligence—

- (a) the burden of taking precautions to avoid a risk of harm includes the burden of taking precautions to avoid similar risks of harm for which the person may be responsible; and
- (b) the fact that a risk of harm could have been avoided by doing something in a different way does not of itself give rise to or affect liability for the way in which the thing was done; and
- (c) the subsequent taking of action that would (had the action been taken earlier) have avoided a risk of harm does not of itself give rise to or affect liability in respect of the risk and does not of itself constitute an admission of liability in connection with the risk.

- In considering the risk and calculating the standard, we use 'foresight not hindsight' - **Hayne J in *Vairy***. 'We must not look at the 1947 accident with 1954 spectacles.' - **Lord Denning in *Roe***.

*c. The relevant circumstances*

**i. Probability**

- Breach is not about the prevention of harm. Instead, it is about determining the appropriate precautions in the face of knowledge of the harm (**Gummow J in *Dederer***)
- The factor focuses on the probability of the risk of harm being realised; not the frequency of risk-taking activity (**Dederer**).
- **Gummow J**: focus not on knowledge that many dived over a long period, instead that no one had been seriously injured (**Dederer**)
- **Bolton v Stone** - ask: whether a reasonable person, based on knowledge of the very low probability of risk based on past occurrences would refrain from taking precautions to prevent a future danger.

- **Habda** (McHugh J, dissenting): consider the class of plaintiff when evaluating probability: if class of P is particularly vulnerable, reasonable to consider probability as higher than for other, less vulnerable classes of plaintiff

*Roads and Traffic Authority of NSW v Dederer*

**FACTS** -- P (14yo boy) dives from bridge constructed by Roads and Traffic Authority (RTA, D). Water shallow and he suffers partial paralysis. Sues RTA and the local council. D had erected warning signs but knew they are often not complied with.

**ISSUE** -- Did the council breach its duty of care by failing to include signs with words/erect higher fences to stop people jumping from the bridge?

**REASONING** -- **Gummow J**: Though grave, the risk faced by P was of a very low probability and their mitigation would have caused significant expense to D. **Gleeson CJ and Kirby J (dissenting)**: D should have known that their pictograph signs had no effect (since lots of people were flaunting them). There was growing familiarity with need to protect young people near water in Australia; there was opportunity to change the fencing; and there was a new Bridge Design Code introduced in 1992. People expected to fence off domestic pools; similar should be held for public authorities. **Callinan J**: Risk had low probability of occurring (not 1 of many who had dived from bridge in 40 years sustained that kind of harm). Community interests of enjoying the bridge must also be considered.

## ii. Seriousness

- **Paris v Stepney, goggle-less blinded worker returned from war from flying bolt in factory case (already blind in one eye)**
  - This factor can make reference to the subjective seriousness of harm where the defendant has knowledge of the P's susceptibilities
  - Lord MacDermott: "it is the consequences that necessitate the precautions"
  - Lord Morton: "the more serious the damage which will happen if an accident occurs, the more thorough are the precautions which an employer [or a defendant more generally] must take" (supported by *Illawarra Area Health Service v Dell*)

**Paris v Stepney**

**FACTS**: Mechanic who was blind in one eye was struck with bolt in his good eye and completely blinded while at work. Employer knew he was already blind in one eye. P alleged employer was negligent in not supplying goggles to protect him against foreseeable risk.

**REASONING**: The magnitude of the risk posed by a stray bolt to a worker already blind in one eye is huge: complete blindness. The gravity of this consequence meant a reasonable person would have provided goggles.

## iii. Practicality/burden