

# DUTY

## Normal duty

### 1. Introduction (scope)

P is seeking advice regarding a claim against D for injuries sustained as a result of... The injuries include...Class of P & D...P would argue that D owed them a duty to take reasonable care in...

Given that the relationship between the parties belongs to the established category of x, duty arises naturally.

- Complex situation: although the relationship between P & D is an established category, duty cannot be established readily because the duty alleged by P includes (AA, SA, PMH, PEL).

Given that the relationship between the parties does not belong to an established category, it is necessary to proceed to the reasonably foreseeability and salient features analyses.

### 2. RF

The question for reasonable foreseeability is whether the injury to the class of persons to which P belongs is reasonably foreseeable as a result of D's conduct (*Chapman v Hearse*). This is an undemanding test as the specific injury and precise sequence of events need not be foreseeable.

### 3. SF

Salient features approach is a multi-faceted inquiry looking at the totality of the relationship between the parties (*Graham Barclays Oysters*).

- Conflict/coherence
  - *Sullivan v Moody*: if a suggested duty of care would give rise to inconsistent obligations, that would ordinarily be a reason for denying that a duty exists
  - *Hill*: Imposition of liability may lead to the exercise of a function being carried out in a defensive frame of mind
- Vulnerability: the class of P had no means to protect themselves from the risk of harm (*Ibrahim*)
- Control: D had control over the risk of harm/true source of harm (*Ibrahim*)
- Assumption of responsibility: D had assumed responsibility over P
- Knowledge: D had constructive or specific knowledge over the risk of harm (*Bujdoso*)

## Duty to take AA

### 1. Scope

### 2. Complex situation

The duty alleged by P is a duty to take affirmative action, where P suffers injury from D failure to intervene to prevent injury directly caused by a third party or P him or herself or a situation which D did not create.

This is a complex situation because in general, the law is reluctant to recognise such duty to take affirmative action because legal duty should not be contemporaneous with moral obligation (*Heyman*).

### 3. RF

### 4. Special relationship

Courts are more likely to find duty to take AA if there is a special between D & P and special relationship between D and the third party.

- As the current case falls within the special relationship of...the court is more inclined towards finding a duty because...(SF)
- As the current case does not fall within any established relationship...(SF)
- Note: special relationship only an inclination, not determinative nor fatal – key is SF

<ul style="list-style-type: none"> <li>Special relationship between D&amp;P <ul style="list-style-type: none"> <li>School to pupil: Geyer v Downs; Richards v Victoria</li> <li>Parent to children: St Mark's Orthodox Coptic college</li> <li>Prison authority to prisoners: NSW v Bujdoso</li> <li>Doctor to non-patient: Lowns v Woods</li> <li>Police to public in exercising powers: Stuart v Kirkland-Veenstra</li> </ul> </li> </ul>
<ul style="list-style-type: none"> <li>Special relationship between D &amp; third party that D take affirmative action to ensure third party doesn't injure other people <ul style="list-style-type: none"> <li>Parent to control child: Smith v Leurs</li> <li>Prisoner to prevent escape by a prisoner to prevent harm: NSW v Godfrey</li> </ul> </li> </ul>
<p>5. SF</p> <ul style="list-style-type: none"> <li>Geyer <ul style="list-style-type: none"> <li>Duty to supervise</li> <li>Vulnerability: children in need of protection in the absence of parents</li> <li>Control: schoolmaster in position to exercise authority</li> <li>knowledge: presence of students before 9am</li> </ul> </li> <li>Richards <ul style="list-style-type: none"> <li>Control: in general, a schoolmaster owes to each of his pupils whilst under his control and supervision a duty to take reasonable care for the safety of the pupil.</li> </ul> </li> <li>Bujdoso <ul style="list-style-type: none"> <li>Specific/actual knowledge: P was threatened before</li> <li>General/constructive knowledge: people like P given his offence more likely to be targeted</li> <li>Control: prison guards have control over the other prisoners to prevent them from injuring P</li> <li>Vulnerability: no one except the authority can protect P from the violence of other inmates</li> </ul> </li> <li>Lowns <ul style="list-style-type: none"> <li>There was sufficient proximity of relationship to give rise to a duty of care.</li> <li>Note: Ibrahimi casted doubt on this; proximity no longer in use; but not formally overturned</li> </ul> </li> <li>Stuart <ul style="list-style-type: none"> <li>No general duty to rescue &amp; importance of personal autonomy</li> <li>Indeterminacy: no duty for police to prevent self-harm due to indeterminant liability: the class of D being indeterminant.</li> </ul> </li> <li>Smith <ul style="list-style-type: none"> <li>Parental control over children conduct to avoid exposing others to unreasonable danger.</li> </ul> </li> <li>Godfrey <ul style="list-style-type: none"> <li>Conflict with statutory responsibilities of the gaolers and parliamentary intention in keeping prisoners at the lowest level of security</li> <li>Indeterminant liability: the duty appears to be owed to the public at large <ul style="list-style-type: none"> <li>The extent and indeterminate nature of the liability is such that it weighs against the conclusion that a duty to take care is owed</li> </ul> </li> <li>Vulnerability: the class of person susceptible to the risk of harm <ul style="list-style-type: none"> <li>the class of vulnerable persons is so large that this matter merges into the issue of extent of liability</li> </ul> </li> <li>Assumption of responsibility: no assumption of responsibility to take care to prevent injury or harm to others</li> <li>Control: no control over escapee prisoner – conduct being too remote</li> </ul> </li> </ul>

<p>6. Conclusion</p> <p>Good Samaritan are protected by WA s 31B</p> <p>A person is a GS if they expect to monetary repayment (31B (1a)) and the person is at risk of death or injured (31B (1b)). The GS is not liable for anything done in good faith (31B (2), even if the incident was caused by the GS themselves (31B (3)). Subsection (2) does not apply to anything GS did before providing service (31B (4)).</p>
<p><b>Accountability of statutory authority</b></p> <ol style="list-style-type: none"> <li>1. Scope</li> <li>2. Complex situation</li> </ol> <p>The duty alleged by P is a duty on a state authority to take reasonable care to prevent harm to exercise their powers/when exercising their powers. This is a complex situation because the court is generally reluctant to impose a duty in negligence because the greater public interest accorded unimpeded function of statutory authority (Cran). The court is reluctant to extend common law obligations to statutory authorities under the executive.</p> <p>If also AA: the duty alleged is a duty on a state authority to take reasonable care to prevent harm in the exercise of their powers by controlling a third party/P/situation that was not caused by D. This is a complex situation because...</p>
<ol style="list-style-type: none"> <li>3. RF</li> <li>4. Wrongs Act</li> </ol> <p>s 83 states that in determining whether a public authority has a duty of care or has breached a duty of care, a court is to consider that the functions required to be exercised by the authority are</p> <p>(a) limited by the financial and other resources</p> <p>(b) to be determined by reference to the broad range of its activities, not just the matter at hand.</p> <p>The authority may rely on its compliance with the general procedures as evidence of the proper exercise of its functions (83(c)).</p> <p>s 85 states that 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 do so in particular circumstances or in a particular way.</p>
<ol style="list-style-type: none"> <li>5. Policy/operational distinction.</li> </ol> <p>A public authority is under no duty of care in relation to decisions involving financial, economic, social or political factors or constraints (Heyman). Such decisions involve raising avenue and allocating resources, which are essentially political (Gleeson CJ in Graham Barclay Oyester Pty Ltd). The reasonableness of such policy conduct by public authority are inappropriate for judicial review (Gleeson CJ in Graham Barclay Oyester Pty Ltd). Conferral of power is not to be equated with duty of care to a specific individual or a class of persons in relation to the exercise of power (Gleeson CJ in Graham Barclay Oyester Pty Ltd). However, it may be otherwise for action or inaction that is merely administrative or operational (Heyman). SF approach is relevant here, namely control, knowledge, and conflict (McHugh &amp; Kirby, Graham Barclay Oyster Pty Ltd)</p>
<ol style="list-style-type: none"> <li>6. SF <ul style="list-style-type: none"> <li>• McHugh in GB Oyster <ul style="list-style-type: none"> <li>○ Was the authority in a <u>position of control</u> and did it have the <u>power to control</u> the situation that brought about the harm to the injured person?</li> <li>○ Was the injured person or his or her interests vulnerable in the sense that the injured person could not reasonably be expected to <u>adequately safeguard</u> himself or herself or those interests from harm?</li> <li>○ Did the public authority <u>know</u>, or ought it to have known, of an existing risk of harm to the plaintiff or, in some cases, to a specific class of persons who included the plaintiff (rather than a risk to the general public)?</li> <li>○ Would the imposition of the duty of care impose liability with respect to the defendant's exercise of "<u>core policy-making</u>" or "<u>quasi-legislative</u>" functions?</li> <li>○ Is there any supervening <u>policy reason</u> that denies the existence of a duty of care?</li> </ul> </li> </ul> </li> </ol>

- Cran
  - Control: no control over true source of harm: investigative process
  - Conflict: greater public interest accords for unimpeded action, pointing against finding a duty
- Ibrahimi
  - Capacity is not equal to a duty to exercise power unless D made specific representations to P
  - Control: no control over true source of harm: weather
  - Vulnerability: the class of P had no means to protect themselves from the risk of harm
  - Conflict: finding a duty undercuts statutory decisions

## 7. Conclusion

### WA Part XII

S79 public authority means—

- (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 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.

### Pure economic loss

#### 1. Scope

#### 2. Complex situation

Generally, damages are not recoverable for economic loss which is not consequential upon injury to P person or property (Caltex Oil). Courts are usually reluctant to impose duty to prevent economic loss because of it ripple effect, resulting many potential victims that it gives rise to indeterminate liability.

#### 3. RF

#### 4. SF

- Indeterminacy: not about calculating numbers or identifying a specific victim, but about being able to set boundaries: whether there was an ascertainable class of plaintiffs (Perre); as to avoid undue burden on D
- Knowledge: where D has knowledge that the P individually or as an ascertainable class, not merely as a member of an unascertained class as to avoid indeterminant liability, will be likely to suffer economic loss as a consequence of their negligence, and owes the P a duty to take care not to cause him such damage by his negligent act (Caltex Oil).
- Vulnerability: if P is in no position to protect its own interests (Perre v Apand).
- Conflict: No liability should be imposed if it results interference with D's ordinary business conduct or commercial freedom (Perre v Apand).

#### 5. Conclusion

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 (s 75)