Torts

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TOPIC 9: NEGLIGENCE: BREACH OF DUTY AND STANDARD OF CARE

Breach of duty is determined by reference to the **reasonable person** standard. A defendant breaches their duty of care if they fail to take the precautions that a reasonable person in their position would have taken against a foreseeable risk of harm. Breach is a **question of fact**, assessed at the time of the alleged negligence (not retrospectively with hindsight).

A. The Reasonable Person Standard

→ ***Blyth v Birmingham Waterworks Co (1856) 11 Ex 781 (Alderson B)***: 'Negligence is the omission to do something which the reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs would do, or doing something which a prudent and reasonable man would not do.' The standard is objective: it does not take into account the defendant's personal skill, capacity or knowledge (except where those factors would be attributed to the reasonable person in the defendant's position).

→ ***Roe v Minister of Health [1954] 2 QB 66 (Denning LJ)***: 'We must not look at the 1947 accident with 1954 spectacles.' The standard of care is assessed prospectively, by reference to knowledge and practice at the time of the alleged negligence. Hindsight must not be used.

B. The Statutory Framework: CLA s 5B

s 5B(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; and*
>
> *(c) in the circumstances, a reasonable person in the person's position would have taken those precautions.*

s 5B(2): In determining whether a reasonable person would have taken precautions, the court is to consider (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.*

s 5C: (a) the burden of avoiding one risk includes the burden of avoiding similar risks; (b) the fact that risk could have been avoided differently does not impose liability for the way it was done; (c) subsequent taking of precautions is not an admission of liability or evidence of breach.

> *[note: s 5B is not exhaustive: the listed factors are 'amongst other relevant things'. The calculus in s 5B(2) corresponds to the common law 'Shirt calculus' (Wyong Shire Council v Shirt (1980) 146 CLR 40), but the threshold 'not insignificant' in s 5B(1)(b) is higher than the common law 'not far-fetched or fanciful' standard, though only marginally: Shaw v Thomas [2010] NSWCA 169 (McFarlan JA).]*

C. The Common Law Background: The Shirt Calculus

→ ***Wyong Shire Council v Shirt (1980) 146 CLR 40 (Mason J)***: Shirt dived into water near a 'deep water' sign in an area that was actually shallow and was injured. Held: two-stage test for breach: (1) Was a risk of harm reasonably foreseeable? A reasonably foreseeable risk is one that is not far-fetched or fanciful; and (2) What would a reasonable person have done in response? Balance: (a) magnitude of the risk; (b) probability of its occurrence; (c) cost, difficulty and inconvenience of taking

precautions; (d) conflicting obligations. Principle: the fact that the risk is unlikely to materialise does not make it unforeseeable; but the probability of occurrence is relevant to what a reasonable person would do.

→ ***Bolton v Stone [1951] AC 850***: A cricket ball was hit out of the ground and injured the plaintiff. Held: no breach. Although the risk was foreseeable, the probability of occurrence was so low, and the burden of eliminating it so high, that a reasonable person would not have taken additional precautions.

→ ***Paris v Stepney Borough Council [1951] AC 367***: A one-eyed worker was blinded when a metal chip struck his good eye; the employer had not provided goggles. Held: breach. The potential gravity of harm to this particular plaintiff (total blindness) was so serious that a reasonable employer would have supplied goggles even if the probability of injury to a two-eyed worker was low. Principle: the likely seriousness of harm is a key factor in assessing what a reasonable person would do.

→ ***Romeo v Conservation Commission (NT) (1998) 192 CLR 431***: An intoxicated person fell from an unfenced cliff face at a nature reserve. Held (majority): no breach. The risk of injury at the cliff's edge was an obvious risk to entrants exercising reasonable care. The cost of fencing every natural cliff face in the Northern Territory was disproportionate. The Commission's other responsibilities (conservation, aesthetics, competing priorities with finite budget) were also relevant. Principle: the burden of precautions must be assessed across all circumstances, including the defendant's other responsibilities and the width of the area at risk.

D. Characterising the Risk of Harm

The risk must be correctly characterised. It must include 'the general causal mechanism of the injury sustained which gave rise to the potential for harm for which the plaintiff seeks damages': *Tapp v Australian Bushmen's Campdraft and Rodeo Association Ltd* [2022] HCA 11 (Gordon, Edelman and Gleeson JJ). An incorrect characterisation (either too broad or too narrow) will distort the s 5B analysis.

→ ***Tapp v Australian Bushmen's Campdraft and Rodeo Association Ltd [2022] HCA 11***: An experienced rider fell in a rodeo on an unsafe arena surface. Issue: was the risk an 'obvious risk' under s 5L? The High Court held the risk of injury from the dangerous surface conditions was not an obvious risk; the obvious risk of a dangerous recreational activity must be the risk that actually causes the harm (not merely a general risk of the activity). Principle: (1) correct characterisation of the risk is essential; (2) for s 5L, the risk which materialises must be the same risk which makes the activity 'dangerous'.

E. The Objective Standard: Personal Characteristics of the Defendant

Children

The standard of care for a child defendant is that of a reasonable child of the same age, intelligence and experience: McHale v Watson (1964) 111 CLR 384.

Mental Illness and Intoxication

Mental illness is not a defence to negligence. The standard is objective and does not accommodate the defendant's mental illness: Carrier v Bonham [2002] 1 Qd R 474.

Inexperience

→ ***Imbree v McNeilly (2008) 241 CLR 529***: A learner driver who rolled a 4WD was held to the same objective standard of care as an experienced driver. The supervisor's knowledge of the learner's inexperience was relevant to contributory negligence, not to the standard of care.

TOPIC 13: DEFENCES TO NEGLIGENCE

A. Voluntary Assumption of Risk (Volenti Non Fit Injuria)

Volenti non fit injuria is a **complete defence** to negligence (not merely an apportionment mechanism). To establish it, the defendant must prove that the plaintiff: (1) **knew of the facts constituting the risk**; (2) **appreciated and understood the full extent of the risk**; and (3) **freely and voluntarily agreed to accept that risk**, including specifically accepting the risk of the defendant's lack of reasonable care.

The defence rarely succeeds because it requires more than mere knowledge of a risk or participation in a risky activity; it requires a voluntary agreement to waive the right to complain of the defendant's negligence.

→ ***Rootes v Shelton (1967) 116 CLR 383***: The plaintiff was waterskiing and was injured when the defendant driver negligently drove the speedboat into a stationary boat. Held: volenti failed. The plaintiff had consented to the ordinary risks of waterskiing, but not to the risk of the defendant's negligent driving. Principle: participation in a risky activity does not amount to consent to all risks, including the risk of negligence by those conducting the activity.

→ ***Morris v Murray [1991] 2 QB 6***: The plaintiff and defendant drank heavily together, then decided to fly the defendant's light aircraft; the defendant piloted it, crashed and was killed; the plaintiff was seriously injured. Held (English CA): volenti applied. The plaintiff had sufficient knowledge and appreciation of the risk despite his intoxication.

CLA s 5G: A person is presumed to have been aware of an obvious risk (as defined in s 5F) unless they prove otherwise on the balance of probabilities. Awareness of the **type or kind** of risk is sufficient. This makes volenti more readily available where the risk is obvious.

> *[note: Volenti is generally unavailable for motor accidents in NSW: Motor Accident Injuries Act 2017 (NSW) s 4.18. The interaction between s 5G CLA (presumption of awareness of obvious risks) and the volenti defence should be carefully considered: presumed awareness may not alone satisfy the 'freely and voluntarily agreed' element.]*

B. Contributory Negligence

Contributory negligence is the failure of the plaintiff to take reasonable care for their own safety, which contributes to the harm they suffer. At common law, it was a complete defence. Under **Law Reform (Miscellaneous Provisions) Act 1965 (NSW) s 9**, it is now a partial defence, resulting in apportionment of damages.

> *s 9(1) LRMPA 1965: If a claimant suffers damage as a result partly of their own contributory negligence and partly of the wrong of another, a claim is not defeated by reason of the contributory negligence of the claimant, and the damages recoverable in respect of the wrong are to be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage.*

Three Issues for Determination

- (1) Did the plaintiff fail to take reasonable care for their own safety?
- (2) Was the plaintiff's negligence a cause of the damage?
- (3) What reduction in the plaintiff's damages is just and equitable?

CLA s 5R: The principles applicable to determining whether a person has been negligent also apply to determining contributory negligence. The standard is that of a reasonable person in the plaintiff's position, based on what they knew or ought to have known at the time.

→ ***Caterson v Commissioner for Railways (1973) 128 CLR 99***: A passenger jumped from a moving train to assist his son left on the platform. The court considered contributory negligence: where the plaintiff has been placed in a situation of danger

or inconvenience as a result of the defendant's negligence, the reasonableness of the plaintiff's response is assessed by comparing the degree of inconvenience against the risk taken to avoid it.

Apportionment Principles

→ ***Butterfield v Forrester (1809) 11 East 60***: The plaintiff rode at high speed at twilight and struck a pole the defendant had placed in the road. Held: contributory negligence was a complete defence at common law. Principle: the historical origin of contributory negligence as a complete defence. 'One person being in fault will not dispense with the requirement that the other must use ordinary care for himself.' Now replaced by apportionment legislation.

→ ***Pennington v Norris (1956) 96 CLR 10***: Both parties were negligent in a road accident. Principle: under the apportionment legislation, damages are reduced by such extent as the court considers 'just and equitable' having regard to the comparative degree to which the conduct of each party departed from the standard of the reasonable person. 'Culpability' means degree of departure from the standard of care of the reasonable person, not moral blameworthiness. The court must compare both culpability and the relative importance of each party's acts in causing the damage.

→ ***Wynbergen v Hoyts Corporation Pty Ltd (1997) 72 ALJR 65***: A cinema employee slipped on a wet floor; the jury found 100% contributory negligence. Held (High Court): under the apportionment legislation as it then stood, a 100% reduction was not available because the plaintiff could not be found wholly responsible when the defendant's negligence was also a cause. Note: CLA s 5S has since expressly permitted a 100% reduction where just and equitable — but this should be rare.

→ ***Podrebersek v Australian Iron and Steel Pty Ltd (1985) 59 ALR 529***: Apportionment of contributory negligence involves comparing: (a) the culpability of each party (degree of departure from the standard of the reasonable person); and (b) the relative importance of the acts of the parties in causing the damage.

Contributory Negligence: Special Contexts

Children: The standard is that of a reasonable child in the plaintiff's position (age and maturity are taken into account): s 5R(2)(a) CLA.

→ ***Oliver v Birmingham and Midland Motor Omnibus Co [1933] 1 KB 35***: An infant was injured when his grandfather released his hand in front of an omnibus; the company argued the grandfather's contributory negligence should be attributed to the infant. Held: the grandfather's negligence is not imputed to the infant plaintiff. Principle: the contributory negligence of a person to whose care the plaintiff has been entrusted is not attributed to the plaintiff. Each person is entitled to recover against a wrongdoer notwithstanding the negligence of those with care of them.

→ ***Doubleday v Kelly [2005] NSWCA 151***: A child aged 7 climbed a trampoline while wearing roller skates and was injured. Held: no contributory negligence. The standard under s 5R(2) CLA is that of a reasonable person in the plaintiff's position, including being a child of 7. Whether a risk is 'obvious' under s 5F CLA also requires taking into account the plaintiff's age. A reasonable 7-year-old would not have regarded the trampoline as an obvious risk.

→ ***Waverley Council v Ferreira (2005) 64 NSWLR 154***: A 12-year-old fell through a plastic skylight on a community centre roof and died; father suffered nervous shock. Applying Doubleday v Kelly: a reasonable 12-year-old would not have perceived the risks of climbing on the roof and sitting on the skylight. Damages were not reduced for the deceased child's contributory negligence. Note: under s 30(3) CLA, any

8. NEGLIGENCE: DUTY OF CARE | Common Law | CLA ss 5A, 31, 32 | Donoghue v Stevenson [1932] AC 562

NEGLIGENCE ELEMENTS: (1) Duty of care owed by D to P (question of LAW); (2) Breach of duty (question of FACT); (3) Damage caused by breach; (4) Damage of a kind not too remote. P bears the onus of proof throughout. Damage is the gist of the action.

ESTABLISHED CATEGORIES (no novel analysis)	Manufacturer-consumer: Donoghue v Stevenson [1932] AC 562. Employer-employee. Road users to other road users. Medical practitioners-patients: Rogers v Whitaker (1992) 175 CLR 479. Occupier-invitee. School authority-pupil. Solicitor-client. Use established categories without full novel duty analysis.
NEIGHBOUR PRINCIPLE (Donoghue)	Lord Atkin: a person owes a duty to their 'neighbour' -- persons closely and directly affected by the act who D ought reasonably to have in contemplation as likely to be affected. Reasonable foreseeability is necessary but NOT sufficient for novel duties.
NOVEL DUTY: SALIENT FEATURES	Perre v Apand Pty Ltd (1999) 198 CLR 180: for novel duties, courts consider 'salient features' including: (a) reasonable foreseeability of harm; (b) vulnerability of P (inability to protect self); (c) control D had over the situation; (d) assumption of responsibility and reliance; (e) risk of indeterminate liability; (f) coherence with any statute; (g) policy. No single factor is determinative.
INCREMENTAL APPROACH	Sullivan v Moody (2001) 207 CLR 562: courts develop novel duties incrementally by analogy with established categories, not by application of a universal formula. Duties must be coherent with other legal rules and must not produce incoherent results (e.g. conflicting duties to different parties).
THIRD-PARTY CONDUCT / OMISSIONS	No general duty to control a third party's conduct or prevent harm caused by third parties. Exceptions: (1) Special relationship between D and third party creating responsibility for that party's conduct; (2) D created or increased the risk; (3) D had ability and opportunity to control third party: Smith v Leurs (1945) 70 CLR 256; Modbury Triangle v Anzil (2000) 205 CLR 254.
PUBLIC AUTHORITIES	Sutherland Shire Council v Heyman (1985) 157 CLR 424: no duty merely by having a statutory power (failure to exercise it). Requirements for duty: proximity of relationship; actual assumption of responsibility; P's reliance on exercise of power; vulnerability. Pyrenees Shire Council v Day (1998) 192 CLR 330: authority who exercises power may assume responsibility and incur duty.
PURE ECONOMIC LOSS DUTY	See Topic 11 for full treatment. In brief: duty for PEL requires salient features including knowledge of P's identity, vulnerability, and no indeterminate class risk: Perre v Apand (1999) 198 CLR 180. Negligent misstatement: Hedley Byrne [1964] AC 465.
SCOPE OF DUTY	The duty is owed in relation to the particular kind of loss suffered by P in the particular way it occurred: Overseas Tankship (Wagon Mound) [1961] AC 388. Duty must be coherent with any statutory framework applicable to D: Sullivan v Moody.

NOTE: Duty is a QUESTION OF LAW; breach is a QUESTION OF FACT: never conflate. For novel duties: identify all salient features (Perre v Apand) and argue for and against. For mental harm claims: see Topic 10 (CLA ss 31-32 and normal fortitude). Incremental approach (Sullivan v Moody): is there a coherent analogous established category?

KEY CASES

Case	Result	Key Principle
Donoghue v Stevenson [1932] AC 562	**Duty of care**	Manufacturer owes duty to ultimate consumer. Neighbour principle: reasonably foreseeable persons closely and directly affected. Foundation of modern negligence.
Perre v Apand Pty Ltd (1999) 198 CLR 180	**Duty of care**	PEL: potato farmers near diseased crop. Salient features: D knew P's identity/situation; P was vulnerable; no indeterminate class.
Sullivan v Moody (2001) 207 CLR 562	**No duty**	Child protection authorities investigating abuse did not owe duty to parents investigated. Conflicting duties cannot coexist; incremental development required.
Modbury Triangle v Anzil (2000) 205 CLR 254	**No duty**	Shopping centre did not owe duty to prevent criminal attack by third party on employee in car park. No general duty to prevent third-party harm.
Sutherland Shire Council v Heyman (1985) 157 CLR 424	**No duty**	Council not liable for failure to exercise statutory power to inspect foundations. No duty merely by having statutory power.
Pyrenees Shire Council v Day (1998) 192 CLR 330	**Duty of care**	Council assumed responsibility by exercising power (issuing notice). Having done so, duty arose to complete or warn properly.
Rogers v Whitaker (1992) 175 CLR 479	**Duty of care**	Doctors owe duty to warn of material risks. Material risk test: reasonable person in P's position would attach significance (not Bolam standard).
Woolcock Street Investments v CDG (2004) 216 CLR 515	**No duty**	Commercial purchaser not vulnerable (could have protected self by contract). No duty for PEL re defective building sold to commercial P.

15. VICARIOUS LIABILITY AND NON-DELEGABLE DUTIES | Common Law | CLA s 5Q | Prince Alfred College v ADC (2016) 258 CLR 134

Vicarious liability (VL): employer (E) is liable for tort of employee (EE) if: (1) tortfeasor is an EMPLOYEE (not independent contractor); AND (2) tort was committed IN THE COURSE OR SCOPE OF EMPLOYMENT. Non-delegable duties: E remains primarily liable even where contractor causes harm.

EMPLOYEE vs INDEPENDENT CONTRACTOR	Hollis v Vabu Pty Ltd (2001) 207 CLR 21: multi-factor test. Indicators of employee status: (a) integrated into business; (b) right to control HOW work is done (not just outcome); (c) presents as part of E's enterprise to the public; (d) ownership of equipment; (e) inability to subcontract; (f) payment by wages not invoice. No single factor determinative.
COURSE OF EMPLOYMENT (SALMOND TEST)	VL attaches if the wrongful act was: (a) an act actually authorised by E (express or implied); OR (b) a wrongful and unauthorised mode of doing some act authorised by E. Wrongful mode of authorised act = still vicarious liability.
FROLIC OF HIS OWN	Employee who departs employment for own purposes (frolic) = outside course of employment: Joel v Morison (1834) 6 C & P 501. Slight detour does not necessarily break course of employment: Storey v Ashton (1869) LR 4 QB 476. Test: was the employee doing what they were employed to do, albeit in an unauthorised way?
INTENTIONAL TORTS AND VL	Prince Alfred College v ADC (2016) 258 CLR 134: for sexual abuse by EE, ask whether employment created or materially enhanced the risk of wrongdoing by placing EE in a position of special intimacy/authority over P ('close connection' test). This is the leading Australian test for VL for deliberate/criminal wrongdoing.
CLOSE CONNECTION TEST (PAC v ADC)	Prince Alfred College: employment must have given EE 'the authority, power, trust, control and ability to achieve intimacy' with the victim. Mere opportunity provided by employment is insufficient if E did not create the particular risk. Materially enhanced risk from employment is required.
BORROWED/LENT EMPLOYEE	Mersey Docks and Harbour Board v Coggins & Griffith [1947] AC 1: where E lends EE to another employer (A), liability may pass to A if A had relevant control over EE at time of tort. Presumption: general employer remains vicariously liable unless complete control transferred to hirer.
INDEPENDENT CONTRACTORS (GENERAL)	No VL for independent contractors: Hollis v Vabu. Exceptions: (1) Non-delegable duty (see below); (2) Contractor authorised to create a nuisance; (3) Operations on or near a highway. CLA s 5Q: E not vicariously liable for independent contractor's actions unless E would be independently liable.
NON-DELEGABLE DUTIES	Some duties cannot be delegated; E remains primarily liable even for contractor's negligence: Kondis v State Transport Authority (1984) 154 CLR 672. Categories: employer-employee safe system of work; school-pupil; hospital-patient; some occupier duties. D cannot escape by delegating to a competent contractor.

NOTE: Distinguish: (1) VL (liability FOR another's tort -- relationship question); (2) Primary liability (D directly failed to perform non-delegable duty -- duty question); (3) Non-delegable duty (remains primarily liable even for contractor's negligence). Prince Alfred College: deliberate wrongdoing needs 'materially enhanced risk' from employment, not mere opportunity.

KEY CASES

Case	Result	Key Principle
Hollis v Vabu Pty Ltd (2001) 207 CLR 21	**Vicariously liable**	Bicycle courier = employee despite independent contractor label. Control, integration, presenting as part of enterprise. Multi-factor test.
Prince Alfred College v ADC (2016) 258 CLR 134	**Vicariously liable**	Housemaster's sexual abuse: employment gave authority/intimacy materially enhancing risk. Leading Australian test for VL for deliberate/criminal wrongdoing.
Lister v Hesley Hall Ltd [2002] 1 AC 215	**Vicariously liable**	Care home VL for warden's sexual abuse of residents. Position of trust and authority created by employment was sufficient (UK authority).
Kondis v State Transport Authority (1984) 154 CLR 672	**Non-delegable duty**	Non-delegable duty: employer cannot escape liability for contractor's failure to provide safe system of work.
Joel v Morison (1834) 6 C & P 501	**No vicarious liability**	Employee on frolic of his own (personal errand). Employer not vicariously liable for frolic.
Storey v Ashton (1869) LR 4 QB 476	**Vicariously liable**	Slight detour: still in course of employment. Minor deviation from route did not break employment connection.
Mersey Docks v Coggins [1947] AC 1	**Vicariously liable**	Borrowed employee: general employer remains VL unless complete control transferred to hirer. Presumption favours general employer.