

TOPICS: TORT OF NEGLIGENCE

DUTY OF CARE → BREACH OF DUTY → CAUSATION → DEFENCES → DAMAGES & VICARIOUS LIABILITY

✓ DUTY OF CARE SUMMARY

Week 5 and Week 6

General D + General P:

Was it reasonably foreseeable that carelessness by D in the general sort of activity in which they were engaging might have harmed P in some general way?

QUICK GUIDE:

1. Determine whether it is [A: Established Duty Category] or [B: Novel Duty Category]
2. Novel Duty Category: Is there a [General Duty] / [Pure Economic Loss] / [Pure Mental Harm]
3. Cite the Key Cases
4. Discuss the legal principles of: [for all three]
 - a. Reasonable foreseeability
 - b. Salient Features

Pure Mental Harm: [Extra Steps]:

1. Pure or Consequential Harm?
2. Direct or Indirect Harm?
3. Knew or ought to know P was less than 'normal fortitude'?
4. Reasonable Foreseeability
5. Salient Features

ESTABLISHED DUTY CATEGORY

- Duty of care either automatically exists or automatically does not exist.
- This section does not require further analysis, only statement of law and cited case is necessary – One liner in exam

YES [Duty of Care]

- Manufacturer → Consumer (*Donoghue v Stevenson*)
- Employer → Employee (*Hamilton v Nuroof (WA)*)
- Occupier → Entrant (*Aus Safeway Stores v Zaluzna*)
- Doctor → Patient (*Harriton v Stephens*)
- Teacher → Student (*Richards v Victoria*)
- Road User → Other Road User (*Imbree v McNeilly*)

NO [Duty of Care]

- Advocates (Barristers and Solicitors)
- Police and Prosecutorial authorities
- Parents

1. Is there a duty of care that automatically exists based on D and P's pre-existing relationship?
2. If YES, what category is the duty of care [state the relationship and cite the relevant case]
3. Highlight the facts which the D has a duty of care for P

[ANSWER THE ABOVE - ONE LINER EXAM RESPONSE]

NOVEL DUTY CATEGORY

- Reasonable Foreseeability + Salient Features

GENERAL DUTY:

1. What type of general duty? Identify the facts that the harm was not PEL or PML
 - a. Loss that flows from personal injury or property damage, including:
 - i. Consequential Economic Loss
 - ii. Consequential Mental Harm

2. Reasonable foreseeability [Key Legal Principles]:

- **Donoghue v Stevenson:**
Must be reasonably foreseeable that if the D were careless in engaging in the general sort of activity in which they were engaging, the P, either as an individual or member of a class of people might have been harmed
- **Sullivan v Moody:**
The risk of harm must be more than merely ‘fanciful or far-fetched’, there must be a real risk of harm, though it need not be likely
- **Chapman v Hearse:**
The precise sequence of events, or precise manner in which the harm occurs, need not be reasonably foreseeable

Guideline:

- a. **Cite: Donoghue v Stevenson**
 - i. Was it RF that if [Defendant] was careless in [Conduct], [Plaintiff] might/would have been harmed/injured as a result? — YES/NO
- b. **Cite: Sullivan v Moody**
 - i. Was there a real risk of harm? That is more than farfetched or fanciful (which isn’t unrealistic or not foreseeable) As a result that is a general risk of some kind of harm to the [Plaintiff] — YES/NO
 - ii. “The harm need not be a ‘likely’ risk”
- c. **Cite: Chapman v Hearse**
 - i. What is the precise sequence of the events, or precise manner in which the harm occurs?
 - ii. Note: It is not necessary for the P to show that the precise manner in which their injury was sustained was RF (which isn’t necessary to establish a duty of care)
- d. **Check: Must cite all 3 cases to get full marks for this discussion, must expand discussion on WHY it is... rather than just stating YES/NO**
- e. **Conclude – Clearly YES/NO for the risk of harm to be reasonably foreseeable**

3. Do the [Salient Features] of the case suggest there should be a duty of care imposed (*Sullivan v Moody; Caltex Refineries*)?

- Salient Features (Control Test) [Key Features] – use 4-5 features (not less, not more)**
- a. **Control:** D’s power to prevent the harm
 - b. **Vulnerability:** P’s inability to protect themselves in the situation
 - c. **Reliance:** P’s dependence on the defendant
 - d. **Knowledge:** D’s knowledge of the risk imposed
 - e. **Interminancy:** Liability; whether imposing a duty would create unmanageable liability for the defendant

NOTE:
If the facts have mental harm or pure economic loss, even if it has an established duty of care relationship (such as manufacturer-consumer), it must be treated as a Novel Duty Category [Below]

PURE ECONOMIC LOSS

NOTE: Must go through all elements individually then make conclusion

1. Is it pure or consequential economic loss?

- a. Consequential economic loss → General Duty of Care (Above)
- b. Pure economic loss → Special Duty of Care

2. Reasonable Foreseeability [Key Legal Principles]

- a. **Was it RF that D was careless in engaging in the activity they were engaging in, and that P would have suffered a pure economic loss as a result?**
 - i. It must be reasonably foreseeable that if D were careless in engaging in the general sort of activity in which they were engaging, P, either as an individual or as a member of a class of people, might have suffered pure economic loss
 - ii. *Donoghue v Stevenson; Perre v Apand*
- b. The risk of harm must be more than merely ‘fanciful or far-fetched’; there must be a real risk of harm
 - i. *Sullivan v Moody*
- c. The precise sequence of events, or precise manner in which the harm occurs, need not be reasonably foreseeable
 - i. *Chapman v Hearse*

3. Do the salient features of the case suggest there should be a duty of care imposed?

Salient Features: [Most relevant for Pure Economic Loss]

- a. Indeterminacy
 - b. Interference
 - c. Assumption
 - d. Knowledge
 - e. Conflict of duties
- Summarise each feature of whether it leans towards or away from duty for the D
 - Cite Cases – specific to pure economic loss — [above]

4. Conclusion whether there is a duty of care owed from D to P?

PURE MENTAL HARM

NOTE: Must go through all elements individually then make conclusion

- 1. **Is it pure or consequential mental harm? *Wrongs Act 1958***
 - a. **Section 23** - Duty of Care can be owed for mental harm
 - b. **Section 67** - Definitions
 - c. **Section 75** - Mental Harm must be recognised by psychiatric illness
- 2. **Is this a direct or indirect mental harm?**
 - a. **Direct Mental Harm**
The event of the mental harm arose from P’s own incident rather than the fearing for any third party – Section 73 hurdle does not apply
 - b. **Indirect Mental Harm: Definition**
The P is the indirect subject of the traumatic event, by witnessing or otherwise learning of another person being killed, injured or put in danger by the D’s negligence — Section 73 hurdle does apply

Pure Mental Harm	Consequential Mental Harm
Harm that occurs in the absence of any personal or bodily injury	Harm that is a consequence of a personal or bodily injury — usually for direct MH
If indirect mental harm (fear for others) Hurdle requirement: Witness at scene <u>or</u> close relationship	No Hurdle requirement: P must have suffered harm that led to the mental harm, so it is therefore not about fear for others
Section 73	

Witnessed at the Scene: s 73(2)(a)
Wicks v State Rail Authority of NSW

Close Relationship: s 73(2)(b)
Gifford v Strang Patrick Stevedoring

Conclude: Did P satisfy the hurdle requirement under section 73?

3. Test: Did D know or ought to know P was of less than normal fortitude?

- a. **Normal Fortitude** – standard of reasonable mental and emotional strength, should D have foreseen that their actions would cause psychiatric injury to a person of average and ordinary resilience
- i. Note: there is no definition of ‘Normal Fortitude’ in the Wrongs Act, must use the facts provided and assess it on a case-by-case basis

b. Section 72(3) [Reasonable Foreseeability Test]

- i. P must actually be of less than normal fortitude (Factually); and
- ii. D must have known (subjective) or ought to know (objective) that was the case

4. Reasonable Foreseeability (based on answer to #3)

<p>Answer to #3 YES</p> <p>P is of less than normal fortitude and D knew or should have known...</p>	<p>Apply:</p> <ul style="list-style-type: none">• Common Law RF test, but must determine whether a recognised psychiatric illness would be reasonably foreseeable• Section 71 — Pure Mental Harm• Section 74(1)(b) — Consequential Mental Harm• Cite Cases:<ul style="list-style-type: none">◦ <i>Donoghue</i>◦ <i>Sullivan</i>◦ <i>Chapman</i>
<p>Answer to #3 NO</p> <p>Either D did not know or ought to know, or P simply was not of less than normal fortitude</p>	<p>Apply:</p> <ul style="list-style-type: none">• Legislative RF test• Section 72 (1) & (2) — Pure Mental Harm• Section 74 (1)(a) — Consequential Mental Harm• Ask: <i>is it RF that a person of normal fortitude in the P's position might suffer a recognised psychiatric illness in the circumstances of the case if reasonable care were not taken by the D?</i>• TEST (s 72(2)), if response is yes = more likely to be RF<ul style="list-style-type: none">◦ S 72(2)(a) — result of sudden shock◦ S 72(2)(b) — P witnessed, at the scene, person being killed, injured or put in danger◦ S 72(2)(c) — relationship between P and any person killed, injured or put in danger◦ S 72(2)(d) — pre-existing relationship between P and D• Make overall RF statement – with surrounding circumstances, such as environment, emotional state, relationships and objective test of a person of normal fortitude<ul style="list-style-type: none">◦ Would it have caused a psychiatric illness?

Conclude: Likely/Unlikely Reasonably Foreseeable that it would cause MH?

5. Salient Features [refer to the chart]

- a. Examine the circumstances of the facts
- b. Use to determine whether the duty leans TOWARDS or AWAY from D
- c. Then use the results to determine conclusion

Cite [Mental Harm] Cases Specifically

- *Tame v NSW* (2002)
- *Annetts v Australian Station* (2002)

- *Gifford v Strang Patrick Stevedoing* (2003)

NOTE: *Annetts v Australian Station* (2002)

- There is no duty of care for mental harm caused by the manner in which bad news is communicated (as a messenger) — public policy of open reporting and communication
- There **MAY** be a duty of care for mental harm caused by the **accuracy of the information** communicated → uses the ordinary mental harm process to determine

Overall Conclusion: [Likely/Unlikely that D owes P a duty of care?]

OTHER NOTES

END OF SAMPLE
Continued.... [Breach of duty]