

Element One – Duty of Care

- For Df to be liable, they first must have owed the Pf a duty of care – **Moody**
- Damage must be quantifiable (physical, economic, mental) AND reasonably foreseeable – **Allsop CJ in Sharma**
 - Damage CANNOT be pre-emptive, even if almost certain to occur – **Sharma**

Established Duties of Care

- **Drivers and Other Road Users** → All road users owe each other a duty to use the road with care – **Chapman**
 - Driving experience is irrelevant → if you use road, you owe a DoC – **Imbree**
- **Manufactures and Consumers** → must take reasonable care to avoid acts or omissions which would reasonably and foreseeably harm their consumers – **Donoghue v Stevenson**
 - Applies to ANY product that the manufacturer intends to reach the consumer – **Graham Barclay Oysters**
 - Consumer is not expected to closely inspect the intended product before use – **Grant v Australian Knitting**
- **Employer and Employees**
 - If activity is inherently dangerous, employer owes a DoC not just to take reasonable care in the ordinary sense, but must also take special precautions to prevent the harm from materialising – **Nuroof**
 - Not defined by the location / time, but by the nature of the work required of employees – **Chomentowski**
 - Employers owe DoC protecting employees from 3rd parties (including criminal acts) if harm is foreseeable – **Chm**
 - If employer is profiting/directing activity → cannot escape liability by delegating to 3rd party – **Nuroof**
- **Occupiers and Entrant** → Occupiers of premises owe a duty to take reasonable care to ensure that people entering are not exposed to risks of physical injury arising from the condition of the premises – **Safeway v Zaluzna**
 - Includes reasonable care to remove, reduce, or prevent hazard that pose risk to other properties – **Hargrave**
 - Df does NOT need to remove ALL potential hazards, just ones they ought to know about – **Neindorf**
 - Does not usually extend to risks from commonly encountered objects or natural hazards – **Welch**
 - Occupier = 'someone exercising a 'measure of control' over the premises' – **Thompson v Woolworths**
- **Occupiers undertaking special activities / special venues (Sub of Occupier and Entrant)**
 - If occupier carries out dangerous activity on their land → owe a non-delegable DoC to persons on their property AND neighbours – **Burnie Port Authority**
 - If serving alcohol → may owe further DoC to ensure patrons kept safe from intoxicated customers
 - HOWEVER → do NOT need to monitor their patron's alcohol consumption – **South Tweed Heads**
- **Landlords and Tenants (Sub of Occupier and Entrant)**
 - Landlords owe a DoC to their tenants in relation to defects they DO or OUGHT to know of – **Barlett**
- **Teachers and Students** → must take all reasonable measures to prevent students from physical injury – **Geyer**
 - This is duty is non-delegable – **Bryar**
- **Professionals and Clients** → **general rule** = if person / entity is (1) assuming responsibility and (2) has a high degree of control over a vulnerable person (dependant on the pf), then DoC is likely owed – **Hill v Van Erp**
 - **Drs** have DoC take reasonable care in the provision of (1) diagnosis, (2) treatment and (3) advice – **Whitter**
 - **Hospitals** undertaking the care, supervision and control of patients owe them a personal, non-delegable DoC to ensure that reasonable care is taken to avoid injury – **Ellis**
 - **Solicitors** owe DoC to clients to exercise reasonable care in provision of their professional services – **Hill v Van Erp**

Scope of Liability

- **Often a DoC DOES exist, BUT contentious question is 'does the SCOPE of that DoC extend to the facts presented?' → depends on circumstances**
- For the DoC to extend to the actions of a third party, there must be some aspect of control
 - If Df has a high-level control, the duty extends to illegal acts of third parties – **Adeels Palace**
 - If Df has less control, the duty does not extend to illegal acts of third parties – **Modbury**
- If there is **joint illegal activity between Pf and Df** → NO duty of care – **Gala**
 - If Pf has taken **all reasonable steps** to withdraw from the illegal activity = duty of care reestablished – **Miller**
- The scope of a DoC is a question of reasonableness (duty must be enforceable) – **Karpik v Carnival**
- DoC is generally not owed between people jointly engaged in a serious crime – **Miller**

Establishing a Novel Duty of Care

- **Step 1 – Is it foreseeable that the Df's act / omission would affect the Pf?** – **Stevenson v Donoghue; Kuhl**
 - You can only come under a duty in respect of acts and omissions that you can reasonably foresee may affect your neighbours – persons who are directly and closely affected by your acts' – **McHugh J in Tame**
- **Step 2 – Consideration of "Salient Features" Sullivan → these include: Caltex Refineries**
 - (a) **nature of the harm** alleged
 - (b) degree and nature of **control able to be exercised by the Df** to avoid harm - **Kirkland-Veenstra**
 - (c) **degree of vulnerability** exercised by the Pf – **Perre v Apand**
 - (d) **assumption of responsibility** by the Df - **Caltex**
 - (e) **relationship** between the Df and Pf - **Tame; Graham Barclay Oysters**
 - (f) nature and **consequences** of any action that can be **taken to avoid the harm** to the pf - **Sullivan**
 - (g) desirability of / need for conformance and **coherence** in the structure of the common law
 - (h) consistency with the terms, scope and purpose of any statute relevant to the existence of a duty - **Sullivan**
 - (i) **autonomy or freedom of individuals**, including the right to pursue one's own interests - **Kirkland-Veenstra**
 - (j) general **policy** considerations - **D'Orta-Ekenaike**
- These 'salient' factors are entirely dependant on the uniqueness of the case facts – **Sullivan v Moody**

Liability of Public Bodies

- Courts are **reluctant to impose liability of public bodies** → impractical for them to carry duties effectively
 - See **Hill v Chief Constable** → While the police owe a general DoC to the public, they do not owe individual DoC to specific members of the public

CLA Provisions Addressing Public Bodies

- These provisions **supplement** the common law, they don't replace it!! → when dealing with PB, **apply Novel DoC Test** then consider relevant provisions
- **S 5W - Principles Concerning Resources and Responsibilities** = requires courts to **consider** a public body's:
 - (a) limited resources (b) allocation of resources (c) broad range of functions (d) compliance with standards
- **S 5X – Policy Defence** → POWERFUL defence if policy is based on financial, economic, political, or social factors
 - EXCEPTION = if the policy decision was "so unreasonable that no reasonable public body or officer in the defendant's position could have made it"
- **S 5AA – Exercise of Function Does Not Create Duty** → The fact that a public body has the power to do something, or decides to exercise that function, DOES NOT by itself mean that it has a DoC to do so – see **Kirkland-Veenstra**

Common Law Examples of Public Body Liability

- **Graham Barclay Oysters** → whether a public body owes DoC depends on an examination of its statutory purpose
 - DoC is more likely to be found where
 - (a) Public authority power is specifically intended to protect from risk and;
 - (b) Public authority is **aware of that risk to specific individuals**
- **Kirkland-Veenstra** → Mere existence of a statutory power to intervene does not, on its own, create a common law duty of care to do so → requires something more (salient features)
- **Sharma** → Although outcome was highly likely, Minister's decision was not merely operational but was a matter of "high policy"

Duty of Care Regarding Mental Harm

Common law Approach

ONLY USE FOR WORKPLACE / EMPLOYMENT MATTERS

- Is it **reasonably foreseeable** that a person of **normal fortitude** in the pf's position would suffer **psychiatric harm**? **Tame; Annetts**
 - **Tame** = NOT reasonably foreseeable that someone of normal fortitude would develop a psychiatric harm from minor clerical error
 - **Annetts** = IS reasonably foreseeable that parents would suffer psychiatric harm from the death of their son given prior assurances
 - DOES NOT require the Pf to be a person of normal fortitude in order to be owed DoC!! = Only requires it to be foreseeable that a person of normal fortitude in the plaintiff's position might suffer mental harm ∴ **Normal fortitude ≠ precondition**
 - An employer will owe a DoC for **stress-related psychiatric injuries ONLY IF the employer knew or ought to have known** that the specific employee was a risk - **Koehler v Cerebos**
 - Developing a psychiatric illness is foreseeable for employees in **inherently stressful / traumatic occupations** – **The Age; Kozarov**
 - Furthermore, employer has DoC to be proactive in taking steps to prevent psychiatric harm from developing
 - **Direct perception of the event is NOT required**, but a close relationship between victim and Pf can be important - **Gifford**
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S 5Q CLA definitions of mental harm

- **Mental harm** = impairment of a person's mental condition
- **Consequential mental harm** = mental harm that is a consequence of a personal injury of any kind
- **Pure mental harm** = mental harm other than consequential mental harm

S 5S CLA – Does D owe P a Duty of care in Respect to Mental Harm?**The General TEST For Establishing DoC (for both Pure and Consequential Mental Harm)**

s 5S(1) - 'A df does NOT owe a DoC to the Pf to not cause mental harm unless...'

- **Step 1 – s 5S(1) - Has the Pf suffered a recognisable psychiatric illness?** → usually obvious from the facts
 - Must be a diagnosable psychiatric illness - sorrow / shock / grief not enough on its own – **Mt. Isa Mines**
- **Step 2 – s 5S(1) – Is it foreseeable, given the circumstances, that a person of normal fortitude would develop this harm if reasonable care were not taken?**
 - 'Normal fortitude' = normal vulnerability or susceptibility to impairment of his or her mental condition - **Zaghoul v Bayly**
 - **DOES NOT require the Pf to be someone of 'normal fortitude' to be owed DoC** → only that someone with 'normal fortitude' in the shoes of the Pf would have suffered a psychiatric illness if reasonable care were not taken
 - Circumstances of foreseeability diverge depending on whether psychiatric injury is pure or consequential (see below)
- **ONLY IF CONSEQUENTIAL - Step 2a – s 5S(3) Relevant foreseeability circumstances for consequential mental harm**
 - Only need to consider the personal physical injury suffered by the plaintiff → if severe = more foreseeable to cause PI.
- **ONLY IF PURE - Step 2b – s 5S(2) – Relevant foreseeability circumstances for pure mental harm**
 - These are NOT preconditions / requirements → even one can be enough is severe enough
 - a) **whether or not the mental harm was suffered as the result of a sudden shock**
 - (Statutory restatement of CL) → however CL abolished 'sudden shock' requirement in **Tame**
 - "Sudden shock" = mental harm resulting from "an event so distressing that the perception of the phenomenon fronts the P's mind and leads to a psychiatric illness" - **Brennan J in Coffey**
 - b) **whether P witnessed, at the scene, a person being killed, injured or put in peril**
 - Witnessing is not confined to the moment of the accident → can include immediate aftermath – **Wicks; Gifford**
 - c) **the nature of the relationship between P and any person killed, injured or put in peril**
 - To be significant factor, requires 'close and loving relationship' – e.g. parent-child – **Tame**; Spousal – **Coffey**
 - UNCLEAR how far this relationship may extend → friendships? Depends upon circumstances
 - d) **whether or not there was a pre-existing relationship between Pf and Df**
 - E.g. Parents frequently contacted Df for reassurance of son's safety, reassurances held to be significant = pre-existing relationship – **Tame**
- **NOTE!! - s 5S(4) – court is NOT required to disregard what the Df knew or ought to have known about the mental fortitude of the Pf**
- **S 5T – Limitation of Damages** → courts CANNOT award damage for economic loss (i.e. lost wages) **for consequential mental harm unless** the harm consists of a recognised psychiatric illness
 - C.f. common law where sometimes damages can be awarded for mental distress which falls short of a diagnosed illness

Duty of Care Regarding Economic Loss

- **Consequential economic loss (primary)** = directly derived / flows from physical harm done to the person or property (e.g. rehab)
- **Pure economic loss (secondary)** = exists without physical harm to the person or property (e.g. reliance on bad financial advice)

Relational Economic Loss (aka 'indirect PEL')= Pf suffers PEL due to Dfs negligently damaging a third party's property or person

- DoC owed if the Df **knew** their negligence **would cause harm** to a members of a **vulnerable, ascertainable class** – **Caltex Oil; Perre v Apand**
- Pf is NOT considered vulnerable (especially in commercial aspects) if they **have the ability to protect themselves** via contracting or insurance – **Mallonland v Advanta Seeds** → **IMPORTANT FOR ALL PEL CATEGORIES**

Negligent statements / misrepresentation = Pf acts to their financial detriment in reliance upon a negligent statement / advice / information given by Df

- Form of PEL. Why? → financial loss doesn't flow directly from the statement itself, instead, it is "once removed."
- Damage is caused by the plaintiff's own action (or inaction) taken in reliance on the defendant's negligent words.
- Party can be liable for negligent misstatements (owe a DoC) if there is a 'special relationship between the parties' - **Hedley Byrne**
- **TEST** for when a DoC arises for statements / misstatements – **Barwick CJ in Mutual Life & Citizens' Assurance**
 1. **Has the Df given information / advice on a serious matter, whether actively sought or merely accepted by the Pf?**
 2. **Is the relationship such that the Df realises / ought to realise they are being trusted give their best information / judgement?**
 3. **Given the circumstances, would a reasonable person in the Pf's shoes accept and act upon the Dfs information / advice?**
- The Pf does NOT need to request the advice / information → DoC can be owed for volunteered information – **San Sebastian**
- DoC is not limited to professional advisors → DoC can apply to anyone who holds themselves out as possessing a special skill or unique access to information; i.e. a local councilman providing zoning information – **Shaddock**
- A Df does NOT owe a DoC to 3rd parties for negligent statements UNLESS the statement was made with the intention of inducing that 3rd party (or class of ascertainable people including them) to act in reliance on it - **Esanda Finance Corporation**