

Torts

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Topic Eight: Standard of Care and Breach of Duty

GENERAL PRINCIPLES FOR ESTABLISHING BREACH

- *Civil Liability Act*

Foreseeability of risk of injury

- *Wyong Shire Council v Shirt*
- *Doubleday v Kelly*

Civil liability legislation

Responding to the foreseeable risk

CALCULUS OF NEGLIGENCE

- *Civil Liability Act*

Determining breach- the general approach

- *Romeo v Conservation Commission*
- *Vairy v Wyong Shire Council*

Civil liability legislation

- *RTA v Refrigerated Roadways Pty Ltd*
- *Standards of care and negligence law*

Probability of harm

- ***RTA v Dederer***

Magnitude or gravity of harm

- *Paris v Stepney Borough Council*
- *Adelaide Chemical & Fertilizer Co Ltd v Carlyle*

Burden of taking precautions

- *Woods v Multi-Sport Holdings*
- ***Neindorf v Junkovic*** (shows policy underlying tort law)

Social utility of the risk creating activity

- ***E v Australian Red Cross Society***

INHERENT AND OBVIOUS RISK

Inherent risk

- *Mulligan v Coffs Harbour CC*

Obvious risk defined

- *Wrongs Act 1958 (Vic)*

Recreational activities under the civil liability legislation

- ***Fallas v Mourlas***
- *Laoulach v Ibrahim*

WHO IS THE REASONABLE PERSON?

Gender

- *Tort law and the Feminist Critique of Reason*

Age: Children

- ***McHale v Watson***

Mental illness and disability

- ***Carrier v Bonham***

Learners

- *Imbree v McNeilly; McNeilly v Imbree*

Professionals those with special skills

- ***Rogers v Whitaker***
- *Civil Liability Act 2002*

Public authorities

- *Civil Liability Act 2002*

INTRODUCTION

(Gummow J in *RTA v Dederer*)

First, decide if there is a **duty of care**. **Second**, duty imposes obligation to **exercise reasonable care** not a duty to prevent potentially harmful conduct. **Thirdly**, assessment of breach depends on correct identification of relevant **risk of injury**. **Fourth**, breach must be **assessed prospectively** not retrospectively. **Fifth**, such assessment must be made in manner described by Mason J in *Wyong*...

(Mason J in *Wyong Shire Council v Shirt*)

To decide if there has been a breach, tribunal of fact must ask whether **reasonable man in D's position** would have **foreseen** that his conduct involved risk of injury to P or class of persons including P.

If the answer is affirmative, must then determine **what reasonable man would do** in response to risk. Perception of reasonable response calls for consideration of (1) **Magnitude of the risk** and (2) **Degree of probability of its occurrence** along with (3) expense, difficulty and **inconvenience** of taking alleviating action and (4) any other **conflicting responsibilities** the D may have.

Whether D owes P a **duty of care** is a **question of law**. See factors test in *Sullivan v Moody*. **Standard** of care is a **question of law**. Consider reasonable person in circumstances. **Breach** of that standard is a question of fact.

OVERVIEW ON STANDARD OF CARE

Civil Liability Act

Standard required is that of a **reasonable person in the circumstances of the defendant**, except in the case of:

Children: reasonable child.

Professionals: peer professional opinion unless irrational (s50).

Skilled persons: reasonable person possessing that skill e.g. carpenter.

Public authorities: general allocation of resources not open to question, failure to exercise power won't attract liability unless so unreasonable that no authority with that power would think it reasonable.

NB: *Reasonable person* doesn't possess individual idiosyncrasies of D.

OVERVIEW ON BREACH

Civil Liability Act s 5B

D in breach by failing to take precautions if:

- Risk was foreseeable and not insignificant.
- Reasonable person in D's position would have taken precautions (considering probability of harm, magnitude against burden of taken precautions and social utility of activity creating harm).

No liability for harm suffered from **obvious risks** of **dangerous recreational activities** (5L); injured persons presumed to be aware of **obvious risks** (5G), no proactive duty to warn of obvious risks (5H), no liability for materialisation of an **inherent risk** (5I).

GENERAL PRINCIPLES FOR ESTABLISHING BREACH

The Test at Common Law

United States v Carroll Towing Co:

'a person's conduct X is unreasonable only if $P \times L > B$ '.

P: Probability of injury occurring

L: Magnitude of injury

B: expected benefit of engaging in conduct X or, the expected burden or cost required to avoid engaging in conduct X.

Confusing because not really a calculation but judgement of reasonableness.

The Statutory Formulation

Civil Liability Act Section 5B- General Principles

1. Not negligent in failing to take precautions against a risk of harm unless:
 - a. Risk was **foreseeable** (that is, a risk which person knew or ought to have known), and
 - b. The risk was **not insignificant [not improbable]**, and
 - c. In the circumstances, a **reasonable person in the person's position** would have taken those precautions.
2. In determining whether a reasonable person would have taken precautions against a risk of harm, court is to consider the following (**amongst other relevant things**):
 - a. **Probability** that harm would occur if care not taken,
 - b. **Likely seriousness** of the harm,
 - c. **Burden** of taking precautions to avoid a risk of harm,
 - d. **Social utility** of the activity that creates the risk of harm.

McKenna & Ors v Hunter New England Local Health

5B(1): requires determination that the risk was foreseeable, not insignificant and what precautions a reasonable person would have taken. It doesn't require a conclusion that harm would probably occur.

5B(2): simply directs attention to degree of likelihood that the harm would occur. Findings of negligence 'do not require a conclusion that it was foreseeable that harm would more likely than not occur.' [124]

Section 5C- Other Principles

In proceedings relating to liability for negligence:

- a) **Burden of taking precautions** to avoid risk of harm includes burden of taking precautions **to avoid similar risks of harm** for which the person may be responsible, and
- b) **Fact that a risk of harm could have been avoided** by doing something differently does not itself give rise to or affect liability for the way in which the thing was done, and
- c) **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 itself constitute an admission of liability in connection with that risk.

NB: Section 5 defines 'harm' as 'harm of any kind'

Shorthand Statutory Test
Weigh s5B(2) (a) + (b) against (c) + (d), or
Conduct is unreasonable if $P \times L > C$

P: probability of injury occurring
L: likely seriousness of harm
C: cost of taking precautions less social utility of activity

Theoretical Considerations

- Breach involves a normative judgement and balancing test.
- Not all foreseeable risks must be guarded against.
- Negligence calculus thus strongest evidence of utilitarian efficiency foundation for tort law.

Foreseeability of risk of injury

- Foreseeability at breach stage means '**foreseeability of risk of injury**'.
- Must be **foreseeable** and '**not insignificant**' but the 'not insignificant' requirement doesn't add anything to the test: *RTA v Refrigerated Roadways*.
- It is foreseeability of risk that **D knew or ought to have known**. This is an **objective test** but **subjective knowledge** by D is relevant. Example: that an employee was blind in one eye *Paris v Stepney Borough Council*. Otherwise, D held to standard is of reasonable person.

Ask: Was it 'reasonably foreseeable as a possibility that the kind of carelessness charged against D might cause damage of some kind to the plaintiff's person or property' *MAEPA v San Sebastian*

Wyong Shire Council v Shirt

- Facts: P became quadriplegic after striking head on bottom of shallow lake while waterskiing. Council had erected 'deep water' signs nearby.
- Issue: did Council breach DOC by failing to warn users to dangers of shallow water?
- Decision on breach: reasonable man in circumstances of Council would have **foreseen** that message and placement might lead to risk of injury by inducing inexperienced water skiers to ski beyond sign. RP would have altered sign, cheap and easy.

Doubleday v Kelly [2005] NSWCA

- Facts: 7 year old injured when trying to roller skate on trampoline while visiting D's house. P unsupervised because doing it before parents woke. Previous night warned kids not to use it without supervision.
- Issue: did D breach DOC?
- Decision on breach: **reasonably foreseeable** that child may be injured if using it without supervision. Don't need to foresee complexity of situation. Warning was insufficient, could have upturned trampoline.

THE CALCULUS OF NEGLIGENCE

Determining Breach- the General Approach

Romeo v Conservation Commission (1998) HCA

- Facts: 16 yr P and friend fell off unfenced cliff at night on nature reserve, night, some alcohol, P quadriplegic.
- Issue: was Commission (public authority) in breach of DOC?
- Decision on breach: 4:2 against P. Risk was foreseeable but **low** (required alcohol and darkness), **obviousness of the risk***, expense, difficulty and inconvenience of preventative measures (fencing all equivalent sites) and diverting funds from **other priorities of Commission** outweighed other factors. ***Nagle distinguished** because danger of submerged rocks hidden from users, here elevation of cliffs perfectly obvious to a reasonable person.
- Significance: shows that test of breach is prospective. Need to pretend exactly how and where harm occurred, therefore cost of preventative measures (fencing everywhere) would be really high.

Vairy v Wyong Shire Council

- Facts: P in mid 40s, tetraplegic after diving from rocks on beach.
- Issue: Was Council (public authority) in breach of DOC by failing to erect warning sign or prohibiting diving (NB Council had 27km of coastline)?
- Decision on breach: Foreseeable that someone may sustain injury from diving, but reasonable council wouldn't have marked every point that someone could dive from.
- Important principles: negligence calculus must be performed by looking forward *from a time before the accident without benefit of hindsight in terms of how the risk materialised*. Thus you can consider expense, difficulty and inconvenience of preventative action (Hayne J).

Civil liability legislation

RTA v Refrigerated Roadways Pty Ltd

- Facts: truck driver killed from deliberately dropped rocks.
- Issue: was RTA in breach of DOC by failing to enclose bridge at time built or later? RTA aware of a risk of people dropping rocks and in process of enclosing bridges. This not on top of priority list.
- Decision on breach: **No breach** of duty at time built because no evidence that problem was real in 1975-1978 (**no foreseeability**). Not reasonable to require RTA to enclose all bridges.
- Important principle: Necessary to weigh **s5B(2) (a) and (b) against (c) and (d)**; legislation encourages courts to directly consider **whether it would be reasonable to require precautions** to be taken against a particular risk.

Probability of harm

Boulton v Stone (Lord Denning House of Lords)

- Facts: Woman struck on head while standing outside her house across road from cricket ground. Balls had only escaped ground 6-10 times in 30 years.

- Issue: was club and members in breach of DOC to woman?
- Decision on breach: HL couldn't see anything unfair about compensating her but negligence law concerns what is culpable. Probability of risk so low as to justify no breach.

RTA v Dederer

- Facts: Teen dived off bridge and partially paraplegic. 'No diving' pictograms at each end.
- Issues on appeal: (1) Were CA and judge wrong in reasoning that RTA breached duty by failing to prevent diving, which it knew continued after signs erected, (2) what was relevant risk of harm, (3) was RTA's response to harm reasonable?
- Decision on breach:
 - Question is whether RTA exercised reasonable care, not whether it took steps to *prevent* continued diving.
 - **Relevant risk of harm** was diving *and being injured* (not just diving), which was **foreseeable** on any objective test (why else would they put up signs?).
 - **Magnitude** of risk was grave (paralysis),
 - **Probability** of injury was **low** (first such injury).
 - No evidence that other **preventative action** would have been effective (e.g. triangular hand rail so people can't balance).
 - **No breach** because erection of warnings signs sufficient, duty discharged.

Manley v Alexander (2005)

- Driver liable for running over someone lying on road at 4 am, even though risk was considered 'remote'.

Magnitude or gravity of the harm

Paris v Stepney Borough Council [1951] AC

- Facts: Fitter in D's garage partially blind, rendered almost totally blind after workplace accident in which chip of metal flew off bolt that he was hammering and entered his good eye. Beforehand, D aware that P had only one good eye.
- Issue: Whether D in breach of DOC? Could have provided goggles.
- Decision on breach: P successful. D owed higher standard of care than to others because *D was aware* that P had only one good eye. **Gravity or magnitude** of harm much greater for P than others. Should have given goggles.

Adelaide Chemical & Fertilizer Co Ltd v Carlyle

- Facts: Manufacturer of sulphuric acid liable for death of P's husband. Had supplied acid in brittle earthenware containers, one of which broke when husband using it.
- Issue: Whether D in breach of DOC to P (could have supplied acid in more solid containers).
- Decision on breach: D breached DOC to P because should have exercised more diligence when dealing with a dangerous substance.

Burden of taking precautions

Woods v Multi-Sport Holdings (2002) High Court

- Facts: P partially blinded during indoor cricket organised by D and played on D's premises. D provided equipment not including helmets or pads.
- Issue: Whether D breached DOC to P (e.g. supply eye protection or warn of dangers). Duty of care was conceded/approved.
- Decision on breach: Majority of 3:2 HC didn't interfere with trial judge's finding that D not in breach.
- Reasoning: Risk of being struck so obvious that reasonableness did not require D to warn, no evidence of reasonably appropriate safety equipment.

Neindorf v Junkovic (2005) High Court

- Facts: P tripped on uneven concrete on D's driveway when attending garage sale. One slab 10-12 mm higher, difference visible, P fractured bone in right foot.
- Issue: Whether D in breach of DOC to P, DOC conceded (occupier's liability), SA legislation said failure to take any steps didn't necessarily mean that occupier was negligent.
- Decision on breach: 4-1 majority. In case of modest garage sale, P's duty didn't extend to taking action such as painting lines, erecting warning signs etc. Danger was minor and obvious, similar to those in driveways around Australia. Eliminating or warning against all hazards not practicable.
- Dissent by Kirby*: Said D owed duty because had invited P to premises for economic advantage. Said majority opinion endorsed '*notions of selfishness that are the antithesis of the Atkinian concept of the legal duty that we all owe...to each other as neighbours...*'

Caledonian Collieries Ltd v Spiers

- Facts: P's husband killed when car struck by line of runaway railway tracks on level crossing.
- Issue: Whether D in breach of duty to P, could have installed 'catch points' which would have derailed trucks (which carried risks of injury) but would have caused long delays at traffic junctions.
- Significance on breach: useful discussion of balancing competing arguments where 'drastic measures' are the alternative to no action.

Social utility of the risk creating activity

E v Australian Red Cross Society

- Facts: recipient of contaminated post-operative blood transfusion contracted AIDS.
- Issue: DOC conceded, question was whether D in breach of duty by failing to introduce infection screening earlier or more widely.
- Decision on breach:
 - D not in breach of duty because **magnitude** of risk and **probability** of HIV blood transfusion infection would outweigh the

- ‘expense, difficulty and inconvenience’ of adopting screening program **based on state of scientific knowledge at the time**, including that false positive results would require D to discard 5% of otherwise usable blood in circumstances of short blood supply.
 - Likely false positives would mean that usable blood would be discarded, more would die from the screening process than not screening. Putting a price on life.
- Significance: imposed on P the cost of protecting wider public interest of increased blood supply (utilitarian). Court expressed ‘hope’ of ex-gratia payment to P and others in situation.

Wilson v Nlepac Pty Ltd T/A Vision Personal Training (Crows Nest)

- Facts: D suffered a severe back injury when using a medicine ball in course of personal training session under supervision of PT.
- Issue: DOC conceded. Question was whether D (employer of trainer) was in breach of duty.
- At trial on breach: for the purpose of s 5(2)(d) trial judge accepted that operating PT studios was an activity of high **social utility**.
- On appeal: CA rejected that submission and noted that ‘rescuing people from the impact of floods, cyclones and earthquakes were’ examples that might attract such a finding.