

Duty of Care

In assessing duty, the threshold of reasonable foreseeability is construed generally (*San Sebastian*): the issue is whether careless conduct of any kind by DEFENDANT would result in some kind of harm to PLAINTIFF (*San Sebastian*). PLAINTIFF must belong to a class of persons whom DEFENDANT could reasonably foresee being harmed as a consequence of DEFENDANT'S carelessness (*Chapman*). The risk of harm must be a real and not far-fetched possibility (Sullivan). In establishing a duty owed by defendant to plaintiff, reasonable foreseeability is a necessary but insufficient criterion.

‘A duty of care is the recognition of a legal relationship between the parties, indicating that one has obligations to take care with respect to the other.’ (*Donoghue*)

The nature of the harm alleged can be recognised as XXX

Reasonable foreseeability is necessary but not determinative (*Chapman*). XXX was a consequence which was reasonably foreseeable and real and not far-fetched (*Sullivan*). Rarely, there can be unforeseeable plaintiffs (*Seltsam* – asbestos case dependant on timing – differentiating XXX). As per Seltsam, only need to foresee that careless conduct of any kind will result in harm of some kind to the plaintiff (*San Sebastian*).

Plaintiff, XXX, indicated acknowledgement of the risk.

ESTABLISHED DUTY OF CARE

The relationship between PLAINTIFF and DEFENDANT is an established category where a duty of care does exist.

Established Duty Category:

Given there is an established duty category, the act complained of must be within the scope of duty. If it is not within the scope of duty for the relevant authority, salient features may be used to extend the scope of the duty to cover the situation.

NOVEL DUTY OF CARE

If the relationship between PLAINTIFF and DEFENDANT is not an established duty relationship, the court will examine salient features of the relationship to evaluate the appropriateness of imputing a legal duty to take reasonable care to avoid harm or injury (Allsop J, *Caltex Refineries*).

The Court will consider the vulnerability of the plaintiff. In the circumstances of this case XXX. In the case of XXX it was held that XXX. Analogous to the current scenario where XXX.

DEFENDANT'S assumption of responsibility meant that XXX. This can be distinguished by the case of XXX where XXX.

DEFENDANT's knowledge of the risk of harm to the plaintiff supports the argument that XXX. Analogous to XXX.

It can be argued that DEFENDANT's control over the risk XXX meant that XXX. Similarity/Difference can be drawn to XXX where XXX.

The proximity between the plaintiff and the defendant in this case is analogous to *Hill v Chief Constable of West Yorkshire* where it was held that the victim was one of the 'vast number of female general public who might be at risk from his activities, but was at no special distinctive risk in relation to them'.

A salient features analysis also requires consideration of normative/policy factors affecting the appropriateness of imputing a legal duty of care.

As per McHugh J in *Perre* liability is indeterminate only when it cannot be realistically calculated. In the circumstances of this case XXX.

DEFENDANT may argue that their autonomy would be compromised if XXX

In the circumstances of this case where XXX occurs, diversion of scarce resources may be considered such as the case of *Sullivan* and *Hill* where a diversion of the primary objective occurred, requiring a shift in priority from XXX to XXX.

In the case of a joint illegal enterprise, as per s146, the plaintiff would have to prove that in order for a duty of care to be found, the plaintiff such as in *Miller v Miller* withdrew complicity from the activity. Similarly/Differentiating to *Miller* XXX in this case XXX.

In *Graham*, Gleeson CJ held that Public Authorities are under no duty of care obligations when regarding decisions involving or dictated by financial, economic, social or political factors or constraints. Where a decision is operational rather than policy, the position of the authority is the same as that of an ordinary citizen in the sense of attracting ordinary liability for tortious conduct. Such as in the case of *Bujdoso* where an operational breach was found on the part of the prison to adequately protect the prisoner, Bujdoso, as part of their operational responsibility.

In this scenario XXX.

Public Authorities

Section 79 of the *Victorian Wrongs Act* defines a public authority as

- (a) The Crown
- (b) A public service body