

NEGLIGENCE CHEAT SHEET:

<p>Negligence is the failure to confirm one's conduct as reasonable of a person under the same or similar circumstances                  For a prima facie case of negligence the ptf. must prove the dft. owed him a duty of care, that the dft. breached that duty and the ptf. suffered damage which was caused by the dfts. breach and that it was not too remote.</p>	
<p>DUTY OF CARE</p>	
<p><i>Donoghue</i> – 'Love thy neighbour' becomes in law 'duty of care'</p> <ol style="list-style-type: none"> <li>1. What was the duty? What was the person a foreseeable ptf?                     <ul style="list-style-type: none"> <li>- A duty of care is owed, when it is RF that the dfts. actions will cause harm to their neighbours who are so closely and directly affected by the dft. that they ought reasonably to have them in your contemplation (<i>Donoghue</i>)</li> <li>- Duty is owed only to those who are foreseeable ptf., in the foreseeable zone of danger, facing foreseeable harm (<i>Palsgraf</i>)</li> <li>- A contract is not needed (<i>Donoghue</i>)</li> <li>- Was there any warning against acting a certain way? (<i>Wilson &amp; Horton</i>)</li> <li>- Was there an opportunity for intermediary inspection? (<i>Donoghue</i>)</li> <li>- Was there a proximate relationship between the dft. and the ptf? (<i>Wilson &amp; Horton</i>)                             <ol style="list-style-type: none"> <li>a. Extra elements as informed by the facts...</li> </ol> </li> </ul> </li> </ol>	
<p>NERVOUS SHOCK</p> <p>Primary victim:</p> <ol style="list-style-type: none"> <li>a. If the dft. can RF that his conduct will expose the ptf. to risk of PI then DOC (<i>Page</i>)</li> <li>b. Assume the victim is of reasonable fortitude and susceptibility, unless tortfeasor has special knowledge (<i>Page dissenting</i>)</li> <li>c. Psychiatric harm resulting from the risk or apprehension of physical harm is enough, within the zone of danger (<i>Page</i>)</li> <li>d. Within the range/risk of foreseeability physical injury = PV (<i>White</i>)</li> <li>e. We do not know from <i>Van Soest</i> whether harm needs to be recognisable – could apply <i>Page</i></li> </ol> <p>Secondary Victim:                  Suffers due to witnessing physical harm/ threat, but not exposed himself (<i>White</i>)</p> <p><b>Foreseeability of psychiatric harm:</b>                  → Is it RF that a person of 'ordinary fortitude'/normal nervous strength" would suffer NS? (<i>Bourhill, Page</i>)                  → ptf. suffers no physical injury and psychiatric condition was not foreseeable (<i>Page</i>)                  → Last thing on Bourhill's mind at the time (<i>Bourhill</i>)</p> <p><b>Bystander:</b>                  → Assumed to have ordinary fortitude to survive shock (<i>McLoughlin</i>)                  → Even if bystanders at an event, suffer foreseeable psychiatric harm, they can't recover (<i>Alcock</i>)</p> <p><b>Rescuer:</b>                  → Rescuers are treated as primary victims if exposed to physical risk, limit by <i>Page</i> zone – not PV (Steyn) (<i>Chadwick</i>)                  → To recover pure psychiatric harm, not necessary to establish condition was caused by perception of personal danger (<i>Chadwick</i>) passed personal danger threshold, but had injury due to "the whole horror of the situation" (Goff)                  → No exposure to physical injury = not PV, but must satisfy SV mechanisms (<i>White</i>)                  → Steyn in <i>White</i> limits PV ptf. recovery through <i>Page</i> – not in the zone of foreseeable danger (majority) (<i>White</i>)                  → Goff, dissenting – PV can be part of witnessing the whole horror of the event (<i>White</i>)</p> <p><b>Employees:</b>                  → must surpass <i>Alcock's</i> SV restrictions (<i>White</i>)                  → Duty to protect from physical, not psychiatric too (<i>White</i>)</p>	<p>NERVOUS SHOCK POLICY</p> <p>← "DOC depends on a normal standard of susceptibility" Lord Wright (<i>Bourhill BUT Page</i>)</p> <ul style="list-style-type: none"> <li>- Since NS is easily foreseeable, Courts are weary of allowing too many to recover</li> <li>- Proliferation of claims for victims witnessing gruesome events is unwanted (floodgates) (<i>Alcock</i>)</li> <li>- Liability could be out of proportion to the wrong committed (<i>Van Soest</i>)</li> <li>- Would sit uneasy with relatives who cannot recover, but employees could (<i>White &amp; Alcock</i>)</li> <li>- Rubber band theory (<i>McLoughlin</i>) – line must be drawn somewhere</li> <li>- Lord Goff (<i>White</i>) issues with requirement of risk of physical injury in the case of rescuers...                      → police, as rescuers couldn't recover under <i>Chadwick</i>                      → Goes against established authority (<i>Chadwick</i>, "whole horror," <i>McLoughlin</i> - mother similar to rescuer)                      → artificial and undesirable barrier against recovery in respect of psychiatric injury – <i>Chadwick</i> x2 analogy                      → Concerns that people will be better off that relatives are misconceived – just because 1 ptf. cannot recover – doesn't mean others can't</li> <li>- Thomas J (<i>Van Soest</i>)                      → limited right of recovery favoured by majority is unprincipled and arbitrary – calls for abandonment of all mechanisms to apply only RF                      → Take on any injury that is plainly outside the range of ordinary foreseeability</li> </ul>

*McLoughlin* establishes 3 elements to limit extent of claims - class of persons, proximity & means by which shock was caused – Re-established in *Alcock* and *Van Soest* decides in accordance with “softer edges” – NZ law

1. **Relationship proximity:** Ptf. must have a close relationship of love and affection w/ the person endangered (*Alcock*)
  - *McLoughlin* – mother → husband & child, presumption of closeness, closer ties
  - *Alcock* – brother, “special brother” “close and intimate” – Cain & Abel (murder), David and Jonathon (friends)
  - *Van Soest* – stranger/ bystander
2. **Physical proximity (time and place):** ptf. must be present at the incident or the immediate aftermath (*Alcock*) SV there in time and place – more likely
  - *McLoughlin* – exception of immediate aftermath – 1 hr., victims in same condition, direct fear not required
  - *Alcock* – 8 hrs. not immediate aftermath – no recovery for those indirectly aware
  - *Van Soest* – accommodate for events made closer by modern technology – physical proximity not confirmed in NZ as could be arbitrary
3. **Means of communication**
  - Viewing on TV is not enough, except where intimate footage is shown (*Alcock*)
  - Not liable if shock occurred from out of sight impact (*McLoughlin*)
  - Witness the event with their own unaided sense (*Alcock*)
  - Some flexibility is required (e.g. children hearing disaster over the phone) *Van Soest*
4. **Recognisable psychiatric illness (*Page, Van Soest*)**
  - Grief is not enough, high threshold, not a “normal function” (*Van Soest*)
  - Thus far and no further – Lord Steyn, line between acute grief and psychological harm (*White*)

#### THIRD PARTY POLICY:

- Omissions vs. commissions (inaction rather than action)
- Dft. is a public body?
- Operations (Elias, *Couch*) – understaffing, operations mishap
- Police – concern as being held liable – effect their job
- Public service – police (*Michael*)

#### THIRD PARTY

What is the specific duty?

1. **Reasonable foreseeability**
  - Damage caused by carelessness by dfts., with knowledge that carelessness would result in danger (*Dorset*)
  - Whose job was it to prevent the danger? Was the damage too remote? (*Lamb*)
  - Law does not impose a duty to prevent harm to person by criminal act of a third party based on simple RF (*Mitchell*)
2. **Relationship between the dft. and the third party**

Degree of control

  - Officers supervising boys under statute, not acting under discretion, have a degree of control (*Dorset*)
  - limited control (*Couch*)
  - Steps to prevent danger expected (*Smith*)

Assumption of Responsibility

  - Only DOC when the dft. has negligently caused or permitted the creation of a source of danger on his land and where it is RF that third parties interferes with it, sparking danger – damage would not have occurred ‘but for’ (*Lamb*)
  - Decorator did not lock the door – house unsecure (*Stansbie – Smith*)
3. **Relationship between the ptf. and the dft.**

DoC is only owed where the ptf. is known to the dft. to be an individual “subject of a distinct and **special risk of identifiable class**, sufficiently delineated, particularly vulnerable” to the harm suffered (*Couch*)

  - Duty only owed to person whom they could have RF had property in situated in the vicinity (*Dorset*)
  - Couch was not at special risk, duty is not always indicated just b/c they are a member of public, they have close physical proximity or have greater contact (*Couch*)
  - Look at the nature of the offence, “voluntary and independent conduct” (*Couch*)
  - Knowledge – the risk must be distinct, apparent and identifiable by the dft. (*Couch*)
  - Where dft. assumes a positive responsibility to safeguard the ptf. – embraces relationship where positive action typically arises (*Michael*)
4. **“Very likely”**
  - Action of the third party must have been ‘very likely’ and physically proximate (immediate vicinity) (*Dorset – Reid and Diplock*)
  - There must be a clear basis that the damage was more than a mere possibility – extends ‘very likely’ (*Lamb*)
  - Human behaviour is unpredictable – need more than a mere possibility (on the facts) (*Smith* – accepted by Elias in minority for *Couch*)
5. **Good Samaritan**
  - No person can be liable for a wrong done by another who is of full age/ capacity, who is not acting on behalf of that person (*Dorset*)
  - You cannot owe a duty to all of the public (*Couch*)
  - CL does not require you to prevent harm to others, only that you do not harm others yourself – do not impel positive action “pure omissions” – Goff (*Dorset, Smith, Mitchell*)
  - You do not create the risk; you do not assume the liability (*Michael*)

## ECONOMIC MISSTATEMENT

### Policy:

Lord Denning in *Candler*:

- “timorous souls” fearful of allowing new causes of action and “bold spirits” who are ready to allow change if justice requires
- *Donoghue* demonstrates how the law “must adapt itself to changing circumstances of life. The categories of negligence are never closed”

Key words: Easily misunderstood; can go viral quickly – Reid (*Hedley*); “liability in an indeterminate amount, for an indeterminate time and to an indeterminate class” (*Candler and Hedley*); casual v formal situations

### Duty of care:

#### BY WHOM?

- There must be a special relationship between dft. and ptf. (*Hedley* factors)
  1. Special skill:
    - If someone possesses a special skill (or knowledge) and undertakes to apply that skill for the assistance of another person who relies on it – a DOC will arise; Devlin hold yourself out as having one” (*Hedley*) (*Scott Group*) professionals – relied on
    - Special skill isn’t limited to contract; skill can be used to assist someone else (*Hedley*)
  2. Assumption of responsibility
    - Dft. needs to have accepted some responsibility - knew the info provided was going to be relied upon by the ptf. (*Hedley*)
    - Where the relationship is particular (created for a purpose), it is necessary to examine the particular facts to see whether there is expressed or implied undertaking of responsibility (*Hedley*)
    - Lord Reid – ‘objective standard,’ they can either; 1. Refuse to give information 2. Speak without a disclaimers and take responsibility or 3. Make a disclaimer – cannot be voluntarily undertaking a responsibility if at the very moment he declares he is not (Devlin) (*Hedley*)
  3. Knowledge of the purpose for which the advice is required vs. purpose for which it was relied
    - Found if in making the statement, the dft. foresees that the ptf. will reasonable place reliance on what is said (*Carter*)
    - There is no proximity unless the dft. can identify the ultimate victim of his carelessness in advance (*Candler overruled by H*)
    - Immaterial that dfts. did not know the specific purpose for seeking the information, you only need to know the kind of group receiving the information (*Hedley* changed by *Scott Group* – added specific knowledge requirement)
    - *Scott Group* – minority **Richmond P**: too general, annual accounts were public and could be relied on for many purposes – it is too far to impose responsibility towards all people dealing with the company – Dft. must have knowledge that his advice or information would be made available and relied upon by a particular person or class of persons (have told them directly), for a specific purpose – foreseeability is not sufficient, must know the nature of the transaction contemplated (*and Caparo*)
    - *Scott Group* – majority **Cooke J**: accountants lack knowledge of the purpose (actual transaction), BUT takeover was virtually inevitable, there was a relationship where the likelihood of reliance was sufficiently high. Majority **Woodhouse J**: reasonable foreseeability, as long as it is RF that someone (class of persons) will rely on the information for any purpose then that is the level of knowledge required by the dft.
- There must be reliance of a specific piece of information that create the damage (*Boyd Knight* – although auditors knew the prospectus was going to the public to entice investors, ptf. failed b/c they did not rely specifically on accounts, rather just its existence – Purdue was a financial planner, blind to matters that might cause alarm to careful investors)
  4. Knowledge that advisee will likely rely on the information (*Caparo*)
  - Payment for advice indicates likely reliance (*Hedley*)
  - Either specifically or as a member of an ascertainable class, in order for it to be used for that purpose – there mere possibility of accounts being used in the takeover is not enough (*Caparo*)
    - Useful to look at the purpose of the advisor’s statement – who was the statement for?**
      - (*Caparo*) Purpose was **internal**, accounts were for investors who were already part of the company to confirm the company was being run properly, NOT for them to invest further or for outside investors – therefore dft. not liable
      - (*Boyd Knight*) Purpose of prospectus was **external** – entice the public to invest, ptf was an outside investor h/e dft. was not liable because ptf. did not rely *specifically on the accounts*
      - (*Scott Group minority, Caparo*) Purpose was **internal**, and not for outside takeover bidders – even if it was RF that the accounts would be looked at because takeover was virtually inevitable
  5. Reasonable reliance under context → Casual vs formal

#### TO WHOM?

##### 1. Reliance:

- Ptf. must have reasonably relied on the statement by the dft. to his detriment (*Hedley, Boyd knight*)
- Must have relied specifically on factual inaccuracy (*Boyd Knight*)
- If a publication is made for one reason it is not reasonable to rely on it for another (*Boyd Knight*)
- Indirect or general reliance on prospectus/ existence of info – rely on something specific (incorrect accounts) (*Boyd Knight*)

##### 2. Purpose

- Purpose of the statement vs. purpose for which the ptf. used it (*Caparo*)
- Purpose for providing the advice was consistent with the advisee’s reason for applying the information (*Boyd Knight*)

##### 3. Reasonable reliance (*Hamlin*)

- It was not reasonable to rely on existence of accounts; a careful investor should have looked properly (*Boyd Knight*)
- If the statement is made and the dft. foresees or ought to foresee that the ptf will rely on what is said depends on the *purpose* for which the *statement is made* and the *purpose* for which *the ptf. relies on it* (safety vs. economics (*Carter*))
- If statement is made to and for the benefit of a particular person or class and the ptf *is not within that class*, it will *not be reasonable* for the ptf. to place reliance on it (*Carter*)

**DAMAGES: Loss of potential profit is not sufficient to constitute a loss, they must prove they acted on statements and obtained damages as a result** (*Scott Group – Cooke J*)

#### BREACH

*Breach occurs when the dfts. conduct falls short of what a reasonable man would or would not do in the circumstances* (*Blyth*)  
*Ptf. must show how the outcome would have been different if the dft. had acted in a different way* (*Bolam*)

1. Assess the standard of care expected of the dft.

##### Reasonable man:

- RM must act with reference to the average circumstances/ ordinary considerations of what you would expect (*Blyth*)
- Was the negligence unreasonable – what should the dft. have done? (*Carroll*)

##### Reasonable professional:

- The standard of care expected of a professional professing to have a skill, is the standard expected of an ordinary competent skilled person acting in accordance with realm of accepted practice of respected professional opinion (*Bolam*)
- Dfts. must exercise a degree of skill that an average specialist in his field, possessing a reasonable level of knowledge and his conduct must be judged in light of the knowledge they ought to have reasonably possessed at the time (*Ter Neuzen*)
- Properly qualified and alert professional (engineer) is held to a higher standard (*Wagon No.2*)

##### Policy:

- Cannot place judgment on doctors using ordinary expertise; issues – playing God? Professionals with close ranks? Is the practice itself unreasonable? informed consent is more important than medical paternalism; you must not continue with old techniques if they are disproven (*Bolam*)

2. Did the dfts. conduct meet the required standard of care in light of what was required of him?

- Public utility - held to a lower standard of care than a commercial enterprise or when responding to an emergency (*Watt*)
- Reasonable professionals are not negligent if they have acted in accordance with a practice accepted as proper by a reasonable body of skilled in a particular art (*Bolam*); Actions don't have to be the 'best' practice, just one accepted (*Bolam*)

##### Was the risk thrust upon him?

- Where risk is thrust upon the dft. not from own fault - rather than expecting the reasonable action, you must evaluate the capacity/ ability to ameliorate risk the dft. has and the material circumstances (*Goldman*)  
 → *Goldman* - Storm – BUT actions necessary were with the dfts. capacity so he was negligent
- If we take too many individual circumstances into account, the test becomes subjective

3. What should the dft. have done differently to meet this standard?

- Balance risks against the end benefit you are trying to achieve – end must justify the means for dft. not to be liable (*Watt*)

##### Risk:

- Must consider the likelihood of the risk occurring and the seriousness of the risk (*Watt*)
- Whether risk of damage is so small a RM in the position of the dft., would be justified in disregarding it (*Bolton*)
- Risk must be real and one which would occur to the mind of the RM as one which would not be brushed aside as 'so fantastic or far-fetched' that one would not have paid any attention to it (*Wagon No.2 – Reid furthering Bolton*)
- It is not justifiable to neglect a risk even of small magnitude if there is no valid reason to ignore it OR there is no social utility in it (*Wagon No.2*)

##### Means:

- If you cannot do an activity safely it should not be done at all (*Bolton*)
- Whether the risk of damage to the person was great enough that a RM, considering the safety of others would refrain (everyday risks are unavoidable) (*Bolton*)
- If a RM would have realised and prevented the risk, the dft. is liable (easy to prevent) (*Wagon No.2*)

##### End:

- Saving a life justifies risk (real emergency) – balance risk against measures necessary to eliminate risk (*Watt*)
- Social utility – what would the prevention of this risk cause? (*Bolton* – should we ban cricket? *Tomlinson* – should not prevent people from swimming, making their own choices)
- Was the risk so that they should have considered alternative – risk so small dft. could be entitled to disregard it (*Bolton*)

##### The Carroll test:

- B<PL – if the burden of precautions to reduce the injury is less than the probability of the harm occurring multiplied by the potential magnitude of harm then the dft. has breached DOC (*Carroll*)
- The greater the cost of preventing the risk, the lower the duty there is to prevent it (allow harm to occur and pay cost); the more serious the harm the more likely the risk should be addressed (*Carroll*)
- Calculate the the likelihood of the risk eventuating and the seriousness of that risk if it happened (*Bolton*)

- You must not take singular circumstances into account – you must think of the situation as a whole (what will the burden of extra precautions be – e.g. budgets, perfect systems, outside their means) (*Watt*)
- However, if the risk of harm is substantial, the dft. cannot avoid liability on the basis that remedial measures would be very high (*Wagon No.2*)
- 4. Things that lower the standard of care required
- The ptf's. voluntary decision to accept a risk, may lower the standard of care required (*Tomlinson*)
- Risk is thrust upon the dft. court will consider the circumstances (*Goldman*)

**Policy:**

- “Monstrous” to hold the dft. liable because they didn’t foresee/ prevent an accident which cause was obscure (*Blyth*)
- Guaranteed compensation should not be allowed (strict liability) because this may require ‘perfection’ (e.g. pipes from Iceland, just “in case” of extreme weather conditions – prices will rise & impossible to plan for all things that could go wrong) (*Blyth*)
- Legitimate reasons for negligence may be taken into account (Bargee ill etc.) (*Carroll*)
- Foreseeability of harm is not enough – if it happens once it can happen again, the difference is the degree of risk (*Bolton*)
- People of full capacity should be free to choose for themselves whether to take notice of warnings and partake in activities which carry inherent risk (*Tomlinson*)
- Social value/ utility should be taken into account when eliminating risks (impact on general population) (*Bolton, Tomlinson*)
- Even if the risk is so small – there may be NO justification/ conceivable benefit – e.g. illegal offence or considerable financial loss (*Wagon No.2*)
- Remedial measures – where the dft. cannot afford to take precautions
- Hazard arises on smaller property, owner informs man with larger property (with interests in the hazard) – greater capacity/ resources should take action (*Goldman*)

CAUSATION

*In order for the dft. to be liable the breach must be the cause of harm* NZ judges like common sense approaches to causation

1. ‘But for’ test

- Causation exists when ‘but for’ the conduct of the dft. the damage would not have been suffered
  - If the harm would have occurred anyway, harm is not caused by the dft's. negligence – if the dft. had done everything properly would the damage still occur (*Barnett*)
  - Must be causal nexus between PI suffered and alleged medical error in order to get ACC
- Death from failure to diagnose/ treat when 1. Injury/ death resulted in close proximity to the failures; and 2. There is no evidence that death or injury was inevitable or limitations of scientific knowledge/ while causal relationship may exist between a possible cause in certain % of population – it may be impossible to say whether it causes the situation at hand and 3. There was no supervening cause producing the injury (*Ambros*)

2. Balance of probabilities

- Need to prove causation on the balance of probabilities – even if it might’ve happened, how likely? 51% chance that... but BOP in law can come to different conclusions that expert opinion (common sense etc.) (*Ambros – Atkinson*)

Legal burden – to prove causation remains with the ptf (*Ambros*)

Tactical burden – Where the Q of causation is arguable, a tactical burden rests on the dft. to adduce counter evidence; absence of counter evidence points towards fact that none existed (*Ambros*)

Policy:

- *Ambros* found a way to uphold justice for ptf. despite failure to prove BOP b/c there was enough evidence to prove inference of causation (chance of being cured before treatment decision); ACC have greater resources
- Make it easier for ptf. to meet level required

3. Exceptions to ‘but for’

- Relaxes standard of proof for causation (multiple tortfeasors – unjust to impose liability for harm perhaps not caused but unjust to say P will get no redress)
- Did the dft's. materially increase the risk of harm towards the ptf's? (*Fairchild*)
- Do not need to prove on the BOP that *this* was the cause, only that it was *one of the causes* (Fairchild exception – enough to show the employers negligence materially increased the risk of the ptf. contracting the disease (*Fairchild*))

Policy:

- Redress for victims
- Big employers with insurance
- Rough justice for the dft. - Employers held liable for things they did not expressly cause

4. Breaking the chain of causation

- Dft. should look for new intervening act to break the chain of causation – thereby removing liability (*Dorset*)
- If act by the third party was nevertheless foreseeable, the chain is not broken and dft. is still liable (*Dorset*)



## DAMAGE

- The ptf. must be appreciably worse off (*Rothwell*)
- Symptomless plaques and fear of future illness do not amount to damage, the damage must be real (*Rothwell*)
- The risk of future physical and the psychiatric injury caused by the presence of symptomless plaques/ contemplation or apprehension of future harm are not actionable as there is not current damage (*Rothwell*)

## REMOTENESS

Ptf. must prove that the damage was not only caused by the dft., but that it was not too remote.

The remoteness of damage rule limits a dfts. liability to what can reasonably be justified – ensures a claimant does not profit from an event and aids insurers to assess future liabilities.

Is it reasonably foreseeable that if an *event* might happen, it will cause this certain *kind of damage*?

### Traditional:

- Dfts. are liable for all direct consequences of their actions (*Polemis*) –overruled by WM – not just that actor should be liable for all consequences however unforeseeable and however grave so long as they are ‘direct’

### Modern:

1. Dft. is liable for the **kind of damage** that was reasonably foreseeable by the person (*Wagon No.1*)
- *Wagon No.1* - Dft. not liable for damage by fire as oil igniting on water was too remote to be RF, but *pollution was RF*
2. Injury is not too remote if the type of injury was RF, even if the precise way the injury was caused was not (*Hughes – changed WM*)
- *Hughes* – Dft. is liable because harm in the form of burns was RF, even though the accident itself was unexpected – vapour or spilt paraffin = same accident (potentially more liable b/c risk was dangerous/ alluring for children)/
3. Dft. is liable for the kind of damage that is foreseeable and for all such damage, even if the extent of the damage was not RF (Egg shell skull rule applies (liability even if scope was not RF) - type of injury is foreseeable but due to the ptf. special characteristics, the extent of the injury is not foreseeable (*Stephenson*)
- *Stephenson* – cut was RF, it did not matter whether the resulting brain injury was RF or not
4. Ptf. must show that it was RF that a person of ‘ordinary fortitude’ would suffer harm, law expects reasonable fortitude and robustness of all its citizens, will not impose liability for ‘exceptional frailty’ (*Mustapha* step back from *Stephenson?*)
- *Mustapha* - Unusual or extreme reactions to events caused by negligence are not RF (mental injury from seeing flies in a bottle was not RF -
5. In cases where dft. had knowledge of ptf. particular sensibilities – the ordinary fortitude need to apply strictly, could have been RF (*Mustapha*)

### Policy:

- Line must be drawn on causal responsibility in tort for reasons of practicality or justice
- Answer depends on how “kind of damage” is described – widely and generally or narrowly and specific detail?
- Problems with RF results occurring in an unforeseeable way?

## EXEMPLARY DAMAGES

### ED and negligence (ACC statutory bar)

- ACC Act did not serve a punitive purpose and therefore does not expressly bar ED (*Donselaar*)
- Cannot assume that in absence of intentional wrongdoing or conscious recklessness, dfts. negligent conduct will never give rise to justifiable feeling of outrage calling for ED (*Bottrill*)

NOTE: (*Couch no.2 on Donselaar*) – enables statutory bar to operate consistently with its purpose while at the same time meeting continuing need for special remedy

Objective recklessness test: either is needed (*Couch no.2*)

- May be cases where the dft. departed so far and fragrantly from the dictates of ordinary or professional precepts of prudence or standards of care that his conduct satisfies this test even though he was not consciously reckless (*Bottrill*)

Subjective recklessness test:

- Only appropriate where the dfts. wrongdoings were intentionally or consciously reckless (*Bottrill*)

### For exemplary damages:

1. Need ‘outrageousness’ – usually involving wrongdoing with element of cynicism or oppression (rendering wrongdoing particularly appalling (*Bottrill*))
2. OR must aware of the risks involved but proceed with reckless indifference such that this conduct too evokes a sense of outrage (conscious reckless close to intentional wrongdoing) (*Bottrill*)
3. Elias (dissenting) – no precondition for ED, there must be conscious appreciation (*Couch no.2*)
4. Tipping (majority) – objectiveness should not be the sole criterion (too unpredictable) – there must be subjective recklessness (*Couch no.2*)

### Policies of ED: (*Bottrill*)

- To punish (not for deterrence in NZ)
- There must be an intention to cause harm – deliberate risk taking (exceptions)

- Test should avoid any risk of hidden or indirect compensation
- No indirect subversion of ACC
- No general principle that high level inadvertence justifies ED
- Cannot receive compensatory and exemplary damages (*Couch no.2*)

#### DEFENCES

If negligence is established it may be defeated by...

1. Contributory negligence (if the ptf. careless actions contributed to the dfts. damage)
  2. Dft. may raise consent
- Knowledge of the risk
  - Willingness to take part in it
  - Agreement (either express or implied)