1. DUTY OF CARE

1. Reasonable foreseeability: was the type of harm reasonably foreseeable?
Palsgraft: If harm was unintended, there must have been possibilities of danger so many and apparent that entitles the plaintiff to be protected (*Palsgraft*) i.e. risk imports relation

- Here, no danger to the eye of ordinary vigilance and it not foreseeable that the plaintiff would be harmed by the exploding fireworks. If the package had been marked "fireworks", this would have made them more foreseeable.

Donoghue v Stevenson: Relationship of neighbourhood/proximity

- Should the defendant have had the person harmed in contemplation, i.e. they should have known would be affected by their careless act? (*Donoghue*)
- Neighbourhood principle (*Donoghue)*: a person must take reasonable care to avoid acts or omissions which it is reasonably foreseeable would injure a neighbour

Wilson v Horton: reasonably foreseeable that the actions of the defendant would exacerbate the fire even if they did not start it, therefore liable.

- Defendants owe a duty to take reasonable care to minimise the impact of hazards (e.g. fire).

Products: a manufacturer of goods owes a DOC to a consumer, if goods reach the consumer in the same way they left him, without an opportunity for intermediate inspection (*Donoghue)*

NERVOUS SHOCK

Psychiatric harm is treated differently due to greater difficulties in differentiating acute grief and psychiatric harm, more time consuming and expensive to ascertain expert opinion, compensation could also be an unconscious disincentive to rehabilitation, increasing class of people who can claim, and would also create liability disproportionate to tortious conduct (Lord Steyn, *White*)
Courts generally reluctant to recognise DOC for mental harm due to the potential floodgates argument. Courts have created "control mechanisms" for nervous shock cases.
Ultimate boundaries for nervous shock are not to be found in logic but in **policy** (Lord Oliver, Alcock)

Primary victims	**Secondary victims**
1) Recognisable psychiatric illness • Shock is not enough, must be a recognisable psychiatric illness (*Page v Smith*) 2) It is enough that there is *a real foreseeable risk of physical injury* to the plaintiff (*Page v Smith).* • A minor car crash satisfied this test • Bumping into a parked car would not (*Page v Smith*) *Policy:* depends on immediate physical injury; plaintiff would not become liable to all the world; so limiting liability this way.	List of factors (Apply): Relational proximity, physical proximity, means of discovery, recognisable psychiatric illness, ordinary fortitude (not recognised in *Van Soest – question of whether it applies in NZ?*) (See below)

Relational proximity

- The closer the tie, the more likely the plaintiff is to be covered. Initially limited to parent/child or spousal relationship. (*McLoughlin*)
- This will depend on the degree of love + affection between the individuals. Can include friends and relatives, but need to prove that it was an intimate and close relationship (*Alcock*)
- *Van Soest* – this approach could preserve enough flexibility, endorsed relational proximity

Physical proximity

- "Close in time and space", i.e. directly there or in the immediate aftermath (*McLoughlin*)
    - Two hours after the accident was considered upper limit for this, and considered that McLoughlin saw her family "covered with oil and mud" essentially witnessing what she would have at the crash scene
    - *Alcock* plaintiff checking identity of brothers at morgue 8 hours later did not meet sufficient physical proximity

Means of discovery

- Must come through direct sight/hearing of event or in the immediate aftermath (*McLoughlin*)
- Simultaneous TV broadcasting of an accident ***might*** be covered if it depicts the same or worse sight/sound as seeing the accident or immediate aftermath (*Alcock*). [example of children in hot air balloon, bursting into flames].
    - But here, the TV broadcasting of the football was not covered as broadcasters blurred out people suffered due to code of ethics, breaking the chain of causation
- **However** in *Van Soest* Blanchard J gave some support to Kirby P's dissent in the Australian case of *Coates;* that where there is foreseeability + proximity some plaintiffs who are told of incident and effect but did not perceive it should also recover. Based on emotional involvement not physical presence. → (probably would not succeed but argue anyway).
    - Told over telephone/informed? – Kirby P in *Coates* – modern telecommunications

Recognisable psychiatric illness

- The plaintiff must have a **recognisable** psychiatric illness (*Van Soest*): Courts limiting liability
- The definition of this can evolve, and medical evidence must be taken into account
- Shock or grief is not enough
    - Everyone who suffers death of a relative will suffer long and intense grief; normal (*Van Soest*)
    - "Recognisable" not recognised = courts should take a flexible approach

Minority:

- There does not need to be a recognisable psychiatric illness if it is "plainly outside the range of ordinary human experience." (*Van Soest,* Thomas J)

Ordinary fortitude /similar to foreseeability ?

- The test is for someone of "ordinary susceptibility." The plaintiff cannot be unusually sensitive or delicate (*Bourhill*, *Page v Smith*)
- Assume victim is of ordinary fortitude, unless tortfeasor has special knowledge otherwise: would an ordinary person suffer psychological harm from what actually happened? (*Page v Smith*)
- Not mentioned in *van Soest* ?

Rescuers exception

- An attempt to save someone in danger is foreseeable (*White*)
- Defendant may owe a duty of care to a rescuer, even though they don't owe one to the primary victim, [eg: if they are a trespasser] (*White*)
- *Policy:* Rescuers serve an important social purpose, we want to encourage this. But do not want to allow "ghoulishly curious spectators" to recover.

In danger

- The rescuer must have been in, or reasonably thought that they were in, physical danger *(White*) – so basically primary victims
    - Police officers at the stadium disaster were never in personal physical danger (*White*)
    - *Chadwick:* man crawling under a train to help and comfort trapped accident victims

Why reform this approach? – *Lord Goff doesn't like restrictions on rescuers*

- Most of the time the mental harm is caused by seeing suffering not fear of physical harm, i.e. "horror of the whole experience"
- This would mean that two rescuers could be doing exactly the same thing, but one could recover in negligence and the other couldn't (E.g: 2 ends of a train) – Lord Goff

NEGLIGENT MISSTATEMENT

Negligent words different to negligent acts (*Hedley Byrne):* people think less carefully about words than acts, technology means words can be easily proliferated beyond original use, words often used in social settings, would be going too far for the adviser to owe a DOC to every "consumer" i.e. **indeterminate liability**

Test for negligent misstatement must be more than reasonable foreseeability, includes proximity (i.e. assumption of responsibility of knowledge of reliance on the information (*Candler*)

1) Who owes a DOC?

Wider test: Hedley Byrne

- Lord Morris: any situation where a person has a special skill/knowledge that is relied upon; and a person has taken it upon themselves to tell another information based on special skill/knowledge knowing the other person will rely on this information
- Lord Devlin:
  - Special relationships not limited to contractual/fiduciary
  - Doesn't matter whether the information is a matter of fact, opinion, or a mixture of both
  - Doesn't matter whether it was the result of an inquiry, or of prior knowledge
  - Eg: "Let me do this for you. Do not waste your money in employing a professional... I will do it for nothing and you can rely on me." – lack of skill doesn't matter

Assumption of responsibility (*Hedley Byrne*)

Where the person has undertaken some responsibility, they have the follow options:

1) Defendant could say nothing;
2) Give info with a disclaimer (*Hedley Byrne*); or
   - Possibility of disclaimer may justify greater liability (Cooke J, *Scott*)
3) Give info unqualified by disclaimer = accepting responsibility

- Accepting responsibility can be express or implied (*Hedley Byrne*)
- Eg: "you can rely on me" express statement of responsibility (obiter, Lord Devlin *Hedley Byrne*)
- A **disclaimer** may negate liability (*Hedley Byrne)*
  - Does not apply if duty is under contract, or has already assumed responsibility (*HB*)

Knowledge of *actual reliance* *(Hedley Byrne)*

Reliance

Where the defendant had been in a "special relationship": Any relationship where one party trusts another to exercise a DOC and the person ought to have known that the information would be relied upon (*Hedley Byrne* modification from *Candler*)

- Knowledge that a particular party will actually rely on the statement (*Candler*)
- Knew or *ought to have known* the inquirer was relying on him (*Hedley Byrne*): objective standard of what the reasonable man would have thought in the defendant's position
- Payment for info/advice is good evidence that the statement is being relied on, and that the defendant knows that it is (*Hedley Byrne,* Lord Devlin).
- Ability to make an independent inquiry may make a difference (Obiter, *Caparo*)
- Must know *who* exactly will rely on the information, otherwise infer class of persons from facts
  - Sufficient that the information is required by a class of persons, even if the defendant does not know their exact identity; eg *Hedley Byrne*

For what?

- Reliance for a particular transaction
- May be for *foreseeable transactions* (*Scott Group*)

- Rich in assets, low in turnover, "classic case for a takeover", takeover "virtually inevitable" – Inevitable the published accounts would be relied on in a takeover (*Scott Group*)
- Reserved view on unforeseeable takeover (Cooke J, *Scott Group*) – probably not
- *Caparo:* Audited accounts to update shareholders and exercise powers, not for individual speculation with regards to profit

2) *To whom* is the DOC Owed?

Reliance on the statement

- Plaintiff must rely on the particular negligent misstatement (Blanchard J, *Boyd Knight*)
    - Plaintiff must show their reliance on a particular item in the accounts, relying on general "integrity of the market" is not enough (*Boyd Knight*)

Reliance for its intended purpose

- Plaintiff cannot recover under negligent misstatement if they use information in a way it was not intended.
    - *Caparo:* Audited accounts used for individual speculation; intended as an informer for shareholders to exercise their powers in the Company

Purchasers of shares? *2 Approaches; the purpose for which the info was relied on*

- *Scott:* DOC for a foreseeable takeover to 1 purchasing company
    - Less about whether the info was prepared for a specific purpose, and more about how foreseeable it was that an investor would rely on that information
- *Caparo:* No DOC to the investing public generally in relation to a statutory audit
    - Not applying to where accounts specifically audited for a particular investor: then they would be prepared specifically for the purpose of investing
    - Criticizes *Scott* decision

That reliance must be *fair, just and reasonable*

- Informed by all the circumstances whether/not it was reasonable to rely on the advice (*Hedley Byrne*)
- *Caparo*: limits liability, question whether it is "fair, just and reasonable" to impose a DOC.

NEGLIGENT INSPECTION

Case name	Who/what?	DoC?	Reasoning
Anns (UK)	Council inspection of houses	✓	Reasonably foreseeable that failure to inspect, and comply with the bylaws would cause damage, threatening health and safety of owners and occupiers.
Murphy (UK)	Council inspection of houses	✗	Pure economic loss; not recoverable. Allowing liability would extend a duty of care too far → would also include faulty chattels, we do not want this.
Hamlin (NZ)	Residential buildings	✓	NZ social and economic context means NZ courts should choose not to follow *Murphy* (See Richardson J's factors)
Carter (NZ)	Ministry of Transport inspection of boat	✗	Building inspection cases are suis generis. The MOT could not have foreseen that the plaintiff would have placed reliance on their inspection as they used the report for a different purpose to what it was prepared for. No assumed responsibility.

THIRD PARTIES

Where it is a third party that caused the damage to the plaintiff, rather than the tortfeasor. The courts have been reluctant to impose DOC where it is a third party that caused the harm, unless it is a direct result of the breach as traditionally tort law does not impose liability for 'pure omission'. Difficulty in judging these cases, so focus should be on the different cases and what mattered as opposed to a series of tests.

General rule is that there is no general liability/responsibility for the actions of a third party in the common law. The foreseeability of harm is not enough to find a DOC. (*Smith and Littlewood*). Must also be "fair, just and reasonable" to impose liability (*Caparo*).

Exceptions – (Goff, *Smith and Littlewood*)

Where you create the danger/situation

- *Haynes v Harwood*: defendant left horse unbolted that injured people
- *Dorset Yacht*: negligence of officers essentially created the situation of the boys escaping
- *Smith v Littlewood*: did not create the fire

When you are in a position of control/supervision over a 3rd party and it is your "job" to prevent harm from occurring

Control/supervision: necessary to establishing the necessary relationship (*Dorset Yacht, Couch*)
Did the defendant have sufficient power and control over the party to prevent the harm?

- *Dorset Yacht*: boys were in control/custody of officers
- *Couch*: defendant must have sufficient power and ability to exercise control over the immediate wrong-doer
- *Michael*: murderer was not under the control of police

When you know/should know that a dangerous situation is likely to occur

- *Goldman v Hargrave*: by not putting the fire out, should have known that it could have been re-ignited
- *Smith v Littlewood*: could not have foreseen the risk of fire starting (predictable that the boys would break in, not that they would start a fire)

When you should have foreseen the harm happening as "very likely"

- Where human action forms a link between the original wrong and the harm (3rd party), the harm must be shown to be **very likely** to happen (*Dorset Yacht*)
- *Lamb:* shows implications for the "very likely" test
    - Lord Denning: thought it was more important to consider who was responsible/whose job it was to do a certain action, as the "very likely" test can extend liability beyond reason
    - Lord Oliver: prefers the legal test, "very likely" test + a degree of likelihood of actions being inevitable
    - Lord Watkins: gut instinct that damage in *Lamb* was too remote
- *Lamb*: as human conduct is particularly unpredictable, third party actions must be reasonably foreseeable in order to be "very likely"
    - i.e. contextual
- *Smith v Littlewood*: Lord Mackay sets a high threshold for "very likely" and reasonable foreseeability; third party action being a "mere possibility" is not sufficient. Must be a special relationship between the defendant and third party AND between the defendant and plaintiff

Identifiable person or class of persons

- The plaintiff must be at a special risk of the harm occurring (*Couch*)

When you assume responsibility for the actions of a third party

- Relationship based: see *Hedley Byrne*
- When defendant assumes a positive responsibility to safeguard the claimant (*Hedley Byrne*)
- Relationships with a duty of positive duty can also apply to public bodies (*Mitchell*)
- *Strainsbury*: painter assumed responsibility by taking key, should have locked house
- *Michael*: Police do not owe a duty to individual citizens, only to community as a whole

2. BREACH OF DOC

What would the "ordinary man" have done? X must show that Y has breached DOC. Think about the nature of the duty, what it requires, and measure this against the conduct of the defendant.

Reasonable person – *Blyth*

- Defendant must have done something that a reasonable person would not have done (*Blyth*)
  - A reasonable man will act in accordance with ordinary circumstances, taking account of reasonable risks

Learned Hand formula for reasonable person

If B<PL then there is a breach of the duty of care (*United States v Carroll Towing)*

- B = burden of preventing loss, P = probability of loss, L = average cost of the loss.

- *Bolton v Stone*: small risks can be run
  - Probability of the risk was so unlikely that the cost of adequate burden was higher than the potential for harm
  - BUT Reasonable person balances the risk against the cost of eliminating it and would only neglect a risk if there was a valid reason to do so e.g. $$$ (*Wagon Mound No 2)*

Foreseeability

- Risk that would not be brushed aside as far-fetched (*Wagon Mound No 2): THRESHOLD*
- Was it clear that the reasonable person would have realised or foreseen and prevented the risk? (*Wagon Mound No 2)*
  - Chief engineer should have foreseen the damage – oil catching fire

Emergencies/risk

- In measuring due care, the risk must be balanced against the measures needed to eliminate it. If case involves a risk to human life, defendant's actions justified (*Watt v Hertfordshire County Council*)
- This effects the reasonable person and what they would do (*Watt*)
  - *Watt:* woman trapped under heavy vehicle, justified the harm to the plaintiff

Personal circumstances (Not defendant's fault)

- Where an occupier does not bring the risk upon himself, his individual circumstances and ability to abate the risk must be taken into account, (*Goldman v Hargrave*) eg: physical + financial
- *Policy:* Defendant has not brought about the harm so should be held to a lesser standard
- Should not be liable unless it can be proved that he could, and reasonably in individual circumstances should, have done more (*Goldman*)

Social utility

- Social utility can be taken into account (*Tomlinson*) → Court weighed social value + free will > cost of preventive measures
  - Provided by Council: public swimming area, may not be as great a utility for private bodies. Look at the extent of utility it provides/costs/who can access it

- Other people were enjoying using the beaches; should not pay for risk-taker

Free will of the plaintiff

- People who have full capacity to decide for themselves what they do should bear some responsibility (*Tomlinson*)
- Will be rare for land occupiers to be under a duty to prevent people taking risks that are inherent in activities they freely choose to undertake on the land (*Tomlinson*).
  - *Tomlinson:* risks inherent in diving. Examples (obiter): Mountain climbing, hang gliding, swimming, diving: "that is their affair."

"Reasonable professional":

- Use of some special skill or competence – (*Bolam*)
- The test is that of the ordinary skilled man exercising and professing to have that skill (*Bolam*)
- No negligence if: Acting in accordance with a **practice accepted as proper** by a **responsible body** of [medical] men skilled in that particular art (*Bolam*)
- However, courts may question the practice accepted by the professional body to determine if it is too low/negligent (*ter Neuzen*)
- Must judge defendant by the standards of the time which the case was heard (*ter Neuzen*)

3) HAS DAMAGE BEEN CAUSED?

It is not enough that the duty of care has been breached. The plaintiff must also show that they have suffered damage as a result of that breach. Negligence is not actionable per se. The starting point is the "but for" test from Barnett.

1. *Has **damage** been caused?*
2. *Was that a **result of the breach** of the duty?*

1. Has there been *damage* caused to the plaintiff?

What counts as "damage"?

- **Damage =** is the plaintiff appreciably worse off (on account of having the plaques)? (*Rothwell*)
- The damage cannot be too trivial (*Rothwell)*
- Symptomless plaques are not damage (*Rothwell*) – have no effect on health in themselves
- The risk of future illness or anxiety about a future risk materializing are not damage themselves (*Rothwell*)
  - This is the case even if it results in a recognizable psychiatric illness (because of remoteness)
  - But can be taken into account for computing losses of someone who has suffered a compensable physical injury

Economic damage/"pure" economic loss

- Loss of potential profits is not damage (*Scott*)
  - Plaintiffs could not sue for a loss of profit, - good deal but not as good as they thought
  - Must also show the plaintiff sustained damage by acting on the defendant's statement

2. Was the damage the *result of the defendant's breach* of duty?

"But-for" test

[Courts have modified this test to suit cases]

- But for the breach of the duty of care, would the harm still have occurred? (*Barnett*)
  - No liability in *Barnett:* The men drank tea with arsenic, and would have died anyway
- Plaintiff fails to show that on the balance of probabilities the negligence caused the harm (50%)

Proving causation *Balance of probabilities > 50%*

Ambros was an ACC case, but it is useful for deciding on the reason of causation

- Prove the necessary causal link between breach and damage *on balance of probabilities* - cause is > 50% likely to have resulted in the damage (*Ambros*)
- The risk of causing the injury is insufficient (*Ambros)*
- There will be uncertainty establishing a causal link between medial error and damage (*Ambros*)

Deciding the cause? Inferences

- Judged by what constitutes the "normal course of events" (*Ambros*)

- This should be based on whole of lay, medical and statistical evidence, not limited to expert witnesses (*Ambros*)
- May sometimes favour plaintiff even though medical profession – only possible connection

Statistics:

- May be useful, but should bear in mind limitations, false perception of precision (*Ambros*)

Proximity:

- Proximity will always be relevant, but how persuasive it is depends on the case (*Ambros*)
    - May be sufficient alone, eg: injected with penicillin – allergic reaction immediately afterwards (known risk with penicillin) – *Ambros*

Evidential burden

- Burden resting on party at risk of losing an issue
- Legal burden doesn't shift – stays w/ claimant in ACC claims, but tactical burden may shift; raising another possibility for the cause, doesn't have to be balance of probabilities

Multiple defendants?

- Where there are multiple defendants who have caused or contributed to the harm, both may be liable even when it is not possible to tell which one caused the exact damage (*Fairchild*)
- Rough justice for the defendant, to get compensation for the plaintiff

POLICY:

- Injustice of imposing liability on a duty-breaking employer is less than denying redress to the victim who has suffered material harm (*Fairchild*)
- Otherwise: Employers would escape liability by employing workers already exposed to asbestos
- Remember: plaintiff will not get 3x amount: costs of damages will be split between defendants
    - *Fairchild:* both employers breached their DoC to the employee; and one or both of them must have caused the damage
- This was an inconsistent move away from the previous law, but necessary for fairness

4) IS THE DAMAGE TOO REMOTE?

The resulting damage must also not be too remote from the initial breach of the duty. The policy behind this is to limit liability to a reasonable level, on behalf of the defendant. ***This essentially asks whether the harm is too unrelated to the wrong*** *to hold the defendant fairly liable.*

- Defendants are liable for consequences which they ought to have **reasonably foreseen** (*Wagon Mound No 1*)
- **Policy**: reversed *Polemis:* liable for all consequences of negligent act, even unforeseeable ones
- All the chain of events leading to the harm do not have to be foreseeable. It is the **type of harm** (eg: Burning) that must be foreseeable by the defendant (*Hughes*)

Extent of injury: *Extension*

- Unforeseeable consequences go to the extent of the injury not the type of injury: seen as either an exception to the rule, or an extent argument (*Stephenson*)
- (Must still be able to foresee *some* harm to the plaintiff – but then liable for extent of the harm)
    - Plaintiff cut hand on rope = foreseeable, led to unforeseeable brain damage. Covered as part of the injury even though it was not foreseeable.
    - Taking the victim as you find them
    - The eggshell skull argument remains in cases of physical and mental injury
    - Burn causes cancer – only need to foresee the burn

This does not seem to fit with the general rule of foreseeability from *Wagon mound*

Extension to property?

- If property damage worse because of its inherently fragile state then this should be covered too
- Defendant needs to be able to foresee the kind but not the extent of the injury

If they crash into a BMW and this is more expensive than the average car, this is too bad

Ordinary fortitude: (*Mental injury) – For mental injury (in absence of physical injury), there needs to be foreseeable harm of some mental injury. Once this threshold is met, the eggshell skull rationale applies, and the defendant is liable for the extent of that injury (as in Stephenson*)

- Unusual or extreme reactions to events caused by negligence are imaginable, but not foreseeable (*Mustapha*)
- **Policy:** Tort law covers foreseeable damage but does not act as insurance (*Mustapha*)

- Plaintiff must show the mental injury would occur in someone of ordinary fortitude (*Mustapha*)
    - In *Rothwell* the UKHL found that psychiatric illness would not occur in someone of ordinary fortitude because of the risk of an asbestos-related disease.
- If the defendant had actual knowledge of the sensitivity of the plaintiff, the ordinary fortitude test may not apply so strictly: may be reasonably foreseeable to defendant (*Mustapha*)
    - No evidence a person of ordinary fortitude would suffer mental injury after seeing flies in the bottle (*Mustapha*)