

Negligence exam notes

5 matters need to be considered in a negligence case:

1. Duty of care
2. Standard of care (Breach)
3. Causation (including remoteness of damage and scope of liability)
4. Measure of damages
5. Defences

Ordinary claim skeleton

To conclude: After for and against 'it is arguable that ___ (will occur) (a finding for liability or responsibility). 'Or a strong case for' → then proceed.

To weave in cases:

- ___ is authority for the proposition that ___. In these circumstances therefore _____.
- _____ is authority that there is justification for a _____.
- - 'the application of s__ will result in _____'

Start with relevant section of the CLA. Then Identify relevant case law. Then apply both to facts.

1) ' ___ ('A') may have a case against ___ ('B') in the tort of negligence, claiming that [B]'s conduct in _____ (specify what they did or didn't do) caused [A] to suffer _____ (identify harm caused).

2) First a duty of care must be established. *Tabet v Gett* stands as authority that reasonable foreseeability is sufficient in relation to physical harm. On the facts, it is reasonably foreseeable that _____ could cause harm. Therefore a duty of care is owed

3) The next issue is if ___ met their standard of care. *Adeels Palace Pty Ltd v Moubarak* is authority that the proper starting point is the Civil Liability Act 1936 (SA). Sections 31 and 32 are the CLA test. The standard required is that of a reasonable person in [the defendant's] position under s 31. Section 32 determines how a reasonable person would have acted. On the facts (ss a,b,c). When considering the calculus of negligence given legislative form in s 32(2) it was reasonable to have done _____ as (ss a, b, c, d). If borderline to be a successful breach, say "although unlikely to be a breach of duty, but if successful defences could be _____ and damages could be _____ - because_____.

4) Causation is the next stage in the negligence inquiry, which comprises s 34 of the CLA. Again, *Adeels Palace Pty Ltd v Moubarak* is authority that the proper starting point is the Civil Liability Act 1936 (SA). Under s 35, the burden of proof is on the plaintiff to prove causation on the balance of probabilities. Then the first test/limb of the inquiry prescribed in the CLA is factual causation per s34(1)(a). _[relate to facts – see notes]_. The next step is to consider the scope of liability under

s34(1)(b) of the CLA. [relate to facts – see notes]. Hence, _____ was a causal factor contributing to the harm.

5) (For pure damages question, see damages notes), otherwise: Calculating damages is the next limb of the inquiry. The plaintiff has the burden to prove the injury or loss (*Todorovic v Waller (1981)*). [Plaintiff] may be able to claim two types of damages. The first being Special Damages, which are awarded to compensate for pre-trial monetary loss, that can be calculated with certainty. The second is General Damages to compensate for post-trial expenses, and therefore they cannot be proven with precision. General damages fall under two heads, pecuniary loss for financial losses that can be easily associated with a dollar amount, and non-pecuniary loss for losses of a non-financial nature, defined by s3 of the CLA. – *determine these for the plaintiff keep in mind loss of earning capacity* -

S 54 Civil Liability Act 1936 (SA) prohibits the Court from awarding damages for the loss of earning capacity for the first week of incapacity and it dictates the damages cannot exceed the prescribed maximum set out in **s 3 of the CLA** of 2.2 million that is the same proportion as the Consumer Price Index.

[Plaintiff] should be awarded damages in a lump sum that will be assessed on a once and for all basis (s55(a)). Damages will also be reduced according to **s 55 of the CLA** and **s 3 of the CLA** provides a 5% statutory reduction.

6) Any relevant defences will not be considered. [Defendant] will likely submit 'although negligent, should not have to pay damages, or, damages should be reduced as....' Plaintiff was contributory negligent, the voluntarily assumed the risk, it was an obvious and inherent risk or the injury occurred during an illegal activity.

Duty of Care

Physical Harm: - Use Tabet!! Should be simple!

Tabet v Gett (2010) 240 CLR 537: A duty of care is owed for physical harm caused by a direct action if [defendant] should have been able to reasonably foresee [plaintiff] would suffer injury as a result of their negligence.

Chapman v Hearse (1961) 106 CLR 112: Facts: Car accident, Chapman thrown clear, Dr Cherry ran to aid, hit & killed by Hearse. Chapman's negligent driving lead to Dr's death. **Held**: The precise sequence of events need not be foreseen, only that some harm may occur to the same class of persons as the plaintiff.

Nagle v Rottneest Island Authority (1993) 177 CLR 423: Facts: Sign was insufficient in warning reckless swimmers. **Held**: A person who owes a duty of care to others must consider that those, whom a duty is owed to, may fail to take care for their own safety.

Agar v Hyde (2000): **Facts**: respondents suffered injury in rugby. **Held**: Reasonable foreseeability is not enough if the plaintiff accepts the inherent risks of a particular injury.

Mental Harm:

[Defendant] may owe a duty of care to [plaintiff]. As mental harm was suffered this is a special duty inquiry, reasonable foreseeability is no longer sufficient. The requirements of s 53 and s 33 of the CLA must be met.

Begin with s 53 of the Civil Liability Act 1936 (SA) ('CLA') to establish if they can recover damages. S 53(1) dictates damages may only be awarded for mental harm if the injured person was: physically injured in the accident, present when it occurred, or a parent, spouse or child of a person injured, killed or endangered. Further, (s53(2)) damages will only be awarded if the harm is a recognised psychiatric illness.

If satisfied on the facts then proceed to s 33(1) of CLA: No duty is owed unless a reasonable person in the defendant's position would have foreseen that a person of normal fortitude in the plaintiff's position might, in the same circumstances, suffer a psychiatric illness.

If on the facts this is satisfied then, under s 33(2)(a), factors must be considered (don't recite these, relate them to facts):

- I. Whether or not a sudden shock caused the mental harm
- II. Whether the plaintiff witnesses, at the scene, a person being killed, injured or put in peril
- III. The nature of the relationship between the plaintiff and any person killed, injured or put in peril
- IV. Whether or not there was a pre-existing relationship between the plaintiff and defendant.

Note: s33(3) this section does not affect the duty of care of a defendant to the plaintiff if the defendant knows, or ought reasonably to know, that the plaintiff is of less than normal fortitude. (i.e. if they knew this and acted anyway).

Relevant Case Law to consider (i.e. ___ is analogous to support the proposition that ___. Therefore ___)

Mt Isa Mines v Pusey (1970) 125 CLR 383: **Facts:** 2 employees were injured and the plaintiff went to assist them. They died in hospital and the plaintiff later suffered mental harm from what he saw at the accident. **Held:**

- Windeyer J at 394: Sorrow does not sound damages,
- Barwick CJ at 390: The particular pathological injury need not to be foreseeable, just that some form of harm could have occurred,
- A bystander who chooses to witness the accident breaks the chain of causation and a duty is therefore not owed and,
- Windeyer J at 407: The court declined to extend liability to those who merely hear bad news, so the bearer of bad tidings is not liable.

Jaensch v Coffey (1984) 155 CLR 549: **Facts:** Husband was in an accident caused by the negligence of Coffey. The wife, Mrs Jaensch, heard of the accident through a phone call and then witnessed her husband in hospital, causing her to suffer mental harm. **Held:**

- Reasonable foreseeability of sudden shock is the foundation of the duty of care,
- hearing bad news over the phone is not sufficient for recovery,
- no recovery for those who suffer harm due to caring for injured loved ones as no shock and
- They extended 'immediate aftermath' to include witnessing the husband in hospital due to her emotional relationship with the injured person. Therefore, Jaensch succeeded.

Tame v State of New South Wales; Annetts v Australian Stations Pty Ltd (2002) 191 ALR 449: **Facts of Tame:** Was an accident, police officer made a mistake in recording blood alcohol level of Mrs Tame. She subsequently suffered mental harm. **Facts of Annetts:** Son worked for the respondent. The parents (plaintiffs) specifically asked for him to be cared for. He died, whilst on his own in the outback. The parents suffered mental harm after the shock of the phone call and subsequent prolonged search.

- **Held in Tame:** Normal fortitude does not matter if the person responds in a reasonably foreseeable manner. Hence Tame lost as her response was 'far-fetched or fanciful'.
- **The test:** Is it reasonable that someone of normal fortitude would suffer? If so, irrelevant if plaintiff not of normal fortitude (what is relevant is that a normal person would not suffer).
- This looks at the class of injury also (i.e. Mrs Tame's illness due to administrative error not reasonably foreseeable).
- **Held in Annetts:** The bearers of bad tidings not liable (in the absence of malign intentions), the court focused on the importance of the relationship of trust between the plaintiff and defendant, the Station was held liable.