Physical injury caused indirectly by intentional acts intended to inflict harm

- seen as a tort independent from the above, however, an action on the case is still available
- *Bird v Holbrook*: D placed a spring gun in his garden following the theft of valuable plants
- P went onto land to retrieve a pea-fowl which had strayed and stepped on wire which discharged the gun
- D was held to be liable because he did not warn P of the gun and therefore intended to cause injury to persons

<table>
<thead>
<tr>
<th>Elements:</th>
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<tbody>
<tr>
<td>1. A deliberate act (not merely negligent); and</td>
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<tr>
<td>2. The defendant intended to do injury with it, and</td>
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<tr>
<td>3. The plaintiff suffered injury</td>
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**INTRODUCTION TO NEGLIGENCE; DUTY OF CARE**

Liability in negligence deals with unintentional wrongdoing which amounts to more than mere carelessness but less than deliberate harm.

To succeed in a claim of negligence, a plaintiff will have to prove three elements. These are:

1. that the defendant owed the plaintiff a duty of care
2. that the defendant has breached that duty of care by negligent conduct
3. that the defendants breach caused the plaintiff actual damage which is not too remote from the breach

*Jaensch v Coffey* (1984) 155 CLR 549:

**Duty of care**

Whether duty of care exists is a question of law. The relationship between plaintiff and the defendant may fall within the scope of an established duty category. E.g:

- manufacturer/consumer *Donoghue v Stevenson*
- doctor/patient *Rogers v Whitaker* (1992)
- occupier/occupant: Hackshaw v Shaw, *Australian Safeway Stores v Zaluzna*

The current approach to establish the duty of care inquiry in novel fact situations (ones where the relationship falls outside established duty categories), is divided into two legal considerations (p.157):

1. reasonable foreseeability
2. an additional test—which confirms a legal/factual link between the duty of care owed also known as salient features
Reasonable foreseeability

A plaintiff has to demonstrate that a reasonable person in the position of the defendant would recognize that negligent behavior may cause injury to another person. *Rogers v Whitaker* (1992) 175 CLR 47

Chapman v Hearse established ‘not unlikely to occur’.

Salient features

**Proximity**

“Proximity” was a term used to describe close and direct relations between the plaintiff and the defendant. The High Court still refers to the concept of proximity. These references are to limit and reject the historical formulation of the concept (p.161).

In *Jaensch v Coffey* (1984) 155 CLR 549, Deane J stated that proximity can refer to:
- physical proximity (the notion of nearness & closeness)
- circumstantial proximity such as a relationship of employer & employee
- casual proximity in the sense of closeness or directness of the relationship between the act and the injury sustained

In *Home Office v Dorset Yacht Co Ltd* it was held that:
- although it was foreseeable that escaping prisoners might damage personal property in making their escape, only those persons who owned property in close proximity would be owed a duty of care

**Incrementalism**

- refers to the method of incremental steps of law creating precedent and established categories
- Brennan J stated this in *Sutherland Shire Council v Heyman*

**Three stage approach**

In *Pyrenees Shire Council v Day*, Kirby expressed view that approaching duty of care question should regard three stage approach

1. Reasonable foreseeability of the plaintiff
2. A relationship between the plaintiff or neighbourhood between P and D and
3. That it be fair, just and reasonable that a duty should be imposed in the particular case

However, this has been overturned in Australia in *Caparo*

**Role of public policy**
Torts notes

• there are cases where public policy considerations have been decisive in the resolution of the duty question, either to indicate that a duty of care is appropriate or to deny the existence of a duty
• public policy refers to matters which are not legalistic but include notions of justice, morality, social and economic values

Current approach

• Based on Graham Barclay Oysters Pty Ltd v Ryan, it would seem the current approach is the incremental approach based on the identification of salient features of the case before it
• But this is not rule

Advocates immunity

• advocates of law are immune from negligence
  o work done in court affecting conduct of case
  o work outside court which is closely connected
  o although if solicitor doesn’t advise the client on the timeframe to start
• this has been recently confirmed in the High Court in D’Orta-Ekenaike v Victoria Legal Aid (2005) 223 CLR1
  o main reasons: finality of the principle, duty of court over client, cab rank rule etc.
• police investigating a crime did not owe a duty of care to individual members of the public in respect of their failure to apprehend a dangerous criminal
  o Hill v Chief Constable of West Yorkshire (1989) AC 53
    ▪ the mother of the last victim tried to sue the police claiming they were responsible for her daughter’s death as they had been negligent in their investigation
• also no common law duty upon police to prevent people inflicting self-harm (Stuart v Kirkland-Veenstra (2009) 237 CLR 215 due to the value of personal autonomy
• however, police do have a duty of care to protect an informer who is endangered because of disclosing confidential info Swinney v Chief of Northumbria Police (1997) QB 464
• most professions are required to keep up to date with treatments/protocols
NEGLIGENCE: BREACH OF DUTY

Statutory definition of negligence: S 5B General Principles *Civil Liability Act 2002* (NSW):

A person is not negligent in failing to take precautions against a risk of harm unless:
(a) the risk was foreseeable (that is, it is a risk of which the person knew or ought to have known), and
(b) the risk was not insignificant, and
(c) in the circumstances, a reasonable person in the person’s position would have taken those precautions.

In determining whether a reasonable person would have taken precautions against a risk of harm, the court is to consider the following (amongst other relevant things):
(a) the probability that the harm would occur if care were not taken,
(b) the likely seriousness of the harm,
(c) the burden of taking precautions to avoid the risk of harm,
(d) the social utility of the activity that creates the risk of harm.

S 5C:

In proceedings relating to liability for negligence:

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

50 Standard of care for professionals

(1) A person practising a profession (*a professional*) does not incur a liability in negligence arising from the provision of a professional service if it is established that the professional acted in a manner that (at the time the service was provided) was widely accepted in Australia by peer professional opinion as competent professional practice.
(2) However, peer professional opinion cannot be relied on for the purposes of this section if the court considers that the opinion is irrational.
(3) The fact that there are differing peer professional opinions widely accepted in Australia concerning a matter does not prevent any one or more (or all) of those opinions being relied on for the purposes of this section.
(4) Peer professional opinion does not have to be universally accepted to be considered widely accepted.
Torts notes

5P Division does not apply to duty to warn of risk

This Division does not apply to liability arising in connection with the giving of (or the failure to give) a warning, advice or other information in respect of the risk of death of or injury to a person associated with the provision by a professional of a professional service.

Basis of negligence:

- failing to do what a reasonable person would do
- doing what a reasonable person would not do

Reasonable person

- reasonable meaning not perfect (p.185)
- supposed to be an objective test, however, not always the case
- “hypothetical person on a hypothetical Bondi tram” Deane J in Papatonakis v Australian Telecommunications Commission (1985) 156 CLR
- sometimes courts will consider particular attributes of the defendant, such as whether the defendant is a child or a skilled medical practitioner (p.187)
- the test cannot be wholly objective because he court must address the attributes and skills of each individual defendant as against the standard of care expected in the particular factual situation

Children

- children may be liable for negligence, in tort law there is no minimum age for liability
- a child is only expected to conform to the objective standard expected for normal children of a similar age and experience (p.187)
- same with old people, however, not when operating a motor vehicle

McHale v Watson (1966) 115 CLR 199

- 12 year old boy threw a piece of steel and it accidently hit a 9 year old girl in the eye
- held: not liable in negligence
- parents are not vicariously liable but can be personally liable (act or omission)
  - “characteristic of humanity at his stage of development and in that sense normal”

Inexperience

Collins v Hertfordshire County Council (1947) 1 All ER 633

- final year medical student was employed as a junior surgeon and misheard head surgeon say “cocaine” and not “procaine” which ended up killing the patient