

TORTS OF NEGLIGENCE OUTLINE:

(Elements: Duty, Breach, Factual Causation, Scope of Liability, Remoteness Damages)

I. DUTY

(A duty of care is only owed to someone who is a neighbour at law and in order to establish the duty of care, the P must establish that he was D's neighbour in that sense)

i. Reasonable Foreseeability

1. Neighbour principle test (Manufacturers General Duty)

a. Case: *Donoghue v Stevenson* [1932] AC 562 (Manufacturers General Duty)

1. **Reasonably foreseeable:** acts or omissions which you can reasonably foresee
2. **Proximity:** person who are so closely and directly affected (physical or other relationship)
 - i. **Neighbour at law:** *'anyone who is so closely and directly affected by my acts that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called into question'*.

2. Reasonable foreseeability test (Act not reasonably foreseeable)

b. Case: *Bourhill v Young* [1943] AC 92

Defendant did not owe the plaintiff a duty of care because the act is not foreseeable

ii. Salient features of the case

- The court uses the salient factor approach to determine whether or not duty of care arises.

1. SALIENT FACTORS INCLUDE:

- a. Level of vulnerability of the P compared with the power or control of the D in the situation
- b. Level of reliance compared with the power or control of the D in the situation
- c. Level of reliance of the P on D
- d. Kind of knowledge involved

2. SALIENT FEATURES INCLUDE:

- a. Foreseeability of harm
- b. Nature of the harm
- c. Degree and nature of control able to be exercised by the D to avoid harm
- d. Degree of vulnerability of the P to harm from the D's conduct including the capacity and reasonable expectation of a P to take steps to protect itself
- e. Degree of reliance by the P on D
- f. Any assumption of responsibility by the D
- g. Proximity or nearness in a physical, temporal or relational sense of the P to the D

Case: *Sullivan v Moody* (2001) 207 CLR 562

1. **The need for coherency in the law:** used to prevent others from passing on adverse information
2. **Conflicting duties of care:** if a doctor owed a duty of care to the parent of a patient → conflict with the paramount duty owed by the doctor to the patient
 - If a public authority owed a duty of care to an alleged perpetrator of child abuse → conflict with its duty to protect the child
3. **The possibility of indeterminate liability:** if the Department of Community Welfare's duty of care extended to the parents, it would extend to other family members, teachers, or anyone accused of child abuse.

iii. Obvious risk situations

a. Case: *Wood v Multi-Sport Holdings* (2002) 208 CLR 46

- Obvious risk of collision between players and of any player
- MSH did not have an obligation to warn players of the obvious risk or to provide them with protection
- A reasonable person *would not have* provided a helmet with a guard or warned Woods about the risk of eye injury

WARNING!!!

- **Relationship between parties DOES fall within one of categories: only cite relevant case law authority to establish the existence of duty of care**
- **Relationship between parties DOES NOT fall within one of categories: consider 'reasonable foreseeability' and 'salient features'**

II. BREACH

- To establish a breach of duty it must be shown that the defendant failed to do what a reasonable person would have done in the same circumstances

Objective test: what an ordinary and careful person would do in the circumstances

- If the defendant does not meet the standard of the reasonable person, they have breached the duty of care.
 1. Foreseeable and significant risk of harm
 2. Failed to do what a reasonable person would have done in light of the foreseeable risks
 - i. **Reasonable Person Standard**
 1. Objective
 2. Reasonably prudent person under the same or similar circumstances
 3. Error in judgement is not conclusive proof of breach
- 1. **Breach of duty test:**
 - **Degree of foreseeable risk**
 - a. **The probability of the harm**
 1. **Case: Bolton v Stone [1951]**
 - it was foreseeable that a person on the adjacent road could be struck by a ball hit out of the ground
 - CCC did not breach their duty of care → reasonableness did not require precautions to be taken against the very small risk that someone would be struck by a ball hit out of the ground
 - Δ reasonable person would not have taken any additional precautions given the very low risk of injury
 - b. **The (likely) seriousness of the harm**
 2. **Case: Paris v Stepney Borough Council**
 - Failing to provide Paris with suitable goggles for the protection of his eyes while he was engaged in the work he was engaged in
 - Failing to require him to wear the goggles
 - Reasonable employer would take different precautions against a risk of likely injury for different employees
 - The gravity of the consequences of injury to the particular employee was a relevant consideration in determining the reasonable precautions against injury that an employer was required to take
 - Δ standard of care owed to Paris was higher
 - A reasonable person in the position of the Council would have insisted that Paris wear protective goggles.
 - **Reasonableness of defendant's response to risk**
 - c. **The burden of taking the precaution (Practicability of Precautions)**
 3. **Case: Latimer v AEC Ltd**
 - Latimer slipped on the wet floor
 - AEC Ltd could have closed the factory while the floor was wet, but this precaution was a significant and expensive one
 - Reasonable person would not have taken the precaution in the circumstances
 - Δ AEC Ltd had not breached its duty of care
 - d. **The social utility of the activity (Utility of D's conduct)**
 4. **Case: Watt v Hertfordshire County Council**
 - Jack moved inside the vehicle and hit Watt's leg, injuring him
 - HCC moved under no duty to ensure that a vehicle specially fitted to carry a jack was available at all times
 - The risk taken in travelling on a vehicle with a jack which was not secured was consistent with the risks that would normally be faced by a fireman and not unduly great given the emergency situation
 - ii. **Child Standard of Care (Lower Duty of Care)**
 1. Age, intelligence, maturity, and experience
 - a. **Inexperience**
 - Case: McHale v Watson (1966)**
 - Standard of care to be applied was not that of a reasonable person
 - 'to be expected of an ordinary child of comparable age'
 - b. **Knowledge by the P of D's inexperience**
 1. **Case: Cook v Cook (1986)**
 - Special and exceptional circumstances the standard of care owed by a driver to a passenger might be modified from that which is expected of a reasonably competent and experienced driver
 - MC was to the knowledge of IC quite inexperienced and had not even obtained a learner's permit
 - IC was not an unwilling passenger and had instigated the driving of the vehicle by MC
 - At the time of the accident, the relationship of MC and IC bore some similarity to that of instructor and pupil
 - There was special and exceptional circumstances giving rise to a lower standard of care
 - MC should be judged against the standard expected of an inexperienced and unqualified driver

- MC's action in accelerating off the road to avoid the parked car was carelessness over and above that which could be expected of mere inexperience
- However (2008) → Cook v Cook was overturned by the High Court of Australia

2. Case: **Imbree v McNeilly (2008)**

- Standard of care owed by Mc Neilly to Imbree was the standard of care expected of a reasonable driver, and was not modified by the experience of the driver or whether they were licensed
 - Imbree's knowledge of McNeilly's inexperience was not sufficient to warrant the application of a lower standard of care
 - High Court overruled its earlier decision in *Cook v Cook*
2. Subjective standard
 3. Minimum age for negligence → under certain age, no negligence
 4. Inherently Dangerous Activity / **Adult Activities**
 - a. Analyse as reasonable adult standard of care

iii. Professional Standard of Care (Higher duty of care)

Standard of care—Reasonable person test —s.48 Wrongs Act(Vic) 1958

1. Reasonable professional: **non-delegable duty of care** (a duty of care that cannot be delegated or passed on to another person)
 - Cannot avoid liability by delegating responsibility
 - a. Employers to employees

Case: Kondis v State Transport Authority (1984)

 - Crane being operated by an independent contractor fell on Kondis
 - Breach of STA's non-delegable duty to provide a safe place of work that it owed to all of its employees
 - Duty could not be delegated to an independent contractor
 - b. Hospital to patients
 - c. School to its students
 - d. Occupier in relation to things on their property and under their control that could cause harm to others
2. Duty of care → extends ONLY to negligent acts by others, NOT to intentionally harm others

iv. Liability for failing to act

- a. No legal obligation to help someone in need or come to their rescue
- b. There may be an ethical obligation
- c. **Brennan J → Council of the Shire of Sutherland v Heyman [1985] HCA 41:**
A man on the beach is not legally bound to plunge into the sea when he can foresee that a swimmer might drown

III. HARM CAUSED BY THE BREACH OF DUTY

(it must be established that the defendant's breach of duty caused the harm suffered by the plaintiff)

i. FACTUAL CAUSATION

(this caused this directly)

1. Section 51 Wrongs Act
2. **'But For' Test** → "but for the D's carelessness the P would have suffered the harm"

Case: **Yates v Jones [1990]**

- **breach directly caused the damage**
- Yates was injured in a car accident
- Yates's friend offered her heroin (to cope up with the pain)
- Yates included a claim for the cost of her heroin addiction
- *But for Jones's carelessness, would Yates have become addicted to heroin?*
- Heroin addiction was not caused by the car accident, but was caused by the actions of Yates's friend

3. **Material Contribution Test** → multiple causes

a. **McHugh J Chappel v Hart (1998)**

1. MUST PROVE that the D's conduct materially contributed to the plaintiff suffering that injury
2. If D's act results in an increased risk of injury P suffers → D's conduct has materially contributed to that injury occurring

Case: **Cook v ACT Racing Club Incorporated and the Australian Jockey Club Inc [2001]**

- Overheated sauna → caused a jockey to suffer a heart attack
- Dehydration with the use of sauna → only one of the causes of the heart attack
- Δ the sauna significantly increased the risk of injury to the plaintiff → cause of the heart attack

4. **Substantial Factor Test** → D's negligent conduct was a substantial factor in contributing to the P's injuries
 - a. Case where two (or more) D's and each contributed to the harm = enough to bind both parties
 - b. Establish causation b *preponderance of the evidence*
 1. Evidence: eyewitness, expert testimony, circumstantial evidence

ii. SCOPE OF LIABILITY

(Remoteness of damages)

1. **Foresight Test:** limits recovery to harms that were foreseeable and natural consequences of the negligence
(harm caused by the breach: reasonably foreseeable → **not too remote / far-fetched**)
 - a. **Unforeseeable (Reasonable foreseeable damage)**

Case: Overseas Tankship (UK) Ltd v Morts Dock & Engineering Co Ltd

 - Large quantity of furnace oil was released into the harbour due to the carelessness of OT's employees
 - Morts works manager made enquiries with the Caltex manager regarding the situation → led him to believe that the works of Morts Wharf could safely continue
 - Consequently, the wharf and the vessel where Morts employees were working caught fire
 - Considerable damage was done
 - OT was only liable for the consequences of its actions that were reasonably foreseeable at the time of the negligent act
 - OT was NOT liable for unforeseeable consequences of its negligence
 - Δ Damage suffered by Morts was not reasonably foreseeable → OT did not know and could not reasonably be expected to have known that furnace oil was flammable when spread on water
 1. **Unforeseeable consequences?**
 - i. Different type of harm than what was foreseen → cuts off liability
 - ii. Extend of harm / specific harm greater than foreseen → does not cut off liability
 2. **Intervening conduct?**
 - i. Supervening act → unforeseeable → D's liability is cut-off
 - ii. Supervening act's result → foreseeable → D's liability not cut-off
 - a. If the harm is within the risk, negligently created by D, then it is foreseeable risk and if they fail to mitigate the harm then D will be found liable

Case: Rowe v McCartney [1976]

 - **If there is factual causation usually the damage will be reasonably foreseeable**
 - Rowe agreed to permit McCartney to drive her car
 - Got into accident
 - Rowe → minor injuries & mental illness
 - McCartney → serious injuries + quadriplegic
 - McCartney did breach the duty, but mental illness was not a reasonably foreseeable consequence/too remote of McCartney's careless driving
 3. **Eggshell skull rule**
 - i. only the type of harm must be foreseeable, not the extent of the harm.
 - ii. So if the plaintiff suffers more damage than **would be usual for someone without a pre-existing injury**, the **defendant is nonetheless liable for the full harm suffered**.
 4. **Vicarious liability:** unauthorised or wrongful way of doing an authorised act
 1. **Case: Century Insurance Co Ltd v Northern Ireland Road Transport**

IV. DEFENCES

(Even if the plaintiff has established all three elements of the tort of negligence, the defendant can still avoid liability, either completely or partially, if they can establish the existence of one or more defences)

i. Contributory negligence

(partial defence)

- a. both the plaintiff and defendant have contributed to the loss sustained
- b. This is a partial defence to the action in negligence and, if successful, liability will be apportioned between the defendant and plaintiff.
- c. It reduces the amount of damages payable to the plaintiff.

1. Case: Ingram v Little

- where both the plaintiff and defendant have contributed to the loss sustained
- This is a partial defence to the action in negligence and, if successful, liability will be apportioned between the defendant and plaintiff. It reduces the amount of damages payable to the plaintiff.
- Ingram was an employee by Britten
- Ingram drove a tractor owned by Britten at excessive speed
- Ingram lost control → hit a tree → tractor roll over
- No metal frame was fitted to the tractor to protect the driver (Ingram)
- Britten was negligent in not fitting a metal frame
- Ingram was also negligent for driving at an excessive speed
- Apportioned liability 40 per cent → Britten; 60 per cent → Ingram

ii. Voluntary risk assumptions

(complete defence)

- P is fully aware of the risk (had full knowledge and appreciation)
- P freely and willingly agreed to the precise risk that eventuated

2. Case: *Rootes v Shelton*

- which is a complete defence to an action in negligence.
- P injured while waterskiing
- D (driver of the boat) drove too close to a moored boat
- D → P had voluntarily assumed the risk of being injured
- P is aware, but had not assumed the risk of the D failing to avoid / warn of obstacles in the water

c. EXCEPTIONS:

- P was intoxicated at the time of the incident
- P was relying on the care and skill of a person they knew to be intoxicated

iii. Immunities

- Barrister's immunity
- Volunteer's immunity
- Emergency service provers' community
- Compliance by professionals with standard practice

V. OCCUPIER'S LIABILITY

(An occupier premises owes a duty of care to all persons entering the premises to ensure that the premises are safe: extend the harm of something)

i. Occupier owes a duty of care to all persons entering the premises → ensure that premises are safe

a. Case: *Australian Safeway Stores Pty Ltd v Zaluzna*

- in the context of occupier's liability to an invitee and established that an occupier owes an invitee a duty of care to take reasonable precautions to avoid acts or omissions that will foreseeably injure the invitee.
- Rainy day, Zaluzna slipped on the wet floor → injured
- Safeway, as an occupier, is liable to compensate Zaluzna when she slipped the floor because they owed her a duty of care
- had breached duty of care by failing to take reasonable precautions to avoid such harm

b. Case: *Phillips v Daly*

- P climbed over horizontal logs → tripped and fell
- D had not breached duty of care
- It was daylight → risk was obvious
- P should've walked around the logs rather than stepping over them
- P is careless and not the D

ii. Occupier also owe a duty of care to trespassers

c. Case: *Hackshaw v Shaw*

- Farmer caught a man stealing his petrol
- Shot at the tyres of the man's vehicle to prevent him for leaving
- But he hit the passenger door of the vehicle → P is Δ injured
- Even if the thief and the P were trespassing, farmer still owed them duty of care
- D breached duty of care by firing his gun at the car in the dark

VI. FINANCIAL HARM – NEGLIGENCE

a. DUTY

1. 3rd parties

- P suffers pure economic loss as a result of harm caused by the defendant to the person or property of another person
 - a. **Case: Perre v Apand Pty Ltd (Pure economic loss)**
- Was reasonably foreseeable that the supply of infected seeds to one farmer could affect the ability of neighbouring farmers to sell their produce
- Δ Apand caused the their suppliers duty of care → as they suffer purely economic loss
- vulnerability of the plaintiff would contribute to a higher chance for duty of care to be established

2. Defective products

- I. Negligently manufactured a defective product or provided a defective service
- II. P suffers economic loss as a result of the defect
- III. Duty to act reasonably to protect persons who may come in contact with the product if:
 1. Knowledge of probable danger arising from product
 2. Knowledge that danger will be shared by others than buyer
 3. Proximity or remoteness of the relation is a factor to consider (scope of liability is expanded)

a. Case: Junior Books Ltd v Veitchi Co Ltd

- Veitchi Co Ltd negligently laid defective flooring in the factory of Junior Books Ltd
- P is entitled to recover compensation from D for its pure economic loss
- The cost replacing the floor together with the profits lost while the business was closed for the replacement

3. Negligent Misstatement / Advise

(giving of careless advice that leads to economic loss)

I. Need to prove

(When a person is **giving advice** they owe you a duty of care if:)

1. The advice given was of a serious or business nature
2. The defendant knew or should have known that the plaintiff intended to rely on the advice
3. It was reasonable in the circumstances for the plaintiff to rely on the defendant's advice

AND

4. Breach of duty and breach causing harm would need to be proven too

II. The person giving advice may owe a duty of care even if they are not a professional adviser

a. Case: Hedley Byrne & Co Ltd v Heller and Partners Ltd (Disclaimer)

- HB (advertising company) ask for H&P's advice regarding Easipower's financial status
- H&P is a professional advisor (Easipower's merchant bankers)
- H&P's letter of advice began with a disclaimer
- Easipower subsequently went into liquidation
- H&P was NOT liable because of the express of disclaimer of responsibility
- However, *orbiter dicta* → H&P owed a duty of care to HB in relation to the reference about Easipower because of H&P's knowledge/expertise → knew it's opinion would be relied on by HB
- In the ABSENCE of DISCLAIMER → H&P would have been found negligent

b. Case: Rentoki Pty Ltd v Channon

- Channon relied on a pes inspection report prepared by Rentokil Pty Ltd
- Channon discovered that the house was so badly infested by termites
- Report was incorrect
- Δ Rentokil Pty Ltd owed a duty of care, and that it had breached that duty

c. Case: L Shaddock & Associates Pty Ltd v Parramatta City Council

- Shaddock was considering the purchase of a property in Parramatta for the purposes of redevelopment
- Shaddock's solicitor → contacted the relevant department of the Council → enquire whether any road-widening proposals affected the property → advised there were not
- Shaddock entered a contract to purchase the property
- Council approved the proposal → it required the acquisition of more than a third of a property
- What was remained was unsuitable for Shaddock's proposed development
- Shaddock sued the Council → damages for negligence misstatement
- Council owed Shaddock a duty of care in relation to the information provided
 1. The person carries on a business or profession
 2. In the course of business or profession, the person provides advice or information of a kind which requires skill and competence
 3. The person knows or ought to know that the recipient intends to act or rely on it

- Liability for negligent misstatement was not confined to those who carry on a profession, business or occupation involving the giving of advice

III. Any person who gives advice / provides information on an 'occasion of seriousness': seen to owe a duty of care to the person to whom they are providing the advice or information

a. Case: Esanda Finance Corporation Ltd v Peat Marwick Hungerfords (Defendant, Client, Plaintiff)

- Esanda loaned money to various subsidiaries of Excel
- Deciding to grant the loan relied upon financial records audited by PMH
- PMH's audited financial records were negligently prepared
- Excel defaulted → Esanda sought to recover its economic loss from PMH
- Esanda argued PMH owed it a duty of care
- PMH responded that it owed a duty of care only to its client, Excel
- Court decided in favour of PMH
- It is reasonably foreseeable that a third party will rely on the advice is not enough to make the adviser liable to that third party
- Esanda should have made its own enquiries rather than relying on the records audited by PMH and provided to Esanda by the borrower

1. Person giving advice (accountant / auditor)

a. GENERAL RULE (With respect to this case)

- Not owe a duty of care to a third party who relies on the advice where the adviser is aware or should be aware that the third party will be relying on the advice
- Person giving advice who does not wish to be liable to third parties: should include in the advice a clear statement that the advice should only be relied upon by the person to whom the advice is directly provided

b. A person giving advice will owe a duty of care to a third party if:

1. They give their client business or serious advice knowing that the client will communicate that advice to the third party
2. The advice is likely to lead the third party to enter into a particular type of transaction
3. It is likely if they enter into that transaction and the advice is wrong