

Dear Law Student Colleague,

Torts was probably one of the more challenging units. This outline deals exclusively in negligence - arguably the core examinable aspect of Torts 2017. My recommendation would be to develop your own concise guide to assist your own learning progression.

I have put a lot of effort into this outline to assist with my learning experience. I hope this will somehow provide you that same assistance.

The first part is the negligence outline. It is roughly arranged in a format that addresses the different elements of tortious negligence in the required sequential order. The second part is the case briefs derived from in the prescribed text book as well as external sources. The case brief also touches on intentional tort cases. Please be warned that the case briefs is not fully complete.

This outline does not guarantee you will pass. That is up to you. This is not a subject for the faint-hearted. To do well in this subject you will need to be committed. I wish you the best of luck.

If you enjoy flash cards I recommend having a look at <https://www.brainscape.com/packs/australian-nsw-torts-law-2017-western-sydney-university-9395429> which I made while studying this unit. I suggest making your own flash cards to address your knowledge gaps and limitations.

The best kind of regards,

Fellow Student

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- (Overseas Tankship (UK) Ltd v Morts Dock & Engineering Co Ltd (The Wagon Mound (No 1)) [1961] 1 AC 388 – Privy Council) (Dude, you split some oil. Nar, yeah it's fine mate Case No 1)**Error! Bookmark not defined.**
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- (Overseas Tankship (UK) Ltd v Miller Steamship Co Pty Ltd (The Wagon Mound (No 2)) [1967] 1 AC 617 – Privy Council) (Dude, you split some oil. Nar, yeah it's fine mate Case No 2)**Error! Bookmark not defined.**
- (Kind of injury and manner of its occurrence) **Error! Bookmark not defined.**
- (Hugh v Lord Advocate [1963] AC 837 – House of Lords) **Error! Bookmark not defined.**
- (Eggshell Skull Rule) **Error! Bookmark not defined.**
- (Stephensen v Waite Tileman Ltd [1973] 1 NZLR) () **Error! Bookmark not defined.**
- (APPORTIONMENT - CNEG) **Error! Bookmark not defined.**
- (Pennington v Norris (1956) HCA 12) **Error! Bookmark not defined.**
- (APPORTIONMENT - CNEG) **Error! Bookmark not defined.**
- (Podrebersek v Australian Iron and Steel PL (1985) 59 ALJR 492 - HCA) **Error! Bookmark not defined.**
- (Voluntariness – Voluntary Assumption of Risk) **Error! Bookmark not defined.**
- (Carey v Lake Macquarie City Council [2007] NSWCA 4) **Error! Bookmark not defined.**
- (DEFENSE OF ILLIGALITY) **Error! Bookmark not defined.**
- (Miller v Miller (2011) 242 CLR 446) **Error! Bookmark not defined.**
- (DAMAGES) **Error! Bookmark not defined.**
- (Sharman v Evans (1977) 138 CLR 563 - HCA) **Error! Bookmark not defined.**
- (DAMAGES – WORK BENEFITS) **Error! Bookmark not defined.**
- (Graham v Baker (1961) 106 CLR 340) (178 Sick Days Case) **Error! Bookmark not defined.**
- (DAMAGES – Determining the future or what would happen to P if not for tortious act. – Certainty and proof of loss) **Error! Bookmark not defined.**
- (Malec v JC Hutton PL (1990) 169 - HCA) (Meatworking Spine Problem Case) **Error! Bookmark not defined.**
- (Vicissitudes in assessing loss of earning capacity) **Error! Bookmark not defined.**
- (Wynn v NSW Insurance Ministerial Corporation (1995) 184 CLR 485) .. **Error! Bookmark not defined.**
- (CLA: Adjusting the award) **Error! Bookmark not defined.**
- (Macarthur District Motorcycle Sportman v Ardizzone [2004] NSWCA 145) **Error! Bookmark not defined.**
- (NON ECO LOSS – AWARENESS TO PAIN AND SUFFERING) **Error! Bookmark not defined.**
- (Skelton v Collins (1966) 115 CLR 94) (Non-Eco Loss) **Error! Bookmark not defined.**
- (DAMAGES – NEL – PAIN SUFFERING, LOSS OF ENJOYMENT OF LIFE, Shortening Life)**Error! Bookmark not defined.**
- (Sharman v Evans (1977) 138 CLR 563 - HCA) **Error! Bookmark not defined.**
- (“Most extreme case” the meaning) **Error! Bookmark not defined.**
- (Southgate v Waterford (1990) 21 NSWLR 427) **Error! Bookmark not defined.**

- (The process of determining a % for most extreme cases under CLA) ... **Error! Bookmark not defined.**
- (Woolworths v Lawlor [2004] NSWCA 209 - NSWCA) **Error! Bookmark not defined.**
- (Collateral Source Rule – Gifts – Overview of law on benefits)..... **Error! Bookmark not defined.**
- (Zheng v Cai (2009) 239 CLR 446 - HCA) **Error! Bookmark not defined.**
- (Inherent risks in sports)..... **Error! Bookmark not defined.**
- (Rootes v Shelton) (Water Skier Stationary Boat Case)..... **Error! Bookmark not defined.**
- (Obvious Risk in Dangerous recreational activities) **Error! Bookmark not defined.**
- (*Fallas v Mourlas* (2006) 65 NSWLR 418) **Error! Bookmark not defined.**
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- (*Laoulach v Ibrahim* [2011] NSWCA 402) **Error! Bookmark not defined.**
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1A. DUTY OF CARE (Is there DOC?)

GENERAL RULES FOR ALL FORMS OF NEGLIGENCE

- (Donohue v Stephenson [1932] AC 562*) (Snail in the Bottle Case)
 - The 'neighbour principle' – "There is duty of care to avoid acts or omissions which you can reasonably foresee would likely to injure your neighbor"
 - Who is your neighbour? → Persons who closely and directly affected by my act that I ought reasonable to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question

ESTABLISHING CATEGORIES OF DUTY

1. Personal Injury
 - a. Neighbour principle or question of reasonable foreseeability
2. Property Damage
 - a. Neighbour principle or question of reasonable foreseeability
3. Factors that effect of the approach of DOC:
 - a. Acts or omissions → IF act → Kinds of act (Words, Physical Acts)
 - b. Kind of harm → Personal injury Psychiatric harm Property damage Pure economic loss
 - c. Who is D? → Individual Public Authority Manufacturer Medical practitioner
 - d. Who is P? → Child at school Patient at hospital Another third party
4. **General Rule:** when factors move away from original paradigm (personal injury/property damage) more is required to establish DOC. (The salient factors)

PHYSICAL HARM

PHYSICAL HARM CAUSED BY A POSTIVE ACT

- Donohue v Stephenson [1932] AC 562 – (Snail in the Bottle Case)
- Grant v Australian Knitting Mills [1936] AC 85 Privy Council (Itchy Underpants Case)

PHYSICAL HARM CAUSE BY OMISSION

- Hargrave v Goldman [1963] HCA 56) (Oh, darn, my tree is on fire. Case)
- Romeo v Conservation Commission of Northern Territory (1998) 192 CLR 421 (Drunk Girls and Cliffs Case)

DUTY OF CARE THROUGH AN OMISSION

- Hargrave v Goldman [1963] HCA 56) (Oh, darn, my tree is on fire. Case)
 - There is a duty of affirmative action (duty of act), that is a duty to exercise reasonable care when there is a fire on his land not started or continued by him, of which he knows or ought to have known. The reasonable care is to render it harmless or its dangers to his neighbours diminished.
 - A defendant is liable for the naturally occurring danger that arose on his land as he was aware of the danger and failed, by omission, to act with reasonable care to remove the hazard.
 - Where an omission exists, DOC will exist where there is an affirmative duty to act.

DUTY OF CARE AND REASONABLE FORESEEABILITY (RF)

- Reasonable foreseeability of risk is almost always necessary to establish DOC (in the absence of a special/commercial relationship).

THE TEST OF REASONABLE FORESEEABILITY

- **(Chapman v Hearse (1961) 106 CLR 112 – HCA*) (Dr Cherry Gets Ran Over Case)**
- RF does not mean exact/precise consequence probability – *rather consequence of the same general character or if it appears the injury to a class of persons of which he was one might reasonably have been foreseen as a consequence*
 - It was RF
- Risk is RF if it was “not fanciful or farfetched” **(Wyong Shire Council v Shirt (1980) 146 CLR 40) (Jet ski Accident Case)**
- However, a party may not be liable for people failing to take reasonable care for their own safety
 - RTA extent of DOC was exercising reasonable care for users exercising reasonable care for their own safety. **(RTA v Dederer (2007) 234 CLR) (Bridge Jumping for fun Case)**

INTERVENING ACTS

- **(Chapman v Hearse (1961) 106 CLR 112 – HCA*) (Dr Cherry Gets Ran Over Case)**
 - RF does not mean exact/precise consequence probability – *rather consequence of the same general character* or if it appears the injury to a class of persons of which he was one might reasonably have been foreseen as a consequence

WHEN CONSEQUENCES ARE UNFORESEEABLE (THE UNFORESEEABLE PLAINTIFF)

- Plaintiff cannot recover damages
- Known as the ‘unforeseeable plaintiff’.
- A series of dust disease cases to be unforeseen consequences given the state of scientific knowledge at the time P was exposed to the risk. P cannot recover damages as they are an ‘unforeseeable P’ **(Palsgraf v Long Island RR Co 248 NY 339) (1928) (US)**.
- Foreseeable risks can change according to the circumstances of time **(Bale v Seltsam PL [1996] QCA) (Asbestos Wife Case)**

SECTION 5C

- **5C Other principles** (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**
 - This section must be considered in the proceedings in relation to negligence (**RTA v Refrigerated Roadways PL [2009] NSWCA 263**) (**Overhead Bridge and Brick Case**)
 - Section 5C provides that a court must take consideration of the responsibilities of the defendant (**RTA v Refrigerated Roadways PL [2009] NSWCA 263**) (**Overhead Bridge and Brick Case**)
 - The burden of precaution is not to be narrowly construed but must have regard to the burden of taking precautions against similar risks of harm (**Waverley Council v Lodge [2001] NSWCA 439**)
 - The 'foreseeability test' you have to stand in D's position and look prospectively, cannot be said that simply because the harm materialized, therefore it was foreseeable. 'Must stand before the incident, and see what was foreseeable from that position'. Although, P's injury was foreseeable, a reasonable council on D's position could not have been expected mark and prohibit every single point along the 27km coastline for which they are responsible where a person may jump into the water and suffer injury. (**Vairy v Wyong Shire Council (2005) 223 CLR 422**)
 - **(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**
 - Duty is not of an insurer but a duty to act reasonably (**Romeo v Conservations Commission of the Northern Territory**)
 - **(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."**
 - Even if D offered protection or put up signs, P can't lead evidence to lead those factors to for D to admit liability, would give D a disadvantage. (**Vague principle**) (**Wood v Multisports**)

5C IN APPLICATION AT COMMON LAW:

- There are limits of a burden that can be placed on an authority. The cost of burden for the RTA to retrofit every bridge before the date of the accident would not have been a reasonable burden to place on the limited resources of a public authority. Therefore, RTA did not BDOC (**RTA v Refrigerated Roadways PL [2009] NSWCA 263**)

THE 'THREE HEADS OF LOSS' (SO, SO, SO EXAMINABLE.)

- RECOVERABLE HEADS OF LOSS (CLR Ltd v Eddy (2005) 226 CLR 1)
- 1. LOSS OF EARNING CAPACITY
 - Loss of earning, before and after trial.
 - PRETRIAL – ASSESSING PAST LOSS
 - A. PAST OUT OF POCKET EXPENSES
 - Can be calculated with high accuracy. (Graham v Baker (1961) 106 CLR 340)
 - Ambulance charges, medical, hospital, nursing services, travel, accommodation expenses incurred from such services, rehabilitation, special clothing, equipment, housing modifications, fund managements, home maintenance services. (Sharman v Evans (1977) 138 CLR 563)
 - All medical expenses recoverable by proof of expenses. (Sharman v Evans (1977) 138 CLR 563 – HCA –)(20yo → MVA → quadriplegic - \$300K question Case)
 - P has a duty to mitigate, minimize, their losses by the acceptance of reasonable treatment. (Westinghouse v Electric Railways [1912] AC 673)
 - B. PAST LOST EARNING CAPACITY
 - Such as income of loss between accident and trail, the normal standard of proof applies (BOP). (Malec v JC Hutton PL (1990) 169 - HCA) (Meatworking Spine Problem Case)
 - POST TRAIL – ASSESSING FUTURE LOSS
 - The Difference between 'earning capacity' and 'loss of wages';
 - 'Loss of earning capacity' is distinguished from 'loss of wages'. Court takes into account the possibility of a person to advance in their life to better paying jobs. The difference allows help to plaintiff who were unemployed/underemployed at the time prior to injury. (Cullen v Trappell (1980) 146 CLR 1)
 - "a capacity to earn which is not being exercised at present has a value which can be estimated, though no other earnings are available to demonstrate its worth" – (Atlas Tiles v Briers (1978) 144 CLR 202)
- THE MEANING OF "MOST EXTREME CASE"
 - The meaning of a "most extreme case" will vary, but quadriplegia would call into that class. (Southgate v Waterford (1990) 21 NSWLR 427)
 - The determination of "most extreme case" rests upon the courts findings and reactions drawing from the judge's experience where a more scientific approach is forbidden by the binding authority of HCA. All that legislation requires is that damages be fixed in

harmony with a maximum to be reserved for “most extreme case” (**Southgate v Waterford (1990) 21 NSWLR 427**)

- An assessment of 15-20% of most extreme cases of that order would be too low or 33% too disproportionate (too high?), thus courts has seemed to settle about 30% of most extreme cases under NEL, based the following circumstances: (**Woolworths v Lawlor [2004] NSWCA 209 - NSWCA**)
 - P has suffered significant ongoing pain,
 - P is likely going to suffer this pain for the remainder of his life
 - P has to use medication such as inflammatory pills and pain killers.
 - There is significant interference nearly all aspect of her life, despite being able to return to work
 - P suffered depression for a period after the accident.
 - P’s Life expectancy of another 30 years (subject to life tables depending on case)
 - No medical evidence to suggest condition of P was to improve

NEGLIGENT MISSTATEMENTS (NEGMIS)

THE ‘BARWICK TEST’ FOR NEGLIGENT MISSTATEMENTS

- 1. *ASSUMPTION OF RESPONSIBILITY*:
 - The speaker must realize that the speaker is being trusted by the recipient of the information or advice to give information which the recipient believes the speaker has or had access to. (**MLC v Evatt; Shaddock; Hedley Byrne v Heller**)
- 2. *SUBJECT MATTER SERIOUS*:
 - The subject matter of the information or advice must be “serious or business nature” (**MLC v Evatt ; Shaddock; Hedley Byrne v Heller**)
- 3. *SPEAKER AWARENESS OF INFORMATION*
 - The speaker must be aware – or the circumstances must show that the speaker should be aware – that the recipient intended to act upon the information or advice.
 - This excludes advice given in at a social occasion with no thought of its possible legal consequences.
- 4. *REASONABLE RELIANCE*
 - It must be reasonable for the recipient to ask for and to rely on what the speaker says (**MLC v Evatt ; Shaddock; Hedley Byrne v Heller**)
 - (**Mutual Life & Citizens’ Assurance Co Ltd v Evatt (1968) 122 CLR 556**):
 - 1. Information or advice is given.
 - 2. Information was actively sought or merely accepted by another on a serious matter.
 - 3. Based on the relationship, the speaker realizes or ought to have realized that he is being trusted to give the best advice as a basis for the action by the other party
 - 4. It was reasonable for the other party to seek or accept

- 5. Other party act upon information or advice.
- **TO CONSIDER REASONABLENESS OF RELIANCE, FACTOR IN:**
 - **A. CAPACITY OF PARTIES**
 - *In the absence of a request:*
 - In the absence of request, DOC may be established by proximity, in that the intention to induce another by the information provided by which it may be shown that the reliance on the info or advice is reasonable. (**Esanda Financial Corp v PMH (1997) 188 CLR 241 - HCA**)
 - If a person of special skill undertakes to apply skill to for the assistance of another (**MLC v Evatt (1968) 122 CLR 556**)
 -
 - **B. NATURE OF SUBJECT MATTER, BEING SERIOUSNESS OR BUSINESS RELATED.**
 - 1. Representor gives information or advice on a serious matter.
 - 2. Representor intends to induce the representee to act on it
 - DOC will exist if:
 - 1. Rep realize or ought to realize that the repree will trust his especial competence to give the information or advice
 - 2. It was reasonable for repree to rely on that info or advice
 - 3. If it is reasonably foreseeable that the repree is likely to suffer a loss should the information turn out to be incorrect or advice is unsound.
 - Mere foreseeability is not enough, but needs an intention to induce the plaintiff to act in reliance on the report. (**R Lowe Lippman Figdor & Frank v AGC (Advances) Ltd [1992] 2 VR 671**)
 - **C. OCCASION WHEN THE ADVICE WAS GIVEN:**
 - When a person gives information or advice to another upon a serious matter (not merely social intercourse) where that person realizes or ought to realise, that he is being trusted to give the best of his information or advice as a basis for action on the part of another, and it is reasonable for the other to act on the information or advice, there is duty to exercise reasonable care in so doing. (**Esanda Financial Corp v PMH (1997) 188 CLR 241 - HCA**)
 - Did D have anything to gain (directly or indirectly) from P's reliance on D's words.? (**Hedley Byrne & Co Ltd v Heller & Partners Ltd [1964] AC 465**)

FALSE IMPRISONMENT

Balmain New Ferry Co Ltd v Robertson (1906) 4 CLR 379 - HCA

➤ **FACTS:**

- 1. A Sydney wharf required payment for entering and leaving.
- 2. RES paid for entering, missed the ferry and tried to leave without paying
- 3. Wharf officers (APP) prevented RES to leave. Eventually RES was able.

- 4. RES claims assault and false imprisonment.
- 5. APP appeals.
- **ISSUES:**
 - Can false imprisonment arise when a person willingly enters a premise on a condition of restriction of the movement of the person.
- **REASONING:**
 - Griffith CJ:
 - RES had been there before and was aware of the condition, thus he agreed to the conditions of admission. A binding condition.
 - O'Connor J:
 - The condition of entry imposed by APP was reasonable, in that involved a surrender of a portion of the RES' liberty.
 - Privy Council:
 - Notice was immaterial. Ferry Co was entitled to impose a condition which was reasonable.
- **CONCLUSION:**
 - Decision For the APP
 - Remaining judges concurred.
- **LEGAL P:**
 - If person is not aware or familiar with the condition of the possibility of the restriction of movement, the other person must do everything reasonably necessary to give the plaintiff notice.
 - If the person is aware or familiar with the conditions of a restriction on the freedom of movement, it must be held to have agreed to them.
 - A person may enter a contract in which involves the surrender of a portion of their liberty for a short time, and if the restriction is within no more than the restraint of that surrendering, he cannot complain.

(REASONABLE FORSEEABILITY = DUTY OF CARE OWED)

(Chapman v Hearse (1961) 106 CLR 112 - HCA) (Window Eject/Dr Gets Ran Over Case)

- **FACTS:**
 - 1. APP (Chapman) was involved in an MVA (his negligence) where he was thrown out of his car and lay unconscious.
 - 2. Dr Cherry attended to the scene with another to assist APP and was struck and killed by RES (Hearse).
 - 3. RES alleges contributory negligence on the part of Dr Cherry and joined the APP as a third party claiming contribution from him.
 - 4. Trial judge found Hearse to be negligent and also APP was liable to contribute some damages to the executor of Dr Cherry.
 - 5. Chapman appealed, dismissed by the FC-SCSA, appealed to HCA.

➤ **ISSUES:**

- Did Chapman owe DOC.
- Could APP reasonably foresee that he would be thrown out of a window and someone would assist him and that this person then be injured by another driver?

➤ **REASONING:**

- The Court (Dixon, Kitto, Taylor, Menzies, Windeyer):
 - 1. APP owed no DOC to Cherry.
 - 2. APP owed DOC to Cherry, Cherry's death was solely by negligent driving of RES
 - 3. Death of Cherry was a consequence of APP's negligence was too remote to APP to be responsible.
- There does not need to be a precise sequence to be reasonably foreseeable, it does need to be a consequence of the same general character
- Applied in this case, this class that should have been anticipated when driving negligently – driving negligently could very well easily result in someone being run over.
- In this case, the general consequence or the type of harm (someone being run over) was a reasonably foreseeable result of the act (driving negligently)

➤ **CONCLUSION:**

- APP argument fails.

➤ **LEGAL P:**

- There does not need to be a precise sequence to be reasonably foreseeable, it does need to be a consequence of the same general character.

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- Foreseeable risks can change according to the circumstances of time (**Bale v Seltsam PL [1996] QCA**) (**Asbestos Wife Case**)

NOVEL CASES

- When novel cases arise, or the foreseeability test for an established category is weak, apply the 'salient factors' approach:

- SALIENT FACTORS (*Sullivan v Moody*; *Thompson v Cannon* (2001) 207 HCA) (Dr Father Children Abuse, was there DOC owed to the father? Case)**

- | | |
|---|---|
| ○ Foreseeability of harm | ○ Nature of harm |
| ○ Degree of control by D | ○ Degree of reliance by P |
| ○ Assumed responsibility of D | ○ Proximity or physical, temporal, relational of P/D |
| ○ Vulnerability of P and ability of P to protect themselves | ○ Existence of a category between P/D or person connected with P |
| ○ Nature of activity by D | ○ Nature/degree of danger to be caused by D |
| ○ Potential indeterminacy of liability | ○ Actual/constructive knowledge by D |
| ○ Actions that could have been done to avoid harm to P | ○ Autonomy, rights for pursue one's own interest |
| ○ Any conflicting duties from other law/statute | ○ Consistency of Terms, purpose, scope, of statute that provides duty |
| ○ The desire to have conformity of statute and laws | |

- No need to apply all these factors. only apply if the circumstances allow it.

TO ESTABLISH VL (2 Requirements to indemnify the employee, 1. RELATIONSHIP and 2. SCOPE):

➤ BOTH ELEMENTS MUST BE ESTABLISHED TO HOLD THE EMPLOYER VICARIOUSLY LIABLE.

1. RELATIONSHIP – IS THERE AN EMPLOYER/EMPLOYEE RELATIONSHIP

○ A. ESTABLISHING EMPLOYEE/ER

- The lawful authority to command/exercise authority, superintendence, the power to hire or fire, power to suspend/dismiss for misconduct, provider of uniforms, rehearsals conduct all within control of the place of work which will establish an employer and employee relationship (*Zujis v Wirth Bros Pty Ltd* (1955) 93 CLR 561) (Circus Case)
- Seven factors that may establish employee/er relationship. (*Hollis v Vabu PL* (2001) 207 CLR 21) (Courier Bike Case) (Leading Case in VL)
 - 1. Not providing skilled labour with special qualifications – unable to have independent career as a freelancer.
 - 2. Lack of control by the alleged employee -
 - 3. Presented to the public as company representative
 - 4. A deterrence of employers to avoid harm to public
 - 5. Control over alleged employee finances
 - 6. Supplies equipment or employee supplies equipment as just one of many alternatives
 - 7. Alleged employees cannot exercise control.

○ *B. CONTRACTOR OR EMPLOYEE*

- General rule is that employer is VL for tortious acts of an employee but that a principle is not liable for the tortious acts of an independent contractor. (**Hollis v Vabu PL (2001) 207 CLR 21**) (**Courier Bike Case**) (**Leading Case in VL**)
- **'Control test'** a central to determine relationship, but not exclusive – Does the alleged employer have the right to exercise control over the alleged employee? Other factors such as the 'indica of relationship' should also be considered(**Stevens v Brodribb Sawmilling Company Pty Ltd (1986) 160 CLR 16**)
- **'indicta of relationship'**: (**Stevens v Brodribb Sawmilling Company Pty Ltd (1986) 160 CLR 16**)
 - How the person is paid.
 - The provision of maintenance of equipment
 - Obligation of work
 - The hours of work and provision of holidays
 - Deduction of income tax
 - Power of delegation of work by the person.