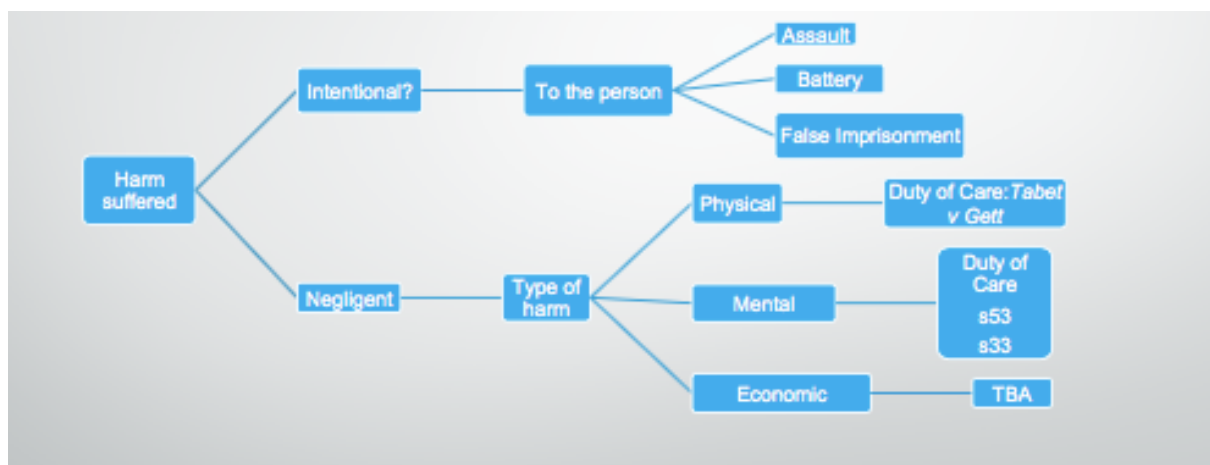


## TORTS – EXAM NOTES

Advise generally:

- step 1: identify in a heading, which plaintiffs and defendants will be discussed e.g. Joe v Amanda
- step 2: identify the tort
- step 3: set out the elements
- step 4: discuss facts and case law in relation to each element
- step 5: discuss relevant defences
- step 6: offer an opinion on the likely outcome
- step 7: discuss potential damages claims



## ACTIONS IN NEGLIGENCE

- Not actionable per se
- Can result in:
  - o Physical harm
  - o Nervous shock (property damage)
  - o Property damage
  - o Pure economic loss
- “negligence is a failure to exercise reasonable care and skill” CLA 1936 (SA) s3
- always start with legislation except for duty for physical harm
- Fault – does not equate to moral culpability, simply that the act was either:
  - o Intentional – intended the actual outcome
  - o Reckless – subjective state of mind
  - o Negligent – objective test -> what a reasonable person would have done

### - Civil Liability Act 1936 (SA)

#### o Process

- Start with legislation

- Identify relevant case law
- Apply both to the facts
- Duty – does d owe p a duty of care? If yes, did they act appropriately?
- Breach – (identification of standard) failed to fulfil duty of care → breached standard
- Causation
- Defences
- Damages

## DUTY OF CARE

- “Duty is an obligation of a particular scope and that scope may be more or less expansive”  
RTA v Dederer
- no general test for determining duty of care, different cases bring different issues – *Kemspsey Shire Council*
- must be link between duty of care and breach
- 2 levels of inquiry:
  - issue of law – situation where duty of care can exist?
  - Does there exist a duty based on the facts?
- Lord Atkins Neighborhood Principle: persons who are close and directly affected by my act that I ought reasonably to have them in my contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question
- Proximity: involves a notion of nearness or closeness and embraces:
  - Physical proximity (sense of space and time) between the person or property of the plaintiff and the person or property of the defendant
  - Circumstantial proximity such as an overriding relationship of employer or employee
  - Causal proximity in the sense of closeness or directness of the relationship between the particular act or cause of action and injury sustained
    - *Jaensch v Coffey*
- *Sullivan v Moody*
  - All JJs stated that the formula for determining whether or not there is a duty of care is no proximity
- *Kirby J*
  - Duty of care will be imposed when it is reasonable in all of the circumstance to do so
- *Perrett v Williams*
  - High court has been unable to establish a definition statement of when a duty of care will arise
- *Chapman v Hearse*
  - ‘to establish a prior existence of a duty of care with respect to a plaintiff who is subsequently injured as a result of a sequence of events following a defendant’s carelessness, it is not necessary for the plaintiff to show that the precise manner in which his injuries were sustained was reasonably foreseeable; it is sufficient if it appears that injury to a class of persons of which he was one might reasonable have been foreseen as a consequence’ = the precise sequence of events need not be foreseen, only that some harm may occur

- A simple statement of duty –
  - *Tabet v Gett* (2010) 240 CLR 537, in which a previous statement was cited with approval: *D'Orta Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1, McHugh J said:
    - \*\*\*\*\*"Reasonable foreseeability of physical harm is generally enough to impose a duty of care on a person who knows or ought reasonably foresee that physical harm is a likely result of his or her conduct. Liability will arise when the duty is breached and where there is a causal relationship between the breach and the harm." (37)
  - duty of care in the context of physical harm caused by a direct action of the defendant is straightforward (*Tabet*)
- reasonable foreseeability explored at duty stage – some form of injury could occur if careless – *Chapman v Hearse*
- OR established duty categories
  - *Rogers v Whitaker* – doctor & patient
  - Driver/road user – *Imbree v McNeilly*
  - Manufacturer/consumer – *Donaghue v Stevenson*
- Obvious & Inherent Risk
  - Legislative concept of no duty to warn of obvious or inherent risks
  - Grew from the defence of *Volenti*
  - CLA – s 38 – no duty to warn of obvious risk (*Kempsey Shire*)