



# TORTS

Exam Notes Preview

# *Torts Exam Notes -- Negligence*

## Contents

<b>Duty of Care.....</b>	<b>3</b>
General Rules.....	3
Immunity from Duty.....	3
Established categories .....	4
Novel cases – General.....	4
Novel cases – Pure Omissions .....	Error! Bookmark not defined.
Novel cases – Public Authorities .....	Error! Bookmark not defined.
<b>Breach of Duty.....</b>	<b>Error! Bookmark not defined.</b>
General.....	Error! Bookmark not defined.
Set the Standard of Care.....	Error! Bookmark not defined.
Standard of the Reasonable Person.....	Error! Bookmark not defined.
Standard of Person Professing a Skill.....	Error! Bookmark not defined.
S 41 Defence to s 40 - Standard of Care for Professionals .....	Error! Bookmark not defined.
Has D Breached the Standard of Care? .....	Error! Bookmark not defined.
Conclusion .....	Error! Bookmark not defined.
<b>Causation .....</b>	<b>Error! Bookmark not defined.</b>
Preliminary .....	Error! Bookmark not defined.
Factual Causation <i>CLA s 34(1)(a)</i> .....	Error! Bookmark not defined.
Scope of Liability <i>CLA s 34(1)(b)</i> .....	Error! Bookmark not defined.
Conclusion .....	Error! Bookmark not defined.
<b>Defences.....</b>	<b>Error! Bookmark not defined.</b>
Complete Defences .....	Error! Bookmark not defined.
Limitation Period.....	Error! Bookmark not defined.
Road Authorities .....	Error! Bookmark not defined.
No Duty to Warn of Obvious Risk .....	Error! Bookmark not defined.
Materialisation of Inherent Risk.....	Error! Bookmark not defined.
Voluntary Assumption of Risk .....	Error! Bookmark not defined.
Joint Illegal Enterprise .....	Error! Bookmark not defined.
Partial Defences .....	Error! Bookmark not defined.
Criminal Conduct .....	Error! Bookmark not defined.
Good Samaritan.....	Error! Bookmark not defined.
Food Donors and Distributors .....	Error! Bookmark not defined.

Contributory Negligence .....	Error! Bookmark not defined.
<b>Damages.....</b>	<b>Error! Bookmark not defined.</b>
Definitions .....	Error! Bookmark not defined.
<b>Any non MVA or MVA Before 2013 .....</b>	<b>Error! Bookmark not defined.</b>
<b>Non-Economic Loss.....</b>	<b>Error! Bookmark not defined.</b>
<b>Loss of Earning Capacity.....</b>	<b>Error! Bookmark not defined.</b>
<b>Lump Sum Compensation .....</b>	<b>Error! Bookmark not defined.</b>
<b>Interest .....</b>	<b>Error! Bookmark not defined.</b>
<b>Management/Investment Costs .....</b>	<b>Error! Bookmark not defined.</b>
<b>Gratuitous Services.....</b>	<b>Error! Bookmark not defined.</b>
<b>MVA On or After 1 July 2013.....</b>	<b>Error! Bookmark not defined.</b>
<b>Non-Economic Loss.....</b>	<b>Error! Bookmark not defined.</b>
<b>Loss of Earning Capacity.....</b>	<b>Error! Bookmark not defined.</b>
<b>Lump Sum Compensation .....</b>	<b>Error! Bookmark not defined.</b>
<b>Interest .....</b>	<b>Error! Bookmark not defined.</b>
<b>Management/Investment Costs .....</b>	<b>Error! Bookmark not defined.</b>
<b>Gratuitous Services.....</b>	<b>Error! Bookmark not defined.</b>
<b>Extra Case Notes .....</b>	<b>6</b>
<b>Duty .....</b>	<b>6</b>
<b>Breach: .....</b>	<b>Error! Bookmark not defined.</b>
<b>Causation:.....</b>	<b>Error! Bookmark not defined.</b>
<b>Defences:.....</b>	<b>Error! Bookmark not defined.</b>
<b>Damages.....</b>	<b>Error! Bookmark not defined.</b>

## Duty of Care

### General Rules

- P bears the burden of proof, which is civil standard: on the balance of probabilities.
- 'A defendant will only be liable, in negligence, for failure to take reasonable care to prevent a certain kind of foreseeable harm to a plaintiff, in circumstances where the law imposes a duty to take such care.' *Sullivan v Moody* [42].

### Immunity from Duty

- Road Authorities – *CLA s 42*
  - “(1)A road authority is not liable in tort for a failure—
    - (a)to maintain, repair or renew a road; or
    - (b)to take other action to avoid or reduce the risk of harm that results from a failure to maintain, repair or renew a road.”
- Good Samaritans – *CLA s 74*
  - “(2)A good Samaritan incurs no personal civil liability for an act or omission done or made in good faith and without recklessness in assisting a person in apparent need of emergency assistance.  
  
(3)A medically qualified good Samaritan incurs no personal civil liability for advice given about the assistance to be given to a person in apparent need of emergency medical assistance”
- Food Donors – *CLA s 74A*
  - “(2)A food donor or distributor incurs no civil liability for loss of life or personal injury arising from consumption of the food donated or distributed.  
  
(3) However, the immunity does not operate if the food donor or distributor knew or was recklessly indifferent to the fact that when the food left the possession or control of the food donor or distributor it was unsafe within the meaning of the Food Act 2001.”
- Common law immunities
  - Military in war time – *Shaw Savill & Albion Co Ltd v The Commonwealth*.
  - Police officers and prosecutors when investigating a crime – *Tame v NSW*.

- Child protection services – Sullivan v Moody.
- Parole boards – Swan (by his next friend) v South Australia.
- Emergency services – Capital & Counties plc v Hampshire City Council
- Sometimes barristers to their client in the conduct of a case – Giannarelli v Wraith.

## Established categories

- Manufacturers of goods to customers – Donoghue v Stevenson (1932) at 584.
- Employers to employees – Hamilton v Nuroof; Smith v Charles Baker & Sons.
- Road users to each other – Chapman v Hearse; Cook v Cook; Imbree v McNeilly.
- Occupiers of premises – Australian Safeway Stores v Zaluzna. Only within the bounds of what is reasonable and possible – Goldman v Hargrave; Neindorf v Junkovic.
- Doctors to patients – Rogers v Whitaker (1992).
- Schools and teachers to students – Roman Catholic Church Trustees for the Diocese of Canberra and Golburn v Hadba.
- Hospitals to patients – Ellis v Wallsend District Hospital.
- Solicitors to their client – Hawkins v Clayton; Hill v Van Erp.
- Prison authorities to prisoners – New South Wales v Bujdos.
- If there is an established category as above
  - Identify the category.
  - Cite the authority.
  - Explain why your case fits the category.
  - Move on.

## Novel cases – General

### Reasonable Foreseeability Question

- D owes a duty of care to a class of persons whom it is reasonably foreseeable that D could injure unless reasonable care was taken – Donoghue v Stevenson (1932) at 580. Grant v Australian Knitting Mills adopted Donoghue into Australian law.
- **Was it reasonably foreseeable to a reasonable** [Describe D and their position, in depth, one very long sentence, include everything] **that** [D's act or omission, how you frame this should relate to the relevant breach] **could cause** [injury/harm/damage] to [person in P's position]? Donoghue v Stevenson (1932)

## Answer the Question

- Foreseeable plaintiff?
  - Palsgraf v Long Island Rail Road Corp.
    - P in this case was someone far down the other end of the station, not foreseeable class of P.
  - What makes P or their class, a foreseeable P?
- Foreseeable harm?
  - Seltsam v McNeill.
    - Court found that at the time of 1961 it was not foreseeable that harm could occur from 12 hour use of asbestos.
  - What makes this kind of harm foreseeable to D? Did they know something or have some kind of relevant experience?
- Not farfetched and fanciful – Wyong Shire v Shirt.
- Real and not farfetched – Sullivan v Moody.
- What was foreseeable to D at the time, not what may be foreseeable now.
- “The test of foreseeability is undemanding”, “it must be approached as a test which exists in reality and operates within the limits of the reasonable” – Seltsam v McNeill [36].
- Do not need to see precise manner or events of the harm, just whether something of the same character was reasonably foreseeable – Chapman v Hearse.
- Reasonably foreseeable at the time of the negligence, cannot apply hindsight – Sydney Water Corp v Turano.

## Express Need for Salient Features

- Reasonable foreseeability is not a strenuous test, it is not sufficient to give rise to a duty of care – Sullivan v Moody [25].
- The court needs to balance factors (salient features) to determine if there was a sufficiently close relationship that justifies duty– Sullivan v Moody [50].

## Discuss Relevant Salient Features

- Salient features are developed from principles – Caltex Refineries v Stavar [173].
- Pick what is relevant, not what is easy, *aim for three in the exam*. Sam says indeterminacy is weakest.

\*\*\* there is all the other notes here, then it gets to extra case notes, just wanted to show what the chart looks like as well as what my standard notes look like\*\*\*

## Extra Case Notes

Case	Notes	Key words
<b>Duty</b>		
<i>Donoghue v Stevenson</i> [1932] AC 562	<ul style="list-style-type: none"> <li>Established a duty of care in English law.</li> <li>Need a 'special relationship' between D and P.</li> <li>To support an action for negligence, P has to show injury, caused by the breach of a duty, owed to him in the circumstances by the defendant to take reasonable care to avoid such injury.</li> <li>D owes a duty to P if P is a person, or a member of a class of persons, whom D can <b>reasonably foresee</b> could be injured if D does not take reasonable care. <ul style="list-style-type: none"> <li>At 580: You must take reasonable care to <b>avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour</b>. Who, then, in law is my neighbour? The answer seems to be—<b>persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation</b> as being so affected when I am directing my mind to the acts or omissions which are called in question.'</li> </ul> </li> </ul>	Duty, special relationship, manufacturer and consumer, injury, dangerous goods, neighbour principle, foreseeability, neighbour principle
<i>Grant v Australian Knitting Mills Ltd</i> (1936)	<ul style="list-style-type: none"> <li>Incorporated the rule of <i>Donoghue v Stevenson</i> into Australia. <ul style="list-style-type: none"> <li>At 105:</li> </ul> </li> </ul>	Australia, manufacturer

	<p>“The principle of Donoghue’s case can only be applied where <i>the defect is hidden and unknown to the consumer</i>, otherwise the directness of cause and effect is absent: the man who consumes or uses a thing which he knows to be noxious cannot complain in respect of whatever mischief follows, because it follows from his own conscious volition in choosing to incur the risk or certainty of mischance”</p>	
<p><i>Sullivan v Moody 2006</i></p>	<ul style="list-style-type: none"> <li>• <b>Foreseeability</b> cannot be farfetched nor fanciful.</li> <li>• [25] foreseeability of harm if not sufficient to give rise to a duty of care.</li> <li>• [50] In addition to foreseeability, need a second test of principles, later becoming known <i>salient features</i>. <ul style="list-style-type: none"> <li>▪ The court has to balance these factors to conclude whether there was a sufficiently close relationship that justifies duty.</li> </ul> </li> <li>• <b>Coherence</b>: Would a duty not to cause psychological harm to Sullivan, be consistent with existing duties? <ul style="list-style-type: none"> <li>▪ No, it would be irreconcilable with demands of child protection.</li> <li>▪ The duty was to the child. Not to the suspected abuser</li> </ul> </li> <li>• [54]-[55] 'ensure that the recognition of any new duty maintains the overall ‘coherence of the law’ and promotes the desirable goal of achieving consistency and imposing ‘compatible’ duties on defendants'</li> </ul>	<p>Salient features, novel cases, public authority, coherence</p>