

5. Negligence: Unpacking Duty of Care

Key elements

- It is an **action on a case**
 - **Damage is vital:** You have to have **claimable damage**
 - **Common law and the CLA** recognise several types of damage, but it must be recognised kind to be claimable
- Different types of plaintiffs will be treated under different principles, e.g. a child vs. the government vs. a public authority

• Key elements

1. The defendant owed a *duty of care* to the plaintiff
2. The duty was *breached*
3. This breach resulted in *damage* to the plaintiff

- **Courts control the scope** of this tort at all three stages, at every level
 - The existence of a duty of care may be denied in certain situations
 - Even if there was a duty, courts might rule that it was not breached
 - The damage might be declared as too remote to be recoverable

- Regarding 'breach', under the CLA, the risk of harm needs to be **reasonably foreseeable** (what reasonable steps should've been taken)

- Regarding the 'breach causing the damage': Someone has to have suffered damage by looking at the remoteness of harm

Common Law and *Civil Liability Act 2002 (NSW)*

s 5A Application of Part:

- applies to any claim for damages for harm resulting from *negligence*
- does not apply to civil liability that is excluded by section 3B.

! s 3B is complicated and convoluted
Basically, it summarises that certain actions don't fall under the CLA

s 3B Civil liability excluded from the Act

- An intentional act with the intent to cause injury or death
- Sexual assault or sexual misconduct
- Claims where workers' compensation legislation applies
- Dust diseases
- CLA was created to cap damages: To **limit** the types of damages, and access to causes of action
- These are the categories of people who will *not* get the benefit of *limited damages*
- This then allows plaintiffs to gain access to common law damages, which are higher than CLA damages (including exemplary and aggravated damages)
- Some of these areas are also covered by other legislative regimes, e.g. Workers' Compensation Act 1987 (NSW)
- For this unit, assume that motor vehicle accidents apply under the CLA

Duty of care

Under the **CLA**, on the duty of care, the common law applies **except** in specific circumstances, e.g.

- public authorities
- professional negligence, e.g. lawyers, doctors, architects, etc.
- mental harm
- intoxication
- recreational activities
- criminal enterprise



REMEMBER: When going through the duty of care, look at the particular situation, the circumstances of the case, who is the plaintiff, who is the defendant, what's the type of harm, etc., to determine which principles are required to establish whether a duty of care was owed

Breach and causation

- **Breach and Causation:** the common law tests have been codified/modified by the CLA
 - Breach: **ss 5B and 5C**
 - Causation: **ss 5D and 5E**
- Again, even with the CLA, refer to the common law tests: The **'but for' test**, which is the factual causation at common law (CLA: **'necessary condition'**)

Historical origin and evolution

- Donoghue v Stevenson, a landmark decision: The **neighbour principle** has become the *lingua franca* for the tort of negligence

- **Donoghue v Stevenson [1932] AC 562**

- In 1928, Mrs Donoghue went with a friend to a café in Scotland for an ice-cream soda, and the **friend purchased** an ice cream and ginger beer for her. The ginger beer came in an opaque glass bottle with the manufacturer's name, David Stevenson, on it. When the beer was poured into the tumbler, a decomposed snail floated out of the bottle. Donoghue sued Stevenson for shock and severe gastro-enteritis.
- **NOTE:** Under the privity of contract, Donoghue couldn't sue under contract law, and it would be difficult for the friend to sue because she didn't suffer any damages
- Does it matter that the bottle was opaque? Consider
 - Should the manufacturer be liable?
 - Personal responsibility: Had she known, she would not have drunk it
 - Contributory negligence: Did she see something but drink it anyway?
- The HOL, by a majority of 3:2, allowed Donoghue's appeal: Laid down the proposition that there is a separate tort of negligence
- Lord Atkin reasoned

The liability for negligence, whether you style it such or treat it as in other systems as a species of culpa, is no doubt based upon a general public sentiment of moral wrongdoing for which the offender must pay. But acts or omissions which any *moral code* would censure cannot in a practical world be treated so as to give a right to every person injured by them to demand relief. In this way *rules of law* arise which limit the range of complainants and the extent of their