

TORTS EXAM NOTES

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fact intensive (engage with hypo facts and if relevant draw on cases from that topic)

- duty: salient features
- breach: negligence calculus
- causation: NIA
- loss distribution: VL (employee v. contractor)

remember separate standalone negligence claims embedded in the main process:

- causation: 3P negligence as a potential NIA
- defence: Contributory Negligence
- loss distribution: there could be **direct claims against the employer**; AND **vicarious claim against the employer** (have to do a complete, separate underlying negligence claim against the employee + apply vicarious liability rules);

INTRODUCTION

identify the shorthand:

WA or the Act: *Wrongs Act 1958* (Vic). when a section is referred to, it refers to the section in the WA.

RPI: recognized psychiatric illness.

RF: reasonably foreseeable; RF test: reasonable foreseeability test.

PMH: pure mental harm; CMH: consequential mental harm.

PEL: pure economic loss; CEL: consequential economic loss.

PA: public authority

SOP: separation of powers.

PPO: peer professional opinion

NIA: new intervening act

CL: common law

3P: Third Party

CN: contributory negligence

identify the actors:

the plaintiff is [Name]. his or her class of persons is [...].

the defendant is [Name]. his or her class of persons is [...].

confirm admissibility:

here, the exclusions (e.g. smoking, dust-disease, etc) in WA s 45 do not apply to preclude an action in negligence.

HARM

Negligence is not actionable *per se*. To establish a negligence claim, [the P] must show that he or she suffered a **legally recognisable harm**. here, [the P]’s harm include:

- [X], physical injuries.... and is legally recognisable.
- [Y], economic loss that is a result of physical injuries sustained by the [Plaintiff]. consequential economic loss, is legally recognisable.
- [Z], pure mental harm... because it was not caused by any physical injuries (*WA s 67*). [Z], being a recognized psychiatric illness other than ‘mere grief or sorrow’, is legally recognisable harm (*Tame*), and is not precluded from damages because it consists of an RPI (*s 75*).

Physical injuries	Is a form of Legally recognisable harm
Consequential mental harm	Mere grief and sorrow are among the ‘ordinary and inevitable incidents of life’... fright, distress or embarrassment without more, will not ground an action in negligence. emotional harm of that nature may be evanescent or trivial (<i>Tame</i>). To recover damages, the mental harm [P] suffered has to consist of a recognized psychiatric illness (<i>WA s 75</i>).
Pure mental harm	
Consequential economic loss	Is a form of legally recognisable harm.
Pure economic loss	

DUTY

general rules

[the plaintiff] must show, that [the defendant] owes him/her a duty of care (*Donoghue*), which generally involve three steps.

To demonstrate the existence of a duty, *generally*, [the plaintiff] must show that:

1. it is reasonably foreseeable that *any* carelessness by the [defendant], would cause *any* kind of harm to someone in [the P’s] class, i.e. [state the P’s class]. (*Chapman*)
2. P and D is in an established relationship and the usual scope of that duty covers the behaviour of D, i.e. [an act or an omission].
3. if there is no established relationship, or if the behaviour of D is outside the usual scope of that duty, P must then prove that a duty should be imposed based on salient features. (*Sullivan*).

first step: Reasonable foreseeability

Common Law RF test	<ul style="list-style-type: none"> • is it reasonably foreseeable that <i>any</i> carelessness by the [defendant], would cause <i>some</i> kind of harm to someone in [the P’s] class, i.e. [state the P’s class]? (<i>Chapman</i>) • the precise manner or the exact sequence of events need not be RF (<i>Chapman</i>) • it is a rather undemanding test to meet/ a low threshold to get over.
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Apply the RF	As it is accepted that the RF test is undemanding, and the precise manner of harm caused need not be RF (Chapman), it is reasonably foreseeable that any carelessness by [D] would cause some kind of harm to someone in [P's] class, i.e. [state P's class].
Modified RF test in PMH	See PMH
Modified RF test in PEL	See PEL

second step: Established Relationship and relevant scope

established relationship

Established relationship	<ul style="list-style-type: none"> • manufacturer and consumer (<i>Donoghue</i>) • road users/drivers to other road users/passengers/passers-by (<i>Chapman</i>) • employer to employee (<i>Paris</i>) • school/headmaster/teacher to students (<i>Geyer</i>) • prison authority/prison guards to prisoners (<i>Budjoso</i>) • hospital/doctor to patient (<i>Rogers</i>) • lawyer to client (<i>Heydon</i>, subject to advocates' immunity) • occupier/entrant (only re state of premises; cf activities on the premises e.g. <i>Modbury; Adeels</i>) (<i>WA s 14B(3)</i>)
Apply Established relationship	The [] relationship is an established duty in common law Analogize: the relationship between [P and D] is analogous to the established duty relationship of [] (CITATION), as _____. but they differ in _____. therefore, a salient features analysis would be applied (<i>Sullivan</i>).

relevant scope

Acts v omission	Common law in Australia does not recognize a 'general duty to rescue' (<i>Stuart</i>) or a duty to take affirmative actions to prevent harm (<i>Modbury</i>) absent special relationships.
Special relationships	<ul style="list-style-type: none"> • employer to employee (<i>Red Garter; Paris</i>) • school/headmaster/teacher to students (<i>Geyer</i>) • prison authority/prison guards to prisoners (<i>Budjoso</i>) • hospital/doctor to patient (<i>Rogers</i>) • lawyer to client (<i>Heydon</i>, subject to advocates' immunity) • occupier/entrant (only re state of premises; cf activities on the premises e.g. <i>Modbury; Adeels</i>) (<i>WA s 14B(3)</i>)
Apply	There is generally no duty to act affirmatively to prevent harm (<i>Modbury; Stuart</i>). However, with some special relationships or salient features of the circumstance, the court has recognized that the scope of one's duty covers taking affirmative actions. <u>If it fits</u> , as this case falls within a special duty relationship, D owes a duty of care to P which covers taking positive steps. <u>If somewhat analogous</u> , while this may not fall in a special relationship, [P] may argue that it is analogous to the special relationship of [](CITATION) because []. [D] may

	distinguish it by [___]. Therefore, a salient features analysis would be applied (<i>Sullivan</i>).
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special rules re Public Authorities (location in the structure: between step 2 and 3)

	<p>STEP one reasonable foreseeability</p> <p>STEP two established duty and relevant scope</p>
Public authority	<p>The D, being [___], falls in the definition of Public Authority under s 79(). Hence, special rules regarding duty of PA in both common law and statute applies (WA s82, 83, 85).</p> <ul style="list-style-type: none"> • Crown (e.g. the Commonwealth or the state of Victoria) • Public service body (e.g. Victoria government parliament, or Victorian government department) • A body... established by or under an Act for a public purpose (e.g. the police) • A council within the meaning of the Local Government Act (e.g. local government council) • Or a person holding an office or position established by or under an Act (e.g. a police officer or a commissioner) <div style="border: 1px solid black; padding: 5px;"> <p>S79</p> <p>(a) the Crown;</p> <p>(b) a public service body within the meaning of the Public Administration Act 2004 ;</p> <p>(c) a body, whether corporate or unincorporate, that is established by or under an Act for a public purpose;</p> <p>(d) a Council within the meaning of the Local Government Act 2020 ;</p> <p>(e) a body established or appointed for a public purpose by the Governor in Council or by a Minister, otherwise than under an Act;</p> <p>(f) a person holding an office or position established by or under an Act;</p> <p>(g) a person holding an office or position to which he or she was appointed by the Governor in Council or a Minister otherwise than under an Act;</p> <p>(h) any other person or body prescribed (or of a class prescribed) as an authority to which this Part applies (in respect of all or specified functions);</p> <p>(i) any person or body in respect of the exercise of a public or other function of a class prescribed for the purpose of this part.</p> </div>
Special rules re police immunity	<p>Police immunity with respect to investigations and the prosecutors' immunity [advocate's immunity]: the greater public interest accorded unimpeded investigation by the police...precludes any duty of care to the P (<i>Cran</i>)</p>
Acts v Omission	<p>Only applies IF omission. here, the P is arguing that the PA fail to exercise its statutory capacity i.e. an omission, rather than exercised its power negligently i.e. an act when it does 'step into the arena' (<i>Herridge</i>).</p> <p>By using 'may', the statute is conferring a discretionary power (rather than statutory duty) on the PA. The starting point is that there is generally no duty to exercise a statutory power (<i>Herridge</i>). a duty may be found based on salient features (see below) (<i>Herridge</i>), but there will be a higher threshold.</p>
Policy v operational	<p>If an act. here, the P is arguing that the PA exercised its power negligently i.e. an act when it does 'step into the arena' rather than failed to exercise its power i.e. an omission.</p>