

KEY ELEMENTS OF NEGLIGENCE

Negligence is an action on the case—claimable damage is vital to initiate an action. Negligence has 3 elements: i) The defendant owed a duty of care to the plaintiff; ii) The duty was breached iii) This breach resulted in damage to the plaintiff.

Civil Liability Act 2002 (NSW)

Section 5A: This Part applies to any claim for damages for harm resulting from negligence. This Part does not apply to civil liability excluded by s 3B.

Section 3B: These areas are covered by common law and and/or other legislative regimes: an intentional act with the intent to cause injury or death, sexual assault or sexual misconduct, claims where workers compensation applies, dust diseases.

The CLA must apply concurrently to the common law for the DOC in these specific circumstances: public authorities, pure mental harm, recreational activities, professional negligence, intoxication, criminal enterprise.

DUTY OF CARE (DOC)

A DOC will arise if the defendant undertakes an activity (e.g., manufacturing), which is alleged to give rise to a duty, will foreseeably injure the plaintiff, if reasonable care is not taken in carrying out that activity. It is a duty to take reasonable care to avoid causing the specifically foreseeable kind of injury to identifiable people in identifiable circumstances.

Reasonable Foreseeability of Harm

Donoghue v Stevenson [1932] is the landmark decision for establishing the test of reasonable foreseeability of harm (paradigm cases):

Donoghue v Stevenson [1932] AC 562

F	D went with a friend to a cafe in Scotland Friend purchased an ice-cream soda and a ginger beer for D (privity of contract) • The ginger beer came in an opaque glass bottle with the name of the manufacturer (S) written on it • A decomposed snail floated out of the bottle as the beer was poured into the tumbler • D sued S for shock and severe gastroenteritis
J	The House of Lords by a majority 3:2 laid down the proposition that there is a separate tort of negligence. <ul style="list-style-type: none"> Lord Atkin reasoned: "The liability for negligence...cannot in a practical world be treated so as to give a right to every person injured by them to demand relief..You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour". Lord Atkin continued to explain who is a neighbour: "Who, then, in law is my neighbour? The answer seems to be – persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected [by]...the acts or omissions which are called in question".

The 'neighbour principle' was applied in *Grant v Australian Knitting Mills [1936]*:

Grant v Australian Knitting Mills [1936] AC 85

F	G brought underpants from a retailer who had purchased them from AKM • G wore the underpants for a week and developed severe dermatitis (spent 17 weeks in hospital) • Underpants had free sulphites which might have caused dermatitis which was not something G could see to exercise any judgment
J	The PC held that the damage suffered by G was caused by the negligent way AKM made the garments (fell within the 'neighbour principle'). The PC clarified that the principle can only be applied where the defect is "hidden and unknown to the consumer, otherwise the directness of cause and effect is absent".

Home Office v Dorset Yacht Co Ltd [1970] AC 1004

F	Juvenile detainees were under the supervision and control of 3 officers on an island • 7 boys escaped and boarded a nearby yacht which collided with a moored yacht owned by DY • DY sued the HO (government department in charge of prisons) for damages
J	The HoL found HO owed a DOC to DY because the people who might be harmed were foreseeable (yachts moored in the harbor) if the boys escaped custody, despite the damage being caused by the independent activity of the boys.

Meaning of Reasonable Foreseeability

It is relevant to all 3 elements of negligence: 1) DOC: whether "an injury" was reasonably foreseeable to a class of persons; 2) breach of duty: whether the "risk of injury" by the kind of carelessness was reasonably foreseeable; 3) damage caused: whether the "kind of damage" suffered by the plaintiff was reasonably foreseeable.

Chapman v Hearse (1961) 106 CLR 112

F	C was thrown out of his car after his negligent driving resulted in a collision • Dr Cherry began to assist C • A car driven by H hit DC and killed him • DC's estate successfully sued H • H argued that C was liable for contributory negligence • C argued that the sequence of events was not reasonably foreseeable
I	Did C owe a DOC to DC to avoid placing DC in a position where he might be endangered?
J	The HC held that a person (C) who is negligent owes a DOC to take reasonable care to prevent injury to a person (DC) who comes to rescue or assist them. <p>"It is, we think, sufficient ... to ask whether a consequence of the same general character as that which followed was reasonably foreseeable ... it 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 reasonably have been foreseen as a consequence"</p>

NOTE: What is reasonably foreseeable (the unforeseeable plaintiff) can change according to the state of scientific knowledge regarding risks to certain injuries e.g., risk of exposure to asbestos.

Accepted Categories of Duty

It is easy to establish the DOC in accepted categories where: 1) the courts have accepted that a duty arises e.g., physical harm or property damaged caused by an act or omission; 2) the elements to prove a duty have been established e.g., PEL caused by an act.

The following factors affect the approach of the DOC: 1) whether an act or omission is involved ii) what kind of harm has been caused; iii) who the defendant is; iv) who the plaintiff is; vi) whether there is a special relationship between the plaintiff and the defendant e.g., occupier and entrant, employer and employee, manufacturer and consumer.

Salient Factors Test

The salient factors test should only be used where i) reasonable foreseeability of harm is inadequate alone to find a conclusion of duty (not paradigm); and ii) the facts do not fall under an established category duty i.e., novel cases (e.g., harm from climate change) or extensions of established categories.

Caltex Refineries Pty Ltd v Stavar [2009] NSWCA 728

F	Husband worked from 1964-1991 with asbestos in oil refineries (CR) • S would wash his asbestos-contaminated clothes • Legislation came into effect in 1971 providing that works with asbestos wear protective clothing to be washed on site • S developed malignant mesothelioma
I	Whether CR (employer) owed a duty of care to S (employee's wife)?
J	Allsop P held "if the posited duty is a novel one, the proper approach is to undertake a close analysis of...the relationship between the plaintiff and the putative tortfeasor by references to the "salient factors" affecting the appropriateness of imputing a legal duty to take reasonable care to avoid harm or injury". <p>A non-exhaustive list of salient factors include: Foreseeability of the harm • Nature of harm alleged • Degree/nature of control by the defendant to avoid harm • Vulnerability of the plaintiff • Degree of reliance by the plaintiff upon the defendant • Assumption of responsibility by the defendant • Proximity of the plaintiff to the defendant • Existence or category of relationship between the defendant and the plaintiff • Nature of the activity undertaken by the defendant • Degree of danger to be caused by the defendant's conduct • Knowledge by the defendant that the conduct will cause harm to the plaintiff • Indeterminacy of liability • Nature and consequences of potential action to avoid harm • Imposition on individual autonomy • Conflicting duties arising from common law or statute • Consistency with any statute relevant to the existence of a duty • Coherence in the structure and fabric of the common law</p>

NOTE: Make sure to establish reasonable foreseeability of harm before discussing the salient features of the relationship between the plaintiff and defendant.

Novel Cases

Approach: 1) Start with the test of reasonable foreseeability of harm (*Donoghue*); 2) Apply the salient factors approach to determine whether or not a duty of care can arise (it is not necessary to make findings about all these factors in every novel case) 3) Make determinations by reasoning of analogy to others cases.

Policy Concerns

Sullivan v Moody (2001) 207 CLR 562

F	S was accused of sexually abusing his daughter • No criminal charges were laid • S claimed that the medical practitioners acted negligently in investigating the possibility of sexual abuse • S suffered a divorce, shock, distress, psychiatric injury and consequential financial loss
I	Whether the defendants owed a DOC to S (father) to exercise reasonable care in investigating the allegations of sexual abuse?
J	The HC did not find a DOC because if mere reasonable foreseeability of the harm subjected the first person to legal liability to compensate the second person by way of damages for negligence, this would: 1) impose an intolerable burden of potential liability; and ii) result in the tort of negligence subverting many other principles of law and statute. <ul style="list-style-type: none"> • "A duty of the kind alleged should not be found if that duty would not be compatible with other duties which the respondent owed" • Difficult to limit the extent and potential indeterminacy of liability e.g., wide range of people who might foreseeable suffer some kind of harm • Why limit the extent and liability to parents "if the suspected child abuser were a relative...schoolteacher, or neighbor, or a total stranger"

DOC CATEGORY: PHYSICAL HARM

Physical Harm Caused by an Act

This is the paradigm for the DOC (physical injury and property damage have the same requirements for DOC). The test is reasonable foreseeability of harm—can establish a DOC by referencing *Donoghue v Stevenson [1932]* or *Grant v Australian Knitting Mills [1936]*.

Physical Harm Caused by an Omission

It is more difficult to impose a DOC for physical harm or property damage caused by an omission—partly, because it is harder to establish a duty for something that was not done (omission) than it is for something that was done (act). It alters what is required to establish a DOC in such situations:

Romeo v Conservation Commission of the Northern Territory (1998) 192 CLR 431

F	R arranged to meet friends for a beach party at a Reserve • R arrived at 10:15pm and consumed 150 ml of rum • R fell 6 ½ m from the top of a cliff and became a paraplegic • R could not remember the fall • R argued that the omission was the failure to fence off the reserve from a cliff
J	The HC (majority) held that there was no DOC in this case. Toohey and Gummow JJ observed that the CCNT: <ul style="list-style-type: none"> • "was under a general duty to take reasonable steps to prevent persons entering the Reserve from suffering injury...But the taking of such steps did not extend to fencing off an area of natural beauty where the presence of a cliff was obvious" • The nature of the danger should be "assessed before the event according to its obviousness and the care ordinarily exercised by the public" • "It is one thing to hold that a person owes a duty of care of some kind to another. But the critical question is commonly the measure or scope of that duty." • It was not appropriate to consider the contributory negligence of R but is "preferable to approach the matter on the footing that there was a duty of care on the respondent to take any steps that were reasonable to prevent the foreseeable risk becoming an actuality"

An affirmative duty to act must be held to exist, for an omission to give rise to a DOC:

Hargrave v Goldman (1963) 110 CLR 40

F	G owned a grazing property on which a tree was struck by lightning setting it on fire • G cleared the area in the vicinity of the combustible material and damped the fire • G left the area to let the logs burn out • Fire spread to H's property (property damage) • H sued G for negligence
J	The HC held "a man has a duty to exercise reasonable care when there is a fire upon his land (although not started or continued by him or for him), of which he knows or ought to know, if by the exercise of reasonable care it can be rendered harmless or its danger to his neighbours diminished".

No Duty to Rescue

The general rule in negligence law is that there is no duty to rescue—due to the unwillingness of the common law to recognise a duty of affirmative action.

People will not be required to rescue another person unless they have created the risk or endangered the person by their own action:

Stuart v Kirkland-Veenstra (2009) 237 CLR 215

F	Police found V attempting to commit suicide • V persuaded them that he changed his mind • V drove to his garage at home and completed the suicide • KV (wife) brought a claim against the police that they should have exercised their powers under the Mental Health Act
J	The HC held the police did not owe a DOC to a person who was attempting to commit suicide. It was not the police who controlled the risk but V.

Section 57: A good samaritan who assists a person who is apparently injured or at risk of being injured in an emergency will incur no liability.

Section 58: Section 57 does not apply if the good samaritan created the risk/injury or was under the influence or failed to exercise reasonable care and skill.

Duties to 3rd Parties: Controlling the Conduct of Others

The defendant is directly liable for their own failure to exercise care over the conduct of the persons who cause harm to the plaintiff e.g., parents for the behaviour of their children, criminal activity by a third party (see *Dorset Yacht [1970]* NB: duty to control was the basis of liability).

An occupier of land owes a duty to take reasonable care to protect a person lawfully on their land, including from the conduct of third parties.

Modbury Triangle Shopping Centre v Anzil (2000) 205 CLR 254

F	A was employed by a video shop which leased premises in the centre • A closed the shop and walked to the carpark when he was attacked by 3 unknown men and was badly injured • Carpark was lit by lights which were on a timer which turned the lights off at 10 • Lighting was provided the discretion of MTSC and the tenant paid a proportion of the cost under the lease • 2 years before the practice had been to leave the lights on until 11pm
J	The HC (majority) held that the DOC "as an occupier of land did not extend to taking reasonable care to prevent physical injury to the first respondent resulting from the criminal behaviour of third parties on that land". Gleeson CJ held: <ul style="list-style-type: none"> • The basis of the occupier's duty in relation to the condition of the premises was "control over, and knowledge of, the state of the premises" — MTSC had no control over the behaviour of the men who attract A • Reliance could not be the basis of a DOC i.e., the video shop could have had its own additional safety arrangements • Not a case of assumption of responsibility — the capacity to illuminate the carpark ≠ MTSC had the obligation to protect A from attack by 3rd parties • A DOC may arise in circumstances in which the criminal conduct has a "high degree of foreseeability and predictability" • "The possibility that knowledge of previous, preventable, criminal conduct, or of threats of such conduct, could arguably give rise to an exceptional duty"