

# TORTS EXAM NOTES

## Elements Summary:

- ❖ **Duty of care:** Defendant owes plaintiff a duty of care
- ❖ **Breach:** Duty of care owed to the plaintiff has been breached by the defendant
- ❖ **Causation:** Harm that is legally compensable is not too remote from the defendant
- ❖ **Defence:** No defenses applies

## Introduction

Dear \_\_\_\_\_

The facts you have relayed to me indicate that you might be subject to a claim in negligence by X/you might be able to bring a claim in negligence against X.

To make out a cause of action in negligence, [the plaintiff] prove the general elements of duty, breach, causation and remoteness of injury (Deane J in *Jaensch v Coffey*).

Note that all sections I refer to in this letter are in reference to those in the *Wrongs Act 1958* (Vic).

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## DUTY OF CARE

Since *Perre* and *Oysters*, Australia has adopted an incremental approach in determining the existence of a duty of care. A duty of care may be owed by virtue of the relationship being one which the law recognizes as giving rise to a duty of care (McHugh in *Perre*). Otherwise, courts will look (in the absence of such a relationship or an analogous one) for a duty based on reasonable foreseeability and salient features (*Sullivan v Moody*).

First question → Is there an **established** duty creating relationship? Or **can you draw analogy** with one? (McHugh J in *Perre*)

Consider immunity/non-recognised relationships

- **Is the potential defendant ‘immune’ from a duty of care?**
  - At common law: *D’Orta* (advocates’ immunity- barristers)
- **Distinguish police conducting investigations** and non operational policy matters (*Hill/Cran; Zaleski*)
- *Wrongs Act* - Food donors – s. 31F, volunteers – s. 37
- **Is the defendant a rescuer?** Generally they have no duty to aid (See *Heyman*)
  - *Wrongs Act* – Good Samaritans: ss 31A and 31B

### Is there an established duty creating relationship?

The courts have recognized a duty of care in this established category \_\_\_\_\_. Therefore, X owes you a duty. The scope of this duty generally extends to...

(Reminder: if confident about established category, don’t bother with salient features)

<b>Manufacturer and consumers</b> (Think of economic exchange)	<ul style="list-style-type: none"> <li>• <i>Donoghue v Stevenson</i></li> </ul> Central feature that gives rise to duty is the product involved and that the consumer has no chance to inspect or take precautions to avoid risks associated with the product
<b>Road Users</b>	<ul style="list-style-type: none"> <li>• <i>Chapman v Hearse</i> - Anyone travelling in vehicles (and pedestrians) is usually owed a duty of care by those who drive such vehicles: they are injured by direct impact resulting from the driver’s carelessness</li> </ul>
<b>Employer and employee</b>	<ul style="list-style-type: none"> <li>• <i>Paris v Stepney Borough Council; McLean v Tedman</i></li> <li>• Employers owe employees a duty to provide a safe system of work and a safe place work</li> </ul>
<b>School and pupil</b>	<ul style="list-style-type: none"> <li>• <i>Geyer v Downs</i>**</li> <li>• <i>Oyston v St Patrick’s College</i></li> <li>• School owes a pupil a duty of care, but what are the limits?</li> </ul>
<b>Doctor and patient</b>	<ul style="list-style-type: none"> <li>• <i>Rogers v Whitaker</i></li> <li>• Doctors owe patients a duty of care</li> <li>• Now there is uncertainty as to whether doctors owe third parties a duty of care</li> </ul>

	<ul style="list-style-type: none"> <li>• <i>Lowns v Woods</i> – NSWCA extended a doctor’s duty to non-patients</li> </ul>
<p><b>Occupier of premise and entrant</b></p> <p>Occupier is someone in control of premises who can exclude others (<i>Wheat v Lacon</i>)</p>	<ul style="list-style-type: none"> <li>• <i>Wrongs Act Part IIA</i></li> <li>• Under statute a duty will be owed by an occupier with respect to the <u>state of the premises</u> <ul style="list-style-type: none"> <li>○ s.14B(3) for liability: note the wide definition/application of principles – e.g. an invitee is any person on premises, whether invited or not; premises include any movable things and spaces</li> <li>○ s. 14B(4) when assessing breach – considerations include intoxication and illegality</li> </ul> </li> <li>• Common law governs activities and conduct on premises: <ul style="list-style-type: none"> <li>○ <i>Australian Safeway Stores v Zulunza</i></li> <li>○ <i>Modbury Triangle</i> (no duty)</li> <li>○ <i>Adeels Palace</i></li> </ul> </li> </ul>
<b>Landlord and tenant</b>	<ul style="list-style-type: none"> <li>• <i>Jones v Bartlett</i></li> </ul>
<b>Local government authority and facility</b>	<ul style="list-style-type: none"> <li>• <i>Wyong Shire Council v Shirt</i></li> <li>• <i>Nagle v Rottnest Island Authority</i></li> </ul>
<b>Sports participants</b>	<ul style="list-style-type: none"> <li>• <i>Agar v Hyde</i> (no duty of care owed)</li> </ul>
<b>Prison authority and prisoner</b>	<ul style="list-style-type: none"> <li>• <i>New South Wales v Budjuso</i> (held that the prison authority owed a duty to prisoner to protect the prisoner from harm)</li> <li>• <i>State of NSW v Godfrey</i> (held that a duty of gaoler to prevent criminal activity of an escaped prisoner, so as it has been established, is confined to the course of the escape, where control is still capable of being asserted)</li> </ul>
<b>Builders/engineers/inspectors and subsequent purchasers</b>	<ul style="list-style-type: none"> <li>• <i>Sutherland Shire Council v Heyman</i></li> <li>• This is a contentious and developing area, dependent on the relevant salient features</li> <li>• In limited circumstances, a duty of care will exist</li> <li>• Generally builders owe a duty to subsequent homeowners but not to commercial buyers who have the means, knowledge and commercial interest to undertake necessary surveys of structural integrity</li> </ul>
<b>Providers of financial information to creditors/investors</b>	<ul style="list-style-type: none"> <li>• <i>Wrongs Act ss 57, 58, 59, 60</i> all deal with ‘persons holding out as possessing a particular skill’</li> <li>• <i>Hedley Byrne v Heller</i></li> <li>• <i>Mutual Life and Citizens Assurance v Evatt</i></li> <li>• <i>Esanda Finance Corporation v Peat Marwick Hungerfords</i> – However, in this case, a lender relied on statements made by auditors which were alleged to be negligently inaccurate. The</li> </ul>

	auditors avoided a duty of care in the absence of a client or other relevant relationship
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If it does fall into an established category, does an issue with the scope of the duty arise?

- ‘There is an established relationship where a duty of care is owed: \_\_\_\_\_. X is authority for that duty of care relationship... The critical question here is whether that duty of care should extend to the circumstances between you and \_\_\_\_\_.’
  - ‘Even though an established category of duty of care arises in this situation, there is doubt about the boundaries of that category.’
  - ‘To the extent that incremental law-making is required, it is a logical extension of the common law position in \_\_\_\_\_ that a duty of care arises in this case.’
- Even if there is a duty, the **salient features** approach can be used to define the scope of that duty.
  - Occupiers: *Modbury*
  - Local councils: *Wyong/ Graham Barclay Oysters*
  - Landlords: *Jones v Bartlett*
  - Teachers: *Geyer v Downs* - could this duty extend to activities off school premises e.g. school excursions?

Analogy with existing duty relationships? (McHugh in *Perre*)

#### ARE YOU DEALING WITH AN OCCUPIER? (ESTABLISHED RELATIONSHIP) p. 15

**Occupier:** any person with control over premises, right to exclude (*Wheat v E Lacon*)

**ASK:** Is it about the state of premises or about activities/conduct on premises?

- Under statute a duty will be owed by an occupier with respect to the state of the premises
- ‘With respect to \_\_\_\_\_, you would argue that a duty of care is based on the occupier established relationship. The duty would be founded in the *Wrongs Act* because the alleged breaches/failures on the part of the Council were faults with the premises (i.e. \_\_\_\_). Under s. 14B(3), such a duty extends to take affirmative action.’
- Common law governs activities and conduct on premises:
  - *Australian Safeway Stores v Zulunza*
  - *Modbury Triangle* (no duty)
  - *Adeels Palace*

#### PARTICULAR HARM (Pure mental harm; pure economic loss) p. 12

##### Mental harm

Is any of the damage suffered by the plaintiff ‘mental harm’? If so, must consider (even if you have an established duty relationship): This replaces the reasonable foreseeability test.

- Is it a recognized psychiatric illness?
- Is it consequential or pure mental harm?
- Is it foreseeable?

For **pure mental harm** – we discuss now, even if established category (*deal with consequential mental harm at remoteness stage*)

- Recall *Tame*; *Annetts*; *Wicks* – use them as illustrations

- Key provisions for pure mental harm – ss. 72 and 73
  - Section 73 denies liability for secondary/indirect “victims” (unless they witness the primary harm or are in a close relationship with the primary victim)
  - Section 72 introduces ‘normal fortitude’ and factorial circumstances to consider

### Reasonably foreseeable?

**Second question** → If not established category, dealing with pure mental harm, or still uncertain, it is necessary then to turn to the second test: reasonable foreseeability and salient features: *Sullivan*.

‘As your relationship is a novel inquiry, we use the reasonable foreseeability and salient feature approach to determine whether a duty of care is owed.’

**WE ASK: Is some kind of harm to the plaintiff a reasonably foreseeable consequence of any action of the defendant? (*San Sebastian*)**

The chain of events need not be foreseeable (*Chapman*), and the courts have considered this an undemanding test (*Godfrey*).

- Is any harm in the realm of intelligent imagination? (Hayne J in *Modbury*)
- A consequence is reasonably foreseeable if it is ‘not unlikely’ to occur as a result of the actions of the defendant (*Chapman*, endorsed by Barwick CJ in *Caterson*)
- ✓ **Is the defendant part of an unforeseeable class of people? (Rare)**
  - Where the plaintiff is part of a class of people disconnected from the defendant in some way
    - Geography (*Bourhill v Young*), time without control (*Turano*), lack of knowledge (*Seltsam v McNeill*)
  - E.g. *Sydney Water v Turano* – 20 years after drainage works, tree falls on car – found enough distance and separation between Sydney Water and Mrs. Murano, it was far fetched
  - E.g. *Seltsam* – handyman encountering asbestos unknown to suffer from mesothelioma cf asbestos workers who were known to be at risk of disease (no evidence that minimum exposure to asbestos like that experienced by the defendant could give rise to injury)
- ✓ Is the loss **pure economic loss**? If so, then that class of loss must be foreseeable (*Perre*)

‘In your case, I do/do not think it will be problematic for the courts to conclude that the harm was reasonably foreseeable.’ [Give examples of kind of harm]

### Salient features + grappling with policy

‘Courts will then weigh up the salient features of your relationship with policy considerations. This is a multi-faceted inquiry, and the extent and number of salient features is unclear (see Allsop P in *Caltex*). Attaching weight to salient features is an evaluative act.’

I will focus on the salient features of: (which are more salient than others?)

- ✓ Control (*Geyer, Oysters, Crimmins*)
- ✓ Vulnerability (*Geyer, Perre*)

- ✓ Knowledge (*Geyer, Nagle*)
- ✓ Indeterminacy (*Sullivan, Agar, Perre*)
- ✓ Assumption of responsibility (*Modbury, Geyer, Esanda*)
- ✓ Coherency in the law (*Sullivan, Hunter*)
- ✓ Defensive practices (*Sullivan, Cran*)
- ✓ Diversion of resources (*Sullivan, Hill, Cran*)
- ✓ Policy considerations
- ✓ Practicality and fairness
- ✓ Proximity (*Sullivan, Perre*)
- ✓ Autonomy (*Stuart, Agar*)

❖ **NB: Pure economic loss? SALIENT FEATURES APPROACH HAS BEEN MODIFIED (p.13)**

### CONTROL OVER THE RISK

When arguing for P	When arguing for D
<ul style="list-style-type: none"> <li>• <b><i>Crimmins v Stevedoring</i></b> – Statutory body had the power to make regulations in relation to employment of stevedores. D controlled exposure to harm through control of workplace</li> <li>• <b><i>Geyer v Downs</i></b> - Subjected the pupil to his control by requiring her, as an early-arriving pupil to comply with the instructions he laid down for the pupils</li> <li>• <b><i>Budjoso</i></b> – Control grounds duty in gaol-prisoner relationship</li> <li>• <b><i>Perre v Apand</i></b> – Supply of diseased seed was control of risk of harm</li> </ul>	<ul style="list-style-type: none"> <li>• <b><i>Agar v Hyde</i></b> – the IRFB had no legal or practical control, influence is not control</li> <li>• <b><i>NSW v Godfrey</i></b> – The duty of the gaoler to prevent the criminal activity of an escaped prisoner is confined to the course of the escape, where control over the prisoner is still capable of being reasserted</li> <li>• <b><i>Stuart v Kirkland-Veenstra</i></b> – Police officers were not a source of the risk – Mr. Veenstra alone was the source</li> <li>• <b><i>Modbury</i></b> – Control only extended to state of premises and not third party criminal conduct</li> <li>• <b><i>Graham Barclay Oysters</i></b> – Public authority had limited managerial control over the industry, and was in this way removed from the circumstances</li> </ul>