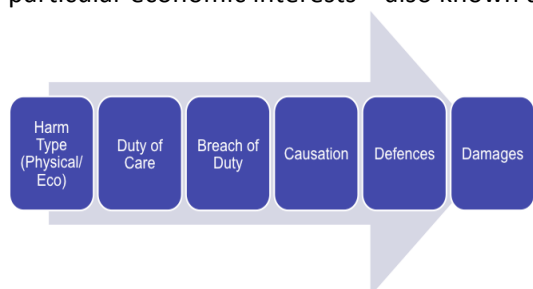


NEGLIGENCE, TORT

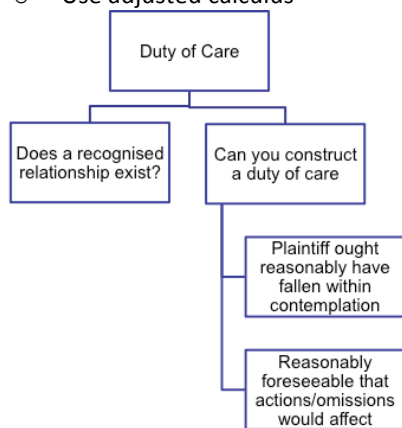
What does one hope to gain for suing for negligence?

- The **Tort of Negligence** only provides **monetary compensation** for harm down to property, person or particular economic interests – also known as **damages**.



Step 1: Recognize the type of harm:

- Physical / Property
 - o Use the normal calculus
- Pure Economic Loss
 - o Use adjusted calculus



Step 2: Arguing a Duty of Care:

Option 1: Accepted Relationships (e.g: Doctor and patient)

- Occupier and Visitors (*Australian Safeway Stores*)
- Manufacturer to Consumer (*Donoghue v Stevenson*)
- The potential plaintiff is *entirely dependent* on the other party. Dependence is the common thread.

Option 2: "Neighbour" Relationship

Where the **plaintiff ought reasonably** have been in contemplation; and was it **reasonably foreseeable** that the action could cause harm. These rule comes from case: **Lord Aitken** in [*Donoghue v Stevenson*].

Two Outcomes:

1. Owe a duty to a person who **ought reasonably** be in contemplation when you act (or not act); and **[OBJECTIVE TEST]**
2. That duty is restricted to action/inaction that you can **reasonably foresee** will cause injury to such a person **[SUBJECTIVE TEST]**

Wrongs Act 1958 s48:

1. A person is not negligent in failing to take precautions against a risk of harm unless:
 - a. The risk was **foreseeable** (that is, it is a risk of which the person knew or ought to have known); and
 - b. The risk was **not insignificant**; and
 - c. In the circumstances, a **reasonable person** in the person's position would have taken those precautions.

Consider relevant factors to construct duty:

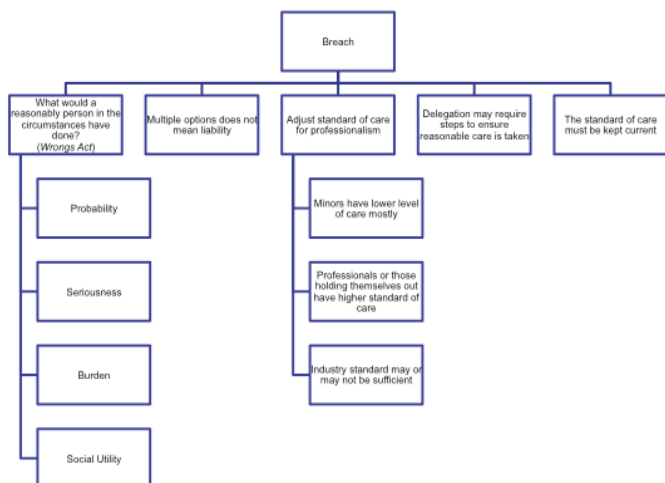
- Defendants knowledge of action affecting plaintiff

- Defendants control over plaintiff, or plaintiff's dependence.
- Special roles that would suggest such a protective duty

Step 3: What does it mean to breach your duty?

- Largely an issue of common law, but assisted by the **Wrongs Act 1958 (Vic) s48(1)(c)**:
 - o "In the circumstances, a reasonable person in the person's position would have taken those precautions." [objective test]
- This is a codification of **Wyong Shire Council v Shirt**
- The legislations provides us a framework to use from the **Wrongs Act s48**:
 - o The **probability** that the harm would occur if care were not taken (**Bolton v Stone**)
 - o The likely **seriousness** of the harm (**Paris v Stepney Borough Council**)
 - o The **burden of taking precautions** to avoid the risk of harm (**Latimer v AEC Ltd**)
 - o The **social utility** of the activity that creates the risk of harm (**E v Australian Red Cross Society (1991)**)
 - o The **higher the probability/likely seriousness of harm**, the required **level of care** is **higher**.
 - o The **higher the burden of precautions/higher social utility**, then the required **level of care** is **lower**.

Bolton v Stone (1951)	<p>Facts: She walks past a cricket pitch and gets hit by a ball, she's suing for breach of care.</p> <p>Probability that the harm would occur is Low</p> <p>Likely seriousness of harm, is low not life threatening.</p> <p>Low burden of taking precautions to avoiding risk.</p> <p>Conclusion: the <i>required level of care</i> is low. As the standards are pretty low, all they had to do was to have a fence, which they did, and hence, there was no breach.</p>
E v Australian Red Cross Society (1991)	<p>Facts: Red Cross takes blood donations and does blood transfusions. Transfused blood had HIV, and subsequently infected many people with HIV/AIDS.</p> <p>Probability of the harm is supposedly low as all blood should have been assessed and screened before transfusion, this is human error.</p> <p>Likely seriousness of the harm, is high as it is still an incurable infection.</p> <p>Social utility is high, it outweighed the needs of the 5% of people that the blood infected.</p> <p>Conclusion: Red Cross was found not liable of breach of care.</p>
Paris v Stepney Borough Council (1951)	<p>Facts: One-eyed mechanic, working under a vehicle. Hits metal which flakes off, striking him in his good eye. Not wearing or provided with glasses.</p> <p>Probability of harm is high</p> <p>Likely seriousness of harm is high (because he only has one good eye). The employer should have had a higher standard of care for him than for someone with two good eyes.</p> <p>Low burden of taking precautions as the employer just needs to provide him with glasses.</p> <p>Conclusion: Found to have breached the duty of care.</p>



Step 4: Causation

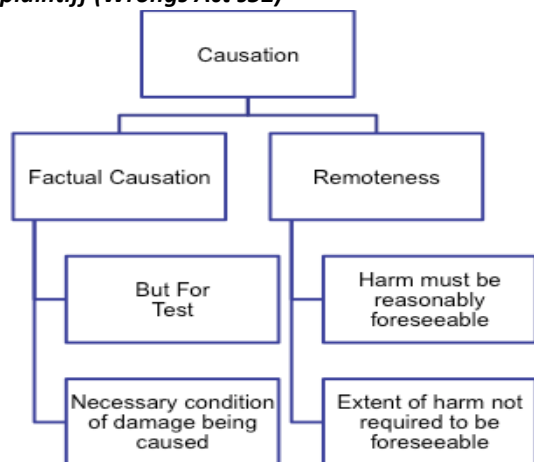
Because they failed their duty of care, did their negligence actually cause the harm?

Test for causation comes from the **Wrongs Act s51** and require:

- That the negligence was a **necessary precondition** of the occurrence of the harm; and
- That it is appropriate for the scope of the negligent person's liability to extend to the harm so caused [**remoteness**]

Therefore translates to two concepts – **factual causation** and **remoteness**.

It is important to mention that the **burden of proof is on the plaintiff (Wrongs Act s52)**



Tests for **FACTUAL CAUSATION**

The “**but for...**” test:

- **But for** the negligence, the damage would **never** have resulted = **causation**
- **But for** the negligence, the damage would **still have** resulted = **no causation**
- In the case of the one-eyed man. **But for** the employer not having provided him with protective glasses, the damage would never have resulted.
- If he had worn the glasses and not get harmed, that would call for **causation** of the employer's negligence.
- However, if he had worn the glasses and he would **still have gotten harmed** then there will be **no causation**.

Tests for **REMTENESS**

Requires that the harm be **reasonably foreseeable**:

- Inline with the Wrongs Act s51 “That it is appropriate for the scope of the negligent person's liability to extend to the harm so caused [**remoteness**]”
- Does it matter about the manner of the harm? This is the **egg-shell skull situation from (Dulieu v White & Sons)**

- You cannot complain if the victim happens to be particularly susceptible. You have to take them as they come (Extent of the harm)
- **Manner of the harm.** If it's **reasonably foreseeable** then there is **causation**. If it's **not** reasonably foreseeable, then there is **no causation**.

Step 5: Defences

If it is found to have causation, we go to **the defendant** now.

We have **two defences**:

1. **Contributory Negligence**
2. **Voluntary Assumption of Risk (VAR)**

CONTRIBUTORY NEGLIGENCE

The defendant is at fault, however in defence, the other party (plaintiff) is **as negligent** and **contributes to the harm**,

Complete Defence under **common law**.

Partial Defence under the **Wrongs Act s26. (Froom v Butcher)**

Froom v Butcher (1976)	<p>Issue: Does not wearing a seatbelt amount to contributory negligence?</p> <p>Facts: Mr Froom was driving his wife and daughter, none of whom were wearing seatbelts. An accident occurred when Butcher pulled out and struck them head on. Mrs Froom's injuries would have occurred with or without the seatbelt. Mr Froom, would not have been as badly injured, if he had his seatbelt on.</p> <p>Conclusion: Froom received full compensation at trial, but Butcher appealed, and was allowed. Whereby contributory negligence was found, and damages reduced by \$100. Hence, Partial Breach was found.</p> <p>But for Butcher's negligence, Mr Froom would still have been injured as he was not wearing a seatbelt.</p>
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VOLUNTARY ASSUMPTION OF RISK (VAR)

A **plaintiff who is aware of a risk**, but still puts himself in the position where the risk might eventuate, **cannot** recover damages if he suffers harm. (**Action Paintball Games Pty Ltd v Barker (2013)**)

It is a **complete defence**, which means that if a VAR is proved, a **plaintiff will recover nothing**.

There can only be a VAR if:

1. **Knowledge** – the plaintiff had **knowledge of the risk**
2. **Voluntary Action** – the plaintiff **voluntarily made the choice to undertake the risk**. A plaintiff who was constrained by circumstances from making a **free choice** will **not** be regarded as acting voluntarily.

Step 6: Damages

If it is established that there is a Duty of Care + A Breach + Causation + NO Defences = Damages (Remedies)

Difference in Remedies:

1. **Damages** – “removing” the damage
2. **Rescission** – undoing the arrangement
3. **Punitive Damages** – penalizing the party at fault
4. **Specific Performances** – enforcing an arrangement

DAMAGES IN NEGLIGENCE = To attempt to put the **plaintiff in the position they would have been in prior to the negligence**.

NOTE: Arguing for negligence case = getting compensatory remedies.