

**TORTS LAW  
SUMMARY 2010**



**LAWSKOOL.COM.AU**

**LAWSKOOL PTY LTD**

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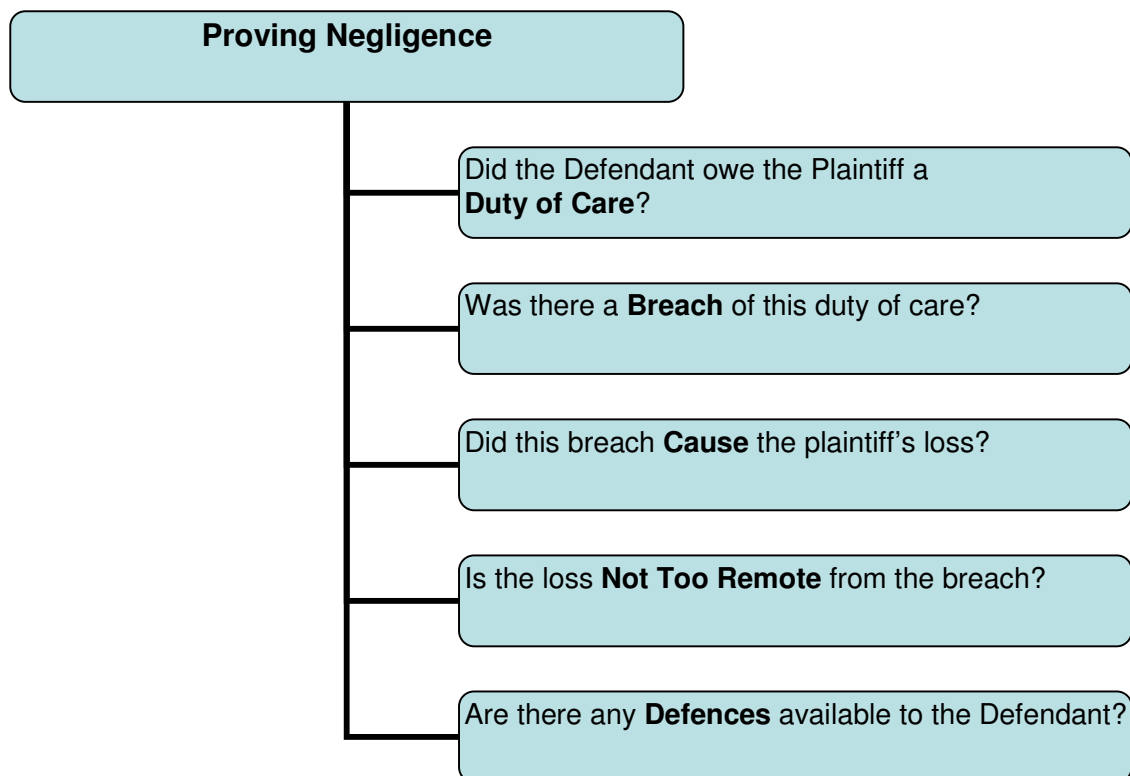
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## 1. INTRODUCTION TO NEGLIGENCE

- The diagram below illustrates the elements that need to be satisfied in order to successfully make a claim for negligence pursuant to the *Civil Liability Act 2002* (NSW)<sup>1</sup> which has subsumed the common law tort of negligence.



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<sup>1</sup> *Civil Liability Act 2003* (Qld); *Civil Liability Act 1936* (SA); *Civil Liability Act 2002* (Tas); *Wrongs Act 1958* (Vic); *Civil Liability Act 2002* (WA); *Civil Law (Wrongs) Act 2002* (ACT); *Personal Injuries (Liabilities and Damages) Act 2003* (NT).

## 2. DUTY OF CARE

### 2.1 Introduction

- A Defendant will only be held liable in circumstances where it can be determined that he or she owed the Plaintiff a duty to take reasonable care to avoid causing the Plaintiff damage or loss.
- A Defendant will owe the Plaintiff a duty of care in two situations:
  - Where the relationship between the Plaintiff and Defendant falls within an established category in which the court is required to impose a duty of care such as:
    - employer/employee (*Hamilton v Nuroof (WA) Pty Ltd*);
    - manufacturer/consumer (*Donoghue v Stevenson*);
    - doctor/patient (*Rogers v Whitaker*);
    - owner/occupier (*Zaluzna v Australian Safeways Stores Pty Ltd*);
    - solicitor/client (*Hill v Van Erp*); and
    - parent/child (*Robertson v Swincer*).
  - Where the court adopts the incremental approach based on salient features and determines that the Defendant owes a duty of care to the Plaintiff.

### 2.2 Incremental Approach Based on Salient Features

#### 2.2.1 Reasonable Foreseeability of the Plaintiff

- Where the relationship between the Plaintiff and Defendant does not fall within an established category, the court will examine the relevant indicia to decide whether or not to impose a duty of care on the Defendant (*Perre v Apand*).
- Although reasonable foreseeability of the Plaintiff is a significant salient feature, it is not sufficient alone to establish a duty of care (*Jaensch v Coffey*).

- In general, the Plaintiff is required to prove that a reasonable person in the position of the Defendant would recognise that negligent conduct may cause injury to the Plaintiff (*Minister v San Sebastian Pty Ltd*).

Chapman v Hearse

- Facts
  - The Defendant, Chapman, negligently drove his car and caused a serious car collision.
  - A doctor, Cherry, drove past the incident and offered medical assistance to the Defendant.
  - Mr Hearse negligently drove into Dr Cherry and killed him.
  - The widow of Dr Cherry successfully brought an action in negligence against Mr Hearse.
  - The present case arose out of an action of contributory negligence by Hearse against Chapman.
  - Chapman argued that he owed no duty of care to Dr Cherry because it was unforeseeable that a doctor would offer medical assistance to him and later be struck by a third party.
- Held
  - It is not necessary that the precise sequence of events leading to the injury is foreseeable.
  - It is sufficient that the Plaintiff belong to a class of persons (in this case rescuers) to whom the damage could have been foreseen.

Bale v Seltsam Pty Ltd

- Facts
  - The Plaintiff's husband was exposed to large quantities of asbestos at the Defendant company's workplace.
  - The Plaintiff contracted mesothelioma as she breathed in the dust brought home by her husband.
  - She brought an action in negligence against the Defendant.
- Held
  - A Defendant will not owe a duty of care to an unforeseeable Plaintiff.
  - The Defendant company was not held liable because the lack of scientific knowledge on the effect of asbestos meant that the Plaintiff was unforeseeable.

Palsgraf v Long Island Railroad Co

- Facts

- Two employees of the Defendant assisted a passenger to board a train and knocked a package out of the passenger's hands.
- The package contained fireworks and caused an explosion which culminated in the Plaintiff sustaining physical injury.
- The Plaintiff brought an action in negligence against the Defendant railway company based on the actions of their employees.
- Held
  - The Defendant did not owe a duty of care to the Plaintiff because there was no sign that the parcel contained fireworks, and hence it was not reasonably foreseeable that the Plaintiff could sustain damage.

### Bourhill v Young

- Facts
  - The Plaintiff heard a motorcyclist being involved in an accident which resulted in his death.
  - She suffered nervous shock and sued the estate of the negligent motorcyclist for negligence.
- Held
  - The Defendant's duty of care does not extend to the world at large.
  - The Defendant's duty of care was confined to other road users whom he could reasonably foresee would be harmed by his negligence.

## **2.2.2 Salient Features**

### Vulnerability and Control

- In *Ryan v Great Lakes Council*, the High Court identified the following salient features which can be taken into account when determining whether the Defendant owes the Plaintiff a duty of care:
  - the nature and degree of control exercised by the Defendant over the risk of harm that eventuated; and
  - the degree of vulnerability of the Plaintiff who relies on the proper exercise of reasonable care and skill by the Plaintiff.

### Agar v Hyde

- Facts
  - Two rugby union players sustained serious injuries in the scrum during a rugby union game.

- At the time of the incident, there was a body of evidence indicating the dangers of scrums.
- The Plaintiffs alleged that the International Rugby Football Board owed them a duty of care to amend the rules so as to avoid these dangers.
- Held
  - The Defendant Board did not owe a duty of care because:
    - they had limited control over the matches;
    - if they did owe a duty of care, this duty could potentially be owed to thousands of potential plaintiffs; and
    - the Plaintiffs voluntarily played the game and knew of the inherent risks.

### Policy Considerations

- The court can take into account policy considerations when deciding whether or not to impose a duty of care (*Sullivan v Moody*).
- In *Giannarelli v Wraith*, the High Court held that legal practitioners are immune from actions in negligence because of the following policy considerations:
  - the imposition of a duty of care would affect the administration of justice;
  - to allow a barrister to be sued by a client in respect of completed proceedings would involve a court reviewing a decision of another court otherwise than on appeal.
- In *Esanda Finance Corp v Peat Marwick Hungerfords*, the High Court held that an auditor does not owe a duty of care to avoid economic loss to a company who relies on their reports because of the following policy considerations:
  - to impose liability would increase the costs of auditing services;
  - there would be an increased burden on the courts to administer justice;
  - the potential group of plaintiffs have the means to avoid the risk of loss;
  - the auditor's role in causing the economic loss is secondary; and
  - to impose liability would culminate in prolonged litigation.

### Dorset Yacht Co v Home Office

- Facts
  - Juvenile offenders escaped from a juvenile justice centre and caused damage to nearby yachts.
  - The yacht owners sued the Home Office for negligence.

- Held
  - The State owes no duty of care to protect people in general against criminal behaviour.
  - The Defendant owed a duty of care to the yacht owners because their proximity to the juvenile justice centre put them at a greater risk than general members of the public.

Hill v Chief Constable of West Yorkshire

- Facts
  - A woman was murdered by the “Yorkshire Ripper” as a result of the failure of the Yorkshire Police to apprehend him.
  - The mother of the woman sued the police in an action in negligence.
- Held
  - The class of potential plaintiffs (i.e. young women) was too large for the police to owe them any duty of care.
  - Police officers do not owe a duty of care in relation to their failure to apprehend an unknown criminal.

Sullivan v Moody

- Facts
  - The Plaintiff was alleged to have committed child sexual assault.
  - The Plaintiff brought an action in negligence against the government officials who charged the Plaintiff for child sexual assault when he had not committed the alleged offence.
- Held
  - Government officials investigating allegations of child abuse do not owe a duty of care to a parent who may be a suspect to conduct their investigations carefully so as to avoid psychological harm to the parent.
  - To impose a duty of care would be contrary to the statutory scheme that existed to protect the interests of children rather than parents.

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