

# **TORTS LAW SUMMARY**



**LAWSKOOL.COM.AU**

**LAWSKOOL PTY LTD**

**TABLE OF CONTENTS**

SOURCES USED ..... 7  
CASE LIST ..... 7

**1. INTRODUCTION TO TORTS AND NEGLIGENCE ..... 13**

    1.1 CAPACITY TO SUE AND BE SUED ..... 14

**2. DUTY OF CARE ..... 15**

    2.1 INTRODUCTION ..... 15  
    2.2 INCREMENTAL APPROACH ..... 15  
    2.3 SALIENT FEATURES APPROACH ..... 16  
        2.3.1 *Vulnerability and Control*..... 17  
        2.3.2 *Policy Considerations*..... 18  
        2.3.3 *Intermediate Examination*..... 19  
    2.4 REASONABLE FORESEEABILITY ..... 20

**3. STANDARD OF CARE AND BREACH OF DUTY ..... 24**

    3.1 INTRODUCTION ..... 24  
    3.2 STANDARD OF CARE ..... 25  
    3.3 THE REASONABLE PERSON – CHARACTERISTICS OF THE DEFENDANT 25  
        3.3.1 *Special Skills – Professionals* ..... 25  
        3.3.2 *Special Skills – Generally* ..... 26  
        3.3.3 *Beginners* ..... 27  
        3.3.4 *Children and the Elderly* ..... 28  
        3.3.5 *Disability* ..... 28  
    3.4 THE REASONABLE PERSON – CHARACTERISTICS OF THE PLAINTIFF ..... 30  
        3.4.1 *Skill and Knowledge* ..... 30  
        3.4.2 *Children* ..... 30  
        3.4.3 *Intoxication* ..... 31  
    3.5 BREACH OF STANDARD ..... 32  
        3.5.1 *The Risk Was Foreseeable* ..... 33  
        3.5.2 *The Risk Was Not Insignificant* ..... 34  
        3.5.3 *Reasonable Response to the Risk* ..... 34  
        3.5.4 *Probability of Harm* ..... 35  
        3.5.5 *Likely Seriousness of the Risk or Harm* ..... 35  
        3.5.6 *Burden of Taking Precautions* ..... 36  
        3.5.7 *Warnings and Obvious Risks* ..... 38  
        3.5.8 *Social Utility of Risk-Creating Activity* ..... 39  
    3.6 PROOF OF BREACH ..... 41  
        3.6.1 *Burden of Proof* ..... 41  
        3.6.2 *Standard of Proof and Inferences* ..... 41  
        3.6.3 *Potential Multiple Defendants* ..... 42

**4. DAMAGE - CAUSATION ..... 43**

    4.1 INTRODUCTION ..... 43

4.2 THE “NECESSARY CONDITION” TEST .....	44
4.2.1 <i>Common Sense and Experience Test</i> .....	44
4.2.2 <i>The Legislative ‘Necessary Condition’ Test</i> .....	45
4.3 NOVUS ACTUS INTERVENIENS .....	46
4.4 CUMULATIVE CAUSATION .....	47
4.5 INCREASE IN RISK .....	47
4.6 LOST CHANCES .....	48
4.7 CAUSATION IN MEDICAL FAILURE TO WARN CASES .....	49
<b>5. DAMAGE – REMOTENESS OF DAMAGE/SCOPE OF LIABILITY .....</b>	<b>50</b>
5.1 INTRODUCTION .....	50
5.2 COMMON LAW POSITION ON REMOTENESS OF DAMAGE .....	50
5.2.1 <i>Minimum Damage Required</i> .....	50
5.2.2 <i>Reasonable Foreseeability of Damage</i> .....	50
5.2.3 <i>Kind of Damage</i> .....	51
5.3 EGG-SHELL SKULL RULE .....	54
<b>6. VICARIOUS LIABILITY AND NON-DELEGABLE DUTIES .....</b>	<b>57</b>
6.1 INTRODUCTION .....	57
6.2 RELATIONSHIP OF EMPLOYMENT .....	57
6.3 RELATIONSHIP OF AGENCY .....	60
6.4 THE COMMISSION OF A TORT .....	62
6.5 DURING COURSE OF THE RELATIONSHIP .....	62
6.5.1 <i>Passion and Resentment</i> .....	63
6.5.2 <i>Unconnected Acts</i> .....	64
6.5.3 <i>Employer Prohibitions</i> .....	64
6.5.4 <i>Criminal Acts of Employees</i> .....	66
6.6 INDEPENDENT CONTRACTORS AND NON-DELEGABLE DUTIES .....	66
6.6.1 <i>Hospital and Patient</i> .....	66
6.6.2 <i>School Authority and Pupil</i> .....	67
6.6.3 <i>Danger to Neighbouring Land Users</i> .....	67
6.6.4 <i>Employer and Employee</i> .....	68
6.6.5 <i>Landlords</i> .....	68
6.6.6 <i>Tort Law Reform</i> .....	69
<b>7. CONCURRENT LIABILITY/MULTIPLE TORTFEASORS .....</b>	<b>69</b>
7.1 INTRODUCTION .....	67
7.2 THE DISTINCTION BETWEEN JOINT/MULTIPLE TORTFEASORS AND CONCURRENT TORTFEASORS .....	69
7.2.1 <i>Contribution Between Tortfeasors</i> .....	70
7.3 PROPORTIONATE LIABILITY .....	71
<b>8. DEFENCES - CONTRIBUTORY NEGLIGENCE .....</b>	<b>72</b>
8.1 INTRODUCTION .....	72
8.2 STANDARD OF CARE TO BE APPLIED TO THE PLAINTIFF .....	72
8.2.1 <i>Children</i> .....	74
8.2.2 <i>Policy Considerations</i> .....	74

8.2.3 <i>Expected Performance of Statutory Obligations</i> .....	74
8.2.4 <i>Imminent Danger/Emergency</i> .....	75
8.2.5 <i>Intoxication</i> .....	77
8.3 CAUSATION AND REASONABLE FORESEEABILITY .....	77
8.4 APPORTIONMENT OF DAMAGES .....	79
<b>9. DEFENCES – VOLUNTARY ASSUMPTION OF RISK .....</b>	<b>80</b>
9.1 INTRODUCTION .....	80
9.2 STATUTORY DEFENCE .....	80
9.2.1 <i>Obvious Risks</i> .....	80
9.2.2 <i>Inherent Risks</i> .....	81
9.2.3 <i>Risk Warnings for Recreational Activities</i> .....	81
9.2.4 <i>Exclusion Clauses</i> .....	82
9.2.5 <i>Dangerous Recreational Activities</i> .....	82
9.3 COMMON LAW DEFENCE .....	82
9.3.1 <i>Voluntarily Accepted the Risk</i> .....	83
9.3.2 <i>Appreciation of the Scope of the Risk</i> .....	84
9.3.3 <i>Actual Perception of the Danger</i> .....	85
<b>10. DAMAGES FOR PERSONAL INJURY .....</b>	<b>86</b>
10.1 INTRODUCTION .....	86
10.2 THE NEED TO ITEMISE .....	86
10.3 PECUNIARY LOSS .....	87
10.3.1 <i>Loss of earning capacity</i> .....	87
10.3.2 <i>Collateral source rule</i> .....	87
10.3.3 <i>Voluntary Services - Griffiths and Kerkemeyer Damages</i> .....	88
10.4 NON-PECUNIARY LOSS .....	89
10.4.1 <i>Loss of life expectancy</i> .....	89
10.4.2 <i>Loss of amenities</i> .....	89
10.4.3 <i>Pain and suffering</i> .....	89
<b>11. PARTICULAR NEGLIGENCE SITUATIONS .....</b>	<b>90</b>
11.1 LIABILITY FOR OMISSIONS .....	90
11.1.1 <i>Distinguishing between Acts and Omissions</i> .....	90
11.1.2 <i>When a Duty will Arise</i> .....	90
11.1.3 <i>Occupation of Land</i> .....	90
11.1.4 <i>Duty to Protect Someone or Something Under One’s Control</i> .....	91
11.1.5 <i>Parent and Child</i> .....	92
11.1.6 <i>Professional Duty to Rescue</i> .....	93
11.1.7 <i>Duty to Protect</i> .....	93
11.2 ATYPICAL PLAINTIFF .....	94
11.3 THE UNBORN PLAINTIFF .....	94
11.3.1 <i>Negligence Before Conception</i> .....	95
11.3.2 <i>Negligence Ex Utero</i> .....	95
11.3.3 <i>Negligence In Utero</i> .....	95
11.4 WRONGFUL BIRTH .....	96
11.5 WRONGFUL LIFE .....	97

11.6 RECOVERY FOR MENTAL HARM .....	97
11.6.1 Introduction – Establishing a Duty of Care to Avoid Mental Harm .....	97
11.6.2 Recognised Psychiatric Illness .....	98
11.6.3 Normal Fortitude and Circumstances of the Case .....	98
11.7 RESCUERS .....	102
11.8 LIABILITY OF STATUTORY AUTHORITIES .....	103
11.8.1 Distinction Between Powers and Duties of Statutory Authorities .....	103
11.8.2 Breach of Statutory Duty .....	103
11.8.3 Breach of Special Statutory Powers .....	103
11.8.4 Breach of Discretionary Powers .....	104
<b>12. TRESPASS TO THE PERSON .....</b>	<b>107</b>
12.1 INTRODUCTION .....	107
12.2 BATTERY .....	108
12.2.1 There must be direct application (a positive act) .....	109
12.2.2 Force - Requirement of hostility? .....	110
12.2.3 Fault .....	110
12.2.4 Without Consent .....	111
12.2.5 Defences .....	111
12.3 ASSAULT .....	112
12.3.1 Apparent ability to apply force .....	113
12.3.2 Intended to cause fear .....	113
12.3.3 Plaintiff feared imminent contact .....	113
12.3.4 Defences .....	114
12.4 FALSE IMPRISONMENT .....	114
12.4.1 Physical or psychological restraint/there must be a total restraint .....	114
12.4.2 Does the plaintiff need to know of the restraint? .....	115
12.4.3 Without Consent .....	116
12.4.4 Conditional imprisonment .....	116
12.4.5 Directness .....	117
12.4.6 Remedies for Trespass to the Person .....	117
<b>13. DEFENCES TO TRESPASS TO THE PERSON .....</b>	<b>119</b>
13.1 CONSENT .....	119
13.2 NECESSITY .....	120
13.3 SELF DEFENCE .....	120
<b>14. TRESPASS TO LAND .....</b>	<b>122</b>
14.1 MEANING OF LAND .....	122
14.2 ACTS THAT WILL CONSTITUTE TRESPASS .....	123
14.2.1 Entering land without consent of the landowner .....	123
14.2.2 Remaining on land after permission to remain has been withdrawn .....	124
14.3 TITLE TO SUE .....	124
14.4 INJUNCTIONS AS A REMEDY .....	125
14.5 NUISANCE .....	125
14.5.1 Private Nuisance .....	126
Matters not protected by this tort .....	126

*14.5.2 Defendant's Activities 'Unreasonable' ..... 126*  
*14.5.3 Title to Sue ..... 128*  
*14.5.4 Defences ..... 128*

**SAMPLE ONLY**

## Sources Used

- University lecture notes
- Frances McGlone and Amanda Stickley, *Australian Torts Law* (Butterworths, 2<sup>nd</sup> ed, 2009).
- Tim Paine, *Butterworths Question and Answers: Torts* (Lexis Nexis, 2<sup>nd</sup> ed, 2010).
- Harold Luntz and David Hambley, *Torts Cases and Commentary* (Butterworths, Revised 5<sup>th</sup> ed, 2006).
- Martin Davies, *Butterworths Tutorial Series: Torts* (Butterworths, 3<sup>rd</sup> ed, 1999).
- Pam Stewart and Anita Stuhmcke, *Australian Principles of Tort Law* (Federation Press, 2005).
- R P Balkin and J L R Davis, *Law of Torts* (Butterworths, 4<sup>th</sup> ed, 2009).

## Case List

<i>Adamson v MVIT</i> (1957) 58 WALR 56.....	3.3.5
<i>Agar v Hyde</i> (2000) 201 CLR 552.....	2.2.2
<i>Albrighton v Royal Prince Alfred Hospital</i> [1980] 2 NSWLR 542.....	6.6.1
<i>Annetts v Australian Stations Pty Ltd</i> (2002) 211 CLR 317.....	11.6.3
<i>APQ v Commonwealth Serum Laboratories</i> [1999] 3 VR 633.....	5.2.1
<i>Armstrong v Strain</i> [1952] 1 KB 232.....	6.3
<b>SAMPLE ONLY</b>	
<i>Bale v Seltam Pty Ltd</i> (Unreported, 23 August 1996, Court of Appeal (Qld)).....	2.2.1
<i>Balmain Ferry &amp; Co v Robertson</i> (1906) 4 CLR 379.....	12.4.1
<i>Bennett v Minister for Community Welfare</i> (1992) 176 CLR 408.....	4.2
<i>Berstein v Skyviews and General Ltd</i> [1978] QB 479.....	14.1
<i>Birch v Thomas</i> [1972] 1 WLR 294.....	9.3.1
<i>Bird v Jones</i> (1845) 1 QB 742.....	12.4.1
<i>Blyth v Birmingham Waterworks Co</i> (1856) 11 Exch 781.....	3.3
<i>Bolton v Stone</i> [1950] 1 KB 201.....	3.4.1
<i>Bourhill v Young</i> [1948] AC 92.....	2.2.1
<i>Bowditch v McEwan</i> (2002) 36 MVR 235.....	11.3.3
<i>Bradshaw v McEwans Pty Ltd</i> (1951) Unreported High Court decision, 27 April 1951.....	3.5.2
<i>Brodie v Singleton Shire Council</i> (2001) 206 CLR 512.....	11.8.3
<i>Brooke v Bool</i> [1928] 2 KB 578.....	7.2
<i>Broom v Morgan</i> [1952] 1 QB 597.....	6.2
<i>Buckley v Lloyd Aviation Jet Charter Pty Ltd</i> (1992) SASR 269.....	3.5.7
<i>Bugge v Brown</i> (1919) 26 CLR 110.....	6.5.3
<i>Burns v Lipman</i> (1971) 132 CLR 157.....	2.1
<i>Burnie Port Authority v General Jones Pty Ltd</i> (1994) 179 CLR 520.....	6.6.3
<i>Bye v Bates</i> (1989) 51 SASR 67.....	8.2.1
<i>Byrnes v Snare</i> (1986) 66 ALR 296.....	2.1
<i>Caledonian Collieries Ltd v Speirs</i> (1957) 97 CLR 202.....	3.4.3
<i>Carrier v Bonham</i> [2002] 1 Qd R 474.....	1.1
<i>Canterbury Bankstown RLFC v Rogers</i> (1993) Aust Torts Reps 81-246 .....	4.3

<i>Caterson v Commissioner of Railways</i> (1973) 128 CLR 99.....	8.2.4
<i>Cattanach v Melchior</i> (2003) 215 CLR 1.....	11.4
<i>Century Insurance Co Ltd v Northern Ireland Road Transport Board</i> [1942] AC 509.....	6.5
<i>CES v Superclinics (Australia) Pty Ltd</i> (1995) Aust Torts Reps 81-360.....	11.4
<i>Chapman v Hearse</i> (1961) 106 CLR 112.....	2.2.1
<i>Chappel v Hart</i> (1998) 195 CLR 232.....	4.7
<i>Chin Keow v Government of Malaysia</i> [1967] 1 WLR 813.....	3.3.2
<i>Chomentowski v The Red Garter Restaurant</i> (1970) 92 WN(NSW) 1070.....	4.3
<i>Clarey v The Principal &amp; Council of the Women's College</i> (1953) 106 CLR 170....	14.5.2
<i>Coates v Government Insurance Office of NSW</i> (1995) 36 NSWLR 1.....	11.6.2
<i>Collins v Hertfordshire</i> [1947] 1 All ER 633.....	3.3.3
<i>Collins v Wilcock</i> [1984] 1 WLR 1172.....	12.2.1
<i>Colonial Mutual Life Assurance Society Ltd v The Producers and Citizens Co-operative Assurance Co of Australia Ltd</i> (1931) 46 CLR 141.....	6.3
<i>Commonwealth v McLean</i> (1996) 41 NSWLR 389.....	5.3
<i>Commonwealth of Australia v Introvigne</i> (1982) 150 CLR 258.....	6.6.2
<i>Commissioner of Railways v Ruprecht</i> (1979) 142 CLR 563.....	8.2
<i>Cortis v Baker</i> (1968) SASR 367.....	8.2.4
<i>Cowell v Rosehill Race Course Co Ltd</i> (1937) 56 CLR 605.....	14.2.2
<i>Crimmins v Stevedoring Industry Finance Committee</i> (1999) 200 CLR 1.....	11.8.3
<i>Cullen v Trappel</i> (1980) 146 CLR 1.....	10.3.1
<i>Daborn v Bath Tramways Motor Co Ltd</i> [1946] 2 All ER 333.....	3.4.4
<i>Daly v Liverpool Corporation</i> [1939] 2 All ER 149.....	3.3.4
<i>Dare v Dobson</i> [1960] SR (NSW) 474.....	7.2.1
<i>Davies v Swan Motor Co (Swansea) Ltd</i> [1949] 2 KB 291.....	8.2
<i>Deatons Pty Ltd v Flew</i> (1949) 79 CLR 370.....	6.5.1
<i>Dickinson v Waters Ltd</i> (1931) 31 SR (NSW) 593.....	12.4.4
<i>Dixon v Western Australia</i> [1974] WAR 65.....	11.1.4
<i>Donoghue v Stevenson</i> [1932] AC 562.....	2.1
<i>Dorset Yacht Co v Home Office</i> [1969] 2 QB 412.....	2.2.2
<i>Doubleday v Kelly</i> [2005] NSWCA 151.....	3.4.2
<i>Doughty v Turner Manufacturing</i> [1964] 1 QB 518.....	5.2.3
<i>Dulieu v White &amp; Sons</i> [1901] 2 KB 669.....	5.3
<i>Edwards v Noble</i> (1971) 125 CLR 296.....	2.1
<i>Ellis v Wallsend District Hospital</i> (1989) 17 NSWLR 553.....	6.6.1
<i>Esanda Finance Corp v Peat Marwick Hungerfords</i> (1997) 188 CLR 241.....	2.2.2
<i>Fennell v Robson</i> [1977] 2 NSWLR 486.....	14.5.3
<i>Fontin v Katapodis</i> (1962) 108 CLR 177.....	13.3
<i>Fox v Hack</i> (1984) Aust Torts Reps 80 – 531.....	3.4.6
<i>From v Butcher</i> [1975] 3 All ER 520.....	8.1
<i>Gala v Preston</i> (1991) 172 CLR 243.....	2.2.2
<i>Gent-Diver v Neville</i> [1953] QSR 1.....	8.3
<i>Geyer v Downs</i> (1978) 138 CLR 91.....	2.1
<i>Giannarelli v Wraith</i> (1988) 165 CLR 543.....	2.2.2
<i>Gifford v Strang Patrick Stevedoring Pty Ltd</i> (2003) 214 CLR 269.....	11.6.3
<i>Glasgow Corp v Taylor</i> [1922] 1 AC 44.....	3.4.3

<i>Goldman v Hargrave</i> (1966) 115 CLR 458.....	11.1.3
<i>Griffiths v Kerkemeyer</i> (1977) 139 CLR 161.....	10.3.3
<i>Groom v Crocker</i> [1939] 1 KB 194.....	2.1
<i>Haber v Walker</i> [1963] VR 339.....	4.3
<i>Haileybury College v Emanuelli</i> [1983] 1 VR 323.....	3.4.1
<i>Haley v London Electricity Board</i> [1964] 2 QB 121.....	11.2
<i>Halliday v Nevill</i> (1984) 155 CLR 1.....	14.2.1
<i>Hamilton v Nuroof (WA) Pty Ltd</i> (1956) 96 CLR 18.....	2.1
<i>Hargrave v Goldman</i> (1963) 110 CLR 40.....	11.1.3
<i>Harrison v Michelin</i> [1985] 1 All ER 918.....	6.5.2
<i>Harriton v Stephens ; Waller v Hoolahan</i> [2004] NSWCA 93.....	11.5
<i>Hawkins v Clayton</i> (1988) 164 CLR 539.....	2.1
<i>Haynes v G Harwood &amp; Son</i> [1935] 1 KB 146.....	9.3.1
<i>Herd v Weardale Steel</i> [1915] AC 67.....	12.4.2
<i>Henderson v PTC</i> (1981) 37 ALR 29.....	3.3.5
<i>Hill v Chief Constable of West Yorkshire</i> [1989] AC 53.....	2.2.2
<i>Hill v Van Erp</i> (1997) 188 CLR 159.....	2.1
<i>Holbeck Hall Hotel Ltd v Scarborough Borough Council</i> [2000] QB 836.....	11.1.3
<i>Hollis v Vabu Pty Ltd</i> (2001) 207 CLR 21.....	6.2
<i>Hollywood Silver Fox Farm Ltd v Emmett</i> [1936] 2 KB 468.....	14.5.2
<i>Hotson v East Berkshire Area Health Authority</i> [1987] AC 750.....	4.6
<i>Howard v Jarvis</i> (1958) 98 CLR 177.....	2.1
<i>Hughes v Lord Advocate</i> [1963] AC 837.....	5.2.3
<i>Hunter v Canary Wharf</i> [1997] AC 655.....	5.2.1
<i>Imperial Chemical Industries Ltd v Shatwell</i> [1965] AC 656.....	9.3.3
<i>Innes v Wylie</i> (1844) 174 ER 800.....	12.2
<i>Jaensch v Coffey</i> (1984) 155 CLR 549.....	2.2.1
<i>Jolley v Sutton London Borough Council</i> [2002] 3 All ER 409.....	5.2.3
<i>Jones v Livox Quarries</i> [1952] 2 QB 608.....	8.3
<i>Jones v Manchester Corporation</i> [1952] 2 QB 852.....	3.3.2
<i>Joslyn v Berryman</i> (2003) 214 CLR 552; 198 ALR 137.....	8.1
<i>Kavanagh v Akhtar</i> (1998) 45 NSWLR 588.....	5.2.3
<i>Kent v Scattini</i> [1961] WAR 74.....	9.3.2
<i>Kondis v State Transport Authority</i> (1984) 154 CLR 672.....	6.6
<i>Kosky &amp; Anor v The Trustees of the Sisters of Charity</i> [1982] VR 961.....	11.3.1
<i>Leahy v Beaumont</i> (1981) 27 SASR 290.....	3.3.5
<i>Levi v Colgate-Palmolive Pty Ltd</i> (1941) 41 SR(NSW) 48.....	11.2
<i>Liesbosch Dredger v SS Edison</i> [1933] AC 449.....	5.3
<i>Lincoln Hunt v Willesee</i> (1986) 4 NSWLR 457.....	14.2.1
<i>Lister v Hesley Hall Ltd</i> [2001] UKHL 22.....	6.5.3
<i>LJP Investments v Howard Chia</i> (1989) 24 NSWLR 490.....	14.1
<i>Lowns v Woods</i> (1996) Aust Torts Reps 81-376.....	11.1.6
<i>Lynch v Lynch (by her Tutor Lynch)</i> (1991) 25 NSWLR 411.....	11.3.3
<i>March v E &amp; M Stramare Pty Ltd</i> (1991) 171 CLR 506.....	4.2
<i>Mahon v Osborne</i> [1939] 2 KB 14.....	3.3.2

<i>McCoy v Watson</i> (1976) 13 SASR 506.....	5.3
<i>McDonald v The Commonwealth</i> (1945) 46 SR (NSW) 129.....	6.2
<i>McGhee v National Coal Board</i> [1972] 3 All ER 1008.....	4.5
<i>McHale v Watson</i> (1964) 111 CLR 384.....	3.3.4
<i>McLean v Tedman</i> (1984) 155 CLR 306.....	3.5.1
<i>McNamara v Duncan</i> (1971) 26 ALR 584.....	13.1
<i>Merryweather v Nixan</i> (1799) 8 Term Rep; 101 ER 1337.....	7.2.1
<i>Minister v San Sebastian Pty Ltd</i> [1983] 2 NSWLR 286.....	2.2.1
<i>Modbury Triangle Shopping Centre Pty Ltd v Anzil</i> (2000) 205 CLR 254.....	11.1.7
<i>Morris v C W Martin &amp; Sons Ltd</i> [1966] 1 QB 701.....	6.5.4
<i>Morris v Marsden</i> [1952] 1 All ER 925.....	1.1
<i>Mount Isa Mines v Pusey</i> (1970) 125 CLR 383.....	5.2.3
<i>Munro v Southern Dairies Ltd</i> [1955] VLR 332.....	14.5.2
<i>Murray v Ministry of Defence</i> [1988] 1 WLR 692.....	12.4.3
<i>Nader v Urban Transit Authority</i> (1985) 2 NSWLR 501.....	5.2.3
<i>Nagle v Rottneest Island Authority</i> (1993) 112 ALR 393.....	3.2
<i>Naxakis v Western General Hospital</i> (1999) 197 CLR 269.....	4.6
<i>Neill v NSW Fresh Food and Ice Pty Ltd</i> (1963) 108 CLR 362.....	3.4.3
<i>Newington v Windeyer</i> (1985) 3 NSWLR 555.....	14.3
<i>NSW v Lepore; Samin v QLD; Rich v QLD</i> (2003) 212 CLR 511.....	6.5.4
<i>NSW v Seedsman</i> (2000) NSWCA 119.....	11.6.3
<i>Northern Sandblasting v Harris</i> (1997) 188 CLR 313; 146 LR 572.....	6.2
<i>O'Connor v South Australia</i> (1976) 14 SASR 187.....	8.3
<i>O'Dwyer v Leo Buring Pty Ltd</i> [1966] WAR 67.....	3.4.7
<i>Ogwo v Taylor</i> [1988] AC 431.....	11.7
<i>Owston v Bank of New South Wales</i> (1879) 4 App Cas 270.....	
<i>Palsgraf v Long Island Railroad Co</i> (1928) 248 NY 339.....	2.2.1
<i>Papatonakis v Australian Telecommunications Commission</i> (1985) 156 CLR 7....	3.3.2
<i>Paris v Stepney Borough Council</i> [1951] AC 367.....	3.4.1
<i>Perre v Apand</i> (1999) 198 CLR 180.....	2.2.1
<i>Phillips v William Whitely Ltd</i> [1938] 1 All ER 566.....	3.3.2
<i>Phoenix Society Inc v Cavanagh</i> (1997) 25 MVR 143.....	6.5
<i>Planet Fisheries v La Rosa</i> (1968) 119 CLR 118.....	10.4
<i>Police v Greaves</i> [1964] NZLR 295.....	12.3.1
<i>PQ v Australian Red Cross Society</i> [1992] 1 VR 19.....	3.5.6
<i>Pyreness Shire Council v Day</i> (1998) 192 CLR 330.....	11.8.3
<i>Quarman v Burnett</i> (1840) 6 M & W; 151 ER 509.....	6.2
<i>Ranieri v Ranieri</i> (1973) 7 SASR 418.....	9.3
<i>Ray v Ray</i> [1977] Qd R 268.....	2.1
<i>Redding v Lee</i> (1983) 151 CLR 117.....	10.3.2
<i>Roads and Traffic Authority v Scoop</i> (1998) 28 MVR 233.....	8.4
<i>Robertson v Swincer</i> (1989) 52 SASR 356.....	11.1.5
<i>Roe v Minister for Health</i> [1954] 2 QB 66.....	3.4.5
<i>Rogers v Whitaker</i> (1992) 175 CLR 479.....	2.1
<i>Romeo v Northern Territory Coastal Commission</i> (1998) 192 CLR 431.....	3.4.3
<i>Rootes v Shelton</i> (1967) 116 CLR 383.....	9.3.2

<i>Rose v Plenty</i> [1976] 1 WLR 141 .....	6.5.3
<i>Rowe v McCartney</i> [1976] 2 NSWLR 72.....	5.2.3
<i>Rozsa v Samuels</i> [1969] SASR 205.....	12.3
<i>Ruddiman &amp; Co v Smith</i> (1889) 60 LT 708.....	6.5.2
<i>Samos v Repatriation Commission</i> [1960] WAR 219.....	6.6.1
<i>Schiller v Mulgrave Shire Council</i> (1972) 129 CLR 116.....	11.8.2
<i>Scott v Davis</i> (2000) 204 CLR 333.....	6.3
<i>Sedleigh-Denfield v O'Callaghan</i> [1940] AC 880 .....	14.5.3
<i>Sharman v Evans</i> (1977) 138 CLR 563.....	10.2
<i>Shellharbour City Council v Rigby</i> (2006) 150 LGERA 11.....	3.4.2
<i>Sibley v Kais</i> (1967) 118 CLR 424.....	8.2.3
<i>Skelton v Collins</i> (1966) 115 CLR 94.....	10.3.1
<i>Sloane v Kirby</i> (1979) 20 SASR 263.....	9.3.3
<i>Smith v Baker &amp; Sons</i> [1891] AC 325.....	9.3.1
<i>Smith v Leech</i> [1962] 2 QB 405.....	5.3
<i>Smith v Leurs</i> [1944] SASR 213.....	11.1.5
<i>Soblusky v Egan</i> (1960) 103 CLR 215.....	6.3
<i>Spence v Percy</i> [1992] 2 Qd R 299.....	11.6.3
<i>Stevens v Brodribb Sawmilling Co Pty Ltd</i> (1986) 160 CLR 16.....	6.2
<i>Storey v Ashton</i> (1869) LR 4QB 476.....	6.5.3
<i>Sullivan v Moody</i> (2001) 207 CLR 562.....	2.2.2
<i>Sungravure Pty Ltd v Meani</i> (1964) 110 CLR 24.....	8.2
<i>Sutherland Shire Council v Heyman</i> (1985) 157 CLR 424.....	11.1.2
<i>Tame v New South Wales</i> (2002) 211 CLR 317.....	11.6.3
<i>Thompson v Smiths Shiprepairers (North Shields) Ltd</i> [1984] QB 405.....	3.4.6
<i>Todorovic v Waller</i> (1981) 150 CLR 402.....	10.1
<i>Tucker v Tucker</i> [1956] SASR 297.....	3.3.4
<i>Voli v Inglewood Shire Council</i> (1963) 110 CLR 74.....	2.2.2
<i>Wagon Mound (No. 1)</i> [1961] AC 388.....	5.2.2
<i>Wagon Mound (No. 2)</i> [1967] 1 AC 617.....	5.2.2
<i>Wallaby Grip (BAE) Pty Ltd v Macleay Area Health Service</i> (1998) 17 NSWCCR 355.....	4.4
<i>Watt v Hertfordshire Country Council</i> [1954] 2 All ER 368.....	3.4.4
<i>Watt v Rama</i> [1972] VR 353.....	11.3
<i>Waugh v Kippen</i> (1986) 160 CLR 156.....	11.8.2
<i>Wells v Cooper</i> [1958] 2 QB 265.....	3.3.2
<i>West v GIO of NSW</i> (1981) 148 CLR 62.....	3.5.2
<i>Williams v Commissioner for Road Transport</i> (1933) 50 CLR 258.....	8.1
<i>Wilson v Pringle</i> [1987] QB 237.....	12.2.2
<i>Woods v Multi-Sport Holdings Pty Ltd</i> (2002) 208 CLR 460; 186 ALR 145.....	3.5.7
<i>Wyong Shire Council v Shirt</i> (1980) 146 CLR 40.....	3.2
<i>X and Y v Pal</i> (1991) 23 NSWLR 26.....	11.3.1
<i>X (Minors) v Bedfordshire CC</i> [1995] 2 AC 633.....	11.8.2
<i>Yonge v Toynbee</i> [1910] 1 KB 216.....	1.1

*Zaluzna v Australian Safeways Stores Pty Ltd* (Unreported, Victoria FC, 1/06/89)..2.1  
*Zanker v Vartzokas* (1988) 34 A Crim R 11.....12.3.1

**SAMPLE ONLY**

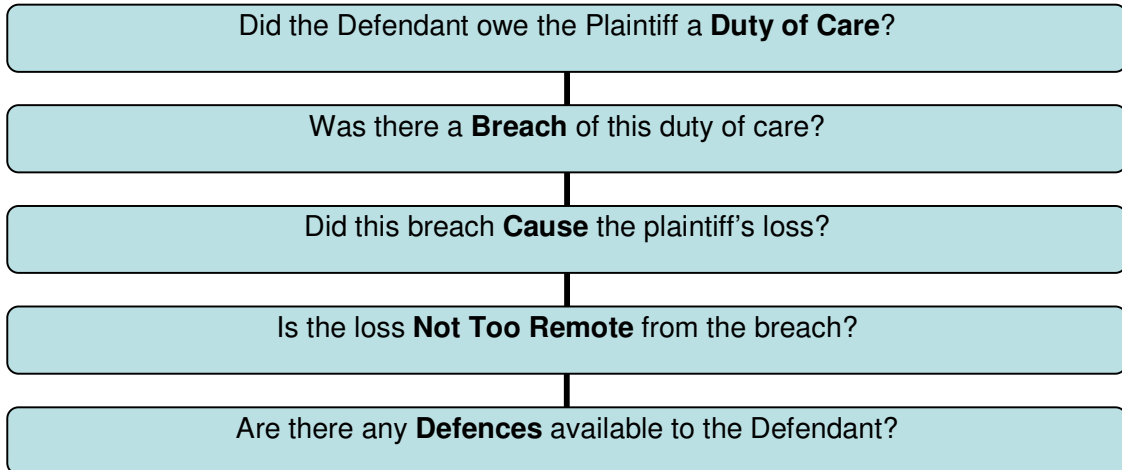
## 1. INTRODUCTION TO TORTS AND NEGLIGENCE

- The word 'tort' means 'wrong'.
- Generally there are three key aspects of the law of torts:
  1. an act or omission;
  2. the infringement of rights;
  3. an action for damages
- Torts can be classified as either a misfeasance or a nonfeasance.
  - A misfeasance is a positive act causing harm. The wrongdoer in this sense commits the act voluntarily and knowingly. It is irrelevant whether or not the tortfeasor knew that the act would result in harm.
  - A nonfeasance is an omission or failure to act which results in harm.
- Negligent acts that result in damage to the plaintiff (such as injury, damage or loss – be it in the form of personal injury, physical damage to property, a recognised psychiatric illness and/or financial loss) can be sued upon in negligence or trespass.
  - Direct interference causing damage can be sued upon in either negligence or trespass.
  - Indirect interference is actionable only in negligence (not trespass).
- There are three elements to be proved by the plaintiff to establish a liability in negligence:
  1. a duty of care existed;
  2. a breach of this duty of care occurred; and
  3. the injury was caused by, and not too remote from, the breach.
- The diagram below illustrates the elements that need to be satisfied in order to successfully make a claim for negligence pursuant to the civil law legislations<sup>1</sup> which has subsumed the common law tort of negligence.

---

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

### Proving Negligence



- If all of the above elements are established it is likely that the defendant will be liable unless he/she can establish a solid defence.
- Note the existence of the 'once and for all' rule which means that the defendant can only be sued once. As such, the award of damages will compensate the plaintiff for the original injury and also for consequential loss.

#### 1.1 Capacity to Sue and be Sued

- General Rule: any person of sound mind and who has reached the age of 18 years old may sue and/or be sued.
- Minors: a minor sues by a next friend and defends through a guardian *ad litem* (Note: a minor, in Australia, is a person under the age of 18 years of age.)

Intellectually Disabled Persons: an intellectually disabled person may sue or be sued. A legal representative will be appointed to act on his/her behalf: *Yonge v Toynbee*. Note that mental incapacity is no defence where the defendant is aware of the nature and quality of his/her act (*Morriss v Marsden*; *Adamson v Motor Vehicle Insurance Trust*; *Carrier v Bonham*).

## 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*);
    - road user/road user (*Edwards v Noble*; *Burns v Lipman*; *Ray v Ray*; *Byrnes v Snare*);
    - school authorities/pupils (*Commonwealth v Introvigne*; *Geyer v Downs*);
    - prison authorities/prisoner (*Howard v Jarvis*);
    - professional/client (*Groom v Crocker*; *Voli v Inglewood Shire Council*; *Hawkins v Clayton*);
    - lawyer/client (*Hill v Van Erp*); and
    - parent/child (*Robertson v Swincer*).
  - Where the circumstances are that of a novel fact situation and the court adopts either the incremental approach, salient features approach or reasonable foreseeability approach in determining whether the Defendant owes a duty of care to the Plaintiff. This is commonly referred to as a 'novel fact situation'. Thus far, there has been no definite approach to establish a duty of care. The current approach in the High Court mainly involves the reasonable foreseeability test and the salient features approach.



**To order the complete version of the lawskool Torts Law Summary  
please visit [www.lawskool.com.au](http://www.lawskool.com.au)**