

TORTS LAW SUMMARY



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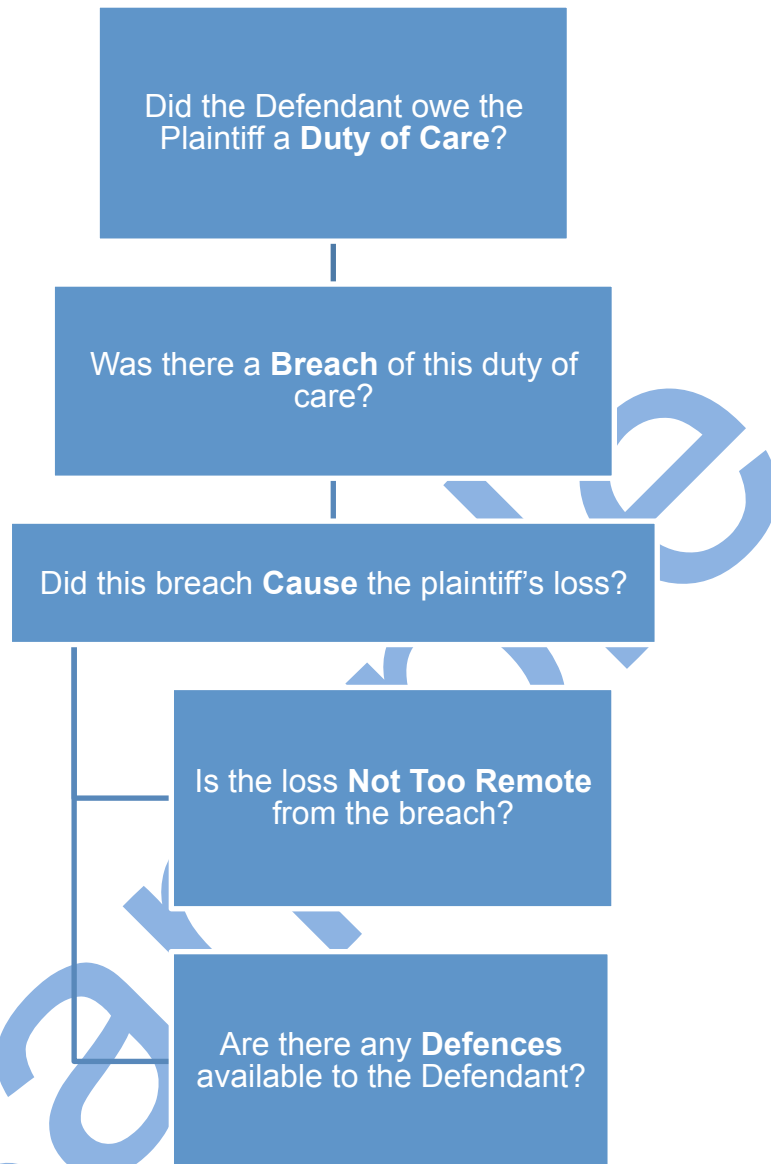
1. INTRODUCTION TO TORTS AND NEGLIGENCE

- The word 'tort' means 'wrong' and arises in civil law
- A tort may be understood as a wrong which, other than a breach of contract, will be redressed in civil law with damages.¹
- Generally there are three key aspects of the law of torts, namely:
 1. an act or omission;
 2. the infringement of rights; and
 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 commits the act voluntarily and knowingly. It is irrelevant as to 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 can be sued upon in negligence or trespass. This can include injury, damage or loss – be it in the form of personal injury, physical damage to property, a recognised psychiatric illness and/or financial loss.
 - 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, namely:
 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 law² which has subsumed the common law tort of negligence.

¹ C Sappideen and P Vines, *Fleming's The Law of Torts* (10th ed, 2011) 3.

² *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 or she can establish a solid defence.
- It is important to note the existence of the 'once and for all' rule. This rule 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

- As a general rule, any person of sound mind and who has reached the age of 18 years old may sue and/or be sued.
- A minor sues by a next friend and defends through a guardian *ad litem*. A minor, in Australia, is a person under the age of 18 years of age. An intellectually disabled person may sue or be sued. A legal representative will be appointed to act on his/her behalf: *Yonge v Toynbee* (1910) 1 KB 215. Mental incapacity is not a defence where the Defendant is aware of the nature and quality of his/her act: *Morriss v Marsden* [1952] 1 All ER 925; *Adamson v Motor Vehicle Insurance Trust* (1957) 58 WALR; *Carrier v Bonham* (2002) 1 Qd R 474).

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 duty of care may be understood as a legal obligation to avoid conduct that poses an unreasonable risk of harm to other people.³
- A Defendant will owe the Plaintiff a duty of care in two situations:
 1. 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* [1956] 96 CLR 18;
 - manufacturer/consumer: *Donoghue v Stevenson* [1932] UKHL 100;
 - doctor/patient: *Rogers v Whitaker* (1992) 175 CLR 479;
 - owner/occupier: *Zaluzna v Australian Safeways Stores Pty Ltd* (1986) 162 CLR 479;
 - road user/road user: *Edwards v Noble* (1971) 125 CLR 296; *Burns v Lipman* (1971) 132 CLR 157; *Byrnes v Snare* (1986) 66 ALR 296;

³ C Sappideen and P Vines, *Flemming's The Law of Torts* (10th ed, 2011) 151.

- school authorities/pupils: *Commonwealth v Introvigne* (1981-1982) 150 CLR 258; *Geyer v Downs* (1978) 17 ALR 408;
 - prison authorities/prisoner: *Howard v Jarvis* (1958) 98 CLR 177;
 - professional/client: *Groom v Crocker* [1939] 1 KB 194; *Voli v Inglewood Shire Council* (1963) 110 CLR 74; *Hawkins v Clayton* (1988) 164 CLR 539;
 - lawyer/client: *Hill v Van Erp* (1988) 164 CLR 539); and
 - parent/child (*Robertson v Swincer* (1989) 52 SASR 356.
2. Where the circumstances are that of a novel fact situation the court adopts either the incremental approach, the salient features approach or the reasonable foreseeability approach in determining whether the Defendant owes a duty of care to the Plaintiff. 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.



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