



Miles and Dowler, *A Guide to Business Law 21st edition*

Study Aid – Chapter summaries

Chapter summary – ch 3 – introduction to torts (negligence)

1. A tort is a civil wrong that does not arise from breach of a contract. It is claimed by the victim of the wrong and the remedy is damages or an injunction.
2. As a tort is a civil wrong the standard of proof in a tort is a civil standard; ie on the balance of probabilities.
3. The burden of proof is on the plaintiff.
4. The plaintiff can generally bring proceedings in tort up to six years from the date the damage is suffered or known.
5. Legislation now generally provides that on the death of a person all causes of action by or against that person survive to the benefit or detriment of his or her estate. Legislation also generally provides that upon the death of a person because of tortious conduct, certain classes of relatives, such as a spouse or children, may sue for damages arising from that person's death.
6. The essence of negligence is that in certain situations the law imposes a duty to take reasonable care not to harm others.
7. In negligence the plaintiff must show four things:
 - the defendant owed the plaintiff a duty of care;
 - the defendant breached that duty of care;
 - the plaintiff suffered damage as a result of the defendant's breach of duty (causation); and
 - the damage was not too remote (reasonably foreseeable).
8. Duty of care: the plaintiff must show that the defendant owed a duty of care to the class of person of which the plaintiff was a member.
9. The traditional test for this is reasonable foreseeability: if I do this thing, should I, as a reasonable person, foresee the likelihood of harm to the plaintiff?
Donoghue v Stevenson [1932] AC 562, and *Grant v Australian Knitting Mills* (1933) 50 CLR 387.
10. It is not always easy to determine the extent of the duty of care. If the case falls into a category where the duty of care has already been determined, there are few problems. For example, it is well known that a driver of a vehicle owes a duty of care to other road users.



11. In respect of new categories, the High Court has said that reasonable foreseeability is governed by the notion of proximity. Proximity can be:
 - physical – in the sense of space and time;
 - circumstantial – in the sense of a relationship between the plaintiff and defendant (such as employer/employee or professional adviser/client); or
 - causal – in the sense of the closeness or directness between the defendant's actions and the damage caused.
12. In some situations, particularly where the claim is only for economic loss, the relationship of proximity will depend upon whether there has been an assumption of responsibility by the defendant and a reliance by the plaintiff.
13. The duty of care extends to abnormal persons – persons with a higher degree of sensitivity than normal.
14. In some situations, the plaintiff need not show a duty of care because there is clear evidence of careless behaviour. This is called “res ipsa loquitur”, meaning that the facts speak for themselves.
15. Standard of care: having established a duty of care, the plaintiff must show that the defendant breached that duty of care. The test applied is how a reasonable person would have acted in the situation. The High Court has said that the test is whether a reasonable person “in the defendant's position would have foreseen that [his] conduct involved a risk of injury to [the plaintiff]” and if so, “what a reasonable [person] would do by way of response to the risk”.
16. Damage: the plaintiff can only sue where the damage flows from the defendant's conduct. This is referred to as “causation”; ie the plaintiff must prove the negligence was the cause of the losses or damage.

To discover the true cause of the plaintiff's loss the courts generally use the “but for” test: “would the damage have occurred but for the defendant's negligent actions?” The “but for” test has limitations, especially where there may be more than one reason for the losses or injury suffered by the plaintiff (see *Yates v Jones* [1990] Aust Torts Reports 67,632).

Recently, the High Court said that the “but for” test is not the only test and other tests may be used. Some judges have suggested that the courts should adopt a commonsense approach; in other words, “using commonsense, did the defendant's conduct cause the damage?” (see *March v E & M H Stramare Pty Ltd* (1991) 171 CLR 506).

17. Remoteness of damage: the damage must not be too remote. This means that only those losses that are reasonably foreseeable can be recovered from the defendant. See *Overseas Tankship (UK) Ltd v Morts Dock Engineering Co Ltd* [1961] AC 388 (the *Wagon Mound No 1* case).



18. In recent times, courts have recognised that a claim can be made for negligence that caused pure financial losses only (without any personal injury or harm to property); see *Bryan v Maloney* (1995) 182 CLR 609, *Caltex Oil v The Dredge Willenstad* (1976) 136 CLR 529, *Perre v Apand Pty Ltd* (1999) 198 CLR 180, and *Johnson Tiles Pty Ltd v Esso Australia Pty* [2003] Aust Torts Reports 81-692; [2003] VSC 27.
19. Categories where pure economic losses may be recovered include:
 - negligent misinformation/misstatements or advice; or
 - negligent professional undertakings and work.
20. Negligent misstatement: a person who gives careless advice or information can be liable for negligent misstatement. In *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465, the court held that the giver of professional advice has a duty to act reasonably in the giving of that advice. In this case, however, the bank was saved from liability because it issued a disclaimer when it gave the advice. This case was followed and extended by the High Court in *Mutual Life & Citizens' Assurance Co Ltd v Evatt* (1968) 122 CLR 556.
21. In *Shaddock & Associates Pty Ltd v Parramatta City Council* (1981) 150 CLR 225, the High Court stated that a person who gives careless advice or information, gratuitously or otherwise, to another person will be liable where the other person reasonably relies on the advice and suffers loss.
22. Unless there is a supplying of information there may not be a claim for negligence (*San Sebastian Pty Ltd v Minister for Environment and Planning* (1986) 162 CLR 340).
23. Not everyone may sue for professional services being supplied carelessly. In *Caparo v Dickman* [1990] 1 All ER 568 and *Esanda Finance Corporation Ltd v Peat Marwick Hungerfords* (1997) 71 ALJR 448, both English and Australian courts suggested it would be difficult for shareholders and investors to sue auditors for a careless audit of company financial records. In *Esanda Finance Corporation Ltd v Peat Marwick Hungerfords* (1997) 71 ALJR 448, the High Court held that it was difficult to establish a duty of care to outsiders or parties who were not intended to receive information. The court has recommended foreseeability and proximity as being necessary to establish a duty of care in cases involving negligent misstatements.
24. Section 52 of the *Trade Practices Act 1974* may apply to careless statements or advice supplied by professionals. (Note that the new Australian consumer laws (s 18) in Chapter 19 also cover this issue.)
25. Section 74 contains an implied warranty that any services shall be performed with reasonable care and skill. A party who supplies incorrect advice/information carelessly may be in breach of this warranty. (Note that the new Australian consumer laws in Chapter 19 address this matter.)



26. Liability for professional undertakings and work: a professional person who fails to perform work for a client with reasonable skill and care can be liable in the tort of negligence.
27. In *Hawkins v Clayton* (1988) 166 CLR 539, *Van Erp v Hill* (1997) 188 CLR 159 and *Walmsley v Cossentino* [2001] NSWCA 403, solicitors were found liable for careless provision of their professional services and supplying correct legal advice. In *AWA v Daniles t/a Deloitte Haskins & Sells* (1992) 10 ACLC 933, the court found both auditors and company directors liable for negligence in failing to maintain proper internal controls and supervision and failing to bring problems to the attention of the company.
28. Liability for defective structures: builders may be liable to others either in contract or tort for defective building work.
29. Liability of occupiers of premises: in *Hackshaw v Shaw* (1984) 155 CLR 614, and *Australian Safeway Stores Pty Ltd v Zaluzna* (1987) 162 CLR 479, the courts found the careless occupiers liable for the injuries suffered by the defendants who had entered onto the premises.
30. In certain situations, the law recognises that a person can be legally responsible for the careless behaviour of another. This is called “vicarious liability”. Typical situations where such liability may be imposed include employers and principals.
31. Liability of public authorities: in certain situations, public bodies such as councils may be held liable for injuries/damage caused by their careless conduct or neglect (see *Pyrenees Shire Council v Day* (1998) 192 CLR 330).
32. However, courts also recognise self-responsibility and will not impose a duty of care where the risks are obvious to any reasonable person. In *Romeo v Conservation Commission* (1998) 192 CLR 431 and *Vairy v Wyong Shire Council* (2005) 80 ALJR 1; [2005] HCA 62, the courts refused to hold the public authority liable for negligence because the risks were obvious and the plaintiffs had contributed to their own injuries by their conduct.
33. Liability for defective products: manufacturers of defective products have been held liable in negligence and required to pay damages to the party injured by their products (*Donoghue v Stevenson* [1932] AC 562 and *Grant v AKM* (1933) 50 CLR 387). Liability has been extended to repairers, packagers and distributors and there is much protection offered under consumer protection legislation such as the *Competition and Consumer Act 2010* (Cth) (Chapter 19).
34. Liability for dangerous activities/criminal offences: The High Court has now held this liability is governed by the ordinary rules of negligence (*Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520). This non-delegable duty of care could extend to employment situations if the employer did not take reasonable care to avoid a foreseeable risk (*NSW v Lepore, Samin v Queensland and Rich v Queensland* (2003) 212 CLR 511).
35. The law imposes a duty of care on a bailee to take reasonable care of the goods



in his or her possession. See the case of *Pitt Son & Badgery Ltd v Proulefc* (1984) 153 CLR 644.

36. Defences to negligence.

- Voluntary assumption of risk: the defendant can show “volenti non fit injuria” – that the plaintiff voluntarily assumed the risk. A classic example is voluntarily accepting a lift from a drunk driver.
- Contributory negligence: the plaintiff's own carelessness contributed to the incident. If the defendant is successful, the courts will reduce the damages proportionately to the blame.
- Illegal enterprise: the High Court has now declared that there is no public policy that would deny relief to a defendant engaged in an illegal activity but it would always be difficult for such a plaintiff to establish the necessary relationship of proximity.

37. Statutory torts: the *Competition and Consumer Act 2010* (Cth) gives a right to damages in respect of certain conduct. This in effect creates statutory torts. It is difficult to exclude liability under the Act, particularly in a consumer transaction. This is covered in greater detail in Chapter 19.

38. Motor accidents in New South Wales

From 5 October 1999, there has been a new system of claiming compensation in relation to personal injuries caused by a motor vehicle accident on or after that particular date. The legislation is known as the *Motor Accidents Compensation Act 1999* (NSW). The legislation applies to motor vehicle accidents occurring after 5 October 1999. Payment of damages is now based on impairment rather than disabilities, pain and suffering.

39. The *Civil Liability Act 2002* (NSW) was passed, bringing changes to the issues of liability for negligence and damages. Negligence is defined as the “failure to exercise reasonable care”.

Division 2 provides that a person is not negligent in failing to take precautions against a risk where it was unforeseeable, the risk was insignificant and a reasonable person would not have taken any precautions. The Act has a variety of parts dealing with many aspects of negligence, self-responsibility and damages:

- Part 1A Negligence
- Part 2 Personal injury/damage
- Part 2A Special provisions for offenders in custody
- Part 3 Mental illness
- Part 4 Proportional liability



- Part 5 Liability for public authorities
 - Part 6 Intoxication
 - Part 7 Self-defence and recovery by criminals
 - Part 8 Good Samaritans
 - Part 8A Food donors
 - Part 9 Volunteers
 - Part 10 Apologies
 - Part 11 Damages for birth of a child.
40. Under s 5L of the CLA a defendant may avoid being sued for negligence if they can show the plaintiff was injured by the occurrence of an obvious risk during a dangerous recreational activity. In *Fallas v Mourlas* (2006) 65 NSWLR 418; [2006] NSWCA 32, the court agreed that kangaroo shooting was a dangerous activity but the defendant could not avoid liability because the injury to the plaintiff was caused by the defendant's gross negligence in using his handgun.
41. To avoid frivolous negligent claims the Act prohibits lawyers bringing legal action unless there are "reasonable prospects of success". In *Lemoto v Able Tehnical Pty Ltd* (2005) 63 NSWLR 300; [2005] NSWCA 153, the court suggested that these words meant the prospects of success in any case were fairly arguable.
42. Under s 50 of the CLA there have been recent cases where the courts have found against and in favour of the defence of professional peer opinion (*Walker v Sydney Area Health* [2007] Aust Torts Reports 81-892; [2007] NSWSC 526; *Dobler v Halverson* (2007) 70 NSWLR 151; [2007] NSWCA 335); and *MD v Sydney Southwest Area Health Service* [2009] NSWDC 24.