

Introduction to Torts

Engineers Beware

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What is a tort?

A **tort** is basically:

- A **civil wrong** against another person.
- Any **act** or **omission** which is likely to cause **injury** or **harm** to another individual.

Essentially: **The act need not be deliberate but avoidable.**

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Types of Tort

Torts can be classified into the following categories:

- Negligence
- Trespass on the person (eg assault)
- Trespass on land
- Trespass on goods (detinue and conversion)
- Nuisance (eg, noise)
- Deceit, Passing off
- Defamation
- Interference (domestic or economic relations)

What's Negligence?

Policy: Every person must be answerable and accountable for any damage or injury caused by their negligence.

- This area of law is constantly changing and is in some ways a reflection of the public's expectation for the **level of care** that we owe to our "neighbours"
- The notion of negligence is not limited to **individuals** but also includes **professionals**, private and public **institutions**.

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Examples of Negligence

Negligence can be the result of:

- not performing or performing their **duties** poorly
- producing **defective** products
- giving **bad advice** or making **misleading** statements
- having a **special relationship** (vicarious liability, eg: employee-employer, landlords–tenants) or responsibility (eg bailee)
- being in a **particular industry** (eg safety equipment manufacturer)
- being a **professional**

Elements in proving a tort

Elements required to proving an action in negligence:

- 1 **Duty**: defendant owes a **duty of care** to the plaintiff (duty of care)
- 2 **Breach**: the defendant **breached** the duty of care (breach)
- 3 **Causation**: the **injury** was a direct result of the defendant's breach (actual damage)
- 4 **Damage**: type of damage suffered is not too **remote** from the defendant's conduct

Step 1: Establishing a Duty of Care

Donoghue v Stevenson [1932] AC 562.

- Got around the problem of privity of contract
- **Principle:** a general duty of care is owed to your “neighbour” who is any person that it’s **reasonably foreseeable** may be affected by your negligent act.

Jaensch v Coffrey (1984) 155 CLR 549

- “proximity” test – requirement to see if there was a sufficiently **close relationship** or connection between the parties to establish a duty of care.

Perre v Apand (1999) 198 CLR 180

- proximity test as the major test for establishing duty of care in cases involving economic loss.

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- Negligent acts or omissions
- Defendant has knowledge that the claimant is likely to suffer loss as a result of the defendant's act or omission.

Esanda Finance Corp Ltd v Peat Marwick Hungerfords (1997)

- Economic loss resulted from **negligent misstatements**
- The Defendant should have known that the Plaintiff (a specific class of persons) was **reliant** on the advice given.

Reasonable foreseeability is still the primary test to establish a **duty of care** and it is for the Courts to determine if there is a link between the parties.

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Pre-existing Relationships

- School teachers
- Employer and Employee
- Hospitals, doctors and patients

Abnormal Claimants

- Defendants must take their claimants **as they find them**
- Duty of care to take **reasonable care** may include measures to remove reasonable hazards from the path of the “abnormal” claimant (*Haley v London Electrical Board* (1964))

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Step 2: Breach of Duty

Principle: Breach occurs when the defendant fails to satisfy a **reasonable standard of care** that a **reasonable person** would have taken.

Standard of care - The Objective Test:

- **reasonable person** is one with a normal level of intelligence and social experience and does not suffer from mental or social disability
- **Doing your best** is not sufficient if it falls below the standard expected of a reasonable person
- A Defendant with **higher than average abilities** will not be held liable if they do not use those abilities
- A **higher standard of specialization** will only apply where the Defendant has held themselves out to have those skills

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The Objective Standard of Care: the Court may consider the following factors

- **Likelihood of the harm** (*not far fetch or fanciful*)
- **Seriousness** of the risk and injury (*more serious the risk, the higher standard of care*)
- **Knowledge** available (*Defendants not liable for advances in knowledge which occur after the act*)
- **Common practices** (*failure to adopt common practices*)
- **Utility** of Defendant's acts (*the utility of the act may determine the standard of care*)
- Practicability of **precautions** (*gravity of risk v probability of it happening v costs of prevention*)

Step 3: Causation

The universal legal test used by courts is the **but for** test to prove the causal link between the defendant's conduct and the claimant's injury

Problem arises when there are **multiple causes** in which a **subsequent act** compounds the injury, the defendant is only responsible for as much harm as is **attributed** to their own negligence

Where a **chain of causation** is broken by an intervening act no longer responsible for the claimant's injury, then the defendant's conduct will not be considered the cause of the injuries – *novus actus interveniens*

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Step 4: Actual Damage

To succeed in an action for negligence, the claimant **must** have suffered damage

The Court also looks at whether the type of damage incurred by the claimant was a **reasonably foreseeable** result of the defendant's negligence

The **extent of the injury** which actually results is **irrelevant** so long as the class of injury can be reasonably foreseen

The claimant only has to **belong to the class of claimants** that may be injured as a result of the defendant's actions

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Defenses

At Common Law, **contributory negligence** was a complete defense

Since the *Law Reform (Miscellaneous Provisions) Act* 1965 NSW, contributory negligence operates to **reduce the amount of damages**

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Civil Liability Act 2002 NSW

- [Section 5O](#) Standard of care for professionals
 - Professional does not incur liability in negligence if that professional acted in a manner that is widely accepted in Australia by peer professional opinion as competent professional practice
- [Section 5P](#) Division does not apply to duty to warn of risk
 - Professional must give a warning, advice or other information in respect of risk of death or injury
- [Section 5Q](#) Liability based on non-delegable duty
 - You will be liable for non-delegated duty that is entrusted to another person (vicariously liable).

Trade Practices Act

- [Section 65C](#) Product Safety Standards and Unsafe goods
- Part V Division 2A Condition of sale for the goods to be **fit for the purpose** purchased and is of **merchantable** quality (see also s62-64 *Sale of Goods Act* 1923 (NSW))