1A – The Role and Function of Tort Law
SVW Ch.1 [1.15-1.30]
Bismarck

[3.2] Overview of Tort Law from Julia Davis Textbook (pg. 35-38)

- Law of torts → protects some of our most fundamental rights and basic freedoms

- An area of law concerned with **actions that harm others**
  - Provide a victim with a **remedy in the form of an award of damages** → the aim of an award of damages is to **restore the victim's position**, as far as money can do, into a position they would be in if the tort had NOT been committed

- "Civil wrongs" → enforceable by the **person wronged**, rather than by the state (criminal)

- Torts protects individuals from acts such as assault, battery, false imprisonment, trespass to land, conversion of goods, nuisance, defamation, deceit and negligence
  - **Imposes duties** to avoid conduct causing harm
  - No liability without fault → there must be intention, recklessness or negligence in bringing about harm
    - However, there are instances of **strict liability** → liability **without fault**

Functions of the law of torts (pg. 37)

- Torts **define rights, makes the law** and then applies it to **individual cases**
  - Protects fundamental rights and basic freedoms
  - Sets norms of conduct that **govern interpersonal relations**

- Torts **promotes corrective justice** between individual parties
  - Provides a remedy to a victim through compensatory damages

- Torts **promotes wider community benefits**
  - Deters unethical and harmful conduct which wrongfully causes harm to others

Remedies in the law of torts (pg. 37)

- Damages are awarded to a plaintiff once the defendant is found liable (there must be FAULT):
  - **Nominal** → recognise plaintiff's rights invaded, awarded even with no damage
  - **Compensatory** → intentional torts: compensated for *direct* harmful consequences, negligence: compensated for *reasonably foreseeable* consequences that are NOT too remote
  - **Aggravated** → compensate any *extra* distress, insult or humiliation
  - **Contemptuous** → rarely awarded, when the plaintiff's case was worthless
  - **Exemplary / punitive** → punish the defendant in extreme circumstances

- Plaintiff entitled to an injunction
  - **Mandatory injunction** → defendant must do something positive
  - **Prohibitive injunction** → defendant must refrain from doing something
  - **Interlocutory injunction** → interim orders, can be replaced with a final or perpetual order

5A –Breach of duty 1
SVW Ch.10 [10.05-10.70]
CLA Part 11

[10.05] Introduction

Breach → concerned with whether the defendant's conduct fell below the **required standard of care**

- **Standard of care** → measured in reference to a **notional reasonable person**
- **Breach** → then determined by **comparing the defendant's actions** with those expected of a **reasonable person** as a matter of law

Bankstown Foundry Pty Ltd v Braistina (1986)
- Notions of **reasonableness** vary over time and place → highly dependent on the **specific circumstances** of a case
- Influenced by **current community standards**
  - For example, **industrial safety standards** have become more demanding → this has its impact on community expectations on the **reasonably prudent employer**

Vairy v Wyong Shire Council (2005)
- A breach of duty in a **specific context** does NOT create a precedent for **other contexts**
- Breach of statutory duty → on its own, does NOT constitute a breach of duty
  - Running a red light → breach of the Motor Traffic Legislation
  - An offence has been committed → but did the person act like a reasonable person in the circumstances?

[10.10] General principles

- Two limbs to the **breach enquiry:**
  - **Reasonable foreseeability** of a real risk of injury arising
  - **Reasonableness** of the defendant's response to that risk

- **Common law test** → outlined in **Wyong Shire Council v Shirt (1980)**
- **Civil liability test** → similar to **Shirt** but NOT identical

[10.15] NSW General Principles regarding Breach (CLA, s 5B)

(1) A person is not negligent in failing to take precautions against a risk of harm unless:
(a) the risk was *foreseeable* (that is, it is a risk of which the person knew or ought to have known), and
(b) the risk was not *insignificant*, and
(c) in the circumstances, a *reasonable* person in the person's position would have taken those *precautions*.

[10.20] Foreseeability of risk of injury

- Foreseeability → goes from **GENERAL** to **PARTICULAR**:
  - Duty → concerned with foreseeability for the plaintiff
  - Breach → relates to risk of injury
  - Remoteness → kind of damage/harm suffered by the plaintiff

In regards to **breach**:
- **Foreseeability** is the **first limb** of the common law test

[10.25] Wyong Shire Council v Shirt (1980) – High Court

Foreseeability → first test to determine whether a breach has occurred
Is *"not insignificant"* a more stringent test than the once set out by Mason J in this case

Material Facts:

- Plaintiff became a quadriplegic after striking head at the bottom of a lake (that was just over 1m deep) whilst water skiing
- Argued that he had been misled by a nearby "Deep Water" sign erected by the council
- The sign was intended to warn swimming that near the jetty, the water was deep → however, the water elsewhere was very shallow

Procedural history:

- **Trial judge** → plaintiff initially succeeded → council negligent in relation to the sign
- **NSW Court of Appeal** → council's appeal dismissed, also held that the Aquatic club also owed the plaintiff a duty of care
- **High Court** → appeal by council, refused **special leave**

Issue:

- Is foreseeability sufficient for a finding of negligence

Legal reasoning:

- **Foreseeability** of risk (in context of breach) and **likelihood** of risk are two different things
- A risk of injury which is **unlikely** to occur may be plainly **foreseeable** (Bolton v Stone)
- Thus, **foreseeability** is concerned with whether the risk is not one that is **far-fetched or fanciful** → It is NOT concerned with the **probability or improbability of its occurrence**
    - It is true that a greater probability of occurrence means the risk will be more readily perceived to be a risk
        - However, it does NOT follow that a risk which is unlikely to occur is NOT foreseeable
- **A risk which is NOT far-fetched or fanciful is real and therefore foreseeable**

Outcome:

- Dismiss the appeal → special leave NOT granted

[10.70] Vairy v Wyong Shire Council (2005) – High Court of Australia

Application of foreseeability

Material Facts:

- A young men (plaintiff) suffered a catastrophic injury from diving into water and striking their heads/necks on the sand below
- Plaintiff sued the public authority → for failure to warn of the risk which materialised

Procedural history:

- **Trial judge** → there had been a **breach of duty**, but damages were reduced as a result of **contributory negligence**
- **NSW Court of Appeal** → risk was **obvious**
- **High Court** → present case, plaintiff appealing

Issue:

- Whether the **council** had a **duty to warn of risks** associated with diving from a rock platform
- Whether the **council** had a **duty to prohibit diving** from the rock platform

Legal reasoning (Hayne J):

- Breach of duty → concerned with a **reasonable person's response** → what the reasonable person *would* have done to avoid what is now known to have occurred
- Inquiry is **prospective** → looking *forward* from a time before the accident

In terms of the facts of this case:

- A **reasonable council** would have recognised that there was a risk that people diving / jumping off the rock platform could result in catastrophic spinal injury
- **Risk was foreseeable** → this is evidenced in the fact that the appellant actually suffered injuries and so did another man
- **Occurrence** → found to have been "common knowledge within the Council" → however, Council took **NO steps to warn / prevent** others from diving off the platform
    - Thus, it was **reasonably foreseeable** that a person entering the water would suffer injury when:
        - Entry is head first
        - Water too shallow
- However, although the **injury was foreseeable**, it was **NOT and could NOT be suggested** that a **reasonable council** would have **marked every point** in its municipal district, warning / prohibiting against diving
    - Council could NOT mark every single spot where there is risk of injury

Outcome:

- **Appeal dismissed** (4:3) → Gleeson CJ, Kirby and McHugh JJ finding that the Council had NOT breached its duty of care, McHugh JJ dissenting

7B – Causation 2

SVW Ch 11 [11.105-11.145]; [11.60-11.80], [11.190]
CLA Pt 1 s 5D

Multiple sufficient causes

[11.105]

- **Multiple sufficient causes** → exists when there are *two or more* events which is sufficient to **cause** the harm
    - Traditional **"but for test"** is difficult to apply (**Negligence Review Panel**)
- The courts have taken different approaches to resolve multiple sufficient causes:

Approach 1 → Alternative Liability Theory

- **Plaintiff** → shift the burden of **proof of causation** to **multiple defendants** (even though only one of them is responsible)
    - The innocent plaintiff's case is NOT defeated because she cannot establish the **"but for"** test

Cook v Lewis [1951] → **Canadian authority**

- ***FACTS:*** two defendants were negligent in firing their guns in the direction of the plaintiff → the jury could NOT decide which defendant should be liable
- ***HELD:***
    - All negligent defendants are to be held liable in cases of **multiple sufficient causes** that ***CANNOT*** be distinguished on the **balance of probabilities**

Approach 2 → Market Share Liability

- Allows a plaintiff to establish a prima facie case against **product manufacturers** for an injury caused by a product (despite NOT knowing which defendant produced the product)
- Liability apportioned amongst manufacturers according to market share for the product that produced the injury

Sindell v Abbott Laboratories (1980) → American authority

- ***FACTS:*** A correlation emerged between a drug to control miscarriage and a rare form of cancer → drug produced by over 200 manufacturers → however, plaintiff could NOT prove which of the manufacturers caused the cancer
- ***HELD:*** Each defendant was liable for the **proportion** represented by their **share market** (unless they can prove that their product was NOT responsible)

Successive causes

[11.110] Baker v Willoughby [1970] – House of Lords

Compensation → NOT for injury but rather for the loss suffered due to injury
The *FIRST TORTFEASOR* is responsible for the original loss → the *SECOND TORTFEASOR* is only liable for any additional loss the plaintiff suffers

Material Facts:

- **Baker (plaintiff)** injured in car accident caused by **Willoughby's (defendant)** negligence → Baker experienced serious injury to left leg and ankle → lost earning capacity, endured pain, ability to move freely was reduced
- Three years later → **shot in the leg** during a robbery → leg had to be amputated

Procedural history:

- Trial judge held that the:
  - **Plaintiff** – *25% liable*
  - **Defendant** – *75% liable*

Issue:

- Whether the defendant is liable for the harm sustained by the plaintiff, given the two successive injuries that were both capable of **causing** the harm
  - Plaintiff argued that the loss suffered from the car accident **(first injury)** has NOT been diminished by his **second injury**
  - Defendant argued that after the **second injury**, no loss can thereafter be attributed to the respondent's negligence → second injury submerged the effect of the **first injury**

Legal reasoning:

Lord Reid

- The function of compensation → NOT for the injury, but rather, for the **loss suffered** as a result of that injury
  - Thus, in the present case → loss is NOT for having a stiff leg → but **inability** to lead a full life, enjoy free movement and earn as much
  - The second injury did NOT diminish these

Performance Cars Ltd v Abraham [1962]

- ***RULE:*** A wrongdoer must take the plaintiff as he finds him/it (**eggshell-skull rule**), with this to his/her advantage or disadvantage
  - If a **second tortfeasor** causes **NO additional loss** to the **plaintiff**, then they are **NOT liable**

- ***APPLYING:*** The robber NOT liable for damage caused by the respondent → only responsible for the **additional loss** suffered by the appellant (this is having an **artificial limb** rather than a stiff leg)

Present case

- The plaintiff will continue to suffer disabilities caused by the car accident **(first injury)** for as long as he would have done if his leg had never been shot or amputated

- ***NOTE*** → Even though the **second accident** shortened the period of time that the plaintiff suffers (thus, the defendant should be liable for a shortened period of time), this is defeated by the fact that the plaintiff continues to suffer from disabilities

Lord Pearson

- A **comprehensive** and **unitary view** of the damage caused:
  - Original accident caused a **devaluation** of the plaintiff (reduction in his ability to do things)
  - For the devaluation → **original tortfeasor** should remain **responsible** to the full expects (unless there is an unexpected recovery or shortening of time which the plaintiff suffers the devaluation)

Outcome:

- Appeal allowed in favour of the plaintiff
  - Plaintiff disability **caused** by TWO events → later injuries became a **concurrent cause** of the disabilities caused by the injury inflicted by the defendant, they could NOT diminish the amount of damages payable
    - **Subsequent injury is irrelevant** → unless such subsequent injury reduces the plaintiff's disabilities or shortens the period during which disabilities would be suffered
    - **Supervening event** → it had made him more lame, more disabled, more deprived → he should NOT have less damages through being worse off than might have been expected

"Exceptional Cases"

[11.120-11.130]

Overview:

- **5D(1)** → **"But for" test** → **Marche v Stramare**
- **5D(2)** → When the but for test doesn't work and we're looking at exceptional cases

For exceptional cases:

- Used in **situations** where the plaintiff is unable to establish that the breach is a **"necessary condition"** of the injury
- **In certain circumstances, a breach of duty may be considered causal, even if it CANNOT be proved to be a necessary condition of the injury**
- Exceptions must be tested with:
  - "Established principles" with the ones endorsed by the Negligence Review Panel → those being **"material contribution to harm"** and **"material contribution to risk"**
    - The **"but for"** test doesn't help us → must see if there is a **material contribution to the harm**

[11.115] Williams v The Bermuda Hospitals Board [2016] – UK Privy Council

A defendant found to have materially contributed to an indivisible injury will be held fully liable for it (even though there may have been other contributing causes, with successive events capable of making a material contribution to the subsequent outcome)

Material Facts:

- Williams suffered from **acute appendicitis**
- However, he experienced complications → **delays** in diagnosing and treating him
- Williams sued the appellant hospital board (responsible for management of the hospital for his pain and suffering)
- **Alleged that the complications were the result of negligent delay in his treatment**

Procedural history:

- Trial judge → Williams did **NOT** prove that the **culpable delay** caused the complications (although he was awarded $2,000 for his extra-suffering)

- Court of Appeal → reversed the trial decision on causation – the "numerous delays" were **contributing factors** to the damage ultimately suffered

Issue:

- The issue of **causation** → whether the **breaches of duty** by the hospital board **"contributed materially"** to the injury
  - NOTE that the legal question is **NOT whether the negligent delay / inadequate system caused the injury**

Legal reasoning (Lord Toulson):

- Gregg v Scott [2015] → Causation is NOT a case of **"all or nothing but one of sufficiency"**
  - There must be a **"sufficient"** causal link between defendant's conduct and the claimant's injury

- Professor Sarah Green **(Causation in Negligence)** → Where a defendant has been found to have caused or contributed to an indivisible injury, he/she will be held **fully liable** for it, even though there may well have been other **contributing causes**

- The present case has many **obvious parallels** with Bonnington Castings Ltd v Wardlaw
  - Bonnington → disease was produced by **multiple sources** (inhalation of dust from swing grinders *AND* pneumatic hammers)
  - Present case → sepsis and resulting **myocardial ischemia** were produced by multiple sources (appendicitis, hospital's negligence)

- Hotson v East Berkshire Health Authority [1987] → When there's room for finding that something was caused by a **combination of *TWO* factors**, use the **balance of probabilities** to see which one caused it
  - If there were **"material contribution"** on the part of the defendant's negligence → the defendant would be **fully liable**
  - The **"material contribution"** approach is **confined to cases** where the **timing of origin of the contributory causes is simultaneous**

- McGhee v National Coal Board [1973] → It is immaterial if the **cumulative factors** operated **concurrently or successively**
  - Successive events are capable of making a **"material contribution"** to the **subsequent outcome**

- Wilsher v Essex Area Health Authority [1988] → A claim will fail if the most that can be said is that the claimant's injury is likely to have been **caused** by one **or more of a number of disparate (different) factors**, one of which was a **wrongful act or omission**.

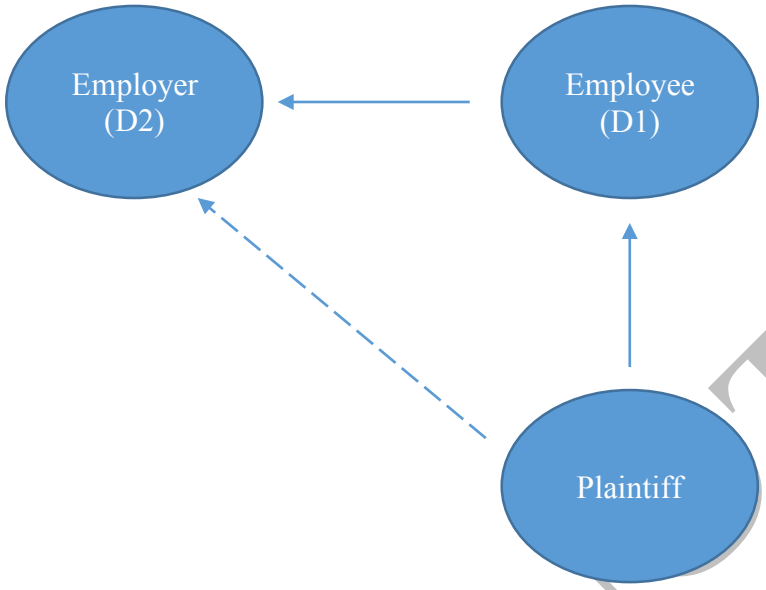
- **"Doubling of risk" TEST**
  - Must be used with **caution**
  - Inferring causation from proof of heightened risk is never an exercise to apply mechanistically → just because there's a higher risk, doesn't mean it was a cause → a doubled tiny risk will still be very small

Outcome:

- Appeal to be dismissed → the hospital was found to have made a **material contribution** to the injury of Williams (delays lasted for 2h, 20mins longer than it should have been done)
  - Thus, the hospital board materially contributed to the process

Vicarious Liability

Visual diagram



[13.45] Vicarious Liability – liability for the conduct of others

Vicarious liability is a form of **strict liability** that operates to make one person **legally viable to compensate a plaintiff** for a tort that has been committed by another person

- Typical case concerns an **employer's liability** for a tort committed by an **employee** within course of employment

Policy reasons → adopted from Fleming's 'The Law of Torts'

- The "master" (ie. employer) is a more "promising source of recompense" than his "servant" (ie. employee)
- This is because:
  - Ensures that larger units (ie. employer) **reduce accidents** through efficient organisation and supervision
  - Smaller units (ie. employee) are not worth suing as they are **rarely financially responsible**
- Thus, by holding the "master" liable, the law provides an **incentive** to discipline "servants" guilty of wrongdoing

Necessary elements to prove

1. There must be a **requisite relationship** imposing responsibility for the **conduct** of others
2. There must be a **sufficiently close relationship** between wrongful conduct causing injury AND what the person is employed to do (conduct within the course of employment)

[13.50] But who is an employee?

- **"Control test"** → used to decide whether a person is an employee (or servant)

A person is an **employee** if the **employer** can tell the person not only **what to do** but **how to do it**

- Stevens v Brodribb Sawmilling Co Pty Ltd (1986) → **Mason J** → 'control is NOT the sole criterion'
- Other **factors** are used to make a determination:
  - Hours of work
  - Dress codes

- Provision of equipment
- Right to hire and fire
- Payment of wages
- Deductions for taxation
- Provision of equipment
- Mode of remuneration
- Obligation to work
- Hours of work and provision of holidays
- Delegation of work by putative employee

- Ermogenous v Greek Orthodox Community of SA (2002) → there is **no automatic presumption** that commercial / family relationships give rise to contractual responsibilities and employment relationships

[13.50] Distinction between Employee and Independent Contractor

	Employee	Independent Contractor
Type of contract	Contract ***of*** service • Provides ongoing service • Subject to **directions** and **control** of the employer	Contract ***for*** services
Factors	• Work to set and determined hours • Use employer's equipment • Payment made at beginning/completion • Renders **personal service** (carried out by themselves)	• Workers determine own hours • Provide their own equipment • Payment made on completion of the job • **Employs others** to carry out the work
Key authorities		• On Call Interpreters and Translators Agency v Commissioner of Taxation (No 3) [2011] • ACE Insurance Ltd v Trifunovski [2013] • Fair Work Ombudsman v Quest South Perth Holdings [2015]

[13.55] Hollis v Vabu (2001) – High Court of Australia

Distinction between independent contractor, employee and agent

Material Facts:

- **Hollis** (plaintiff) injured in an accident caused by a bicycle courier (D1)
- Courier never identified → rode off before Plaintiff could get details
  - However, Courier was wearing the company uniform provided by **Vabu**, his employer (D2)

Procedural history:

1. **Trial judge / Court of Appeal** → held that the couriers were running their own business or enterprise due to the following factors:
   a. Couriers owned their own bicycles
   b. Bore the cost of expenses
   c. Supplied own accessories

2. **High Court** → overturned decision

Issue:

- Whether the courier should be classified as an **employee** or an **independent contractor** (employment relationship)
  - If the courier was an employee, then he may be held to be **vicariously liable** for the tortious conduct of its employee

Legal reasoning:

Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ:

- First, the courts made a distinction between the relationship of an **employer and employee** AND **principle and independent contractor**
    - An ***employee*** performs work for the benefit of their ***employees***
    - An ***independent contractor*** performs work for the benefit of their ***principles***
        - **This indicates it is NOT sufficient to simply establish an employer-employee relationship simply by the fact that one party *benefited* from the activities**
- Second, the **fundamental question** → **whether "the employer's enterprise has created the risk that produced the tortious act"**
    - Affirmative answer = employer must **bear responsibility**
- Third, the court referenced fundamental concerns why the **imposition of vicarious liability** has been accepted by the courts → **Bazley v Curry [1999] → Supreme Court of Canada**
    - Provides a **just and practical remedy**
    - **Deters future harm** → an incentive is provided to the employee to reduce the risk of an accident
- Fourth, the court referred to the **control test** → established that it is NOT the only relevant factor

- **Fifth, the following factors indicate that the courier was NOT running their own business or enterprise → there was NO independence in their conduct**

• Couriers were NOT providing **skilled labour** which required special qualifications	• A bicycle courier cannot forge an **independent career** as a free-lance bicycle courier → thus, intuitively, it is wrong to regard the couriers
• Couriers had NO **control** over performing the work	• Required to: o Begin work at 9am o Assigned in a work roster o Unable to refuse work o NOT able to delegate their tasks
• Couriers wore the company uniform	• Thus, they were **presented to the public** as employees of Vabu
• **POLICY** → This is a matter of deterrence	• Vabu should be penalised for **failing to adopt an effective means** for the public to personally identify couriers
• Vabu controlled the courier's finances	• Vabu produced pay summaries • No scope for couriers to bargain • Vabu undertook **provision of insurance** • No leave allowed during Christmas holiday season * This indicates that there was a **limited scope** for the couriers to pursue their business on their own account
• Although couriers provided bicycles, repaired or replaced them when lost or damaged and bought their own uniforms and radios, this should NOT mean that they were independent contractors	• Rather, this indicates that the contractual situation of employment was **more favourable to the employer**
• Vabu retained **control and direction** of all deliveries → couriers had little latitude	• Couriers had to deliver goods in the manner which Vabu directed

- Sixth, the court concluded that the relationship between **Vabu** and the **courier** was that of **employer and employee**

McHugh J

- Overall, McHugh J reached the **same outcome** as the majority but adopted a **different approach**
- Used the **AGENT TEST** established in **Colonial Mutual Life Assurance Society (1931)**
    - A **principle** may be liable for the conduct of an **agent**, even if the agent is NOT an employee
    - **Principle liable only when the agent carries out a task for the benefit of the principle**
        - In the present case, the courier was an **AGENT** of Vabu (but NOT an independent contractor)
        - Thus, the courier was **acting as Vabu's representative** in carrying out the task → delivered goods for the **benefit** of Vabu
- Refused to extend the law of vicariously liable → rather, the AGENT rule ensures **policies** of effective compensation, fairness and deterrence

Outcome:

- Plaintiff **successful → appeal allowed**

In the course of employment

[13.80] In the course of employment

- The final issue in **vicarious liability** has often been the most difficult

An **employer** is *only* liable where the tortious conduct is **"in the course of employment"**

New South Wales v Lepore (2003)

- Answers the following questions:
    - When does the **relevant conduct** have a **sufficiently close connection** with the "employment" as to make the "employer" liable?
    - What role should **policy** have in making determinations?
    - Is it sufficient that the enterprise **creates a risk** that the **wrongful conduct** might occur?

10A – Non-delegable duty and proportionate liability

SVW Ch.13 [13.130-13.150], [13.155-13.180], [13.190-13.200]
CLA Part 1 s5Q

Definition

A **non-delegable duty** is a duty of care owed towards a group of people which cannot be assigned to someone else.

- When one owes a non-delegable duty towards another, he has a duty not only to **take reasonable care himself**, but **ensure that others take reasonable care** (since he cannot discharge his duty by 'delegating' or transferring it to others).
- As a result, a defendant who owes a non-delegable duty will be **liable for the wrongdoing of others** even if they are **independent contractors**.
    - It offers a way around the rule that a principle is NOT vicariously liable for the torts of an independent contractor

11B – Damages 1
SVW Ch.12 [12.15-12.30]; [12.45-12.65], [12.75], [12.90-12.95], [12.105-12.110], [12.120-12.185]
CLA Part 2 ss11-26

Basic principles in compensatory damages awards

[12.15]

- Basic principles derive from the **common law** (NOT altered in any substantial way by legislation)
- **FOUR main principles:**
  - A defendant is awarded a sum of money which would **put him in a position as if he had not sustained the injuries**
  - Damages must be awarded as a **lump sum** → NO periodic payments
  - A plaintiff is **free to do what he likes** with the money
  - Burden lies on the **plaintiff** to prove the injury or loss

[12.20] Restitutio in integrum (compensatory principle)

- **Common law principle** → **restitution in integrum**
  - **Plaintiffs are entitled to be restored to the position they would have been but for the defendant's wrongdoing**

- Damages → provide **"fair"** rather than **"perfect"** compensation for the plaintiff's loss
- **Livingstone v Rawyards Coal Co (1880)** → Damages should, as nearly as possible, get at the sum of money which would have **put the party** who has been injured in the **same position as he would have been in** if he had not sustained the wrong
  - Plaintiff → earning $500,000 p.a. before the accident → future economic damages calculated on the basis of $500,000 p.a
- Damages have a **highly individualised focus** premised on **corrective justice notions**

[12.25] The "once and for all" rule

- **A cause of action arises when cause of action is complete (damage is suffered or when harm occurs)**
- Common law principle → plaintiff can only recover a **single lump sum payment** intended to compensate for **past and future losses** relating to the action

- **Murphy v Stone-Wallwork (Charlton) [1969]**
  - A plaintiff cannot come back for ***more*** damages
  - Defendant cannot come back if the loss is ***less*** than anticipated
  - Thus, a court must do the best it can to reach a figure on a **reasonable balance of the probabilities**, avoiding "undue optimism" and "undue pessimism"

- Necessarily, the court is being asked "to assess the un-assessable, to pronounce on the unpronounceable, to judge the unjudgeable" → **Mundy v Government Insurance Office of New South Wales (1995)**

- For the **plaintiff** → can cause serious hardships → there is no ability to re-open assessments
  - Evidence from the **NSWLRC** suggests that plaintiffs are frequently under-compensated

- But even if courts were to introduce periodic payments, which may seem an attractive possibility, there are still serious drawbacks → for example, the **unending possibility of litigation** (which means there is **NO finality** in judgements)

[12.30] Damages awarded unconditionally

- Todorovic v Waller (1981) → "the court has no concern with the manner in which the plaintiff uses the sum awarded to him … [he] is **free to do what he likes with it**"

[12.215] Thresholds and caps on general damages

- CLA, workers' compensation and motor accident legislation → impose **thresholds on general damages** and **maximum amounts (caps)**, particularly in regards to **non-economic loss**
    - This excludes the high volume of minor injuries (which are costly to administer)
        - This means that **awards for non-economic losses** are only administered in the **most serious cases**

In NSW, no claim for **NON-ECONOMIC LOSS** may be made where the **severity of the loss** is **BELOW 15% of a most extreme case (NSW CLA, s 16)**

- Damages are assessed using a **sliding scale**
- **The maximum amount of damages that may be awarded for NON-ECONOMIC LOSS is $594,200** (this maximum amount is to be awarded only in the most **extreme cases**)
- CLA restricts claims from **falling below 33%** of **"a most extreme case"** to less than **full compensation**, in accordance with the table contained in sub(3)

Severity of the non-economic loss (as a proportion of a most extreme case)	Damages for non-economic loss (as a proportion of the maximum amount that may be awarded for non-economic loss)
15%	1%
16%	1.5%
17%	2%
18%	2.5%
19%	3%
20%	3.5%
21%	4%
22%	4.5%
23%	5%
24%	5.5%
25%	6.5%
26%	8%
27%	10%
28%	14%
29%	18%
30%	23%
31%	26%
32%	30%
33%	33%
34%-100%	34%-100% respectively

- At **15%** of "a most extreme case" → only 1% of the max. set by legislation may be awarded
- At **20%** of "a most extreme case" → 3.5% of the max. may be awarded
- At **32%** of "a most extreme case" → 30% may be awarded [*notice that this is due to the sliding scale*]

Common law rules relating to assessment of NON-ECONOMIC LOSS

- Courts have often emphasised that "a most extreme case" is conceptually different from "the" most extreme case

- "A most extreme case" avoids requirement to apply the **superlative by imagining *the* most extreme case**

Dell v Dalton (1991) → NSW Court of Appeal

- The word "most" is synonymous with "very"
- It does NOT mean "in the greatest quantity, amount, measure, degree or number"