

EXAMPLES OF TOPIC NOTES

Topic 1 - damages

- Nature of compensation in the law of torts

- Defendant is compelled to **pay fair compensation** (*Teubner v Humble*) for **past and future economic loss** suffered by the plaintiff **as a result of the injury**, and any needs created by the wrongful conduct that would not otherwise exist, and pain and suffering
- The standard of proof is **'balance of probabilities'** - *Evidence Act 2008* (Vic) s 140, *Davies v Taylor*

- Lump sum awards and structured settlements

- The 'once and for all rule'

- Affirmed in *Todorovic v Waller*.
- In *Murphy v Stone-Wallwork* (Charlton) Ltd, Lord Pearce justified the rule on the grounds that it **prevents unending litigation**.
- Courts of Appeal have the power to reassess damage where the assumptions on which the assessment of damages was based was falsified - *Mulholland v Mitchell*.
- In cases of continuing nuisance, successive actions can be brought for every fresh injury.

- Lump sum awards

- **Courts have no interest what happens to the damages** awarded to the plaintiff - *Nominal Defendant v Gardikiotis*.
- **Where claimant is incapable of managing his or her finances**, award should include an amount to cover the costs of managing the sum awarded - *Willett v Futcher*.
- If there is **no clause providing for the possibility for early death** and the cease of payments if so, full damages should be paid - *Gilchrist v The Estate of the Late Sara Alexander Taylor*.

- Structured settlement agreements

- **Lump sum payments and annuities earned on them are tax free** - *Taxation Laws Amendment (Structured Settlements and Structured Orders) Act 2002* (Cth).
- Therefore led to Victoria introducing ss 28M and 28N in the *Wrongs Act* which provided for defendants to pay the awarded damages periodically rather than in a single lump sum.

Topic 5 - Tort of negligence: duty of care

- The following elements of the cause of action in negligence must be established by plaintiffs, on the balance of probabilities, before they can obtain damages:
 - **Duty of care** - plaintiff must establish that the defendant owed a duty to take reasonable care to avoid injury to the plaintiff.
 - **Remoteness of damage** - plaintiff must show that the damage caused by the defendant was reasonably foreseeable.
 - **Breach of duty** - fault lies in the defendant's breach of duty by falling below the 'standard of care' expected of a reasonable person in their position.
 - **Causation** - plaintiff must establish a legal connection between the breach by the defendant and the injury suffered.
- Once the plaintiff has established a prima facie case, the burden of proof shifts to the defendant to plead and establish a defence.
- **NOTE:** the plaintiff must have suffered a recognisable form of damage - *Mahoney v Kruschich*. Transient emotions (stress, anxiety, fear) or inconvenience are not compensable forms of damage - *Jaensch v Coffey*.

The requirements of a duty of care

- A 'special relationship' between the parties; that is the 'control factors' recognised by the courts must support the existence of a duty of care; **and**
- **Reasonable foreseeability** of the plaintiff as a person at risk of harm from the defendant's negligent activity.

Established categories of duty of care

- Manufacturer of products and consumer - *Donoghue v Stevenson*.
- Road users - *Chapman v Hearse*
- Employer and employee - *McLean v Tedman*
- School and pupil - *Geyer v Downs*
- Doctor and patient - *Rogers v Whitaker*
- Occupier of premises and entrant - *Australian Safeway Stores Pty Ltd v Zaluzna*
- Local government and facilities users - *Wyong Shire Council v Shirt*
- Solicitor and client - *Hill v Van Erp*
- Landlord and tenant - *Jones v Bartlett*

- If a case was one in which there was an established category of duty of care, you would consider:
 - a) Reasonable foreseeability; and
 - b) Whether this cause falls within the established category by:
 - 1) Identifying the relationship;
 - 2) Citing authority for the established category of duty of care; and
 - 3) Establishing that the facts fall within the scope of the duty (if not an issue, state this) and move onto the next element in negligence.

Topic 6 - Tort of negligence: breach of duty of care

- Once the plaintiff has established the existence of a duty of care, they must show, on the balance of probabilities, that the defendant was at fault.
- The defendant acts negligently when he has breach his standard of care by failing to take reasonable precautions to avoid a foreseeable risk of injury.
- The courts impose an objective, not subjective, standard of care. It is accepted that the reasonableness of the defendant's behaviour should be measured by reference to an objective comparison of what a reasonable person would do, not by reference to the subjective qualities of the plaintiff.

General breach principles

- The requirements for establishing a breach of duty are set out in s 48(1) of the *Wrongs Act 1958* (Vic). It provides:

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| <p>(1) A person is not negligent in failing to take precautions against a risk of harm unless-</p> <ul style="list-style-type: none">a) the risk was foreseeable (that is, it is a risk of which the person knew or ought to have known); andb) the risk was not insignificant; andc) in the circumstances, a reasonable person in the person's position would have taken those precautions. |
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Reasonable foreseeability

- It is not necessary for the plaintiff to show that the defendant ought to have foreseen the precise manner in which the injury was occasioned - it is enough that the injury was reasonably foreseeable in a general way - *Cole v South Tweed Heads Rugby League Football Club*.
- Where the defendant knew of the risk in question, the risk will be considered to have been reasonably foreseeable.
- Where the defendant did not have actual knowledge of the risk, the question will be whether the defendant as a reasonable person 'ought to have known' of the risk - *Baden Cranes Pty Ltd v Smith*.
- To be reasonably foreseeable, the risk has to be considered in its physical and temporal context and focused on the plaintiff or the class of people of which they are a member.

'Not insignificant' risks

- The phrase 'not insignificant' indicates a risk that is of higher probability than indicated by the 'not far-fetched or fanciful test' but of a lower probability than a 'substantial' or 'significant' risk and is defined in s 48(3).

Generally, a foreseeable risk that is very unlikely to occur might be considered to be an 'insignificant risk' which the defendant can

EXAMPLES OF QUESTION GUIDE

Damages

1. Does the *Wrongs Act 1958* (Vic) apply?

[Plaintiff] will be entitled to claim damages for their personal injury under Part VB and VBA of the *Wrongs Act 1958* (Vic) ('WA').

→ If claiming for injury damages

Part VB applies to an award of 'personal injury damages' (s 28C) with 'personal injury damages' defined in s 28 as 'damages that relate to the death of or injury to a person caused by the fault of another person'. In this case, [plaintiff] is claiming damages caused by [defendant's] negligence and therefore, Part VB applies.

→ If claiming for non-economic loss

Part VBA, which provides a threshold for recovery of non-economic losses as defined in s 28LB, applies on the facts as [plaintiff] will also claim for non-economic loss as a result of [defendant's] negligence.

→ Intentional act/sexual assault exclusion

The WA does not apply where 'the fault concerned was an intentional act done with intent to cause death or injury or that is sexual assault of another kind of sexual misconduct' (ss 28C, 28LC). On the facts, this exclusion does not apply.

2. Economic loss damages

→ Hospital and medical expenses

[Plaintiff] is entitled to compensation for all reasonable expenses, now and in the future, in treating or coping with the injuries which occurred as a result of [defendant's] negligence - *Sharman v Evans*. The costs incurred thus far are [amount] and this will be recoverable. It will also be necessary for the court to assess future medical expenses and award the cost of these.

- If any 'unreasonable' costs

When the court is determining whether to award any costs for medical expenses, they weigh the actual cost against the health benefits to the plaintiff - *Sharman v Evans*. In this case, it is unlikely that...

- Modifying of home

The cost of modifying the primary home to accommodate for the injuries that the plaintiff has occurred as a result of negligence will be rewarded as long as it is reasonable - *Diamond v Simpson*. In this case...

Private nuisance

[Plaintiff] may have a claim in nuisance for [defendant's actions].

Private nuisance is concerned with indirect interferences that result in material harm to the plaintiff's land or an unreasonable interference with the plaintiff's use or enjoyment of their land - *St Helen's Smelting Co v Tipping*.

1. Emanation

Nuisance only concerned with emanations from the defendant's land - that is something coming from defendant's land or as a result of the defendant's conduct - *Hunter v Canary Wharf*. In this case, [defendant's action] [are/not] an emanation as...

2. Who can sue

Generally, a person with exclusive possession of the land has the ability to sue. In this case, that person is...

3. Who to sue

[Apply relevant category]

→ Creator of the nuisance

There is strong authority to suggest that the creator of the nuisance will be held liable where the creator has no proprietary interest in the land from which the nuisance emanated - *Fennell v Robson*. In this case...

→ Occupier's liability

In certain circumstances, occupiers may be responsible for a nuisance created by third parties where:

- The occupier is or ought to be aware of it - *Montana Hotels Pty Ltd v Fasson*;
- The occupier adopts the nuisance or passively permits it to continue - *Challen v Mcleod Country Golf Club*;
- Knowledge will be imported to the occupier if the claimant can establish that the employees of the occupier were aware of it - *Sedleigh-Denfield v O'Callaghan*.

In this case... [work through each element]

→ Landlord's liability

A landlord will be liable for a nuisance created by a tenant where the landlord lets the premises for a particular activity and the nuisance was an inevitable by-product, or nearly certain consequence of that activity, or where the landlord directly participated in the nuisance - *Harris v James*. In this case...