

SAM NOTES – SEMESTER 2 (2016) – TORTS
PROBLEM TEMPLATE – SAM

PARTY NAME (A v B)

PLAINTIFF v DEFENDANT

BREACH

The issue is whether _____ (*DEFENDANT*) has breached his assumed duty of care.

1. Identification of negligent wrong / risk

The negligent wrong in this case was _____. This created the risk, which should properly be characterised as _____.

2. Standard of care – NORMAL

The standard of care of _____ [*DEFENDANT*] is that of a reasonable person in their position (*Imbree v McNeilly*).

However, in this case, that standard should be modified because _____ [*identify attributes of the reasonable person*]

< _____ is a child. Thus, it is appropriate to **set the standard of care** according to what may be expected of a child of the same age and experience of the defendant (*McHale v Watson*)>

3. Reasonable Person

Upon establishing the standard of reasonable care, it is necessary to determine whether or not _____ [*DEFENDANT*] has reached that standard. Regard is to be had to the **s 5B(1)** factors outlined in the CLA.

(a) Foreseeability

Foreseeability is tested prospectively (*Adeels Palace*) and in general terms only (*Doubleday v Kelly*). The **common law test** is set out in *Wyong Shire Council v Shirt*: 'a risk which is not far-fetched or fanciful is real and therefore foreseeable'. In this case, the risk was clearly (**foreseeable**) as a reasonable person in the position would have necessarily foreseen the risk of injury (*Wyong Shire Council v Shirt*). _____ (*DEFENDANT*) should have known or "ought to have known" of the risk of harm.

4. Calculus of Negligence

[remember to weight these factors together into a discussion → discuss what precautions should have been taken or not]

(a) Probability that harm would occur: _____ (ie. high probability → indicates high need for precautions; alternatively, if the probability that harm would occur was low → less need for precautions)

(b) Likely seriousness of harm: The injury sustained as a result of the risk would (**likely / unlikely**) be very serious because _____ [*reasoning*].

FACTUAL CAUSATION

The issue is whether _____ (DEFENDANT) factually caused the harm.

ORDINARY CASE

The statutory test requires that the defendant's wrongful conduct was a **necessary condition** (or 'but for' cause) of the occurrence of the harm suffered by the plaintiff (**s 5D(1)(a)**). _____ (apply if applicable).

EXCEPTIONAL CASE – NOVUS ACTUS INTERVENIENS (new intervening cause) / SUCCESSIVE CAUSES

(a) Novus actus

The intervening act of _____ (describe) may be considered a novus actus if it is a **voluntary human act**, which is free, deliberate and informed (**Haber v Walker**). If this is the case, then the original defendant will NOT be liable for its consequences (**McKew v Holland**).

(b) Successive (superseding) cause

Alternatively, the intervening act of _____ (describe) may be considered a case of successive causes if it is part of an **unbroken causal chain** caused by the defendant's initial act (**Baker v Willoughby; Chapman v Hearse**). If this is the case, liability will still extend up to that event.

TENTATIVE CONCLUSION FOR CAUSATION

A tentative conclusion suggests that _____ [DEFENDANT] (caused / did not cause) the plaintiff's harm.

DEFENCES

CONTRIBUTORY NEGLIGENCE

The issue is whether _____ [PLAINTIFF] failed to take care of their own safety based on the standard of care they owed himself in the circumstances and there was some casual connection to their injury. The same principles in determining whether the defendant has been negligent apply here (**s 5R(1)**).

BREACH

First, the plaintiff's negligent wrong should be characterised as _____ (reasoning why there should be contributory negligence).

The standard of a reasonable person in _____ (PLAINTIFF) position is an object standard.

APPORTIONMENT OF DAMAGES-

To apportion damages, a court would consider both:

- (a) Relative departure from standard of care;
- (b) Causal potency – that is, the relative important of each party's wrongdoing (**Podrebersek v Australian Iron and Steel; Pennington v Norris**)

VICARIOUS LIABILITY

The issue is whether _____ [EMPLOYER] is vicarious liable for the actions of _____ [EMPLOYEE]. An employer is vicarious liable if:

- (1) The employee's conduct was tortious
- (2) There is a requisite relationship between the employer and employee ([Hollis v Vabu](#))
- (3) The negligence occurred within the course of employment ([NSW v Lepore](#))

Tortious Conduct

_____ 's (DEFENDANT employee) act was negligent as they breached their assumed duty of care and caused the harm, which fell within the required scope of duty (*note that this was probably proved earlier*).

<Vicarious liability requires that the defendant's conduct was tortious>

DAMAGES

General Compensation Principles

The determination of damages is guided by the general principles of *restitution in integrum* (returning the victim to a position as if the harm had not occurred). Damages are paid in a lump sum and courts are not concerned with how victims use their money ([Todorovic v Waller](#)). It is necessary to have regard to the legal tests guiding the determination of damages under the three heads of damages ([CSR v Eddy](#)):

- (1) **Actual financial loss** (including medical expenses)
- (2) **Special damages** – loss of earning capacity
- (3) **General damages** – Non-pecuniary losses

DIVISION 2 – Fixing damages for past and future economic loss

LOSS OF EARNING CAPACITY

First, _____ (PLAINTIFF) is entitled to the actual loss of wages suffered from the incident up to the time of trial ([Sharman v Evans](#)). The maximum amount that may be awarded is **3 times** the claimant's earnings ([s 12\(2\)](#)).

- (1) The most likely future income of _____ [PLAINTIFF] must be determined ([s 13\(1\)](#)). In assessing future income, the court must disregard the claimant's gross weekly earnings that exceed an amount that is **3 times** the amount of average weekly earnings ([s 12\(2\)](#)).

<Most likely future income may take into account the **prospect of promotion**, future educational opportunity, likelihood of employment, current position and the period of working life remaining for the plaintiff → look to the circumstances of the case>

DIVISION 3 – Fixing damages for non-economic loss (general damages)

NON-PECUNIARY LOSS

_____ (PLAINTIFF) might be able to claim for damages for non-economic loss, namely due to:

Summary Notes

BREACH

Standard of care

<u>The reasonable person</u>		
Age of the defendant	McHale v Watson	<ul style="list-style-type: none"> - A child does NOT have the same knowledge and experience as an adult - No special allowance for those of advanced age
Disabled defendants suffering mental illness	Carrier v Bonham	<ul style="list-style-type: none"> - Courts do not take into account that a person may be suffering from a debilitating mental illness/disability
Experience and skill of the defendant (BEGINNERS)	Imbree v McNeilly	<ul style="list-style-type: none"> - Standard of a reasonable driver - Inexperience will not be factored into the attributes of the 'reasonable person' in cases where an inexperienced person decides to undertake an ordinary activity requiring ordinary care and skill - Ordinary people are not expected to have special knowledge or advanced skills - Standard is objective → it should NOT vary with the particular aptitude or temperament of the individual
Experience and skill of the defendant (PROFESSIONALS)	Rogers v Whitaker standard	<ul style="list-style-type: none"> - Professionals must exercise reasonable professional care and skill to the standard 'of the ordinary skilled person exercising and professing to have that special skill' - A professional will be held to the standard of the ordinary skilled professional, regardless of whether they are a complete novice or an experienced professional
Experience and skill of the defendant (SPECIALISTS)	Rogers v Whitaker standard	<ul style="list-style-type: none"> - A specialist who has a special skill higher than an ordinary professional (ie. medical practitioner specialising in ophthalmologist) will be held to the higher standard of a skilled specialist
Intoxication	Section 49(1)(c)	<ul style="list-style-type: none"> - Ordinary reasonable person normally taken to be sober - The fact that a person is or may be intoxicated does not of itself increase or otherwise affect the standard of care owed to the person

The risk was foreseeable

Wyong Shire Council v Shirt	
FACTS	<ul style="list-style-type: none"> - Inexperienced water skier became a quadriplegic after falling off skis in shallow water - Ambiguous sign saying "deep water"
HELD	<ul style="list-style-type: none"> - A risk which is NOT far-fetched or fanciful is real and therefore foreseeable - Foreseeability → NOT concerned with probability/improbability of occurrence (foreseeability and likelihood are different) - TEST: whether a reasonable person in the position would have necessarily foreseen the risk of injury - The ambiguous sign meant that the risk of harm was foreseeable and not too remote a possibility

Doubleday v Kelly	
FACTS	<ul style="list-style-type: none"> - 7-year-old roller skating on a trampoline unsupervised - Fell backwards → suffered severe injury
HELD	<ul style="list-style-type: none"> - Foreseeability measured in general terms - A warning was not an adequate discharge of duty of care - Rather, to prevent small children from using the trampoline → turn it over so the jumping surface is on the ground → legs up

DEFENCES

Contributory negligence

STANDARD OF CARE

Child

Doubleday v Kelly	
FACTS	<ul style="list-style-type: none"> - 7-year-old roller skating on a trampoline unsupervised - Fell backwards → suffered severe injury
HELD	<ul style="list-style-type: none"> - An individual's particular idiosyncrasies are normally excluded from consideration, except concerning age - The plaintiff's behaviour was not unreasonable, having regard to the standard of the reasonable child of the same age

Disabilities accompanying old age

Smith v Zhang	
FACTS	<ul style="list-style-type: none"> - 83-year-old man with limited eyesight crossing road
HELD	<ul style="list-style-type: none"> - Physical disabilities accompanying old age may be taken into account - However, still reasonable for the man to look before crossing the road

Vicarious Liability

Within course of employment

New South Wales v Lepore	
FACTS	<ul style="list-style-type: none"> - Involved the sexual abuse of a child by a teacher who acted under the context of supposed misbehaviour (which is within the course of employment as a teacher) - Issue is whether the school authority should be held liable
HELD	<ul style="list-style-type: none"> - TEST: whether there is a <u>sufficient connection</u> between act and employment - TEST: whether the act was done 'in the <u>intended pursuit</u> of the employer's interests' - In this case, the following factors were referred to: age, vulnerability, task of teacher, adults responsible for care of students - A school authority is normally vicariously liable for all acts performed in teachers' course of employment - However, sexual abuse is too far removed from duties and NOT in the interests of the state to be regarded as occurring within the course of employment - There is the possibility that the employer might be vicariously liable for the teachers' intentional and criminal conduct

Non-delegable duty

Recognised categories which justify imposing a non-delegable duty

<u>Recognised categories</u>		
Employer and employee	Kondis v State Transport Authority ; Stevens v Brodribb Sawmilling Co	An employer has a duty to provide safe tools and equipment, a safe workplace, safe systems of work and properly qualified fellow employees and supervisors
Hospital and patient	Gold v Essex County Council	A hospital has a duty to use reasonable care in treatment and proper nursing and medical care as well as to provide a safe physical environment
Road authority and pedestrian	Leichardt Municipal Council v Montgomery	