Torts

Trespass and the Case

Case Name	Material Facts	Ratio
Scott v Shepherd (1773) – Fireworks in the market place	The defendant Shepherd threw a lighted squib(firecracker) into a crowded market place where it fell on Yates stand where Willis threw it away to prevent injury to himself and Yates. It landed on Ryal's stand where it struck the plaintiff Scott in the face and exploded causing him to lose sight in one eye.	Where the injury is a direct injury, an action for trespass will lie. Where it is consequential – it must be an action on the case. - An unbroken and unstoppable chain of events is attributable to the instigator of the chain. A continuation of the first force
Hutchins v Maughan (1947) – Dumb dogs ate bait	Complainant's dogs died as a result of eating poisonous baits laid by the defendant. The defendant did warn the complainant of the location of the baits, and the claim was brought in trespass, nuisance and negligence. Police magistrate upheld the defences to nuisance and negligence however found for the plaintiff in regard to trespass. **Issue** – defendant contending that this is not a trespass.	An interference with the plaintiff will be DIRECT when it follows so immediately in terms of causation upon the defendant's act – **as to be part of the act.** - Key to determine whether the act was direct or indirect in trespass.
Bird and Holbrook (1828) – Chased a pea hen – shot by a spring gun	The plaintiff suffered injuries when entering the defendant's walled garden after chasing a pea hen. He was shot in the leg by a spring gun set by the defendant after recent thefts. No notice was displayed. **Issue:** Was an action on the case maintainable? Keeping in mind that the action on the case lays in the intentional infliction of an indirect injury.	The act rather than the consequences need to be intentional and there needs to be a calculation to cause harm to the plaintiff.
Williams v Holland (1833) – Horse cart smashes children	The plaintiff possessed a horse and cart and was driving carelessly – he drove this into the plaintiff's horse and cart with great violence. By this action, the children were gravely injured. The jury had to decide whether the injury was caused by the negligence and carelessness of the defendant. **RULE: Plaintiff is at liberty to bring action on the case IF the act is immediate and as long as it is not wilful or intentional.**	Where the plaintiff is injured by the defendant's direct/immediate act – plaintiff may elect to bring an action on the case and not a trespass IF he can provide that the defendant's act was Negligent. However – if the act is direct and intentional the plaintiff can only motion a TRESPASS. - Plaintiff has an option in direct injury if he can prove negligence
Williams and Milotin (1957) – Garbage truck hits kid	Plaintiff was struck down while riding his bicycle in the street by a motor truck being driven negligently. Plaintiff brought an action on	Plaintiff can elect to bring an action on the case in direct injury if negligence is a component of the

	the case against the defendant, defendant argued that it was not an action but rather a trespass. Trespasses had a 3-year expiry by the 'limitations of Actions act' at the time. Action on the case had a 6-year expiry. **Result: This was the Australian authority for Williams v Holland.**	act.
Reynolds v Clarke **Log thrown off a bridge**	Where a log hits a passer-by, the correct action is trespass. If a passer-by trips on a log thrown by someone, the correction action is case.	Trespass must be direct and not indirect. In all the cases, it was held that for a trespass to be ruled – the injury must be a direct and immediate result. Where it is only a consequence – there will only be a case.

Fault in Trespass – There NEEDS TO BE FAULT.

Weaver v Ward (1616) – **Military exercise accident**	Defendant soldier injured the plaintiff by firing his musket in training.	No man should be excused of a trespass unless he is UTTERLY without fault. - In trespass, there MUST be fault.
Holmes v Mather – **Pedestrian hit by horses scared by dogs.**	The defendant's horses were startled by a dog barking and ran away. Notwithstanding the efforts of the defendant's servant, an efficient driver, the plaintiff was injured whilst walking on the side of the road. Held, the defendant was not liable	A person causing injury by an act which is neither wilful nor negligent is not liable **POSITIVE ACT**
Stanley v Powell (1891) – **Bullet rebounds off tree and hits the servant**	Plaintiff was carrying cartridges for the defendant. Defendant shot a pheasant in the air, however the bullet ricocheted off a tree and hit the plaintiff in the eye.	Where you have an injury without intentional or recklessness element – no claim can exist. No fault no claim. Same as weaver and ward.

Onus of Proof of Fault

Blacker v Waters (1928) –	The defendant was at a shooting gallery located on a vacant lot	Plaintiff has to establish the trespass. Onus of the

Wales	officers who attended the scene and throughout the day. As a result they developed a recognisable psychiatric injury. **Issue;** Was a duty of care owed to the police officers not to inflict mental shock?	of the act and only dealt with s30. The language of these sections is negative – it limits the damages and is not a positive source of right.
King v Philcox		

Breach – Standard of Care

- Assuming that the plaintiff has **established that the defendant owed to him/her a duty of care**, the plaintiff must prove as a matter of fact that the **defendant breached that duty**, i.e. was negligent.
- **Negligence is breach of a duty of care** and consists of the **defendant's failure to exercise the standard of care of the reasonable person in response to a reasonably foreseeable risk**
- **The risk must be "real", "not farfetched", now the risk must be "not insignificant"** (s 5B(1)(b)).
- In assessing the reasonable person's response to such a risk, the court must consider "balancing considerations", e.g. the **magnitude of the risk, the probability of its occurrence, the burden of taking precautions to avoid the risk, the social utility of the activity which creates the risk (s 5B(2))**

Reasonable person's response to a foreseeable risk

Civil Liability Act 2002 (NSW) ss 5B-5C	This is the starting point for determining breach. This alters and restates the Shirt case.	
Wyong Shire Council v Shirt Water-skiing Accident – the difference between foreseeability and probability	Shirt was water-skiing on the lake and the Council had dug a deep water trench in the circuit for safety. They also placed 4 signs around the circuit which said 'deep water'. Shirt fell off into shallow water and hit his head on the seabed. As a result he suffered severe personal injury and brought an action against the council for negligence. Duty was easily established. **Issue;** Had the council breached the duty owed to Shirt by the ambiguity of the signs. Shirt argued that the deep water signs didn't indicate where the deep water was and that a reasonable person in the place of the council would have made it clearer where the water was deep. **Held:** Council had breached their duty.	**This case distinguished between foreseeability and probability.** **An improbable risk can be foreseeable and probability is not determinative in assessing foreseeability.** A multifactorial enquiry is necessary when identifying breach – 1. What are the reasonably foreseeable risks of harm AND what would a reasonable person do in response to those risks? - **This requires balancing**

		considerations of the probability, the cost inconvenience of addressing the risks, the existence of conflicting duties etc.?
Bolton v Stone – Stoned on the head by a cricket ball – no breach	Mrs Stone was hit on the head by a cricket ball originating from the Cricket Ground. There had been a 2 metre fence erected and only 6 times in 28 years had the ball been hit over the fence. She brought an action for personal injury principally framed in negligence. The issue here wasn't whether a duty of care was owed – this was readily established, but rather **had there been a breach of that duty?** Held: No breach of duty.	The risk in this case may have been foreseeable, but it was so highly improbable that a reasonable person could not have anticipated the harm to the claimant and would not have taken any action to avoid it. In the words of Lord Normand, "It is not the law that precautions must be taken against every peril that can be foreseen by the timorous." - **Foreseeability of risk and harm are not determinative of negligence. The reasonable person's response to such a risk must be taken into account. Breach occurs when there is a failure to exercise the standard of care of the reasonable person in response to the reasonably foreseeable risk.**
"Wagon Mound" (No 2) – Furnace oil causes ship to explode – probability is relevant but not determinative. What is the inconvenience to be suffered by the person averting the risk?	A spillage of furnace oil into the water from the Wagon mound. Welding was occurring on the plaintiff's ship and sparks fell into the water. Though furnace oil is not combustible, the wharf and other vessels were incinerated. The owner of a ship at the wharf affected brings an action for recovery. **Issue:** Though the risk was improbable as in Bolton v Stone, could the same principles apply in order to preclude the plaintiff's recovery? Had there been a breach **Held:** There had been a breach of duty. They distinguished the case from Bolton v Stone on the facts of the case – risk of being hit on the head compared to the significant property damage in this case. Furthermore they considered it relevant that the inconvenience of addressing the risk was not so significant e.g. a mere warning or stop work request.	Privy Council held that the Bolton v Stone case was not the authority for such a narrow approach. The enquiry is a multifactorial one; 1. Is the risk of injury reasonably foreseeable? One that is REAL, and not far-fetched or fanciful 2. What would a reasonable person do in response to that risk. This involves considering the likelihood of the extent of the harm – what cost or inconvenience might there be in addressing the risk **The likelihood of the harm materialising is a relevant consideration when determining the reasonable response to the risk BUT is not determinative.**
Paris v Stepney Borough Council - Blinded in both	Paris was blind in one eye and worked at a garage operated by the Council. He was asked to knock bolts out of a piece of machinery and there were safety goggles on the premises which were usually reserved for welding	Knowledge of a personal susceptibility may increase the standard of care which is owed to a plaintiff.

	involved in moving the bins herself.	**In some cases the risk is so obvious – the court will say no duty arises. However, uf breach is determined, obviousness may come in as a defence through contributory negligence.**
***RTA New South Wales v Dederer (2007)**	Plaintiff [Dederer] jumped off a bridge into the water below and gravely injured himself. Many others used to do it all the time but none have been injured. There were signs on the bridge with pictograms indicating no diving. Dederer claimed that the RTA had breached their duty for failing to take steps to make it less attractive for people wanting to jump. **Held:** There was already clear signage – there was no suggestion that there should be further signage required. The fact that people continued to jump where it was illegal did not increase the RTA's responsibility.	**Obviousness of the risk is a significant factor in reaching the conclusion – that there had been no breach.**

Proving Negligence

- The plaintiff bears the onus of proof in relation to all those elements on the balance of probabilities.
    - Breach is a question of fact.
    - Duty is a question of law.
- **Res Ipsa loquitur**
    - IF the alleged tortfeasor and the negligence of his or her acts are obvious
    - 'the thing speaks for itself' – something has happened which does not normally happen unless someone has been negligent – and therefore, negligence can be assumed.
    - **This is a rule of evidence rather than a rule of substantive law.** Allows for the inference of negligence.
    - **The** Plaintiff still bears the onus of proof
    - ***Holloway v McFeeters –*** *McFeeters was killed and run down by an unknown vehicle. There were no bushes, shrubs or trees obscuring the view, the road was straight and well lit. On the road where he was found – the car had braked and pushed his body along the road for a few metres then driven off. The estate of McFeeters brought proceedings against the nominal defendant.* ***Issue –*** *Is there evidence that the uninsured/unknown driver drove negligently?* The HCA held that it was open to the jury to find that it was more probable than not that there was negligence involved. **Negligence may be based on INFERENCE and probability rather than a finding of fact.**
    - ***Scott v London Docks*** - a customs officer was struck by six bags of sugar falling from a warehouse at the docks. They could not find who was responsible for the bags dropping so he brought proceedings against the dock company who housed the shipping firm. **Held:** In the ordinary course of life – bags do not come raining from the sky. Res Ipsa Loquitur was held in this case as such an event does not occur without negligence. The doctrine is only capable of proving breach and is not a free-standing cause of action.

- ***Mummery v Irving's*** – A chunk of wood from a circular saw hit Mummery in the head that Irving's was operating. He sues Irvings for personal injury suffered. In proving breach, he seeks to rely on Res Ipsa Loquituor. **Held:** The doctrine ceases to have operation when you have proven the origin of the injury.
- ***Schellenberg v Tunnel Holdings (2000)*** – Schellenberg was injured when a high-pressure air hose detached from a hand-held grinder he was using. He sued, pleading that the mere fact the hose had separated proved his employer's negligence. **Issue –** did that fact prove negligence? **Held:** The cause of injury was known – hence he could not rely on the doctrine. As the hose was not in the exclusive control of the defendant – there was no clear evidence that the injury was a result of their negligence. Breach was not proven.

Causation and Remoteness

- Damage is the gist of negligence. **There can be no liability until damage is suffered.** The limitation period in negligence starts when the damage is suffered.
- The damage must be the kind of damage recoverable in law. It must be caused by the defendant's negligence (in breach of a duty to the plaintiff) as a matter of fact
- Finally, as a policy limitation, it must not be "too remote" from that negligence or must be within "the scope of the defendant's liability" as a matter of law.

March v Stramare (1991)	Stramare is a company which owns a truck that is delivering groceries in the middle of the night in central Adelaide. They park the truck in the middle of a multi lane road with their hazard lights on to unload the truck. March is slightly intoxicated and collides with the back of the truck – he is injured and the car is damaged. **Issue –** Was there a causal connection between the defendant's decision to park in the middle of the road and the damage suffered by March. **Held:** The plaintiff can be held as the cause of the injury as long as they were a contributing factor or cause of the harm suffered. There can be multiple causes of damage.	**The but-for test – BUT FOR the defendant's conduct the plaintiff would not have suffered harm.** However, allowing it to be the only tst would result in absurd results. However, the but for test is imperative in identifying factual causation
***Civil Liability Act 2002 (NSW), ss 5D, 5E**	**5D – General Principles** (1) A determination that negligence caused particular harm comprises the following elements: (a) that the negligence was a necessary condition of the occurrence of the harm (**"factual causation"**), and (b) that it is appropriate for the scope of the negligent person's liability to extend to the harm so caused (	*5E Onus of proof* In proceedings relating to liability for negligence, the plaintiff always bears the onus of proving, on the balance of probabilities, any fact relevant to the issue of causation