

II. HISTORICAL BACKGROUND

TRESPASS	ACTION ON THE CASE
Trespass to the person Battery, assault and false imprisonment	Negligence

The origin of the action on the case

- Modern tort law in essence is derived from the medieval forms of action **trespass vi et armis** or trespass with force and arms ('trespass') and trespass on the case ('action on the case' or 'case')
- In the 1500s, the two avenues of legal redress for trespasses were the royal courts (King's Bench or Common Pleas) and the local (or county) court
- When someone wanted to bring a case before the royal courts, they would have to apply for a **writ**- a form of pleading with a very strict structure which if not done correctly, would be refused
- The correct jurisdiction for legal redress depended on whether the trespass involved breach of the peace e.g. breach of the peace would be involved where the trespass consisted of one person's physical attack on another, but not where the trespass consisted of an innkeeper's failure to provide adequate security for a guests' goods against third party theft
- Until the 1360s there was a jurisdictional requirement that no trespass was actionable in the royal courts unless breach of the peace was involved/unless the action was done vi et armis and **contra pacem** (against the King's peace)
- However, in the 1360s this jurisdictional requirement was relaxed with the effect that legal redress for trespasses not involving breach of the peace became possible in the royal courts
 - o Provoked by cases such as **Rattledean v Brunstone** where people ridiculously twisted facts to fit the requirements of vi et armis
 - o This jurisdictional change is the origin of the action on the case
- With action on the case, there was no longer a requirement for the wrong to have been done with violence. Instead, the plaintiff was required to explain the facts of the case
 - o The name derives from the recitation in the writ of the particular circumstances or special facts which constituted the plaintiff's case
- Where the trespass involved breach of the peace, the writ was in stereotypical form because little factual explanation was called for in respect of mainly physical wrongs
- Historically, only difference between the two types was whether it was alleged that the wrong involved violence
- Yet in the 18th century, the two began to be distinguished on the element of directness
- The 18th century misunderstanding of the medieval origin of the action on the case (Reynolds v Clarke) may have come about because a common element in battery, assault, etc.- all medieval trespasses involving breach of the peace- was the directness in casual sequence between the defendant's act and plaintiff's injury
- Thus, the difference was explained in terms of causation
- Writ system now abolished- the plaintiff technically doesn't have to fit their facts into a cause of action in order to bring a case (although they often do)

Differences between trespass and case

	TRESPASS	ACTION ON THE CASE
Element of directness	The injury must be direct i.e. there must be a direct connection btn the actions of the defendant and the harm suffered by plaintiff	The injury is consequential, or an indirect result of the defendant's action
<i>Exception</i>	(B) However, if the employer directly ordered the trespass, then the cause of action will be trespass	(A) Where an employee has committed a trespass in the course of their employment and the plaintiff brings a cause of action against the employer who is vicariously responsible for the employee, they must bring it in case as it is the employee, not employer, who did harm
<i>But- Williams v Holland rule</i>	Trespass OR an action on the case is main table for direct injury caused negligently	
Necessity to show damage	Trespass is actionable per se - without proof of material loss or damage	Proof of material loss or damage is an essential element of an action on the case such as the modern tort of negligence
Fault: a negligent or intentional failure to act according to law	Fault is an essential ingredient in trespass If the fault is intentional , it is trespass	Fault is essential in almost every action on the case If the fault is negligent , it is action on the case

<i>Separate: strict liability</i>	Liability that does not depend on actual negligence or intent to harm Here you do not have to prove fault	Example is damage caused to people on the ground by aircraft
The onus of proof (On the balance of probabilities)	Onus on the defendant to prove that the trespassory act occurred without the defendant's fault (Blacker v Waters; McHale v Watson) Exception in respect of incidents on the highway where the onus of proof of fault is on the plaintiff (Venning v Chin) However, as a first step, the plaintiff must prove a trespassory act attributable to the defendant (Platt v Nutt)	In an action on the case the onus is on the plaintiff to prove the defendant's fault and indeed all elements
Distinguished from modern English law	Fowler v Lanning- in all circumstances, the onus is on the plaintiff to prove the defendant's fault	
Limitation period to bring action (abolished in 1969)	Limited to 4 years	Limited to 6 years

FAULT ELEMENT			
		INTENTIONAL	UNINTENTIONAL/NEGLIGENT
INJURY	DIRECT	Trespass (Scott v Shepherd)	Both (Williams v Holland - origin, Williams v Milotin - brings into Australian law)
	INDIRECT	Action on the case (Hutchinsons v Maughan)	Action on the case (Essentially negligence)

Negligence for intentional trespass?

- As **Williams v Milotin** makes plain, negligently inflicted injury to the person can be pleaded as trespass to the person, but the intentional infliction of harm cannot be pleaded as negligence
- Negligent trespass is actionable per se
- Case in the UK: if the fault element is negligence, then you must bring the case in case of action
- However, in Australian law, we still have the cause of action of a negligent trespass

Directness of act

Reynolds v Clarke (1725) 92 ER 410 (Fortescue J)

- The defendant had built a spout on his house that collected rainwater
- The rainwater fell onto the house of the defendant and damaged his walls
- Issue was whether this was trespass/action on the case
- Here, the action correctly lay in case as the damage was done by the rainwater
- Emphasised that the distinction between the two acts is directness
- Plaintiff lost- should have brought the action in action on the case, and not trespass (used the wrong writ)

Scott v Shepherd (1773) 96 ER 525 (Blackstone J)

- In trespass, the wrong had to be directly inflicted, whereas in case, the harm had to be consequential
- Shepherd threw a firecracker into a marketplace, two other people picked it up and threw it before it hit the plaintiff, exploding in his face and causing him to lose an eye
- Test for distinguishing between trespass and action on the case: where the injury is immediate (direct), an action for trespass will lie. Where the injury is consequential (indirect), it must be an action on the case
- Majority held that the injuries were caused directly: initial act had set off a chain of consequential events that eventually resulted in injury

XI. CAUSATION AND REMOTENESS OF DAMAGE/SCOPE OF LIABILITY

- **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**
- Damage must be caused by the defendant's negligence (in breach of a duty to the plaintiff) as a matter of fact
- As a policy limitation, damage **must not be 'too remote'** from that negligence or must be **within 'the scope'** of the defendant's liability' as a matter of law

THREE THINGS TO CONSIDER FOR THE DAMAGE ELEMENT:

Damage – causation – scope

1. Identify whether the damage is the kind of **damage that the law recognises**: has the plaintiff suffered actual damage as the law recognises?
 - o Only **recognises four types** of damages: physical injury, damage to property (e.g. land or goods), recognised psychiatric illness (since middle of 20th century, entrenched in **CLA**) and pure economic loss
 - o Mere risk of injury is not an injury: have to have suffered the actual injury and that is the final part of your cause of action
 - o So, limitation period only begins to run against you when you have suffered the actual damage; **can't sue before you've suffered** the actual damage e.g. may have been a worker exposed to the risk of a disease, but you've never contracted it, but mere exposure to the risk is not suffering the damage; no cause of action
 - o Might have been a passenger of driver who is speeding; owed you a duty, breached it, but you got out before any accident occurred; have not suffered damage and thus have no claim
 - o Doctor may have failed to warn you about something, but this risk never materialised: have not suffered relevant damage that's connected to what they have failed to do
 - o Mere distress, inconvenience, interruption to autonomy or self-determination: values that the law reflects (e.g. in **Rogers v Whitaker**) but are not in themselves a form of damage (e.g. Whitaker had to show she suffered damage before she had an action)
2. Question of causation: did the **defendant's negligence cause** the **damage** that is complained of? Is there a causal link b/n what the defendant did/didn't do and what the plaintiff suffered (question of FACT)
3. Is the **damage** which was caused **within** the limits/the **scope of liability** of the defendant OR is it outside the scope i.e. simply too remote from what the defendant did to be claimed? (question of LAW)

Factual causation at common law and under Civil Liability Act 2002 (NSW)

- Causation is in fact distinct from concepts of remoteness of damage in law or scope of liability
- The principle of **remoteness** of damage is a **policy limitation** on the liability of the defendant for damage caused to the plaintiff

CIVIL LIABILITY ACT 2002 (NSW), ss 5D & 5E

- CLA interferes: **ss 5D** on causation: not intended to be a code (i.e. replace the common law), rather, intends to guide judges as to how they ought to decide the case
- But, this means that we can probably start with **ss 5D**: but not the only thing we have to look at, simply the starting point to determine causation, need to refer back to common law principles to understand (**Adeels Palace**)
- **ss 5D** talks not just about causation but also of scope
- **ss 5D(4)** states that value judgments are relevant: court must express whether or not and why scope should be imposed: whether or not this is an appropriate liability for the defendant to carry
- However, does not tell which factors court should take into account, doesn't dictate how court should determine this value judgment
 - o All it says that courts must give its reasons, but is leaving it up to the courts to determine question of scope (rather than telling them how to do it)
- Factual causation **ss 5D (1)(a)**: common law also used the necessary condition test, but called it the **'but for test'**: would the damage have happened but for the negligence of the defendant? If it would've happened anyway, D's negligence is no longer a necessary cause of the damage
- But, if it would not have happened but for defendant's negligence, then we can identify defendant's negligence as a cause as what happened
- All that is necessary is that defendant's negligence is a cause: doesn't have to be the cause, the sole cause, the substantive cause, simply has to be a necessary condition of the plaintiff's injury (**March v Stramare**)

Division 3- Causation

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 persons liability to extend to the harm so caused ("scope of liability").
2. In determining in an exceptional case, in accordance with established principles, whether negligence that cannot be established as a necessary condition of the occurrence of harm should be accepted as establishing factual causation, the court is to consider (amongst other relevant things) whether or not and why responsibility for the harm should be imposed on the negligent party.
3. If it is relevant to the determination of factual causation to determine what the person who suffered harm would have done if the negligent person had not been negligent:
 - (a) The matter is to be determined subjectively in the light of all relevant circumstances, subject to paragraph (b), and (b) any statement made by the person after suffering the harm about what he or she would have done is inadmissible except to the extent (if any) that the statement is against his or her interest
 - (b) For the purpose of determining the scope of liability, the court is to consider (amongst other relevant things) whether or not and why responsibility for the harm should be imposed on the negligent party
4. For the purpose of determining the scope of liability, the court is to consider (amongst other relevant things) whether or not and why responsibility for the harm should be imposed on the negligent party.

Necessary condition test, but for test, is always the starting point: if you can't get over that, can't go any further

MARCH v STRAMARE (E & MH) PTY LTD

(Test of causation; causation extending to later events or other party conduct)

- The but for test cannot be the complete test of causation (same for the necessary condition test under S 5D(1)(a))
- Three main problems with the but for test they identify:
 1. Have to distinguish between **causes and mere pre-conditions**, which but for test doesn't allow you to do
 - o E.g. grandparents meeting is a pre-condition of us being here, but it is not a cause of us being here
 - o Same is the case even if the pre-condition is negligence
 - o E.g. if flatmate promises to wake you up but doesn't, causing you to be at bus stop at a later time, where you get run over by the bus, your flatmate's broken promise is a pre-condition of you being run over by the bus, but is not a cause of it
 2. Two hunters case: where we have two equally sufficient causes, the but-for-test does not work
 - o **Two hunters case**: out in the woods, two hunters out with their guns and they fire at same time, both hitting you at precisely the same time in the arm
 - o If we apply the but for test, we would have to say that both get off: each of them could say you would've been hit in the arm anyway: leads to an absurd result
 3. But-for-test doesn't give us a complete answer where you can say yes, the defendant is negligent and this contributed to me being out in a risky situation, but then someone else comes along and knocks you over/does something negligent or intentional
 - o Might have exposed them to some risk, but another person takes over as the cause of their death
 - o This is what we have to decide when talking about a **novus actus interveniens**; do we say that the 2nd action was a NAI which broke the chain of causation?
 - o But-for test is satisfied, but can we say that D is let off because the second act broke the chain of causation and took over as the dominant cause?
- Because but for test doesn't work in all situations, majority of court here said the **but for test is always the starting point**, but is not the complete test of factual causation: the **ultimate test** for factual causation **is common sense**
 - o However: some people disagree, this is a value judgment, differs for people, etc.
 - o **S 5D** says you start off with factual causation then consider scope/liability

SITUATIONS WHERE DEFENDANT DOESN'T EVEN GET OVER THE 'BUT' FOR TEST:

ADEELS PALACE PTY LTD v MOUBARAK

(Example of difficulty of getting over but for test where the perpetrator does the act intentionally)

- Argued that if there was property security, they wouldn't have been shot
- **Modbury**: occupier had no duty to protect employees from random attacks by third parties
- **Cole v Tweed Heads**: club owed no duty to Cole to stop her from drinking herself paralytic and going out and being injured
- Adeels palace do have a duty of care to protect patrons in premises from other unruly patrons
- However, breach of duty more contentious; HC not convinced that having another security guard would've prevented this- critical of plaintiff for not bringing evidence about how much security should've been provided
- However, plaintiffs here essentially lost on the point of causation

LAW1012 SUMMARY

I: SCOPE OF TORT LAW

- Theme of torts is the idea of unreasonable interference with the interests of others
- A **tort** is a civil wrong for which the law provides a remedy, usually in the form of an award for damages by way of compensation for the injury or loss or wrong that was suffered
- Many torts are only torts if you've suffered actual damage, except for trespass, which is **actionable per se**
- The nature of tort **liability** is **fault-based**, requiring intent or negligence on the part of the defendant
 - o Torts of **strict liability**- don't have to prove fault e.g. damage caused to people on the ground by aircraft
 - o **Vicarious liability**- one person is liable for what someone else has done
 - o In tort law to be liable you need to intend to do the act, don't have to intend the consequences of that act
- **Standard of proof** for torts is the balance of probabilities
- **Concurrent liability**- where more than one person may be liable to the injured party
 - (a) Committed a separate tort- severally or separately liable to the plaintiff
 - o Plaintiff may recover 100% of their loss from any of the parties but defendants can seek a contribution from each other; s 5(1)(c) Law Reform (Miscellaneous Provisions) Act 1946 (NSW)
 - (b) Committed a tort together
 - (c) Person who committed the tort was employed as an employee at the time and the tort was committed in the course of that employment
 - o Employer's vicarious liability is strict liability; not dependent on any personal fault of employer
 - o However, an employer is not generally liable for a tort committed by an independent contractor
 - o The vicarious liability of an employer does not affect the personal responsibility of the employee who committed the tort as between the employee and the tort victim

II: HISTORICAL BACKGROUND

The origin of the action on the case

- Until the 1360s no trespass was actionable in the royal courts unless the action was done **vi et armis** (with force and arms) and **contra pacem** (against the King's peace)
- With action on the case, there was no longer a requirement for the wrong to have been done with violence. Instead, the plaintiff was required to explain the facts of the case

Differences between trespass and case

	TRESPASS	ACTION ON THE CASE
Directness	Direct	Indirect/consequential
Williams v Holland rule	Trespass or case for direct, negligent injury	
Show damage?	Actionable per se - without proof of damage	Proof of damage is an essential element
Fault	Intentional	Negligent
Strict liability	No proof of fault needed	
Onus of proof	Plaintiff proves defendant did act (Platt v Nutt) Defendant must disprove fault (Blacker v Waters ; McHale v Watson) Exception: highway cases, plaintiff has onus of proof of fault (Venning v Chin)	Onus of proof on plaintiff for all elements (Platt v Nutt)

Directness of act

- **Scott v Shepherd**- firework squib case. Held that the injuries were direct: initial act had set off a chain of events that ultimately resulted in injury
 - o Principle: in trespass, the wrong had to be directly inflicted, but in case, harm had to be consequential.
- **Hutchins v Maughan**- poisonous baits eaten by dogs. Held that the harm should be regarded as consequential as the defendant had laid the baits on the land before the plaintiff came
 - o Principle: injury is trespass when it follows so immediately from act that it can be said to be part of act
- **Williams v Holland**- hit the plaintiff with a wagon, severely injuring his son. Direct but negligent
 - o Principle: a direct but negligent act can be framed as either trespass or action on the case
- **Williams v Milotin**- struck riding his bike by a motor truck driving negligently. Brought an action on the case. Defendant argued that he was barred to bring it in 3 years (as could've brought trespass.) Held he was not barred
 - o Principle: brought Williams v Holland into Aus law. Plaintiff is only barred by what they choose
- **Southport Corp v Esso Petroleum Co**- oil caused damage to land. Harm caused indirectly and by employee (employer sued)- action on case

IX: NEGLIGENCE: DUTY OF CARE

Negligence as an independent tort

- Damage is the 'gist of the action'
- Can be an act or an omission, whether in trespass there must be a positive act
- The plaintiff bears the onus of proof in relation to all elements

FIVE ELEMENTS

1. Duty of care (question of law)
2. Breach of the duty of care (question of fact)
3. That breach causes harm to the plaintiff
4. The plaintiff suffers a recognised form of damage
5. That damage is not too remote i.e. reasonably foreseeable

The concept of a duty of care

DONOGHUE v STEVENSON

- Set out the 'neighbour principle' (the broader ratio)
 - o Neighbours= 'persons so closely and directly affected by my act that I ought to have them in my mind'
 - o 1st principle= reasonable foreseeability: duty to ppl who could be reasonably foreseen to be hurt
 - o 2nd principle= proximity: a close and direct relationship between defendant and victim
- The narrow ratio is essentially that a manufacturer owes a duty to the consumer to be careful

How do we determine if a class of plaintiffs is 'reasonably foreseeable'?

Haley v London Electricity Board (blind person): reasonably foreseeable plaintiff is not just the normal, average person

How do we go about establishing a duty of care?

HOME OFFICE v DORSET YACHT COMPANY (establishes the incremental approach; where you argue that an existing duty of care should be extended by analogy to a case in front of you)

- **Held:** officers breached their duty in failing to prevent escape and it was reasonably foreseeable that if these trainees did escape that they would cause damage
 - o Particular duty here: duty of officer to prevent trainee from escaping owed only to persons whom he could reasonably foresee had property near place of detention and which detainee was likely to steal and damage
- Diplock: look at factors of other cases and see if these factors exist in the current case
 - o Duty can still be established if some factors missing. Where the conduct and relationship possess each of the characteristics A, B, C and D, etc. but do not possess any of the characteristics Z, Y or X etc. which were present in the cases but eliminated from the analysis, a duty exists
 - o Neighbour principle can guide incremental approach/characteristics to consider but isn't universal approach

If your case fits within an established duty, you do not need to establish it, just point to the relevant factors.

If arguing that a new DOC should be established, start w/ reasonable foreseeability of harm, then consider salient features

THE TEST FOR ESTABLISHING A NOVEL DUTY OF CARE

- The High Court in **Sullivan v Moody** rejects two main tests
 - o Test of proximity as the touchstone for establishing a duty; but whilst not universal principle, still relevant
 - o Three-stage **Caparo test**; (i) reasonable foreseeability, (ii) proximity, (iii) fair, just & reasonable to impose duty

THE 'SALIENT FEATURES' APPROACH

This involves a close factual analysis of the relationship b/n the parties with reference to the salient features in the case.

Salient features are factors affecting the appropriateness of imputing a legal duty, drawn on previously decided cases

CALTEX REFINERIES (QLD) PTY LTD v STAVAR (establishes salient features)

- Features include foreseeability of harm and proximity, include factual matters e.g. vulnerability of plaintiff and normative considerations e.g. cohesion in the common law
- SFs are control measures on foreseeability. In a novel area, reasonable foreseeability is inadequate alone to find a duty
- This is not a checklist of factors, and it is not exhaustive

PERRE v APAND

- **Held:** when determining whether a DOC exists in respect of pure economic loss, reference must be made to the few general principles that appear to govern all cases of pure economic loss e.g. plaintiff's vulnerability to risk
- Law should be developed incrementally by reference to the reasons why the material facts in analogous cases did or did not found a duty and by reference to the few principles of general application can be found in the duty cases

IX. DUTY

A duty of care is the obligation to avoid acts or omissions, which are reasonably foreseeable to cause damage to another

STEP I. DOES THE DUTY ALREADY FIT INTO AN ESTABLISHED CATEGORY?

Manufacturers to consumers for defective products	<i>Donoghue v Stevenson</i> , <i>Grant v Australian Knitting Mills</i>
Medical professionals to patients	<i>Rogers v Whitaker</i>
Hospitals to patients	<i>Cassidy v Ministry of Health</i>
Schools to pupils	<i>Commonwealth v Introvigne</i>
Builders for defective structures	<i>Voli v Inglewood Shire Council</i>
Duties to rescuers	<i>Wagner v International Railway Co</i> ; <i>Chapman v Hearse</i>
Occupier to entrant	<i>Thompson v Woolworths</i>
Occupier to trespasser	<i>Hackshaw v Shaw</i>
Occupier to neighbouring occupier when dealing with dangerous activity/substances	<i>Burnie Port Authority v General Jones</i>
Landlord to tenant	<i>Jones v Bartlett</i>
Jailer to jailee	<i>NSW v Bujdoso</i>
Driver to driver	<i>March v Stramare</i>
Driver to passenger	<i>Miller v Miller</i>
Driver to pedestrian	<i>Chpaman v Hearse</i>
Employers for safe workplace for employees	<i>Wilson v Clyde Coal Co v English</i> ; <i>Kondis v State Transport Authority</i>

NB: the duties in pink are also non-delegable duties

FURTHER INFO ON ESTABLISHED CATEGORIES OF DUTIES

DUTIES OF MANUFACTURERS FOR DEFECTIVE PRODUCTS

- *Donoghue v Stevenson*: duty when no opportunity to inspect product prior to consumption
- *Grant v Australian Knitting Mills*: duty to safeguard them when using a product as intended

DUTIES OF BUILDERS AND DESIGNERS FOR DEFECTIVE STRUCTURES

- *Voli v Inglewood Shire Council*: architect owes a DOC to entrants of building who use it in the ordinary way, despite no contract btn them
 - Contract may be relevant to but not determinative of duty i.e. contract may ask them to design a stage to hold a certain weight, not liable for someone who negligently puts more weight on it
 - Skilled work requires ordinary liabilities of a man who follows a skilled calling

DUTIES OF OCCUPIERS OF DEFECTIVE PREMISES

- *Hackshaw v Shaw* (trespassers): relationship btn occupier and trespasser doesn't give rise to a duty; DOC arises if there is a reasonably foreseeable real risk of injury or knowledge of trespasser
 - Also held that DOC should be determined on ordinary principles of negligence
- *Australian Safeway Stores v Zaluzuna* (lawful entrants): relationship of lawful entrant gives rise to a duty to avoid reasonably foreseeable risk of entry
 - Does away with categories of duties
- *Thompson v Woolworths* (occupiers' duty): relationship btn parties still relevant to scope/standard of care
- *Parissis v Bourke* (duty of social host): occupier carrying on activity has DOC to supervise

DUTIES OF LANDLORDS OF DEFECTIVE PREMISES

- *Jones v Bartlett*: landlords owe DOC to avoid reasonably foreseeable risk of injury to tenants and fam members
 - Duty limited in that not an occupier; limited control. However, does include remedying dangerous defects with they know about
- Contractual entrants; premises must be safe for contemplated purpose (*Voli v Inglewood*)

DUTIES TO RESCUERS

- A person who negligently creates a dangerous situation owes a duty to a rescuer who responds (*Wagner v International Railway Co*)
- Unnecessary to foresee precise sequence of events; only consequences general character (*Chapman v Hearse*)

DUTIES OF RESCUERS

No duty to rescue (*Hargrave v Goldman*) unless: you've created situation/you have special relaeo with person in danger

- However, may be additional factors that lead to a duty i.e. you are a doctor (*Lowns v Woods*)
- Also no duty to rescue one from harm, including self harm: *Stuart v Kirkland-Veenstra*

Once rescuing, not liable for any act/omission done (s 57, CLA) → subject to exceptions under s 58, CLA

STEP II. WHERE THE DUTY IS NOT AN ESTABLISHED ONE

1. Reasonable foreseeability
2. Test of salient features

REASONABLE FORESEEABILITY/PROXIMITY

Reasonable foreseeability is a condition essential to, though not sufficient for, the establishment of a DOC

A person owes a legal duty to take reasonable care to avoid acts which he should reasonably have foreseen would be likely to injure his 'neighbour'

Donoghue v Stevenson: the 'neighbourhood' principle

- (1) **Reasonable foreseeability:** duty to people who would be reasonably foreseeable to be hurt if care not taken
- (2) **Proximity:** close and direct relationship between D and P

Neighbours as 'persons so closely and directly affected by my act that I ought to have them in my mind'

- **Reasonable foreseeability is now inadequate alone (Sullivan v Moody)**
Neighbour test, proximity test and Caparo 3-stage test 'fair just and equitable' all rejected here
- The reasonably foreseeable P. is not just the normal, average person (**Haley v London Electricity Board**)

INCREMENTAL APPROACH

Home Office v Dorset Yacht Company

- Compare characteristics of current cases to characteristics of existing cases where a duty has been established
- If discrepancy, see if this is sufficient to prevent a DOC arising

SALIENT FEATURES APPROACH

Caltex Refineries (Qld) Pty Ltd v Stavar

- (a) **Foreseeability** of harm;
- (b) The **nature of the harm** alleged;
- (c) The degree and nature of **control** able to be exercised by the defendant to avoid harm;
- (d) The degree of **vulnerability** of the plaintiff to the harm from the defendant's conduct, including the capacity and reasonable expectation of a plaintiff to take steps to protect itself;
- (e) The degree of **reliance** by the plaintiff upon the defendant;
- (f) Any **assumption of responsibility** by the defendant;
- (g) The **proximity** or nearness in a physical, temporal or relational sense of the plaintiff to the defendant;
- (h) The existence or otherwise of a **category of relationship** between the defendant and the plaintiff or a person closely connected with the plaintiff;
- (i) The **nature of the activity** undertaken by the defendant;
- (j) The **nature or degree of the hazard or danger** liable to be caused by the defendant's conduct or the activity or substance controlled by the defendant;
- (k) **Knowledge** (either actual or constructive) by the defendant that the conduct will cause harm to the plaintiff;
- (l) Any potential **indeterminacy of liability**;
- (m) The nature and **consequences of any action** that can be taken **to avoid the harm** to the plaintiff;
- (n) The extent of **imposition on the autonomy** or freedom of individual, including the right to pursue one's own interests;
- (o) The existence of **conflicting duties** arising from other principles of law or statute;
- (p) Consistency with the terms, scope and purpose of any **statute** relevant to the existence of a duty; and
- (q) The desirability of, and in some circumstances, need for conformance and **coherence** in the structure and fabric of the common law

SCRIPTS

Duty of care

1. See if the duty is already established
2. If not established:
 - (a) Satisfy condition of reasonable foreseeability
 - (b) Consider salient features
 - (c) If relevant; consider any policy considerations that may negate duty

Breach

1. Establish the standard of care
2. Satisfy shirt test:
 - (a) If a reasonable person would've foreseen risk; s 5B(1) of CLA
 - (b) Consider what a reasonable response would be; s 5B(2) of CLA
3. Consider s 5C of CLA if necessary

Causation

1. Establish onus; s 5E of CLA
2. Consider factual causation; s 5D(1)(a) of CLA
 - o If failure to warn case; s 5D(3) of CLA
3. Consider scope of liability
 - (a) First: satisfy reasonable foreseeability of kind of damage suffered by P
 - o Eggshell skull rule considered here if necessary
 - (b) Consider any novus actus interveniens
 - o If very kind of thing likely to happen: several concurrent tortfeasors/personally liable?
 - o If genuine crime: separately liable for own damage caused
 - o Medical negligence: if subsequent tort a foreseeable consequence = several concurrent tortfeasors
 - o Failure to warn: liable only for risks that materialise/weren't warned of/unacceptable
 - o If vicissitude: liable up to the point where vicissitude would've taken over

Defences

1. Contributory negligence → s 9 of LRMPA, s R-T o CLA
 - (a) Establish
 - o Establish how to figure it out (s 5R) and standard of care (s 5R)- childhood relevant here
 - o Intoxication → see s 50(3) of CLA
 - o Motor Accidents → see s 138(2) of MACA
 - o Pure mental harm → s 30(3) of CLA
 - o Deceased plaintiffs → s 5T of CLA
 - o Exceptions: agony of moment principle
 - (b) Apportionment of damages:
 - Just and equitable; s 9 (1)(b) of LR(MP)A
 - 100% (s 5S of CLA)
2. Self-defence → s 52 & 53 of CLA
3. Intoxication → s 50 of CLA
4. Volenti → s 5F-N of CLA
 - Unavailable motor accidents; s 140 of MACA
 - (a) Knowledge; knew of and appreciated the relevant risk (Roggenkamp v Bennett)
 - (b) Voluntarily accepted risk: free choice to undergo it (Bowater)
5. Unlawful conduct → s 54 of CLA + common law (Gala v Preston, Henwood v Municipal Tramways Trust)
6. Rescuers → s 57 of CLA

Damages

1. Establish basic rule: put plaintiff in same position (Livingstone v Rawyards Coal Co)
2. Special damages; s 12 of CLA
3. General damages; division 2 of part 2 of CLA
 - o Loss of future EC; s 12 & s 13 of CLA
 - To pre-accident date of death (Skelton v Collins)
 - Discount for 'saved' self maintenance expenses during the 'lost' years (Skelton)
 - Deduct cost for outgoings associated with earning income (Sharman)
 - s 14: deduct discount rate 5%
 - s 13: deduct vicissitudes; 15%; Wynn
 - o Gratuitous services; yes, subject to restriction s 15 of CLA