Contents

CHECKLIST:

DEFENCES:

Contributory negligence:

- Wrongs Act 1958 (Vic) s. 26
- A defendant may be able to rely on the defence of contributory negligence when a plaintiff has failed to take reasonable care for their own safety and suffered harm from a reasonably foreseeable risk of injury: Nance v British Columbia Electric Railway Co Ltd [1951].

ISSUE: the overriding issue is whether_____

Elements:
INTRO:
To find contributory negligence at common law, it is necessary to show:

a. that the plaintiff failed to take reasonable care for his or her own safety or for the protection of the plaintiff's interests;
b. this negligence was a cause of the plaintiff's harm.
c. the harm that eventuated was within the risk created by the plaintiff's conduct.

Element 1: Did the plaintiff fail to take reasonable care for his or her own safety or for the protection of the plaintiff's interests?

- In order to satisfy a claim of contributory negligence, it must first be established whether The plaintiff fell below the requisite standard of care expected of the reasonable person in the plaintiff's position on the basis of what the plaintiff knew or ought to have known at the time. **(*Wrongs Act 1958* (Vic) s 62(2).**
- **Application: does the standard of care need to me modified? : children, intellectually impaired or physically disabled persons, employment, intoxication, emergency situations.**

  - **CHILDREN:** When determining whether a child is contributory negligent, the general approach is to apply a standard of care that reasonably would be expected of a child of similar age. ***Joslyn v Berryman*** **(2003, HCA).**
  - The standard of care expected of a child plaintiff is still objective and not subjective, meanings that they will be assessed according to the levels of intelligence, experience and development that a reasonable child of similar age could be expected to have attained. ***Kelly v Bega Valley County Council*** **(1982, NSWCA).**

EXAM NOTES

PRINCIPLES OF TORT LAW

The Tort of Negligence

Duty of Care

- The first requirement of a negligence action is that there must exist a legal duty of care owed on the part of the defendant in the circumstances towards the plaintiff
- A duty of care is automatically presumed to exist where the relationship between the plaintiff and the defendant falls within a legally recognised duty of care category (*Harriton v Stephens 2006*)
    - Relationships include:
        - **Manufacturer and consumer** (*Donoghue v Stevenson 1928*): established that a manufacturer of products will owe a legal duty to a very broad class of person; that is any member of the class of consumer of goods.
        - **Doctor and patient**
        - **Lawyer and client**
        - **Teacher and student** (*Richards v Victoria 1969*): A school's duty to take positive steps for its pupils' safety whilst they are under their control and supervision arises simply from the relationship of teacher and pupil
        - **Employer and employee** (*English v Rogers 2005*): In particular, the relationship between the owners of a hotel and contracted cleaners so closely resembled that of an employer and employee for an affirmative duty to be placed on the hotel owners to take reasonable precautions for the cleaners' safety
        - **Prison authority and a prisoner** (*Howard v Jarvis 1958*): A prison authority has an affirmative duty to take positive steps ensure the safety of their prisoners during their detention in custody because of the relationship between a jailer and prisoner
        - **Driver and other road users** (*Watt v Rama 1972*): owe each other a duty to exercise reasonable care. Motorists, pedestrians etc are all foreseeably affected by conduct on the road.
- If the relationship doesn't fall into these categories, settled methodology must be applied. This is **reasonable foreseeability**
- The plaintiff must show that he or she is a member of a class of people who would reasonably foreseeably be at risk of injury if the defendant failed to take reasonable care (*Chapman v Hearse 1961*)
- If the reasonable foreseeability test cannot be satisfied, then no duty of care as it falls outside the sphere of foreseeable risk.

CASE SUMMARIES

Duty of Care I

Donoghue v Stevenson [1932] AC 562

Sullivan v Moody [2001] HCA 59

Caltex Refineries (Qld) Pty Limited v Stavar [2009] NSWCA 258 (31 August 2009)

TOPIC: Salient features
COURT: Supreme Court of NSW Court of Appeal
FACTS: Mr Stavar worked at an oil refinery in Queensland, at which time he used and applied asbestos materials to parts of the refinery on a daily basis and would wear asbestos contaminated clothing home from work where Mrs Stavar (the plaintiff) would wash throughout the time he worked at the refinery. Mrs Stavar (the plaintiff) washed his contaminated clothes. In 1971 the Asbestos Rule made under the Factories and Shops Act 1960 (Qld), s38 (1) came into effect in Queensland. The Asbestos Rule required, amongst other things, the provision of protective clothing to those working with asbestos and that contaminated clothing be cleaned on site (or removed safely for cleaning off site). Mrs Stavar now suffers from malignant mesothelioma contracted as a result of coming into contact with asbestos dust and fibres on her husband's work clothes in the family home and car. The President of the Dust Diseases Tribunal gave judgment for the plaintiff against the five defendants for the employment period after 1974.
ISSUES: The issue before the court was whether there was a breach of duty to assess the existence of a duty of care.
DECISION: Court refused to award costs to the plaintiff in respect of the period before 1974. Caltex appealed to the Court of Appeal. The appeal was dismissed, the cross-appeal allowed and questions relating to the cross-appeal were remitted to the Dust Diseases Tribunal.

Duty of Care II

Tepko Ltd v Water Board (2001) 206 CLR 1 extracted in D&M at p 362

TOPIC: Reliance and reasonable reliance

COURT: High Court of Australia

FACTS: Companies owned or controlled by one of the P's (Mr Neal) owned rural land. They decided to have the land rezoned and subdivided for development. One of the companies obtained a bank loan. Before getting the required development approvals from the local council, the companies had to arrange for the land to be connected to the water supply at their expense. The water board did not usually provide developers with estimates of the cost of connection, but the estimated total cost would be about $2.5 million. Because of the high water cost the bank decided that the development was not economically viable. It appointed a receiver to Mr Neal's companies. The development did not go ahead, and the land was sold off to repay the loan. The water board later found out that the total cost would have been much less than $2.5 million. The companies sued the water board, alleging that they had suffered substantial losses as a result of the board's negligence in estimating the costs.

POLICY QUESTION TABLE

Vicarious Liability

Advantages	Disadvantages
• **Advantage for the Plaintiff:** a person who suffers harm or loss as a result of an employee's conduct may be more likely to see any money from their successful claim as an employer would be more financially able to pay such claims compared to an employee. • **Advantage for the Plaintiff:** Imposing vicarious liability has previously been considered in new south wales v lepore (2003), where it was justified on the grounds that such liability works as a deterrent and encourages employers to take greater care, *inter alia,* supervising employees. • **Advantage for the Defendant:** Pointed out by Pullin JA in *Southern properties*, if the employee is immune from liability for some reason, her or his employer cannot be held vicariously liable under the prevailing 'servants theory': Cowell v Corrective services commission of New South Wales (1988). ; the tort is the employee's; if the employee is immune, there is no tort for which liability can be imputed to the employer. • **Advantage of the Defendant: Narrowness outside the employer-employee relationship:** In Soblusky v Egan (1960), the High Court of Australia held that the owner of a motor vehicle is vicariously liable for the negligence of those who drive the vehicle with their permission. (restricts liability). • The Soblusky principle is confined to cases where the driver has been appointed, engaged or requested by the owner of the driver, and also where the owner has an actual power of control over the driver's actions, which is likely to be effective if exercised. - Gatekeeper mechanism.	• **Disadvantage of the mechanism/ for the plaintiff:** The 'Master tort theory'-Creates immunity for the actions of the employee-no 'deterrence'; Gleeson CJ, Gaurdron, Kirby and Hayne JJ in Hollis v Vabu pty ltd (2001): "it has long been accepted that an employer is vicariously liable for the tortious acts of an employee but that an principal is not liable for the tortious acts of an independent contractor". • **Disadvantage for the Plaintiff:** in Scott v Davis (2000), the High Court refused to extend the Soblusky principle to aircraft & in Frost v Warner (2002), the High Court refused to find the registered owner of a boat responsible for fault of the person in charge of that boat. The Soblusky principle was confirmed and does not extend to boats: Gutman v McFall (2004). • **Disadvantage for the Plaintiff:** There is a longstanding authority for the proposition that only one person can be vicariously liable for the negligence of another. - "he is the servant of one or the other, but not the servant of one and the other; the law does not recognise a several liability in two principals who are unconnected"; Littleday J in Laugher v Pointer (1826). • UK had abandoned this position, now recognising the possibility of 'dual vicarious liability; Viasystems (Tyneside) Ltd v Thermal Transfer (Northern) Ltd [2006]. • In Australia the traditional laugher view was reaffirmed in Day v Ocean Beach Hotel Shellharbour Pty Ltd [2013] where the NSWCOA held that a hotel couldn't be vicariously liable for a tort committed by a bouncer because the bouncers employer, a security company was vicariously liable for his actions.

PRACTICE EXAM QUESTIONS:

ANSWER:
The overriding issue to consider is whether or not Wellington's conduct constitutes a claim of battery (the tort of trespass).

In order to make an actionable claim in battery, the following must be established:

1. There was an act of interference in the form of physical contact with Napoleon's body.
2. This interference-the pushing-was direct upon Wellington's act and was a positive act.
3. The act of pushing was voluntary and intentional or voluntary and negligent.

Does pushing constitute an act of interference in the form of physical contact with Napoleons body?

Firstly, the defendants act must cause physical contact with the plaintiff's body: carter v walker (2010). With regards to the facts, it is clear that physical contact did occur in the form of Officer Wellington physically pushing Napoleon back into his cell, and thus the physical act of interference required, is satisfied.

Was the interference suffered by Napolean a direct result of the push?
In order to create an actionable claim, the interference suffered by the plaintiff must be immediate upon the defendants act. Napoleon's fall, was a direct act in response to the interference and was not a consequential impact upon the plaintiff (Carter v Walker 2010), therefore clearly satisfying the element of a direct act. **……..CONT.**