

**Topic 1: Damages**3 BROAD CATEGORIES OF DAMAGES;

1. Compensatory [broad]
2. Aggravated (Topic 2)
3. Exemplary/ Punitive (Topic 2)

*Damages Concerned with damages (for living plaintiffs) ('Injured but alive')*

**FOUR FUNDAMENTAL PRINCIPLES OF COMPENSATORY DAMAGES AWARDS**

Derived from *TODROVIC V WALLER* (1980)

**1. COMPENSATORY OBJECTIVE**

- P to be put back in the [monetary] position as if the injury (tort or wrong) had not been sustained.

**2. ONCE AND FOR ALL RULE** 'court awards damages once and forever' – cannot keep coming back for more

**Two consequences of the once and for and all rule:**

- **A) Lump sum awards; cannot be varied (however periodical payment allowed)**
  - **Fetter v Beal (1701)**
    - P sued in battery claiming damage to skull
    - 8 years later p after receiving compensation
    - P sought another claim, as a parts-of-skull came off (therefore injury came out to be more serious than what was assessed initially)
    - D argued that since they have already paid, the court agreed with the D
  - **Gilchrist v The Estate of the Late Sara Alexander Taylor (2004)**
    - 12 yr girl hit by a golf ball
    - P treated & operated, neurological injuries to brain, P suffered severe seizures, P sued the hospital for negligence P awarded 2.5 million + costs and this was settled on 20<sup>th</sup> Dec 2002
    - after a month, the plaintiff died The application by defendant to reduce the damages
    - court dismissed, quoting 'once and for all rule',
- **B) Courts must make predictions about the plaintiff's future health, employment, etc.**
  - Courts therefore need to speculate, what kind of loss a P may suffer in the future.
  - Types of Qs court have to ask themselves i.e. what would happen if the plaintiff were to be sick again in the future?
  - Court calculate whether the damages should go up or down, considering the future (normally 5 to 20% adjustment) Consideration are of subjective matter
  - These considerations are also called the '**Vicissitudes of life**': *Wynn v NSW IMC*; *Malec v JC Hutton* (HCA, 1990)

⇒ **Vicissitudes of life**': *Wynn v NSW IMC*;

**'Vicissitudes of life**': *Malec v JC Hutton* (HCA, 1990)

- While working between 1972 and 1980 in D's abattoir & P contracted brucellosis due to D's negligence, in due to D's negligence, between 1975-1977
- But by 1983 the condition was no longer present.

*Malec v JC Hutton* (HCA, 1990) (pre-existing conditions)

Deane, Gaudron and McHugh JJ:

- Future and hypothetical events to be distinguished from past events (that had happened before trial)
- Balance of probabilities analysis not appropriate to future events which involve prediction/conjecture and are not susceptible of exact proof
- Damages must be discounted for the probability that the future event would occur and the plaintiff would suffer the same loss independently of the tortious accident due to a pre-existing medical condition
- Future event only to be ignored where it is speculative (less than one per cent),

Applied to this case:

- no certainty that Ps back condition would have led to the same psychiatric condition; it could be said only that there was a chance this would occur.
  - Damages for pain and suffering and for gratuitous care to be reduced by the chance that a *similar psychiatric condition would have developed* from factors unconnected with d's negligence (the back injury)

**Structured Settlements: S 28N** : *You can make periodic variation under the following legislation.*

BUT court can now approve an agreement to settle by a structured settlement or payment to be made periodically as opposed to a lump sum if both parties agree.

- s28N Wrongs Act
- No tax consequences
- Advantages: financial management + future reassessment
- Limitations: No power to order parties to enter into a structured settlement + only applies to settlements

**3. THE COURT DOESN'T CARE HOW, OR IF, THE PLAINTIFF SPENDS THE MONEY**

- In *Skelton v Collins (1966)* the plaintiff was Permanently unconscious and therefore they could not spend the money, however this is not a courts concern.
- Damages for 'gratuitous attendant care services' (aka Griffiths v Kerkemeyer damages) such as home care or being looked after.
- However, if damages are awarded as a lump sum, and the defendant's negligence has rendered the plaintiff unable to manage the money, lacking intellectual capacity, the plaintiff is entitled to recover for the costs of managing the fund into which that lump sum is paid (i.e. D providing a accountant or some methods of managing fund for P): *Gray v Richards [2014] HCA 40*

**4. THE PLAINTIFF BEARS THE BURDEN OF PROOF ON DAMAGES.**

HEADS OF COMPENSATORY DAMAGES

[SPECIAL] Economic loss (pecuniary damages) – can put monetry figure on these damages.

- Medical, hospital, rehabilitation expenses (easiest to calculate)
  - Includes damages for gratuitous attendant care services (where someone has to care for you)
- Loss of earning capacity

[GENERAL] Non-economic loss (non-pecuniary damages) not tangible losses

- Pain and suffering
- Loss of amenities of life

### Assessment of impairment 'objective'

- Degree of impairment assessed objectively – a medical determination of loss of physical and/or psychiatric function.
- When determining extent of physical impairment, psychiatric consequences not to be taken into account: s 28L
  1. Pain and suffering
    - Compensation for physical pain and psychological consequences (worry, frustration, anxiety etc.) for instance you lose a limb, you cannot do things your own, or cannot go out etc.
    - Completely subjective
    - Skelton v Collins
  2. Loss of amenities/ enjoyment of life 'subjective standard'
    - Compensation for disability/impairment of p's ability to enjoy life
    - Largely subjective (as it is specific to that person): modest sum if p is permanently unconscious (e.g. \$10,000-\$20,000)
    - Skelton v Collins
  3. Loss of expectation of life also termed 'lost of years' damages
    - Consolation or solace for P for shortened life
      - Modest awards (\$10,000-\$15,000)
      - They vary depending on a person's age and how long of life they had left.
      - Not included in Wrongs Act definition of NEL, so query whether this head of damages still available for negligence claims to which Wrongs Act applies (i.e., if it is an 'exhaustive' code)

### Aggravated and Exemplary Damages

- See topic 2

### CLAIMS UPON THE DEATH OF A PERSON

2 claims available:

1. Claim by estate (survival of action claim) under the Administration and Probate Act, and
2. Claim by dependants for loss of financial support - Pt III Wrongs Act (dependants' claim)

NB: both claims are available in conjunction – Estate claim relates to past economic losses, dependants' claim relates to future losses

- No cause of action arises in respect of the death of another person except as provided by this legislation Barclay v Penberthy [2012] HCA 40

#### 1. Survival of action claim

- The estate may proceed with the cause of action the deceased would have had had he/she lived: Administration and Probate Act 1958 (VIC), s 29
- Where deceased died as a result of the tort, executor can only recover:
  - Economic loss (medical expenses & loss of earning capacity) between date of injury and death, and
    - Includes gratuitous care, subject to thresholds and caps
    - Future ECO losses not recoverable (these can be recovered only on a dependants' claim)
  - Funeral expenses
- Non-economic losses not recoverable

law is my neighbour? The answer seems to be – persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question’ [pg 580]

- Reasonable care must be taken to avoid acts or omissions that you can reasonably foresee will injure your ‘neighbour’
- A ‘neighbour’ is a person who is so closely and directly affected by my act that I ought reasonably to have them in contemplation (D’s mind) when engaging in that act

#### MODERN REQUIREMENTS OF A DUTY OF CARE [derived from DONOGHUE CASE]

1. Reasonable foreseeability of harm – should this person be in the D’s mind, that if D conducted themselves in a activity, in a careless manner, is it likely to result into a risk or harm
2. In novel cases, a ‘special relationship’ between the parties. This entails an evaluation of various ‘control factors’ or the ‘salient features’ of the relationship; ie evaluation of factors for and against imposition of liability
  - Sullivan v Moody [2001]

For ‘novel cases’ duty of care will be denied where policy factors support an immunity from liability unless it is an established categories of duty of care

DUTY OF CARE is two fold

- Relationships + Salient/ control features
- Reasonable Foreseeability (in the broadest terms.
  - the doctor foresee that if they do particular conduct, any patient may be injured. Not that this particular patient be injured.

#### ESTABLISHED CATEGORIES OF DUTY OF CARE

In these instances, the duty would not be an issue, therefore you can move to the element of causation etc.

- Doctor/patient relating to advice and treatment (Rogers v Whitaker)- doctor should always be able to foresee that if they do not conduct their treatment a way they are supposed to (reasonably) then there is a high chance that they may cause a risk of harm
- Driver/road user; driver/passenger; driver/rescuer owe a duty to take reasonable care to ensure not to cause harm to other road users by reasonably looking out
- Driver/ Rescuer if your get out of the vechile to help someone and fail to reasonably help the person, you may be liable Chapman v Hearse 1961)
- Occupier/entrant relating to the physical condition of the premises (Australian Safeway Stores v Zaluzna)
  - P went to D’s store
  - Raining outside, walked in with wet foot D slipped and injured himself and sued for negligence
- Providers of commercial recreational services and their customer (Woods v Multi-Sport Holdings Pty Ltd)
- Public authorities with control and management of land and entrants onto that land for recreational purposes Vairy v Wyong Shire Council )
  - Plaintiff dove into the ocean from a rock platform and cracked his neck.

'But for' test rejected as a comprehensive or exclusive test of causation: majority in [March v Stramare:-](#)

- 'but for' effective at eliminating negligence as a cause; ie as a 'negative criterion' (Tabet v Gett [2010] HCA 12 at [112] per Kiefel J)
- But High Court has been increasingly strict in its application of 'but for' test.

#### [Adeels Palace v Moubarak \[2009\] –'But for' test of factual causation not established](#)

- Issue: whether the D was in Breach of its duty by allowing the TP back-in the premises, if so, was that breach the cause or the necessary condition of the P's harm?

HC: No evidence that presence of security staff would have on Balance of Probabilities deterred or prevented the re-entry of a man armed with a gun that he was ready and willing to use on persons unconnected with the previous altercation; gunman bent on revenge, not acting rationally. Having the security guard was not the 'necessary condition'.

- Mere possibility that security guards could have prevented the shootings insufficient; must be a probability, it needed to be more than 50%
- Not an exceptional case where 'but for' causation does not need to be established (see s 51(2) below) i.e. multiple sufficient cases, where 'but-for' test fails to substantiate the cause of the injury. i.e. multiple shooters, whose bullet caused the injury?
- Sometimes there are multiple concurrent causes- where two wrongs operate together to bring out the injury
- P's own conduct may negate 'but-for' test
- For the purpose of causation 'but for' test should not be the only test, as common sense and experience are also relevant

#### [Amaca Pty Ltd v Ellis \[2010\] \[but for test not satisfied\]](#)

- P failed because could not establish on balance of probabilities that the lung cancer would not have occurred 'but for' the exposure to asbestos:
  - No evidence that exposure to asbestos alone caused the cancer
  - Epidemiological evidence that the combination of smoking and exposure to asbestos can increase risk of lung cancer: but no evidence that they must work together to increase risk
  - Inference could not be drawn from epidemiological evidence that combination of smoking and asbestos exposure had actually caused P's cancer: Medical evidence that P's heavy smoking by far the most probable cause of his lung cancer
  - 'Knowing that inhaling asbestos can cause cancer does not entail that in this case it probably did': at [68].
  - **Held:** 23% for asbestos therefore 'mere' chance only, whereas for smoking 60% therefore causation here was not established

**'BUT FOR' LESS EFFECTIVE AT CONFIRMING NEGLIGENCE WAS THE CAUSE:**

- Must look to the powers, duties and responsibilities conferred on the employee (including any special roles) to determine if the employment put T in the position vis-à-vis the victim to commit the tort
- That is, did T use or take advantage of the authorities, powers and duties conferred on him or her in order to commit the tort

#### IN THE COURSE OF EMPLOYEMENT OR REASONABLE INCIDENTAL THERETO

- **Negligent vs intentional tortious acts**
  - Century Insurance v Northern Island Road Transport Board
  - Petrol driver lit a cigarette, and that caused a fire
  - It was considered to be under the driver's duty
- **Hollis v Vabu vs Deatons Pty Ltd v Flew**
  - An act of retaliation or spite not connected with employment
- **Fontin v Katapodis (Austlii)**
  - A retaliatory act; employee not performing his employment obligations at the time
- **Mohamud v Wm Morrison Supermarkets plc (as discussed in Prince Alfred)**
  - In the absence of a position of authority, power and control over customers, employment merely provided the opportunity for the criminal assault
- **Blake v JR Perry Nominees Pty Ltd (Austlii)**
  - Tort committed for a private motive unconnected with the contract of employment
- **Prince Alfred College Inc v ADC [2016] HCA 37**
  - Fact the tort is a criminal offence does not absolutely preclude the possibility of vicarious liability - the role given to the employee and the nature of the employee's responsibilities might justify the conclusion that the employment not only provided an opportunity but was also the occasion for the commission of the wrongful act (see at [80])
  - Focus must be on the degree of connection between the tortious act and the functions, powers and responsibilities conferred by the employment
  - E.g., did the employee use or take advantage of the position in which the employment placed the employee vis-à-vis the victim to commit the criminal act, including any special roles

#### Vicariously liable for sexual abuse

##### State of NSW v Lepore [important case before Alfred]

- Majority held (on facts) educational authorities not liable for sexual abuse by teachers
- Gleeson CJ: school merely provided the opportunity for the abuse, did not create or increase the risk
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##### Prince Alfred College Inc v ADC

**TOPIC 10: DEFENCES TO NEGLIGENCE**

1. Contributory Negligence
2. Voluntary Assumption of Risk
3. Exclusion Clauses
4. Limitation Periods

**CONTRIBUTORY NEGLIGENCE.** Under s 26(1) of the *Wrongs Act* [plaintiff's] damages may be reduced by apportionment if [he or she] was contributorily negligent. On the basis of *Montfroy v Roads Corporation*, there are three issues for determination in s 26(1).

The first is whether P was negligent, that is did [he or she] fail 'to take reasonable care' for their own safety, ie to take reasonable steps to avoid a foreseeable risk of injury? Section 62(1) of the *Wrongs Act* provides that the principles applicable to determining Breach of Duty in s 48(1) are applicable here.

- 1) S 62(2)(a) provides that the requisite SOC is objective; that of reasonable person in the position of plaintiff. Thus a blind or deaf pedestrian is held to the standard of 'reasonable' pedestrian; his or her defective sight or hearing cannot be taken into account in setting the SOC: *Joslyn v Berryman*. Therefore did the plaintiff take such precautions as would reasonably be taken by a person in their position.
- 2) Further, s 62(2)(b) requires this to be determined on the basis of what [plaintiff] **knew or ought to have known**; i.e. on the facts, Josie was not aware of the issues about the harness failing after a certain amount of jumps and, as a 10 year old, would not be expected to have such knowledge (compare such cases as *Kelly v Bega Valley CC*). A plaintiff with special knowledge of the risks might be held to a higher standard than the 'normal' reasonable person in his or her position.
- 3) Applying the calculus of negligence (as discussed above in respect of the Council's breach) to Josie's actions, it seems that her **only option to avoid harm was not** to [engage in activity which caused her injury] , **and to expect** [him or her] **to take this action would be assessing the risk in hindsight** (cf. *Roe v Minister of Health; E v Australian Red Cross*) rather than at the time of the incident.

The **second** issue is causation, namely whether the [defendant's] negligence in failing to supply a safe harness caused her brain damage; the answer to this is yes. Here, contrary to cases such as *Froom v Butcher*, there were no actions by [plaintiff] that contributed to her injuries or the occurrence of the accident itself.

The **third** issue is apportionment, namely to what extent [plaintiff's] damages should be reduced to the extent that the court thinks 'just and equitable' taking into account her 'share' in the responsibility for the damage: s 26(1)(b). As the preceding discussion indicates, she was not contributorily negligent and so there should be no reduction in the damage payable to her.

CONTRIBUTORY NEGLIGENCEELEMENT 1: NEGLIGENCE BY P

P's negligence is a failure to take a reasonable care for her own safety by failing to take reasonable steps to avoid a foreseeable risk of injury to self

Principles re 'Breach' apply to contributory negligence

Section 62(1) Wrongs Act

- Principles that determine breach of duty also apply to determine whether P was contributorily negligent.
  - Principle used in s 48(1) apply here and
  - need to explicitly classify what the risk of harm is on the facts\*\*, very important for causation discussion

Therefore concepts of

- reasonable foresight of risk;
- the 'not insignificant' nature of the risk; and
- reasonable precautions that could have avoided the risk are relevant.
- In exam situation for 'standard of care' need to provide an example of a 'reasonable contribution' which should have been applied, but was not, therefore the D falling below the 'standard'
- Personal responsibility, autonomy

Reasonable foreseeability—others' negligence

- 62(1) Wrongs Act (Principles that determine breach of duty also apply to determine whether P was contributorily negligent.)
- no requirement that P's actions have endangered other persons
- Note that P can reasonably foresee that others will act negligently

Standard of Care: objective

- 62(2)(a) Wrongs Act: Standard of care is that of a reasonable person in position of P (an objective test)
  - P's subjective personal circumstances can not be taken into account
    - i.e. blind pedestrian is held to be a reasonable pedestrian
  - Reflects common law: *Joslyn v Berryman*, [35] (McHugh J)
  - In the case of intoxicated passengers:
  - Test is whether the ordinary reasonable sober person should have known that capacity of driver impaired by reason of intoxication (not whether drunken plaintiff should have known of this impairment)

Reasonable foreseeability—D's knowledge

- 62(2)(b) Wrongs Act:
- The matter is to be determined on the basis of what P knew or ought to have known at the time
  - i.e., court to take into account the knowledge a reasonable person in P's position would have, as well as any extra knowledge that P actually had
  - Reflects common law: see *Imbree v McNeilly* [learner driver found to be negligent and the Driving instructor said to have contributed to the injury]
  - What P knew and what they ought to have known; both considered
  - The answer for both questions is answered once it is taken into consideration that P was negligent

Standard of Care: mental disability

- Mental disability must be disregarded: court must apply the standard of a person without the plaintiff's mental disability
  - Town of Port Hedland v Hodder [No 2] [2012] WASCA 212, [298] (McLure P), [372] (Murphy JA), cf. [259](Martin CJ)
    - Could not take into account P's reduced capacity for foresight and prudence
    - Affirmed the objective SOC and found that P was not contributory
    - McLure's PRINCIPLES 171-281

Standard of Care: Children

- At common law, children not held to adult standard [Diminished standard]
  - Joslyn v Berryman, per McHugh J
- An objective test: children expected to exercise the degree of foresight and prudence reasonably to be expected of a child of that age
  - Kelly v Bega County Council 1982 [unreported] NSWCA
  - when he entered electric
  - McHale v Watson

Standard of Care: Sudden Emergencies

- P's conduct will be judged by reference to all c'stances, including that situation in which the P is placed in a position of choice b/n two dangers:
  - In such cases, the reasonableness of the P's acts is judged by weighing the degree of inconvenience and risk to which the P was subjected due to D's negligence against the risk P took to escape it. The Bywell Castle (1879).
- Where appropriate, courts must take into account P has acted 'in the agony of the moment' created by D's negligence
- Wvwn though alternative course of action could have been taken however P's conduct is judged based on the circumstantial pressure
  - Eg Caterson v Commr for Railways
  - P only had split second to decide whether to get on tram or to get off
  - P was injured as a result
  - It was considered that P would have been in serious inconvenience 8 mile till next stop and 14 yo son on the plaintiff. Therefore no contributory negligence for P' part. His action were considered to be reasonable standard.

**ELEMENT 2: CAUSATION**

- D must prove P's negligence contributed to the accident, or
- It is sufficient if D proves that P's negligence contributed to the injuries – D need not prove that P's negligence necessarily caused the accident
  - Eg, failure to wear a seatbelt or crash helmet amounts to contributory negligence where P would not have suffered injury (or would have suffered less injury) if a seatbelt had been worn
    - Froom v Butcher (CoA UK, 1976)
    - P injured in car accident due to negligence of D
    - P suffered number on injuries
    - P's injuries would have been 'far less-severe' had they been wearing a seat-belt, P's damages was reduced by 25% as P failed to put seatbelt, even though P's negligence was not the cause

- *Anderson v Mackellar CC (NSWSC, 1968)* (breach of a by-law requiring owners of land to ensure they did not erode the support for adjoining buildings actionable by adjoining owners)
- *Seiwa Australia Pty Ltd v Owners Strata Plan 35042 (NSWSC, 2006)* (breach by an owners corporation of a duty to maintain common property actionable by unit owners)
- A breach of a specific safety obligation on an employer to usually found to support an action for a BOSD by an employee. : *Betts v Whittingslowe (HCA, 1945)*
- ***b) Whether the statute provides for a penalty or other means of enforcing the duty, presumption that that was the only means of enforcement contemplated [presumption is that it must be the only way of enforcing the duty]***
  - X (Minors) v Bedfordshire CC at 731
  - But penalty must be adequate: Anderson v Mackellar (penalty small compared with the damage likely to be suffered)
- ***c) The imposition of civil liability must be consistent with the policy of the legislation***
  - X (Minors) v Bedfordshire CC
    - See also now s 84(3): Where BOSD action is against a public authority, the imposition of liability must be compatible with the provisions and policy of the statute

#### [2] THE STATUTE IMPOSES A DUTY ON D

- D must be obliged, not merely empowered or authorised, to do the act.
- The duty must be imposed on D, not an independent contractor or employee of D.
  - Note that vicarious liability does not apply where the duty is imposed on the employee
  - *Darling Island Stevedoring v Long (HCA, 1957)*
  - *Slivak v Lurgj (Australia) Pty Ltd [2001] HCA 6*
- But note Occupational Health And Safety Act 2004 (Vic), s 21

#### [3] P IS WITHIN THE CLASS OF PROTECTED PEOPLE

- The legislation must be construed to determine the class of persons it intends to protect
- The risk arising from the legislation must be directed to the P
  - *Cutler V wandsworth Stadium Ltd [1949] AC 398*
  - *Mummery v Irvings (HCA, 1956)*
  - *Wynn Tresidder Management v Barkho (NSWCA, 2009)*

#### [4] P'S HARM IS WITHIN THE CLASS OF RISKS THE STATUTE PROTECTS

- The harm suffered must be of a type the legislation was designed to avoid
- See again Mummery v Irvings [dealt with classes of protected person]

#### [5] D WAS IN BREACH OF THE STATUTORY DUTY

- Dependent on the wording of the legislation;
- The legislation might impose strict liability depending on the wording of the legislation (ie D liable even if not negligent and could not have taken precautions to avoid the harm).