

MID SEMESTER EXAM NOTES

Battery (actionable per se)

1. **Positive act:** must have physical contact with body → *Innes v Wylie* (not battery if there is passive/negative act)

*does not require hostile touching → *In re F*

*knowledge of the contact is not required by Plaintiff in battery

2. **Direct interference:** immediate interference, not merely a consequence → *Scott v Sheppard* (fireworks)

*directness can be broken but immediate acts of intervention by 3rd parties will not break the chain of directness

3. **Intentional act:** must be voluntary contact (objective); intended act (which is the contact), proved through substantial certainty or likelihood that contact will follow from act → *Bolton v Stone* (cricket case)

Assault (actionable per se)

1. **Positive act and direct physical threat:** there must be a positive action towards P; no break in time; D must have the means of carrying out the threat → *Stephens v Myers* (tried to hit someone in boardroom but got stopped)

*verbal threats cannot amount to assault unless it is a verbal threat that indicate imminent physical contact → *Barton v Armstrong*

2. **Imminent (anticipated battery) and harmful contact:** she was in immediate and continuing fear so long as she was imprisonment by the defendant the threat having as much effect in an hour as it has at the moment of utterance → *Zanker v Vartzokas* (apprehension)
3. **Apprehension must be reasonable:** P had assaulted the D (pointed gun) though P was not scared → *Brady v Schatzel*

*If P was asleep/not aware of violence that is about to ensure, there is no reasonable apprehension and hence there is no assault

*conditional threats → *Tuberville v Savage* (can amount to assault if applicable/possible to happen)

Nuisance

Private nuisance = an unreasonable, indirect interference with the use and enjoyment of land in respect of a person who has the right to exclusive possession of that land.

1. The Nature of the Interference

Damage → physical/material damage to property (clothes line) (does not have to be recurring: *British Celanese*)

→ interference with comfort or 'amenities' through noise, dust, smoke, Smells, vibration, glare, or interference with rights attaching to the land such as a private right of way, or right to lateral support. (damages and injunction may not be granted when interference occurs infrequently: *Bamford v Turnley*)

Hunter v Canary Wharf [1997]: personal injuries are not actionable in the tort of private nuisance since one's bodily integrity is not an interest 'in' land.

2. Interests protected: 'the use and enjoyment of land'

Not nuisance: abstracting water from channels beneath, obstruction of view; unsightly buildings; lawful construction of buildings interfering with reception; photograph/record another's property

Actionable nuisance: brothel in proximity; presence of bookshop selling offensive hard-core pornography; serious obstruction of light coming into the house enough to render occupation of premises uncomfortable; deliberate attempt to snoop on the privacy of a neighbour and record it on video; picketing (protests) if it interferes with a person's use and enjoyment of land.

→ It is simply the result of ad hoc value judgement about how the costs and benefits of social life should be distributed.

3. Unreasonableness

The courts will examine the relevant factors in determining the unreasonableness of the interference.

(a) Triviality - the requirement of 'substantial' interference

The interference with use and enjoyment of land must be more than trivial to constitute nuisance.

Walter v Selfe → Injunction granted for smell and cinders from D making bricks in a brick kiln which damaged health of P and property, trees and plantations.

NEGLIGENCE (FINAL EXAM)

*Important to apply the Civil Liability Act – need to be aware the date at which the CLA commences, if the exam relates to happenings before the date of commencement of the CLA – common law would have to apply.

0. Does the CLA Apply?
1. **Does the duty of care exist?** D must owe P a **Duty of care**
2. **Has it been breached?** D must have **Breached** that duty through **unreasonable conduct** (falling below the standard of what a reasonable person would do)
3. **Has it caused damages?** The breach must have **Caused** damage
4. **Is damage too remote?** The damage must not be too **Remote**
5. **Should there be contribution from multiple tortfeasors?**
6. **What defences are open?**
7. **What damages are available?** (Calculate if given numbers, otherwise talk about it generally as a concept)

Duty of Care

- Inn keepers have always been held to owe a duty of care to people who stay at their inn
- Similarly, surgeons and their patients, occupiers of land and their visitors; and carriers and their passengers

Palsgraf v Long Island Railroad Co (1928) 162 NE 99: Was not reasonably foreseeable.

Test: the risk reasonably to be perceived defines the duty to be obeyed, and *risk imports relation*; it is the risk to another or to others within the range of apprehension. **Relatively to P, it was not negligence at all.** Nothing in the situation gave notice that the falling package had in it the potency of peril to persons thus removed – too remote.

Chapman v Hearse (1961) 106 CLR 112: A person who is negligent may also owe a duty of care to any person who comes to rescue or assist them. It is reasonable that a rescuer be compensated for taking the risk of helping a person who has been negligent and, is not punished for taking such a risk by not being compensated for any losses they suffer.

Approach 1- Discrete Categories and Analogical Development

Manley v Alexander [2005] HCA 79: drivers must take reasonable care to control the speed and direction of the vehicle – currently established reasonable of care for drivers to other road users.

Czatyрко v Edith Cowan University (2005) 214 ALR 349: established category of care from employers – a non-delegable (can't get rid of it) duty of care to employees by taking reasonable steps and not exposing them to harm (if risk is reasonably foreseeable, and if

Causation

In addition to establishing D owed and breached a duty of care owed to P,
It must also be shown

(a) that the breach in fact caused the plaintiff's damage and

(b) that the damage is not too 'remote' a consequence of the breach (question of how far the defendant's responsibility *ought to extend* for damage that he or she has clearly caused)

Sections 11 and 12 of the CLA supplement traditional common law principles regarding causation (s11(1)(a)) and remoteness of damage (s11(1)(b)) – though the language of these new provisions varies slightly from that used at common law, HC has accepted that **previous common law authorities can be used to interpret the way they should be applied** (*Wallace v Kam* [2013] HCA 19)

The key provisions as regards factual causation under the Act **are s 11(1)(a), 11(2), 11(3) and 12.**

Barnett v Chelsea and Kensington Hospital Management Committee

Evidenced that he probably would have died anyway even if he was admitted into hospital and properly treated – it was too late for competent treatment to do any difference. P's wife who sued for his death failed on the basis that it **could not be proven on the balance of probabilities (s12)** that the defendant's negligence had caused the death: **NOT BUT FOR**
→ s11(1)(a): the breach of duty was a necessary condition of the harm (**factual causation**)

March v Stramare (1991) 171 CLR 506 (HCA)

BUT FOR TEST: D was negligent by parking right in the middle of the road while loading, BUT P's damages were reduced by 70% for his own contributory negligence for running into D while drunk driving.

McHugh J:

Leyland & Fitzgerald

To be a legal cause of damage, the act or omission charged **must not only have been a *sine qua non* (but for) of its occurrence, but it must also have been a cause according to 'common sense principles' (s11)(2)** → allows courts to use the common-sense test in exception cases (i.e. causation is satisfied if the wrongful conduct 'common sensibly' generated the very risk of injury that resulted).

Mason CJ: Accepting but for test as the exclusive test (a) **places rather too much weight on the "but for" test to the exclusion of the "common sense" approach** which the common law has always favoured; and neglects value judgement is resolving causation as an issue

Multiple Tortfeasors

Same damage

- Joint Tortfeasors → Same wrong → **Solidary Liability** → D1 and D2 100% liable
- Several Tortfeasors → Different wrongs → **Proportionate Liability** → D1 and D1 liable for own 'proportion'

*several tortfeasors can either be **liable concurrently** for causing the plaintiff the **same injury** (e.g. 2 negligent drivers cause an accident breaking P's leg) or their **separate wrongs** may cause P **distinct injuries** (e.g. driver 1 negligently breaks P's leg and driver 2 breaks P's arm).

Separate Damage

D1 did Wrong 1, causing Damage 1

D2 did Wrong 2, causing Damage 2

Normal rule: D1 liable for D1 damage, D2 liable for D2 damage

SOLIDARY LIABILITY

Advantageous to P where 1 or more tortfeasors is difficult to identify (or insolvent or uninsured), because full compensation is then still available from any one of the others liable in respect of the same harm.

- P can sue just D1 and the onus is on D1 to identify and seek contribution from other wrongdoers (D2) responsible for the same harm to avoid bearing the full loss.

HOWEVER, **Civil Liability Act 2003 (Qld)** has replaced **solidary liability with proportionate liability**, under which concurrent wrongdoers are liable to P only for such proportion of the damage as represents the measure of their own responsibility for it (if the answer is NO to all 3 steps in the chart)

- To be sure of recovering his or her full loss, P must successfully pursue all the responsible parties

Defences

Once P has proven the basic elements of the tort of negligence, the onus shifts to the D to establish a defence.

- **total defences** (which automatically discharge the plaintiff's liability in full)
- and those which operate only to **mitigate liability**, so as to reduce the defendant's liability.

Contributory Negligence

Partial defence: 'Apportionment legislation' [(**Law Reform Act 1995 (Qld)**, ss 5, 100)] permit P's loss to be apportioned between D and P in proportion of their relative responsibility for the injury.

Damages

Damages are assessed by reference to common law principles, but are now subject to various limits and caps stipulated by the **Civil Liability Act 2003 (Qld), Part 3** and the accompanying **Civil Liability Regulation 2014 (Qld)**.

1. Identify the type of loss

Non pecuniary ('General damages' under the s61-62 of the CLA):

Calculation method:

- a. Determine appropriate ISV number under *Schedule 4 of Civil Liability Regulation*
- b. Calculate awarded amount under *Schedule 7* → Max \$358,500 (also will pick higher ISV value within range if multiple injuries suffered)
- c. Reduce for contributory negligence (if applicable)

E.g. (can be past or future): Pain and suffering, amenities, disfigurement, expectation of life (*Skelton v Collins*)

Pecuniary (financial)

Special damages - undisputed losses: Past (plus RBA rate + 4% interest)

2. Apply Statutory Caps

General damages – disputed losses: apply compensatory principle (was it a reasonable loss – has this loss actually caused P to suffer financial loss)?

EACH of the Future losses below is discounted between 5%-15%

1. **Loss of future Earning Capacity: *Malec*** (the court assesses the degree of probability that an event would have/might occur, and adjusts its award of damages to reflect the degree of probability); *Reardon-Smith v Allianz [2007] QCA 211* (his chance of success in the competition was 'negligible', 'highly *improbable*', 'remote')

CLA s54 Damages for loss of earnings

s54(1) & (2): Limited to 3x average weekly earnings per week

s55 When earnings cannot be precisely calculated

s55(2): Court may only award damages if P has or will suffer loss, considering his age, work history, actual loss of earnings, any permanent impairment

s55(3): Court must state the assumptions on which the award is based and the methodology it used to arrive at the award

2. **Future Care Costs:** medical costs + costs of gratuitous services by family to P, known at common law as '*Griffiths v Kerkemeyer*' damages

Type 1: 'need created'

CLA s59 Damages for gratuitous services provided to an injured person (not just family)

(1): services provided by carers to P must be (a) necessary, (b) solely because of the injury (c) for at least (c)(i) 6 hours per week for (c)(ii) 6 months