

Trespass To The Person

Three main forms of trespass to the person

1. Battery
2. Assault
3. False imprisonment

Note: Trespass is actionable per se: so the actual harm need not be proved

TORT 1: BATTERY

- Definition: Battery is a **voluntary** and **positive act** of the defendant which **directly** and **intentionally or negligently** results in **contact** with the plaintiff's person

Elements of Battery:

1. Positive and Voluntary Act (PVA)
2. Directness
3. Intentionally or negligently
4. Contact

Note: All the elements are within the definition

Element 1: PVA

Voluntary Act

- The defendant must **consciously** bring about the bodily movement that results in contact with the plaintiff

Note: D need to not have intended to bring about the results to satisfy this element, **D need only intend the action**

Positive Act

- 'Not a mere passivity or omission' (*Inness v Wylie*-police officer not found liable of battery for preventing plaintiff from entering room)

Element 2: Directness

- In order for D's act to constitute a trespass against P, the D's act must operate directly with respect to the plaintiff

When is an injury direct?

- '*An injury is **direct** when it follows so immediately upon the act of the defendant that it may be termed part of the act*' (*Hutchins v Maughan*)

Intervening Act

- There must not have been an **intervening act**, necessary for the occurrence of the tort (including the plaintiff's own actions)

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Defences to trespass to the person

DEFENCE 1: CONSENT

- A defendant will have a defence against an act which would constitute a trespass to the person if the plaintiff has consented to that act
- BOP is on D

FORM OF CONSENT

- 1) **Express** - in writing, orally: NB Written consent forms are not conclusive evidence (*Chatterson v Gerson*)
- 2) **Implied** - indicated by P's conduct in the circumstances (*Re T (Adult Refusal of treatment)*)

SCOPE OF CONSENT

- For the defence of consent to operate successfully, it is necessary that the trespass that occurs **falls within the scope of that which is consented**

Sporting cases:

PRINCIPLE: Deliberate injury in the sense of something done solely or principally with the view that causing hurt isn't justified by the rules or usages of the game (*McNamara v Duncan* - Because elbowing a person in the head deliberately to hurt them is not within the rules of usages of the game, McNamara had not consented to being so elbowed)

Note: *Guimelli v Johnston* – touching face prohibited in AFL

NOTE: Be aware that the fact that someone has consented to trespass to the person, does not mean that he has consented to all trespasses to the person

Medical cases:

LAW: A PERSON WILL HAVE VALIDLY CONSENTED TO THE INFLICTION OF FORCE THAT OCCURS IN A MEDICAL PROCEDURE, AS FAR AS IS CONCERNED IN A BATTERY, IF HE HAS BEEN **INFORMED TO THE GENERAL NATURE OF THE PROCEDURE** AND HAS **CONSENTED** TO THAT PROCEDURE. IT WAS NOT NECESSARY, IN ORDER FOR CONSENT, IN THIS CONTEXT TO BE GENUINE, THAT THE DEFENDANT HAVE OUTLINED THE RISKS INVOLVED IN THE PROCEDURE (*Chatterson v Gerson* (affirmed by Australia by the High Court in *Rogers v Whittaker*))

Example: how must a person be told to have said to properly consent to an operation by a doctor

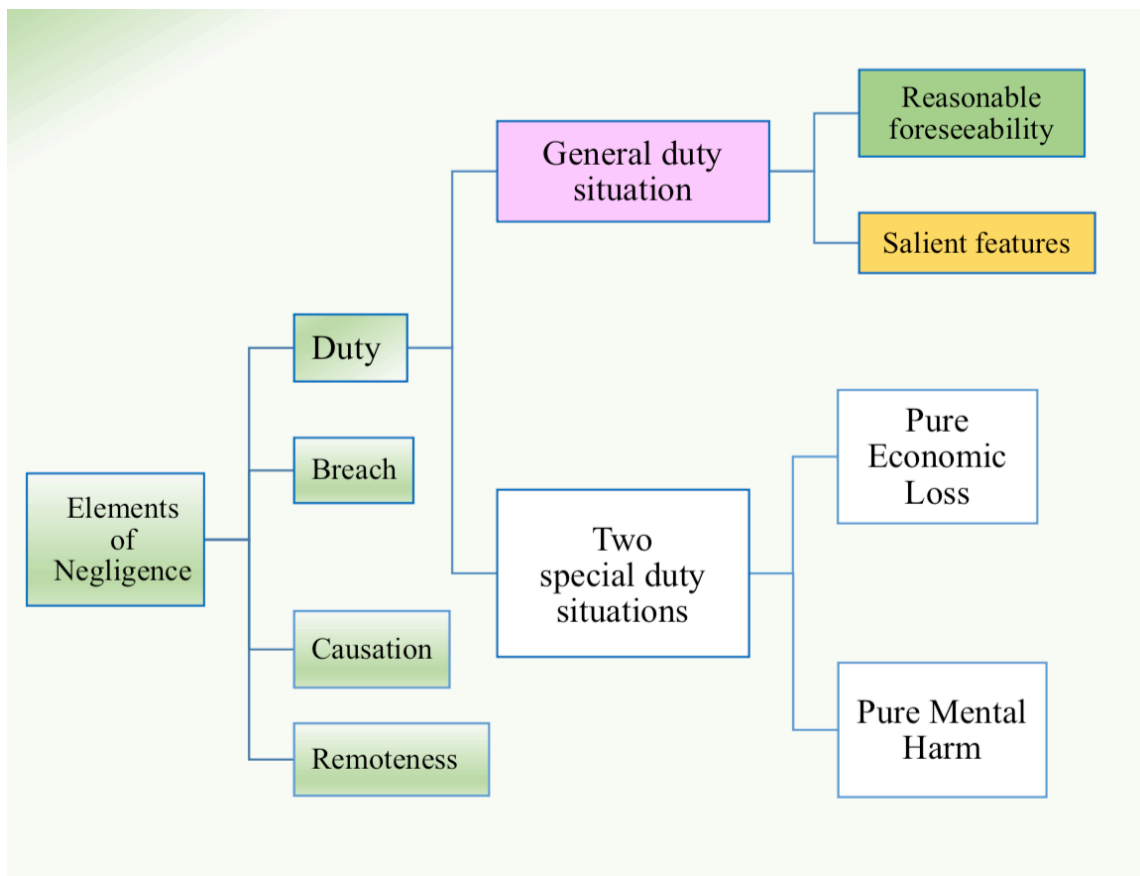
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Negligence

Element:

1. The defendant must have owed a **duty of care** to the plaintiff
2. The defendant must have **breached** the duty
3. The defendant's breach of duty must have **caused** damage, of a **legally recognised kind**, to the plaintiff
4. The damage must have not been too **remote**
5. Does the defendant have a **defence**?

Element 1: Duty of Care



Step by step guide for DOC

Negligence is defined as a failure to exercise reasonable care (S 43 WA). P must prove the 4 elements required to make out negligence listed below on the balance of probabilities (BOP). Any section mentioned in this response is in reference to the *Wrongs Act (1958) Vic ('WA')* unless specified otherwise.

STEP 1) IDENTIFY D'S NEGLIGENT CONDUCT

The negligent act is...

STEP 2) IDENTIFY HARM TO P AND WHETHER IT IS A GENERAL DUTY

The exact loss of P must be identified to determine whether DOC is to be general, pure mental harm (PMH) or pure economic loss (PEL).

In this instance, P suffered a physical injury. The initial harm suffered was [insert initial harm]

If relevant:

The later damage was [insert later harm]

Thus duty will be considered generally.

STEP 3) DETERMINE WHETHER THE LAW IS SETTLED AS TO THE DUTY EXISTING OR NOT EXISTING

- (i) If there is a DOC you move onto next element (breach) - usually there is not settled law
- (ii) Most likely you won't be sure if there is a pre-existing DOC

STEP 4) APPLY THE RF TEST (SEE NOTES)

STEP 5) APPLY THE SALIENT FEATURES (SEE SF CHEAT SHEET)

- Conclude: Must owe a duty of care

Special Situation 2: Pure Mental Harm (PMH)

Steps to take when answering a Pure Mental Harm Question

Step 0.5. S 23 WA

Step 1: Direct or indirect scenario?

Step 2: Identify D's negligent conduct to P (incorporate which of the two situations of mental harm applies)

Step 3: Identify harm to P.

Step 4: Is it Pure Mental Harm?

Step 5: S 73 (only applies to indirect situation of harm)

Step 6: RF test

Step 7: Salient Features (See SF cheat sheet)

P may recover damages from injury arising wholly or in part from mental or nervous shock (S 23)

Step 1: Pure mental harm arises in two situations and Step 2: Identify D's negligent conduct to P

1. If the defendants act **directly** causes the plaintiff mental harm

For example: The bank mistakenly sends a letter to the person saying the bank is going to foreclose on the person's mortgage and the person suffers psychiatric harm as a result. This would be an example of the person's mental harm being caused directly by the banks act

2. If the defendants act **indirectly** causes harm to a third party and the plaintiff witnesses the incident that causes the harm, or in some circumstances, learns about it, and suffers psychiatric injury as a result

Here, the defendants act has indirectly caused the plaintiff, pure mental harm

Identify D's negligent conduct to P (incorporate which of the two situations of mental harm applies)

Step 3: Identify Harm to P and Step 4: Is the Harm Pure Mental Harm (PMH)?

What is PMH?

S 67 Definitions

The following definitions are within S 67 WA. *Injury* is defined to include s67(b) psychological and psychiatric injury and s67(d) aggravation, acceleration or recurrence of an **injury**. PMH is defined (S 67 WA) to mean “mental harm other than **consequential harm**”. **Consequential harm** refers to “mental harm that flows onto another person as a result of injury she suffers.”

P has not suffered consequential mental harm as there is no prior injury to the mental harm (state mental harm).

S 75: Is it a recognised psychiatric illness? Yes / No

A court **cannot** make an award of **damages** for economic loss for mental harm resulting from negligence unless the harm consists of a recognised psychiatric illness.

If the defendant is to owe the plaintiff a duty of care in respect of mental harm or nervous shock, the harm must constitute a recognised psychiatric injury or mental illness

Impairment threshold

Impairment resulting from psychiatric injury is permanently and ‘significant’ (ie. greater than 10%) [S28LE WA, 28LF WA, 28LB WA]

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SALIENT FEATURES CHEAT SHEET

GENERAL DUTY/PEL/PMH

A DOC is unlikely to be imposed where there is no connection between the parties

1. Vulnerability
2. Indeterminate liability (if made out no DOC)
3. Floodgates (if made out no DOC)
4. Illegality (if made out no DOC)
5. Assumption of responsibility
6. Control
7. Conflict of duties (if made out no DOC)
8. Conflict of law (if made out no DOC)
9. Interference with legitimate business interests (if made out no DOC)
10. Knowledge

1. Vulnerability

If a plaintiff is vulnerable to the harm caused by a defendant's act, in the sense that there were **no steps** that the **plaintiff** could **reasonably have** been expected to have **taken** to **guard against the harm**, then the court is more likely to find that the defendant owes the plaintiff a duty of care.

Model responses:

- D would argue that P was able to take reasonable steps, unlike the plaintiffs in *Perre*, who could not move their potato crop to outside the 20km "bacterial wilt zone", because ...[insert reasonable steps to avoid harm]
- P would argue that they were not able to take reasonable steps, like the plaintiffs in *Perre*, who could not move their potato crop to outside the 20km "bacterial wilt zone", because ...[insert reasonable steps to avoid harm]

[General duty: *CAL v Motor Accidents Insurance Board* and PEL: *Perre, Johnson Tiles*.
PMH: *Annetts; Gifford*]

2. Indeterminate Liability

RULE: If the range of potential defendants, is indeterminate (could not be determined in advance how many people had been harmed), then the court will be unlikely to find a duty of care [General duty and PEL: *Perre, Johnson Tiles*. PMH: *Annetts*]

Model response 1:

Imposing a DOC on [D] in these circumstances would not result in indeterminate liability. There is a clear ascertainable class of persons who may be affected by his carelessness
- [state the group].
This points towards the existence a **DOC**.

Model response 2:

Imposing a DOC on [D] in these circumstances would result in indeterminate liability. There is not a clear ascertainable class of persons who may be affected by his carelessness.

This points away from the existence a **DOC**.

Negligence - Damages and Vicarious Liability

DAMAGES

THE PURPOSE OF DAMAGES

Damages seek to, as far as possible, put the plaintiff in the position they would have occupied had the tort not occurred – this is ultimately impossible to achieve as the plaintiff is now a paraplegic.

TYPES OF LOSS

Model response:

Pecuniary losses are financial losses resulting directly from the negligent act such as **loss of earning capacity/income** (STATE LOSS OF EARNING INCOME) and **medical expenses** (STATE MEDICAL EXPENSES)

Section 28F(2): A cap on compensation for **loss of earnings awards**

- Income would be limited to 3x average weekly earnings

Model response:

Non-pecuniary losses are financial losses which are harder to stipulate in exact monetary amounts. They relate mainly to the **pain and suffering** P is subjected to as a result of the harm, **loss of amenities** (the deprivation of the ability to participate in normal activities and thus to enjoy life to the full) and **loss of expectation of life** (here the plaintiff's **life expectancy has been reduced by the accident**).

What is required to qualify for non pecuniary damages?

Damages the non-economic loss/non-pecuniary loss cannot be awarded to P unless this injury was a **significant injury** (s 28LE).

Requirements for "significant injury"

An injury (other than a psychiatric injury) will be **significant** if the degree of impairment from the injury is **more than 5%** (the threshold) [S 28(LF)(1) — see **other considerations below**] and the injury was **permanent** [S 28(LB)]

Further consideration: What is considered a "significant injury"?

Section 28(LF)(1)

- (a) An injury (other than a psychiatric injury) will be **significant** if the degree of impairment from the injury is **more than 5%** (the threshold)
- (b) Loss of foetus
- (c) Psychiatric injury arising for loss of a child
- (d) Loss of a breast

Requirement: Is the level of injury sufficient?

Section 28(LB):

Must satisfy the 'threshold level' in the case of

1. **Injury**; impairment of **5%** or more
2. **Psychiatric** injury; impairment of **10%** or more
3. **Spinal** injury; impairment of **5%** or more

Example sentence: J's spinal injury has assumably resulted in an impairment of more than 5% as he must undertake intensive rehabilitation

A maximum of **\$577 050** can be awarded for damages because of non-economic loss (s 28G) and impairment is to be assessed by an **approved medical practitioner** (s 28LH).