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ACT	NOTES/DETAILS/ELEMENTS	CASE NAME/RULE
I. PRIVATE NUISANCE 私人妨害		
*** LEGAL TEST FOR PRIVATE NUISANCE**		
Element 1:	P must establish that he/she is **entitled to sue**	
Element 2:	There must be **interference with the enjoyment of the land**. Interference can be **tangible or intangible** and the law is different for each. **Unreasonable Interference TANGIBLE:** 1. Material 2. Not Trivial **Unreasonable Interference INTANGIBLE:** 1. Locality 2. Duration, time and frequency extent of the interference 3. P's sensitivity—— standard of the **ordinary person** 4. Malicious (怀有恶意的) motive by D	
Element 3:	D had the **requisite knowledge** of the nuisance 1. The D must have **created** the nuisance OR 2. The D must have **authorised** the nuisance OR 3. The D must have **adopted** or continued the nuisance	
Defences	1. Consent 2. Statutory Authorization	
Remedies	1. Injunction 2. Damages 3. Abatement	
ELEMENT 1: TITLE TO SUE		
exclusive possession or actual (physically in control), exclusive possession ***Animal Liberation v Gasser* (1991):** A circus gave animal performances by wild and domestic animals on parkland in Melbourne owned by the local municipality. **They had informal permission to camp and to give performances (*exclusive possession)*.** Animal Liberation protested 'animal cruelty' by carrying placards, handing out leaflets and preventing patrons from entry into the circus. The circus sued Animal Liberation.[23] **Had actual exclusive possession - The circus was physically present on the parkland.**		***Animal Liberation v Gasser*** (1991)
ELEMENT 2: INTERFERENCE WITH THE ENJOYMENT OF LAND: TANGIBLE AND INTANGIBLE		
Tangible invasions: indirect physical injury to the land e.g., contamination of the land by radioactive or other material - through flooding, fire or vibrations, tree roots encroaching (damage a wall), dust, escape of fumes etc. **Test**: 3. Material 4. Not Trivial		
Challen v McLeod Country Golf Club [2004] QCA 358	The P purchased a property next to a golf course. Over the course of a year 525 golf balls flew onto the P's property. **Some of the golf balls broke tiles and a window on the P's house** (material damages)**. On one occasion the golf ball struck the P** (also material damage)	• Broken tiles and a broken window is more than trivial damage.

***Hollywood Silver Fox Farm v Emmett* [1936] 2 KB 468**	P, a silver fox breeder, erected an advertising sign that D feared would negatively impact his building estate. When P refused D's request to remove the sign, D retaliated by threatening to shoot a gun near P's breeding pens during the breeding season. D followed through with his threat, and the shooting greatly alarmed the female foxes, resulting in a reduced number of cubs being reared. **Issue**: Whether there was an action capable of constituting a private nuisance considering the unusual sensitivity of the foxes. **Outcome: Injunction granted only during breeding season**	• **Malicious motive** • **Even if an act is carried out on one's own land, if the intention is malicious and causes a nuisance to a neighbour, it can constitute a legal wrong.**
Bradford Corporation v Pickles [1895] AC 587	- D sank a shaft on his land **intending maliciously to deprive the Bradford corporation of water** - held that the defendant's intention was irrelevant since the shaft was on his own land and he was entitled to sink a shaft on his own land. ➔ The defendant's **purpose and the utility of his or her activity** may be relevant to whether the defendant's conduct amounted to a nuisance, particularly if it is not clear whether the interference is substantial enough ➔ the Court will also consider **whether there were steps that could be taken** by the defendant to **minimise the nuisance**	• **purpose and the utility of his or her activity** • **whether there were steps that could be taken** by the defendant to **minimise the nuisance**
Rattray v Daniels (1959) 17 DLR (2d) 134 (Can)	- D had stopped initial clearing of his land when he learnt of the problem (bulldozer noise = P's mother minks to kill their young) but resumed it at a later date. - it was **impossible for D to complete the clearing and levelling of the land** because the only time of the year during which the bulldozer was available happened to coincide with the mink breeding season	• not nuisance = not done maliciously
Campbelltown Golf Club Ltd v Winton [1998] NSWCA 257	- nuisance caused by D the barrage of golf balls onto the plaintiff's land - could be minimized by the re-siting of the direction of the hole and/or by the use of appropriate screens.	• regarding retaliation acts - **mild responses would not normally** be considered unreasonable, but **malice can alter this to unreasonable**
Intangible invasions: "sensible personal discomfort", many of these are regarded as "emanations" from the land. e.g., smell, noise and offensive sights. Test: **Unreasonable interference**: **sensible personal discomfort** – The court weighs the nature and circumstances of the **defendant's** activity and the character of the resulting interference against the **plaintiff's** interests **Test:** 5. Locality 6. Duration, time and frequency extent of the interference 7. P's sensitivity—— standard of the **ordinary person** 8. Malicious (怀有恶意的) motive by D		
Christie v Davey (1893)	The P gave music lessons in her home. The D lived next door and sent a letter stating 'During this week we have been much disturbed by what I thought were the howling of your dog...' After no response was forthcoming the **D retaliated by blowing whistles and banging trays** 1. **Locality**. It is a residential area so some noise should be expected however this was beyond the day-to-day amount of reasonable noise. **2. Duration, time, frequency extent**. The extent of noise was **extreme - very loud, constantly, went on for a period of time.** 3. **P's sensitivity.** The P was not particularly sensitive. 4. **Malicious motive by D.** It was a **malicious motive by the D.**	

	The court concluded the noise was substantial and unreasonable.
Munro v Southern Dairies Ltd [1955] VLR 332.	The plaintiff was a resident in 23 Willis Street, Hampton. He complained that since in or about the year 1952, **the noise, smell and flies caused by the defendant stabling horses** on neighbouring land as part of its dairy business and claimed for an injunction and/or damages. **Issue:** Whether reasonable' use of the premises or public benefit are defences. Whether a trade essential to the locality can be complained of. **1. There must be a substantial degree (Duration, time, frequency extent)** of interference with P's enjoyment/rights for the nuisance to be actionable. • There has been caused by the defendant's keeping of horses a substantial nuisance of noise, smell and manure and urine, and flies, to the plaintiff from at least the latter part of 1952 onwards. • The horses made 'ordinary' noise for horses however the P could not sleep at night. The noise was continuous. **2. Locality** • a man who lives next door to premises from which some interference emanates may get relief, when another man some distance away will fail to obtain it, because the degree of interference varies according to the distance. • ***Winfield***: "If a man chooses to make his home in the heart of a coal-field or in a manufacturing district, he can expect no more freedom from the discomfort usually associated with such a place than any other resident can." • Stables are not essential and unavoidable for D's business in that locality even considering the social background back in 1934. **= it can extend only to what can be shown to be essential and unavoidable in the particular locality** **3. P's sensitivity** • The P was not particularly sensitive. **4. Malicious Motive** • There was no malicious motive by the D. (not enough to overweigh other 3 factors) **5. Defences:** • **Nature of activity** - The nature of a D's activities is relevant to reasonableness • **Availability of alternatives** - Regarding the smell and flies D could have reduced the nuisance if they had built stables with proper management. However, even built noise would still exist. **Outcome: P awarded both damages and injunction to restrain D.**
Stoakes v Brydges [1958] QWN 5	- D upset by noise made by P's employees delivering milk in the early morning. - In retaliation D took to dialling the plaintiff's telephone number in the middle of the night. - The court issued a permanent injunction.
Fraser v Booth (1949) 50 SR (NSW) 113	- D retaliated by **making noise\hosing and throwing of firecrackers.** - the noises "were made under the stress of annoyance from an existing nuisance in the hope of alleviating that annoyance, or having it alleviated by the person responsible for it. They **cannot be regarded as merely malicious and spiteful acts** done simply to cause damage to the defendant".
after test must still consider the give and take equation: • ***is it substantial? 有没有实际上造成伤害?*** • ***is it temporary?*** • The **time of day** may be important in assessing what is a reasonable interference. - ***McKenzie v Powley*** [1916] • even if the locality is ok, may still be regarded as a nuisance - ***Bridlington Relay v Yorkshire Electricity Board*** [1965] Ch 436 • if the plaintiff's property has been physically damaged, it may be sufficient to constitute a nuisance if the **physical damage is sufficiently serious.** • The **defendant's actions and the utility or usefulness** of the defendant's conduct are considerations in assessing the give and take.	
Interests not protected:	

- A landowner does not have a right to **natural light** (***Tapling v Jones*** (1854) 11 HLC 290) or to a view from his or her property
- Why? The interferences in **respect of view, light and air occurred as a result of building a structure upon land** and the common law does not prevent someone from building upon their own land (***Hunter v Canary Wharf Ltd*** [1997] AC 655)
- UNLESS if something emanates from a neighbour's land (***Thompson-Schwab v Costaki*** [1956] 1 WLR 335; P sued neighbour; sex worker bring client into premises.)

ELEMENT 3: CAN THE DEFENDANT BE SUED?

- created a nuisance by an act of **misfeasance** was strictly liable.
- nuisance arose by **nonfeasance**, liability generally depended upon proof of fault on the part of the occupier.

In order to sue in nuisance, the D must be connected to the nuisance in one of the following ways:

1. The D must have **created** the nuisance OR
2. The D must have **authorised** the nuisance OR
3. The D must have **adopted** or continued the nuisance

1. Creator of the nuisance

Fennell v Robson (1977)	An excavator (D), hired by a property developer, caused land subsidence on an adjoining property (P) due to their work. Despite D not possessing the land, P sued for private nuisance and succeeded.	• An excavator, even **without possession of the land, can be liable for private nuisance** (like land subsidence) if their actions created the nuisance. • The key point is liability for **creating** the nuisance, regardless of possessory interest.
Roswell v Prior (1701) 12 Mod 635; 88 ER 1570,	The P complained about damage from roots emanating from a neighbouring property formerly owned by the D. Despite no longer owning the land the court held the D created the nuisance.	• even if the person is **no longer in occupation of the land** from which the nuisance emanates, if that they have created it.

2. Authorising the nuisance

If an **occupier permits others** to undertake activities that constitute a nuisance, then the occupier is also liable for the nuisance created by that individual.

De Jager v Payneham & Magill Lodges Hall Inc (1984) 36 SASR 498	D the owner-occupier of a hall was liable for the excessive noise levels created by those who hired the hall. Even though the **D made all reasonable efforts to stop the noise** (installed a noise regulator on the amplification equipment) and the hirers neutralised, the **D was still found to have authorised the nuisance for failure to take reasonable steps to bring the nuisance to an end**
Peden Pty Ltd v Bortolazzo [2006] QCA 350	**for nuisances by tenants** – excessive noise, smoke (repeatedly burning off), excessive barking of a dog and unruly and drunken behaviour at all hours of the day and night. **The landlord was not liable for the tenants' nuisance unless she had authorised it** and given that the terms of the tenancy expressly prohibited the creation of a nuisance, this was not the case.

3. Continuing or adopting the nuisance

A defendant who does not create the nuisance, but **who continues or adopts the nuisance**, can be liable for that nuisance.

Proprietors of Strata Plan v Cowell (1989)	D was **liable for tree roots that spread** from their property to another even although they did not plant the tree. They had **failed to take reasonable steps** to remove the roots
Stockwell v Victoria [2001] VSC 497	The D state owned and occupied Crown land which was invaded by wild dogs. The dogs injured and killed sheep on a neighbouring farm. '**the occupier is liable if he has knowledge or ought to know of the existence of the nuisance, it is foreseeable that damage could occur, and he fails to comply with a measured duty of care to abate the nuisance**.'

<table>
<tr><td></td><td colspan="2">EXAMPLE OF SOLVING A PRIVATE NUISANCE QUESTION:
1. P's Standing: Does P have exclusive possession of the affected land?
2. Unreasonable Interference: Is the interference with P's enjoyment of land substantial and unreasonable (consider malice)?
3. State's Responsibility: Did the State create it, or knowingly allow it to continue?
4. Measured Duty of Care: Did the State take reasonable steps given its resources and the foreseeable harm?
5. Causation & Damage: Did P suffer damage directly caused by the nuisance?
6. State Agent's Wrongdoing: Would the specific State employee/agent have been personally liable?
7. Remedies: What compensation or injunction is appropriate?</td></tr>
<tr><td></td><td colspan="2">STEP 4 REASONABLE STEPS SHOULD CONSIDER THE BELOW:
1. Likelihood of Harm: What are the reasonably foreseeable chances that something untoward will happen or that damage will be caused?
2. Extent of Potential Damage: What is the foreseeable scope or severity of the damage if the risk materialises?
3. Practicability of Prevention: Is it practicable to prevent or minimise the occurrence of the damage?
4. Feasibility of Measures: If prevention is practical, how simple or difficult are the necessary measures? This includes considering the amount and length of work involved, as well as the probable cost of such works.
5. Timeliness of Action: Was there sufficient time for preventative action to have been taken by reasonable persons, between when the risk became known (or should have been realised) by the defendant and when the damage occurred?</td></tr>
<tr><td></td><td colspan="2"><u>Outcome:</u>
Crucially, the court held that the State could no longer claim immunity for controlling wild animals on its land. The relevant employees knew the risk of damage to the plaintiff's stock and failed to take reasonable, practicable steps to prevent or minimise the nuisance, such as increasing baiting or implementing capture programs. The court believed that such actions would have "substantially minimised" or even "eradicated" the problem.</td></tr>
<tr><td>Montana Hotels Pty Ltd v Fasson Pty Ltd (1986) 69 ALR 258</td><td>• Water was found in the cellar of the plaintiff's hotel. It was traced to a faulty down pipe on an adjacent new building which had been leased by the defendant.
• The Privy Council found that <u>defendant was not liable as he had not created the nuisance nor did he know or have the means of knowing that there was a fault in the down pipe.</u></td><td rowspan="2">• <u>There is no liability if the defendant is not the creator of the nuisance, is not aware of it, nor was required to have been aware of it.</u></td></tr>
<tr><td>Becker v Sutherland Shire Council [2006] NSWCA 344</td><td>• The Council had no reason to be aware that its drainage pipes were leaking causing saturation of neighbouring land and resultant land slippage.
• Inspection of the pipes from an operational perspective was conducted upon complaint and whilst aware of land slippage between two properties, there was no indication that this was caused by water seepage from the Council's pipelines.</td></tr>
<tr><td colspan="3">DEFENCES</td></tr>
<tr><td>1. Prescription</td><td colspan="2">• Prescription occurs where the nuisance has been carried on openly, continuously and as of right for at least 20 years;
• This continuous use can give rise to an easement in favour of the benefitting land
Sturges v Bridgman (1879) 11 Ch D 852:
"coming to the nuisance" (i.e., moving next to an existing noisy activity) is no defense in a private nuisance claim. What constitutes a nuisance depends on the character of the locality, and what's acceptable in one area may not be in another.</td></tr>
<tr><td>2. Public Benefit</td><td colspan="2">• This rule has been affirmed in Australia in Campbelltown Golf Club Ltd v Winton [1998] NSWSC 257 and Challen v McLeod Country Golf Club [2004] QCA 358 (details above)</td></tr>
<tr><td>3. Consent</td><td colspan="2">• If the P consents, there is no nuisance. Toleration is not however consent. It is also not a defence to state that the P 'came' to the nuisance.
• Campbelltown Golf Club Ltd v Winton [1998] NSWSC 257 and Challen v McLeod Country Golf Club [2004] QCA 358. In both cases, it was no answer to the plaintiffs' claims that the golf courses had been in existence before the plaintiffs moved to their homes.</td></tr>
</table>

	***Miller v Jackson* [1977] QB 966**: • Homeowners (P) built a house adjacent to a cricket ground where cricket had been played for 70 years. Cricket balls frequently landed on their property, causing damage and preventing enjoyment of their garden. P sought an injunction to stop the cricket. • "**coming to nuisance**"
4. Statutory Authorisation	• It is a defence, if legislation authorizes the nuisance. • It must however be **expressly, impliedly or a necessary incident of the authorized activity**. • It will **NOT** be a defence if the activity **can be conducted without the nuisance**. • For example, legislation authorizing the construction of bridges was not a defence to the construction of a bridge that obstructed the flow of river, as there were other ways of building the bridge. ***York Bros (Trading) Pty Ltd*** (1983).
5. Possibly Contributory Negligence	• Arguably **only where nuisance has been created as a result of the defendant's negligent conduct**. • ***Mitchell v Tsiros*** (No 2) [1982] VR 301; ***White v Humphries*** (1984) 1 MVR 426
II. APPROACHING THE DUTY OF CARE	
A. NEGLIGENCE	
Negligence has 3 elements must be satisfied before the action is made out: 1. D must **owe P a duty of care** (to take care not to cause reasonably foreseeable harm to a reasonably foreseeable P) 2. The **duty of care must be breached** (by D's act or omission); and 3. D's breach of duty of care **must cause P legally recognised harm/injury/damage** **Once steps 1-3 have been established, then:** 4. Does D have any **defences** available? 5. If not, then what **damages** does D have to pay P?	
The tort of negligence imposes liability on a D who, ***when placed in circumstances*** where there is ***a reasonably foreseeable and not insignificant risk of harm*** to another person, ***unjustifiably fails to take reasonable care***, either: to ***avoid causing that harm***, OR in some circumstances, to ***prevent that harm from occurring***, provided it is thought right to impose a ***legal duty to take such care on the D***.'	
B. DUTY OF CARE	
Donoghue v Stevenson [1932] AC 562	On August 26, 1928, Mrs. Donoghue's friend bought her a ginger-beer from Wellmeadow Café in Paisley. She consumed about half of the bottle, which was made of dark opaque glass, when the remainder of the contents was poured into a tumbler. At this point, the decomposed remains of a snail floated out causing her shock and severe gastro-enteritis. **Issue**: Why was the plaintiff **unable to sue in contract**? (not a party to contract) hence, sue Stevenson, the manufacturer to claim for a breach of a duty in negligence **Outcome**: The court held the manufacturer did owe Mrs. Donoghue a duty of care.
	Narrow ratio: '*a manufacturer of products, which he sells in such a form as to show that he intends them to reach the ultimate consumer in the form in which they left him* ***with no reasonable possibility of intermediate examination****, and with the* ***knowledge that the absence of reasonable care in the preparation or putting up of the products will result in an injury to the consumer's life or property, owes a duty*** *to the consumer to take that reasonable care*.'
	Broader ratio: **Neighbour Principle**: '*You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour*.' The neighbour principle was defined as containing two legal tests. 1. **Proximity** - nearness or closeness - physical, circumstantial and causal proximity.

- ***Heaven v Pender*** (1883) 11 QBD (**Lord Atkin**): A duty of care **extends beyond contractual relationships** to those in such **close and direct proximity**—**not limited to physical closeness**—that one's careless act would foreseeably and directly cause injury to their person or property.
- Limitation: exclude the possibility of goods having their **condition altered by lapse of time**, and to call attention to the **proximate relationship**, which **may be too remote** where inspection even of the person using, certainly of an intermediate person, may reasonably be interposed.

2. **Reasonable foreseeability** of a class of persons **who might suffer injury**. Whether the P belongs to a foreseeable class of persons who might suffer injury became a central duty question.

- ***Palsgraf v Long Island Railroad Co*** [1928] 248 NY 339:

  Facts: A passenger carrying a package was assisted by two guards as he boarded a train. One guard pushed him, and the other guard pulled him. The passenger fell and dropped the package which contained fireworks. It exploded and some scales at the other end of the platform were knocked off a shelf and hit a bystander – the P.
  Issue: Does the P belong to a RF class of persons that the guards should have foreseen might suffer injury?
  Argument: The P argued that the guards should have foreseen that anyone on the platform might be injured. The D argued that the **only person that they could have foreseen might be injured was the passenger himself** (since they didn't know the package contained fireworks). Court agreed with D

- ***Chapman v Hearse*** (1961) 106 CLR 112:

  Facts: On a dark, wet night Chapman negligently drove his car into the back of Emery's car. Chapman was flung from the car and onto the road. Dr Cherry came upon the scene and left his car to assist Chapman. While Dr Cherry was treating Chapman, **a car driven by Hearse hit Dr Cherry and killed him**. Hearse joined Chapman as a third-party claiming Chapman contributed to Dr Cherry's death.
  Issue: Does P belong to a RF class of persons that Chapman should have foreseen might suffer injury if he did not take reasonable care?
  Argument: The D argued that Cherry is a doctor, **and it is not RF that a doctor would happen to pass by at the moment of the accident**. The P argued that the class of persons is any good Samaritan, and it is RF that a good Samaritan would stop and subsequently be injured by another negligent motorist. The court agreed with P

C. "Salient Factors: Approach

- **CURRENT GENERAL APPROACH IN AUSTRALIA**
- **The categories of duty where extra-legal tests (salient factors) are required** are typically because of**:**
  - The **kind of harm** - e.g., mental injury and pure economic loss.
  - Who the **defendant** is – e.g., a public authority or an occupier
  - Who the **plaintiff** is – e.g., a fetus or a child
- Categories of duty of care – **overlaps**:
  - ***Donoghue v Stephenson*****:** physical injury; mental injury; product liability **(pg.6)**
  - ***Romeo v CC*****:** physical injury; liability of public authorities
  - ***Home Office v Dorset Yacht*****:** property damage; control over 3rd parties; liability of public authorities
  - ***Hedley Burn v Heller*****:** pure economic loss due to negligent words

那怎么用呢?

RF of P/class + SF for that category (mental harm, physical injury, property damage, economic lost) (**and extract them, often based on precedent – indicate what the salient features are**)

- **may include matters such as:**
  - the **level of vulnerability** of the plaintiff compared with the power or control of the defendant in the situation,
  - the **level of reliance** of the plaintiff on the defendant,

<table>
<tr><td colspan="3">- the kind of knowledge involved, etc.</td></tr>
<tr><td colspan="3">D. Reasonable Foreseeability of a Class of Persons</td></tr>
<tr><td colspan="2">*The relationship must be “not fanciful or farfetched”</td><td>Wyong Shire Council v Shirt (1980) 146 CLR 40, Mason J at 47.</td></tr>
<tr><td colspan="2">the D did not have to foresee dangers which would arise because of people failing to take care of themselves = the extent of the obligation owed by the RTA was that of a roads authority exercising reasonable care to see that the road is safe “for users exercising reasonable care for their own safety”</td><td>Gummow J in RTA v Dederer (2007) 234 CLR 330, at 47</td></tr>
<tr><td colspan="2">Risk is a central issue in the law of negligence because it is the risk which must be reasonably foreseen.</td><td></td></tr>
<tr><td colspan="2">Reasonable foreseeability is also an important element at the stages of breach and remoteness. The application of the test at each stage can be distinguished by the level of abstraction used:

1) Duty: Was the relationship between the plaintiff and defendant such that any careless conduct by the defendant could cause some kind of damage to the plaintiff?
2) Breach: Could the kind of carelessness exhibited by the defendant cause some kind of damage to the plaintiff?
3) Remoteness: Could the kind of carelessness exhibited by the defendant cause the kind of damage suffered by the plaintiff?
- The remoteness test is only passed <u>if the plaintiff proves that the kind of damage suffered by him was foreseeable as a possible outcome of the kind of carelessness</u> charged against the defendant
- Where the prospect of harm to the plaintiff is so remote as to not be reasonably foreseeable, they are considered an unforeseeable plaintiff.</td><td>Glass JA in Minister Administering the Environmental Planning and Assessment Act 1979 v San Sebastian Pty Ltd [1983] 2 NSWLR 268 observed (at 395-396)
Chapman v Hearse (1961) 106 CLR 112 at 120, 121.

Wyong Shire Council v Shirt (1980) 146 CLR 40; 29 ALR 217 at 219-22</td></tr>
<tr><td>Chapman v Hearse (1961) 106 CLR 112</td><td>Facts: On a dark, wet night Chapman negligently drove his car into the back of Emery’s car. Chapman was flung from the car and onto the road. Dr Cherry came upon the scene and left his car to assist Chapman. While Dr Cherry was treating Chapman, a car driven by Hearse hit Dr Cherry and killed him. Hearse joined Chapman as a third-party claiming Chapman contributed to Dr Cherry’s death.
Issue: Does P belong to a RF class of persons that Chapman should have foreseen might suffer injury if he did not take reasonable care?
Argument: The D argued that Cherry is a doctor, <u>and it is not RF that a doctor would happen to pass by at the moment of the accident</u>. The P argued that the class of persons is any good Samaritan, and it is RF that a good Samaritan would stop and subsequently be injured by another negligent motorist. The court agreed with P
Outcome: the High Court upheld the decision that Chapman was liable to contribute to the damages paid to Dr. Cherry's estate. Despite Hearse's intervening negligent act, Chapman's initial negligence in causing the first accident was deemed a foreseeable cause of Dr. Cherry's death, establishing a chain of causation that held Chapman partially responsible.</td><td>• original tortfeasor can be held liable for harm caused by a subsequent negligent act if that subsequent act was a foreseeable consequence of the original negligence.</td></tr>
<tr><td colspan="3">E. The Unforeseeable Plaintiff</td></tr>
<tr><td>Palsgraf v Long Island R R Co 248 NY 339 (1928) (US)</td><td colspan="2">- See pg. 6
- <u>only person that they could have foreseen might be injured was the passenger himself</u> (since they didn’t know the package contained fireworks). Court agreed with D</td></tr>
<tr><td>Bale v Seltsam Pty Ltd [1996] QCA 288</td><td colspan="2">- In 1995, Mrs Bale contracted mesothelioma as a result of breathing in asbestos dust after shaking out and laundering her husband’s work clothes between 1962 and 1965. Her husband worked for Seltsman Pty Ltd. The scientific information available between 1962 and 1965 did not reveal the connection between dust and mesothelioma.
Negligent act by Seltsam, however Mrs Bale seen as an <u>unforeseeable plaintiff</u> as the <u>consequence at the time was not reasonably foreseeable</u></td></tr>
</table>

Tame v New South Wales (2002) 211 CLR 317	- the insurer paid a substantial sum to Mrs Tame in August 1994, meeting her claim for leg and back injuries under the Motor Accidents Act 1988. - There was also clear evidence that the insurer did not believe she had been drinking. However, Mrs Tame continued to think that the delay in paying physiotherapy bills was related to the mistake on the form, and that other people might be thinking that the accident was due to her drunkenness. - Her psychiatrist's evidence was that her inability to accept that the mistake had been rectified was part of the illness. - Mrs Tame won at first instance, but both the Court of Appeal and the High Court rejected her claim, on the basis that the **link between a misstatement on a form and nervous shock was too remote to be regarded as reasonably foreseeable.**

F. Categories of Duty of Care

1) whether **an act or omission 疏忽 is involved;**
- if an act, the kind of act, for example words or physical acts;
- **Example of distinction of act and omission**
  o Rebecca is working as a lifeguard for a public swimming pool owned by the local authority. When she is meant to be on duty, she instead goes to a café and has a cup of tea. Ari gets into trouble in the pool, and he drowns. **Rebecca has breached her duty of care, by omission**
  o If Rebecca had been on duty at the pool and she had dived into assist Ari, but her rescue attempt did not accord with protocols followed by lifeguards, and Ari drowns, **that is an act of negligence.**

2) what **kind of harm** has been caused
- (personal injury, psychiatric harm, property damage, pure economic loss etc);
- 分为 physical injury and property damage 以及 psychiatric injury
- 一般情况下 pure economic loss 属于 contract 但是 ***Hedley Byrne v Heller*** [1964] AC 465 改变了这个原则

3) who the **defendant** is
- an individual, a public authority, a manufacturer, a medical practitioner etc; and

4) in some cases, who the **plaintiff** is
- for example, a child at school, a patient in a hospital etc; or a third party to some other relationship.

* a "**novel case**" refers to a situation where the relationship between the plaintiff and the defendant, and the type of harm suffered, does not fall within an established category of duty of care.

***Sullivan v Moody; Thompson v Connon* (2001) 207 CLR 562 88**	**Facts**: The case involved **two separate appeals heard together**. Both concerned **fathers who were suspected of sexually abusing their children following reports made to authorities (medical practitioners, social workers, and child protection agencies).** The investigations led to severe distress, psychiatric injury, and financial loss for the fathers, although no criminal charges were ultimately laid against them. They subsequently sued the various professionals and agencies involved, alleging that these individuals and bodies owed them a duty of care to conduct the investigations with reasonable care, and had breached that duty. 2. **Issue**: The central legal question was **whether the medical practitioners, social workers, and child protection agencies owed a duty of care to the suspected abusers** (the fathers) to conduct their investigations and reports carefully, such that a failure to do so could lead to a claim in negligence for psychiatric harm and economic loss. **Outcome**: The High Court unanimously held that **no duty of care was owed by the defendants (the investigators**) to the plaintiff fathers in these circumstances. The appeals were dismissed.	• The "Rule" or Principle Established (The "**Salient Features" Approach**) • 拒绝了 **continued use of "proximity"** as a unifying test for determining a duty of care in novel cases

	While not providing an exhaustive list, the Court highlighted several factors that are relevant to this assessment, including (but not limited to): • **Coherence of the Law:** Would imposing a duty of care in negligence conflict with other existing legal duties or statutory schemes? (In this case, the statutory duty of the authorities was to protect children, which would be inconsistent with a duty to protect those suspected of harming them). • **Consistency with Existing Legal Principles:** Would the imposition of a duty undermine or be inconsistent with other areas of law (e.g., defamation)? • **Defensive Practices/Chilling Effect:** Would imposing a duty lead to defensive practices by professionals, hindering the proper discharge of their primary functions (e.g., child protection workers becoming overly cautious to avoid litigation rather than effectively investigating abuse)? • **Indeterminacy of Liability:** Would imposing a duty lead to an indeterminate class of potential plaintiffs or an indeterminate amount of liability? • **Vulnerability of the Plaintiff:** Was the plaintiff particularly vulnerable to the defendant's conduct? • **Control by the Defendant:** Did the defendant have control over the situation that caused the harm?
III. DUTY OF CARE: MENTAL INJURY	
Civil Liability Act 2002 No 22 (NSW) ss 27-33 *** focus on s 30, s 31, s 32**	
*** STARTING POINT ALWAYS ON THE CLA!!!!!**	
Gifford v Strang Patrick Stevedoring Co (2003) 214 CLR 269	**Facts**: a man died while he was working for his employer. His children did not witness the accident but **were informed of it later on the same day**. They claimed to have suffered psychiatric injury from learning what had happened to their father. **Issue**: Whether the employer (Strang Patrick Stevedoring) owed a duty of care to the children of an injured employee **to prevent them from suffering pure mental harm, even though they did not directly witness the traumatic event or its immediate aftermath**. This required the High Court to consider the scope of liability for psychiatric injury to "secondary victims." **Judgment**: - '**sudden shock and direct perception should be rejected as determinants of recovery**.' (The common law requirements of the duty of care for psychiatric harm were considered) - The common law governed the situation because of the wording of s 4(1)(b), which conferred rights, rather than abolishing them.
CLA s 31, 33	**31 Pure mental harm—liability only for recognised psychiatric illness** There is no liability to pay damages for pure mental harm resulting from negligence unless the harm consists of a recognised psychiatric illness. **33 Liability for economic loss for consequential mental harm** A court cannot make an award of damages for economic loss for consequential mental harm resulting from negligence unless the harm consists of a recognised psychiatric illness.
	What is a recognised psychiatric illness?: If it is in the Diagnostic and Statistical Manual of Mental Disorders (DSM–5) then it the court typically will find it is a RPI. If it is not in the DSM-5 then expert evidence will need to establish that it is nevertheless recognized. It does not include grief, sorrow, humiliation, embarrassment or temporary conditions that are not in the DSM-5. Common law determined that harm could take the form of recognisable mental injury, however CLA will override this with recognised psychiatric harm
CLA s 32	32 **Mental harm—duty of care**

	(1) A person (***the defendant***) does not owe a duty of care to another person (***the plaintiff***) to take care not to cause the plaintiff mental harm unless the defendant ought to have foreseen that a person of normal fortitude might, in the circumstances of the case, suffer a recognised psychiatric illness if reasonable care were not taken. (2) For the purposes of the application of this section in respect of pure mental harm, the circumstances of the case include the following— a) whether or not the mental harm was suffered as the result of a sudden shock, b) whether the plaintiff witnessed, at the scene, a person being killed, injured or put in peril, c) the nature of the relationship between the plaintiff and any person killed, injured or put in peril, d) whether or not there was a pre-existing relationship between the plaintiff and the defendant. (3) For the purposes of the application of this section in respect of consequential mental harm, the circumstances of the case include the personal injury suffered by the plaintiff. (4) This section does not require the court to disregard what the defendant knew or ought to have known about the fortitude of the plaintiff.
A. **STEPS TO ESTABLISH A DUTY OF CARE FOR MENTAL HARM	
Step 1. Is the mental injury a **consequential mental harm** or **pure mental harm**? **(s 27).**	
"consequential mental injury": Psychiatric harm has occurred **as a result of physical injury** - a person has been physically injured, when they claim damages, they may claim not only for the physical injury but for the consequential (or "parasitic") mental harm which followed - such as **post-traumatic stress disorder or anxiety**, which impacts severely on their ordinary life. - the duty of care is really owed on the basis of the original physical injury. **"pure" "nervous shock" or psychiatric harm:** a person who has not been physically injured may suffer from mental or psychiatric harm **because of negligence**. - typically arise because a person saw or heard some traumatic event or observed the physical injury or death of a loved one. - the duty of care arises because of a duty in respect of psychiatric harm	
Step 2. If the injury is consequential mental harm, consider only **s 32(1)** If the injury is pure mental harm consider **s 32(1) + (2), s 31** and **s 30**. (All provisions must be satisfied by the P).	
Step 3. **S 32(1)** (**Applies both Pure and consequential mental harm**) **2 questions to ask:** 1. **Is the P of normal fortitude**? - Consider whether an 'ordinary' person in the situation of the P would have suffered a recognized psychiatric illness (note: this question does not ask whether P is vulnerable = P could be vulnerable but it could still satisfy this test = ordinary person vulnerable/not would suffer a RPI) 2. **Ought the D have foreseen** that a person of normal fortitude **might suffer a recognized psychiatric illness if reasonable care was not taken** - (Note that a recognized psychiatric illness does not need to have been suffered, rather D should have reasonable foreseen that they might)	
Crump v Equine Nutrition Systems Pty Ltd t/as Horsepower **[**2006]	**Facts:** - The P purchased horse feed that was contaminated with monensin, a substance used in the production of feed, which is extremely toxic to horses, from the D. - The P rides and prepares show horses in the hack category and has had a strong interest in horses all her life. - The contaminated feed was fed to 8 horses. - The next day the P's favourite horse "Topsy Turtle" was unwell. - The following day the P was awakened by what she described as a "very shrill whinny".

	- The P stated “I saw her trying to scramble over the back of the stable, so I rushed down, and I couldn’t go in because she was thrashing around making funny noises, whinnies, trying to climb over the back fences. We just stood, and watched, she was just in such a horrible state.” - **Topsy subsequently died and the P developed post-traumatic stress disorder and depression**. **Outcome**: The P argued that **she is closely attached to her horses and that any person with a close relationship** between themselves and their pets would suffer a RPI. The D argued, and this **was accepted by the court**, that it is a business that involves horses, and that the P should be resilient to the death of her horses.
Step 4. **s 32(2)** (**Pure mental harm)** 1. Was the mental harm a result of a **sudden shock**? 2. Did the P **witness at the scene** a person being killed injured or put in peril? 3. What is the **nature of the relationship** between the P and the person being killed injured or put in peril? 4. Is there a **pre-existing relationship** between the P and the D?	
Step 5. (Pure mental harm) s 31. 1. Has the P suffered a recognized psychiatric illness? (Not grief, sorrow, embarrassment, sadness)	
Step 6. (Pure mental harm) s 30 1. Did the P witness, at the scene a person being killed injured or put in peril? OR Is the P a close family member of the person being killed injured or put in peril?	
Wicks v State Rail Authority of New South Wales; Sheehan v State Rail Authority of New South Wales (2010) 241 CLR 60.	**Facts:** - The appellants were police officers ordered to save victims of a train accident caused by the respondents’ negligence. - People had been thrown out of the train and many remained in the wreckage (7 died). - The plaintiffs claimed damages for psychiatric injury suffered as a result of their attendance at the scene. **Issue**: - Did the Plaintiff satisfy the requirement posed by s30(2)(a) of the Civil Liability Act 2002 (NSW) Did the plaintiff witness, at the scene, the victim being killed, injured or put in peril? whether State Rail owed the appellants a relevant duty of care?
	The Key Rule/Interpretation Extracted: The crucial interpretation from *Wicks* relates to **Section 30(2)(a) of the Civil Liability Act 2002 (NSW).** The High Court ruled that: - "**Witnessing at the scene" does not require witnessing the instant of the killing or injury. Instead, it encompasses witnessing the aftermath of the event,** where the victim is still "in peril" or is "being injured" in the sense of their injuries still being present and apparent, or their perilous situation is ongoing. - The phrase "**being killed, injured or put in peril**" refers to an ongoing process, not just a single moment in time. Even if the initial impact has occurred, a person **who witnesses the victim's continuing state of being injured or in peril** at the scene can satisfy the requirement of the section. - The "event" referred to in Section 30 is the "killing, injuring or putting in peril" of the victim, and this "event" can encompass a period of time, not just a fleeting instant. The police officers were dealing with the **consequences of the accident as an ongoing** process where victims remained in peril and were suffering injuries, thus fulfilling the requirement.
B. The Concept of Psychiatric Harm	
Plaintiffs have recovered compensation for psychiatric harm in these situations:	

where the psychiatric harm **followed an injury to the self**		***Donoghue v Stevenson*** [1932] AC 562
where the psychiatric harm developed **after exposure to a situation of danger creating fear for the self, or within the zone** of physical risk;		***Victorian Railways Commissioner v Coultas*** (1888) 13 App Cas 222; ***Dulieu v White & Sons*** [1901] 2 KB 669.
where the psychiatric harm developed after exposure to a situation where the plaintiff was **safe from physical harm but feared for relatives;**		***Hambrook v Stokes Bros*** [1925] 1 KB 141 (mother saw driverless truck coming down a hill and feared for her children who were out of sight);
where the psychiatric harm followed a situation **where a relative has been badly injured or killed and the plaintiff saw or heard the accident, or the aftermath of the accident**;		- ***Hinz v Berry*** [1970] 2 QB 40 (where the plaintiff and her family were picnicking and she was across the road with one child, heard something and turned around to see that a car had run down the remainder of the family); ***Jaensch v Coffey*** (1984) 155 CLR 549; ***McLoughlin v O'Brian*** [1983] 1 AC 410.
where a **rescuer or workmate** developed psychiatric injury after witnessing a horrific scene.		***Mt Isa Mines v Pusey*** (1970) 125 CLR 383 (worker/rescuer); ***Chadwick v British Railways Board*** [1967] 1 WLR 912 (rescuer); ***Dooley v Cammell, Laird & Co Ltd*** [1951] 1 Lloyd's Rep 271 (worker).
Tame v New South Wales; Annetts v Australian Stations Pty Limited (2002) 211 CLR 317	**Facts:** ***Tame v New South Wale*****:** Ms. Tame was wrongly told by a police officer that she had recorded a blood alcohol reading well above the legal limit after a car accident, a mistake later corrected. **<u>However, she developed a severe psychotic depressive illness as a result of the incorrect information and subsequent stress</u>**. She sued the police for negligence, arguing they owed her a duty of care to avoid causing her psychiatric harm through their investigation. ***Dismissed*** ***Annetts v Australian Stations Pty Limited*****:** Mr. and Mrs. Annetts' 16-year-old son, James, went missing while working alone as a jackaroo for Australian Stations Pty Ltd in a remote and arid region. **<u>His parents were repeatedly assured by the company that he would be supervised.</u>** After being told by the company that James was likely lost in the desert, and following a prolonged search for several weeks, his body was eventually found. Both parents developed severe psychiatric illnesses as a result of the anguish and uncertainty over their son's disappearance and death. They sued Australian Stations, alleging a duty of care to prevent their psychiatric harm.	• foreseeability of a recognisable psychiatric illness is the determinant of a duty of care for pure mental harm, and there are **<u>no rigid or absolute 'control mechanisms'</u>** such as requirements for **'sudden shock'** or **'direct perception'** of the traumatic event. While the **relationship** between the parties, the **nature** of the event, and the means by which the harm was **<u>sustained are relevant factors in assessing foreseeability</u>**, they are not standalone prerequisites.

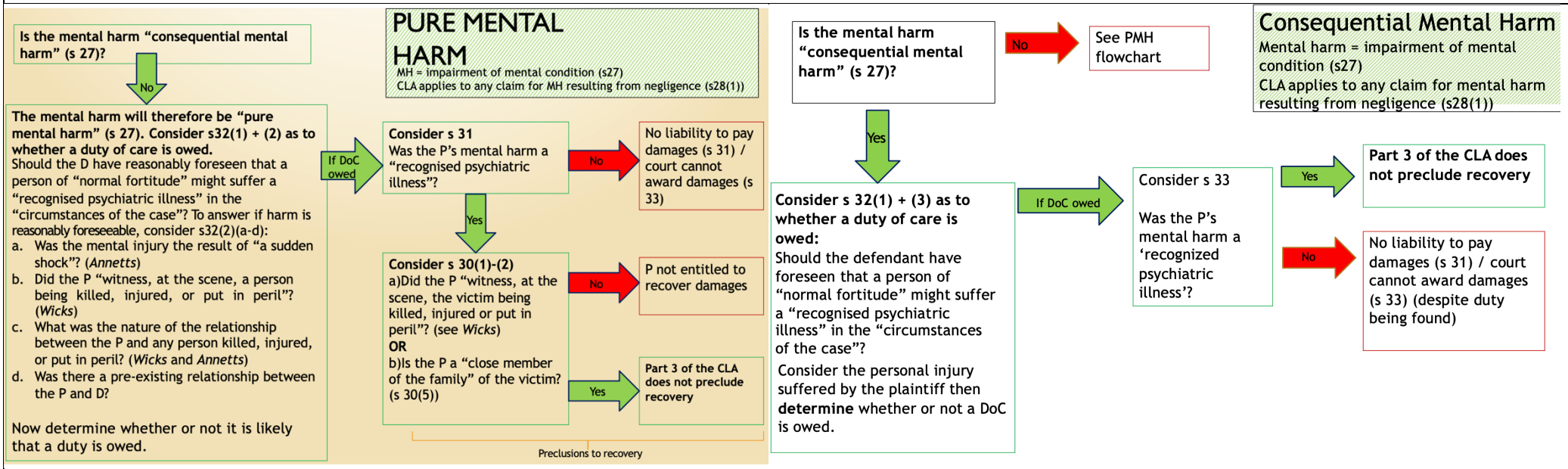
	Appeal Allowed	

CONTROL MECHANISM:

1) the requirement that liability for psychiatric harm be assessed by reference to a hypothetical person of "**normal fortitude**",
→ not free standing, but a postulate which assists in the assessment, at the stage of breach, of the reasonable foreseeability of the risk of psychiatric harm.
2) the requirement that the psychiatric injury be caused by a "**sudden shock**", and
3) the requirement that a plaintiff "**directly perceive**" a distressing phenomenon or its "**immediate aftermath**".
→ 2 & 3 have operated in an arbitrary and capricious manner.
→ the emergence of a coherent body of case law is impeded, not assisted, by such a fixed system of categories.
→ Rigid distinctions/inadequacies of these rules inevitably generate/expand exceptions and new categories,
不是必须满足的！None of the three control mechanisms has been accepted as a pre-condition to liability for negligently inflicted psychiatric harm.

These rules **cannot be substitutes to the general requirements of duty of care,**

1) **reasonable foreseeability,**
2) **causation and**
3) **remoteness of damage,** notions which would foreshorten inquiry into matters by the imposition of absolutes with no necessary relation to basic principles.



IV. DUTY OF CARE: OCCUPIER'S LIABILITY

"That an occupier of land owes a duty of care to a person lawfully upon the land is not in doubt."	***Modbury Triangle Shopping Centre Pty Ltd v Anzil*** (2000) 205 CLR 254, [17]

The duty **depended on categories** of entrant they were classified:

1. **invitee** (someone who has been invited onto the property for the benefit of the occupier),
   - The duty to an invitee was to exercise reasonable care to prevent injury from unusual danger that was known or should have been known to the occupier

2. **licensee** (a person who has been allowed to come onto the property)
   - The duty to a licensee was lower – only to warn of concealed danger known to the occupier
3. **contractual entrant** or
   - The duty owed to contractual entrants depended on the contract
4. **trespasser** (a person illegally entering the property).
   - The duty owed to trespassers was merely to avoid intentional or reckless injury.

the liability of occupiers were **resolved in Australia in 2 ways.**

1. legislatures passed occupiers' liability legislation[132]
2. the common law of negligence subsumed the common law of occupiers' liability,

***Australian Safeway Stores Pty Ltd v Zaluzna* (1987) 162 CLR 479**	The P entered a supermarket to buy cheese and before entering the area of the supermarket where the merchandise was displayed, the respondent slipped and fell heavily on the floor at the "foyer area" of the D's supermarket. The floor was damp because it was raining outside. OUTCOME: Appeal dismissed.	**Occupiers are liable to all guests for reasonably foreseeable harm**
	"All that is necessary is to determine whether, in all the relevant circumstances including the fact of the D's occupation of premises and the manner of the P's entry upon them, **the D owed a duty of care under the ordinary principles of negligence** to the P. **A prerequisite of any duty is that there be the necessary degree of proximity of relationship**. The touchstone of its existence is that there be **reasonable foreseeability of a real risk of injury** to the visitor or to the class of person of which the visitor is a member. The measure of the discharge of the duty is ***what a reasonable man, would, in the circumstances do by way of response to the foreseeable risk.***" "...the fact that the respondent was a lawful entrant upon the land of the appellant establishes a relationship between them which of itself suffices to give rise to a duty on the part of the appellant to take reasonable care to avoid a foreseeable risk of injury to the respondent."	

Different Types of Entrants:

- Scope of duty owed by **landlords to tenants** is to ensure that a premise is **fit for the purposes** for which they are let (***Jones v Bartlett*** (2000)).
- An **individual's degree of control over the land**, rather than the plaintiff's or the defendant's legal status towards it, is the determinant of who constitutes an occupier (***Thompson v Woolworths (Qld) Pty Ltd*** (2005))
- a duty of care was owed automatically from the occupier of a property to an entrant as it was an established duty relationship. The only question in such cases is the scope of the duty that is owed. (***Niendorf v Junkovic*** (2005))

1. Duties to 3rd Parties – Controlling the Conduct of the Others

Cases where the **D is directly liable for their own failure, or their servants' or agents' failure**, to exercise care over the conduct of persons who cause harm to the P.
o E.g., criminal activity by a third party.
o E.g., parents for the behaviour of their children

Modbury Triangle Shopping Centre Pty Ltd v Anzil (2000) 205 CLR 254	• The D worked in a video store leased in a shopping center owned by P. • The lights of the car park of the center were turned off at the same time the store closed (10pm). • Another employee of the video store had requested that the lights stay on longer, but the occupier of the shopping center did not respond to the request. • One night after closing up the P was attacked by three unknown man in the car park and was badly injured. • The 3 men were never identified, and the P sued the occupier. **ISSUE**:	• "The appellant had **no control** over the behaviour of the men who attacked the first respondent, and **no knowledge or forewarning** of what they planned to do." • the law **does not impose a duty to prevent harm to**

	Whether the D owed a duty of care to the P in relation to the criminal acts of the 3 attackers. **OUTCOME**: The appellant is **entitled to succeed** upon the ground that its duty as an **occupier of land DID NOT** extend to taking reasonable care to prevent physical injury to the first respondent resulting from the **criminal behaviour of third parties** on that land.	**another from the criminal conduct of a third party, even if the risk of such harm is foreseeable**.
****LEGAL TEST FOR OCCUPIER'S LIABILITY**		
1. **The D must be an occupier.** - "Control test" = the D must have control, or immediate right to exercise control, over the premises such that they can prevent injury to visitors. 2. **Liability is in respect of "premises**". - **Land and immovable** structures on land including bridges, lifts, escalators, flagpoles, wharves and diving towers. - **Movable** structures such as ladders, scaffolding, ships, aircraft and cars 3. Liability is to "**any person on the premises**" who is part of a **reasonably foreseeable class of persons who might suffer injury**. 4. Danger **can arise out of the static condition of the premises** and out of **activities conducted on the land**. 5. An occupier owes a duty of care in relation to the acts of third parties **if further tests are satisfied**: 1) They have '**control'** over the actions of the third party. 2) There is a '**reasonable reliance'** by the P. 3) There is **an assumption of responsibility by the occupier** for the class of persons the P comes within. 4) If the act by the **3rd party is criminal**, then a much higher degree of '**predictability and foreseeability'** is required. (***Smith v Littlewoods Ltd***)	
Ashrafi Persian Trading Co Pty Ltd v Ashrafinia 2002 NSW CA	The P was hit on the head with an iron bar wielded by an unknown person while she was sleeping in a motel owned by the D. The assailant was outside the motel room but reached through a gap between the sliding door of the room and the wall. **The sliding door could not be fully closed due to a fault which had not been repaired by the D**. **ARGUMENTS**: The P argued that the D had control over the situation and the actions of the assailant because if the sliding door were fixed, the assailant could not have reached through and hit her on the head. The P argued it was reasonable to rely on the D to keep her safe. The D argued that he did not assume responsibility for criminal conduct and that he could not have foreseen it. **OUTCOME**: The court **agreed with the D that he did not have control, and this was not foreseeable or predictable**.	
Club Italia (Geelong) Inc v Ritchie (2001) 3 VR 447.	The P is a police officer who was injured during a violent brawl at a ball held at the D's nightclub. **Bouncers employed by the club had earlier identified the man who attacked the P as a potential troublemaker but decided against ejecting him for fear of causing a disturbance**. The P had attended the club earlier in the evening at the D's request to respond to a disturbance. He was **not warned before he returned that the situation had deteriorated.** **ARGUMENTS:** The P argued that the **D had control over the premises, and that he reasonably relied on the D to inform him of the deteriorating situation in the club**. It was both **foreseeable** and **predictable** that the P might be injured when he returned to the club. **OUTCOME:** The court agreed.	
V. DUTY OF CARE: PURE ECONOMIC LOSS		
Consequential Economic Loss	• **Flows from personal injury or property damage** • **Example**. A fire causes considerable damage to a grocery store. The store closes down for a month to repair the damage and as a result the store suffers a significant financial loss.	
	• legal test' is the same as for physical injury or property damage • **That is, 'RF of a class of persons to which the P belongs which might suffer injury as the result of the failure to take reasonable care.'**	

Pure Economic Loss	• **Only loss is money** • **Example**. The town water supply is contaminated and numerous businesses that rely on a clean water supply are forced to shut down until the water is decontaminated. They lose income as a result.
	• Pure economic loss requires **extra-legal tests (salient factors)** because of a concern that it may lead to a floodgate of claims through a 'ripple' effect. ***The law for duty of care when a P has suffered pure economic loss is found in the common law.** ***The CLA is silent on pure economic loss.**

<table>
<tr><th colspan="2">CATEGORY 1: PURE ECONOMIC LOSS CAUSED BY A NEGLIGENT MISSTATEMENT</th></tr>
<tr><td rowspan="3">Hedley Byrne & Co v Heller & Partners Ltd [1964] AC 465</td><td>Facts:
- Hedley Byrne was a firm of advertising agents.
- A customer, Easipower Ltd, put in a large order.
- Hedley Byrne wanted to check their financial position and creditworthiness and so asked their bank to get a report from Easipower’s bank, Heller & Partners Ltd.
- D replied in a letter that stated: "without responsibility on the part of this bank...Easipower is considered good for its ordinary business engagements".
- As a result of their reliance on the negligent advice of H&P, HBC suffered economic loss £17,000 (equivalent to £400,000 in 2021) when Easipower went into liquidation.
Issue:
- Could negligent words, giving rise to economic loss, incur a duty of care in the tort of negligence?
Outcome:
- The court held that no duty of care was owed because the legal tests were not satisfied, in large part because of the disclaimer.
- It was not reasonable to rely on the information provided because the disclaimer stated: ‘without responsibility on the part of this bank’ and also meant that Heller did not assume responsibility for Hedley’s reliance on the inaccurate information.</td></tr>
<tr><td>The rule extracted from the statements of Lord Reid and Lord Morris establishes a duty of care for negligent misstatement even in the absence of a contract.
<u>The core principle is that a duty of care will arise where</u>:
1) One party (the advisee <u>trusts and relies on the other party (the advisor) to exercise skill and judgmen</u>t in providing information or advice.
2) Where it was <u>reasonable</u> for him to do that, and
3) The advisor <u>knows or ought to know</u> that the advisee is relying on their skill and judgment.
The advisor, being in a position where others could reasonably rely on them, <u>chooses to provide the information or advice without qualification</u>, thereby accepting a responsibility to exercise such care as the circumstances require. This applies even when the service is given through words.</td></tr>
<tr><td><u>Reaction of a reasonable person</u>:
1) keep silent or decline to give the information or advice sought
2) give an answer with a clear qualification that he accepted no responsibility for it or that it was given without that reflection or inquiry which a careful answer would require
3) could simply answer without any such qualification.
• If he chooses to adopt the last course, he must ...be held to have accepted some responsibility for his answer being given carefully, or
• to have accepted a relationship with the inquirer which requires him to exercise such care as the circumstances require.</td></tr>
<tr><th colspan="2">*LEGAL TESTS FOR NEGLIGENT MISSTATEMENT</th></tr>
<tr><td colspan="2">Extra-legal tests (salient factors) other than the reasonable foreseeability of a class of persons who might suffer pure economic loss if reasonable care were not taken, were required, however:
1. Is the loss pure economic loss (PEL)? (not consequential on personal injury or property damage).
2. Is it reasonably foreseeable to the D that the P or an ascertainable class to which the P belongs would suffer PEL?
3. Did the P reasonably rely on the D? (Consider whether there was a request, whether the D had special expertise, whether there was a commercial relationship between the P and the D, whether the D had an intent to induce the P).
4. Did the D assume responsibility for the P - Did the D know, or ought to have known, the P would rely on them? (Consider whether there was a request, whether the D had special expertise, whether there was a commercial relationship between the P and the D, whether the D had an intent to induce the P).
5. Was the P vulnerable to the PEL? (Could the P have protected themselves from the PEL?).</td></tr>
</table>

Esanda Finance Corporation Limited v Peat Marwick Hungerfords (1997) 188 CLR 241	**Facts**: - Esanda loaned money to Excel, a corporation, in reliance on a report prepared by an auditor Peat Marwick. - When Excel, the borrower, defaulted on the loan, Esanda sued Peat Marwick claiming it had acted on reliance of audited accounts which breached mandatory accounting standards and were inaccurate. - Central to this argument was that Esanda had suffered a loss which would not have occurred if Excel's audited accounts, had been properly prepared. - They argued they should have been able to rely on the publicly available reports. **Outcome**: The court held that no duty of care was owed. It was **not reasonable for the P to rely on the D** and the **D did not assume responsibility** for the P.
	Potential arguments for the legal test: **1. Is the loss pure economic loss (PEL)?** - has lost only money, so it is pure economic loss. **2. Is it RF to the D that the P or an ascertainable class to which the P belongs would suffer PEL**? - The D could argue that they **conducted the audit for Excel and not for Esanda** and they could not foresee that they would rely on the report and lose money as a result. **3. Did the P reasonably rely on the D?** (Consider whether there was a request, whether the D had special expertise, whether there was a commercial relationship between the P and the D, whether the D had an intent to induce the P). - The P can argue that the Report was publicly available, and they should be able to rely upon it as the auditor has special expertise. - The D can argue that there was **no request, no commercial relationship** and the report was for the shareholders and not to induce investors. **4. Did the D assume responsibility for the P** - Did the D know, or ought to have known, the P would rely on them? (Consider whether there was a request, whether the D had special expertise, whether there was a commercial relationship between the P and the D, whether the D had an intent to induce the P). - The P can argue that the very existence of the Report, conducted by auditors with special expertise, publicly available signals an assumption of responsibility, - however, the D can argue that the report, **although publicly available was not intended to induce the P** and their responsibility was to the shareholders not prospective investors. **5. Was the P vulnerable to the PEL?** (Could the P have protected themselves from the PEL?). - The D can argue that the P ought to **have done due diligence and made other inquiries as to the viability of Excel**. - The P might argue that there was no other viable way of assessing the company, however this is likely not very persuasive.
CATEGORY 2: PURE ECONOMIC LOSS CAUSED BY AN ACT OR OMISSION	
Perre v Apand (1999) 198 CLR 180	**Facts**: - Apand was a manufacturer of potato chips. - It supplied experimental potato seeds to Sparnon, a potato grower which were infected with bacterial wilt and the potatoes became infected. - Western Australian law prohibited the import of infected potatoes and the import of potatoes from farms in a 20-kilometre radius surrounding an infected farm. - Sparnon and other potato farmers were therefore prohibited from exporting potatoes to Western Australia for five years. Sparnon and his potato growing neighbors (who included Perre and the other P's) had a lucrative trade selling potatoes to Western Australia as the price of potatoes in Western Australia was higher than in South Australia.
	LEGAL TEST APPLIED: **1. Is the loss pure economic loss (PEL)?**

	- Sparnon's economic loss is ordinary (not pure) but Perre has lost only money **2. Is it RF to the D that the P or an ascertainable class to which the P belongs would suffer PEL**? - The P can argue that Apand knew about the possibility of bacterial wilt, knew of the regulation prohibiting export and therefore **must have foreseen the possibility of all potato growers suffering PEL.** **3. Did the D know its act could cause Pure Economic Loss to a class of persons including the P?** - The P can argue that the D must have known, as well as reasonably foreseen, that all growers in the area might suffer PEL. **4. Would the imposition of a DOC impose indeterminant liability on the D?** - No. There is a determinant number of potato growers in the area. **5. Was the P vulnerable to the PEL?** - There is nothing that Perre could have done to protect themselves as they didn't know that Apand was providing Sparnon with the experimental seed. The D could argue that Perre should have fostered other markets, but this is likely not be reasonable. **6. Was the negligence act a legitimate pursuit of a business interest?** - The P can argue that the supply of seed that could be contaminated with bacterial wilt could never amount to a legitimate pursuit of a business interest.
VI. DUTY OF CARE: PUBLIC AUTHORITIES	
What are public (or statutory) authorities? - bodies "entrusted by statute with functions to be performed in the public interest or for public purposes" (***Sutherland Shire Council v Heyman*** (1985) 157 CLR 424)	
What is their purpose? - public authorities must exercise their powers in the public interest specified by the statute, not just as they choose - may be liable as a matter of public law if they exercise their powers outside that public interest.	
Should public authorities be liable in negligence on the same basis as an ordinary citizen? since ***Geddis v Proprietors of Bann Reservoir*** (1878) 3 App Cas 430 it has been recognised that a public authority could be liable for negligence for the way it exercised its statutory power.	
Policy/Operation Distinction:	- *a way of separating matters into those where the court felt it could generally impose a duty of care and those where it could not* - **No DOC**: a decision, including a decision not to exercise a power, were a matter of policy, then the court would not interfere - **DOC**: the matter was operational, that is merely the carrying out of some policy
1. Category - failure to exercise a discretionary power (non-feasance/omission)	
Pyrenees Shire Council v Day (1998) 192 CLR 330	- Local council had a stat power that permitted it to protect people and property from fire danger. - Inspected a house and identified a flaw in the chimney as being hazardous. - Notified tenant but not owner. - Later, with different tenants in occupation, a fire started in the chimney which spread and damaged neighboring property **OUTCOME**: - Council **owed the property owner a duty of care because it had a statutory duty to protect him** **Council had inspected the premises; knew about the hazard and had significant, particular control over fire safety measures. Property owner was also vulnerable**
2. Category - failure to exercise statutory power	
***Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1**	- Crimmins was employed as a waterside worker at Port Melbourne between 1961-1965 - the *Stevedoring Industry Finance Committee Act* 1977 (Cth) - the respondent was to assume "all the liabilities and obligations of the Authority that existed" as at 26 February 1978. (previous Authority was abolished and replaced by SIFC) - As a result of exposure to asbestos in the course of his employment, Crimmins contracted mesothelioma. - the SIFC was the successor to the Authority

	- the workers were employed not by the Authority, but by the stevedores being on a job-by-job basis. - They were ignorant of the structure of the ships to the workers were allocated, and the cargoes to be handled there. - But they had certain powers of discipline over the workers, suspension, wages by levy, allocation to various employers. - the Authority had a supervisory and regulatory role safety on the waterfront, but the primary responsibility fell upon the employers, who's obligation to provide safety equipment **ISSUE**: whether a duty of care was owed to Crimmins and whether the SIFC owed the duty as successor to the Authority.
	OUTCOME: **3. Reasonable Foreseeability**–Yes. [103] 'Safety on the waterfront was part of the Authority's general responsibilities...it was RF that the employers might be derelict in performing their own duties.' **4. Power/Control**–Yes. [104] 'the Authority directed the waterside workers ... and that the failure to obey such a direction could lead to disciplinary action and even deregistration.' This is the principle reason here why there is definitely a DOC. [108] 'the extent of such fear (employer-employee's safety) must inevitably have depended upon ... the Authority was prepared to intervene in the conduct of stevedoring operations.' **5. Vulnerability**– [100], [108]-[109] 'certain features of the relationship between the workers and their employers made the workers especially vulnerable to harm unless the Authority took action.' Yes. Nature of the relationship made the P very vulnerable and unable to protect themselves. Moreover, the Plaintiff was already under the control of the defendant and therefore is automatically vulnerable **6. Knowledge**– Yes. [107]-[108] 'the Authority knew that it was sending waterside workers to a ship where there was a high risk of death or injury' **7. Policy** –No. [131] Although some of the powers were 'quasi-legislative' in nature and thus immune from a DOC, plenty of other powers which could have been used were clearly operational matters [112] '"core policy" p - "the Authority was under a continuing duty of care ... in the exercise of its statutory functions, duties and powers to take reasonable care to avoid foreseeable risks of injury to the health of the plaintiff".' **8. Legislative Scheme**– [130] No. There is no inconsistency between imposing a DOC and the statutory scheme in this case. No policy reasons to deny a duty of care
Amaca Pty Ltd (Formerly Known as James Hardie & Co Pty Ltd) v New South Wales (2004) 132 LGERA 309	- Hay was employed by the appellant, Pacific Power, to assist in the building of a power station. In the course of his employment, Hay contracted mesothelioma from exposure to asbestos. - The State had the power under the relevant Act to inspect work sites, give directions to prevent accidents, and ensure compliance with its regulations. - Hay sued both his employer and Pacific Power. - These claims were settled, but both defendants cross-claimed against James Hardie, the manufacturer of the asbestos products. - James Hardie became liable for payment and in turn cross-claimed against the state of NSW **ISSUE**: Did the State owe a duty of care to Amaca to exercise their regulatory powers to prevent harm to Hay? **OUTCOME**: No DOC
	Sutherland Shire Council v Heyman: 1) Generally, a public authority, which is under no statutory obligation to exercise a power, owes no common law duty of care to do so.

	2) An authority may by its conduct, however, attract a duty of care that requires the exercise of the power. **3) 3 categories are identified in which the duty of care may so be attracted.** I. Where an authority, in the **exercise of its functions, has created a danger**. II. Where the particular circumstances of an authority's **occupation of premises or its ownership or control of a structure attracts to it a duty of care**. In these cases the statute facilitates the existence of a duty of care. III. Where a public authority **acts so that others rely on** it to take care for their safety.
	- **None of the specific exceptional categories identified** in ***Sutherland Shire Council v Heyman*** are categories into which the circumstances of this case fall. - State had **no knowledge** of the potential danger (unlike ***Pyrenees***) - State did **not exercise significant control over the injured party** (***Crimmins***). - (***Graham Barclay Oysters***), in this case the State was empowered to regulate conduct in a situation where the field of endeavour was "populated by self- interested commercial actors who themselves possess some power to avert those risks". Rolls Royce and James Hardie, themselves, **had ample power to avert the risks**. - Rolls Royce **as employer owed Mr Hay the ordinary duty to provide a safe system of work**. This DOC is fundamental to the employment relationship. - **day-to-day control over the workplace and intimate and direct knowledge of what was taking place on site** (unlike the State) (similarly with James Hardie, as manufacturer & Pacific Power, as owner and occupier of the power station site) - The Jones report, was not a statutory direction to eliminate the risk and was not akin to the letter to the Council in ***Pyrenees***. - (***Graham Barclay Oysters***) this is a case "where the duty allegedly is owed not to industry participants but to the ultimate consumer" - the State can only be liable if the employer is liable. - (***Woolcock Street Investments***): '"Vulnerability", in this context, is not to be understood as meaning only that the plaintiff was likely to suffer damage if reasonable care was not taken. Rather, "Vulnerability" is to be
	the following propositions can be drawn from *Pyrennes*, *Crimmins* and *Graham Barclay Oysters*: 1) The totality of the relationship is the proper basis for the determination of a duty of care 2) The **category of control that may contribute to the existence of a duty of care** to exercise statutory powers includes control, generally, of any situation that contains within it a risk of harm to others 3) A duty of care does not arise merely because a statutory authority has powers, the exercise of which may prevent harm to others 4) The existence of statutory powers and the mere prior exercise of those powers from time to time do not, without more, create a duty of care to exercise those powers in the future 5) Knowledge that harm may result from a failure to exercise statutory powers is not in itself sufficient to create a duty of care
Graham Barclay Oysters Ltd v Ryan [2002] HCA 54	- heavy rains around Wallis Lake caused fecal matter to be washed into the lake. - As a result, oysters growing in the lake became contaminated with the hepatitis A virus. - Ryan had consumed oysters grown in Wallis Lake over 1996 and contracted hepatitis. - He argued that a number of powers which different public authorities had under different legislations should have been exercised, and if they had, his harm could have been prevented. o State of NSW – *Clean Waters Act* o Great Lakes Council **ISSUE**: whether there was a duty of care of such a nature that any act or omission shown to have been causally related to Mr Ryan's injury constituted a breach **OUTCOME**: - No duty owed - no distinction between the position of the Council and the State.

	1. **Reasonable Foreseeability:** Was it RF that the act/omission might result in injury to P/class of persons? - No specific power directly linked to Ps harm – could not be said P belonged to a FR class of persons that might suffer harm 2. **Power/Control:** Did D have the power under the statute to protect a specific class including P? - None of the powers, had they been exercised, would have prevented the harm to P 3. **Vulnerability:** Was P vulnerable (could P have reasonably protected itself?) - Yes, because there was no way P could have known that the oysters were contaminated 4. **Knowledge**: Did D know, or ought to have known, of the risk of harm to the specific class including P if it did not exercise its powers? - As none of the powers, had they been exercised, would have prevented the harm to P, D could not have known of the risk of the harm if the powers were not exercised 5. **Policy**: Would finding a duty impose liability on core policy-making? - In relation to some of the powers, policy may have prevented their exercise 6. **Legislative Scheme:** Are there any other policy reasons not to impose a duty? - Responsibility does not sit easily with the State or the Council – rather with the oyster business itself
***CIVIL LIABILITY ACT* 2002 (NSW) PART 5**	
s 41	**41 Definitions** ***exercise*** a function includes perform a duty. ***function*** includes a power, authority or duty. ***public or other authority*** means— (a) the Crown (within the meaning of the Crown Proceedings Act 1988), or (b) a Government department, or (c) a public health organisation within the meaning of the Health Services Act 1997, or (d) a local council, or (e) any public or local authority constituted by or under an Act, or (e1) any person having public official functions or acting in a public official capacity (whether or not employed as a public official), but only in relation to the exercise of the person's public official functions, or (f) a person or body prescribed (or of a class prescribed) by the regulations as an authority to which this Part applies (in respect of all or specified functions), or (g) any person or body in respect of the exercise of public or other functions of a class prescribed by the regulations for the purposes of this Part.
s 42	**42 Principles concerning resources, responsibilities etc of public or other authorities** The following principles apply in determining whether a public or other authority has a duty of care or has breached a duty of care in proceedings for civil liability to which this Part applies— (a) the functions required to be exercised by the authority are limited by the financial and other resources that are reasonably available to the authority for the purpose of exercising those functions, (b) the general allocation of those resources by the authority is not open to challenge, (c) the functions required to be exercised by the authority are to be determined by reference to the broad range of its activities (and not merely by reference to the matter to which the proceedings relate), (d) the authority may rely on evidence of its compliance with the general procedures and applicable standards for the exercise of its functions as evidence of the proper exercise of its functions in the matter to which the proceedings relate.
s 43A	**43A Proceedings against public or other authorities for the exercise of special statutory powers** (1) This section applies to proceedings for civil liability to which this Part applies to the extent that the liability is based on a public or other authority's exercise of, or failure to exercise, a special statutory power conferred on the authority. (2) A special statutory power is a power— (a) that is conferred by or under a statute, and

	(b) that is of a kind that persons generally are not authorised to exercise without specific statutory authority. (3) For the purposes of any such proceedings, any act or omission involving an exercise of, or failure to exercise, a special statutory power does not give rise to civil liability unless the act or omission was in the circumstances so unreasonable that no authority having the special statutory power in question could properly consider the act or omission to be a reasonable exercise of, or failure to exercise, its power. (4) In the case of a special statutory power of a public or other authority to prohibit or regulate an activity, this section applies in addition to section 44.

***Legal Tests- Public Authority**

STEP 1:

s 41. Is the D a public or other authority? Does the D fit within the statutory definition?

- a broad definition (deliberately)
- the more are classed the more individuals are protected

STEP 2:

Is the D protected by s 42 (defence for PA)? Principles concerning resources, responsibilities etc. of public or other authorities

- **s 42** reflects the **common law principle of the policy/operation divide. - applies to 'functions required to be exercised by the authority'**
- **s 41**: function includes a power, authority or duty. - PA is under no DOC in relation to decisions which involve or are dictated by financial, economic, social, or political factors or constraints.
    - E.g., if a Council decided to allocate funds to fence off high cliffs on land they controlled and used inadequate material to erect the fences, which subsequently blew over in a storm and injured a bystander, that would be an operational act of negligence for which they could be sued.
    - However, if the same Council decided they did not have adequate funds to fence off the high cliffs, despite a recognised danger, that would be a policy decision for which they could not be sued.
- **s 42(a):** states the fact **- It is the resources available for the exercise of functions which are limited**, not the functions themselves.
- **s 42(b):** the way 42 operate really to assist D/PA, PA will not own a DOC in the way they choose to **allocate their resources** – even if P belief PA should have allocated their resources in a way to prevent the harm.
    - A court may not reach the conclusion that additional resources should have been made available although they had been allocated to the exercise of other functions at the relevant time.
    - A court can conclude, however, that more unallocated resources should have been provided.
- **s 42(c):** 'the broad range of its activities' - **include activities with a direct relationship to the functions of the PA**.

STEP 3:

Negligent Exercise of a Statutory Power (Misfeasance)	**Negligent Failure to Exercise a Statutory Power (non-feasance/omission)** *(Crimmins and Barclay belong to this category)*	**Negligent Exercise of Statutory Duty (Misfeasance)**	**Negligent Failure to Exercise a Statutory Duty (non-feasance/omission)**
RF of a class of persons who might suffer injury	Mc Hugh 6-point test (Crimmins)	RF of a class of persons who might suffer injury	RF of a class of persons who might suffer injury
s 43A	s 43A		

DIFFERENCE BETWEEN STATUTORY DUTY AND A STATUTORY POWER

Statutory Duty (shall/must)(no discretion/option)	**Statutory Power (may/discretion)**
when the legislation requires a nominated person to perform a task.	*when the legislation gives a nominated person a discretion to perform a task.*
e.g. Corporations Act 2001, s181(1) A director or other officer of a corporation **must** exercise their powers and discharge their duties: (a) in good faith in the best interests of the corporation.	*Income Tax Assessment Act* 1936 (Cth), The Commissioner of Taxation **may** determine which taxpayers are required to lodge an income tax return.

***CLA* s 43A(2)**	**43A Proceedings against public or other authorities for the exercise of special statutory powers** (1) This section applies to proceedings for civil liability to which this Part applies to the extent that the liability is based on a public or other authority's exercise of, or failure to exercise, a special statutory power conferred on the authority. (2) A ***special statutory power*** is a power— (a) that is conferred by or under a statute, and (b) that is of a kind that persons generally are not authorised to exercise without specific statutory authority. (3) For the purposes of any such proceedings, any act or omission involving an exercise of, or failure to exercise, a special statutory power does not give rise to civil liability unless the act or omission was in the circumstances so unreasonable that no authority having the special statutory power in question could properly consider the act or omission to be a reasonable exercise of, or failure to exercise, its power.
	• overrides common law tests as provides escape • Applies 43A to Crimmins. Would it change the outcome? = **yes**, will change as the special statutory power will override the common law test used • **new**; is not part of the common law > imposes a limitation on finding civil liability and is therefore **protective of defendants.**
RTA v Refrigerated Roadways Pty Ltd *(2009) 168 LGERA 357*	A semi-trailer driver died when a chunk of concrete was dropped from an overhead bridge, smashing through his windscreen as he drove along a highway. The culprits were convicted. **ISSUE**: The RTA, who owned the road and bridge under the relevant legislation, admitted it owed a DoC to road users. **Did this DoC extend to building the bridge in a way that would prevent objects being thrown or it**; or altering it to achieve the same effect? **OUTCOME**: Appeal Dismissed
	On Duty of Care (DoC) • The RTA owes motorists a duty of care. • This duty is not automatically excluded just because the harm was caused by the criminal act of a third party (e.g., someone dropping an object from a bridge). • The criminality of the act is not relevant to the *existence* of the duty of care itself. • **Instead, the criminal element should be considered when determining if the RTA *breached* its duty and if that breach *caused* the damage.** ***On Section 42 of the* Civil Liability Act** • Section 42 does not replace the existing common law of negligence for public authorities. • It functions as a "supplement or corrective" to the law, introducing specific principles (like resource allocation) that courts must consider when applying negligence law to public authorities. ***On Section 43A of the* Civil Liability Act** • The s 43A defence was not available to the RTA in this case. • The court found that installing protective screens on a bridge is not an exercise of a "special statutory power." • The RTA's authority to install screens stems from its ordinary rights as the owner of the property (the bridge), not from a special power granted by a statute that a private citizen would not have. • Therefore, since the claim was not based on a failure to exercise a special statutory power, the conditions for s 43A to apply were not met.
Electricity Networks v Herridge [2022] HCA 37	• A bushfire caused extensive property damage. It occurred due to electrical wires that were attached to a poorly maintained, rotting power pole that collapsed **OUTCOME**: Appeal dismissed, unanimously dismissed Western Power's appeal, affirming its **duty to take reasonable care to prevent or minimize fire-related injury or damage from electricity delivery.**

	• This is a landmark ruling confirming that statutory authorities cannot avoid a duty of care simply because failed infrastructure was on private land or owned by a third party. • Where a statutory authority's actions create or control a risk of public harm, it likely owes a duty to mitigate that risk.

VII. BREACH OF DUTY: RF & CALCULUS OF NEGLIGENCE

- Classifications adopted by CLA may differ from the common law
  - CLA provisions relating to BOD are included under the heading of DOC.
  - Practising lawyers may be in the habit of regarding BOD questions as DOC issue, a matter of law rather than a matter of fact
  - **E.g., for traffic collision, the vehicle in front brakes suddenly, the question is not, whether there is a doc by the motorist in front to the motorist behind, but rather whether motorists who owe a doc to other road users are in breach of their duty**.
- Breach questions are **questions of evidence rather than law.**

1. General Principles for Establishing Breach of Duty

The breach enquiry has two limbs:
1. **reasonable foreseeability of a real risk of** injury arising from the defendant's conduct; **(ss 5B(1)(a),(b))**
2. the **reasonableness of the defendant's response** to that risk. **(ss 5B(1)(c), (2))** (assessed prospectively 预测)

- **S 5B, in most part, codified the common law BOD test** (***Wyong Shire Council v Shirt*** (1980) 146 CLR 40, Mason J at 47-48), but not identical. So, a number of cases prior to the legislation are relevant.

*Legal Test – Overview of BOD

Step 0.5 Identify Negligent Acts (failure to)
Step 1. Standard of care = who is the 'reasonable' person? obj/sub children (***McHale***) extra skill (***Imbree***) mental illness (***Carrier***)
Step 2. Can the D use CLA 5O + 5P to avoid liability?
a) Is D a professional?
b) Is D 'providing professional services?
c) Is peer professional opinion about the service 'widely accepted'
d) Is the opinion irrational?
Step 3. Reasonable foreseeability of risk of injury 'not insignificant' CLA 5B(1)(a) and (b).
Step 4. Calculus of negligence CLA 5B(1)(c) and (2)
a) Probability of Harm (***Romeo, Dederer***)
b) Burden of Taking Precautions (***Woods***)
c) Likely seriousness of harm/gravity (***Paris***)
d) Social Utility (***E v Red Cross***)

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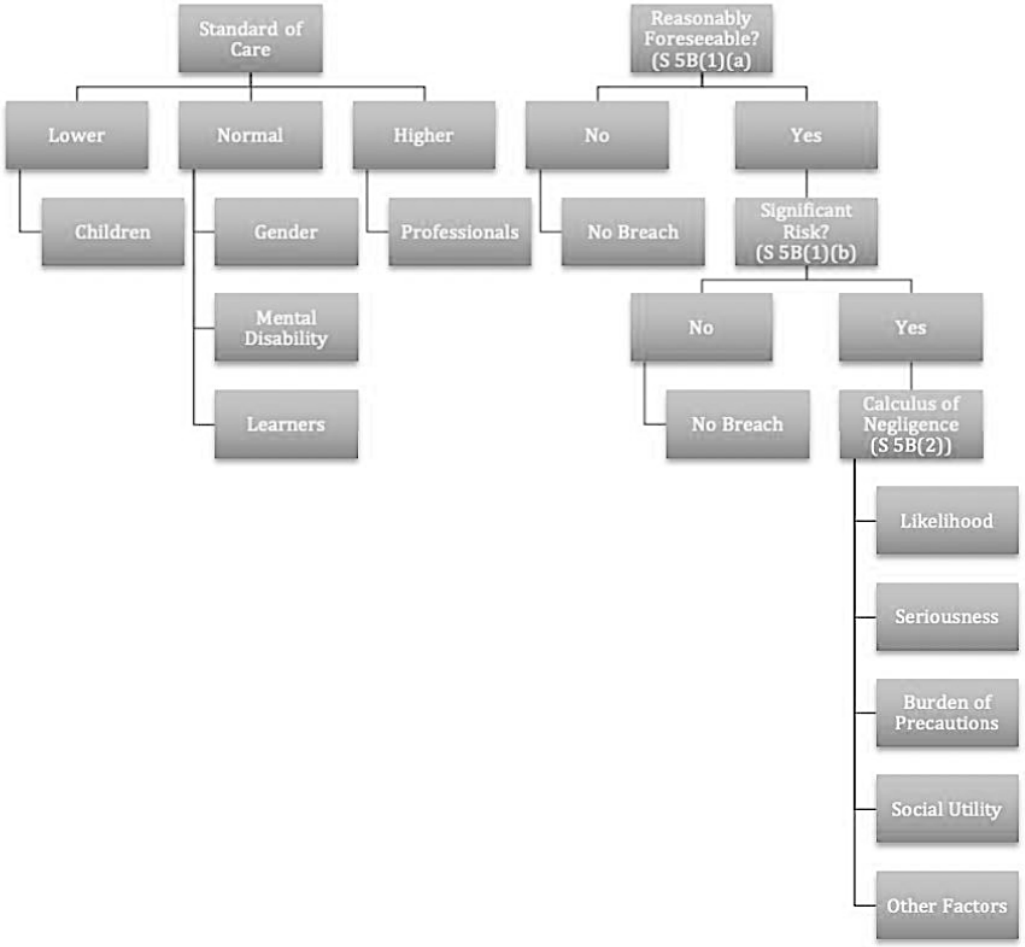

***APPROACHING TO DETERMINE BOD UNDER CLA**

1st step: Definition under s 5:

- [81] 'P must identify "**a risk of harm**" against which he (or she) alleges a **D would be negligent for failing to take precautions**. s 5 of the CLA defines "**harm**" as meaning "**harm of any kind, including ... personal injury or death, damage to property and economic loss**".'
- [82] "...it is **only through the correct identification of the risk that an assessment of the reasonable response**
- **can be made**."
- [83] "...it is sufficient if the risk of harm is described as a **class of injury**, as distinct from the particular injury actually suffered by the plaintiff."

Garling J in ***Benic v New South Wales*** [2010] NSWSC 1039] adopted in Victoria in ***Gunnersen v Henwood*** [2011] VSC 440, at [361]

2nd step: S 5B(1)

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[87] ‘Section 5B presupposes the existence of the law of negligence and operates against its background:141 ... the statute requires that a trial judge <u>must be satisfied that each of the elements in s 5B(1) are satisfied</u> before a finding of a BOD can be made.’
[88] these elements ‘represent the concepts of foreseeability, probability and reasonableness of precautions: ...each represented in the common law and are often conflated in the term “reasonable foreseeability” ...statute... each must be separately addressed. ...’
S 5B(1)(a)

[90] ‘Foreseeability is described in the statute differently from the common law description.’ = D’s knowledge
[91] (The Ipp Report, para 7.10): “Whereas probability is a scientific concept, foreseeability is a matter of knowledge and inference... (Knowledge must be judged as at the date of the alleged negligence and not at a later date)”
[92] for (know or out to know) ‘...will vary from case to case BUT may include such things as (the obviousness or the likelihood of an event) the common knowledge and experience of others in the similar position of the defendant...’

S 5B(1)(b)

[93] ‘is cumulative on the first, is whether the alleged risk of harm was “... not insignificant” ...also judged from the perspective of a reasonable person in the d’s position, and in prospect not retrospect’
[94] ‘“not insignificant” has not yet been the subject of any comprehensive detailed analysis’

<u>3rd step: The Calculus of Negligence</u>

S 5B(1)(c)

[102] ‘requires attention is the <u>conduct of a reasonable person</u>...one most closely reflects the common law...Any consideration of this element <u>also requires attention to s 5B(2)</u>’[1]

S 5B(2)

[103] ‘provides a non-exhaustive list of factors which a court is required to take into account in deciding if this step is made out’[2]

S 5C

[104] ‘casts light upon the non-exhaustive list of factors in s 5B(2)... 5C(a) reflects the remarks of Bryson J in Waverley Council v Lodge [2001] NSWCA 439 at [35]-[36].’

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<tr><td colspan="3">STEP 1: IDENTIFICATION OF THE RISK OF HARM</td></tr>
<tr><td rowspan="2">Coles Supermarkets Australia Pty Ltd v Bridge [2018] NSWCA 183, Leeming, Page JJA)</td><td>CLA require the analysis to start with a risk of harm...</td><td>Uniting Church in Australia Property Trust (NSW) v Miller; Miller v Lithgow City Council (2015) 91 NSWLR 752; at [104]-[107]</td></tr>
<tr><td>‘it is “only through the correct identification of the risk that one can assess what a reasonable response to that risk would be”’</td><td>Roads and Traffic Authority of NSW v Dederer (2007) 234 CLR 330, at [59]</td></tr>
</table>

[1] *RTA v Refrigerated Roadways Pty Limited* [2009] NSWCA 263 at [177]

[2] *RTA v Refrigerated Roadways Pty Limited* [2009] NSWCA 263 at [173] per Campbell JA; [445] per Sackville AJA; Erwin v Iveco Trucks Australia (2010) 267 ALR 752 at [81] per Sackville AJA (Basten and Campbell JJA agreeing)

	'the formulation of risk of harm should identify the "true source of potential injury" and the "general causal mechanism of the injury sustained".	***Roads and Traffic Authority of NSW v Dederer*** (2007) 234 CLR 330, at [60] ***Perisher Blue Pty Ltd v Nair-Smith*** (2015) 90 NSWLR 1, at [98]
	The text identifies two main foreseeable risks of injury for customers in Coles' car park: • **Slipping and falling:** This was the type of incident that occurred in the present case. **Being hit by a moving vehicle:** The text argues against broadly defining the "risk of harm" to include this, as it involves different considerations (e.g., "not insignificant" risk, severity of harm, and necessary precautions) compared to slip and fall incidents.	
STEP 2: REASONABLE FORESEEABILITY OF RISK OF HARM		
"an **affirmative answer** to the question whether **damage was reasonably foreseeable** is usually a near **certainty**"		***Tame v New South Wales*** (2002) 211 CLR 317 at [99].
5B(1)(a) requires consideration of: • **Foreseeability of the risk: CLA**: 'a risk of which the person **knew or ought to have known'**. • **Assess prospectively – without the benefit of hindsight**. • Did D know of the risk? OR Ought D to have known of the risk?		
Wyong Shire Council v Shirt (1980) 146 CLR 40	• The P become quadriplegic after water skiing in a lake. • The D had erected a 'deep water' sign in the lake intended to warn possible swimmers and meaning to signal that a deep trench had been dug out into the lake for boats. • The P thought the sign meant the lake was deep, but it was shallow except for the trench. • He argued the sign was misleading and negligent. **ISSUE**: Did the Council's signs create a foreseeable risk of harm to the plaintiff? **OUTCOME**: Appeal Dismissed	
	• An unlikely risk can still be foreseeable (***Bolton v Stone***) • 'Consequently, when we speak of a risk of injury as being "foreseeable" we are not making any statement as to the probability or improbability of its occurrence, save that we are implicitly asserting that the risk is **not one that is far-fetched or fanciful**.' A) Would a **reasonable man in D's shoes have predicted his behaviour entailed a risk of harm** to P (or the class to which P belongs)? (**Step 1**) If '**No'** > there is no breach of duty. If '**Yes'** > consider: B) How would a **reasonable man respond to this risk of harm**? (**Step 2**) Answer this question by considering: 1. How **RISKY** is the behaviour? ('**likely seriousness of harm'** > **s 5B(2)(b))** 2. How **LIKELY** is the risk to occur? ('probability that the harm would occur if care were not taken' > **s 5B(2)(a**)) 3. How **ONEROUS would it be to avoid the risk? ('burden of taking precautions** to avoid the risk of harm' > **s 5B(2)(c**)) 4. Does D have **CONFLICTING RESPONSIBILITIES**? ('social utility of the activity that creates the risk of harm' > **s 5B(2)(d**))	
	SIGNIFICANCE: Replaced the words 'not far-fetched and fanciful' with 'not insignificant'.	
Doubleday v Kelly [2005] NSWCA 151	Like the common law, the **CLA do not require** that the **precise sequence of events leading** to the injury be foreseeable.	
	• A little girl was staying at her friend's house	

	• She put on roller skates and then jumped on the trampoline, injuring herself. • It was an early hour of the morning, and the children were unsupervised. • A warning was given to the children the night before not to use the trampoline. **ISSUE**: whether it was foreseeable that a seven-year-old child wearing roller skates whilst jumping on the trampoline at a friend's house would fall off the trampoline and break her arm.	
	• F of risk not directed at actual events as they happened; rather foresight in more general terms of risk of injury to P if she were to use the trampoline without supervision • Risk that was F was that P would not use the trampoline competently and would injure herself by falling off	• **Foreseeability of risk prospective wise**
5B(1)(b) requires consideration of: • **Whether the risk was "not insignificant"?** • refers to the probability of the risk eventuating, not to the magnitude of the resulting harm • (***Shirt***: to be 'not insignificant', the significance of the risk of harm materialising must be at least '**not far-fetched or fanciful**' or not one that a reasonable person could ignore; o ***CLA***: ***Adeels*** confirms that **'not insignificant' equates to NFFF**, in a practical sense)		
STEP 3: THE CALCULUS OF NEGLIGENCE – CLA SS5B(1)(C), 5B(2)		
Moving on to CLA 5B(1)(c): "how a reasonable person in the position of the defendant would have acted in response to that risk"		
"There is judicial authority that the NSW provision does not alter the common law"		***RTA v Refrigerated Roadways Pty Ltd*** [2009] NSWCA 263.
"a foreseeable risk is a risk of which the D either knew or ought to have know." • E.g., an employer's knowledge of risk and a P's vulnerability may be relevant • Where the defendant has **particular knowledge relevant to the risk**, what is required by way of precautions must be determined in the light of that knowledge		***Paris v Stepney Borough Council*** [1951] AC 367).
The *Shirt* Formula is incorporated into *CLA* s 5B(2): (a) the probability that the harm would occur if care were not taken, (for P) (b) the likely seriousness of the harm, (for P) (c) the burden of taking precautions to avoid the risk of harm, (for D) (d) the social utility of the activity that creates the risk of harm. (for D)		
• ***Amongst other relevant things***: This suggests that it is **open to the court to take other factors into consideration**, such as the defendant's knowledge of the risk or the surrounding circumstances of the incident. • However, it is implied that these factors **would be secondary to the four** which are explicitly set out		
***Shirt* Calculus Cases:**		
Romeo v Conservation Commission of the Northern Territory (1998) 192 CLR 431	• Two girls were sitting on a low log fence in the car park, which was situated on a cliff-top overlooking Casuarina Beach, three meters from the cliff's edge. • Between the log fence and the edge of the cliff, some vegetation was growing, but it was quite low and did not obstruct the view of the beach and the sea beyond. • At some point, both girls fell over the edge of the cliff onto the beach below and both were injured, the P very seriously. • Such an accident had never before occurred at the Reserve. • The judge inferred that the girls having seen the gap in the vegetation wrongly believed that the bare earth was a pathway leading somewhere. • Neither girl ever remembered the circumstances of the fall, and there were no witnesses. • It was dark and the girls had been drinking.	

	• There was no fencing or signage **ISSUE**: Should the Conservation Commission have "done more" and were they therefore negligent?
	• "Bear in mind as one factor that resources available for the public service are limited and that the allocation of resources is a matter for" • 'What is reasonable **must be judged** in the light **of *all* the circumstances**. (*shirt* calculus). But it is **not only those factors** that may bear upon the question. In the case of a **public authority** which manages public lands, it may or may not be able to control entry on the land in the **same way that a private owner may...'**
	a) **Probability**: low. No such accident had occurred before. b) **Gravity**: The harm was serious, and this factor weighed in favor of a breach. c) **Burden of precaution**: P argued the Commission could have had lights, fenced off the cliffs and provided signage warning of the danger. D argued that was onerous and if they fenced off this cliff, they would be obligated to fence off numerous other cliffs. d) **Social utility**: D argued the natural beauty of the area would be reduced if they were required to fence off cliffs.
Vairy v Wyong Shire Council (2005) 223 CLR 422 and ***Mulligan v Coffs Harbour City Council*** (2005) 223 CLR 486	• Actions for damages for negligence brought by young men who suffered catastrophic injury in consequence of diving or plunging. • Both sued public authorities, complaining of a failure to warn of the risk which materialised. • **4:3** minority favoured p in ***Vairy*** because D was **aware of a previous accident and the recommendation** to place a warning sign in that location but had not done so. This was absent in (***Mulligan v Coffs Harbour City Council*** (2005) 223 CLR 486), thus dismissed P.
	• 'the negligence is assessed prospectively at the time of the negligent conduct not retrospectively after the event.' • [i]t was not and could not be suggested that a reasonable council would have marked every point in its municipal district from which a person could enter a body of water and warned against or prohibited diving from that point.
RTA v Refrigerated Roadways [2009] NSWCA 263	• A semi-trailer driver died when a chunk of concrete was dropped from an overhead bridge, smashing through his windscreen as he drove along a highway. • The culprits were convicted. • The RTA, who owned the road and bridge under the relevant legislation, admitted it owed a DoC to road users. • Progress in screening the bridges was slow due to budgetary constraints **ISSUE**: whether the bridge should have been screened at the time of construction.
	Section 5B: [**176**] Ipp JA [**51**]: 's 5B (2) provides a framework for deciding what precautions the reasonable person would have taken to avoid the harm and **involves weighing the factors set out in ss 5B(2)(a) and (b) against those in ss 5B(2)(c) and (d)** (subject, of course, to each being applicable in the particular circumstances of the case).' **[177]-[178]** s 5B (2) 'does not show any intention to alter the common law on that topic.' (Shirt 47-8) 'continues to govern whether there has been a breach of a duty of care...' ***Shirt* Calculus:** ***RTA v Dederer*, 354 [69]:** '**What Shirt requires is a contextual and balanced assessment of the reasonable response to a foreseeable risk**.' Overseas Tankship (UK) Ltd v Miller Steamship Co Pty (Wagon Mound (No 2) [1967]: 'What that decision did was to recognise and give effect to the qualification that **it is justifiable not to take steps to eliminate a real risk if it is small and if the circumstances are such that a reasonable man, careful of the safety of his neighbour, would think it right to neglect it**.'
1. Probability of harm - S 5B(2)(a)	
• The likelihood that a particular harm will eventuate is an important determinant of whether breach will be found.	
RTA v Dederer (2007) 324 CLR 330	• In Roads and Traffic Authority of NSW v Dederer, a 14-year-old, Philip Dederer, was severely injured after diving from a bridge into a river, despite "no diving" signs and his awareness of the risks. • The RTA, responsible for the bridge, was aware of ignored prohibitions.

	• The High Court found the RTA had not breached its duty, ruling that their obligation was to exercise reasonable care for users exercising reasonable self-care, not to prevent all harmful conduct **ISSUE**: Was the risk of harm sufficiently probable for a breach of duty to have occurred?
	• The proceedings against the RTA were commenced before the CLA came into effect and were dealt with under the common law. **<u>Reasonable care, not prevention</u>** • "An obligation to exercise reasonable care must be contrasted with an obligation to prevent harm occurring to others. The former, not the latter, is the requirement of the law." **<u>The proper identification of the risk:</u>** 1. **Probability:** The court mischaracterized the risk by focusing on the *frequency of diving* instead of the *probability of injury from diving into shallow water*. Despite frequent diving, no one was injured until Mr. Dederer, indicating a **low probability of harm**. 2. **Control over Risk:** The court wrongly assumed the RTA had greater control over the risk than it did. The risk arose from the bridge's location combined with human behavior and natural environmental factors (estuary bed variations), both outside the RTA's control. **<u>The proper assessment of breach:</u>** • **Prospective vs. Retrospective**: The assessment of reasonable care must be prospective (looking forward at what was required) and not retrospective (looking back at whether the defendant's actions could have prevented the injury). The court erred by focusing on the RTA's failure to prevent Mr. Dederer's dive rather than what reasonable care would have required in response to a foreseeable risk. • **<u>(FOR EXAM = must go back before the incident happened to see if its foreseeable that the risk of harm could eventuate)</u>** • **"Shirt" Calculus**: Applying the "Shirt" calculus (a test for breach of duty) retrospectively, after an injury has occurred, distorts the concept of reasonableness. • **Applying the "Shirt" Criteria**: 1) **Foreseeability**: The risk was objectively foreseeable. 2) **Magnitude of Risk**: The potential injury was severe ("self-evidently grave"). 3) **Probability of Injury**: Despite frequent diving, the probability of injury was low because no one was hurt until Mr. Dederer's accident. 4) **Burden of Alleviating Action**: ▪ **Warning signs**: Inexpensive, but likely ineffective since Mr. Dederer knew of variable depths. ▪ **Installing a fence**: Expensive and intrusive, making its reasonableness doubtful.

Identifying the risk: Because "[i]t is only through the correct identification of the risk that one can assess what a reasonable response to that risk would be." This approach continues under CLA	***RTA v Dederer*** (2007)
Reasonable precautions: two patrons were shot by a third patron in a restaurant – sued restaurant for negligence in failing to prevent injury resulting from the criminal behaviour of the third party, arguing that the absence of security guards on the premises was a BOD that led to their injuries = HC agreed applying s 5B(2).	***Adeels Palace Pty Ltd v Moubarak & Najem*** (2009) 239 CLR 420, at [38]
Low probability risks: the p was standing outside her home across the road from a cricket ground when she was struck on the head by a cricket ball. The hit was described as quite the biggest seen on that ground. Evidence that on 6-10 occasions balls had been hit into the road in the past 30 years. = **finding no negligence**	***Bolton v Stone*** [1951] AC 850
Assessed prospectively: As discussed, probability cannot be judged in the light of the "hindsight bias" = the judgment must be made at a time of the alleged negligence based on information available to the reasonable D in those circumstances at that time.	***Vairy v Wyong Shire Council*** (2005) 223 CLR 422 at [163]
2. The gravity or likely seriousness of the harm - S 5B(2)(b)	
• When considering this element, the Court must take into account the individual weaknesses of the plaintiff if the defendant was aware of them at the time.	
Paris v Stepney Borough Council [1951] AC 367	• The P had suffered damage to one of his eyes in war (D knew). • He was employed in a garage but was not provided safety goggles while working with dangerous equipment. • Evidenced at the time not the ordinary practice to supply goggles • As a result, he was almost totally blinded when a piece of metal hit him in his undamaged eye.

	Where the D knows of some vulnerability to greater injury on the part of the P, the seriousness of the potential consequences elevates the level of care required by the D.	
Dangerous Goods and Activities • **Higher Gravity of Harm**: When a defendant's actions involve inherently dangerous items or activities, the potential severity of harm is significantly higher. • **Increased Degree of Care**: While not imposing strict liability, the law demands a much higher degree of care in such situations. • **"Keener Foresight" Required**: As highlighted, handling dangerous substances (like sulphuric acid) requires "keener foresight," "stringent diligence," and "consummate care." The duty becomes "more imperious."		***Adelaide Chemical & Fertilizer Co Ltd v Carlyle*** (1940) 64 CLR 514, Starke J at 523
Vulnerable Plaintiffs • **Adjusted Reasonable Care**: The level of reasonable care expected from the defendant is affected when dealing with an especially vulnerable plaintiff, particularly if a dangerous substance is involved. • **Supplier's Responsibility**: Supplying highly inflammable fuel to a small boy, even a deceitful one, demonstrated heightened risk. A reasonable supplier should have been suspicious, and the child's vulnerability increased the duty of care.		***Yachuk v Oliver Blais Co Ltd*** [1949] AC 386, at 394-395, Lord Du Parcq

Intoxicated Plaintiffs
• **No Alteration to Standard of Care**: In New South Wales (s 49(1) CLA) and Queensland (s 46), a plaintiff's intoxication does not change the standard of care owed to them.
• **Key Principles**:
  ○ The possibility or likelihood of intoxication, or increased risk due to impaired capacity, is irrelevant when determining if a duty of care exists.
  ○ A duty of care is not owed simply because a person is intoxicated.
  ○ Intoxication does not, by itself, increase or otherwise affect the standard of care owed.
• **Same Standard Applies**: This means, for example, a driver must still exercise the same reasonable care towards an intoxicated pedestrian as they would a sober one, as shown in ***Thomas William Vale v Timothy David Eggins***.
		Thomas William Vale v Timothy David Eggins [2006] NSWCA 348.

3. Burden of taking Precautions - S 5B(2)(c)		
• Both the cost, inconvenience and danger of placing precautions against a risk may be taken into account when determining whether breach has occurred. • It is possible that, where the risk of harm is sufficiently remote and the magnitude is sufficiently slight, there will be no requirement for the defendant to take any precautions against a risk.		
Woods v Multi-Sport Holdings Pty Ltd (2002) 208 CLR 460	• The P was playing indoor cricket at a facility owned and operated by D Multi-Sport Holdings Pty Ltd. • Although he had played outdoor cricket for years, it was only his second game of indoor cricket. • Equipment supplied did not include helmets or pads • During his innings the P attempted a 'pull-shot' by striking the ball with the edge of the bat, it ricocheted into his right eye, resulting 99% blindness in that eye **ISSUE**: what steps the defendant ought reasonably to have taken to avoid the risk of injury.	
	• The case provides a good illustration of the **balancing of the relevant factors and competing considerations**. • The case **dealt with the position at common law** - proceedings commenced before the implementation CLA and the special provisions relating to recreational activities, and statutory changes affecting obvious risks.	
	Probability of Harm - Moderate: • Indoor cricket is a body-contact sport. • Evidence indicated two serious eye injuries per year in indoor cricket in Western Australia, suggesting a moderate probability. **Gravity/Seriousness of Harm - Moderate:** • The plaintiff (P) acknowledged awareness of the risk of being struck in the head by a ball in cricket (indoor or outdoor).	

	• The sporting context is significant; this wasn't an unlikely risk, and the plaintiff was an adult who voluntarily chose to play for enjoyment. • The relationship between parties and the context of their entry into that relationship are crucial. An employer-employee relationship differs from an adult voluntarily using a recreational facility. The ultimate judgment depends on all circumstances. **Burden of Taking Precautions - High:** • The incidence of serious eye injuries was not deemed high enough to warrant the defendant (D) providing non-standard equipment. • Protective headgear was not designed for the game, not commonly worn elsewhere, and not required by the rules. • The defendant did not fail to provide any protective equipment that was readily available and commonly used by indoor cricketers. **Social Utility:** • The fast pace and confined space of indoor cricket inherently carry a high risk of collisions and being struck by the ball. • The way the game is played means there are practical considerations of convenience and safety that explain why protective headgear is not worn. • The risk of a severe blow to any part of the head, including the eye, in the confined space was **obvious and well known to the plaintiff**. While the plaintiff might not have known the "precise nature" or "full extent" of the risk, general warnings are not intended for such precision.
‘[T]here is nothing in the words of the section, nor in the common law principles which stand behind s 5B, that requires this provision to be confined to the economic burden of taking any particular precaution. In a given case, s 5B(2)(c) may require consideration to be given to the burden of taking precautions to avoid a risk of harm. **Such consideration may extend to factors such as time or distance or communication**. It may be that a precaution, for some reason, would be difficult to implement. Depending upon the circumstances of a particular case, consideration may need to be given to less tangible burdens, such as the privacy.’	***New South Wales v Mikhael*** [2012] NSWCA 338 at [82]
Homeowner Liability • The case involved a defendant (D) tripping on an uneven driveway while attending a garage sale at the plaintiff's (P) property. • **Ubiquitous Hazards**: Ordinary homes inherently contain many hazards, and no premises are entirely risk-free. • **Reasonableness of Protection**: The core issue is how reasonable it is to expect occupiers to protect entrants from risks related to the property's condition, without resorting to classifying entrants into categories (which was a previous approach in common law). • **Obvious and Ordinary Risks**: The incident in question (tripping on an uneven, visible driveway) was so "ordinary" and "visible" that reasonableness did not require the homeowner to take any action. • **"Do Nothing" as a Reasonable Response**: The legislature acknowledges that for many common hazards around a home, doing nothing can be a reasonable response.	***Neindorf v Junkovic*** (2005) 222 ALR 631
Public Authorities and Obvious Risks: • This case, which predates the Civil Liability Act (CLA), illustrates a situation where **no breach of duty of care (BOD) was found** despite an injury. • **Context**: The plaintiff (P) was injured in a natural reserve where the presence of a cliff was obvious. • **Key Factors**: The risk was obvious, **voluntarily undertaken by the P, and the burden of avoiding the risk would have been huge** (e.g., fencing off a large area of natural beauty). • **Holding**: The defendant public authority was under a general duty to take reasonable steps to prevent injury, but this did not extend to fencing off an obvious natural hazard like a cliff. Therefore, there was no breach for failing to erect a barrier. • **Relevance**: This case emphasizes the significance of a plaintiff's awareness of an obvious risk and the high burden of preventing such risks when assessing the reasonableness of a public authority's actions.	***Romeo v Conservation Commission of the Northern Territory*** (1998) 192 CLR 431
Conflicting Risks • This case addresses the challenge of deciding **which precautions to adopt when different options each involve their own risks**.	***Caledonian Collieries Ltd v Speirs*** (1957) 97 CLR 202

• The plaintiff's husband was killed by runaway railway trucks at a level crossing. The central debate was whether "catch-points" (which would derail runaway trucks) should have been installed instead of the existing "switch points" (which did not cause derailment). • **Balancing Act:** While installing catch-points involved little expense, they were not risk-free (e.g., potential damage to trucks/line, possibility of injury from derailment). • **Court's Reasoning**: The court acknowledged that causing a derailment is a "drastic measure." However, when guarding against a danger of the magnitude of a level crossing collision, "drastic measures may well be within the limits of reasonable care." • **Conclusion**: The jury could legitimately find that a "reasonable man" would not be deterred by the possible dangers of a derailment from installing catch-points to protect users of the level crossing, effectively balancing the risk of derailment against the greater risk of a collision.	
4. Social Utility of the risk creating activity - S 5B(2)(d)	
E v Australian Red Cross Society (1991) 27 FCR 310	• P contracted HIV-AIDS after a blood transfusion with contaminated blood by supplied by the Red Cross. • P argued that the procedures adopted by the Society for the exclusion from the blood donor pool of persons within the known HIV high risk categories were inadequate. • Conceding that no specific test for HIV infection was available, the P argued that the Society ought, by the date of the donation, to have had in place a surrogate test for hepatitis core antibodies, which would have likely led to the exclusion of the blood that infected him. • Red Cross accepted that a DOC was owed and went on to find that the risk of harm to those receiving blood donations was foreseeable
	• **Foreseeability of Risk (HIV/AIDS):** The court acknowledged that by October 1984, a reasonable person in the position of the ARCS would have foreseen the possibility of HIV infection from blood transfusions. This was a crucial finding for establishing a duty of care. • **Negligence in Donor Screening (No Breach Found):** The court found that the ARCS was **not negligent in its donor screening practices** at the time. It was determined that the Society had adopted proper screening practices available to it. • **Negligence in Surrogate Testing (Balancing Social Utility vs. Risk):** This was a highly contentious issue. • The applicant argued that the ARCS should have implemented "surrogate testing" (detecting other antibodies that might indicate HIV, even before specific HIV tests were available). • The court considered the argument that surrogate testing would have significantly impacted the blood supply (potentially discarding 5% of donations, many of which would have been harmless). • Ultimately, the court found that while the body of evidence suggested surrogate testing was not widely used, the **potential serious practical effects on the blood supply, including the risk of endangering lives due to a reduction in blood, outweighed the risk of not introducing the test** at that time. Therefore, the ARCS was **not found to have breached its duty** by failing to adopt anti-HBc surrogate testing before October 1984. • **Social Utility of the Activity:** A key factor in the court's decision regarding surrogate testing was the high social utility of the blood supply. The court explicitly weighed the potential harm from not implementing surrogate testing against the severe consequences of a diminished blood supply, effectively prioritizing the broader public good.
VIII. BREACH OF DUTY: STANDARD OF CARE	
STANDARD OF CARE	
• A BOD occurs when the conduct of the **D does not meet the standard of care of the reasonable person.** o The **first step** therefore is to determine the standard of care. This involves answering the question – **who is the 'reasonable' person in the circumstances**?	
• **Defining Negligence**: Negligence is fundamentally the failure to act as a "reasonable person" would, or conversely, doing something a "prudent and reasonable man" would not do	***Blyth v Birmingham Waterworks Co*** (1856) 11 Ex 781

• **Evolving Standard of Reasonable Care:** The standard of "reasonable care" is not static; it changes over time. ○ Direct comparison between different cases is unhelpful for determining evolving standards due to unique circumstances	***Bankstown Foundry Pty Ltd v Braistina*** (1986) 160 CLR 301 at 308-309
WHO IS THE REASONABLE PERSON?	
• D's conduct is measured by the standard of the "reasonable person" in the circumstances both at common law and CLA, which refers to a "reasonable person in the person's position". • In many situations we would be measuring the conduct of the D against that of **an 'ordinary' person on the Bondi Tram**. (***Papatonakis v Australian Telecommunications Commission*** (1985) 156 CLR 7 at 36)	
The objective "reasonable person" standard in negligence law can, in certain circumstances, be adapted to incorporate specific characteristics of the defendant, such as their **gender, age, mental disability, or skill, when assessing what a reasonable person would have done in those particular circumstances.*	
1. CHILDREN	
• Children are a well-established exception to the reasonable person test. • Instead, the standard of care applied is that of the reasonable child of the defendant's age and experience.	
McHale v Watson (1966) 115 CLR 199	• The D, a 12-year-old boy and the P, a 9-year-old girl, were playing tag. • At the end of the game, the D threw a sharpened metal rod at a tree, and it bounced off and hit the P in the eye causing permanent blindness. **ISSUE**: should the D's conduct be measured against that of a 12-year-old child or that of an adult
	Specific Case Context for Child Negligence: • A 12-year-old boy cannot be absolutely deemed incapable of negligence, nor should he always be held to an adult standard. • The defendant's conduct in the specific case (a dart glancing off a post) was seen as symbolic of "the tastes and simplicity of boyhood." • The court found the 12-year-old defendant **lacked the maturity to foresee** that a dart might glance off in a particular direction and injure someone. • This decision was based on the **special circumstances of that case** and did not establish a general principle that young boys cannot be negligent. **Kitto J's Objective "Normal Child" Standard:** • A child's defense can rely on a **limitation of foresight or prudence** that is **characteristic of humanity at their stage of development** and thus "normal" for their age. • This appeals to an **objective, not subjective, standard of ordinariness** – "normality is, for children, something different from what normality is for adults." • It would be "contrary to the fundamental principle" of objective conduct assessment to compare a child's actions to anyone other than a "normal person" of **corresponding age**. Children, like adults, must accept the risks in society that ordinary care from others won't prevent, including the risk that "boys of twelve may behave as boys of twelve; and that, sometimes, is a risk indeed."
2. MENTAL ILLNESS AND DISABILITY	
• As alluded above, other deficiencies suffered by the plaintiff which limit their capacity to reason, including mental illness, do not give rise to a distinct standard of care.	
Carrier v Bonham [2002] 1 Qd R 474.	• The D was a psychiatric patient with schizophrenia who left the mental facility in which he was detained and intentionally jumped in front of a bus. • The P was a bus driver who braked but was unable to avoid hitting the D. • The P suffered sudden shock as a result and could not continue his work as a bus driver. **ISSUE**:

	whether D should be compared to a person on the Bondi Tram (who does not have a mental illness) or whether the standard should be lowered to that of a person with a similar mental illness to the D **OUTCOME**: the **first defendant's mental condition had no effect on the standard of care owed by him to the plaintiff**
	The Objective Standard (*Vaughan v Menlove*): • Since ***Vaughan v Menlove*** (1837), the established standard for judging negligence has been "the conduct of a man of ordinary prudence." • In ***Vaughan v Menlove***, the defendant argued he acted "**bona fide to the best of his judgment**" and shouldn't be responsible for a "misfortune of not possessing the highest order of intelligence" after his hayrick spontaneously combusted (and he had previously been sued for burning weeds too close to a neighbor's land). • This case is recognized for setting an **objective standard of conduct independent of individual "idiosyncrasies"**, including intelligence, as confirmed in ***McHale v Watson*** (1964). **Contrast with Children's Liability (*McHale v Watson*):** • While the standard for adults is objective, the High Court of Australia in *McHale v Watson* held that **age is a relevant consideration for children**. A child's conduct is judged by the "foresight and prudence of an ordinary boy of twelve," not an ordinary adult. • Sir Frank Kitto's reasoning in *McHale v Watson* (which rationalized the special category for children) would likely view "unsoundness of mind" as an **abnormality that *does not* exempt a person from the ordinary objective standard** of foresight and care.
3. LEARNERS/KNOWLEDGE	
• Learner drivers were previously a class of people who owed a lower standard of care to their instructors than is generally owed by drivers to their passengers (***Cook v Cook*** [1986]). However, **this principle would be later overturned by the High Court**.	
Imbree v McNeilly; McNeilly v Imbree (2008) 82 ALJR 1374	• The 2nd P was injured in a motor accident in the Northern Territory while 1st P front seat passenger "supervising" the D driver. • The D driver was 16 years of age, the 1st P knew, the 1ST D had little driving experience, not licensed to drive, and did not hold any learner's permit. • Immediately prior to the accident, the D saw a piece of tyre debris on the road and attempted to steer the vehicle to the right. • Despite the P yelling at him to brake, the D lose control and vehicle overturned • The P was rendered a tetraplegic. **ISSUE**: What was the standard of care that the first respondent (the driver) owed the appellant (the passenger)? **OUTCOME**: • It accepted that the appellant was contributorily negligent by failing to give the driver basic advice about driving on dirt roads and failing to instruct the driver to straddle observed debris on the road. • Contributory negligence was held to be appropriately assessed by the trial judge at 30%.
	Overturning *Cook v Cook* (General Principle): • The core argument is that the **standard of care for a driver is the same for all drivers: to take reasonable care to avoid injury to others, embodying the "reasonable driver" standard.** This standard is *not* to be qualified by whether the driver holds a license or by their level of experience. The case of *Cook v Cook* should no longer be followed. **The "Reasonable Learner Driver" Debate:** • The applicable standard of care is **objective** and does not vary with individual aptitude or temperament. • A **learner driver owes all other road users the same standard of care as any other driver** on the road. • A passenger's knowledge of the driver's inexperience **does not affect the standard of care** the driver must meet.

	Why Knowledge is Irrelevant to the Standard of Care: • Translating a plaintiff's specific knowledge into a distinct category of relationship with a different duty of care creates "doctrinal and practical difficulties." • The fundamental reason for rejecting *Cook v Cook*'s approach is that the standard of care **must be objective and impersonal**. • Allowing knowledge to alter the standard would lead to "difficult distinctions" and leave the content of the "inexperienced driver" standard undefined. • The "reasonable driver" is defined by their actions on the road, **not by their licensing status**. **No Different Standard of Care (Generally):** • While some exceptions exist (e.g., a higher standard for professionals with particular skills, or an "attenuated" standard for children), in most other cases, the **relevant standard of care is applied uniformly**. • A plaintiff's ability to supervise the defendant **does not change the defendant's standard of care**. However, a plaintiff's *failure to supervise or instruct* can be highly relevant in determining their **contributory negligence**. • Ultimately, a learner driver must exercise the care of a "reasonable driver." ***The Insurance Commissioner v Joyce* (Voluntary Assumption of Risk / Drunken Driver):** • This case is cited regarding the doctrine of "voluntary assumption of risk," which requires proof that the plaintiff "freely and voluntarily, with full knowledge of the nature and extent of the risk... impliedly agreed to incur it." • Latham CJ notably stated that for a drunken driver, "all standards of care are ignored" because such a driver "cannot even be expected to act sensibly," implying a plaintiff could voluntarily assume the risk. **Plaintiff's Knowledge and Standard of Care (Recap):** • A plaintiff's actual knowledge of a defendant's inability to meet a reasonable standard might be *necessary* but not *sufficient* for voluntary assumption of risk. • Both actual and reasonably expected knowledge of the plaintiff are relevant to **contributory negligence**. • The document points out an "unarticulated middle step" in reasoning that a plaintiff's knowledge of a defendant's deficiencies directly dictates the standard of care owed, suggesting this link is problematic. • *Joyce* concluded there was no "relevant reasonable actor" for a drunken driver, while *Cook v Cook* (prior to being overturned) tried to define a "reasonable inexperienced driver."
4. PROFESSIONAL AND THOSE WITH SPECIAL SKILLS	

• Section 5O and s5P are also relevant as they provide a standard of care for professionals
• The professional standard of care which at common law both in England (***Bolam*** standard) and Australia (***Rogers v Whitaker***) is a breach of duty issue.
  ○ "The standard of reasonable care and skill required is that of the ordinary skilled person exercising and professing to have that special skill" (***Rogers v Whitaker***)
  ○ In the UK , the ***Bolam*** principle: 'a doctor is not negligent if he acts in accordance with a practice accepted at the time as proper by a responsible body of medical opinion'
• **<u>Where the task requires special skills, the standard of care will be that of the reasonable person possessing those skills</u>** - (householder repairing a telecom cable held to the standard of a skilled technician).	

Rogers v Whitaker (1992) 175 CLR 479	• The P had been blind in her right eye since the age of nine from an accident. • The D a surgeon operated on the eye with the aim of restoring her sight. • The P was worried about the operation particularly concerned that the D would interfere with her seeing eye. • The **D failed to warn her about the remote possibility of 'sympathetic ophthalmia'**, a complication which could damage her seeing eye.

	• Unfortunately for the P there were two bad outcomes. 1**. The operation on her blind eye failed, although it was carried out with all due care.** **2. The complication 'although rare, manifested and the P was left blind.** • She sued on the basis that the D had failed to warn her of the possibility of 'sympathetic ophthalmia'. **ISSUE**: Did the doctor owe a DOC to warn the P of such a remote risk that could arise from the surgery? **OUTCOME**: Appeal Dismissed (patient won)
	Medical Practitioner's Duty of Care: • Medical practitioners owe a "**single comprehensive duty**" to exercise reasonable care and skill in all aspects of their professional services, including examination, diagnosis, treatment, and providing information. The standard required is that of an "**ordinary skilled person exercising and professing to have that special skill**." **Discarding the *Bolam* Principle in Australia (Especially for Advice/Information):** • Australian courts have largely **discarded the Bolam Principle**, particularly concerning the **non-disclosure of risk and the provision of advice and information**. • While evidence of acceptable medical practice remains a useful guide, it is now **for the courts to adjudicate the appropriate standard of care**. • This shift prioritizes the "paramount consideration that a person is entitled to make his own decisions about his life" (*F v R*). • Cases like ***F v R*** and ***Reibl v Hughes*** explicitly refused to apply Bolam, asserting that **the "ultimate question" of reasonable care is "a question for the court and the duty of deciding it cannot be delegated to any profession or group in the community."** **Factors for Disclosing Information/Advice (Court-Determined):** • The amount of information a careful and responsible doctor should disclose depends on a "complex of factors" determined by the court, not solely by medical opinion. These include: o The nature of the matter/risk to be disclosed. o The nature of the treatment. o The patient's desire for information. o The patient's temperament and health. o General surrounding circumstances. • Expert medical evidence is relevant to identifying risks and their materiality but is not conclusive on whether a risk should be disclosed. The **patient's right to know** is paramount. **Distinction Between Diagnosis/Treatment and Provision of Advice/Information:** • **Diagnosis and Treatment:** Here, the patient's role is primarily to provide symptoms; the practitioner provides medical judgment. • **Provision of Advice/Information (Patient's Choice):** This is fundamentally different. Except in emergencies, all medical treatment requires the patient's consent. This consent is "meaningless unless it is made on the basis of relevant information and advice," because the choice relies on information known to the doctor but not the patient. • Generally, the amount of information to disclose is **not a question dependent on medical standards or practices**, unless disclosing it would specifically harm an "unusually nervous, disturbed or volatile patient."

	• **Material Risk Defined:** A risk is "material" if a **reasonable person in the patient's position**, if warned, would likely attach significance to it, or if the doctor knows (or should know) that the particular patient would likely attach significance to it. **Legal Action for Non-Disclosure:** Failure to disclose risks related to a medical procedure can only found an action in **negligence**, not trespass (as initial consent to the broad nature of the procedure prevents a trespass claim).	
Rosenberg v Percival (2001) 205 CLR 434	'The relevance of professional practice and opinion was not denied; what was denied was its conclusiveness. In many cases professional practice and opinion will be the primary, and in some cases, it may be the only, basis upon which a court may reasonably act. But, in an action brought by a patient, the responsibility for deciding the content of the **doctor's DOC rests with the court**, not with his or her professional colleagues.'	• Explained the effect of ***Rogers v Whitaker***
Naxakis v Western General Hospital (1999) 197 CLR 269 at 285-286	the decision in ***Rogers v Whitaker*** rejected the ***Bolam*** principle as regards all aspects of a doctor's DOC, not limited merely to diagnosis and **treatment but also including the duty to warn of material risks**.	
Jones v Manchester Corp [1952] 2 QB 852	• the comparative inexperience of two-house surgeons, who injected a powerful drug while a patient was under anaesthetic causing the patient's death, d**id not operate to reduce the ordinary standard of care expected of a properly qualified surgeon**.' • question arose of the hospital's claim against the doctors for contribution: the proportions to be borne that the board had placed inexperienced practitioners in charge of the outpatients' department	• Even if a professional has **no experience**, he is still held to the high standard of care of professionals.
Wilsher v Essex Area Health Authority [1987] QB 730	• **Patient Expectation:** Patients have a legitimate expectation of receiving a degree of skill appropriate to the specific task undertaken by each medical professional involved in their care. • **Duty of Care (DOC) and Post, Not Individual:** The standard of care (DOC) relates to the "post" or position a doctor occupies, rather than their individual rank, status, or personal attributes. • **Standard in Specialized Units:** For doctors in specialized units, the standard is not merely that of an "averagely competent" junior houseman, but rather of a person filling a post within a unit offering a highly specialized service. • **Varying Demands of Posts:** It's recognized that different medical posts make different demands, and the standard of care may vary accordingly. • **Mitigating Litigation Risk:** The hierarchical structure of hospital medicine, where lower ranks have different expectations, can help reduce litigation risks. • **Reliance on Senior Colleagues:** Mustill LJ (and Glidewell LJ) believed that a junior houseman is entitled to rely on the skill of a senior registrar.	• standard of care of a **junior doctor** in a specialist paediatric unit

CLA SS 5O, 5P

- The CLA does not apply where the professional has a duty to warn, such as in ***Rogers v Whitaker*** and its equivalents.
- The statutory test avoids the extreme application of the ***Bolam*** test which would have required a court to find for the D where the defence relied on the evidence of a single expert witness as representing a responsible body of opinion.

5O Standard of care for professionals

(1) A person practising a profession (***a professional***) does not incur a liability in negligence arising from the provision of a professional service if it is established that the professional acted in a manner that (**at the time the service was provided) was widely accepted in Australia by peer professional opinion** as competent professional practice.

(2) However, peer professional opinion cannot be relied on for the purposes of this section if the court considers that the opinion is irrational.

(3) The fact that there are differing peer professional opinions widely accepted in Australia concerning a matter does not prevent any one or more (or all) of those opinions being relied on for the purposes of this section.

(4) Peer professional opinion does not have to be universally accepted to be considered widely accepted.

<table>
<tr><th colspan="2">**Analysis of 5O and 5P</th></tr>
<tr><td colspan="2">1. Is the D a professional? A professional could be limited to the classic trio of doctor, lawyer and accountant or it could be more broadly interpreted to include persons with a university degree, professions that are accredited or anyone with a particular skill set. (e.g., a plumber)
2. Is the D providing services? This contrasts with s 5P with the giving of a warning, advice or other information in respect of the risk of death of or injury to a person
3. Is the service 'widely accepted? In s 5O(4) it states that widely accepted does not require it to be universally accepted. - means A significant percentage of peers in the relevant profession must agree.
4. Is the opinion irrational? No definition of irrational is provided. Examples are experimental or alternative health care.
➔ s5P – THIS division does not apply to cases involving provision of info, advice, warning (cf Rogers) - if the professional service is giving or failing to give info, advice, warning in respect of the risk of death of or injury to a person, the professional service will fall outside the scope of the legislation, and liability for it will be considered under the common law.</td></tr>
<tr><td rowspan="2">Sparks v Hobson [2018] NSWCA 29; (2018) 361 ALR 115</td><td>• the P suffered from a genetic disorder that hindered his ability to breathe.
• Without surgical intervention, his prognosis was grave.
• The surgery took place in two stages
• first was successful, the second operation, the P was in respiratory difficulty from the commencement of the surgery.
• The operation had to be terminated early, but there was a severe ischaemic collapse in his spinal column resulting in paraplegia.
• The P argued the D took too long to stop the operation.
• The D Dr Sparks the anaesthetist argued s 5O.
ISSUE:
Is s 5O a defense, or part of the breach of duty i.e. determining the standard of care?
Whether or not it was a practice that was widely accepted?</td></tr>
<tr><td>Section 5O as a Defence:
• When Section 5O of the CLA is invoked, it implies the plaintiff must first establish a breach under Section 5B. The practitioner then bears the burden of proving their conduct was "competent professional practice" as per Section 5O(1).
Practical Determination:
• Despite the legal implications, in practice, the dispute is determined based on all evidence presented, not by a rigid "shifting burdens of proof" approach.
Order of Determination (Section 5O Application):
• The proper course is <u>to first determine the standard of care</u> before assessing the alleged negligence against that standard, rather than treating Section 5O as a defence after findings on the plaintiff's case are made.
Establishing "Widely Accepted Standard":
• Evidence must establish a standard that <u>was "widely accepted in Australia"</u> at the time of the conduct. Persuasive evidence often grapples with potential conflicting views in a reasoned manner.
Test of Irrationality and Antecedent Questions:
• The test of irrationality applies to the opinion of competent professional practice. The court must be satisfied that the opinion addresses the conduct as found at trial and that the evidence supports its <u>"widely accepted" status at the time of the conduct</u>.
Peer Professional Opinion (Past Tense):
Section 5O requires the relevant peer professional opinion to have <u>existed at the time the defendant acted</u>. It's insufficient for experts to merely believe the conduct was reasonable and would have been so regarded if others had been asked at that time.</td></tr>
<tr><td>South Western Sydney Local Health District v Gould [2018] NSWCA 69</td><td>Onus of Proof for Section 5O:
• <u>In NSW, the defendant has the onus of proving the requirements of Section 5O. If these are not met, then Sections 5B and 5C (general negligence principles) apply. If met, Section 5O sets the single standard for assessment (subject to Section 5O(2)).</u></td></tr>
</table>

	"Widely Accepted in Australia":
	• This requirement doesn't mean the practice must exist throughout all of Australia.
	• If similar professions exist in different localities, the court considers the professional practice in the specific locality where the alleged negligent act occurred.
	"Unreasonable" / "Irrational" Standard (Section 5O(2) equivalent):
	• The statutory standard applies unless it's deemed "unreasonable" (Vic, WA) or "irrational" (NSW, SA, Tas, Qld).
	• An opinion is considered irrational if:
	  ○ The court deems the peer professional witnesses not credible.
	  ○ The plaintiff provides sufficient expert testimony demonstrating the opinion is out of step with conflicting evidence.

IX. CAUSATION	
• P in negligence claims must prove that the **D's BOD is causally connected to their harm or damage** and that the damage is not too remote. • The **P always bears the onus of proving**, on the balance of probabilities, any fact relevant to the issue of causation. (***Strong v Woolworths***). • There are **exceptional cases**	
***CLA* s 5D**	**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 person's 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. (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.
****KEY STEPS FOR CAUSATION**	
1. **Factual Causation**. s5D(1)(a). **The "but for" test**. ○ s5D(2) If but for not satisfied + exceptional = **'whether and why'** ○ If failure to warn (e.g. ***Rosenberg***): • Risk eventuates and causes physical harm + • Had warning been given, risk would have been avoided (subj, ***Rosenberg***) • s5D(3), CLA restrictions on admissibility of P's evidence about what s/he would have done. 2. **Scope of Liability** Test of remoteness ○ Test of remoteness – RF of the Kind of damage ○ s5D(1)(b) + (4). 'appropriate' and 'whether or not and why' ****fundamentally it's just factual causation + scope of liability*** **2.5 Is there an intervening act (Novus actus interveniens) comes below scope of liability**	
STEP 1 – FACTUAL CAUSATION	
The "but for" test: 'but for the negligence of the defendant would the injury/damage have occurred?' **如果没有这个 act 的话 D 还会遭受损失吗?**	
Barnett v Chelsea & Kensington	• the deceased poisoned with arsenic. The duty doctor refused to attend as he was also unwell...too late for effective treatment and he died shortly afterwards...although there was a negligent failure to treat. plaintiff (widow) failed to discharge her burden of proving causation.

Hospital Management Committee [1969] 1 QB 428	• Neild J explained (at 433-4), **the "[p]laintiff ... failed [because] ... had all care been taken, still the deceased must have died".**
March v E & M Stramare Pty Ltd (1991) 171 CLR 506	• D parked a truck in the middle of a road in the early morning • hazard lights were on, and the street was moderately well-lit. • This method to unload the truck for as long as the driver could remember. • P was speeding and affected by alcohol, **was injured when his car collided with the truck**. • D and P were both negligent, 70% contributory negligence against the P. • On appeal, a majority held that responsibility should be attributed solely to the P. **ISSUE**: What was the causative factor of the plaintiff's harm?
	• The majority held that while the "but for" test is a useful tool, it is **not the exclusive or definitive test** for causation in negligence. They emphasized that causation is ultimately a question of fact to be determined by applying **common sense and experience** to the facts of the particular case. This approach allows for a broader assessment of responsibility, especially in situations with multiple causes or intervening acts. **Intervening Acts (Novus Actus Interveniens):** • The case reaffirmed that an intervening act by a third party can break the chain of causation and shift legal responsibility. However, if the intervening act was a **reasonably foreseeable consequence of the original defendant's negligence**, it would generally *not* be considered an intervening act that breaks the chain of causation. In this case, March's own negligent and intoxicated driving was considered a concurrent cause of the accident, but it did not fully break the chain of causation from Stramare's initial negligence in parking the truck. **Apportionment of Liability:** • The court ultimately found both March and Stramare responsible for the accident. The case highlights how liability can be apportioned between parties when both have contributed to the harm suffered.
McKiernan v Manhire (1977) SASR 571	**FACTS**: P tripped over in hospital after being injured in a car accident caused by D's negligence. While the plaintiff was recovering in hospital, they tripped over a step and suffered further injury. **ISSUE**: Did D's negligence cause the further injury? Was D's negligence a 'necessary condition' of P's further harm
	• Tripping over could've happened anywhere. **That it happened in the hospital was irrelevant**. The initial injury merely secured P's presence where the subsequent injury occurred. • The '**but for' test was unsuccessful**. D's negligence was not a necessary condition of P's further harm.
Pyne v Wilkenfeld (1981) 26 SASR 441	**FACTS**: P was injured in a car accident and later stumbled on uneven ground because she was wearing a surgical collar to support her neck as a result of injuries sustained in the accident. **ISSUE**: Did D's negligence cause the further injury? Was D's negligence a 'necessary condition' of P's further harm
	• **Wearing the neck brace was due to D's negligence and wearing the neck brace is what made P trip**. The initial injury and treatment impaired P's capacity to take care for herself in the environment as she otherwise would have. • The '**but for' test was successful**. D's negligence was a necessary condition of P's further harm.

- **Medical cases** frequently pose very difficult issues of causation
- considered the problem of **how to assess causation** (for the purpose of attributing responsibility) when there are **multiple factors** present that are known to cause the type of injury suffered.
- something ***could*** have caused the P's condition is not the same thing as proving that it ***did*** cause it.
- Note that the law stated in Ellis is the common law because s3B(1)(b), CLA **excludes dust diseases and tobacco-related injury**.

	• Paul Cotton died from lung cancer in 2002. • During his working life he had been exposed to respirable asbestos fibres with two separate employers. • Between 1975 and 1978, he worked for SA, manufactured by Amaca. • Between 1990 and 2002 he worked for Millennium • Mr Cotton smoked on average between 15 and 20 cigarettes a day for more than 26 years • epidemiological evidence showing that tobacco and asbestos have a "a synergistic effect" • smoking was many times greater than the risk from exposure to asbestos. **ISSUE**: • **Causation in multi-factorial disease cases**: Can a plaintiff prove, on the balance of probabilities, that a defendant's negligence caused their lung cancer when they were exposed to both asbestos (due to negligence) and were a heavy smoker?

Amaca Pty Ltd v Ellis (2010) 240 CLR 111	**The Problem (Scientific vs. Legal Certainty):**
	• **Medical Uncertainty:** Science/medicine *couldn't* say definitively *why* Mr. Cotton got cancer; it wasn't a type exclusively linked to asbestos.
	• **Legal Necessity:** Courts *must* make a decision, even with scientific uncertainty (Dixon J: "reduce to legal certainty"). They can't just say "we don't know."
	Why "But For" Test Was Hard to Apply:
	• **"But For" Test:** Would cancer have occurred *but for* asbestos exposure?
	• **Conflicting Probabilities:** Medical evidence showed:
	  ○ Asbestos (with/without smoking) = **<23% probability** of causing cancer.
	  ○ Smoking alone = **>67% probability** of causing cancer.
	• **Challenge:** It wasn't "more probable than not" (the civil standard) that asbestos was a *necessary condition*.
	OUTCOME:
	• **Amaca's Appeal Allowed (Plaintiff Lost):** The High Court found in favour of the defendant (Amaca).
	• **Key Principle Reaffirmed:** It was **not shown to be more probable than not** that asbestos was a "cause" (a necessary condition) for Mr. Cotton's cancer.
	• **Crucial Takeaway:** Knowing that asbestos *can* cause cancer does **not** mean it *probably did* in this specific case, especially when another cause (smoking) had a much higher probability. The court requires a direct connection to be demonstrated on the balance of probabilities for the specific individual.

****INTERPRETING CLA S 5D(2)**	
STEPS FOR THIS SECTION: **1) "If but for not satisfied and** • 5D (2) is only relevant if the negligent act cannot be established as a necessary condition of the occurrence of harm. This means it is only relevant if the "but for" test is not satisfied. **2) if exceptional case then** • The next step is to determine **whether it is an exceptional case**. The CLA **does not define** an exceptional case, but the courts have stated it is likely to mean either there are **multiple possible causes** or the **negligence has significantly increased the risk of harm**. **3) 'whether or not and why'** • If it is an exceptional case the court must consider whether or not and why responsibility for the harm should be imposed on the negligent party. This is the statutory equivalent of the "common sense" test which required the court to consider whether the outcome of the "but for" test resulted in a **common-sense** outcome.	
Adeels Palace Pty Ltd v Moubarak; Adeels Palace Pty Ltd v Bou Najem (2009) 239 CLR 42	• Adeels Palace had a reception and restaurant business in NSW. • On NYE, a dispute erupted. D was involved in a fight was hit in the face, drawing blood. • He left the restaurant and returned with a gun. • He shot Bou, who escaped into the kitchen (the respondent in the second appeal, innocent) • The gunman returned to the restaurant.

	• He found the man who had struck him in the face the respondent in the first appeal – shot him in the stomach and then left the premises. • Both P alleged they suffered injury as a result of Adeels Palace's negligence in not providing any or any sufficient security **ISSUE**: Whether the failure of the restaurant to have proper security caused Ps to have been shot.
	***Contrast with *March v Stramare*:** • *March v Stramare* (common law) viewed causation as "ultimately a matter of common sense," implying that "value judgment" could play a role in factual causation. • **S5D(1) differs:** It intentionally separates factual causation (strict "but for") from policy considerations (scope of liability). This means "common sense" or value judgments are *not* to be used when determining *factual causation* under the Act. • **Statutory Primacy:** When a Civil Liability Act (CLA) applies, the *statutory provision* (s 5D) *must* be applied, not just the common law approach. 1. **Factual Causation (Section 5D(1)(a)):** • This is determined **strictly by the "but for" test**. • The plaintiff must prove, on the balance of probabilities (more likely than not), that the defendant's negligent act or omission was a **necessary condition** for the occurrence of the harm. • Unlike the common law approach in *March v Stramare*, "common sense" or value judgments are **not** to be used in determining this factual link. 2. **Scope of Liability (Section 5D(1)(b)):** • This is a separate, policy-driven inquiry. • Even if factual causation is established, the court must consider whether it is **appropriate for the scope of the negligent person's liability to extend to the harm so caused**. • This is where concepts like foreseeability of harm, remoteness of damage, and any potential intervening acts (which might break the chain of causation for legal purposes) are considered. This element allows for value judgments and policy factors. **Exceptional Cases (Section 5D(2)):** • This is a narrow exception for cases where factual causation ("but for") **cannot be established**, but the court considers that responsibility should still be imposed. • These are genuinely "exceptional" scenarios (e.g., certain "material contribution to risk" cases like *Fairchild v Glenhaven* where multiple exposures make "but for" impossible). It's not a general escape clause for difficult "but for" proofs. **In essence:** The CLA has legislated a more structured and rigorous approach to causation, clearly separating the factual inquiry ("but for") from the policy-based decision about the extent of legal responsibility. The "but for" test is now the **primary and necessary** test for factual causation in almost all cases.

FOR EXAM:

- 5D and expectational cases does not say what an expectational case looks like
  - then use ***Adeels*** to try and argue whether you think on the facts that it's an **expectational case**
  - when the **but for test fails due to multiple D or multiple circumstances** you can render it an expectational case
  - **USE THE COMMON LAW AND THIS CASE**
- **Facts don't have to be identical - just need multiple circumstances**

	• Ms. Strong, an amputee using crutches, slipped on a greasy chip on the floor of a sidewalk sales area at a shopping centre, suffering a spinal injury. • The area was under the care and control of Woolworths, who admitted they had no system for periodic inspection and cleaning. **ISSUE**: • whether Ms. Strong could prove that Woolworths' negligence (lack of a cleaning system) was a "necessary condition" of her harm. **OUTCOME**: • There was no direct evidence of how long the chip had been on the floor. • The High Court, by majority, found that **on the balance of probabilities**, the chip had been on the floor long **enough for a reasonable cleaning system to have detected and removed** it. • Therefore, Woolworths' negligence was found to be a necessary condition of her fall.
Strong v Woolworths Ltd (2012) 246 CLR 182	**The CLA's Two-Part Causation Test (s 5D(1)):** • The CLA formally divides causation into **two separate and distinct elements**, moving away from the "common sense" approach used at common law (e.g., *March v Stramare*). **a) Factual Causation (s 5D(1)(a)):** ○ Determined **strictly** by the **"but for" test**: "Would the harm have occurred *but for* the defendant's negligent act/omission?" ○ The defendant's negligence must be a **"necessary condition"** of the harm. ○ **Important Nuance:** "Necessary condition" does **NOT** mean the *sole* necessary condition. A defendant's conduct can be a necessary condition if it completes a **"jointly sufficient set of conditions"** for the harm. ○ **No independent role for "material contribution" here:** Concepts like "material contribution" or "increase in risk" **do not** have an independent role in satisfying s 5D(1)(a). While many past common law "material contribution" scenarios *might* still satisfy the "necessary condition" test, the *terminology* itself isn't applied. **b) Scope of Liability (s 5D(1)(b)):** ○ This is a **separate policy judgment** where the court decides if it's "appropriate" to extend the defendant's liability to the harm. ○ This element explicitly addresses policy considerations, remoteness, and whether any intervening acts break legal responsibility. **Why "But For" Was Problematic / How it Applied in *Strong*:** • **In *Strong*:** Woolworths' system should have involved inspections every 20 minutes. If the chip had been on the floor for longer than 20 minutes, then a proper system *would have* led to its removal, and the fall would have been prevented. Thus, the absence of reasonable care *was* a necessary condition ("but for" satisfied). • **Possibilities Not Enough:** Merely showing that proper care *might* have prevented the harm is insufficient; it must be shown that it *probably would have*. **Exceptional Cases (s 5D(2)):** • **When it Applies:** Only when factual causation (the "but for" test) **cannot be established**. • **Purpose:** Allows for a finding of causation in truly **"exceptional cases"** where negligence cannot be proven as a necessary condition, but "established principles" warrant imposing responsibility. • **Ipp Report Categories (Examples):** Cases involving **cumulative factors where individual contributions are unascertainable** (e.g., *Fairchild* - multiple asbestos exposures), or where **negligence materially increased the risk but scientific proof of cause is impossible**. • **Limited Scope for "Material Contribution":** Only in *these very narrow exceptional cases* might "material contribution" or "increase of risk" concepts be relevant to establish causation, *if* consistent with established principles. • **In *Strong*:** The court concluded that **even if factual causation was hard to prov**e, this case was **NOT** an "exceptional case" under s 5D(2).
Failure to Warn of a Risk	
• CLA, s 5D(3) and (4) relate specifically to **exceptional cases** in which the BOD is a **failure to warn**	

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- ***Rogers v Whitaker***: Duty to warn established
- How can we determine what the P would have done had she or he received the warning?
  - **Subjective approach** (Common Law & CLA)– what the P would have done if she had received the warning
  - **Objective approach** – what the reasonable person would have done if she received the warning.

</td></tr>
<tr><td rowspan="2">***Rosenberg v Percival*** [2001] HCA 18</td><td>

- The P was a lecturer in nursing with a PhD in nursing.
- The D was a surgeon and recommended surgery to restore a problem with P's teeth.
- Both parties agreed that **the D did not advise P of either general or specific risks of her getting a temporomandibular joint disorder** from the procedure.
- **Warning was given of risks of anesthesia**.
- After the surgery P was left with chronic pain, is unable to eat hard food and her ability to work was reduced.

ISSUE:
Did that failure to warn her caused the joint disorder she's suffering? What would P have done if she had received the warning?

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The Subjective Test (s 5D(3)(a) CLA & Common Law):

- **Patient-Centric:** Both the Civil Liability Act (CLA, specifically s 5D(3)(a)) and common law are consistent: they apply a **subjective test**.
- **Focus on *This Patient*:** The court asks what *this particular patient* (the plaintiff) would have done, not what a "reasonable person" would have done.
- **Hypothetical Questions:** The court is asking two related hypothetical questions:
  - What would the patient have *decided*?
  - What would the patient *have done*?
  - The answer to the first provides the answer to the second.

Credibility and "Exceptional Cases" (When Subjective Evidence is Doubted):

- **Direct Evidence is Key:** If the court accepts the plaintiff's direct evidence of what they would have done, that usually resolves the matter.
- **Challenging Credibility:** However, if there's *no direct evidence*, or if the plaintiff's testimony is **not credible**, the court *may infer* their hypothetical decision from objective facts.
- **Factors for Assessing Credibility:**
  - **General Credibility:** If the judge finds the plaintiff to have poor general credibility.
  - **Objective Facts:** Inferences are drawn from objective facts, combined with the court's assessment of the plaintiff's general character and personality (e.g., their attitude/conduct *at the time* the breach occurred, not just their retrospective view).
  - **Warning from High Court:** The High Court (e.g., in *Chappel v Hart*, *Rosenberg*) has repeatedly warned about the dangers of blindly accepting a plaintiff's retrospective self-serving evidence, as "human nature" leads people to believe they would have avoided harm if warned.

Admissible Evidence (s 5D(3)(b) CLA):

- **No Retrospective Evidence (Generally):** The law generally does *not* treat a plaintiff's retrospective statements about what they *would have done* as admissible evidence for establishing causation. This is because such statements are inherently self-serving and unreliable after the harm has occurred.

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	• **Admissible Evidence (Prior Statements):** The main admissible evidence favourable to the plaintiff are **statements made *prior* to suffering the injury** (e.g., documented concerns, prior discussions). This is because pre-injury statements are less likely to be influenced by the outcome. • **Outcome Example (Similar to *Wallace v Kam*):** • In the specific scenario described, the plaintiff **failed the "but for" test** because the court found she **would *not* have heeded the warning** and *would have* undergone the surgery anyway. • **Reasons for rejecting plaintiff's evidence/finding against P:** ○ It was a common procedure. ○ The plaintiff's testimony was found to lack credibility. ○ Her willingness to undergo general anesthesia suggested a lower concern for risks. ○ Her profession (a nurse) implied a greater knowledge of medical risks.
**** KEY STEPS FOR THE CAUSATION (FAILURE TO WARN)**	
• **If failure to warn** (e.g. ***Rosenberg***): ○ Risk eventuates and causes **physical harm** + ○ Had warning been given, risk would have been avoided (subj, ***Rosenberg***) + ○ s5D(3), CLA restrictions on admissibility of P's evidence about what s/he would have done.	
Chappel v Hart (1998) 195 CLR 232	• The P suffered from a deteriorating condition of the throat - would have eventually caused her to lose her voice if left untreated. • During an operation to correct the condition • Infection set in and she lost her voice. • As the risk of perforation was inherent, the operation was performed not negligently. • The case then turned-on failure to warn. • The D doctor argued that there was no causal connection between his failure to warn of the risk of this complication and the P's damage, and that the P's loss was a loss of chance. • Alternatively, the infection was a novus actus interveniens **ISSUE**: whether a causal connection exists between a D's failure to warn of a risk of injury and the subsequent suffering of injury by the P
	1. P: need to prove a causal connection will exist between the failure and the injury if it is probable that the **P would have acted on the warning and desisted from pursuing the type of activity** or course of conduct involved **D:** needs to prove evidence which indicates that the **P would not have acted on the warning because of personal inclination** **2. For D: no causal connection will exist** a. if the P would have persisted with the same course of action in comparable **circumstances even if a warning had been given** b. if every alternative means of achieving the P's goal gave rise to an equal or greater probability of the same risk of injury and **the P would probably have attempted to achieve that goal notwithstanding the warning** c. where the P suffered injury at some other place or some other time **unless the change of place or time increased the risk of injury.** d. if the **eventuation of the risk is so statistically improbable as not to be fairly attributable to the D's omission**. **3.** the onus of proving that the failure to warn was **causally connected with the P's harm lies on the P.** ○ once the **P proves that the D BOD to warn of a risk and that the risk eventuated and caused harm to the P**, the P has made out a prima facie case of causal connection - **onus then rests on the D**

Wallace v Kam (2013) 250 CLR 375	• P was NOT warned of TWO inherent risks in proposed medical treatment for a condition of his lumbar spine 1. Bilateral femoral neurapraxia (temporary local damage to his nerves) 2. 1 in 20 chance of permanent and catastrophic paralysis • P suffered the first risk but the second risk did NOT eventuate • P argued that liability should arise from the failure to warn of all risks ○ If he had been warned - he would NOT have had the surgery and thus, would NOT have had the surgery **ISSUE**: Whether failure to warn about some other risk that did NOT eventuate result in liability
	• causation (specifically, the "scope of liability" limb under the CLA) in failure-to-warn cases requires a direct link between the **unwarned risk that eventuated** and the patient's **unwillingness to accept that specific risk**. It's not enough to show that *any* unwarned risk would have led them to avoid the procedure if the actual injury was one they would have accepted. • 简单来说如果被告知风险还能接受的话，手术后发生了没被告知的另一风险，被告方也不会承担责任，因为**原告本来就愿意接受风险**
STEP 2: NOVUS ACTUS INTERVIENS	
• **superseding cause** or **novus actus interveniens** (new intervening cause). • Is there an intervening act? ○ Intervener can be the P ○ Intervener can be a 3rd person ○ Intervener cannot be the D	
Voluntary Human Act with Knowledge of the Consequences - Intervening Act before the Injury/Damage	
Chapman v Hearse (1961) 106 CLR 11 *Foreseeable Intervention does not break the chain of causation*	• Chapman negligently drove a car, collided with other car, and was thrown unconscious on the roadside. • Dr. Cherry drove by and stopped to help rescue Chapman, but unfortunately hit and killed by another car, driven by Hearse. • Trial judge held Chapman responsible for 1/4 of the damages and Chapman appealed. • Chapman argued that Hearse was an intervening act and broke the chain of causation. **ISSUE**: Whether Chapman's negligence was a cause of Dr Cherry's death
	• **Chapman's main argument**: Hearse's subsequent negligent driving constituted a novus actus interveniens, which should break the chain of causation between Chapman's initial negligent driving and Dr. Cherry's death. Essentially, Chapman contended that Hearse's actions were an independent, superseding cause, making Chapman no longer liable. • The High Court **rejected Chapman's argument** that **Hearse's negligence was a *novus actus interveniens*** that severed the chain of causation. The Court held that: 1. **Reasonable Foreseeability of the Intervening Act:** An intervening act, even if negligent or wrongful, will **not break the chain of causation if it was reasonably foreseeable** as a consequence of the initial negligent act. 2. **"Not Unlikely to Follow":** The Court held that it was **reasonably foreseeable** that if a person negligently causes a car crash on a busy, dark, and wet highway, others (including rescuers) would come to their aid, and those rescuers might then be exposed to further risks from other negligent drivers. It wasn't necessary to foresee the *precise manner* in which the injury occurred, only that a "consequence of the same general character" was "not unlikely to follow." 3. **No "Clean Dividing Line":** The Court effectively found that no "clean dividing line" could be drawn to separate Chapman's initial negligence entirely from Dr. Cherry's death. Hearse's negligence was a foreseeable continuation of the dangerous situation created by Chapman. 4. **Contribution, Not Exoneration 免除:** Because Hearse's negligence was a foreseeable consequence, Chapman remained a partial cause of Dr. Cherry's death, leading to an **apportionment of liability** between Chapman and Hearse. **Significance regarding *Novus Actus Interveniens*:**

	• **High Bar for Breaking Causation:** *Chapman v Hearse* established a high threshold for what constitutes a *novus actus interveniens* sufficient to break the chain of causation. A subsequent negligent act will *not* break the chain if it is within the realm of reasonable foreseeability as a consequence of the original negligence. • **Foreseeable Risks of Rescue:** It specifically affirmed the principle that a negligent party can be liable for injuries sustained by a rescuer, as the intervention of a rescuer (and the risks they face) is generally considered a foreseeable consequence of creating a perilous situation.
Haber v Walker [1963] VR 339	• The P's husband was injured in a car accident that resulted from the D's negligence. • He suffered severe brain damage and developed serious mental health issues and ultimately suicided. • His wife argued the D caused his suicide • "The negligent driver argued in part that the **suicide represented a novus actus, that is, it was a voluntary act that severed the chain of causation** between the death and the driver's negligence." **ISSUE**: Whether the deceased's act of suicide could **properly be regarded as a voluntary act,** so as to 'break the chain of causation' between injury and death (new intervening cause) **OUTCOME**: The Supreme Court of Victoria (and subsequently the Full Court) found in favour of Mrs. Haber, holding that the suicide **did not break the chain of causation.**
	3 main principles 1. A wrongful act / omission **cannot** ordinarily be held to have been cause of subsequent harm unless that **harm would NOT have occurred without the act / omission** having previously occurred with such of its incidents as rendered it wrongful ***(if satisfied, then 2)*** 2. the act / omission is regarded to as a cause of the harm **unless there intervenes between the act / omission and the harm** an occurrence which is necessary for the production of the harm and is sufficient in law to sever the casual connexion (***if satisfied, then 3)*** 3. 'The intervening occurrence, **must ordinarily be either**: (a) human action that is properly to be regarded as **voluntary**, OR (b) a **causally independent event** the conjunction of which with the wrongful act or omission is by ordinary standards so extremely unlikely as to be termed a coincidence.'
SUBSEQUENT NEGLIGENT CONDUCT – OCCURS AFTER THE ORIGINAL INJURY	
Mahony v J Kruschich Demolitions (1985) 156 CLR 522	• The employer was negligent and caused **injury to its employee**. • The employee then went to a **medical practitioner who treated him negligently causing a worsening** of his injury. • The employer argued the negligence of the medical practitioner was an intervening act **ISSUE**: whether the employer is responsible for the further injuries that occurred because of the medical practitioner's negligence. **OUTCOME**: Mahony was able to recover damages from J Kruschich Demolitions for the full extent of his injuries, including the aggravation caused by the negligent medical treatment.
	• when subsequent medical negligence will (and won't) break the chain of causation. It **sets a high bar for such an intervention** to be considered a *novus actus interveniens*. • Only truly **extraordinary or unreasonable medical treatment would sever the causal link**.
State Rail of NSW v Chu [2008]	• The P fell while **walking downstairs** at the railway station in Sydenham and fractured her left ankle. • The cause of the accident was the **hazardous condition of the stairs**. • Five weeks after the accident and at a time when the P's leg was still in plaster, a man, who had been taking the P around Sydney and speaking English with her, invited her to his home. • He took her into his bedroom and **sexually and physically assaulted her**. • It was many hours before she was able to leave.

	ISSUE: The question is not whether State Rail is responsible for her leg injury (which they are) but whether they are responsible for the sexual assault. **OUTCOME**: The court answered this question with a no. The sexual assault by the 3rd party was an intervening act and State Rail did not cause the further injuries to the P.
STEP 3 – SCOPE OF LIABILITY – TEST OF REMOTENESS	

COMMON LAW:
• The test of remoteness (common-law) – Reasonable foreseeability of damage:
  ○ Kind of damage must be foreseeable
  ○ Manner damage occurred does not need to be foreseeable
  ○ ***Eggshell rule*** applies	

CLA: **S 5D (1)** A determination that negligence caused particular harm comprises the following elements **(a)** ... **(b)** that it is **appropriate** for the scope of the negligent person's **liability** to **extend to the harm** so caused **(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. ➔ **s5D(1)(b) CLA "appropriate" + s5D(4) CLA "whether or not and why"**	
1ST step for remoteness - Foreseeability of damage • Duty – we are concerned with the RF of the class of P. • Breach – we are concerned with the RF of risk of injury. • **Causation - Remoteness - RF of the damage - foreseeability of the kind of damage/harm suffered by the plaintiff**. ➔ "The concept of foreseeability operates in different ways at various stages in the proof of negligence, 'progressively declining from the general to the particular."	
Overseas Tankship (UK) Ltd v Morts Dock & Engineering Co Ltd (No 1) [1961] 1 AC 388 原告是 wharf owner	• the D negligently **leaked oil into the water** when it was parked by the wharf of the P. • The P consider whether the oil would likely be flammable and was informed that it would be **very hard for the oil to catch alight**. • They continued with welding work, a **spark likely lit a rag in the water** causing a fire that burnt the P's wharf. **ISSUE**: Whether the "direct consequences" test should be applied
	In the present case, it was not RF that the oil would catch alight as the **flashpoint of this type of oil was very high**, meaning it could not normally be set alight while spread on a large body of cold water. D is NOT liable for the damages as they are too remote **可预见性判断：** 法院认为，在当时的情况下，一名**理性的工程师**不会预见到炉用燃料油泄漏到水面会引发**火灾**。火灾这种损害类型被认为**不可合理预见**
Overseas Tankship (UK) Ltd v Miller Steamship Co Pty Ltd (The "Wagon Mound" (No 2)) [1967] 1 AC 617	**ISSUE**: Whether the fire and damage to the wharf was RF (note that the trial judge found that damage from the fire was not foreseeable) **Trial judge**: the damage was "**NOT RF by those for whose acts the D would be responsible"**
	OUTCOME: • **Risk of fire would have been present to the mind** of a reasonable man in the position of the ship's engineer. A properly trained and alert chief engineer would have realised that there was a real risk

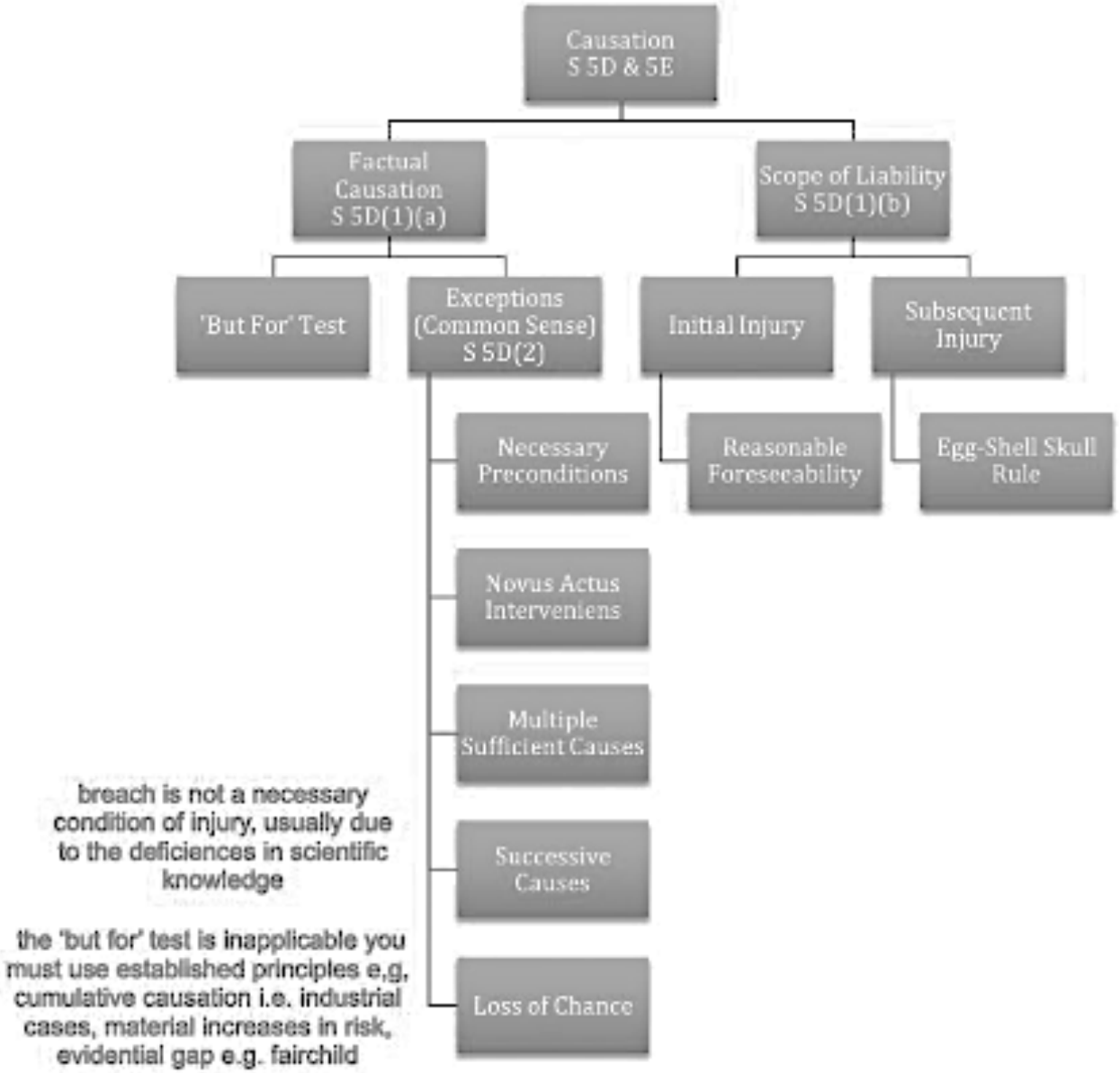
原告是两条船的主人	• 'If a real risk is one which would occur to the **mind** of a **reasonable man in the position of the D's** servant and which he would not brush aside as **far-fetched**, and if the criterion is to be what that reasonable man would have **done** in the circumstances, **then surely he would not neglect such a risk** if action to eliminate it presented no difficulty, involved no disadvantage and required no expense.' • low probability but high impact risks **可预见性判断：** 法院认为，虽然起火的**概率很低**，但并非可以完全忽略。一个**谨慎的首席工程师**应该预见到，即使是微小的火灾风险，如果一旦发生，后果将是灾难性的。考虑到防止燃油泄漏所付出的努力或成本极小，而潜在损害巨大，那么这个"微小但真实"的风险就应该被预见到并加以防范。
2nd & 3rd step for remoteness - Kind of injury and manner of its occurrence • The injury must be of a kind (or class or character) that is **reasonably foreseeable.** • **Manner does not need to be foreseeable** ○ When the **manner/cause of injury was UNFORSEEABLE, but the injury was FORESEEABLE** = the **D will still be held liable** (a D is liable for ALL foreseeable consequences of an accident)	
Hughes v Lord Advocate [1963] AC 837	• Lamps were left surrounding a work site with an open manhole. • An eight-year-old boy picked up a lamp and was lowered into the hole by his friends. • The lamp exploded due to gases in the hole and the boy was severely burnt. • The **D argued it was not RF that the boy would be lowered into the manhole**. **ISSUE**: Whether the D is liable for an injury where the **manner/cause was UNFORESEEABLE, but the injury was FORESEEABLE**
	Lord Reid's Reasoning: • The plaintiff's burn injuries were foreseeable. • It was foreseeable that a boy entering the manhole could be burned if a lamp broke and fell, likely causing serious burns. • Liability can only be escaped if the *type* of damage differs in kind from what was foreseeable. • The injuries did not differ in kind from foreseeable injuries, only perhaps in degree. • The defendant's argument that the lamp behaved in an "unpredictable manner" (exploding due to paraffin creating an explosive mixture) and was thus "unforeseeable" was rejected. • Reference to ***Glasgow Corpn v Muir*** (**where unforeseeable *way* of accident happening excluded liability**) was not sufficient defence here. • **Conclusion:** An accident caused by a known source of danger, even if in an unforeseen way, does not provide a defence. **Lord Pearce's Reasoning:** • The defendant is liable for all foreseeable consequences of their negligence. • **If an accident is of a *different type and kind* from what was foreseeable, the defendant is not liable** (***Wagon Mound*** **principle**). • However, demanding too much precision in foreseeability would be unfair to the plaintiff. • In this case, the explosion did *not* create an accident and damage of a *different type* from what was foreseeable. • The accident was considered a "variant of the foreseeable" and "within the risk created by the negligence." • The resulting damage, though severe, was not *greater than* or *different in kind* from what might have resulted from a more "normal conflagration" from a spilled lamp in the hole. **OUTCOME:** • **The foreseeable risk was that a child would be injured by falling in the hole or being burned by a lamp (or a combination). The injury that materialized fell within this description, despite involving an unanticipated explosion and unexpected severity.**
The injury fell within the broad description of the risk	
Jolley v Sutton London Borough	• The Council left an abandoned boat in on the grounds of a block of flats, and, foreseeing the risk of harm, **had supports put in place to prevent it from falling.**

Council [2000] 3 All ER 409	• A 14 year old boy attempted to repair the boat, in the course of which **it fell on him, crushing his spine**. **ISSUE**: Whether the wider risk (which would include the accident which actually happened) was RF?
	General Description of Injury: What's foreseen is not the precise injury, but rather an injury of a **general description** or "genus." This description is based on the nature of the risk that should have been foreseen. • **Contrast with *Wagon Mound (No 1)*:** In *Wagon Mound (No 1)*, damage by burning was **not** considered a foreseeable description of damage. • **Comparison to *Hughes v Lord Advocate*:** In *Hughes v Lord Advocate*, the actual injury was within a foreseeable description. **"Reasonably Foreseeable" is Not Fixed:** "Reasonably foreseeable" isn't a fixed point on a probability scale. Other factors, like the cost or practicality of avoiding the risk, are considered.in the acadmeis • ***Wagon Mound (No 2)*** highlighted that a duty to eliminate risk arises when the probability of injury justifies taking steps, considering undue cost or abstaining from reasonable activity. • ***Bolton v Stone*** demonstrated a risk so low that a reasonable person wouldn't need to take such steps. **Application to the Present Case:** • The council conceded they should have removed the boat, which implies acknowledging a risk of **minor injuries** to children from rotten planking. • Removing the boat would have incurred **no additional expense** to eliminate this wider risk, as it already fell within the council's duty. • Liability was established due to three reasons: 1. No extra trouble for the defendant to avoid the injury. 2. Defendants are liable for even relatively small risks of a different kind. 3. A child's ingenuity in finding unexpected ways to cause themselves harm should not be underestimated. • The **broad description of the risk** was that children would "meddle with the boat at the risk of some physical injury," and the actual injury fell within this description. **Outcome:** The appeal was allowed.
3rd step for remoteness - The Eggshell rule applies ***What is the eggshell rule?*** ➢ D must take their victims as they find them. It does not refer only to physical or mental vulnerability but also surrounding context. ➢ Application of this rule: ***Dulieu v White & Sons*** [1901] 2 KB 669 (at 679) ○ 'If a man is negligently run over or otherwise negligently injured in his body, it is no answer to the sufferer's claim for damages that he would have suffered less injury, or no injury at all, if he had not had an unusually thin skull or an unusually weak heart.'	
Stephenson v Waite Tileman Ltd [1973] 1 NZLR 152	• Appellant employed by respondent as a steeplejack • During his employment, he was resetting the wire rope system • rope was very rusty and was starting to de-strand itself, producing little snags • Whilst appellant working, rope snapped and received a cut to his right hand • After 2 days - admitted to hospital - although swelling subsided after a short time, **continues to suffer from lack of concentration, headaches and loss of balance** **ISSUE**: Whether the eggshell rule should be applied **OUTCOME**: Appeal Allowed
	Conclusions in relation to 'egg-shell skull rule':

	1. In cases of damage by physical injury to the person the principles imposing liability for consequences flowing from the pre-existing special susceptibility 敏感性 of the victim and/or from new risk or susceptibility created by the initial injury remain part of our law. ▪ I.e., the egg-shell skull rule remains part of the law. 2. In such cases questions of **<u>foreseeability should be limited to the initial injury</u>**. The tribunal of fact must decide whether that injury is of a kind, type or character which the D ought reasonably to have foreseen as a risk. 3. If the P establishes that the ***<u>initial injury was within a RF kind, type or character or injury, then the necessary link between the ultimate consequences of the initial injury and the negligence of the D can be forged simply as one of cause and effect.</u>*** ▪ that is, there is an adequate relationship between the initial injury and the ultimate consequence **Applying to the present case:** • The **initial injury** was RF by the D • The case contains **special susceptibility** on the part of the D (infection entering the wound) OR • The case is a **normal reaction to a new risk** (risk of infection / risk of functional disorder) **created by the initial risk** • It may be a mixture of both.
Smith v Leech Brain & Co Ltd [1962] 2 QB 405, [163]	• the P was employed by the D as a galvaniser. • As a result of the **D's negligence in failing to provide adequate protective equipment**, the P was struck on the lower lip by a piece of molten metal causing a burn. • The burn was the promoting agent of cancer which developed at the site of the burn. • The cancer developed in tissues which already had a pre-malignant condition.
	Lord Parker: 'the test is **not whether these employers could reasonably have foreseen that a burn would cause cancer and that he would die.** The question is **<u>whether those employers could RF the type of injury he suffered, namely, the burn'</u>**.
Nader v Urban Transit Authority of NSW (1985) 2 NSWLR 501	• the P was a 10-year-old boy who struck his head on a bus stop pole while alighting from a slowly moving bus. • He developed a rare psychological condition known as Ganser Syndrome. • The D argued that the illness resulted from his family's response to the accident.
	<u>The rule of the egg shell skull cases is not confined to the physical or constitutional characteristics of the particular individual</u>
Kavanagh v Akhtar (1998) 45 NSWLR 588	• the P was seriously injured due to the D's negligence. • The P was an Muslim woman and the injury caused her significant discomfort in caring for and brushing her long hair. • Contrary to her husband's cultural and religious beliefs, she cut her hair without first consulting him. • This caused a break-up of the marriage, and the P suffered a serious psychiatric illness as a consequence - "husband's reaction would have been well-known reaction in the Islamic community"
	• Court held that the P was entitled to recover damages for the psych illness. • Kind of damage was RF • "It was perfectly foreseeable that a severe and continuing shoulder injury would affect the P's capacity to attend to matters of personal hygiene...it was equally foreseeable that it would put a strain on martial relations...That such strain might lead to a severe breakdown of that marital relationship with extreme psychiatric consequences for a vulnerable P was also foreseeable. The fact that the breakdown occurred in consequence of a perhaps unforeseeable step taken by the D (cutting her hair) or the perhaps unforeseeable reaction of her husband is irrelevant in the light of cases such as ***Hughes*** and ***Nader***, so long as psychiatric injury is itself regarded as a foreseeable consequence of the physical injury inflicted on the respondent."
Mt Isa Mines v Pusey (1970) 125 CLR 383	• P went to the aid of a workmate who was electrocuted - P suffered schizophrenia as a result
	1. Note that it was foreseeable that the P would have suffered some form of nervous shock as a consequence, but the specific condition (schizophrenia) was not foreseeable ○ **HELD**: A P is entitled to recover damages for nervous shock on the basis that it was sufficient if the particular condition came within a class or kind of injury that could be foreseen 2. This ensures: The damage suffered is NOT different from that which was foreseeable - The test for liability is foreseeability of injury

	3. Walsh J (at 413): '"Wagon Mound" [No 1] express approval was given in King v Phillips that "there can be no doubt since Bourhill v Young that the test of liability for shock is foreseeability of injury by shock". Thus injury by shock is treated as a distinct "kind" or class of damage...

CAUSATION OVERVIEW



X. DEFENCES

- P who sues in negligence bears onus of proof
- Success is dependent upon whether the D can raise a defence
- **Complete defence** – ends all liability of the D
- **Partial defence** – enables apportionment of liability between P and D

***KEY STEPS OF DEFENCE: OVERVIEW

1. **Contributory Negligence** (ameliorated by apportionment legislation) - Law Reform (Miscellaneous Provisions) Act 1965 (NSW))
   - Failure to take care for own safety **CLA s5R** = 'reasonable person" (obj). +
   - Causal connection between injury and negligence (***Froom***)

   Apportionment
   - the departure from the standard of the reasonable person (***Pennington***)
   - 'causal potency' – contribution to the injury (***Podrebersek***)

2. **Voluntary Assumption of Risk (complete defence)**

   Obvious Risk
   - Knowledge of the 'type and kind' of risk (**CLA s 5G**) +
   - Consented to the 'type and kind' of risk (if not express might be inferred from conduct) (***Joyce***)

   Non-obvious risk = Must know and consent to specific risk

3. **Statutory Defence (complete defence)**
   - **CLA s 5F, s5L, s 5K** = materialisation of 'obvious risk' while engaging in dangerous recreational activity (***Fallas, Falvo, Vreman***)

➔ If the facts permit, D can argue all 3 defences

1. CONTRIBUTORY NEGLIGENCE

A failure by the P to take reasonable care for his or her own safety that contributes to his or her lungs

The following have been held to amount to contributory negligence:
- Failing to wear a seatbelt. (***Froom v Butcher*** [1976] 1 QB 286 (CA) 22)
- Accepting a ride from an obviously intoxicated driver.(***Insurance Commissioner v Joyce*** (1948) 77 CLR 397; [1948] HCA 17)
- A passenger in a car driven by a person under the influence of drugs (***Bevan v Coolahan*** [2019] NSWCA)
- Failing to check for oncoming vehicles before crossing the road.(***Taheer v Australian Associated Motor Insurers Ltd*** [2010])
- Clinging to the roof rack of a taxi as it sped away. (***Asim v Penrose*** [2010] NSWCA 366)
- Giving control of one's motor vehicle to a child. (***Zanner v Zanner*** [2010] NSWCA 343)

STEP 1 - AN OBJECTIVE STANDARD - TAKING REASONABLE CARE FOR YOUR OWN SAFETY

- **Objective standard**: how much care would the reasonable person in the P's position have taken and did the P take less care?
  - **Consideration of CLA S 5R (does not alter common law)**
- The principles referred to in s 5R(1) are those in s 5B.= BOD
  - including the need to first identify the relevant risk,
  - As with the standard of care that the D is required to achieve,
  - the standard against which the P is judged is objective

***CLA* S 5R**	**5R Standard of contributory negligence** (1) The principles that are applicable in determining whether a person has been negligent also apply in determining whether the person who suffered harm has been **contributorily negligent in failing to take precautions against the risk of that harm**. (2) For that purpose— (a) the standard of care required of the person who suffered harm is that of a **reasonable person in the position of that person**, and (b) the matter is to be determined **on the basis of what that person knew or ought** to have known at the time.

Need to take into account:

1. **Child**: ***Doubleday v Kelly*** [2005] - held that the adequacy of the P's behaviour had to be assessed by referenced to the standard of the **reasonable child of the same age**.
2. **Special skills or expertise**: ***Wingecarribee v Lehman Brothers*** (2012) - held that local councils who had sued their investment adviser were not contributorily negligent:
    - If a professional recommends or advises a client to take ... a particular step or decision based on the professional's expertise, ordinarily the client will not be equipped to analyse, and certainly not with the same degree of expertise... [**The advisor] knew that [the] local council lacked financial sophistication**
3. **Physical and mental disabilities**: ***Goldsmith v Bisset (No 3)*** [2015] NSWSC 634 - A 9-years-old child's intellectual disability was taken into account. The test is related to a "**child of similar age, intelligence and experience**".
4. **Physical disabilities accompanying old age**: ***Smith v Zhang*** [2012] NSWCA 142 - P was 83-year-old with limited sight Court said that even such Ps should first look before trying to cross the road.
5. **Adults with intellectual disabilities:**
   Russell v Rail Infrastructure Corporation [2007] NSWSC 402 thought the standard should be modified for a person with a "**recognised degree of intellectual incapacity**".
   Town of Port Headland v Hodder (No 2) (2012) - P **had serious physical disabilities and serious intellectual disabilities - being deaf and virtually blind**. The P dived off at the shallow end of swimming pool hitting his head causing quadriplegia.
    - COURT held that the standard COULD NOT be modified for intellectual disabilities. But was modified in relation to physical disabilities.

Contributory negligence and the DOC:	• 'the **duty that [P] owes is not just to look out for himself, but not to act** in a way **which may put him at risk**, in the knowledge that society may come under obligations of various kinds to him if the risk is realized.'	***Vairy v Wyong Shire Council*** (2005) 223 CLR 422 at [220];
Inconvenience of taking precautions:	• The P was injured when he jumped off a train as it was leaving a platform. No warning was given that the train was about to depart. • The HC held the question **whether the plaintiff's conduct was unreasonable was to be answered in the light of the inconvenience had he remained on the train.** ○ E.g., a reasonable person would probably use a nearby pedestrian crossing to cross the road, **but not if the nearest crossing is five kilometres away.**	***Caterson v Commissioner for Railways*** (1973) 128 CLR 99
The 'agony of the moment' principle	• if the P was injured when confronted with an emergency caused by the D's negligence, the standard of the reasonable person will be adjusted to accommodate the fact that **the reasonable person lacked the time for calm reflection as to how to proceed.** • Ps will not be penalised simply because they made a poor decision in the heat of the moment: (both case predated CLA)	
	• the HC held that as the P **only had a split second to decide** whether or not to remain on the train; his conduct **was not unreasonable** even though it exposed himself to risk of injury. • P released his seatbelt and moved away **from the point of impact;** the removal of the seatbelt resulted in more serious injuries. ○ HELD**: P was not contributorily negligent**. The misjudgement was a decision taken in the agony of the moment.	***Caterson v Commissioner for Railways*** ***Avram v Gusakoski*** (2006)
Employees and employers	• But if a worker **trained in safety procedures** without excuse does not follow procedures, this may warrant a substantial reduction for contributory negligence. • But otherwise, where employees have no choice but to comply with the employer's system of work	***Kennedy v Queensland Alumina Ltd*** [2015] QSC 317 ***Williams v Metcash Trading Ltd*** [2019] NSWCA 9

Anticipating the negligence of others:	• The **reasonable person will take precautions to guard** against the risk of negligence of others.	
	• 'a prudent man will guard against the possible negligence of others when experience shows such negligence to be common'. • 'there is no general rule that in all circumstances a driver can rely upon the performance by others of their duties.'	***Grant v Sun Shipping Co Ltd*** [1948] ***Sibley v Kais*** (1967) 118 CLR 424
Contributory negligence and a plaintiff's intentional conduct:	• COA upheld the reduction of 90-100% of the P's damages for contributory negligence where the D taxi driver when threatened with a knife in an attempted robbery drove off causing the P to be injured	***SW v Khaja*** [2020] NSWCA 128
Consolidated Broken Hill v Edwards [2005] NSWCA 380	• A cyclist tried to cycle across a narrow space on a bridge that carried only a railway spur line. • His jumper caught on a protrusion from a rail wagon and he fell into a creek bed and became paraplegic. • The bridge was on the defendant's land who had not taken any steps to prevent the public from having access to the land or the bridge. **ISSUE**: Was the cyclist taking reasonable care for his safety in the position that he was in?	
	• P argued that since there was sign and the D had not fenced his land the P did not know the danger. • D - a more compelling argument the court accepted - is that the **cyclist could see the bridge was only for rail wagons and by choosing to cross he did not take reasonable care.**	
Hatch v Alice Springs Town Council (1989) 1000 FLR 56	• The P broke her leg when she stumbled over a hole in a footbridge that had been dug by the D's employees that morning. • She was not looking at the footpath in front of her and was carrying a shopping bag in her arms that obscured her view. **ISSUE**: • Was the cyclist taking reasonable care for his safety in the position that he was in?	
	• P argued that since she could not have known there was hole in the footbridge the P did not know the danger • D counter argument - **the court accepted** - was that by **carrying a large shopping bag** so that she **could not see the ground in front of her was a failure to take reasonable care for her own safety.**	
STEP 2 – CASUAL RELATIONSHIP BETWEEN CONTRIBUTORY NEGLIGENCE & DAMAGE		
• The P's contributory negligence must be causally related to the P's damage.		
Jones v Livox Quarries Ltd [1952] 2 QB 608	• The P was riding on the towbar of a truck. Another vehicle, due to the negligence of its driver, ran into the back of the P's vehicle. The P was crushed between the two vehicles.	
	• P argued that he was not contributorily negligent = main risks from riding on the back of the vehicle were falling off or getting tangled up with its moving parts. • **COA disagreed, finding that the P's damage was within the scope of the risk generated by his contributory negligence.** **'His dangerous position on the vehicle was one of the causes of his damage'**	
• The P's contributory negligence need not be a cause of the accident, it is **sufficient that it be causally related in the required sense to his/her damage**.		
Froom v Butcher [1976] 1 QB 286 (CA).	• The P was in an accident that was caused entirely by a negligent driver. The P, however, did not wear a seatbelt and his injuries were much more serious as a result.	
	• 'The question is not what the cause of the accident was. **It is rather what was the cause of the damage**.' • 'The accident is caused by the bad driving. The damage is caused in part by the bad driving of the D, and in part by the failure of the P to wear a seat belt. If the P was to blame in not wearing a seat belt, the damage is in part the result of his own fault. He must bear some share in the responsibility for the damage.'	
	• The P was on a lengthy drinking spree with his friend Aaron Brown.	

Makenzie v The Nominal Defendant [2005] NSWCA 180	• both very intoxicated • the P allowed his friend Aaron (who had no driver's license and had never ridden a motor bike) to drive the P's Harley with P on the back. • The motorcycle left the roadway, and the P was injured and sued his friend Aaron. **ISSUE**: Is there a casual connection between the P's failure to take care for his own safety (by drinking, by loaning his bike to Aaron and y riding on the back) and his injuries?	
	The P's excessive drinking and allowing his unlicensed friend (Aaron) to drive his motorcycle contributed to the accident and therefore the P's injuries.	
STEP 3 – APPORTIONMENT FOR CONTRIBUTORY NEGLIGENCE – THE EFFECT OF CONTRIBUTORY NEGLIGENCE		
• the Law Reform (Miscellaneous Provisions) Act (NSW) installed a regime for the apportionment of damages in its place = enabled apportionment between • the P's damages are **reduced to the extent the court thinks just and equitable according to the parties' responsibility** for the P's damage.		
Pennington v Norris (1956) 96 CLR 10	• The P, negligently failing to look before crossing the road, was hit by the D's car. • The D was speeding and failed to adjust his driving to the conditions - it being a misty night with lots of people around • The trial judge reduced by the plaintiff's damages by 50% **ISSUE**: Was the apportionment decided by the trial judge fair? **OUTCOME**: Appeal allowed	
	• The statutory framework (**s 9(1)**) requires a **comparison of culpability** ○ By "culpability" we **do not mean moral blameworthiness but degree of departure from the standard of care of the reasonable man.** ○ because the P's "contributory" negligence is not a breach of any duty at all = difficult to impute "moral" blame to one who is careless merely of his own safety. In the present case, the negligence of the D (driving 30 miles per hour in a low visibility environment with many people surrounding) was **in high degree more culpable than** that of the P (very commonly done: not looking when crossing the road).	
Comparison of the parties' conduct	• Two Ps **equally negligent might have different degrees of contributory negligence because the gravity** of the negligence of Ds who are liable to them might be quite different. ○ an adult driver allowing a 12-year-old child to skateboard by hanging on to the back of a moving vehicle bears greater responsibility than the child (10% more) ○ a police officer travelling at speed in a situation of some urgency might be forgiven for not observing a lowered boom gate	***Verryt v Schoupp*** [2015] NSWCA 128) ***Grills v Leighton Contractors Pty Limited*** [2015] NSWCA 72
Pedestrians and motorists	• common law generally apportions damages very much in favour of pedestrians.	***Talbot-Butt v Holloway*** (1990) 12 MVR 70 at 74 (NSWCA).
Seatbelt cases	• ***Froom v Butcher*** created a guideline reduction in seatbelt cases (not formally accepted): ○ If damage could have been the same, even if a seatbelt had been worn – no reduction in award of damages. ○ If a seatbelt had been worn, damage would have been prevented altogether– damages reduced by 25%. ○ If a seatbelt had been worn, damage would have been less severe– damages reduced by 15%.	
Podrebersek v Australian Iron and Steel Pty Ltd (1985) ALJR 492	• P was injured at work due to his employer's (D) negligence. • A jury determined that the P was 90% responsible. **ISSUE**: Whether this apportionment could be justified **OUTCOME**: Appeal dismissed	

	Two factors to consider in apportioning damages: 1. A comparison of **culpability** – the degree of departure from the standard of care of the reasonable person. 2. A comparison of the **relative importance of the parties' acts in causing damage** (often termed '**causal potency'**). • Professor Flemming (outside of this case) described it as follows: ○ '[w]hat [**causal potency**] must mean is that weight be given to the comparative gravity of risk that each party created. In situations, for instance, where even slight negligence is fraught with exceptional peril to others, the main blame must fall on him who created the danger or brought to the accident the dangerous subject matter, since he was in a sense master of the situation'.
***CLA* S 5S**	**5S Contributory negligence can defeat claim** In determining the extent of a reduction in damages by reason of contributory negligence, **a court may determine a reduction of 100%** if the court thinks it **just and equitable** to do so, with the result that **the claim for damages is defeated**.

• Cases in which it is appropriate to reduce damages by 100% are very rare.

2. VOLUNTARY ASSUMPTION OF RISK

• A P who voluntarily assumes a risk of injury cannot recover damages in respect of loss caused by its materialisation

The defence has two elements:
1. The P must have had full knowledge of the risk ('knowledge element').
2. The P must have made an unpressured decision to run the risk in question ('voluntariness element').

➔ These stringent preconditions to the defence's application mean that the defence is rarely successful.

➔ Voluntary assumption of risk is a complete defence

****substantial overlap between the defences - Almost invariably = P assumes a risk of injury - also be guilty of contributory negligence.**

1ST ELEMENT: THE KNOWLEDGE ELEMENT

• P knew of the precise danger/risk, understood it fully and turned their mind to it at the time

CLA ss 5F and 5G	**5F Meaning of "*obvious risk*"** (1) For the purposes of this Division, an obvious risk to a person who suffers harm is a risk that, in the circumstances, would have been **obvious to a reasonable person** in the position of that person. (2) Obvious risks include risks that are patent or a matter of **common knowledge**. (3) A risk of something occurring can be **an obvious risk even though it has a low probability of occurring**. (4) A risk can be an obvious risk even if the risk (or a condition or circumstance that gives rise to the risk) is **not prominent 显眼的, conspicuous** 引人注目的 **or physically observable**. **5G Injured persons presumed to be aware of *obvious risks*** (1) In proceedings relating to liability for negligence, a person who suffers harm is presumed to have been aware of the risk of harm if it was an obvious risk, **unless the person proves on the balance of probabilities that he or she was not aware of the risk.** (2) For the purposes of this section, a person is aware of a risk **if the person is aware of the type or kind of risk, even if the person is not aware of the precise nature, extent or manner of occurrence of the risk.**

The following risks have been held not to be obvious:

- A raised lip of a concrete slab on a footpath in circumstances where it is obscured by shade and could not be seen by a pedestrian until the pedestrian was only a stride away from it.
- Bald tyres in circumstances where the car did not belong to the P and the P had no reason to inspect the tyres.
- Falling off a trampoline while wearing roller skates (from a perspective of a 7 year old).
- the collapse of a sand dune causing a tourist to fall headfirst into shallow water (from the perspective of a tourist with little knowledge of the local environment running down a sand dune on Fraser Island);
- attack by a horse whilst horse riding;268 o entanglement with a ski towrope after falling from a jetski in calm conditions.

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<tr><td colspan="2">
• serious assault by a fellow competitor in a paint ball contest.
• a raised platform in a hotel lobby which would not be anticipated by a user watching where they were going.
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The following risks have been held to be <u>obvious</u>:
• Lip of a depression in a road.
• a bollard on a pathway used by cyclists.
• Driving off a bridge into water 9 metres below in circumstances where a ‘no diving’ sign is positioned nearby (from the perspective of a 14-year-old).
• Diving a distance of between 2 and 3 metres into water from a bollard positioned on a wharf in circumstances where the seabed could not be touched while treading water.
• a wet and slippery floor where cones indicated that cleaning was in progress;
• injuries suffered by a jockey, falling from a horse and being hit by another horse or falling from the horse when it was spooked, or when a professional jockey was injured when his mount fell as a result of another jockey negligently (and in breach of racing rules) forcing another horse into the path of the injured jockey’s mount;
• emergency landing in a paddock in relation to a student taking flying lessons in a light aircraft
• aircraft colliding with a kangaroo on a country aerodrome where kangaroos are a known risk;
• walking downstairs with ice skates on at a skating rink;
• colliding with another bike or falling off a bike whilst racing;
• paying 80% deposit on purchase of property.
➔ Where a risk is obvious, the onus is on the P to prove that he or she was not aware of it.
</td></tr>
<tr><td colspan="2">2ND ELEMENT: THE VOLUNTARINESS ELEMENT</td></tr>
<tr><td colspan="2">• P freely and willingly agreed to take the risk</td></tr>
<tr><td rowspan="3">Carey v Lake Macquarie City Council [2007] Aust Torts Reports 81-874</td><td>• CLA: in relation to dangerous recreational injuries, the defence of volens has no role to play.
• Decision made AFTER CLA</td></tr>
<tr><td>• P - cyclist who was injured when he struck a bollard located on the centre of a path for which the D was responsible.
ISSUE:
whether the D’s pleading raised the defence of voluntary assumption of risk
OUTCOME:
Appeal Dismissed, respondent failed to make out defence of volenti</td></tr>
<tr><td>• <u>Knowledge is Necessary, But Not Sufficient</u>: Simply knowing about a risk isn't enough to prove a plaintiff voluntarily accepted it. There must be an actual agreement to accept the risk.
• Implied Agreement: This agreement is often implied or inferred from conduct. The inference is more readily drawn when the plaintiff not only knew of the danger but also <u>comprehended 理解 it</u> (as seen in Roggenkamp v Bennett).
• <u>Voluntary Consent is Crucial</u>: The agreement to accept the risk must be truly voluntary. If a person exposes themselves to danger due to the <u>exigency of the situation</u> or has <u>no real or practical choice</u>, they are not considered to have voluntarily consented (The Insurance Commissioner v Joyce). Courts are reluctant to infer voluntary agreement when it means giving up employment or abandoning a rescue.
• A plaintiff <u>cannot be deemed</u> to have freely and voluntarily agreed to accept a risk if they had <u>a genuine belief that the risk would not materialize</u>, even if they fully appreciated the risk itself. This is because one cannot agree to accept something they honestly believe won't happen.
○ For example, in Suncorp Insurance & Finance v Blakeney, a 16-year-old passenger wasn't found to have voluntarily accepted the risk from a drunk driver because, despite knowing the driver was drunk, he thought the driver "seemed alright."
• Ultimately, the question is whether the plaintiff <u>freely and voluntarily decided to embark on a course of conduct that involved a known risk</u>, coupled with a <u>conscious awareness of the possibility that the risk might eventuate</u>, and a <u>decision to proceed regardless.</u></td></tr>
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Motor vehicle accidents	• The defence of voluntary assumption of risk is excluded in NSW unless the P was injured while involve in motor vehicle racing	***Motor Accidents Compensation Act*** 1999 (NSW) s 140.
Workplace Accidents	• The defence of voluntary assumption of risk is **rarely applicable in actions by employees against employers**. ○ employees will often **not have any realistic choice whether or not to accept to work in a dangerous environment**. ▪ the defence might succeed where the employee accepts "danger money" from the employer (***Bowater v Rowley Regis Corp*** [1944] KB 476, 479) ▪ But may also not succeed ***Davies v Global Strategies Group (Hong Kong) Ltd*** [2009] EWHC 2342 (QB) ○ **defence might be available** - injured employee was **not only aware of the dangerous situation but was instrumental in creating the danger.** ▪ the P and his brother were using explosives and disregarded the statutory regulation that explosives only be tested from a shelter. The HOL held that this was an exceptional case where the defence applied, particularly as a statutory duty was imposed on the employees and not the employers. (***Imperial Chemical Industries Ltd v Shatwell*** [1965] AC 656) ➔ CLA does not apply to claims governed by workers compensation legislation	

3RD ELEMENT: STATUTORY DEFENCE – DANGEROUS RECREATIONAL ACTIVITY

- Injuries while participating in, or being a spectator at, a **recreational 娱乐 activity** may fail to recover because there might be no negligence on the part of the D or the **P might have consented to the risk of injury.**
  - *one guiding common law principle*: P does **not necessarily consent** to risks that could be eliminated by **simply participating in or observing** a recreational activity.
    - A golfer might consent to risks inherent in playing golf, such as slipping on wet grass, the golfer may not consent to the risk that another player will drive a ball without keeping a proper lookout for other players. (***Ollier v Magnetic Island Country Club*** [2004] Aust Torts Reports 81-273)
    - Similarly, a footballer might agree to the risk of being injured by a tackle that is within the rules but not to one that is dangerous and constitutes a foul.
- ***CLA*** provides that **D do not owe a duty to warn of 'obvious risks' or to take precautions** in respect of '**inherent risks'**.

Step 1: What is a recreational activity?	
s 5K	***recreational activity*** includes— (a) any sport (whether or not the sport is an organised activity), and (b) any pursuit or activity engaged in for enjoyment, relaxation or leisure, and (c) any pursuit or activity engaged in at a place (such as a beach, park or other public open space) where people ordinarily engage in sport or in any pursuit or activity for enjoyment, relaxation or leisure. ➔ This is a very broad definition of a recreational activity – it is easier to ask what is not recreational activity!
Step 2: What is a dangerous recreational activity?	
s 5K	***dangerous recreational activity*** means a recreational activity that involves a significant risk of physical harm. • 'significant' refers to both the risk and the nature of the harm. • **A significant risk of significant physical harm**
Step 3: Is the injury the result of the materialization of an obvious risk?	
s 5F (in summary)	- Obvious to a **reasonable person** in the position of that person - Risks that are **patent** or a matter of **common knowledge** - Can be **obvious even though it has low probability of occurring** - Can be **obvious even if risk is not prominent, conspicuous or physically observable**.
Exclusion of Liability	**Dangerous recreational activity was introduced as a defence** because of: ○ A belief that people were engaging in dangerous activities and then **blaming someone else for their injuries**. ○ A belief that organisations and councils **should not be responsible for another person's risk taking**.

s 5L	**5L No liability for harm suffered from obvious risks of dangerous recreational activities** (1) A person (the defendant) is **not liable** in negligence for harm suffered by another person (the plaintiff) as a result of the **materialisation of an obvious risk of a dangerous recreational activity** engaged in by the plaintiff. (2) This section **applies whether or not the plaintiff was aware** of the risk.
Singh bhnf Ambu Kanwar v Lynch [2020] NSWCA 152	• P Singh, a professional jockey, suffered serious head injuries when his horse fell during a horse race. • D Lynch, a fellow jockey, fall by aggressively pushing his mount against the horse alongside causing it to move into the path of Singh's horse which fell. • P by his next friend (BHNF) sued Lynch in negligence. **OUTCOME**: • Their honours found that there had been a breach of duty by the respondent and consequently the appeal should be allowed
	1. **Was professional horseracing a 'recreational activity'?** • **Judgment (Basten JA):** Yes, the court agreed with the precedent set in ***Goode v Angland*** that participants in **professional sport fall within the scope of "dangerous recreational activity" for the purposes of s 5L**. • The statutory definition of recreational activity provides no basis to exclude professional sports as an occupation or livelihood from its scope. • Therefore, professional jockeys can be considered to be engaging in a dangerous recreational activity under s 5L. 2. **How did the court majority interpret the requirement that the risk be obvious?** • **s 5L Criteria for "Obvious Risk":** 1. The risk must be "obvious" to a **reasonable person in the plaintiff's position**. 2. The activity must involve a "**significant risk of physical harm**." 3. The plaintiff must have been **engaged** in the dangerous recreational activity. • **Causal Relationship:** There needs to be a causal relationship between some activity of the defendant and the physical harm suffered by the plaintiff, even if they aren't participating in the exact same activity. The defendant could be an owner/manager, employer, association, or the directly negligent party. • **Distinction between Inherent and Obvious Risk:** The court noted a distinction between **the materialization of an inherent risk (not due to negligence) and an obvious risk (which often assumes negligence**). • **"Risk of Negligence" vs. "Gross Negligence":** o The court considered the interpretation from ***Fallas v Mourlas***, where it was stated that for s 5L to be relevant, the obvious risk must be of negligent conduct. o A key point of contention was **whether "grossly negligent" conduct could also be considered an obvious risk**. The majority believed that defining the risk too broadly (e.g., as "any kind of careless conduct") could undermine the purpose of the defense. o The **appropriate characterization of a risk is fact-dependent** and may require a more nuanced inquiry than just distinguishing between "negligence" and "gross negligence." • **Prospective Assessment:** The obviousness of the risk must be **assessed prospectively**, without the benefit of hindsight, and at a level of generality as to the *kind* of risk involved. **Application to the Present Case (Majority - Basten JA, Payne JA):** • **Injury as Materialization of Obvious Risk:** The majority found that the plaintiff's injury was the materialization of an obvious risk. • **Knowledge of Professional Jockeys:** The premise of horseracing involves aggressive riding. The frequency of careless riding charges indicates jockeys are pushing boundaries, which professional jockeys would know. • **Reckless/Deliberate Conduct:** The fact that the defendant "recklessly" or "deliberately" caused contact did not alter the obviousness of *that kind* of risk within the context of competitive racing. • **Example of Non-Obvious Risk:** A hidden rabbit burrow causing a fall *would not* be an obvious risk.

	• **Payne JA's Concurrence:** Emphasized that a risk being rare or not "expected" does not automatically make it non-obvious. An aggressive maneuver by a jockey, even with a low probability, can still be an obvious risk.	
3 limbs of 5K	Recreational activity is defined inclusively, by reference to **three limbs**. Each limb is disjunctive. Each limb commences with the word "any", but yet each operates in a different way. 1. directed to the **characterisation of the activity** 2. to the **purpose** of the participant, 3. to the **location**.	***Goode v Angland*** [2017] NSWCA 311 at [190]:
• 'significant' refers to in between trivial risk and a risk that is likely to materialise.(***Fallas v Mourlas*** (2006) NSWLR 418.) • The probability of a risk occurring, it is necessary to consider the magnitude of the resulting harm that it might cause (***Falvo v Australian Oztag Sports Association*** [2006] Aust Torts Report 81-831) ➢ Activities **held to be** 'dangerous recreational activities' include: o Shooting kangaroos at night by aid of a spotlight o Diving into water from a wharf. (***Jaber v Rockdale City Council*** [2008] Aust Torts Report 81-952.) o Riding BMX bikes in a skate park. (***Vreman v Albury City Council*** [2011] NSWSC 39.) ➢ Activities **not** considered to be 'dangerous creational activities' include: o Touch football (***Falvo v Australian Oztag Sports Association*** [2006] Aust Torts Report 81-831) o Spear fishing. (***Smith v Pearse*** [2006] NSWSC 288.) o Dolphin watching from a boat. (***Lormine Pty Ltd v Xuereb*** [2006] NSWCA 200.) o Weightlifting (***Drouet v Garbett*** [2011] WADC 100)		
Vreman v Albury City Council [2011] NSWSC 39	• A skate park with "opposing or facing smooth concrete ramps called roll-ins and steeper concave sections called drop-ins at each end of the park" was constructed of concrete with a rough finish. • It remained like that and was used without incident by local young people for some years. • In 2006 the Council painted the concrete surfaces with blue paint in order to facilitate the removal of graffiti that was constantly being applied to it. • Shortly afterwards in April the first P was severely injured at the skate park when he fell from his BMX bike whilst attempting a jump. • In August 2006 the second P was also injured when he fell from his BMX bike in the course of riding down the centre ramp. • Each P **alleges that his fall was caused by the slippery and dangerous condition of the skate park** that resulted from the application of the paint. The D relies on s 5L.	
	Step 1. Is BMX riding a recreational activity? - It is an activity for recreation or a sport so its very likely a recreational activity. **Step 2. Is BMX riding a dangerous recreational activity?** • Is there a significant risk of significant physical harm? It is hard to argue there is not significant risk of significant physical harm when both boys have suffered serious injury. • It is not retrospective, however, prospective. Difficult to argue. • Hadn't been accident at this park = became dangerous activity once the paint applied and condition were wet **Step 3. Is the risk an obvious risk that materialized? Lets go through 5F**. • Would it be **obvious to a reasonable person** in the position of that person? The P's are children but its wet and the P's are experienced riders, and they likely know that paint is slippery. However, in McHale the court held that a 12 yr old boy would not have known the danger of throwing a sharpened rod at a tree. • Is it a risk that is **matter of common knowledge**? It can be argued the P's are experienced riders and would have known the dangers of the tyres slipping on wet paint. In Dederer the court held it was 'obvious'to a 14 yr old that jumping of a bridge into water with shifting sands was an 'obvious danger'.	

	• Can be obvious even if risk is not prominent, conspicuous or physically observable. Difficult for the P's to escape this as it the paint and the rain was physically observable.

*****THE STATUTORY DEFENCE STEP-BY-STEP**

1. Is the risk 'obvious' (consult s 5F)?
- Obvious to someone in P's position (**objective test**) and can:
- be **common knowledge**/have a **low probability of occurring/not be prominent or conspicuous or physically observable**.

➔ If YES, then:

2. Did P engage in a 'recreational activity' (consult s 5K)?
- This can be a **sport** (whether organised or not) or
- a **form of enjoyment, relaxation or leisure**, or
- something else engaged in where people **usually engage in enjoyment**, relaxation or leisure.

➔ If YES, then:

3. Did P engage in a 'dangerous recreational activity' (consult s 5K)?
- Did the activity entail a **significant risk of physical harm** (not trivial harm)?
- Consult **case law examples** for guidance.

➔ If YES, then:

➢D is ***NOT*** liable for P's harm suffered due to the materialisation of an obvious risk of a dangerous recreational activity.

XI. TORT OF BREACH OF STATUTORY DUTY

- an action for BSD (except worker safety statutes) - has been **held to be available are now rare & less likely due to changes in legislation**
  - Authorities almost universal reluctance to find that BSD gives rise to a private right of action
  - Even in the area of its principal operation (worker safety legislation) - there are diminishing opportunities for successful claims (see below – step 2: industrial legislation)
- It is frequently **argued alongside a negligence claim** - if the negligence relates to, or includes, a duty imposed by legislation
  - However - with courts usually finding it unnecessary to rule on the BSD claim
  - Reason for P to sought remedy in BDS: **aren't able to receive adequate remedy from elsewhere** (e.g., negligence, administrative law) = not necessarily able to provide P the damages they need

- Breach of statutory duty is **not part of negligence** – it is a separate, independent tort.
- **Different** in:
  - **Strict liability**
  - Defences to BSD **more restricted** than common law
  - **Rules for remoteness of damage do NOT apply** - once a breach is shown to have caused the P's harm
- a statutory duty is non-delegable - if unqualified in its terms
- no advantage for burden of proof: The onus of proof does not shift to the D to show that there is no "reasonably practicable" alternative unless the statute requires this
- ***Darling Island Stevedoring & Lighterage Co Ltd v Long*** (1957) 97 CLR 36: an action was brought against an employer for negligence and had failed; this **did not prevent a separate claim being brought for BSD**
  - Even if an action for BSD is NOT available, statutory breach provides evidence that D has been NEGLIGENT - A reasonable person will generally obey the law

*****Elements / steps for establishing BSD**

Step 1. Does the **legislation intend to confer** on the P a **right to sue**? (***Cutler***)
Step 2. Is the P a **member of a class of persons protected** by the legislation? (***Pask***)
Step 3. Is the legislation **directed at the kind of harm** suffered by the P? (***Mummery***)
Step 4. Was the **legislative duty imposed on the D**? (***Cubillo***)
Step 5. Was the legislation **breached**? - **Strict liability** (***Galashiels***)

Step 6. Did the **breach cause the injury**? (***John Pfeiffer***)

DETERMINING WHETHER A CAUSE OF ACTION ARISES

Groves v Wimborne [1898] 2 QB 402	• An **injured employee** was **entitled to recover damages** against the employer for BSD imposed by the Factory & Workshop Act 1878 (UK) • **Statute** - provides for performance by certain persons of a particular duty - when someone is **injured for whose benefit the statute imposed a duty** (i.e., there is failure to perform that duty) - an **action lies against the person who failed to perform the duty** *'[W]here a statute provides for the performance by certain persons of a particular duty, and someone belonging to a class of persons for whose benefit and protection the statute imposes the duty is injured by failure to perform it, prima facie, and, if there be nothing to the contrary, an action by the person so injured will lie against the person who has failed to perform the duty.'*

- If the injury is one - **Workers Compensation legislation applies** = claim is totally excluded from CLA but may be subject to its own restrictions on recovery of common law damages
- Where **CLA NOT included - CLA negligence principles** (including limitations for mental harm) apply to any claim for "***damages for harm resulting from negligence***, ***regardless of whether the claim is brought in tort, in contract, under statute or otherwise***"

CLA s 43(2)	**43 Proceedings against public or other authorities based on breach of statutory duty** (2) For the purposes of any such proceedings, an act or omission of the **authority does not constitute a breach of statutory duty** unless the act or omission was in the circumstances so **unreasonable that no authority having the functions of the authority in question** could properly **consider the act or omission to be a reasonable** exercise of its functions.
	• When a statute imposes strict liability - section substitutes a **Wednesbury unreasonableness standard** ○ a decision would only be considered unreasonable if it was "so unreasonable that no reasonable authority could ever have come to it."
CLA s 44	**44 When public or other authority not liable for failure to exercise regulatory functions** (1) A public or other authority is not liable in proceedings for civil liability to which this Part applies to the extent that the liability is based on the failure of the authority to exercise or to consider **exercising any function** of the authority to prohibit or regulate an activity if the authority could not have been **required to exercise the function in proceedings instituted by the plaintiff**. (2) Without limiting what constitutes a function to regulate an activity for the purposes of this section, a function to issue a licence, permit or other authority in respect of an activity, or to register or otherwise authorise a person in connection with an activity, constitutes a function to regulate the activity.
	There are **THREE elements**: 1. **Non-feasance** (failure to exercise a function) 2. Whether the D could have been required to **exercise that function** 3. Whether it could have been so **required in the P's proceedings**

STEP 1: RIGHT TO SUE

- The statute must confer a private right to sue.
- Any breach of statute by itself is NOT sufficient – satisfied if the statue expressly states the private right to sue
  - **Almost never state an intention to give private remedy**
- Presumptions are **not binding**, but they provide us with some **guidelines**

THE PRESUMPTIONS

1. Is there a **penalty imposed**? (***Cutler***)

If yes - then presumption NO private right to sue.

2. Is the legislation for the benefit of a **defined class or the public at large**?

If for the benefit of the public at large then presumption NO private right to sue.

3. Are there **adequate alternative remedies**?

If yes - then presumption NO private right to sue.

4. Does the duty concern a **specific safety precaution** which **could lead** to an action in **negligence**?
If yes - then a presumption of a private right to sue.

5. Does the **duty relate to health, education or welfare**?
If yes - then presumption NO private right to sue.

6. Is the duty **specific or general**? (***Cutler***)
If general then presumption NO private right to sue.

Cutler v Wandsworth Stadium Ltd [1949] AC 398	• An operator of a licensed dog-racing track (D) failed to provide a bookmaker (P) space at the track to carry on business. • The P argued the D had breached the ***Betting and Lotteries Act 1934*** (UK). • "The **occupier of a track shall take such steps as necessary to secure that**, so long as a totaliser is being operated on the track, there is **available space for bookmakers on the track**". • Substantial penalties were imposed by the Act. **ISSUE**: Was the intent of the legislature to provide a private right to sue?
	• In favor of no right to sue = there is a **penalty**, and it **doesn't relate to safety**. • In favor of there being a right to sue = it is a **specific duty (not general)** + it does **not relate to health or safety**. • The deciding issue: whether it was for the **benefit of the public at large or for a defined class**. • The P argued it was for **bookmakers** (a defined class) • the D argued it was for the **public at large** – to give them more options for betting (court accepted)

Categories unlikely to give rise to actions:

- Political decisions and priorities
  - Such acts include:
    - Setting political priorities for govt.
    - Allocation of resources
    - Balancing of competing societal demands
- General duties
  - broadly expressed general duties to ensure work health & safety
- Health, education and welfare duties
  - **general acceptance**: in the absence of very clear statutory language, **welfare legislation is unlikely** to give rise to actions for BSD (***X v Bedfordshire County Council*** [1995] 2 AC 633 at 731-732)
- Investigatory, regulatory and administrative functions
  - Reluctance to allow actions for BSD in relation to government bodies / officials exercising:
    - Investigative powers (failure to disclose information relevant to accused's case) (***Nathan Wortley v Health Care Complaints Commission*** [2003] NSWSC 61.)
    - Regulatory functions (failure to exercise a regulatory function)
    - Carrying out administrative duties (duties under social security legislation) (***Scott v Secretary, Department of Social Security*** [2000] FCA 1241)
    - particular when decisions may be subject to judicial review (***Repacholi Aviation Pty Ltd (ACN 009 054 022) v Civil Aviation Safety Authority*** [2010] FCA 994 at [156].)
  - unlikely to give rise to actions:
    - duties to ensure **Timely** performance
    - duties to ensure **Administrative efficiency**
- Legislation

<table>
<tr><td colspan="2">
Where the statutory duty was enacted for the <u>benefit of the public</u> rather than for the protection of a defined class = Parliament was presumed not to have intended to grant a private right of action (Matthews v SPI Electricity (2011) 34 VR 584)
</td></tr>
<tr><td colspan="2">STEP 2 – CLASS OF PERSONS</td></tr>
<tr><td colspan="2">
The plaintiff must be a member of class of persons protected by the statute
</td></tr>
<tr><td colspan="2">
In exam: if P is not entitled to establish step 1: right to sue = don't end your answer there = you should: e.g., <u>in the alternative/ should the court found that the P is actually entitled to bring an action in BSD, then we will need to move to the 2nd element/step</u>: member of class of persons protected by legislation
- You are expected to show an understanding of the full elements
</td></tr>
<tr><td rowspan="2">Pask v Owen [1987] 2 Qd 421</td><td>
Ds gave their 15 year-old son an airgun and ammunition.
They knew their son allowed P, a 13 year-old friend, to handle the gun and ammunition.
P shot himself in the eye with the gun and argued Ds had breached the Firearms and Offensive Weapons Act 1979 (Qld) – "A person shall not knowingly supply any firearm or ammunition to or for the use of a prevented person"
ISSUE:
Was school friend a member of the class of persons protected by the statute?
</td></tr>
<tr><td>
The relevant statute, the Firearms Act 1958, <u>made it an offense to provide a firearm to a person under 18</u>.
This was a clear legislative attempt to protect minors from the dangers associated with firearms.
The injured boy, being a minor, fell squarely within this protected class.
</td></tr>
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These requirements can act to impose some limits on liability and act as a type of remoteness of damage rule
Examples:
A fireman attending a fire in a building cannot rely on safety regulations - concerning electricity switches passed for the benefit of persons employed in a building (Hartley v Mayoh & Co [1954] 1 QB 383)
nor can a sub-contractor necessarily rely on building regulations passed for the protection of a "person employed" (Herbert v Harold Shaw Ltd [1959] 2 QB 138)
</td></tr>
<tr><td colspan="2">STEP 3 – KIND OF HARM SUFFERED</td></tr>
<tr><td colspan="2">
The statute must be directed at preventing the kind of harm suffered by the plaintiff
the P must prove that the damage suffered was within the risk at which the statute is directed.
</td></tr>
<tr><td rowspan="2">Gorris v Scott (1874) LR 9 Ex 125</td><td>
The P's sheep were washed overboard while being transported on the D's ship
The ship had no pens for the sheep to stand in and they were unable to hold onto the deck with their hooves
The P claimed for the loss of sheep that had been swept overboard while being shipped by the D - a breach of the Contagious Diseases Act: required that pens be provided on a ship used to transport sheep
</td></tr>
<tr><td>
HELD: even if the supply of such pens would have prevented the sheep being washed overboard = <u>no action for BSD could be based on provisions that aimed - not at protection from perils of the sea - BUT prevention of the spread of disease</u>.
</td></tr>
<tr><td>Sutherland Shire Council v Heyman (1985) 157 CLR 424</td><td>
"the protection of the owner of land from the mere economic loss which might be sustained by reason of a defect in a building erected upon his/her land = is no part of the purpose for which the relevant legislative powers & functions were conferred upon the council".
</td></tr>
<tr><td colspan="2">Is the statute directed at preventing the kind of harm suffered by the P?</td></tr>
<tr><td rowspan="2">Mummery v Irvings (1956) 98 CLR 99</td><td>
The P entered the D's sawmill to buy timber.
The D's foreman was operating a power-driven circular saw.
There was no guard attached to the saw.
A piece of wood flew from the saw and hit the P in the face causing him severe injuries.
The P claimed that the D had breached the Factories and Shops Act 1928: "Every occupier of a factory shall provide guards for all dangerous parts of the factory".
</td></tr>
<tr><td>
➔ Yes, breach, but is that part of the Act aimed at preventing the harm suffered by the P?
- The P argued if the guard had been in place, then he would not have suffered the injury.
</td></tr>
</table>

	- True ... ➔ But is that **the harm that the statute is designed to prevent?** - D successfully argued that the **purpose of the guard was to protect the operator of the saw and to prevent them from placing their hand or arm into the saw.** - The statutory phrase did not include "**parts indirectly dangerous**". - P did not satisfy element 3 of the tort and his claim failed. - HELD: the fencing statute did not impose an obligation to guard against dangerous materials being ejected from the machine while in motion.
STEP 4 – STATUTORY DUTY IMPOSED ON D	
• The statutory duty must have been imposed on the defendant • **in exam:** if there is one/more element that does not have any shades of grey about it, where it is clear cut = need merely acknowledge/mention that and move on = don't skip	
Darling Island Stevedoring and Lighterage Co Ltd v Long (1957) 97 CLR 36.	• The P was a stevedore unloading a ship under the supervision of a foreman. • He was **injured when part of the cargo hit the ships hatch beams**. • He argued his employer (Darling island Stevedoring) **breached the Navigation** (*Loading and Unloading Regulations* (Cth) • which provide that hatch beams should be removed while loading and unloading and that any breach was punishable by a fine on the 'person in charge'. The case concerns **THREE ISSUES (**我们做的时候也基本上根据这个顺序**)**: 1. Whether the regulation creates a civil right of action 2. Whom the statutory duty is imposed 3. Whether an employer can be vicariously liable for BSD imposed directly on the employee
	1. **Does the regulation create a civil right of action?** (包括了 step 1 & 2) The court affirmed that a regulation can create a civil right of action for damages. The principle established in ***O'Connor v SP Bray Ltd*** was referenced, stating that if a regulation requires specific precautions for employee safety, and the employer is already under a general common law duty of care, then a private right to sue for damages is created for the protected class of people. 2. **Is the duty imposed on the defendant (the employer)?** The court found that the regulation's duty was imposed on the "person-in-charge," which was determined to be the supervisor or foreman, not the employer. The wording of the regulation, which focused on the person directly in control of the operations, indicated that the duty was not meant to be placed on the company itself. 3. **Can the employer be held vicariously liable for the employee's breach?** This was the pivotal issue. The High Court **rejected** the argument that the **employer could be held vicariously liable for their employee's breach of the statutory duty**. The court's reasoning was that the civil right of action **originated from the regulation itself, not from common law**. Therefore, holding the employer vicariously liable for a duty that the regulation explicitly placed on the employee would be an unjustified expansion of the regulation's scope. The court concluded that any civil liability was confined to the supervisor or foreman who actually had the duty. As a result of this reasoning, the appeal was allowed, and the employer was not held liable for the statutory breach committed by their employee.
	***Note that the decision from Darling Island Stevedoring has been reversed in NSW on the issue of vicarious liability.**
Cubillo v Commonwealth (2000) 103 FCR 1	• Aboriginal children removed from their families, sued the Cth in tort of BSD. • Argued that the Cth had breached a statutory duty placed on government officials "personally and by virtue of their office"
	• The P argued: the Commonwealth should be responsible for the actions of their officials. • The **D successfully argued**: the wording of the legislation **'personally' meant that only the government officials could be sued** in the tort of BSD. • Because the **breach had occurred decades earlier it was not possible for the P to locate the particular officials who had removed the children. = No BSD** • Famous case – stolen generation able to succeed = Although the P's failed in this action, they **did succeed in negligence**.

<table>
<tr><th colspan="2">STEP 5 – STATUTE MUST BE BREACHED</th></tr>
<tr><td colspan="2">
• The statute must be breached – <u>Strict liability</u> imposed.
• unlike negligence = there is no defence of ‘reasonableness’ UNLESS it is in the legislation.
• Breach is determined in accordance with the words of the statute o
• Breach is <u>NOT determined by applying s 5B CLA (negligence) – RATHER the terms from the particular legislation</u>
</td></tr>
<tr><td rowspan="2">Doval v Anka Builders Pty Ltd
(1992) 28 NSWLR 1</td><td>
• The P employed by builders was on a lower level of a building under construction.
• There was an electricity blackout, and the lights went out.
• After waiting in the darkness for 10 minutes the P and other workers moved to a higher level of the building.
• He tripped over some steel mesh and was injured.
• Shortly afterwards the lights came back on.
• <u>He sued his employer for BSD under the Construction Safety Regulations 1950 (NSW)</u>
• “Any person who carries out any construction work shall ...make provision to ensure and maintain lighting (natural or artificial) sufficient and suitable for the illumination of workplaces”. (nothing about reasonableness)
</td></tr>
<tr><td>
• “maintain” = indicates that the obligation is not complied with simply by the provision of a system
• <u>there must at all times either be adequate natural light or a system which is operative</u> - while persons are engaged in the relevant building work - If this means that compliance with the sub-regulation requires a back-up system so be it.
• the <u>P successfully argue that strict liability means if there is no lighting the duty is breached</u>
• There is no reference to reasonableness in the legislation - there was a BOD to maintain sufficient and suitable lighting = when as a result of an unexplained power blackout
</td></tr>
<tr><td colspan="2">CONTRAST TO THIS CASE</td></tr>
<tr><td rowspan="2">Austral Bronze Co Pty Ltd v Ajaka
(1970) 44 ALJR 52</td><td>The P was employed in the D’s factory = He was injured when he slipped on a grease or oil slick on the factory floor.</td></tr>
<tr><td>
• HC - placed a qualified interpretation on the words: “all floors ... shall be of sound construction and properly maintained” - s 34(a) of the Factories, Shops and Industries Act 1962 (NSW).
• Section 4(1) defined “maintained”: “maintained in good order, condition and repair and in an efficient state”.
• Barwick CJ: could not accept a construction of the section that placed the D in breach of it in the circumstances.
</td></tr>
<tr><td colspan="2">
Foreseeability:
- Courts may sometimes <u>qualify a seemingly absolute standard</u> by requiring <u>some level of knowledge of foreseeability for breach</u>.
</td></tr>
<tr><td>Dunlop Rubber Australia Ltd v Buckley (1952) 87 CLR 313</td><td>
• “securely fence all dangerous parts of machinery” – Factories, Shops & Industries Act 1912 (NSW), s33
• HELD: machinery will be dangerous if it may reasonably be foreseen to be a source of injury to people who may be in the vicinity, taking them with all the ordinary infirmities to which human nature can be prone.
</td></tr>
<tr><td colspan="2">
Knowledge:
- Statutory duties may also be moderated by finding that <u>the D must have some level of knowledge for liability</u>.
- A duty not to “permit or allow” certain conduct presupposes some level of knowledge.
</td></tr>
<tr><td rowspan="2">Waugh v Kippen
(1986) 60 ALJR 250</td><td>
• the : an adult male employee “shall not be permitted or allowed to ... carry by hand any object so heavy as to be likely to cause risk of injury”.
• Unknown to the employers the P had existing back trouble.
</td></tr>
<tr><td>
• HELD: the words “permitted or allowed” presupposed awareness, actual or constructive on the part of the employer = that the employee was moving by hand an object so heavy as to be likely to cause risk of injury to him.
• It would be <u>unreasonable to construe the clause as imposing an obligation on the employer to protect the employee from a risk of injury = of which the employer neither knew nor ought to have known</u>.
• The phrase “likely to cause risk of injury” required a real or not remote chance or possibility regardless of whether it was less or more than 50%.
</td></tr>
</table>

Reasonable Practice:

- Modern work, health and safety legislation commonly imposes duties based on what is "reasonably practicable".

STEP 6 - CAUSATION

- The breach must cause the injury
- The usual rule applies that the causal connection must be proved on the balance of probabilities (causation & remoteness)
  - 'but for' test
  - Remoteness of harm
- NOT necessarily different from causation in negligence – except that court tend to take a **more common-sense approach to causation in BSD**
- The court applied the **principle of res ipsa loquitur** – that is, the mere occurrence of some types of accident is sufficient to Causation = a simple common-sense approach is taken to causation in this tort BSD

John Pfeiffer Ltd v Canny (1981) 36 ALR 466	• The P was injured when he was struck in the head by a steel pin fired from an explosive-powered gun by a fellow employee. • The employee was not a 'qualified operator' - which was defined as an adult thoroughly trained in the correct use of such tools and their dangers. • The P argued a breach of the *Scaffolding and Lifts Regulations* (NSW) ○ "No person shall employ, instructor allow any person to use a tool in any work without first ensuring by proper enquiry that such a person is a qualified operator and is not by reason of any infirmity or disability or incapacity unfit to use such tool." • The court **applied the principle of res ipsa loquitur** = the mere occurrence of some types of accident is sufficient for causation = simple common-sense approach is taken to causation in this tort • The injury was caused by the employee's firing of the gun and that a qualified operator would not have fired the gun while the respondent was in front of him. • Held – **BSD**

Defences

- Voluntary Assumption of risk does not apply
- Contributory Negligence applies (***Piro v Foster***)

XII. CONCURRENT LIABILITY

Concurrent liability has the following features:

- more than one person is liable in tort for the P's harm;
- it is not possible to attribute separately identifiable harm to each wrongdoer; and so that
- all D are liable to the P for the same damage.

- Where concurrent liability exists, the P can choose to sue one or more of the Ds in a single action or series of actions.
- But there are restrictions on the recovery of damages and costs in subsequent actions.
  - See the Law Reform (Miscellaneous Provisions) Act 1946 (NSW) s5(1)(a)(b)

illustration of one type of case which satisfies these criteria:

- P walking on the footpath
- There is a collision between two vehicles - one of the vehicles hits P - suffers physical injuries
- Assuming that BOTH drivers are negligent
  - D1= drove at an excessive speed - 80% negligent
  - D2= failed to keep a proper lookout - 20% responsible
- Thus, D1 and D2 are both guilty of tortious wrongdoing - they are considered concurrent tortfeasors

EFFECT OF CONCURRENT LIABILITY

1. Solidary Liability 连带责任

- **Common law approach** - a P could recover the whole of the damage (solidary liability) against only ONE of the concurrently liable Ds (irrelevant if that D was only a minor contributor)

Using the above example:
- P entitled to recover 100% damage against D2 (even though he was only 20% negligent)
- D2 could bring a separate action - seek to recover D1's responsibility (that being 80%)

➔ **Problem arises:** If D1 was bankrupt, then D2 could not recover the 80% he was NOT liable for

Applied today:
- Cases of **personal injuries** (including the case above) - **solidary liability retained** - D must bear risk of insolvency rather than P
- Cases of **economic loss / property damage** - **proportionate liability**

2. Proportionate Liability 比例责任

- **Statutory amendments** - Each concurrent wrongdoer is **only liable for their proportionate share** for negligently caused economic loss or property damage

Using the above example:
- If accident caused property damage to P's house (instead of personal injury), then D2 would only be liable for 20%

CONCURRENT TORTFEASORS

Concurrent liability in tort may arise for the same damage:
- Where there are **multiple torts** causing the **same damage**.
- Where tortious conduct occurs during a **joint enterprise**.
- Liability for the tortious conduct of an **employee within the course of employment** (**vicarious liability**);
- Where there are **special duties to ensure that others take due care** (**non-delegable duties**).

Individual torts causing the same damage:
- Several Ds commit individual torts - cause the same damage to the P
- BOTH Ds are concurrently liable for the whole of the P's damage
- A P CANNOT recover double damages
- P has the option of obtaining damages against:
  - The D with the most resources
  - The D who is insured against the loss

VICARIOUS LIABILITY

- Vicarious liability: a form of **strict liability** that operates to make one person **legally viable to compensate a P** for a tort that has been **committed by another** person
- Typical case concerns an employer's liability for a tort committed by an employee within course of employment

****ELEMENTS TO PROVE**

1. Existence of an employer/employee relationship
- 'employers right to control' and
- organisation test' and
- Multi-factor test (***Vabu***)

2. In the course of employment
= an authorised act or
= 'an improper mode of performing an authorised act' (***Bugge, Deatons***)
- contract? (***CFMMEU; ZG***)

3. Victim injured by tort of employee.

STEP 1 - IS THERE AN EMPLOYER/EMPLOYEE RELATIONSHIP

1. Control Test

- used to decide whether a person is an employee (or servant)
- The question is whether "ultimate authority over (the person) resided in the employer so that [the person] was subject to the [employer's] **order and directions**

Stevens v Brodribb Sawmilling Co Pty Ltd (1986) 160 CLR 16	"**Control**, whilst significant, is **not the sole criterion** by which to gauge whether a relationship is one of employment... it [is] one of a number of indicia which must be considered...Other relevant matters include, but are not limited to - the mode of remuneration, - the provision and maintenance of equipment, - the obligation to work, the hours of work and - the putative employee - provision of holidays, the deduction of income tax - the delegation of work by

Distinction between Employee and Independent Contractor

	Employee	**Independent contractor**
Type of contract	**Contract of service** - Provides ongoing service - Subject to directions and control of the employer - employee's duty is to render personal service = if the worker employs others to carry out the work, there is usually no contract of employment	**Contract for service** - the person is in business on their own account - provide services in the same way as a plumber goes to a domestic home to fix the hot water.
Factors	- Work to set and determined hours - Use employer's equipment - Payment made at beginning/completion - Renders personal service (carried out by themselves)	- Workers determine own hours - Provide their own equipment - Payment made on completion of the job - Employs others to carry out the work

2. The 'Organization Test'

- Is the person 'part and parcel of the organization'
- not generally adopted in Australia (***Stevens v Brodribb Sawmilling Co Pty Ltd***)
- been considered one of many factors in the overall determination (***Jamsek v ZG Operations Australia Pty Ltd*** [2020] FCAFC 119)

Features under a contract of service:

- a man is employed as part of the business, and his work is done as an integral part of the business.
- under a contract for services, his work, although done for the business, is not integrated into it but is only accessory to it.
- A key factor is that the activities are carried out as an integral part of the D's business and for its benefit.

3. Multi Factor Test

Hollis v Vabu (2001) 207 CLR 21	- Distinction between independent contractor, employee and agent - The leading Australian authority on who is an employee
	• Hollis was struck and **injured by a cyclist** in the Sydney CBD. • The cyclist was wearing a jacket with '**Crisis Couriers' on it, but was never identified.** • Crisis Couriers was a company delivering parcels by bicycle (**run by Vabu**). • Couriers were contracted as 'independent contractors' however, a number of their work conditions suggested they might be employees. • The P could not directly sue the D because Vabu was not at fault (the individual courier was at fault). • The only avenue for the P was to argue that Vabu was vicariously liable for the conduct of the courier. **ISSUE**: Whether the courier should be classified as an employee or an independent contractor (employment relationship)
	• An employee performs work for the benefit of their employers • An independent contractor performs work for the benefit of their principles (单独不足矣)

	○ The independent contractor carries out his work, not as a representative but as a principal.' ➔ This indicates it is NOT sufficient to simply establish an employer-employee relationship simply by the fact that one party benefited from the activities • An independent contractor performs work for the benefit of their principles ○ 'rooted fundamentally in the difference between a person who serves his employer in his, the employer's, business, and a person who carries on a trade or business of his own'. **Control Test** • Control is not now regarded as the only relevant factor (***Stevens***). Rather it is the totality of the relationship between the parties which must be considered." **Application** 1. **Low Skill Work:** Couriers provided non-skilled labor, unable to forge independent careers. 2. **Lack of Control:** Couriers had no control over hours, could not refuse or delegate work, and had assigned rosters. 3. **Branding:** Wore uniforms with the Vabu logo, presenting them as employees to the public. 4. **Financial Management:** Vabu managed pay, provided insurance, and did not allow bargaining or holiday leave. 5. **Employer-Favorable Terms:** Couriers providing their own equipment (bicycles, uniforms) was seen as a benefit to the employer, not proof of being independent contractors. 6. **Vabu's Direction:** Vabu retained complete control over how deliveries were made. **Outcome:** The couriers were found to be employees, and Vabu was held vicariously liable for their negligence.
STEP 2 – IN THE COURSE OF EMPLOYMENT	
• An employer is liable only where the tortious conduct is "in the course of employment". • **Classic 'Salmond' Test**: ○ An authorized act or ○ 'an improper mode of performing an authorised act'	
Royal Prince Alfred College Incorporated v ADC [2016] HCA 37	• In 1962, the P (respondent), aged **12 years old was a boarder at the Prince Alfred College when he was abused by Bain, the housemaster and College employee.** • The abuse occurred **also outside the school**. • The P commenced proceedings against the College in December 2008. • In issue was whether an extension of the limitation period for bringing proceedings should be granted. • The HC allowing an extension of time = a fair trial was not possible; key witnesses and personnel at the College had died or were ill, material evidence had been lost and the College had been prejudiced by the earlier decision of the P respondent not to take proceedings against the College. • The P respondent argued that the **College was liable on three grounds**: (1) the College's independent negligence (2) the College owed a non-delegable duty in relation to intentional criminal conduct by Bain and that decision in New South Wales v Lepore should be overruled on this point (3) the College was vicariously liable for the conduct of its employee. • **Evidentiary difficulties existed in relation to all three grounds** which ultimately meant that a fair trial would not be possible. • Ultimately no decision was necessary on liability issues as the HC held that the extension of time to bring proceedings should not have been granted.
	• **The "ostensible authority" principle.** An employer can be liable for an employee's wrongful act if it is committed **under the cover of the authority or position the employer has given them.** ○ ***Lloyd v Grace, Smith & Co***: A firm of solicitors was held liable when a managing clerk, acting within the scope of his duties, fraudulently took a client's property. His position as an unsupervised clerk conducting conveyancing provided the authority that enabled the fraud.

	○ ***Morris v C W Martin & Sons Ltd***: An employer was liable when an employee stole a fur from a client. The court found that the theft, although dishonest, was still within the scope of his employment to handle and clean the fur. • **Distinguishing disconnected acts.** An employer is **not** liable for an employee's act that is entirely unconnected with their duties and not in the employer's interest. ○ ***Deatons Pty Ltd v Flew***: An employer was not held liable when a barmaid threw a glass at a customer. The court ruled that this action was not in the course of her employment and was entirely disconnected from her duties of serving drinks. **In the present case** • the appropriate enquiry is whether Bain's role as housemaster ○ placed him in a position of power and intimacy vis-à-vis the D ○ so as Bain's apparent performance of his role gave the occasion for the wrongful acts ○ because he misused or took advantage of his position, the wrongful acts could be regarded as committed in the course or scope of his employment. • The evidence on the D's case was that no other housemaster was present in dormitories after lights out and that the prefects were supervising the boys after that time. This raised a real question about what the role of housemaster entailed, a question which could not fairly be answered given the loss of relevant evidence
Two matters should be considered: 1) **what functions or "field of activities" have been entrusted by the employer-employee - what was the nature of his job?** This question is to be approached broadly. - The employee was clearly authorised to respond to enquiries. ' 2) whether there is a sufficient connection between the position for which he was employed and his wrongful conduct	***Mohamud v Wm Morrison Supermarkets plc***
****More Demonstrating Cases 超级无敌重要**	
London County Council v Cattermoles (Garages) Ltd [1953] 2 All ER 582–160.	• A garage hand without a driver's license was instructed to move cars by pushing them. He got sick of this and drove one of the cars damaging another car. • The D could argue that the garage hand was only authorized to move the cars by pushing them and therefore it was not in the course of employment. • The P could argue that he was authorized to move the cars and moving them by driving them was an '**improper mode' of the authorized act of moving the cars.** (**court agreed – yes in the course of employment**)
Poland v John Parr & Sons [1927] 1 KB	• An employee was walking home for lunch and thought a boy he saw was stealing sugar from his employer. He hit the boy. • The D could argue that no employee is authorized to hit anyone and therefore the act was not in the course of employment. • The P could argue that the employee was authorized to protect his employers business and this was **an 'improper mode' of doing so. (court agreed – yes in the course of employment)**
Keppel Bus Company Ltd v Sa'ad bin Ahmad [1974] 3 WLR 1082	• A bus conductor collecting fares deliberately returns and hits a passenger out of resentment 15 minutes after an earlier altercation over change • The D could argue that the bus conductor was only authorized to collect money and not to assault customers. Unauthorized act • The P could argue that the bus conductor was authorized to collect the money and the assault arose out of that conduct. Improper mode of an authorized act **(court disagreed – not in the course of employment = P moved away)**
French v Sestlii [2007] SASC 241	• A career of a person with quadriplegia stole $33,350 from her account by misusing her credit card while doing her shopping. (Criminal act) • The D could argue that the career was not authorized to steal money and therefore it was not in the course of employment. • The P could argue that the career was authorized to do shopping and use the credit card and therefore this was an 'improper mode' of doing so. (**court agreed – yes in the course of employment = criminal act can be**)

<table>
<tr><th colspan="2">STEP 3 – THE DAMAGE WAS CAUSED BY THE EMPLOYEES' TORT</th></tr>
<tr><td colspan="2">
• <u>Standard rules of causation</u>
• The tort of the employee is also often already proven and therefore <u>this step will already be established.</u>
  ○ For example, an employee assaults a customer. The battery is proven and then the customer uses vicarious liability in order to seek damages from the employer. The battery is already proven so causation does not need to be separately established.
</td></tr>
<tr><th colspan="2">NON-DELEGABLE DUTY</th></tr>
<tr><td colspan="2">
• a person who is NOT an employee may be liable where a P at special risk is negligently injured
• Seen in cases where:
  ○ P is vulnerable
  ○ D has capacity to exercise control
• If a duty is non-delegable, a D has a duty to:
  ○ Act carefully itself
  ○ Ensure that others delegated the task take reasonable care for the protection of the P
</td></tr>
<tr><td>Wilsons & Clyde Coal Co v English [1938]</td><td>• Employer has a non-delegable duty to provide a safe working space for employees
• If a cleaner (who is NOT an employee) creates a hazard causing injury to an employee, then BOTH the cleaner and employer are liable</td></tr>
<tr><td>Hughes v Percival</td><td>• Duty is cast on D and it <u>cannot get rid of responsibility by delegating performance of the duty to a third party</u>. D can employ third party to discharge the duty but D is still subject to the duty and liable for consequences if it is not fulfilled</td></tr>
<tr><td colspan="2">
• To fill the gap of vicarious liability
  ○ So, a P who has been injured by the tort of an employee may be able to use both vicarious liability and non-delegable duty.
  ○ if the injury was caused by an independent contractor non-delegable duty would be the only avenue available.
</td></tr>
<tr><td rowspan="2">Leichardt Municipal Council v Montgomery (2007) 230 CLR 22</td><td>• An accident occurred on a footpath was caused by the Council's independent contractor</td></tr>
<tr><td>
• The court outlined advantages of non-delegable duty:
  ○ P need NOT be concerned with contractual arrangements entered into by the council
  ○ Council - superior position to see that care is taken (may be able to secure contractual indemnity from contractor if third party injured)
  ○ P protected if contractor is NOT adequately insured
• The court was reluctant to extend the categories of non-delegable duties
  ○ Courts should be reluctant to create exceptional cases where there is liability for the negligence of independent contractors or contractors' employees.
  ○ A contractor is normally in as good a position as the Council to insure and compensate an injured P and deterrence is of doubtful value where the negligent conduct is that of an independent contractor
</td></tr>
<tr><th colspan="2">**ESTABLISHING NON-DELEGALE DUTY</th></tr>
<tr><td colspan="2">
• A non-delegable duty can arise when there is a special relationship between the P and the D.
• A special relationship can arise when:
Step 1: D has control and responsibility as to the safety of the person or property of others (<u>Burnie</u>, AF Textile)
Step 2: There is a special dependence or vulnerability of the P (<u>Burnie</u>, AF Textile Printers) ➔ Criminal conduct is exempted
</td></tr>
<tr><td>Burnie Port Authority v General Jones Pty Ltd (1994) 179 CLR 520</td><td>
• Burnie Port Authority owned a building which was destroyed by fire.
• A portion of the building was occupied by General Jones who stored frozen vegetables.
• The fire began because a welder employed by Burnie negligently allowed a spark to fly off and ignite flammable material that was stored close to where the welder was working.
• The P (General Jones) could not sue Burnie directly because they were not at fault.
• The P could not use vicarious liability because the welder was an independent contractor.
</td></tr>
</table>

	ISSUE: Whether a non-delegable duty was owed

	• P successfully argued that there was a **special relationship** because:
	  o D had **control** over the building and **could have warned** the welder about the flammable material or have it moved away from where the welder was working; (**special dependence**) and
	  o P was **vulnerable** because P could not have prevented the damage. P **did not know** the welder was welding **nor did they have any control** over the welder

New South Wales v Lepore; Samin v Queensland; Rich v Queensland (2003) 212 CLR 511	• 3 Ps were **sexually abused by teachers during school hours and on school grounds**. • 1st was accused of misbehaviour by his teacher and sent to a storeroom. • His teacher followed him into the storeroom and made the student remove his clothes where he was smacked and indecently assaulted. • The teacher was convicted of assault but not sexual assault. • 2nd and 3rd pupils were sexually assaulted by a teacher over a period of 3 years. • The teacher was subsequently tried and convicted for the sexual assaults. • All 3 children sued the teacher, the Education Authority and the State of Queensland/NSW. • One of their arguments was that the **authority and the State owed a non-delegable duty** which they breached **ISSUE**: Whether the school state authority owed a **non-delegable duty of care** to ensure that teachers did NOT cause harm to students
	• **Circumstances matter** →The proposition that, because a school authority's **duty of care to a pupil is non-delegable**, the **authority is liable for any injury**, accidental or intentional, inflicted at school upon a pupil by a teacher, is too broad, and responsibility with which it fixes school authorities is too demanding' . • "A responsibility to take reasonable care for the safety of another, or a responsibility to see that reasonable care is taken for the safety of another, is substantially different from an obligation to prevent any kind of harm". • **The scope of NDD is not absolute** → The majority agreed that schools owe a non-delegable duty of care to pupils, but it would be too demanding to require that the duty could not be breached by a deliberate, intentional sexual assault committed by a teacher against a student. In other words, the scope of the non-delegable duty **does not extend to preventing intentional criminal conduct**

Northern Sandblasting Pty Ltd v Harris	• A landlord employed an electrical contractor to repair a stove. The contractor did so negligently and as a result the tenants' 9-year-old child was electrocuted.
	ISSUE: Does the landlord owe the tenants a non-delegable duty to ensure the contractor was not negligent?
	• The P argued that the landlord should have ensured that the electrician did the job with reasonable care.
	• The D, although conceding that the P was vulnerable, argued he had **no control over the work of the independent contractor.**
	  o He argued it was **different to Burnie because there the D could have intervened in the work of the welder or moved the flammable material.**
	  o The only way he could check the work of the electrician was to hire a second electrician to inspect the work. **This was unreasonable. The court agreed.**

A D & S M McLean Pty Ltd v Meech & Anor [2005] VSCA 305	• The McLeans (D) permitted Samantha to keep horses on their property and she occasionally let her horse "Bob" run in an area of the property known as "the bull paddocks". • Bob escaped from the property onto the Western Highway near to the northern boundary of the property and collided with a car being driven along the highway causing the driver in turn to collide with another car. • Both drivers suffered injury. • (P's) The McLeans argued it was Samantha's responsibility to ensure the horses did not escape. **ISSUE**: Do the McLeans owe a non-delegable duty to the injured motorists to ensure that the fences and gates are in a condition adequate to contain Samantha's horses on the property? • The D's, although conceding the P's were vulnerable, argued **they did not have control over the horses**. • The P argued that they could have ensured the fencing was sufficient to ensure the horses did not escape. **The court agreed.**

XIII. DAMAGES

- Focusing on personal injury

Key principle

- P is awarded such a sum of money as will, **as nearly as possible, put P in the position as if he had not sustained injury** (***Todorovic v Waller***)
- Damages are awarded on a 'once and for all basis' – ie they are awarded as a single lump sum intended to compensate for **all past and future losses** relating to the wrong
- "*...the assessment of damages for the future is necessarily compounded of prophecy and calculation. The court must do the best it can to reach what seems to be the right figure on a* ***reasonable balance of the probabilities, avoiding undue optimism and undue pessimism***." (***Murphy v Stone-Wallwork***)

4 Categories that may be awarded in a tort action

1. Nominal Damages	• Do not apply in negligence • Used by the Court in a case where the P cannot show actual damage, but where the Court recognises that the P's rights have been infringed. • This may occur in trespass, e.g., or breach of contract. • Very trivial sums in which the court believe
2. Compensatory Damages	• to put the victim back into the position she or he was in before the injury • These were the primary form of damages and sought only to compensate for the losses incurred by the victim as a result of the actions of the tortfeasor.
3. Aggravated Damages	• extra compensatory damages for where the D's conduct **was so outrageous that an increased award is necessary** to appropriately compensate injury to a plaintiff's 'proper feelings of dignity and pride' • Awarded in **addition to basic compensatory damages**. • **excluded where the CLA applies**.
4. Exemplary/ Punitive Damages	• To punish D

Economic and non-economic

- **Economic** – can be equated with a monetary value
- **Non-Economic** – cannot be equated with a monetary value
    - the value of personal losses - such as pain and suffering - loss of enjoyment of life - diminished life expectancy

Economic damages - Past and future

- **Past** - specific past losses - expenditure or lost income to the date of the trial = can be done with a high degree of accuracy.
- **Future** – loss of income + the costs of upkeep + treatment for an injured person = assumptions need to be made concerning the injured person's life had the tort not been committed (for purposes of comparison) + in relation to his or her future, post-tort.
    - this is because of the "once and for all" rule + is fraught with difficulty.

General and Special

- **General** – cannot be precisely calculated in monetary terms
- **Special** – can be precisely calculated in monetary terms.

NON-ECONOMIC – CLA s16 - 15% of most extreme case + $635,000

1. Pain and suffering (***Skelton***)
2. Loss of amenities (***Skelton***)
3. Loss of expectation of life

Basic Principles from Common Law

1. A P who has been injured should be awarded such a **sum of money as will, as nearly as possible, put him in the position as if he had not sustained the injuries.**	***Todorovic v Waller*** (1981) 150 CLR 402 at 412

2. **Damages for one cause** of action must be **recovered once and forever**.
3. The court has no concern with the manner in which the P uses the sum awarded.
4. The **burden lies on the P to provide the injury / loss for which he seeks damages**.

restitution in integrum (compensatory principle) - Ps are entitled to be restored to the position they would have been in but for the D's wrongdoing.

ASSESSMENT OF DAMAGES

Date of assessment:

- P entitled to damages **when the harm is sustained (i.e., when the cause of action is complete) - damages are calculated from this date**
  - **Exceptions to this rule**: personal injury, wrongful birth & wrongful death actions = **date of assessment = the date of the verdict**
  - Allows the court to **take account known factors such as inflation, changes in wages, and the vicissitudes of life** - this is especially so when there are **long delays** in coming to trial

Johnson v Perez (1988) 166 CLR 351	• a construction worker sues for **injuries sustained at work over a five-year period** • The claims were eventually struck out for want of prosecution • P sued the solicitors for negligently = claimed psychological injury from the workplace injuries - aggravated by the solicitor's negligence. **ISSUE**: whether the date for assessment of damages was the original hearing date (assuming the solicitors had not been negligent) • the later date when the causes of action were struck out, or • the **date of making the eventual award**. (**THE COURT TAKE THIS ONE**)
	➔ **Later date**: **greater accuracy** in determining the personal circumstances of the P of life.

Factors which may increase/decrease the award of damages:

- Increase in wage rates for the P's / deceased's occupation
- Death of P from an independent cause
- Imprisonment of the P
- Birth of children (***Sullivan v Gordon*** [1999] 47 NSWLR 319)
- Evidence of subsequent injuries (***Baker v Willoughby*** [1970] AC 467 (HL))

There are **3 ways in which personal injury can give rise to damages**: 1. May **destroy or diminish (permanently or for a time) an existing capacity, mental or physica**l 2. May **create needs** that would not otherwise exist 3. May **produce physical pain and suffering**	***Teubner v Humble*** (1963)108 CLR 491
A P is able to recover THREE types of losses: 1. **Non-pecuniary losses** (pain, suffering, disfigurement, limbs, organs, sight, taste, etc) - damages may be recovered, even if no actual financial loss is caused and the damage cannot be measured in money 2. **Loss of earning capacity** (both before and after trial) - only awardable to the extent that the loss has been or may be productive of financial loss 3. **Actual financial loss**	***CSR Ltd v Eddy*** (2005) 226 CLR 1

XIV. DAMAGES FOR ECONOMIC LOSS

****Establishing damages for Economic Loss**

ECONOMIC

1. **Past** loss of earnings = '**actual' loss**
2. **Future** loss of earnings
   - **CLA s13(1)** 'Most likely' future circumstances x remaining working years
   - Minus outgoings (***Wynn***)
   - Minus lost years 'cost of living'
   - Plus or minus contingencies (promotion, unemployment, marriage, maternity leave, sickness, industrial action)

- **CLA s12** No more than 3x average weekly NSW wage

3. **Medical expenses** = 'reasonable' = cost v benefit (***Sharman***)
4. Is there a **gratuitous carer**?
   - CLA s15(1) Services provided by another person without cost
   - CLA s15(2) Reasonable need = solely because of injury and would not be provided 'but for' the injury
   - CLA s15(3) More than 6 hours per week and more than 6 months +
   - CLA s15(4) Not less than 40 hours per week at market rate (***Van Gervan***)
5. **Discount rate on all future economic damages** = **CLA s14** = 5%

1ST PAST & 2ND FUTURE LOSS OF EARNING CAPACITY

Economic loss covered by **two main heads**:

1) **Loss of earning capacity**
2) **New Economic needs created by the injury**
   - A young P - permanently incapacitated for work but who has a long life expectancy - can be awarded very considerable sums under these two heads

Distinction between loss of wages and loss of earning capacity

- **Lost Earnings** focuses on the specific wages or income a person was earning at the time of the injury.
- **Lost Capacity to Earn** is a broader concept that treats a person's ability to make money as a valuable **capital asset**. The injury has damaged or destroyed this asset, and the court's job is to place a value on that loss.

• This case established that the goal is to value the plaintiff's earning potential as a **"capital asset," not just to replace current wages**. • This distinction is important for Ps who are unemployed / under-employed at the date of the accident (i.e., part-time / casual workers, students, children and unpaid domestic carers)	***Cullen v Trappell*** (1980) 146 CLR
• This case reinforced the principle that an **unexercised capacity to earn still has a calculable value**. • The court recognized that a person's future potential, including the ability to retrain for a more lucrative job, should be considered, even if their current job was in a declining industry.	***Atlas Tiles Ltd v Briers*** (1978) 144 CLR

Future loss of earnings

- Damages for future economic loss depend on the extent to which a P is able to prove his/her full capacity would have been exercised in the future, and the level of income that could have been expected.
- Foreseeability has NO part to play in determining economic loss
- If P has stable history of employment - loss of capacity valued by reference to his/her usual salary or wages

****CLA ss12 13 - Establishing Future loss of earning capacity**

STEP 1: CLA s13(1) 'Most likely' future circumstances x remaining working years (specific occupation retirement)

"*s13(1) A court cannot make an award of damages for future economic loss UNLESS the claimant first satisfies the court that the assumptions about future earning capacity or other events on which the award is to be based accord with the claimant's most likely future circumstances but for the injury.*"

- **more generous** that past loss of earnings because it includes capacity
- **Children's cases are difficult to assess** as there is no work history nor educational attainment to guide the courts on 'most likely circumstance' = Evidence is usually parental occupations and education and tables of average weekly earnings of women and men.

STEP 2: Minus outgoings.

- Outgoings are the **costs that a worker incurs in carrying out their occupation** = They are deducted because the injured person will not incur these expenses.
  - Work clothes/uniform
  - Transport to and from work
  - Tools and equipment

STEP 3: Minus lost years 'cost of living'.

- The lost years are the years that the P's **life has been shortened because of the injury**.
- The court considered whether loss of earnings should be awarded for the years that the P's life has been shortened (***Sharman***). = **court decided NO** – **that would be unjust** – however they decided that the **costs of living should be deducted for the lost years** (rent, food etc) BECAUSE the injured person will not be alive to spend those costs.

STEP 4: Plus or minus contingencies

- (promotion, unemployment, marriage, maternity leave, sickness, industrial action).
- **Contingencies (also called vicissitudes of life) can be positive or negative**
- Overall they are **usually negative** – in NSW they usually result in a **deduction of around 15%**

STEP 5: Once the amount is calculated a legislative cap is imposed.

- The **CLA s12 caps the amount a P can receive for future loss of earnings**
- It is capped at **3x average weekly NSW wage**.
  - The average NSW wage at the end of 2019 was $1,720.90
  - The cap is **contrary to the restitutionary principle of tort law** – to put the person back in the position they were in before the injury.
  - Affects high-income earners - may result in no damages being awarded for loss of earning capacity = If you are a high-roller, you should take insurance out yourself - High-income earners should be able to take out insurance

CLA s 12	**12 Damages for past or future economic loss—maximum for loss of earnings etc** (1) This section applies to an award of damages— (a) for past economic loss due to loss of earnings or the deprivation or impairment of earning capacity, or (b) for future economic loss due to the deprivation or impairment of earning capacity, or (c) for the loss of expectation of financial support. (2) In the case of any such award, the court is to disregard the amount (if any) by which the claimant's gross weekly earnings would (but for the injury or death) have exceeded an amount that is **3 times the amount of average weekly earnings** at the date of the award. (3) For the purposes of this section, the amount of average weekly earnings at the date of an award is— (a) the amount per week comprising the amount estimated by the Australian Statistician as the average weekly total earnings of all employees in New South Wales for the most recent quarter occurring before the date of the award for which such an amount has been estimated by the Australian Statistician and that is, at that date, available to the court making the award, or (b) if the Australian Statistician fails or ceases to estimate the amount referred to in paragraph (a), the prescribed amount or the amount determined in such manner or by reference to such matters, or both, as may be prescribed.
Sharman v Evans (1977) 138 CLR 563	• Evans was **aged 20** when injured in a motor vehicle accident. • She suffered serious injuries and is now a quadriplegic. • The condition was **aggravated by trauma-caused epilepsy**, by unusually severe impairment to her respiratory function. • She is **fully aware of her plight**. • Evan's **future had been bright** before the accident: Healthy - Out-going - Intelligent girl - Worked as a secretary & had saved to become a student - She was about to marry in due course • The trial judge **awarded $300,000** (this was a record at the time and was subsequently reduced by HC)
	ISSUE: The following difficulties surround damages in this case: o There would be an **increase in the cost of future nursing care if care for at home** rather than in hospital

	○ There are problems with assessing compensation for the **P's loss of future earning capacity** ○ Doubts as to the **P's present life expectancy**
	• **Lost Earning Capacity:** Damages are calculated based on a **lost capacity to earn**, not a loss of actual earnings. This means valuing the person's potential to earn money as a capital asset. • **Deductions for "Lost Years":** The court must calculate lost earning capacity for the years the plaintiff would have lived had the injury not occurred. However, a deduction must be made for the plaintiff's own living expenses during that period, as they are no longer alive to incur them. This is often referred to as the "lost years" calculation. The case of ***Cullen v Trappell*** is mentioned in this context. • **Hospital and Boarding Expenses:** When a plaintiff is being compensated for future hospital and boarding expenses, the court must be careful to avoid **double compensation**. A deduction should be made for the living expenses the plaintiff would have incurred on their own had they not been injured. The High Court criticized the trial judge for failing to make a proper deduction. • **"Vicissitudes of Life":** This refers to the uncertainties of life that could have impacted the plaintiff's future earnings, such as marriage, illness, or unemployment. The court must consider these factors and may make a deduction from the final award. However, the prospect of a plaintiff marrying and exchanging their earning capacity for financial security should only be a factor if there is clear evidence to support it. The court may disregard this prospect if the pre-injury earning capacity is the only certain factor.
• where a P is **partially incapacitated for work** = If a P is able to find other employment at a **reduced salary** - the current income will be **deducted from the former higher income** over the relevant period in order to establish the amount of loss	
• There are **TWO types of discounting** that are both relevant at common law and the CLA: **<u>DON'T CONFUSE THEM</u>** ○ **Vicissitude's discounting** – P's damages for loss of earning capacity is discounted for **contingencies or vicissitudes** = **CLA, section 13** ○ **Present value discounting** - applied to **personal injury awards** - adjusts for the fact that **P's having much larger sums of capital available for investment** = **CLA, section 14**	
CLA s 13	**13 Future economic loss—claimant's prospects and adjustments** (1) A court cannot make an award of damages for future economic loss unless the claimant first satisfies the court that the assumptions about future earning capacity or other events on which the award is to be based accord with the claimant's most likely future circumstances but for the injury. (2) When a court determines the amount of any such award of damages for future economic loss it is required to adjust the amount of damages for future economic loss that would have been sustained on those assumptions by reference to the percentage possibility that the events might have occurred but for the injury. (3) If the court makes an award for future economic loss, it is required to state the assumptions on which the award was based and the relevant percentage by which damages were adjusted.
• **Vicissitude discounting** - taking into account the award for **ups and downs of everyday life** • There is **NO fixed percentage rate** for this discount (although in **NSW, a 15% reduction** (discount) is usual)	
Wynn v NSW Insurance Ministerial Corporation (1995) 184 CLR 485	• The P was injured by a motor vehicle accident in 1986. • She was previously injured in another motor vehicle accident in 1972. • As a result of the previous accident, she had undergone surgery to stabilise a fracture and dislocation of her spine. **<u>Step 1 P's most likely future circumstances</u>** • The P commenced work with American Express in 1981 and by 1985 was promoted to a managerial position. • Hard working Aiming for vice-president • continued with her work for some little time after the accident and was to the position of Director of Customer Services (involved long hours - computer), one step below vice-president. • salary package of $75,556 net per year - in 1992 • The 1986 accident seriously aggravated the injury sustained in 1972. • She found it necessary to cease her work – in 1988 • Worked part-time in family business – run by husband & brother

	ISSUE: How much deduction of vicissitudes discount from P's future loss of earning capacity?
	• Reasoning: P would have to 'accept a less demanding job' because of the 'demands on her time, energy and health and the love and patience of her husband' • 'The Court of Appeal held that there should be a **discount of 28%** for contingencies, of which 8% was for **two years' absence** from the workforce to have **two children**. The balance of the discount was for the prospect that the appellant "would at some stage [choose] or [be] forced to accept a **less demanding job**" because she "would be **unable or unwilling to remain in her job** which placed such heavy demands on her time, energy and health and the love and patience of her husband'. • 'So far as concerns the prospect of reduced participation in the workforce, there is **nothing in the evidence to suggest** that the appellant was any less able than any other career oriented person, whether male or female, to **successfully combine a demanding career and family responsibilities.'**
3RD MEDICAL EXPENSES: NEW ECONOMIC NEEDS CREATED: PAST & FUTURE CARE COSTS	
• Expenses included under this head include: ○ Medical ○ Hospital ○ Nursing ○ Physiotherapy ○ Ongoing care costs	
Sharman v Evans (1977) 138 CLR 563 same facts as before	• Medical evidence in this case does not justify the conclusion that the D should be required to compensate for future nursing and medical expenses on any basis other than that the P's future will be one substantially spent in hospital • The question should be - "**not what are the ideal requirements BUT what are the reasonable requirements of the D**" • The decision is reached on a normal standard of reasonableness - **costs v benefits** • **The core issue was a choice between two alternatives:** the cost of care for the plaintiff at home versus in a hospital. • **The court found the hospital alternative to be the most reasonable.** ○ The cost of home care was significantly higher ($390,000) than hospital care ($108,500). ○ Home care offered only a benefit of "amenity" (enjoyment of life), with no improvement to the plaintiff's physical or psychiatric health. In fact, she would be at greater physical risk at home. • **The defendant was ordered to pay for hospital care.** ○ The awarded amount for hospital costs over a 30-year period was approximately $128,000. • **Damages for loss of amenity were also adjusted.** ○ Since the plaintiff was to spend her life in a hospital, her damages for loss of amenity were increased. ○ To mitigate this, the defendant was also ordered to pay for transportation (e.g., by ambulance or car) to allow the plaintiff to visit her home periodically. • **Conclusion:** The court balanced the different heads of damages, finding that while the plaintiff's primary care would be in a hospital, it was reasonable to provide funds for her to have some enjoyment of her home life.
4TH GRATUITOUS ATTENDANT CARE SERVICES	
• A person who cares for an injured person without cost. • No overned by s 15 CLA **Question raised in common law before CLA s15 ?** 1. Should damages be payable for gratuitous care? • **YES** (***Griffiths v Kerkemeyer*** (1977) 139 CLR 161) 2. Who should they be payable to? (the carer / the P).	

- The **P should receive the damages. The P is then in control of her/his care** (***Griffiths***)
- career might abandon P/ P might no longer want the career to take care of him/her

3. What rate should they be paid – the lost income of the career the market costs of a career?

- The rate **should be the market cost of a career** because the person providing the gratuitous care may not continue to do so and then the P will have to employ a career at market cost (***Van Gervan v Fenton*** [1992] HCA 54)

Griffiths v Kerkemeyer (1977) 139 CLR 161	• The D suffered severe injuries = became quadriplegic - result of a road accident occasioned by the P's negligence. • Judgment was entered for $221,936 damages & $27,800 interest. • Part of the damages was for gratuitous care provided by family members. • The P's case was that the damages awarded were excessive • there was a cross-appeal on the ground that the damages awarded were inadequate. **ISSUE**: Were the damages awarded inadequate?
	2 stage test to determine gratuitous care: 1. Is it reasonably necessary to prove the services, and would it be reasonably necessary to do so at a cost? YES = then, fulfilment of the need is likely to be productive of financial loss 2. Is the character of the benefit which the P receives by the gratuitous provision of the services such that it ought to be brought into account in relief of the wrongdoer? If NOT = the damages are recoverable • HC decided that compensation could be **awarded in respect of the injured person's need for care and assistance**, even if that need was met gratuitously by relatives / friends at no cost to the claimant

****CLA s 15 – Gratuitous Care**

STEP 1: CLA s15(1) gratuitous attendant care services means attendant care services—
(a) that have been or are to be provided by **another person to a claimant**, and
(b) for which the **claimant has not paid or is not liable to pay**.
- Doesn't change common law

STEP 2: CLA s15(2)
(a) there is (or was) a **reasonable need** for the services to be provided, and
(b) the need has arisen (or arose) **solely because of the injury** to which the **damages relate**,
(c) the services would **not be** (or would not have been) **provided to the claimant but for the injury**.
- Services that were provided to the P **before the injury CANNOT be compensated** as gratuitous care.
    - Intimate care
    - Emotional support
    - Domestic work that might normally have been done by the career (E.G., parent – still cooking, housework – only the increased / extra work will be compensable due to the injury)
- If there was a pre-existing injury, then any care provided for this injury CANNOT be compensated.

STEP 3: **CLA s15(3) - More than 6 hours / week and more than 6 months**
- if the care required is for less than 6 hours per week **OR**
- if the care is more than 6 hours pers week but for less than 6 months = no compensation

STEP 4: CLA s15(4) Not more than 40 hours / week at NSW average
- If the gratuitous care required is for more than 40 hours / week the P can only receive 40 hours.

5TH DISCOUNT RATE – PRESENT VALUE DISCOUNTING

- Applied to personal injury awards in addition to vicissitudes discounting

- Present value discounting - **NOT available for general damages (non-economic) loss nor to sums awarded in respect of past losses**
  - **Present value discount** - equivalent to **negative compound interest**
  - **Vicissitude's discount** - equivalent to **negative simple interest**
  - **present value discount must be calculated first**, then that discounted sum is **discounted again by the percentage allowed for contingencies**.

CLA s 14	**14 Damages for future economic loss—discount rate** (1) If an award of damages is to include any component, assessed as a lump sum, for future economic loss of any kind, the present value of that future economic loss is to be determined by adopting the prescribed discount rate. (2) The **prescribed discount rate** is— (a) a discount rate of the percentage prescribed by the regulations, or (b) if no percentage is so prescribed—a **discount rate of 5%.** (3) Except as provided by this section, nothing in this section affects any other law relating to the discounting of sums awarded as damages.

XV. DAMAGES FOR NON-ECONOMIC LOSS

****Establishing NON-Economic Damages**

CLA s16 - 15% of most extreme case + $635,000

1. Pain and suffering (***Skelton***)
2. Loss of amenities (***Skelton***)
3. Loss of expectation of life

FOR EXAM:

- NO need to actually calculate amounts
- Need to Understand the different rule and apply them to the facts in the scenario
- **Need to know 15% is the bottom cut off for non-economic damages**
- Determine from the fact – e.g., clearly more than 15% / less / likely less =**BUT no need to determine THE EXACT FIGURE**

CLA s 3	**non-economic loss** means any one or more of the following— (a) pain and suffering, (b) loss of amenities of life, (c) loss of expectation of life, (d) disfigurement.

1. **Pain and suffering –** entirely subjective
   - (Kinds of pain and suffering – e.g., pain & suffering of a broken leg)
   - includes physical pain as well as worry, anxiety, frustration, inconvenience and discomfort
   - Damages awarded under this head are to compensate the P for the **subjective impact of the injury** = "*the mental distress due to the realization of the loss*"- ***Sharman v Evans***.
     - comatose P in ***Skelton v Collins*** was NOT awarded any damages for pain and suffering.
2. **Loss of amenities / loss of enjoyment of life** - largely subjective, with a level of objectively
   - (sport, gardening – all things could not anymore do = injury)
   - regarded as objective - but still gives rise to difficulty where a P's unconscious.
     - ***West v Sheppard*** [1964] AC 326: **gave a substantial award** to the P under this head even though she was **unconscious / barely conscious**
3. **Loss of expectation of life**. (Unlike the economic one – this is **feeling miserable because of shortened life**) - primarily subjective, but with some objectivity;
   - Described as "*consolation for the mental anguish suffered during the shortened lifespan or as a means by which the P may attempt to obtain fulfilment in lieu of that which has been denied*." (***Skelton v Collins***).

<table>
<tr><td rowspan="3">Skelton v Collins
(1966) 115 CLR 94</td><td>• The 19-year-old P suffered severe brain damage as a result of the D's negligence and was <u>likely to remain unconscious in hospital for 6 months until his expected death.</u>
ISSUE
• whether the P could receive damages for pain & suffering and/or loss of amenities and loss of expectation of life since he was <u>unconscious and NOT (presumably) able to subjectively experience pain & suffering</u>
• Damages for lost-earning capacity - regard should be had to the probable period immediately before his injuries and not merely to the period of life which remained to him after the event</td></tr>
<tr><td>General Damages for a Permanently Unconscious Plaintiff
• The court's award <u>of general damages for pain and suffering was correctly assessed at zero</u> because the plaintiff was unconscious from the moment of the accident and would never regain consciousness. He could not, therefore, experience any physical or mental pain.
• The award of £1,500 was intended to compensate for 1. loss of amenity (the loss of the enjoyment and pleasures of life) and 2. loss of expectation of life. These losses have both <u>a subjective (the plaintiff's awareness) and an objective (the loss itself)</u> aspect. In this case, compensation was for the objective loss only, due to the plaintiff's permanent unconsciousness.</td></tr>
<tr><td>OUTCOME:
• the sum of £2,000 as reasonable compensation
• P was only expected to live a short time after the trial = so there was not a great deal of importance to be attached either to what should determine the reasonableness of the award for future expenses while he remained alive - or to the precise calculation of loss of wages after the trial until his death.
• the award for loss of earnings during the "lost years" was very important, rather than focusing on the principles applying to its calculation.</td></tr>
<tr><td rowspan="2">Randwick City Council v Muzic
[2006] NSWCA 66</td><td>• The P slipped and fell over whilst approaching the steps to the sea baths at Clovelly Bay.
• The D is a public authority which has the custody, care and control of the area in which the incident occurred.
• P was awarded $40,000 for loss of amenities.</td></tr>
<tr><td>Loss of amenities
Primarily Subjective • Playing Bocce twice a week for three hours; • Enjoying cooking Italian cuisine; • Knitting, crocheting and dressmaking; • Helping at an old persons' home; • Doing all of the domestic work at home with her husband; • Swimming and fishing.
• 'The expression 'loss of amenities of life' is a loose expression but as a head of damages in personal injury cases it is intended to denote a loss of the capacity of the injured person consciously to enjoy life to the full as, apart from his injury, he might have done.' (Skelton)</td></tr>
<tr><td rowspan="2">Sharman v Evans
(1977) 138 CLR 563</td><td>• Miss Evans (aged 20) injured in a motor car accident in December 1971
• Suffered serious injuries - brain stem damage, unconscious for a month and became a quadriplegic
• Condition aggravated by epilepsy, respiratory problems and inability to speak due to larynx injury
• Lost everything = bright future</td></tr>
<tr><td>• The court made it clear that <u>different heads of damage should be assessed in relation to one another</u>.
• Because the plaintiff's damages for future care were limited to the less costly hospital option, the court increased the award for loss of enjoyment and amenities of life to compensate for the fact that she would have to live in an institution.
• However, the court also ruled that <u>damages for loss of amenities should be reduced to the extent that other awards</u> (like for lost earning capacity) provide the plaintiff with funds for pleasurable activities, thereby offsetting some of the loss.</td></tr>
<tr><td colspan="2">• CLA, workers' compensation & motor accident legislation = impose thresholds on general damages and maximum amounts (caps), particularly in regard to non-economic loss
• This <u>excludes the high volume of minor injuries</u> (which are costly to administer)
• This means that awards for non-economic losses are only administered in the most serious cases s16
• "Each case will necessarily depend on its own facts." Southgate</td></tr>
<tr><td colspan="2">A MOST EXTREME CASE – EXAMPLES:
○ although opinions on what constitutes "a most extreme case" will vary, <u>quadriplegia</u> certainly fulfilled the requirement. (Southgate)</td></tr>
</table>

	○ **Total blindness** accompanied by **loss of limbs** was a most extreme case. (***Mason v Demasi*** 2012 NSWCA 210) ○ A brain damaged P retaining a restricted ability to walk but with an exceptionally limited capacity for an independent life would also qualify (***Quintano v BW Rose Pty Ltd*** 2009 NSWSC 210)
***CLA* s16**	**16 Determination of damages for non-economic loss** (1) No damages may be awarded for non-economic loss unless the severity of the non-economic loss is at least 15% of a most extreme case. (2) The maximum amount of damages that may be awarded for non-economic loss is ~~$350,000~~, but the maximum amount is to be awarded only in a most extreme case. (722,000) (3) If the severity of the non-economic loss is equal to or greater than 15% of a most extreme case, the damages for non-economic loss are to be determined in accordance with the following Table—

Severity of the non-economic loss (as a proportion of a most extreme case)	Damages for non-economic loss (as a proportion of the maximum amount that may be awarded for non-economic loss)
15%	1%
16%	1.5%
17%	2%
18%	2.5%
19%	3%
20%	3.5%
21%	4%
22%	4.5%
23%	5%
24%	5.5%
25%	6.5%
26%	8%
27%	10%
28%	14%
29%	18%
30%	23%
31%	26%
32%	30%
33%	33%
34%–100%	34%–100% respectively

(4) An amount determined in accordance with subsection (3) is to be rounded to the nearest $500 (with the amounts of $250 and $750 being rounded up).

Note.
The following are the **steps required in the assessment of non-economic loss** in accordance with this section—
Step 1: Determine the severity of the claimant's non-economic loss as a proportion of a most extreme case. The proportion should be expressed as a percentage.
Step 2: Confirm the maximum amount that may be awarded under this section for non-economic loss in a most extreme case. This amount is indexed each year under section 17.

	Step 3: Use the Table to determine the percentage of the maximum amount payable in respect of the claim. The amount payable under this section for non-economic loss is then determined by multiplying the maximum amount that may be awarded in a most extreme case by the percentage set out in the Table. Where the proportion of a most extreme case is greater than 33%, the amount payable will be the same proportion of the maximum amount.
Khan v Polyzois **[2006] NSWCA 59**	**20% of extreme case** • In the course of his employment with Target Australia the P **sustained an injury to his left testicle** while lifting a table. • It was **not diagnosed accurately** and unfortunately due to this delay **became necrotic and had to be removed**. • His **capacity for work was unchanged** and he has no ongoing physical disability because of the removal of the testicle
Wighton v Arnot **[2005] NSWSC 637**	**45% of extreme case** • The P was **negligently treated by her surgeon** and suffers a range of injuries. • she has **intense pain in her neck**, her shoulder is damaged and she **needs a pillow when sitting**. • She **can't walk for longer than 20 minutes**, she has to sleep on her left side and her husband sleeps in the lounge. • She can **no longer play sport, and nappy changing, bathing her children, breast-feeding are difficult.** • **Driving is painful.**
****In your exam you could say <u>if you think it would reach the 15% threshold or not</u> and could give an approx. of the severity.**	