

LAWS1030/LAWS5024 TORTS

Final Exam Scaffold

Full edition

2025

PART A
FOUNDATIONS
Topics 1–2

PART B
TRESPASS AND NUISANCE
Topics 3–7

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NEGLIGENCE
Topics 8–14

PART D
VICARIOUS AND CONCURRENT
LIABILITY
Topics 15–16

How to read this scaffold

11 Apportionment under the LRMPA 1965

- RULE**
- At common law contributory negligence was a **complete defence** (*Butterfield v Forrester*)
 - Now the claim survives and **damages are reduced**.
- (a) **LRMPA 1965 s 9(1)(a)**: P's contributory negligence does **not defeat the claim**.
- (b) **LRMPA 1965 s 9(1)(b)**: damages "are to be reduced to such extent as the court thinks **just and equitable** having regard to the claimant's share in the responsibility for the damage."
- (c) **LRMPA 1965 s 9(2)**: it does not defeat a defence arising under a contract.
- (d) **LRMPA 1965 s 9(3)**: where a contract or enactment limits liability, damages are "not to exceed the **maximum limit** so applicable."

P's share in responsibility is found by comparing the parties on **two factors**.

- WEIGH**
- (e) **Comparative culpability**: how far P's and D's conduct departed from the reasonable person's standard (*Pennington v Norris*).
- (f) The **relative causal potency** of P's and D's failures to take reasonable care (*Podrebersek v Australian Iron & Steel*).

OPEN WITH *As P was contributorily negligent, P's damages are to be reduced to the extent that is just and equitable having regard to P's share in the responsibility.*

- WATCH**
- **Never** stop at "just and equitable":
 - Compare culpability and causal potency, then propose a percentage.

CASES *Pennington v Norris*: P was hit by D's car crossing a road at night
→ the High Court cut the 50% reduction to 20%.

Butterfield v Forrester: P rode fast into a pole D had wrongly left on the highway, visible from far off
→ D was not liable, contributory negligence then being a complete defence.

Red: the words the answer needs.

Navy italic: a case. Green: a section.

Green tint: the Act's own words.

The label says how the list works: all required, any one of, weigh, in order.

Cream: a sentence to open the paragraph with. White slots take the facts.

Rose: a mistake that costs marks.

Grey: the case in a line. Yellow: the fact it turned on. Arrow: the result.

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Introduction to tort law

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1 Structure of every answer

RULE A tort is a **civil wrong** protecting interests in bodily security, property, financial resources or reputation **not exclusively within** contract, restitution or criminal law (*Balkin and Davis*). Tort law asks what standards of conduct govern us and how justice is done between the parties when they are breached (*Julia Davis*).

- IN ORDER**
- 1. Cause of action:** which tort fits the facts (eg battery, trespass to land, nuisance, negligence)?
 - 2. Elements:** can P prove each ingredient, including the fault element (intention or negligence)? If so P has a prima facie case.
 - 3. Defences:** can D raise a complete defence (eg self-defence, consent) that defeats liability, or a partial defence (eg contributory negligence) that reduces it?
 - 4. Remedies:** what damages or injunction follow, and who pays?

OPEN WITH *The first issue is to identify the cause of action available to P and whether each of its elements is made out.*

- ARGUE**
- Run every problem in this order, calling the parties P and D, and deal with each D and each tort separately.
 - The standard of proof is the **balance of probabilities**: P need only show the tort is more probable than not.

2 Tort compared with contract and crime

RULE Tort differs from contract and crime in the **source of the obligation**, who enforces it, its aim and its outcome.

- (a) Source of obligation:** contract, the agreement between victim and D
 - Crime and tort, generally applicable law.
- (b) Who enforces:** contract and tort, the victim of the wrong
 - Crime, the State.
- (c) Primary aim:** contract and tort, corrective

- Crime, retributive.

(d) **Outcome:** contract and tort, a remedy to the victim (damages or injunction)

- Crime, State-imposed punishment.

OPEN WITH *D's conduct may give rise to liability in tort independently of any criminal or contractual consequences.*

- ARGUE**
- One act can found **concurrent liability**:
 - A punch is a crime and a battery
 - A tort within a contract may also breach it.
 - Exemplary damages give tort a punitive edge.

3 Sources of law: common law and statute

- RULE**
- Tort is a common law creature developed by precedent and **overlaid by statute**
 - A much-patched garment (*Carol Harlow*). The CLA is **not a code**: it modifies the common law of negligence selectively, and the law now fragments across the States (*Mendelson*).

OPEN WITH *The claim must be assessed against both the common law and the Civil Liability Act 2002 (NSW), because the Act displaces the common law only on the points it deals with.*

- ARGUE**
- For each step, check first whether a CLA provision governs it (eg breach **CLA s 5B**, causation **CLA s 5D**); if not, apply case law.
 - Land torts are still almost entirely case law.
 - Cite only NSW legislation.
 - The CLA (from the Ipp Report after the insurance crisis) is mostly plaintiff-unfriendly:
 - New and tighter defences, protection for public authorities, damages caps.
 - Earlier legislation was plaintiff-friendly:
 - **LRMPA 1965 s 9(1)** ended contributory negligence as a complete bar, and **CRA s 3(1)** lets relatives sue where "the death of a person is caused by a wrongful act, neglect, or default" that would have entitled the injured person to sue.
 - Most of the CLA does not apply to an intentional act done with **intent to cause injury** or death, or to sexual assault or misconduct: **CLA s 3B(1)(a)**.
 - Check this before applying it to an intentional tort.

4 Fault-based versus strict liability

- RULE**
- Tort liability is **mostly fault-based**
 - Strict liability (for an outcome regardless of intent or ability to prevent it) is exceptional and usually statutory. Trespass is **never strict**: negligence can supply the fault (*Williams v Milotin*), and D must show it was **utterly without fault** (*Croucher v Cachia*).
- (a) **Intention:** D meant to do the prohibited thing and did it (subjective).
- (b) **Recklessness:** D knew the outcome was likely or might result and went ahead anyway (subjective; scarcely less culpable than intention).
- (c) **Negligence:** D failed to meet the standard of reasonable conduct the law expects (objective, measured against an external standard).

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PART C · NEGLIGENCE

Negligence: causation and scope of liability

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1 Identify the damage and the breach first

RULE Damage is the gist of negligence: breach alone gives no liability, so P must identify **actionable damage** the breach caused (*Tabet v Gett* (Kiefel JJ)).

- (a) **Personal injury.**
- (b) **Psychiatric injury.**
- (c) **Property damage.**
- (d) **Pure economic loss.**

OPEN WITH *Before turning to causation, it is necessary to identify the damage P relies on and what reasonable care by D would have involved.*

- ARGUE**
- State the breach precisely (what D should have done under s 5B), because factual causation asks whether that precaution would have avoided the harm; without it you can't run the counterfactual.
 - Where damage comes in stages (injury, then hospital infection, then a second accident on the way there), run causation and scope separately for each.

2 Statutory framework: two elements in s 5D(1)

RULE Causation is governed by the CLA, not common law common sense, and s 5D(1) splits it into **two elements** that **must both be met** (*Adeels Palace v Moubarak*; **CLA s 5D(1)** "A determination that negligence caused particular harm comprises the following elements").

- ALL REQUIRED**
- (a) **Factual causation:** **CLA s 5D(1)(a)** "that the negligence was a **necessary condition** of the occurrence of the harm (factual causation)".
 - (b) **Scope of liability:** **CLA s 5D(1)(b)** "that it is **appropriate** for the scope of the negligent ... liability to extend to the harm so caused (scope of liability)".

OPEN WITH *Under s 5D of the Civil Liability Act, P must establish both factual causation and that the harm is within the scope of D's liability.*

- ARGUE**
- Always do factual causation first.
 - It is a gatekeeper: scope asks about "the harm so caused", so don't argue responsibility before a factual cause is shown.
 - The Act adopts McHugh J's split in March (a factual question, then a separate value judgment), not Mason CJ's single common sense inquiry (*March v Stramare* (McHugh J)).

3 Onus and standard of proof: s 5E

RULE **CLA s 5E** "the plaintiff **always bears the onus** of proving, on the **balance of probabilities**, any fact relevant to the issue of causation."

OPEN WITH *P bears the onus of proving, on the balance of probabilities, every fact relevant to causation.*

- ARGUE**
- The onus never shifts to D, however hard the proof; s 5E shut down earlier suggestions it might reverse in hard cases.
 - The standard is more likely than not, not certainty.
 - Proved on the balance of probabilities, causation is treated as certain and P recovers the whole loss; unproved, P gets nothing.
 - No discount for residual doubt (*Tabet v Gett*).

4 Factual causation: the but-for test

RULE Whether negligence was a "**necessary condition**" of the harm under **CLA s 5D(1)(a)** is answered by the **but-for test**: would the harm have occurred if D had taken reasonable care (*Adeels Palace v Moubarak*)?

- IN ORDER**
- (a) **Step 1**: identify the precaution reasonable care required (from breach).
 - (b) **Step 2**: substitute that hypothetical reasonable care for D's actual conduct (a counterfactual, sine qua non inquiry) (*Adeels Palace v Moubarak*).
 - (c) **Step 3**: ask whether, on the balance of probabilities, reasonable care would (not merely may) have prevented the harm (*Adeels Palace v Moubarak*).

OPEN WITH *The first question is whether, but for D's failure to take reasonable care, P's harm would not have occurred.*

- ARGUE**
- D's negligence need only be a cause, not the only, main or most significant one (*March v Stramare*); P's or a third party's fault doesn't stop it being a but-for cause.
 - Common mistake: proving only that reasonable care might have made a difference.
 - P must show it would have.

CASES *Barnett v Chelsea & Kensington Hospital*: a casualty doctor negligently sent a vomiting night watchman home
 → he died of arsenic poisoning. He **would probably have died even with proper treatment**, so the negligence was not a cause.

Adeels Palace v Moubarak: **no security on New Year's Eve**

→ a patron who had been in a fight left, returned with a gun and shot P and another. Security may have stopped so determined a gunman, but P couldn't prove it would have, so s 5D(1)(a) failed and breach needn't be decided.

5 Proving the counterfactual on the balance of probabilities

RULE The court **may infer** what would have happened with reasonable care from the probabilities on the evidence (*Strong v Woolworths*).

OPEN WITH *The question is whether it is more probable than not that reasonable care would have averted the harm on these facts.*

ARGUE

- Argue both ways:
 - A time-based statistical approach (the Strong majority) often helps P
 - A common-experience approach looking at when the hazard likely arose (Heydon J, dissenting) may show P hasn't discharged the onus.

CASES *Strong v Woolworths*: P slipped on a chip near a food court at 12.30pm; a proper cleaning system would last have cleaned the area at 12.10pm. Majority: open since 8am, the chip was more probably dropped before 12.10pm and would have been cleaned
→ causation established.

Strong v Woolworths (Heydon J): dissent. Chips are mostly eaten around lunchtime, so P hadn't proved the chip was there before 12.10pm.

6 Common law contrast: March v Stramare common sense

RULE

- At common law causation was a question of fact resolved by **common sense**, with but-for a guide, **not the exclusive test** (*March v Stramare* at 515 (Mason CJ)). Reasonable foreseeability is not a test of causation
- It marks the **limit of responsibility** (*March v Stramare* at 510 (Mason CJ)).

(a) **Coincidences**: a factor that only puts P at the place and time of injury is not a cause unless it increased the risk of the accident (*March v Stramare* at 516 (Mason CJ)).

(b) **Pre-conditions versus causes**: having a head is a precondition of decapitation, not its cause (*March v Stramare* at 523 (Deane J)).

(c) **Multiple sufficient causes**: two hunters each fire a sufficient shot, and but-for says neither is a cause (*March v Stramare* at 516 (Mason CJ)).

(d) **Novus actus interveniens**: A's negligence sets the scene for B's deliberate wrongful act, and A's act is a condition, not a cause (*March v Stramare* at 517 (Mason CJ)).

OPEN WITH *Although causation at common law was a matter of common sense, the CLA now separates the factual question from the question of responsibility.*

WATCH

- **Don't** apply common sense to s 5D(1)(a); the High Court said it has no place there and doubted its place at common law (*Tapp v Australian Bushmen's* (Gordon, Edelman and Gleeson JJ)).
 - It survives only where the CLA doesn't apply (eg the NT).
- The four gaps in but-for are now handled elsewhere:
 - Coincidence and novus actus under scope (s 5D(1)(b)), multiple sufficient causes under s 5D(2).

CASES *March v Stramare*: D parked a produce truck mid-road at night to unload
→ drunk, speeding P drove into it. D's negligence remained a cause despite P's own negligence.

7 Exceptional cases: s 5D(2)

RULE **CLA s 5D(2)**: "in an **exceptional case**, in accordance with **established principles**", in deciding whether negligence "that cannot be established as a necessary condition of the occurrence of harm should be accepted as establishing factual causation", the court considers "whether or not and why responsibility for the harm should be imposed on the negligent party".

OPEN WITH *As D's negligence cannot be shown to be a necessary condition of the harm, the question is whether this is an exceptional case under s 5D(2).*

- ARGUE**
- The model is *Fairchild v Glenhaven*: did D's negligence materially increase the risk of harm to P (*Adeels Palace v Moubarak*)?
 - A truly exceptional case is like the two hunters or industrial disease, where but-for absurdly says no one caused the harm.
 - Failing to prove but-for on ordinary facts isn't exceptional.
 - No case has applied s 5D(2); raise and dismiss it briefly unless the facts are of the two-hunter kind.

CASES *Adeels Palace v Moubarak*: s 5D(2) unavailable
→ **nothing was exceptional**, P simply couldn't prove causation.

8 Loss of a chance of a better outcome

- RULE**
- In personal injury P **cannot recover** for the loss of a chance of a better outcome
 - It is **not compensable damage** (*Tabet v Gett*).
- (a) It interferes with traditional principles of causation (*Tabet v Gett*).
- (b) It would weaken the requirement that P prove that but for D's negligence she would not have suffered the harm (*Tabet v Gett*).
- (c) A lost chance could be sued on as soon as it is reduced, before or regardless of physical harm, and it moves as the patient responds to treatment, so it can't be stably assessed (*Tabet v Gett* (Kiefel J)).
- (d) The balance of probabilities is already a relatively low standard that accommodates uncertainty in proof (*Tabet v Gett*).

OPEN WITH *If P cannot prove that timely care would probably have avoided the harm, P cannot reframe the damage as a lost chance of a better outcome.*

- ARGUE**
- Medical cases carry a competing cause (the pre-existing illness), so P must prove the condition was treatable; if not, the claim fails, with no percentage award.
 - Contrast contract, where a lost commercial opportunity of substance can be damage.

CASES *Tabet v Gett*: a six-year-old with headaches and vomiting; **CT scan negligently delayed**; brain tumour found after a seizure. The trial judge (Studdert J) couldn't find causation on the balance of probabilities but awarded 40% for the lost chance
→ the High Court held no recovery.

9 Failure to warn: what would P have done? s 5D(3)

RULE Where factual causation depends on what P would have done absent D's negligence, **CLA s 5D(3)(a)** "the matter is to be **determined subjectively** in the light of all relevant circumstances" and **CLA s 5D(3)(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."

- (a) P would have refused the procedure entirely: failure to warn is a factual cause (*Chappel v Hart*).
- (b) P would have gone ahead with the same procedure as performed: no factual causation (*Chappel v Hart*).
- (c) P would have had the same procedure later, by the most experienced surgeon available: factual causation if, on the balance of probabilities, the small risk would not have materialised then (*Chappel v Hart*).

OPEN WITH *The next question is whether, if properly warned of the risks, P would have declined the procedure, determined subjectively under s 5D(3).*

- ARGUE**
- The test is this P, not a reasonable patient.
 - P's hindsight evidence that she would have refused is inadmissible unless against interest, so argue from extrinsic evidence; P's evidence of her beliefs, values and fears at the time is admissible.
 - The same applies outside medicine (would the worker have worn the harness?).
 - The doctor owes a single comprehensive duty of reasonable care in advice and treatment, so the counterfactual is a warning of all material risks, not just the one that materialised (*Wallace v Kam*, applying *Rogers v Whitaker*).

CASES *Chappel v Hart*: voice damage from a perforated oesophagus, an unwarned inherent risk → P would have had the operation later by the most experienced surgeon, when the very small risk probably wouldn't have occurred. Factual causation established.

Wallace v Kam: the surgeon failed to warn of temporary nerve damage and of permanent paralysis → the temporary risk materialised. Warned of both, P would have refused surgery, so factual causation was established (the trial judge wrongly asked only about the temporary risk).

10 Scope of liability: s 5D(1)(b) and s 5D(4)

- RULE**
- Factual causation satisfies only s 5D(1)(a)
 - Legal causation needs a yes to the **normative question** whether D's liability should extend to the harm suffered (*Wallace v Kam* at [21]; **CLA s 5D(4)** "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").

OPEN WITH *Having established factual causation, the further question is whether it is appropriate for the scope of D's liability to extend to the harm P suffered.*

- ARGUE**
- Section 5D gives the question, not the answer.
 - Answer it by precedent: the common law on remoteness, intervening acts and supervening events still applies (*Wallace v Kam* at [22] (French CJ, Crennan, Kiefel, Gageler and Keane JJ)).
 - Work through **points 11 to 16** and give reasons (whether or not and why).
 - In failure to warn, ask what policy the duty serves: protecting P from physical injury whose risk P finds unacceptable, not the right to choose as such (*Wallace v Kam* at [36]).

CASES *Wallace v Kam* at [39]: P is not compensated for physical injury whose risk he was prepared to accept. He would have accepted the temporary nerve damage risk that materialised, so it fell