

JURD7161 Torts

Master Cheat Sheet

The whole negligence action on one map + element quick-refs,
numbers & traps

The negligence action , run it in order

MASTER FLOW (every problem)

1. **0. CLA apply?** s 3B (not intentional/sexual/motor accidents/workers comp). Name P, D, the harm.
2. **1. DUTY** , established category (*Donoghue*) OR salient features (*Sullivan v Moody*) OR special category (mental harm ss 30-33 / PEL *Perre/Esanda* / public authority ss 41-44 / occupier *Zaluzna* + 3rd-party *Modbury*).
3. **2. BREACH** , standard (who is D? *McHale/Carrier/Imbree/Rogers*+s 5O/5P) then calculus **s 5B** (foreseeable + not insignificant + reasonable precautions, prospectively; probability/seriousness vs burden/utility).
4. **3. CAUSATION** , factual **s 5D(1)(a)** (*Strong; March v Stramare* limits; s 5D(2) exceptional *Amaca v Booth/Chappel v Hart*; s 5E onus) then scope **s 5D(1)(b)** (novus actus *Chapman*; remoteness *Wagon Mound*; eggshell *Nader*; s 5D(4)).
5. **4. DAMAGE** , actual recognised harm (s 5).
6. **5. DEFENCES** , CN (s 5R; apportion *Podrebersek*; s 5S up to 100%) ; volenti/obvious risk (ss 5F-5H) ; DRA (s 5L) , complete defences.
7. **6. DAMAGES** , economic (ss 12-15: capacity *Graham v Baker*, net *Cullen*, vicissitudes ~15% *Malec/Wynn*, 5% discount s 14, care s 15) + NEL (s 16: 15% threshold, scale, \$722k cap).
8. **Separate torts:** private nuisance ; breach of statutory duty (5 elements) ; vicarious liability + non-delegable duty.

structured settlements under s 22 remain little used.

ESSAY AMMUNITION: ASHBY MEETS THE CLA

This is the sharpest essay move in the topic, and it is the student's own. The subject opens with *Ashby v White*: the right itself is the injury, damage need not be financial, *injuria sine damno*. But NSW tort right now is a **thresholded compensation system, not a rights-vindication system**. s 16 denies non-economic-loss damages below 15% of a most-extreme case; s 12 caps earnings loss. The right to bodily integrity is legally cognisable only above a threshold and below a cap.

So the foundational principle and the operative statute point in different directions. Either *Ashby* is the foundation, in which case the CLA does something different from what tort is supposed to do; or the CLA is the foundation and *Ashby* is rhetoric we use to open the subject. The reform may be defensible on cost grounds, but it is quietly inconsistent with the principle the course uses to introduce tort. Naming that inconsistency, rather than reciting *Ashby* as settled doctrine, is what lifts an essay.

A7. Tort and rights without a Bill of Rights

Australia has no Bill of Rights, so the common-law torts (assault, battery, false imprisonment, defamation, trespass, nuisance, *Wilkinson v Downton*) plus statute are the patchwork through which personal integrity and rights get protected. The three foundation cases trace whether the common law can actually create rights, or only receive them once a statute has named them.

****Three judicial invitations across 300 years****

***Ashby v White* (1703)**	If a statute confers a right, the common law will supply a remedy. Vindication works where the right is already named.
***Lim Poh Choo* (1980)**	Lord Scarman invites Parliament to consider periodical payments. Lump-sum reform is for the legislature, not the courts.
***Lenah Game Meats* (2001)**	The HCA unlocks the door to a privacy tort but declines to walk through it; development is left to incremental working-out.
The pattern	Of three invitations, only one was answered: the Cth privacy tort in 2024, 23 years late. The other two remain open.

ESSAY AMMUNITION

The synthesis: *ubi jus ibi remedium* really only works when the right has already been named in a statute. *Wilkinson v Downton* shows the common law can invent a tort, but only when the gap is small (no contact, no apprehension, the action on the case reaches it). Anything bigger (privacy, lump-sum reform, no-fault) needs legislation. So Australian common law is mostly a receiver of rights, not a creator, which quietly undercuts the *Ashby* story the subject opens with. *Lenah*'s open door staying open for over two decades, then closed by statute rather than by the courts, is the proof.

A8. Doctrinal critiques to fold in

NUISANCE: THE 'PALE GREEN' TORT

Conaghan & Mansell, 'Nuisance: the pale green tort' (*The Wrongs of Tort*, Pluto Press, 2nd ed, 1999): nuisance is presented as tort's environmental mechanism but is only weakly and

mule', referring to *Caltex v Willemstad*). If asked whether the salient-features approach is settled, the answer is yes for now, but flag Edelman J as the live fault line. A deeper theme worth raising: tort may simply decline to step in where P could have allocated the risk by contract, which ties together the disclaimer cases (*Hedley Byrne*, *Mallonland*) and *Woolcock*.

Public authorities

PUBLIC AUTHORITIES FLOW (CLA ss 40-44)

1. **Common-law duty?** salient features plus the *Crimmins* questions: **control**, **vulnerability** / **reliance**, foreseeability, and whether a duty **coheres** with the statute (*Graham Barclay*; *Stuart v Kirkland-Veenstra*).
2. **s 42**: an authority's functions are limited by its **resources**, and broad allocation decisions are not examinable in a negligence claim.
3. **s 43A** (a **special statutory power**): liable only if the act or omission was **so unreasonable that no authority** could properly consider it reasonable (a Wednesbury threshold).
4. **s 44**: no duty for failing to exercise a function to prevent harm **unless** the authority had **actual knowledge** of the particular risk.

Negligence is private law, but a public authority (PA) can be sued in it. The whole problem is how to do that inside the *duty* element without the court second-guessing the PA's political, budgetary or discretionary choices. A PA is a body "entrusted by statute with functions to be performed in the public interest or for public purposes" (Mason J, *Sutherland Shire Council v Heyman*): the Crown, government departments, councils, public health bodies, statutory corporations (and see CLA s 41). Two layers run together: the common law salient-features approach, and CLA Part 5, which supplements the common law and does not replace it.

RULE / FRAMEWORK

A body authorised by statute to do a thing is liable if it does that thing negligently (*Geddis v Proprietors of the Bann Reservoir*). So negligence bites on HOW a PA exercises, or fails to exercise, a function, not on whether it acted outside power (that is admin law / judicial review).

But a legislative grant of power to protect the general public does not ordinarily give rise to a duty owed to an individual or to members of a particular class (Gleeson CJ, *Graham Barclay Oysters v Ryan*). Reasonable foreseeability + knowledge of the risk + a power to avert it is not enough "without more".

Power = MAY (discretionary): no duty just because the power exists. Duty = SHALL / MUST (mandatory): even breach of a statutory duty does not by itself create a common law duty. Courts are reluctant to impose an affirmative duty either way (*Pyrenees Shire Council v Day*).

CLASSIFY THE FACTS FIRST (4 buckets)

- Negligent positive act (misfeasance): the PA itself creates or increases a risk and does so carelessly. Treated largely like a private D on ordinary principles (*Geddis*). *Herridge* sits closest here.
- Failure to exercise a discretionary power (nonfeasance, power = may): the hard category. No duty from the bare existence of the power; run RF + salient features / McHugh J's 6-point test (*Crimmins*, *GBO*, *Amaca*).
- Failure to perform a statutory duty (duty = must / shall): an obligation to act, but breach of it does not by itself give a common law duty; overlaps with the separate tort of breach of statutory duty.

enough) against *Refrigerated Roadways* (a barrier was required), and *Paris* (goggles) against *Woods* (no headgear).

Breach: the s 5B(2) calculus factors

Probability	low probability can excuse even grave harm (<i>RTA v Dederer</i> , <i>Wagon Mound (No 2)</i>).
Seriousness	a known vulnerability raises the care required (<i>Paris v Stepney</i>).
Burden	the precaution must be reasonable and feasible (<i>Woods v Multi-Sport</i>).
Social utility	a high-utility activity can justify the risk (<i>E v Australian Red Cross</i>).
Prospective	judged before the event, no hindsight (<i>Adeels Palace</i> ; <i>Shirt</i> ; <i>Fahy</i>).