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70311 Exam Structure

- **Parties**
 - Consider Relatives Compensation/Workers Comp and VL/NDD/*Motors s 131*
- **(1) Duty**
 - For pure mental harm, refer to *s 32*
 - Reasonably foreseeable plaintiff *Chapman v Hearse*
 - Recognised / novel duty??
 - **If Novel duty** – e.g. Pure economic loss, liability of statutory authorities
 - Use Incrementalism *Sullivan v Moody*
 - Salient features of CL *Relevant cases* (including s 42, 43A, etc. if statutory authorities)
- **(2) Breach**
 - *5B(1)(a)* – Risk was foreseeable (fanciful far-fetched)
 - *5B(1)(b)* – Risk not insignificant
 - *5B(1)(c)* – calculus of negligence in the position reasonable X
- **(3) Causation**
 - *5D(1)(a)* – Necessary condition ‘but for’ *Strong v Woolworths*
 - For failure to warn cases use *5D(3)*
 - For exceptional cases *5D(2)*
 - Breaking of chain of causation? ‘Novus Actus’
 - Is it nullified by the ‘very risk’ D created? *March Stramere*
 - *5D(1)(b)* – purpose test to extend scope of liability to D *Wallace & Kam*
- **(4) Remoteness**
 - Harm reasonably foreseeable? (fanciful far-fetched) *Wagon Mound No 2*
 - Only type of damage is enough, liable to full extent of harm *Hughes v Lord Advocate*
 - Egg-shell skull principle - P liable for full extent of damage due to peculiarity of P *Leech Brain*
- **(5) Defences**
 - **Contributory Negligence**
 - *LRMA (1965) s 9/CLA s 5T* (for death)/*CLA s30(3)* (pure mental harm)
 - 5 R
 - (a) 5B
 - (b) 5D
 - *LRMA (1965) s9* – apportion damages, just and reasonable
 - **Volenti defence**
 - Inherent risks *s 5(I)*
 - No duty to warn of obvious risks *s 5(H)*
 - Dangerous and recreational activities *s 5(L)*
 - **Continue using CL principles if obvious risk or risk not covered by statute**
- **(6) Concurrent tortfeasors**
 - If pure economic and property damage use *CLA* for proportionate liability
 - If not above two categories, use *LRMA (1944) s 5* to apportion liability, D sues other concurrent tortfeasors

Breach of Duty (Negligence)

- In the tort of negligence, D must be found to have breached the duty of care owed to P
 - All elements must be proven by P on BoP
- The **Civil Liability Act 2002 (NSW) s 5B** must be used to answer the question of whether a duty had been breached

Was the risk of injury to plaintiff reasonably foreseeable?

Civil Liability Act s 5B

- 1) **A person is not negligent in failing to take precautions against a risk of harm unless:**
 - a) **Risk** was foreseeable (that is, it is a risk of which the person knew or ought to have known); and
 - b) Risk was not insignificant; and;

5B(1)(a) – Test of reasonable foreseeability

- A risk that is not far-fetched or fanciful is a risk that can be foreseeable for the purposes of **s 5B(1)(a)**¹

5B(1)(b) – Risk was not insignificant

- However, the legislation also requires that the risk not be insignificant²
- This narrows the test of ‘not far-fetched or fanciful’ above, but not by very much and is only slightly more demanding³

¹ *Wyong Shire Council v Shirt (1980)*

² *Civil Liability Act 2002 (NSW) s 5B(1)(b)*

³ *Shaw v Thomas [2010]*

Was the defendant's response to the risk reasonable?

Civil Liability Act s 5B

- 1) A person is not negligent in failing to take precautions against a risk of harm unless:
 - c) In the circumstances, a reasonable person in the person's position would have taken those precautions

'Reasonable person'

- This is an objective, impersonal test, independent of the idiosyncrasies of the particular person whose conduct is in question⁴
- However, the court will consider particular attribute of D, such as whether:
 - Child, relevant⁵
 - Elderly Age, relevant⁶
 - However, does not apply to elderlies driving⁷
 - Beginners are held to a non beginner standard of competency⁸
 - Knowledge by P of D's inexperience irrelevant⁹
 - Intoxication irrelevant¹⁰
 - Special skills relevant¹¹
 - A degree of skill to be expected of such persons was that which is appropriate to a member of the profession with the relevant specialist skills.
 - Includes doctors and lawyers
 - Special skills attempted by amateurs
 - Amateurs will not be held to higher standard of care¹²
 - It may be negligent for an individual who has no special skills to undertake an activity which requires special skills¹³

⁴ *Glasgow Corporation v Muir* [1943]

⁵ *McHale v Watson* (1966)

⁶ *Daly v Liverpool Corporation* [1939]

⁷ *Roberts v Ramsbottom* [1980]

⁸ *Collins v Hertfordshire County Council* [1947]

⁹ *Imbree v McNeilly* (2008)

¹⁰ *Civil Liability Act 2002 (NSW) s 49*

¹¹ *Heydon v NRMA Ltd* (2000)

¹² *Wells v Cooper* [1958]

¹³ *Papatonakis v Australian Telecommunications Commission* (1985)

'Calculus of negligence'

- **Time of assessment**
 - D's conduct assessed from a prospective vantage point: Court must apply standard of care to D's conduct having regard to D's knowledge and responsibilities immediately before the P's injury¹⁴
 - However, prospective conduct can be used to help determine whether there was a practicable way of avoiding risk prior to P being injured¹⁵

Civil Liability Act s 5B

2) **In determining whether a reasonable person would have taken precautions** against a risk of harm, the court is to consider the following (amongst other relevant things):

- a) The probability that the harm would occur if care were not taken
- b) The likely seriousness of the harm
- c) The burden of taking precautions to avoid the risk of harm; and
- d) The social utility of the activity that creates the risk of harm

- **Probability harm would occur**
 - Where injury is very slight, reasonable care may be taken by doing nothing to eliminate the risk¹⁶
 - E.g. of very slight, cricket ball travelled 90 meters out of stadium, only happened 6 times in 30 years
- **Likely seriousness of the harm**
 - Where D could foresee that consequences of their actions would be particularly grave, liability in negligence may be more easily established¹⁷
 - E.g. the fact that a one-eyed workman was likely to sustain more serious injury than his fellow workmen with two eyes should be taken into consideration
- **Burden of taking precautions**
 - Where risk is easy to avert, it is more likely to find that D breached duty of care
 - Court can reject argument if P fails to prove that certain precautions were necessary and appropriate in the circumstances or would have avoided the risk of injury¹⁸
 - D is not required to take expensive precautions where risk is low and an injury unlikely to occur¹⁹
- **Social utility of D's activity**
 - Necessity of emergency life-saving measures has excused what would otherwise be a negligent and dangerous operation²⁰

Defence – 50

Mention **s 50** here, professional peer standard. Deal with in detail in defences

¹⁴ *Adeels Palace Pty Ltd v Moubarak (2009)*

¹⁵ *Nelson v John Lysaght Pty Ltd (1973)*

¹⁶ *Bolton v Stone [1951]*

¹⁷ *Paris v Stepney Borough Council [1951]*

¹⁸ *Neill v NSW Fresh Food and Ice Pty Ltd (1963)*

¹⁹ *Romeo v Conservation Commission of Northern Territory (1998)*

²⁰ *Watt v Hertfordshire County Council [1954]*

Contributory Negligence (Defence)

- In common law, used to be a complete defence, now it is a partial defence

Law Reform (Miscellaneous Provisions) Act 1965 (NSW) s 9

- 1) If a person (claimant) suffers damage as a result partly of the claimant's failure to take care (contributory negligence)
 - A claim in respect of damage is not defeated by reason of the contributory negligence of the claimant; and
 - The damages recoverable in respect of the wrong 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

- **Civil Liability Act 2002 (NSW) s 5R** sets out the standard of contributory negligence

Civil Liability Act s 5R

- 1) The principles that are applicable in determining whether a person has been negligent also apply in determining whether the person who suffered has been contributorily negligent in failing to take precautions against the risk of 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 the person knew or ought to have known at the time

- It is not necessary to establish P owes D or any other person a DoC in CN cases; rather the question of whether P has exposed themselves to an unreasonable risk of being injured through their own carelessness or negligence²¹

Breach

- Refer to above section on breach
- **Civil Liability Act 2002 (NSW) s 5B**
 - Calculus of negligence will be applied using the standard of a reasonable person in the position of P²²

Imminent danger

- Courts will not not plaintive negligent where negligence of D has placed plaintiff in the position of imminent personal danger²³
- An emergency will not always exempt P from CN, the reasonableness of the plaintiff's conduct will be examined in the context of the vents that occurred. In an emergency, plaintiff is required to exercise the level of care and skill which the person of ordinary prudence might exhibit in an emergency²⁴

²¹ *Davies v Swan Motor Co (Swansea) Ltd* [1949]

²² *Civil Liability Act 2002 (NSW) s 5R(2)(a)*

²³ *The Bywell Castle* (1879)

²⁴ *Coris v Baker* [1968]

Causation

- Refer back to above section on breach
- **Civil Liability Act 2002 (NSW) s 5D**
- It will have to be established that P's CN comprises of a necessary condition of the occurrence of the harm in that it is appropriate for the scope of the P's liability to extend to the harm caused

Apportioning Damages

- Once contributory negligence has been found, the court needs to them apportion damages

Law Reform (Miscellaneous Provisions) Act 1965 (NSW) s 9

- 1) If a person (claimant) suffers damage as a result party of the claimant's failure to take care (contributory negligence)
 - A claim in respect of damage is not defeated by reason of the contributory negligence of the claimant; and
 - **The damages recoverable in respect of the wrong 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**

'Just and equitable'

- Court will need to consider the relative importance of acts of each party in causing the damage. Respective culpability is to be assessed on the basis of the degree by which their conduct departed from the standard of care of a reasonable person²⁵

Possibility of complete defence

- Court can reduce damages by reason of contributory negligence by 100% if the court thinks it is just and equitable to do so²⁶

²⁵ *Pennington v Norris (1956)*

²⁶ *Civil Liability Act 2002 (NSW) s 5S*