

## MLL213: Tort Law Deakin 2016

### Answering a Negligence Question

**NB: All legislation referred to is the Wrongs Act (VIC) 1958 unless indicated otherwise.**

1)	<p><b>Preliminary matters: If someone has died, what courses of action/s are available?</b></p> <ul style="list-style-type: none"> <li>• 1) Survival of actions claim s 29 Admin and Probate act- <i>estate can continue with course of action that the P would have had had they lived</i> <ul style="list-style-type: none"> <li>○ Estate can only claim:           <ul style="list-style-type: none"> <li>▪ past economic losses between the accident and the death.</li> <li>▪ Funeral costs.</li> </ul> </li> </ul> </li> <li>• 2) Dependants claim</li> </ul>
2)	<p><b>If required: (If an employee was involved) Discuss Vicarious Liability-( 2 factors )</b></p> <ol style="list-style-type: none"> <li>a) Relationship between employer and employee</li> <li>b) In the course of employment</li> </ol>
3)	<p><b>Go on to Personal Liability (negligence)- Ask, what is the issue?</b></p>
4)	<p><b>Duty of care</b></p> <ol style="list-style-type: none"> <li>1) Was there an established category?</li> <li>2) Was the risk reasonably foreseeable?</li> <li>3) If not an established category- Look it may be a special duty category: at look at salient features and reasonable foreseeability.</li> </ol> <p><b><u>also consider special duty cases: omissions- was there a failure to act???</u></b>  <b><u>Was there a failure to act by a statutory authority?</u></b></p>
5)	<p><b>Breach of duty</b></p> <p>Preliminary point: Broadly characterize what the <u>risk</u> actually is.  <i>'the risk in the circumstances can broadly be characterized as....'</i></p> <p>Apply s 48(1)</p> <ol style="list-style-type: none"> <li>a) Reasonable foreseeability</li> <li>b) Not insignificant risk</li> <li>c) Failure to adopt reasonable precautions       <ul style="list-style-type: none"> <li>· List what precautions the D could reasonably could have taken</li> <li>· Then apply the calculus of negligence to those precaution/s</li> <li>· After calculus of negligence- way up other factors- the calculus is not 100% determinative-</li> </ul> </li> </ol>
6)	<p><b>Causation</b></p> <p>Apply s 51(1)(a)- <b>Factual causation (The 'but for test')</b></p> <p>Apply s 51(1)(b)- <b>Legal Causation</b> <i>Novus Actus? remember neg action on behalf of the p!</i></p>
7)	<p><b>Remoteness – Concentrate on the actual injury/ damage sustained</b></p> <ol style="list-style-type: none"> <li>1) Was the specific injury suffered reasonably foreseeable?</li> <li>2) If not, then ask: Was the injury of a type or class, which was reasonably foreseeable?</li> <li>3) Or- if the original injury is foreseeable, but not the aggravation of the injury- does the egg shell skull rule apply?</li> </ol>
8)	<p><b>Was there Mental Harm? Establish if a DOC to prevent mental harm was required.</b></p>

	<p><i>Then go through the negligence question as per usual.</i></p>
9)	<p><b><u>Defences</u></b></p> <ul style="list-style-type: none"> <li>• <b>Contributory Negligence</b></li> <li>• <b>Voluntary Assumption of Risk</b></li> <li>• <b>Exclusion Clauses</b></li> </ul>
10)	<p><b><u>Damages</u></b></p> <ul style="list-style-type: none"> <li>• <b>Economic Damages</b> <ul style="list-style-type: none"> <li>○ Medical expenses</li> <li>○ Gratuitous Care Damages</li> <li>○ Loss of Income Damages</li> </ul> </li> <li>• <b>Non- Economic Damages- <i>Must be a significant injury</i></b> <ul style="list-style-type: none"> <li>○ Pain and Suffering</li> <li>○ Loss of Amenities</li> <li>○ Loss of expectation of life</li> </ul> </li> </ul> <p><b>Consider:</b> Aggravated/ Compensatory Damages Exemplary Damages</p>
	<p><b><u>Was there a Private Nuisance?</u></b></p> <ul style="list-style-type: none"> <li>• Is there a standing to sue? <i>Proprietary interest</i></li> <li>• Is the D liable?: Must be occupier/ or have caused the nuisance</li> <li>• Was the nuisance reasonably foreseeable?</li> <li>• Does the nuisance constitute a serious and unreasonable interference with the P's enjoyment of their property? <ul style="list-style-type: none"> <li>○ <i>Consider the various factors</i></li> </ul> </li> <li>• Consider defences</li> </ul>
	<p><b><u>Was there a Breach of Statutory Duty?</u></b></p> <ul style="list-style-type: none"> <li>• <b><u>Follow the 6 steps</u></b></li> </ul>

## **Topic 1 – Nature of Torts Law;**

### **Overview of Torts Law**

#### **Torts**

A miscellany of civil wrongs (wrongful conduct giving rise to a civil remedy)  
Torts protects various things such as personal safety, property, security of land, psychological wellbeing, economic interests and reputation

Categories:

Intentional: intended wrong doing (e.g. trespassing, battery, assault, false imprisonment)

Unintentional: unintended wrong doing (e.g. negligence, nuisance)

Miscellaneous (e.g. breach of statutory duty)

Parties:

Tortfeasor: commits the civil wrong (also referred to as the defendant)

Plaintiff: subject to civil wrong

Burden of proof is on the Plaintiff....Standard of proof is balance of probabilities

### **Objectives**

Primary objective: Compensation for loss

Normative and punitive objective:

To create a set of standards of behaviour

To deter + To make an example (through exemplary damages)

Loss spreading (spreading loss from victim to others):

Ensures plaintiff is compensated even though the tortfeasor has short pockets →

*E.g. statutory compensation schemes, TAC and WorkCover (not examinable)*

*Property (house and car), professional indemnity insurance*

### **Damages**

#### **Categories of damages**

Compensatory

Aggravated

Exemplary/punitive

**Fundamental principles of compensatory damages awards** → *Todorovic v Waller* (1980)

#### **1. Compensatory objective:**

Main objective of a damages award is to place the plaintiff in the position she would have occupied if the tort had not occurred

#### **2. Once and for all rule:**

Damages are awarded '**once and for all**' in a lump sum

Two consequences:

Lump sum awards cannot be varied

Cannot claim compensation for the same civil wrong twice – i.e. cannot claim extra compensation when it is believed initial compensation awarded is not sufficient (*Fetter v Beal* (1701))

Cannot claim compensation back, even when the plaintiff dies (*Gilchrist v The Estate of the Late Sara Alexander Taylor* (2004))

Courts must make predictions about the plaintiff's future health, employment etc.

Adjustments are made upwards and downwards to damages awards to reflect 'vicissitudes of life'. The reduction for vicissitudes of life is frequently in the range of 5%-20%; however, the precise adjustment will always depend on the plaintiff's own personal circumstances and the reduction can be significantly

more → *Wynn v NSW IMC*

Circumstances of life – what would happen if they would have fallen ill regardless of tortfeasor's actions

*Malec v JC Hutton* (1990)

1979, Malec contracted brucellosis (couldn't work anymore), in 1982, M began to suffer from an unrelated painful back condition that also rendered him unemployable

Held: Damages must be discounted for the '**degree of probability**' that the future event would occur & P would suffer same loss independently of the tortious action due to pre-existing medical condition

E.g. if 70% chance that the plaintiff would have been forced to give up work in any event (**that is, for a reason unconnected with the defendant's negligence**), damages are reduced by 70%

However see now → **s 28N: Structured settlements:**

s28N provides that the court can approve an agreement by the parties to a claim for damages for personal injury to settle that claim by way of a structured settlement

Reform only applies where the parties have agreed to settle the claim by way of periodic payments, and that the court has no power to order a structured settlement in the absence of such agreement. Thus, if the matter proceeds to trial and judgment, the court must award a lump sum.

### **3. The court doesn't care how, or if, the plaintiff spends the money:**

The permanently unconscious plaintiff:

Court will award damages even though the plaintiff will not be able to spend them, e.g. because the plaintiff is permanently unconscious → *Skelton v Collins* (1966)

When the plaintiff is permanently unconscious, the court does not award damages for pain and suffering

Damages for gratuitous attendant care services:

Plaintiff is entitled to the cost of home nursing care even though that home care is being provided for free by a family member → *Griffiths v Kerkemeyer* (1977)

However, if damages are awarded as a lump sum, and the defendant's negligence has rendered the plaintiff unable to manage the money, the plaintiff is entitled to recover for the costs of managing the fund into which that lump sum is paid

See *Gray v Richards* [2014] HCA 40

Plaintiffs can be given more compensation so that someone else can manage their finances – however, there has to be a reasonable need to have someone manage this